

COMPARATIVE PROPERTY LAW AND THE PANDEMIC: VULNERABILITY THEORY AND RESILIENT PROPERTY IN AN AGE OF CRISES

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Abstract

Political and property crises open up vital new questions for property theorists, and analyses of state responses to these crises cast new light on how property systems, and property law, adapt and evolve to meet complex challenges—while remaining institutionally resilient themselves. The novel coronavirus pandemic was an extreme, exceptional, unexpected, significant ‘shock’ event, with financial, economic, social, cultural and political impacts on a scale not experienced since at least the 1930s. The threat the pandemic posed to human life demanded immediate action in response to an unexpected and unpredictable and urgent threat, delivered under intense public scrutiny. The challenges were ‘wicked’: governments were compelled to act, in conditions of uncertainty and in response to a complex set of high stakes problems, with imperfect information about the impacts of policy choices or the likely endpoint of the pandemic.¹

In acting swiftly to protect their populations, governments adopted radical strategies to shore up housing and home, to tackle street homelessness, and to protect tenants and mortgagors from the threat of eviction. Perhaps most notably, pandemic policies to protect housing intervened with ‘private property’ law in ways that were unimaginable before Spring 2020. In this article, we examine the range of ways that governments adapted their approaches to property, housing and homelessness during the pandemic. We analyze the adaptation of property rules in the pandemic using the new theoretical and methodological framework of ‘Resilient Property’. We consider the implications of the actions to adjust the laws and policies that govern property, housing, eviction and homelessness, and reflect on the legacies of

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¹ See E. Bartolomé, L. Coromina, & H. Dülmer, Valores bajo presión: estudio preliminar sobre el cambio de valores ante la crisis de la COVID-19 en España, 55 REVISTA ESPAÑOLA DE CIENCIA POLÍTICA 145 (2021) citing Hermann, Charles F. 1972. *International Crises: Insights from Behavioral Research*. Nueva York: Free Press; Lucini, Barbara. 2014. *Disaster Resilience from a Sociological Perspective Exploring Three Italian Earthquakes as Models for Disaster Resilience Planning*. Cham: Springer. Disponible en: <https://doi.org/10.1007/978-3-319-04738-6>.

these actions for property theories and property law.

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I. Property and the Pandemic

As we write, the coronavirus pandemic has infected more than 222 million people worldwide, causing more than 4.6 million deaths. New variants of the disease have presented ongoing challenges for states and cities, prolonging disruption in the face of planned re-openings, and amid urgent concerns about the economic impacts of lockdowns and the pursuit of economic recovery plans. In March 2020, the United Nations Trade and Development agency projected that the economic slowdown due to the pandemic could reach \$2 trillion. By December 2020, OxFam forecast a significantly higher cost, projecting closer to \$11.7 trillion (including costs of prevention measures, research, and government funding initiatives).² Economic forecasters predicted that the pandemic will shrink global GDP by 4.5%.³

The global coronavirus pandemic could be described as a ‘black swan event’:⁴ an extreme, exceptional, unexpected, significant ‘shock’ event. The threat the pandemic posed to human life demanded immediate action by states. In the early months of the pandemic, states responded to an unexpected and unpredictable and urgent threat, under high levels of visibility and intense public scrutiny. The challenges they faced were ‘wicked’: governments were compelled to act, in conditions of uncertainty and in response to a complex set of high stakes problems, with imperfect information about the impacts of policy choices or the likely endpoint of the pandemic.⁵ Indeed, at the time of writing, 18 months on from the World Health Organization’s declaration in March 2020 that the novel coronavirus was a global pandemic, the endpoint and full impact remain unknown.

Early indications that the financial, economic, social, cultural and political

² *Global Cost of Coronavirus: \$11.7 Trillion*, BUSINESS TODAY (August 24, 2021), [available at] <https://www.businesstoday.in/current/world/global-cost-of-coronavirus-this-is-how-much-covid19-pandemic-has-cost-the-world-economy/story/425100.html>

³ M. Szmigiera, *Impact of the Coronavirus Pandemic on the Global Economy – Statistics & Facts*, STATISTA (Aug. 3, 2021) [available at] <https://www.statista.com/topics/6139/covid-19-impact-on-the-global-economy/>.

⁴ Nassim Nicholas Taleb, *The Black Swan: The Impact of the Highly Improbable* (Penguin, 2nd edn, 2010); see, for example, P Renjen, ‘The heart of resilient leadership: Responding to COVID-19’ (Deloitte Insights, 16 March 2020); online at: <https://www2.deloitte.com/global/en/insights/economy/covid-19/heart-of-resilient-leadership-responding-to-covid-19.html>.

⁵ See E. Bartolomé, L. Coromina, & H. Dülmer, Valores bajo presión: estudio preliminar sobre el cambio de valores ante la crisis de la COVID-19 en España, 55 REVISTA ESPAÑOLA DE CIENCIA POLÍTICA 145 (2021) citing Hermann, Charles F. 1972. *International Crises: Insights from Behavioral Research*. Nueva York: Free Press; Lucini, Barbara. 2014. *Disaster Resilience from a Sociological Perspective Exploring Three Italian Earthquakes as Models for Disaster Resilience Planning*. Cham: Springer. Disponible en: <https://doi.org/10.1007/978-3-319-04738-6>.

impacts will be on a scale not experienced since the 1930s⁶ distinguish the COVID-19 pandemic from other financial and economic crises and recessions—including the Great Recession of 2008, the first worldwide recession of the global age.⁷ Analysis published by Deloitte explained that, while:

“[r]ecessions since WWII have usually been caused by either economic policy mistakes, oil shocks, or financial bubbles...[t]he rapid economic deterioration of economies and stock markets amid the COVID-19 threat represents a new category: a global societal shock...”⁸

The report noted that:

“[w]hereas the 2008 global financial crisis was stoked by the shutoff of the supply of capital, disruptions on both the supply side and the demand side are the cause this time around...Meanwhile, the mass quarantining of the population cut off consumption, most acutely in the travel, hospitality, restaurant and retail sectors.”

By mid-2020, economists had predicted major economic, financial and social crises,⁹ with immediate and longer term health, economic and social impacts, borne disproportionately by lower socio-economic populations and by black and minority ethnic people.¹⁰

States acted rapidly and under pressure, taking decisive action to contain the spread of the virus. The actions taken to mitigate risk and reduce the spread of contagion departed from established norms in many jurisdictions, and imposed costs across a range of scales—for individuals, businesses and industry, markets, and communities. Forced lockdowns led to closures of courts; businesses embraced telecommuting to enable workers to comply with ‘work from home’ orders; and reduced consumption acutely affected those businesses that depend on foot traffic and in-person services (like restaurants, small merchants, and tourism). National governments mobilized significant

⁶ A report published by the U.S. Congressional Research Service indicated that the negative impact on global economic growth in 2020 was beyond anything in nearly a century – since the 1930s depression-era: Congressional Research Service, ‘Global Economic Effects of COVID-19’ (CRS Report, R46270 (<https://crsreports.congress.gov>)).

⁷ See discussion of the role of economic shifts following World War II in the Post War Consensus, the economic shifts out of the Bretton Woods Compact, and the impact on the global financial crisis through the housing crisis in 2008, in Chapter 4.

⁸ P Renjen, ‘The heart of resilient leadership: Responding to COVID-19’ (Deloitte Insights, 16 March 2020) [available at] <https://www2.deloitte.com/global/en/insights/economy/covid-19/heart-of-resilient-leadership-responding-to-covid-19.html>.

⁹ M Nicola, Z Alsafib, C Sohrabic, A Kerwand, A Al-Jabird, C Iosifidisc, M Aghae, R Aghaf, *The socio-economic implications of the coronavirus pandemic (COVID-19): A review*, 78 INTERNATIONAL JOURNAL OF SURGERY 185 (2020).

¹⁰ Adam Goldstein & Diana Enriquez, *Covid-19’s Socioeconomic Impact on Low-Income Benefit Recipients: Early Evidence from Tracking Surveys*, 6 SOCIUS (Nov. 2020), available at <https://journals.sagepub.com/doi/full/10.1177/2378023120970794>

resources to mitigate the impacts for individuals, communities, businesses and industries, while local authorities led ‘on-the-ground’ responses. Many states invested significant resources in the development of vaccines, on a significantly accelerated timeline relative to any previous vaccination development program. Regulations that would have delayed the deployment of vaccines were flexed to overcome barriers to rapid distribution. As national governments saw the devastating human and economic threats that the novel coronavirus posed—and the implications of these threats for their own authority and legitimacy—states responded.

In acting swiftly to protect their populations, governments adopted radical strategies to shore up housing and home, to tackle street homelessness, and to protect tenants and mortgagors from the threat of eviction. Perhaps most notably, pandemic policies to protect housing intervened with ‘private property’ law in ways that were unimaginable before Spring 2020. In this article, we examine a range of ways that governments adapted their approaches to property, housing and homelessness during the pandemic. Our approach to analyzing the adaptation of property rules in the pandemic is based on the new theoretical and methodological framework of ‘Resilient Property’, which we developed in our forthcoming book, *Squatting and the State*.¹¹ It draws on the central insights of Martha Fineman’s Vulnerability Theory, developing and applying these insights for property theory and property law.

Our analysis draws examples from five jurisdictions: the U.S., the U.K., Ireland, Spain and South Africa.¹² Seeking out a middle-ground—between abstract meta-theories or politically polarized binaries, and on-the-ground doctrinalism—Resilient Property is rooted in contextualized, historicized accounts of state action with respect to private property. It focuses on the systems that create property outcomes, seeking to build a realistic

¹¹ L. FOX O’MAHONY AND M. L. ROARK, *SQUATTING AND THE STATE: RESILIENT PROPERTY IN AN AGE OF CRISES* (NEW YORK: CAMBRIDGE UNIVERSITY PRESS, 2022).

¹² Our choices of jurisdictions is purposive: four of the five jurisdictions are governed by written constitutions, and these constitutions reflect historical waves in property and constitution-making: the U.S. Constitution was ratified in 1780; Ireland’s Constitution was adopted in 1937; Spain’s most recent constitution dates from 1978; and the South African Constitution was ratified in 1996. In three cases (the U.S., Ireland, South Africa), the adoption of a new constitution signaled the re-making of a post-colonial/post-apartheid state; and the re-defining of property/citizen/state relations under a new constitutional dispensation. [Although, as Purdy observes: “Irony and irenism ran together in early American attitudes, partly because of ambivalence as to whether Americans were colonizers or a colonized people.”; J. PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* 70 (New Haven: Yale University Press 2010)]. Each of the five jurisdictions has been influenced by the global transition from liberalism to neoliberalism and affected by the aftershocks of the 2007 global financial crisis, austerity, and the affordable housing crisis. See D. King & S. Wood, *The Political Economy of Neoliberalism: Britain and the United States in the 1980s* [in] H. KITSCHOLT & OTHERS (EDS), *CONTINUITY AND CHANGE IN CONTEMPORARY CAPITALISM* (Cambridge: Cambridge University Press 1999); Coulter & Nagle (2015); C. BAN, *NEOLIBERALISM IN TRANSLATION: ECONOMIC IDEAS AND REFORMS IN SPAIN AND ROMANIA* (College Park: University of Maryland 2011); Bond (2014).

understanding of how these are adjusted: through tactics, strategies, advocacy, but also through events and externalities. Our approach aims to develop new insights to *how* property works, as well as what works, when states respond to property problems.

Eschewing the *ab initio* philosophical commitments that characterize much liberal property theory, it is focused on developing a new mode of thinking about property, and the methodological and analytical tools to enable this. To this end, our approach echoes neo-pragmatism, in seeking first to understand state responses to property problems in a complex, multi-scalar governance framework. Wood and Smith explained that:

“...one of the central features of pragmatism is that it is a way of thinking that is grounded in anti-foundationalism. Ideas are not transcendent, fixed truths, rather they are outcomes of embodied experiences and instrumental actions that are dynamic, contingent and continually evolving. Decades before the first post-structuralist utterances, the early pragmatists were turning away from meta-narratives, objective truths, and unifying theories, preferring instead to develop modes of thinking, which they believed had greater utility for helping people to cope with the messiness of everyday life.”¹³

Resilient Property offers techniques for engaging with—while not eliding or transcending—the ‘messiness’ of property problems, echoing this pragmatic concern for dynamic, contingent and continually evolving modes of thought. Finally, our analysis of state-level and city-level responses to squatting also resonates with the concept of ‘pragmatic localism’—the proposition that ‘high-scale’ ideology (given effect through national policy) can be mediated to deliver ‘what works’ to solve policy problems at the local level;¹⁴ indeed, “not just ‘what works, but what works here’.”¹⁵

‘Resilient Property’ offers a fresh lens through which to understand the nature and effects of state action with respect to private property in periods of crisis and pressure. In what has become an ‘age of crises’, the coronavirus pandemic exemplifies a compound health/economic/property crisis. Each state’s response can be understood relative to other nation states, as well as in relation to its own background commitments—the pre-pandemic property *nomos*¹⁶ or ‘normative universe’ of legal texts, decisions, norms and narratives that frames state responses to property challenges in each jurisdiction. We review state responses to eviction, housing and homelessness during the

¹³ N. Wood & S.J. Smith, *Pragmatism and Geography*, 39 GEOFORUM 1527 (2008).

¹⁴ J. Coaffee & N. Headlam, *Pragmatic Localism Uncovered: The Search for Locally Contingent Solutions to National Reform Agendas*, 39 GEOFORUM 1585 (2008).

¹⁵ *Id.* at 1587.

¹⁶ Robert M Cover, ‘*The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative*’, 66.

pandemic, reflect on the extraordinary steps that states have taken to shore up occupation—enabling people to ‘shelter in place’—and evaluate the impact of the pandemic through a Resilient Property lens.

II. Resilient Property

A. Resilient Property Theory

As states develop strategies, tools and interpretive norms in response to property crises, new legal, political and public discourses of property are revealed. In an era of polarized, high-salience political discourse about property values, states’ responses to the pandemic provide important signals about the states’ stake in ‘private’ property problems. The legitimacy of state action with respect to private property rights¹⁷ is a prominent theme in theoretical debates about the nature of property. Indeed, property is unique amongst legal and political institutions for the conflict between competing accounts which alternatively define it as a product of the political state or as a natural right prior to the state. This conflict is foregrounded in periods of heightened inequality, conflict or austerity. Most recently, conflicts over access to resources have intersected with an exclusionary turn in the politics of belonging.¹⁸ ‘Private property’ is imbricated at the heart of these conflicts. On the one hand, it is suggested that property law’s *raison d’être* is to protect the *status quo* of existing *property rights*. Yet, property law also remains central to the pursuit of appropriate and workable solutions to the challenges and conflicts inherent to governing *property-as-resource*.¹⁹

Competing visions for the role of property law and property scholarship underline the scale of conflict between accounts of private property. These conflicts seem particularly irreconcilable; this is heightened by the putative ‘rivalrousness’ of property claims. In some contexts, new property conflicts have prompted creative responses that destabilize conventional frameworks—

¹⁷ M. R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927). The recent resurgence of interest in this theme was captured in a 2017 special issue of THEORETICAL INQUIRIES IN LAW, see e.g., L. S. Underkuffler, *Property, Sovereignty, & the Public Trust*, 18 THEORETICAL INQUIRIES IN LAW 329 (2017); L. Katz, *Property’s Sovereignty*, 18 TIL 299 (2017); H. Dagan & A. Dorfman, *The Human Right to Private Property*, 18 TIL 391 (2017); T.W. Merrill, *Property and Sovereignty, Information, and Audience*, 18 TIL 417 (2017); S. Dellavalle, *The Dialectics of Sovereignty and Property*, 18 TIL 269 (2017); E. Benvenisti, *Sovereignty and the Politics of Property*, 18 TIL 447 (2017), amongst others.

¹⁸ See e.g., A. Roy, *Paradigms of Propertied Citizenship: Transnational Techniques of Analysis*, 38 URBAN AFFAIRS REV. 463 (2003) (arguing that definitions of background imperialism in property shapes the content of all persons in relationship to property); M. Roark, *Under-Propertied Persons*, 27 CORNELL J. L. & PUBLIC POL’Y 1 (2017) (describing the tropes of resilience created in property owners against others through doctrines like nuisance and waste).

¹⁹ J. P. Byrne, *The Public Nature of Property Rights and the Property Nature of Public Law* [in] R.P. MALLOY & M. DIAMOND (EDS), THE PUBLIC NATURE OF PRIVATE PROPERTY (New York: Routledge 2016).

from tradeable pollution permits to digital property commons licenses.²⁰ Yet, the well-established property conflicts implicated in the law of eviction, housing and homelessness appear only to intensify debates about how (and whether) states act to balance competing individual (private) and community (public) claims. Philosophical theories of property²¹ are often structured around binary frames that reflect underpinning political commitments along a left-right, community-liberty, public interest-private rights spectrum. For example recent debates in property scholarship have developed frameworks based on: property/sovereignty;²² monism/pluralism;²³ and exclusion²⁴/inclusion²⁵ or sharing.²⁶ Through these frameworks, arguments are advanced on behalf of competing interests and claims to property's rivalrous resources.

The structure of private property discourse has important implications for property scholarship. On the one hand, the use of binary frames potentially reinforces the neoliberal world-view, which—rhetorically at least—relies on these binary distinctions to position private power, embodied in “the market,” as the source of individual freedom and wealth maximization; while public power, as embodied in “the State”, is characterized as “oppressive, inefficient and [to] be restrained and limited at all costs.”²⁷ This oppositional structure—

²⁰ Byrne (2016) at 12.

²¹ This feature extends across the field, from morality or efficiency-based accounts to pluralist or ‘progressive’ theories: G. S. Alexander, E.M. Peñalver, J.W. Singer & L.S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 742, 743 (2009) (stating that property implicates pluralistic and incommensurable values, including individual, collective, social and environmental interests, amongst others); *but see* E. Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107 (2013) (arguing that progressive property’s failure to include distributional injustice in its set of policy concerns weakens progressive property’s claim to represent the full set of progressive values), and S. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51 (2005) (noting the tendency to discuss property problems by excluding the experience of people of color and indigenous persons).

²² Cohen (1927) at 8; *see also* references from the THEORETICAL ISSUES IN LAW special issue on property and sovereignty (2017) at 31.

²³ H. Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409 (2012); G. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017 (2011); J. Purdy, *Some Pluralism about Pluralism: A Comment on Hanoch Dagan’s Pluralism and Perfectionism in Private Law*, 113 COLUM. L. REV. SIDEBAR 9 (2013).

²⁴ T.W. Merrill, *Property and the Right to Exclude*, 77 NEB L. REV. 730 (1998); J. E. PENNER, *THE IDEA OF PROPERTY IN LAW* (New York: Clarendon Press 1997); T. W. Merrill & H. E. Smith, *The Morality of Property*, 48 WM & MARY L. REV. 1849 (2007); E. R. Clacys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N. C. L. REV. 413 (2017).

²⁵ D. B. Kelly, *The Right to Include*, 63 EMORY L.J. 857 (2014) (arguing that property law authorizes and enables ‘inclusion’ through a range of informal, contractual and proprietary techniques including easements, leases and trusts).

²⁶ Compare e.g., J. Stern, *What is the Right to Exclude and Why Does it Matter?* [in] M. H. OTSUKA & J. E. PENNER (EDS.), *PROPERTY THEORY: LEGAL AND POLITICAL PERSPECTIVES* 38-68 (Cambridge; New York: Cambridge University Press 2018) (questioning whether a property based on sharing truly excludes less than traditional exclusionary models of property); with R. Dyal-Chand, *Sharing the Cathedral*, 46 CONNECTICUT LAW REVIEW 647, 650 (2013) (describing sharing as the conceptual opposite of exclusion” and as a traditional exception to the general rule of exclusion).

²⁷ P. O’Connell, *The Death of Socio-Economic Rights*, 74 MLR 532, 535 (2011); *see also* G.ALBO, S.

epitomized in the bifurcation of legal realism into law-and-society on the left and law-and-economics on the right—has a tendency to generate politically polarized analyses, with all the risks and perils that follow when scholarly discourse splits into “a fairly distinct right and left that mostly talk past each other...”²⁸ The dominance of politically polarized property theories in contemporary property discourse also tends to privilege a unidirectional account of the nature and effects of state action or restraint on individuals and communities, while obscuring the interactional effects of property problems on individuals and institutions—including the state itself.²⁹ Indeed, the scope and legitimacy of state action vis-à-vis vested private property rights has become a lodestone of modern US property discourse. One implication of the political philosophy-bias in contemporary property theory is the tendency to privilege normative theories *for* state action or restraint, over realistic accounts *of* state action.

Resilient Property theory that we develop in this book, reaches beyond conventional property theories as ‘theories *for* state action’—which seek to provide normative direction to states regarding the scope of effective and legitimate action in the realm of private property—to construct a ‘theory *of* state action’ for property scholarship. Resilient Property theory is anchored in the dynamic, responsive role of states as stakeholders in wicked property problems. It focuses on state responses to property problems in periods of property crisis, and the intersections between state action to allocate resilience to individual, aggregated or institutional claims, and the state’s (or the government’s) own interest in shoring up its resilience through crises. In doing so, Resilient Property departs from the contemporary ideological current in property discourse, which focuses on advancing normative agendas *for* state action (typically along progressive-conservative lines). Instead, we seek to understand the complexities of state action in response to property problems, across a range of jurisdictions, and in the context of the changing pressures on the state.³⁰

GINDIN & L. PANITCH, IN AND OUT OF CRISIS: THE GLOBAL FINANCIAL MELTDOWN AND LEFT ALTERNATIVES 28 (Winnipeg: Fernwood Publications 2010); *see also* D. HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (Oxford: Oxford University Press 2005); R. PLANT, THE NEO-LIBERAL STATE (Oxford: Oxford University Press 2010); A.C. Aman, Jr., *Law, Markets and Democracy: A Role for Law in the Neo-Liberal State*, 51 N.Y.L. SCH. L. REV. 801 (2007).

²⁸ S. L. Winter, *The Next Century of Legal Thought?* 22 CARDOZO L. REV. 747, 748 (2001).

²⁹ The state’s role is alternatively defined as a duty to forbear from interference with private property rights (R. NOZICK, ANARCHY, STATE, AND UTOPIA (Oxford: Blackwell 1974)), or a duty to take account of the interests of all members of the community (L.S. Underkuffler (2017) (advocating for a fiduciary role of the state in balancing interests of property holders and collective interests in takings cases)).

³⁰ To be sure, we are not the first to suggest ways to break a polarizing view of problems to reach common solutions. *See e.g.*, D. A. McDonald, *Defend, Militate, and Alternate* [in] L. PRADELLA & T. MAROIS, POLARISING DEVELOPMENT: ALTERNATIVES TO NEOLIBERALISM AND THE CRISIS 125-26 (London: Pluto Academic Press 2015) (suggesting approaches that facilitate “context-based evaluations that acknowledge

In *The Construction of Property*, Lehavi argued that property theory does not—for definitional purposes—inherently require that we subscribe to core content: asserting that while the concept of property has structural and institutional traits, it has no “inherent essence.”³¹ Rather, Lehavi argued, property law’s “essence” flows from whatever each society’s institutions choose to promote as values and goals. The structural traits of property provide the frameworks for translating these ideals from moral and social concepts into legal concepts, working through the interactions of legislatures, courts, and the professional organizations of civil society (legal and social institutions) that create property norms. While Lehavi shifts the focus from natural, morality- or rights-based content to the political and social institutions that create property norms, the implication remains that the state, and other social institutions, *choose* to promote particular normative agendas based on prior normative commitments. Resilient Property recognizes that, in reality, these ‘choices’ are contextualized and constrained by a range of factors that are both within and beyond the control of the state itself or the social institutions it sustains (for example, the market). State responses to property problems are dynamically shaped, and sometimes constrained, by a complex array of competing, at times overlapping, influences: from multiple or hybrid property ideologies, to the implications of property practices ‘on the ground’, in the context of national and international events and externalities.

The dominant narratives of contemporary Anglo-American private property law tend to ‘look away’ from the state as a primary actor in the shaping and re-shaping of property law, or to characterize the state as a neutral arbiter of competing claims. Yet, as we have seen time after time, periods of crises reveal the enduring, inherent and latent powers of liberal state institutions to direct the property system, in ways that have significant implications for the resilience of individuals, institutions, and governments themselves. Resilient Property analyses recognize how states’ own vulnerabilities frames their responses to property problems, as state actors and agencies seek to accumulate and preserve their own resilience, at the same time as allocating resilience to other stakeholders. This need is foregrounded when states act to shore up their authority and legitimacy in the face of conflict or crises. Crucially, this insight helps us to recognize that states—particularly in periods of property crises—are not neutral arbiters between competing claims. It re-positions the (multi-level) state as a central institution for property theory, reminding us that when states act on behalf of individuals (e.g., owners, squatters, market actors, community members) and institutions (e.g., markets,

local norms but do not fetishise difference.”).

³¹ A. LEHAVI, *THE CONSTRUCTION OF PROPERTY: NORMS, INSTITUTIONS, CHALLENGES* (Cambridge: Cambridge University Press 2013).

the institution of private property, society), they do so against the backdrop of their own ‘self-regarding’ need for resilience.

Davidson and Dyal-Chand argued that ‘property crises’ open up contestable spaces in ongoing debates about the balance between public and private sovereignty—which may or may not leave a lasting impact on residual property norms after the period of crisis has passed.³² States’ responses to the problems of eviction, housing and homelessness during the global financial crisis have reflected the changing factual and normative landscapes against which property problems are understood. They also, more fundamentally, reveal the roles that states play in shoring up the resilience of private property rights, owners, markets and others, all the while reflecting back on the effectiveness and legitimacy of the state itself. As nation states navigate new landscapes of statehood and sovereignty, against the backdrops of globalization,³³ political polarization and partisan antagonism,³⁴ and—most recently—the extraordinary pressures resulting from the coronavirus pandemic, Resilient Property offers a call to action: for property scholarship to recognize and reconsider the role and nature of ‘the state’ and to examine and address the implications of state-resilience (or state-fragility) on responses to property problems.

B. Resilient Property and Wicked Problems

The coronavirus pandemic, and the economic, property and housing crises it has produced, can be characterized as ‘wicked problems’: complex social problems that, because they lack a shared interpretation or collective understanding are not readily subject to delimitation, attribution of responsibility, or the identification of definitive solutions. Rittel and Webber³⁵ defined wicked problems as ill-structured and contingent: there is no definitive statement of “The Problem”, but an evolving set of interlocking issues and constraints. The problem cannot be understood without first knowing its context and different stakeholders have different views about what the

³² N.M. Davidson & R. Dyal-Chand, *Property in Crisis*, 78 *FORDHAM L. REV.* 1607 (2010). Drawing on Ackerman’s account of transformational constitutional realignments, (B. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (Cambridge: Belknap Press of Harvard University Press 1998); B. ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (Cambridge: Belknap Press of Harvard University Press 1998), Davidson and Dyal-Chand argued that, while the state has limited resources to influence how property law develops outside of crisis moments, property crises create moments of potential to punctuate the stable equilibrium of property law’s evolutionary development.

³³ ULRICH BECK, *POWER IN THE GLOBAL AGE: A NEW GLOBAL POLITICAL ECONOMY* 125-165 (Cambridge, U.K.: Polity Press 2005) (describing distinctive strategies employed by states to preserve power, including economic strategies, preventative strategies and globalization strategies among others).

³⁴ Pew Research Center, *Political Polarization in the American Public* (June 2014).

³⁵ H. RITTEL & M. WEBBER, *DILEMMAS IN A GENERAL THEORY OF PLANNING* (Berkeley: University of Urban and Regional Development 1973).

problem is, and what constitutes an acceptable solution. Solutions are proposed and evaluated in a context in which “many parties are equally equipped, interested, and/or entitled to judge [them],” but where their judgements are likely to vary widely depending on the stakeholder’s independent values and goals. Wicked problems engender a high level of conflict among stakeholders, with no agreement on the problem or the solution: “[n]othing really bonds the problem solving process—it is experienced as ambiguous, fluid, complex, political, and frustrating as hell. In short, it is wicked.”³⁶

For example, Bratspies described ‘sustainability’ as: “a particularly wicked problem, in part because of the lack of an institutional framework capable of developing, implementing, and coordinating the responses necessary to address the problem.”³⁷ Similar observations have been made in relation to the long-term goal of reforming farming regulation and the U.S. farming and food regulation system, which is hampered by the “...diverse social, ethical, political, and legal motivations and short-term goals” of stakeholders.”;³⁸ and the management of water resources, which is: “characterized by multiple conflicting, non-commensurate perspectives.”³⁹ Allen and Gould argued that the reason many sustainability problems share the characteristics of wicked problems is that: “[e]ach can be considered as simply a symptom of some higher order problem...The definition is in the mind of the beholder...Furthermore, there is no single correct formulation for a wicked problem, only more or less useful ones.”⁴⁰

The complexities of wicked problems are often elided or avoided through the selective use of narrative ‘frames’. These frames: “select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described.”⁴¹ The frame 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 creates an impression that ‘solutions’ can be found through the application of a narrowing, selective lens. Inevitably, the

³⁶ N. Roberts, *Wicked Problems and Network Approaches to Resolution*, 1 INT’L PUB. MGMT. REV. 1 (2000).

³⁷ Bratspies (2011) at 292.

³⁸ L. Fox O’Mahony & N. Cobb (2008); S. J. Morath, *The Farm Bill: A Wicked Problem Seeking A Systematic Solution*, 25 DUKE ENVTL. L. & POL’Y F. 389, 402 (2015).

³⁹ R. M. Bratspies, *The Climate for Human Rights*, 72 U. MIAMI L. REV. 308, 317 (2018).

⁴⁰ G.M. Allen & E.M. Gould, *Complexity, Wickedness, and Public Forests*, 84 JOURNAL OF FORESTRY 20, 22 (1986).

⁴¹ R. M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 JOURNAL OF COMMUNICATION 51, 52 (1993).

choice of frame (or explanation) determines the nature of the proposed resolution.

The choice of research or analytical methodology also performs a ‘framing’ function. Research methods set the agenda for research, define the questions that are asked by researchers, determine which issues are explored and the types of evidence deemed relevant or appropriate to frame, analyze and answer questions. When specific methods or approaches dominate within disciplines or sub-disciplines (for example, doctrinal approaches to real property law), this determines the nature of the knowledge produced by researchers. Sociologist John Law described the effects of methodological hegemony, when specific approaches or research methods are monopolistic,⁴² so that: “...methods, their rules, and even more methods’ practices, not only describe but also help to produce the reality that they understand.”⁴³

Conventional approaches to doctrinal and theoretical property law have important framing consequences for property scholarship. Even legal realist approaches to property, which seek to recognize and understand property law as a dynamic ‘going institution’—in Dagan’s words, ‘a great human laboratory’⁴⁴—often adopt an analytical frame that is bounded by the institution of private property law, with litigation and case law at the center. This has important consequences for what is seen, or not seen, within this frame.⁴⁵ Narrowing frames elide the complexities of problems, in ways that translate and make visible the ‘official’, ‘relevant’ or legible aspects of the problem, while concealing (or, in Law’s terms, ‘othering’) aspects of the problem that sit outside the official or dominant paradigm. As well as raising justice concerns, the effects of framing can practically hinder attempts to solve complex or wicked problems.

When conflicting ideas are located within distinct and competing frames, there is a risk that problem solving collapses into rhetorical deadlock, with

⁴² J. LAW, *AFTER METHOD: MESS IN SOCIAL SCIENCE RESEARCH* (London; New York: Routledge 2004).

⁴³ *Id.* at 5.

⁴⁴ H. DAGAN (2011) at 54.

⁴⁵ Dagan reasoned that ‘because the judicial drama is always situated in a specific human context, lawyers have constant and unmediated access to human situations and to actual problems of contemporary life. This contextuality of legal judgments ensures lawyers a unique skill in capturing the subtleties of various types of cases and in adjusting the legal treatment to the distinct characteristics of each category’: Dagan (2011). Indeed, it can hardly be surprising that, relying on litigation as the primary (or sole) empirical source, property’s organizing concepts are geared to over-represent the privileged property insiders who enjoy particular advantages in access to justice through legal advice and litigation; L. Fox O’Mahony, *Property Outsiders and The Hidden Politics of Doctrinalism*, 67.1 CURRENT LEGAL PROBLEMS 409-445 (2014). See H. GENN, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* 101 (Oxford; Portland: Hart Publishing 1999), for discussion of access, and lack of access, to law and justice.

analyses and proposals advanced from distinct (and sometimes polarized, political) positions which: “...mostly talk past each other...”⁴⁶ This creates a barrier to problem-solving. And when problems seem like “lost causes”, collective action is inhibited. This dilemma was articulated by Thomas Ross in his essay, ‘The Rhetoric of Poverty: Their Immorality, Our Helplessness’. Ross observed that ‘poverty’ is typically characterized, by courts, as an unsolvable problem: “one of daunting complexity that is virtually beyond solution.” By tacitly accepting that it is a complex and daunting problem—a ‘wicked problem’—stakeholders (in Ross’s analysis, judges) abdicate responsibility to seek out solutions, deeming themselves helpless to act:

“We assume that the eradication of poverty, even if possible in theory, would require the radical transformation of our society. The causes of poverty, we assume, are a product of a complex set of factors tied to politics, culture, history, psychology and philosophy. Thus, only in a radically different world might poverty cease to exist. And, whatever the extent of the powers of the Court, radically remaking the world is not one of them.”⁴⁷

This rhetoric of helplessness underpins the official narrative that: “[h]ard choices, suffering, even ‘Kafka-esque’ results are simply unavoidable.”⁴⁸

Private property is frequently imbricated in wicked social problems. However, the use of theoretical frameworks that apply *ab initio* political or ideological lenses geared to justify, direct or challenge property’s power to complex property problems prematurely narrows the analytical frame, in ways that are ill-suited to complex problem-solving. Because the art of dealing with wicked problems demands that we do not seek, prematurely, to apply a normative len in seeking out solutions,⁴⁹ wicked problem solving methods require that we ‘remain in the mess’—keeping options open, and exploring as many relationships in the problem topology as possible, before synthesising our understanding and starting to formulate solutions. This orientation is also a key feature of Fineman’s Vulnerability Theory, which offers insights for opening up complex, highly-contested ‘wicked problems’ while adopting a perspective of epistemic humility.

C. Vulnerability Theory and Resilience

⁴⁶ S. L. Winter, *The Next Century of Legal Thought?*, 22 CARDOZO L. REV. 747, 748 (2001) (“...the related instrumentalism and consequentialism of the realists can be seen (in sometimes extreme form) in the political polarization of the academy—where there is a fairly distinct right and left that mostly talk past each other.”)

⁴⁷ T. Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. LJ 1499, 1501 (1990-1991).

⁴⁸ *Id.* at 1499.

⁴⁹ Ritchey (2013).

Resilient Property draws three key insights from Fineman’s ‘vulnerability theory’.⁵⁰ Firstly, we draw on Fineman’s general approach to vulnerability and resilience; then on her insights concerning institutional vulnerability, including the vulnerability of the state. Finally, we build on Fineman’s framework to develop a third insight that provides a central anchor for our analyses of state responses to squatting: 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 conflict or crises. This third insight is central to Resilient Property, and underpins our focus on ‘equilibrium’ in section II.C.2. It reminds us that states are not neutral arbiters in relation to competing claims to land. It reveals the realities of state action in response to squatting: 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. Finally, it enables us to develop a realistic, contextualized, conceptualization of state action with regard to complex property problems.

Fineman’s vulnerability theory started by rejecting the idealized, imagined “autonomous and independent subject asserted in the liberal tradition”.⁵¹ The alternative model of legal subjectivity she advanced was anchored in the inherent, universal and constant human vulnerability of “real-life subjects”.⁵² Fineman argued that this “vulnerable subject”, who is “embodied and embedded”,⁵³ is: “[f]ar more representative of actual lived experience and the human condition... [and therefore] should be at the center of our political and theoretical endeavors.”⁵⁴ The *embodied* characteristics of the vulnerable legal subject reflect the material realities of ‘bodily vulnerability’—the flesh-and-blood vulnerability that: “...is apparent at the beginning of life when we were totally dependent on others for our survival”,⁵⁵ and which remains a constant component of our human experience. Fineman described our ability to mitigate this embodied vulnerability as changing over time and across the life course: “embodying different needs and abilities, and often dependent upon others at various stages of normal development”.⁵⁶ While our ability to mitigate vulnerabilities may change, our state of constant embodiment means that:

⁵⁰ M. A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 2 (2008).

⁵¹ *Id.* at 2.

⁵² *Id.* at 10.

⁵³ M. 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).

⁵⁴ *Id.*

⁵⁵ M. A. Fineman, *Women, Marriage and Motherhood in the United States: Allocating Responsibility in a Changing World*, 2011 SINGAPORE JOURNAL OF LEGAL STUDIES 1, 16 (2011).

⁵⁶ Fineman (2015) at 2090.

“...there is no position of invulnerability at any stage. Rather, individuals have different degrees of resilience, which are found in the accumulation of resources that mediate, compensate, or alleviate our vulnerability to harm and injury as embodied beings.”⁵⁷

For Fineman, the concept of ‘resilience’ articulates the means through which universal ‘flesh-and-blood’ vulnerability is mitigated and managed: by accumulation, access to or acquisition of resources⁵⁸ to enable us to adapt to, ameliorate, compensate for or contain our inherent vulnerability.

A second trope of Fineman’s theory is *embeddedness*. Each individual’s experiences of vulnerability are structured through their social *embeddedness* in the institutional structures and relationships that provide *resilience*. This concept of embeddedness echoes the focus on ‘webby relations and practices’ in actor-network theory. Fineman draws out the implications of embeddedness for resilience:

“Even before the moment of birth, human beings are embedded in webs of economic, cultural, political, and social relationships and institutions. We are dependent on those relationships and institutions because they support and sustain us. They are the legitimate means through which we can gain the assets or resources necessary to mediate, negotiate, or cope with our human vulnerability. While there is no position of invulnerability, these relationships and institutions provide us with *resilience*. It is our reservoir of resilience that will determine whether we can not only persevere but be confident enough to take risks or recognize and choose among options and opportunities as they arise over the life course.”⁵⁹

While vulnerability is characterized as constant and universal, Fineman argued that: “...resilience is particular, found in the assets or resources an individual accumulates and dispenses over the course of a lifetime and through interaction with and access to society’s institutions.”⁶⁰ Through this move, vulnerability theory shifted the implications of legal subjectivity away from the individual and onto 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.

⁵⁷ *Id.*

⁵⁸ Fineman’s describes sources of resilience as physical resources: e.g., housing, food, money; human resources: education, training, knowledge and experience; social resources: relationships, social networks, family, community, associations; ecological resources: environments, clean air and water; and existential resources: systems of belief or culture that help us to understand our place in the world: see M. A. Fineman & R.W. Woodruff, *Afterword: Vulnerability and Resilience*, 36 RETFÆRD ÅRGANG 84 (2013).

⁵⁹ M. A. Fineman & G. Shephard, *Homeschooling: Choosing Parental Rights over Children’s Interests*, 46 U. BALT. L. REV. 57, 61 (2016-2017).

⁶⁰ *Id.* at 62.

Since vulnerability is understood as an inevitable and constant characteristic of the human condition, Fineman's vulnerability theory demands that we resist the habit of defining the "vulnerability" of one claimant (the squatter, or the owner, depending on the moral lens applied) in counterpoint to the presumed "invulnerability" of the other. Because it resists labelling individuals as 'vulnerable' or 'not vulnerable' it reminds us to avoid conferring normatively loaded-up identities onto particular subjects or populations (for example, victim/aggressor). Fineman also distinguishes between 'background resilience'—accumulated over time; and the resilience that is allocated to mitigate vulnerability in moments of crisis. Her approach re-located the underpinning source of difference between people's abilities to navigate opportunities and support, gaps and pitfalls, away from the idea that some *people* are more or less vulnerable than others, to focus on differences in people's opportunities to accumulate and access *resilience* through their interactions with social institutions. Echoing the methodological insights of wicked problem theory, vulnerability theory seeks to avoid the trap of analytical frames that prematurely narrow and constrain the problem space and limit potential solutions. Because she seeks to avoid: "inherently privileg[ing] any one outcome of political deliberation"; Fineman described her approach as: "invit[ing], if anything, a high degree of epistemic humility".⁶¹

The second insight we take from vulnerability theory concerns the inherent vulnerability of social institutions, including 'the state'. Fineman argued that, like people, 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."⁶² Fineman emphasized that: "societal institutions themselves are not fool proof shelters, even in the short term".⁶³ Institutions enable us to: "mediate, compensate, and lessen our vulnerability" through the accumulation of assets of resilience,⁶⁴ but these institutions are also themselves vulnerable:

"They may fail in the wake of market fluctuations, changing international policies, institutional and political compromises, or human prejudices. Even the most established institutions viewed over time are potentially unstable and susceptible to challenges from both internal and external forces."⁶⁵

The concept of institutional vulnerability is not unfamiliar to liberal

⁶¹ A. Grear, *Vulnerability, Advanced Global Capitalism, and Co-Symptomatic Injustice: Locating the Vulnerable Subject* [in] M.A. FINEMAN & A. GREAR, *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* (London; New York: Taylor and Francis 2016).

⁶² Fineman & Woodruff (2013) at 88.

⁶³ Fineman (2008) at 12.

⁶⁴ *Id.* at 22.

⁶⁵ *Id.* at 12.

property theorists: indeed, concern for promotion and protection of the ‘institution of private property’ is a regular theme in liberal property theories. The general assumption that property law decision-making must protect and uphold the institution of private property implies that, without appropriate normative direction, legal and policy decisions risk damaging this foundational liberal institution.

For Fineman, the institutions that produce and provide resilience to mitigate our vulnerabilities are central because the institutional structures and relationships in which vulnerable subjects are embedded determine each individual’s particular experience of vulnerability. Vulnerability is mediated through the quality and quantity of resources (*resilience*) that we inherit, accumulate or are capable of accessing in any given moment:⁶⁶ “[w]e are not born resilient; it is produced over time and within state-created institutions and in social, political, and economic relationships.”⁶⁷ Fineman also highlighted the central role of ‘the state’ 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. These institutions of resilience are created, maintained, regulated and backed-up through law, which confers legitimacy on their operation and their power over individuals.⁶⁸

Fineman’s aim was to bring the state back into view: looking to the state as a source of resilience, and re-imagining individuals’ relationships to the state as a resilience-producing institution. Her interest in the state is primarily geared around re-conceptualizing its role as ‘active but non-authoritarian’—what she terms a ‘responsive state’.⁶⁹ She describes this as reflecting an underpinning reality—that the state is always actively shaping institutions, although: “present conceptions of the state underestimate or even ignore the many ways in which the state—through law—shapes institutions from their inception to their dissolution.”⁷⁰ A central concern for vulnerability theory is that, by looking away from the state—and law—as a site of production for institutional resilience, we fail to pay attention to the manner in which this resilience is allocated.⁷¹ By magnifying the state’s responsibility for the institutions and structures it constructs and uses, Fineman advanced her central normative claim: “[that] vulnerability analysis demands that the state give equal regard to

⁶⁶ M. A. Fineman & A. Grear, *Introduction, Vulnerability as a Heuristic: An Invitation to Future Exploration* [in] M. A. FINEMAN & A. GREAR (EDS) (2013).

⁶⁷ Fineman (2015) at 2090.

⁶⁸ Fineman (2011) at 16.

⁶⁹ Fineman (2008) at 19.

⁷⁰ *Id.*

⁷¹ “Currently, the state minimally supervises these institutions in fulfilling their essential role in providing the assets that give us resilience in the face of vulnerability.”; *Id.*

the shared vulnerability of all individuals...”⁷² The state’s responsibilities thus extend both to all individuals, and to: “...how the state has responded to, shaped, enabled, or curtailed its institutions.”⁷³ In a further normative move, Fineman asks:

“Has [the state] acted toward those institutions in ways that are consistent with its obligation to support the implementation and maintenance of a vital and robust equality regime—a regime in which individuals have a true opportunity to develop the range of assets they need to give them resilience in the face of their vulnerabilities?”⁷⁴

Fineman argues that: “[t]he realities of universal and constant vulnerability argue for a responsive state that ensures equality of opportunity and meaningful, not merely formal access for individuals to society’s institutions.”⁷⁵ This approach brings the operation and impact of the state, its institutions and structures into focus. Fineman re-positions this ‘responsive state’ as a means of achieving: “a more nuanced sense of what constitutes equal opportunity than currently theorized—one that is more sensitive to existing inequalities and more demanding of the state.”⁷⁶

While we draw insights from vulnerability theory, Fineman’s ultimate exhortation, that we should be ‘more demanding of the state’, highlights a point of departure between Fineman’s approach and Resilient Property. Vulnerability theory seeks to bring the state under scrutiny as an arbiter, or allocator, of the ‘assets of resilience’:⁷⁷ directing the state towards affirmative obligations embedded in state action to allocate resilience between individuals. Fineman’s normative agenda is to re-direct the state to: “...operate in ways that do not unduly privilege some, while disadvantaging others.”⁷⁸

“This focus on the structuring of societal institutions reflects the fact that the state has an affirmative obligation not to privilege any group of citizens over others and to actively structure conditions for equality.”⁷⁹

In this sense, vulnerability theory can be understood as a theory *for* state action. At the same time, by recognizing the inevitable vulnerability of social institutions, *including the state itself*, it opens up a useful space from which our Resilient Property approach explores the methodological and normative implications of the state’s own vulnerability: the state’s own self-interested

⁷² Fineman (2008) at 20.

⁷³ Fineman (2008) at 20.

⁷⁴ Fineman (2008) at 20.

⁷⁵ M. A. Fineman, *Equality and Difference: The Restrained State*, 66 ALA. L. REV. 609, 626 (2015).

⁷⁶ Fineman (2008) at 20.

⁷⁷ M.A. Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L. J. 252, 255 (2010).

⁷⁸ Fineman (2008) at 2-3.

⁷⁹ Fineman (2008) at 21.

need for resilience.⁸⁰

Applying the terminology used by John Law, the nation-state *nomos* in which state action in relation to property is located is part of the ‘hinterland’ that produces specific realities. Law underlined the importance of the hinterland in shaping and constraining choices about which realities become ‘made’ (or ‘unmade’). However, he claimed that:

“To talk of ‘choices’ about which realities to make is too simple and voluntaristic. The hinterland of standardized packages at the very least shapes our ‘choices’. We who ‘choose’ embody and carry a bundle of hinterlands.”⁸¹

A similar observation can also be made in relation to state action with respect to property: that the hinterland (or property *nomos*) shapes the range of responses available to states with respect to property problems. At the same time, it is important to be clear that we do not present this as a deterministic argument: we are not implying that states have *no* choices in how they respond to property problems. The ‘property *nomos*’ in each jurisdiction is not homogenous, but a complex hybrid of multiple norms and commitments; sometimes competing; shifting and evolving over time; and scaled across the layers of state action on property. Elements of this normative universe can be dialed up and dialed down in particular property moments, or in response to property problems as they are manifest across the vertical scale (eg national/local). We do not suggest that there are not alternatives to the *status quo*; indeed, moments of crisis demand adaptations to the *status quo*, if equilibrium is to be restored. However, we do recognize the reality that, if alternatives to the *status quo* are to be successfully adopted and sustained, they must be built on a legitimate hinterland, located within the window of political possibility.⁸² It is both rare and exceptional for the stresses and strains on the property system to trigger a ‘tipping point’ into an altered state—generating a new (constitutional, or property system) paradigm to work within (for example, the tipping point from apartheid to post-apartheid state).

Resilient Property builds on, but departs from, the insights of vulnerability theory by following through the implications of the state’s own institutional

⁸⁰ While Vulnerability theory has promised to bring the state under scrutiny (see Fineman (2010) at 255), most of the scrutiny is directed at the state’s failure to allocate resilience to all persons, rather than scrutiny about what the state’s own interests may be in allocating the resilience it parcels out.

⁸¹ LAW (2004) at 33.

⁸² Known as the ‘Overton window’ after policy analyst Joseph P. Overton, this describes the range of legitimate policy options that are acceptable to societies in any given time. While other policy ideas exist beyond the Overton window, politicians risk losing popular support if they champion these ideas. The Overton window can move, expand or contract, adjusting the range of acceptable policy ideas as societal values and norms change. For an application of the concept to global environmental challenges, see A. Suzdaleva, *Ecological globalistics and the paradigm of world civilization development* E3S WEB OF CONFERENCES 217, 11993 (2020).

vulnerability: focusing *both* on the state's role in allocating the resources of resilience (its 'other-regarding' role) and the state's own (self-regarding) claim to resilience. 'The state' and its multi-level institutions (global, regional, national and local) flex and adapt over time, in response to changing contexts, stresses and pressures. These adaptations affect how actors and agencies across the multi-level state mediate conflicting interests. Starting from a realistic account of the contemporary state, we recognize that the governance of private property, including responses to property problems through law, is a complex web of interactions between citizens (individually and collectively) and institutions, legal texts and interpretations, regime goals and norms. Demands made *on* the state (for or against state action) must be understood in the wider context of the range of pressures and constraints applied to state actors and institutions. Property scholarship requires methodologies that take account both of the (complex, contested) other-regarding responsibilities of the state, on the one hand, and the state's/government's own (multi-level) self-regarding need for resilience on the other.

The dependencies this generates come into sharp relief in moments of pressure or crisis for national or local governments. State responses reveal how the state's 'other-regarding' responsibilities align with 'self-regarding' actions that (state actors believe, at least) will shore up the authority and legitimacy of state actors and institutions. This focus on state vulnerability (and the processes through which states create their own resilience) is timely in the current age of crises. The methodology of Resilient Property takes account of the multiple and intersecting vulnerabilities and resilience needs at stake when homeless people squat on empty land. Our aim is to surface, understand, and take seriously the full spectrum of individual, collective, and institutional vulnerabilities at stake, including the state's own stake in property problems. By building a more complete picture of the vulnerabilities and resilience associated with homeless squatting on empty land, we are seeking to understand how the individuals (owner, squatters, neighbors) and institutions (markets, communities, housing systems, private property, and the state itself) that are implicated in these conflicts marshal the resources of resilience. By focusing on the state's own vulnerability and resilience—alongside its power to selectively allocate resilience to others—Resilient Property offers a fresh perspective on state responses to property problems—specifically, eviction, housing and homelessness—in the pandemic.

D. Sustainability, Equilibrium, and Resilience

The insight that states are simultaneously both 'self-regarding'—that is, motivated to shore up their authority and legitimacy (the state's own resilience), particularly in periods of crisis—and 'other-regarding' in the

discharge of governance functions, opens up a new frame for property theory. For sure, the ‘other regarding’ role of the state (with respect to property interests, the protection of private property, and property allocations) has attracted considerable attention in contemporary property theory. In her recent work on the ‘fiduciary’ role of the state with respect to private property, Underkuffler argued that the relationship between a government and its citizens is based not in the social contract but in a ‘fiduciary relationship’ and that, as a result, the state acts under a duty to take account of the needs of all members of the community.⁸³ Underkuffler’s application of fiduciary theory to property offers a fresh perspective through which to give content to the state’s responsibilities towards property owners. Because the state’s [other-regarding] fiduciary duty applies not only to *property owners* but to *all citizens*, the state is required ‘to act with due regard for the [beneficiary’s] best interests’. If all citizens *individually*, as well as *collectively*, are ‘beneficiaries’ of the state’s power, the existence of a fiduciary duty demands that: ‘government at the very least must engage in serious reckoning with individual citizens’ (as well as collective) interests.⁸⁴

Underkuffler’s application of fiduciary theory to property theory reaches beyond conventional state/owner or owner/non-owner binaries to make the case for states to take account of the individual (and collective) interests of other (non-owning) members of the community. In deploying the fiduciary lens, she simultaneously recognized the government’s obligations towards property owners, while also asserting that:

“Fiduciaries, by reason of the demands of the fiduciary obligation, are obligated to all of their beneficiaries equally. There is no basis, in fiduciary theory, to rule in—at the outset—the claims of some beneficiaries, and to rule out the claims of others. Government as a fiduciary must reckon seriously not only with the needs of its beneficiaries who own property, but also with the needs of those who do not.”⁸⁵

The individual interests of property owners ‘must be considered, seriously, in sovereign decision-making’;⁸⁶ and her formulation of the duty-matrix of a fiduciary-state promises not to place the claims of non-owners on equal terms with private property rights. Underkuffler’s approach foregrounded the resilience of the liberal institution of private property;⁸⁷ but does not consider

⁸³ L. S. Underkuffler, *Property, Sovereignty, and the Public Trust*, 18 THEORETICAL INQUIRIES IN LAW 329, 330 (2017).

⁸⁴ *Id.* at 346.

⁸⁵ *Id.* at 348.

⁸⁶ *Id.* at 346.

⁸⁷ For example, Underkuffler centres property rights as the ‘guardian’ of other (human) rights: “Of all conceivable human interests, none is more fundamental than the ability to appropriate and retain property. It is a stark biological fact that of all commonly asserted human rights, property claims are

how the state's own vulnerabilities constrain the discharge of its 'fiduciary' functions. Where Underkuffler's fiduciary property theory is a theory *for* state action, Resilient Property develops a realistic account *of* state action. Fiduciary property theory focuses on the state's duty in mediating the competing claims of *others*; but does not extend to consider the implications and effects of state actions (in the exercise of its 'public fiduciary' duty) for the state's own resilience: that is, for the perceived effectiveness and legitimacy—the resilience—of the state.⁸⁸

To the extent that fiduciary theory (broadly understood) is premised on a concern to mitigate the risk of conflicts of interest between the fiduciary's own interests and the duty owed to beneficiaries (as manifest in the 'duty-interest conflict rule'),⁸⁹ the relationship between state self-interest and state action is a salient consideration. Indeed, the 'state-as-fiduciary' model faces some complex challenges when applying the duty of loyalty—the essence of the fiduciary relationship⁹⁰—to state-actor fiduciaries. Fiduciaries are required *only* to pursue the interests of beneficiaries when executing their duties: the duty of loyalty strictly prohibits conflicts of interest and conflicts of duty, and fiduciary law provides powerful remedies to strip fiduciaries of any personal benefit

among the most essential to human life...the ability to live – and to appropriate property to do so – is assumed by any other human right of which we can conceive. When it comes to property, the stakes could not be higher. In other words, government forbearance towards existing property entitlements is *rooted in property's substantive function, and its required guarantees.*" Underkuffler (2017) at 347 (emphasis in original). This can be contrasted with both Singer and Van der Walt's *de-centring* of property rights in the wider constitutional or democratic context. Van der Walt argued that property is *not*: "the saviour, the knight on the white steed, the guardian of every other right." A. J. Van der Walt, *The Modest Systemic Status of Property Rights*, 1 J. L. PROP. & SOC'Y 15 (2014).

⁸⁸ OECD, SUPPORTING STATE-BUILDING IN SITUATIONS OF CONFLICT AND FRAGILITY: POLICY GUIDANCE (Paris: OECD 2011) (laying out how developing and developed countries can better facilitate positive state-building processes and strengthen the foundations upon which capable and legitimate states are built).

⁸⁹ See, e.g., *Whichcote v. Lawrence* (1798) 3 Ves 740, 750 (30 ER 1248) (when a trustee buys trust property for himself he is not acting with 'that want of interest, that total absence of temptation'; 'where a trustee has a prospect of advantage to himself, it is a great temptation to him to be negligent'; at 752). *Aberdeen Railway v. Blaikie Bros* (1854) 1 Macq 461, 471 (149 RR 32) (where the risk of personal interest leading the fiduciary in a different direction to the interests of beneficiaries was described as 'the very evil against which the rule in question is directed'). U.S. courts adopted the British approach that fiduciaries must avoid self-interest conflicts. See e.g., *Michoud v. Girod*, 45 U.S. 503, 555-56 (1846) ("The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand towards each other."); *Farnam v. Brooks*, 26 Mass. 212, 227 (1830) ("And first, the plaintiff would clothe the defendant with the character of a trustee, over whose transactions, in relation to the trust fund, courts of equity are particularly watchful, because of the temptations trustees are under and the opportunities they have to serve their own interest to the prejudice of the *cestui que trust.*"); *Gardner v. Ogden*, 22 N.Y. 327, 350 (1860) ("the disability extends to all persons who, being employed or concerned in the affairs of another, acquired a knowledge of his property.").

⁹⁰ J.C. SHEPHERD, *THE LAW OF FIDUCIARIES* 48 (Toronto: Carswell 1981).

obtained through their fiduciary position.⁹¹ The conflict of interest rule prohibits the fiduciary from allowing personal interests to conflict (actually or potentially) with the interests of the beneficiary—thus prohibiting disloyal conduct grounded in the self-interest of the fiduciary;⁹² while the conflict of duty rule prohibits fiduciaries from acting under conflicting mandates.⁹³

In this section, we reflect on the legitimacy and value of ‘state self-interest’—that is, decisions made by state actors with the intention of producing resilience not only for citizen/beneficiaries and social institutions, but for ‘the state’ itself. In making this claim, it is important to distinguish the self-interest of ‘the state’ as an enduring political entity from the self-interest of the government of the day. While some of us may believe that it would be normatively desirable for certain governments to fail, it is reasonable to suggest, as a general normative proposition, that it is better if (democratic) states do not fail. Of course, it is also highly unusual for states to fail. As Weiss reminded us: “...over the long run, most states have (with some notable revolutionary exceptions) proved highly adaptive to changing circumstances.”⁹⁴ Weiss argued that—withstanding the popular trope of ‘state decline’, nation-state institutions retain significant capacity and capability to govern; and that the strength of these domestic institutions critically determines economic success and political stability. In rejecting the narrative of the *decline* of the nation state, Weiss argued that states are highly *adaptive*, generating resilience in response to changing circumstances.

The idea of *adaptiveness* to changing circumstances is a central component of ‘resilience’, as this concept has been developed in the context of sustainability theory. ‘Resilience’ is defined as the capacity of a system to respond to, and rebound or recover from, shocks (sudden or extreme events) and stresses (long-term trends that undermine the system) without changing its basic state.⁹⁵ Resilient systems have the adaptive capacity to remain in a functional state;⁹⁶ to avoid ‘tipping’ into an altered state, by maintaining

⁹¹ M. CONAGLEN, *FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES* 39 (Oxford: Hart Publishing 2010).

⁹² K.B. Davis, *Judicial Review of Fiduciary Decision-Making- Some Theoretical Perspectives*, 80 NW. U. L. REV. 1(1985); J. H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929 (2005); M. B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO LJ 67 (2005).

⁹³ A. Laby, *Resolving Conflicts of Duty in Fiduciary Relationships*, 54 AM. U. L. REV. 75 (2004); M. Conaglen, *Fiduciary Regulation of Conflicts between Duties*, 125 LAW Q REV 111(2009); S. L. Schwarcz, *Fiduciaries with Conflicting Obligations*, 94 MINN L. REV. 1867 (2010).

⁹⁴ L. WEISS, *THE MYTH OF THE POWERLESS STATE* 9 (Ithaca: Cornell University Press 1998).

⁹⁵ B. WALKER & D. SALT, *RESILIENCE THINKING: SUSTAINING ECOSYSTEMS AND PEOPLE IN A CHANGING WORLD* (Washington: Island Press 2006).

⁹⁶ J. Ahern, *From Fail-Safe to Safe-to-Fail: Sustainability and Resilience in the New Urban World*, 100 LANDSCAPE AND URBAN PLANNING 341 (2011); L. VALE & T. CAMPANELLA, *THE RESILIENT CITY: HOW MODERN CITIES RECOVER FROM DISASTER* (New York: Oxford University Press 2005).

equilibrium in the face of challenges or crises. A related point can be made about the resilience of the frames or paradigms that contain and constrain state responses to property problems. The ‘hinterland’ or ‘*nomos*’ of property norms shapes state responses to property crises. The property *nomos* in each of the jurisdictions we examined comprised a complex hybrid of norms, providing a range of latitude for different types of response to property problems. This normative hybridity also supports *adaptiveness* in moments of crisis; and this adaptiveness enables states, governments, and property systems to be resilient: to recover, and to avoid tipping into an altered state. Hybridity supports flexibility, while the scaling of state responses across the multi-layered institutions of the state enables states to meet different resilience needs.

Sustainability theory examines cycles of resilience, continuity and change in natural systems. More recently, a significant body of scholarship has drawn on its concepts to analyse ‘resilience’ in social systems and institutions—“the property of a social system to cope with, survive and recover from complex challenges and crises that present stress or pressure that can lead to systemic failure.”⁹⁷ Sisk’s account of ‘democratic resilience’ identified four characteristics of resilient social systems: flexibility, recovery, adaptability and innovation. He explained:

“Resilient social systems are flexible (able to absorb stress or pressure), can recover from challenge or crises, adaptable (can change in response to a stress to the system), and innovative (able to change in order to more efficiently or effectively address the challenge or crisis).”⁹⁸

‘Fragile’ social systems—the opposite of resilient—are susceptible to breakage or fracture because they don’t have internal mechanisms to help them cope, survive and prosper when confronted with change, challenges or crises. As the stability—the resilience—of liberal democratic states comes under pressure,⁹⁹ and post-liberal property systems face into yet another (post-pandemic) global crisis, the institutional resilience of the state—its capacity to cope with changes, challenges and crises without ‘tipping’ into a different state (for example, authoritarianism)—raises important and urgent questions for property theorists.¹⁰⁰

⁹⁷ T.D. Sisk, *Democracy’s Resilience in a Changing World* [in] IDEA, *THE GLOBAL STATE OF DEMOCRACY: EXPLORING DEMOCRACY’S RESILIENCE* 37 (Stockholm: International IDEA 2017).

⁹⁸ *Id.* at 38.

⁹⁹ The period since 2006 has been characterised as one of crises in democratic regimes; see IDEA (2017) noting that the quality of democracy is declining in many countries due to internal and external pressures. Diamond framed this as a period of ‘democratic recession’: L. Diamond, *Facing up to the Democratic Recession*, 26 *JOURNAL OF DEMOCRACY* 141 (2015).

¹⁰⁰ The paradox of Anglo-American liberal property theories is that, although private property is a central institution of the liberal state, it is necessarily de-centred or concealed in accounts of state action; and the enduring role of the state in supporting and maintaining the system of private property is systematically de-centred or concealed in most liberal property scholarship.

Van der Walt argued that the dynamic processes of stability and change that produce adjustments within hybrid normative orders¹⁰¹—the processes through which legislation, judicial interpretation and doctrinal development shape and re-shape the content of property law as it tracks political movements over time—tend to be crowded out by the dominant political mood in any given moment. The systemic importance of normative pluralism is not fully reflected in the dominant, or ‘official’, narratives of property law, which typically tell simplified stories about property that elevate certainty over flexibility, predictability over adaptiveness. These narratives have important implications for property theory’s moral reasoning. Most notable, perhaps, as we reflect on the importance of adaptiveness, flexibility and innovation to maintain equilibrium and enable recovery in times of crises is the narrative that locates the essence of property in the ‘property values’ of stability, certainty, predictability and the protection of the *status quo*.¹⁰² Van der Walt described the dominant normative order—the orthodoxy—as imposing an:

“...established hierarchy...on law and meaning by the courts and the state for the sake of clarity, certainty and predictability...established and imposed, as Cover so compellingly argued, through violent suppression of alternative views, alternative meanings, alternative laws...[that] can only be established by violently suppressing some of the energy and diversity that is at work in a legal system.”¹⁰³

That energy and diversity, plurality and hybridity—distributed across scales of governance—enables property systems (and the states that constitute, maintain and rely on them) to resist and overcome institutional, structural or dogmatic inertia or polarization. It underpins the normative orientation towards equilibrium.

¹⁰¹ See A.J. Van der Walt, *Resisting Orthodoxy – Again: Thoughts on the Development of Post-Apartheid South African Law*, 17 South African Public Law 259 (2002); see also A.J. Van der Walt, *Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State*, 118 SOUTH AFRICAN LAW JOURNAL 258 (2001).

¹⁰² Van der Walt described the role of South African courts, developing the common law following the enactment of the 1996 Constitution with its commitment to transformation, as inherently conservative: “In the result, the privileging of stability over change, security over novelty, and normality over deviation appears as a fact of life, an unbearable force of inertia that resists all but the most urgent and unmistakable impulses for change.” Furthermore, he argued, faced with a choice between two or more interpretations, the chosen approach was presented as a self-evident, logical necessity: “Courts do not only restrict the impact of the Constitution when they are reticent or deliberately obstructive about change because they disagree with the politics of transformation—as long as an interpretation is available that preserves stability and certainty, courts often simply fail to recognize the availability or the interpretive force of an alternative interpretation that threatens those values, even though they might acknowledge the need and justification for change in general. The possibility of falling back on well-known, familiar and comfortable solutions seems to have a destabilizing effect that prevents courts from gathering the energy and the inspiration to recognize and support views and approaches that promote transformation and reform but threaten security and stability.”; Van der Walt (2001) at 268-9.

¹⁰³ Van der Walt (2002) at 271.

‘Stability’ (like ‘certainty’) is familiar trope in property law. It is often interpreted as the avoidance of change¹⁰⁴—a backward-looking commitment to the *status quo* of property rights. The stability norm is thought to “subdue uncertainty and flux and to improve stability and security.”¹⁰⁵ It is characterized as politically neutral, self-evident common sense: property law’s ‘settled reason’ and the habits of the ‘common law mind’.¹⁰⁶ A range of standard positions justify this approach, including the need to ensure the security of long-term expectations, the reliability of investment strategies, the rationality of decision-making about future land use, stable forward planning, the need to protect titles taken by purchasers and creditors, and so on. Property law’s stability bias is sometimes articulated as an argument for the protection of settled expectations on the grounds that to unsettle expectations would generate ‘demoralization costs’, by depleting (owners’) confidence in the system of property rights¹⁰⁷—although this inference has been challenged by Davidson, who argued that the property system is better served by prioritizing *ex post* flexibility over *ex ante* certainty, orienting property rules to support (all) parties’ confidence that, over time, they will be treated fairly under a property regime that ‘will ensure inclusion’.¹⁰⁸

The scale of investment in the infrastructure and resources that support dominant paradigms is high, so it is unsurprising that property (law) systems are resilient to new paradigm thinking. However, the embeddedness of the dominant paradigm at the systems-level should not be confused with the idea that specific property rules cannot, or should not, flex to adapt to changing circumstances.¹⁰⁹ Rather, Resilient Property recognises that it is the very scope for adaptation that subsists within each jurisdiction’s (hybridised, multi-scalar) property *nomos* that enables property systems to respond to challenges and crises, and so to be resilient. It is this adaptive resilience that enables property systems to dissipate the effects of shocks that might otherwise create ‘tipping points’ into new paradigms.

¹⁰⁴ Underkuffler claimed that: “...[p]roperty is, by definition, the protection of the status quo; it cannot, of itself, answer the question of when there is a justified change in that status quo.”; Underkuffler (2013) at 2016.

¹⁰⁵ Van der Walt (2002) at 270.

¹⁰⁶ J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 261-62 (Cambridge: Cambridge University Press 1987).

¹⁰⁷ F. I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214 (1967).

¹⁰⁸ N. Davidson, *Property’s Morale*, 110 MICH. L. REV. 437 (2011).

¹⁰⁹ Although we also recognise the powerful political influence of vested ‘insider’ property interests in fixing specific property rules in place, or evolving rules to better protect property insiders: Lorna Fox O’Mahony, ‘*Property Outsiders and the Hidden Politics of Doctrinalism*’, 67 CURRENT LEGAL PROBLEMS 409 (2014).

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.¹¹⁰ 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.”¹¹¹ The resilience of legal systems and property systems depends on being able to adapt, to flex and to innovate in the face of unprecedented and unexpected challenges and change.¹¹²

Resilient Property draws on equilibrium theory to understand how resilience is produced, for states and for individuals. Equilibrium theory defines ‘resilience’ as the capacity of a system to respond to, rebound, or recover from, shocks (sudden or extreme events; tipping points) and stresses (long-term trends that undermine the system) without changing its basic state. Identifying alignments between the resilience needs of governments, and the state’s other-regarding role in allocating resilience, it reveals the complex drivers of property outcomes, as these affect individuals and communities, social and economic institutions. Finally, in focusing attention on the realities of property policy, it identifies realistic spaces for property advocacy.

¹¹⁰ Sisk 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.”; Sisk (2017).

¹¹¹ M. A. Heldeweg, *Normative Alignment, Institutional Resilience and Shifts in Legal Governance of the Energy Transition*, 9 SUSTAINABILITY 1, 4 (2017).

¹¹² Arnold and Gunderson argued that, when legal systems favour monocentric and unimodal methods and linear processes they are maladaptive and ill-suited to resolving emerging challenges; C. T. Arnold & L. Gunderson, *Adaptive Law and Resilience*, 43 ENVIRONMENTAL LAW REPORTER 10426 (2013). Their approach—which they term ‘adaptive law’—focuses on how structure emerges out of nested cycles of adaptation and change. 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 adaptation and context-regarding flexibility; and (4) iterative processes with feedback loops and accountability mechanisms. This also echoes a central premise of Peñalver and Katyal’s *Property Outlaws*, in which they proposed that the behaviours of property rule-breakers provide a necessary impetus to change, that increases the resilience of the institution of private property: E. PEÑALVER & S. K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* (New Haven: Yale University Press 2010).

In Part III, we reflect on the property crises we are currently collectively facing, across the world: the impact, and aftermath of the global coronavirus pandemic. Applying the lens of our Resilient Property theory, we examine the emergency measures adopted by several governments as the pandemic threatened the health and wellbeing of citizens on a scale that was unprecedented for most of our lifetimes. As ‘stay-in-place’ orders, including the provision of emergency shelter for unhoused or precariously housed people, collided with an upsurge in vacant commercial buildings and stalled development projects, the perfect property storm of homelessness, squatting and empty buildings/land was brought into fresh relief. Through a Resilient Property lens, state responses to property problems in the pandemic reveal the resilience needs that states were confronted with during the crisis, and the actions they took to maintain and restore equilibrium through the shockwaves of the pandemic and its aftermath.

III. Framing the Pandemic: State Responses

Bacchi argued that when we frame policy interventions as straightforwardly rational responses to objective social or economic problems, we risk over-simplifying the policy-making process. Rather, she argued, we should understand the orientation of policy initiatives as a consequence of how those problems are framed, understood, and described: of how they are “represented.”¹¹³ This process of representation has been profoundly affected by the imperatives of the coronavirus pandemic as the delivery and sustainability of housing became a ‘vector of contestation’.¹¹⁴ Indeed, as Rogers and Powers observed, Covid-19 foregrounded: “experiences of home, ... in home, and capacities to pay for housing and more.”¹¹⁵ Reflecting on the dramatic re-framing of homelessness and precarious housing in Australia, Parsell *et al* described these re-framed representations as opening up new spaces of political possibility.¹¹⁶ The distinction between pre-pandemic representations of homelessness, and the steps that states took to bring ‘everyone in’, was underpinned by an important narrative shift. Before the pandemic, representations of homelessness, and homeless people, in Australia and elsewhere were: “[i]nformed by prevailing neoliberal rationalities...represented as a problem of defective individuals who require

¹¹³ C. BACCHI, *POLICY ANALYSIS: WHAT IS THE PROBLEM REPRESENTED TO BE* (French Forest: Pearson 2009).

¹¹⁴ D. Rogers & E. Powers, *Housing Policy and the Covid-19 Pandemic: The Importance of Housing Research During this Health Emergency*, 20 INTERNATIONAL J. OF HOUSING POLICY 177, 178 (2020).

¹¹⁵ *Id.*

¹¹⁶ C. Parsell, A. Clarke, & E. Kuskoff, *Understanding Responses to Homelessness During Covid-19: An Examination of Australia*, HOUSING STUDIES at 4(2020). They observed that the new political framing of homelessness had been: “...shaped by prevailing political rationalities, whose assumptions, categories and aetiological logics set the conditions of possibility for exercising political power in particular times and places.”

tailored support to address problematic behaviors and personal pathologies.”¹¹⁷ However, from early in the pandemic period, representations of homelessness as a matter of individual personal responsibility (and failure) were overtaken by representations framed by collective public health.

The re-framing of homelessness as a public health emergency focused policy attention on urgent state action to bring homeless people in to sheltered accommodation. It generated a political imperative for states to act,¹¹⁸ providing the political cover for measures that, in a pre-pandemic context, would have been considered to be outside the window of discourse for politically viable policies—the ‘Overton window’.¹¹⁹ Overton argued that policy options can be understood along a spectrum—from the unthinkable, radical, and acceptable, to those that are considered sensible but not yet popular; with those policies that come within the ‘Overton window’ (popular ideas, or current policy) defined as the realm of the ‘politically possible’. The window is determined by public opinion, and—according to the theory—feeds into the political calculus through which politicians decide which policies are worth pursuing. In most cases, it is argued, only policy choices that fall within the ‘window of the politically possible’ are likely to be successful or garner support from the electorate. Political leaders respond to signals that help them identify where their Overton windows lie, in the context of the policy challenges that governments face.

A majority of states responding to the pandemic deployed ‘innovative property policy’ initiatives. These included the provision of (a) fiscal support—in the form of relief and welfare payments, and initiatives such as furlough to keep people in employment; (b) bringing homeless people into shelter; and (c) eviction bans to safeguard the precariously housed from landlord or mortgagor eviction actions that would have left them without shelter. While the details varied, the common footprint of these responses signals to the role of housing resilience in shoring up the resilience of each of the five jurisdictions we have

¹¹⁷ *Id.*

¹¹⁸ The framing of the problem as an emergency elicited convenient fictions that animated political responses. As noted by Jacob Remes and Andy Horowitz, “disasters are interpretive fictions” because they are predicated on particularized vulnerabilities and risk experienced in a social setting. Indeed, as Remes and Horowitz argue, there is no real “disaster”, but rather events that expose the differing levels of resilience that emerge in political, social, and economic contexts. *See* J. REMES & A. HOROWITZ, *CRITICAL DISASTER STUDIES* (Philadelphia: University of Pennsylvania Press 2021). To this end, they argue, disasters are not inevitable but rather are “bound up in human history, shaped by human action and inaction.” *Id.* As we have argued in the context of property and the state, understanding why the state deploys resilience for some actors and not for others is essential to assessing how property systems operate, how legal scholars interact with those systems, and how outcomes of resilience can be fostered—if not through property, in other institutions of the state.

¹¹⁹ The idea of an ‘Overton window’ (named for policy analyst Joseph Overton) refers to public perceptions of policy ideas. Policy ideas that are within the ‘Overton window’ are considered to be within the range of acceptable policy ideas: see <https://www.mackinac.org/OvertonWindow>.

explored in this book.¹²⁰

A. Fiscal support: emergency relief

Although the U.S. Federal Administration was initially reluctant to provide fiscal relief, by mid-May 2020, a shift in the U.S. policy response was beginning to emerge. As families who lost jobs and wages struggled to pay for food, pay mortgages and rent, or provide for basic needs, and concerns were raised about the economic impacts of prolonged lockdowns, the pandemic was reframed as both a public health crisis and an economic crisis. On May 23, 2020, former U.S. President Donald Trump, lamenting the economic impact of global shutdowns, famously quipped that: “the cure cannot be worse than the disease”. At the same time, the scale of the economic threat led many governments (and central banks) to intervene with unprecedented emergency measures to help people in financial difficulty. In the U.K., the Conservative Government (the Party that implemented ‘austerity’ measures in response to the 2008 financial crisis) announced a £330 billion package of emergency loan guarantees to help people in financial difficulties,¹²¹ and pledged a further £20 billion of fiscal support for U.K. businesses. In the U.S., the Federal Reserve announced a \$300 billion lending program to support Main Street businesses, and the Trump administration secured a \$2 trillion ‘virus-aid package’, the CARES Act, to support the economy and shore up financially vulnerable households. This package included an initial ban on foreclosures of federally-backed mortgages and a ban on evictions of tenants in federal housing programs for four months; as well as food assistance, healthcare assistance and a range of loans, loan guarantee and relief schemes.

Similarly, in May 2020, the South African Government announced a \$26 billion (10% of GDP), three-phase program of financial assistance measures including measures to support and rescue businesses (phase 1); social relief and economic support (phase 2), including direct support to households and individuals for the relief of hunger and social distress and job protection by

¹²⁰ One vector that demonstrated the common problem amongst states was the role that social networks playing in communicating the disease, and communicating information about the disease. These social networks spread across state lines, linking countries in both the challenges of addressing the pandemic as well as communicating responses to the pandemic. As one group of researchers studying the impact of social networks on the disease concluded “countries had the opportunity of learning from others about social arrangements that were more or less effective in containing the disease.” See Fabio Milani, *Covid-19 Outbreak, Social Response, and Early Economic Effects: A Global VAR Analysis of Cross-Country Interdependencies*, 34 J. OF POPULATION ECONOMICS 223, 226 (2020).

¹²¹ Measures implemented in the U.K. included a job retention (furlough) scheme; deferring VAT and income tax payments; a statutory sick pay relief package for small and medium sized England to support enterprises; a 12 month business rates holiday for all retail, hospitality, leisure and nursery businesses in England; grant funding for small businesses and retail, hospitality and leisure businesses; a business interruption loan scheme, and a lending facility from the Bank of liquidity for larger businesses.

supporting workers' wages; and an economic recovery package (phase 3).¹²² In Ireland, the Government provided a 'COVID-19 Pandemic Unemployment Payment'—a state-funded emergency aid program to provide financial relief for employed and self-employed people who were unable to work due to the pandemic. An initial commitment to fund this payment for 6 weeks from March 2020 was extended until April 2021. In July 2020, the Irish Government announced a €7.4 billion stimulus package of measures to boost economic recovery. And in June 2020, as national and global economies shrank rapidly and many millions lost their jobs, the Spanish Government launched what has been described as: "...the world's biggest economic experiment...";¹²³ a universal basic income program intended to help the poorest households meet basic financial needs and avoid becoming trapped in poverty.¹²⁴ Spain also re-directed €150 million of EU Cohesion Policy funding to strengthen the health care sector as part of a national pandemic response that included a €2.5 billion European Regional Development Fund investment to support health services and businesses in mitigating the consequences of the pandemic in Spain.¹²⁵

While governments in each of these countries re-deployed state resources to bolster the resilience of the workforce, neither the impact nor the outcome was uniform. The U.S. experienced record unemployment claims, triggering record unemployment insurance claims by individuals. States with more structured social protection regimes pre-pandemic experienced a less drastic reduction in employment, and were able to tailor their economic support programs towards other forms of resilience. In Spain, the deployment of Universal Basic Income (UBI) was both a response to pre-pandemic economic conditions and the depletion of state and social resilience in the pandemic crisis. UBI seeks to provide citizens with a "social protection floor", guaranteeing to each citizen a basic level of income security.¹²⁶ Ortiz *et al.*, claimed that UBI is designed to allow people "breathing space to engage in meaningful, decent work, and care for their families or others in their community."¹²⁷ UBI is also associated with empowering women who provide

¹²² J. Devermont & T. Mukulu, *South Africa's Bold Response to the Covid-19 Pandemic*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, [available at] <https://www.csis.org/analysis/south-africas-bold-response-covid-19-pandemic>

¹²³ C. Arnold, *Pandemic Speeds Major Test of Universal Basic Income*, 583 NATURE 502 (2020).

¹²⁴ Germany is trialing a similar scheme, although on a much smaller scale: A. Payne, *Germany is set to trial a Universal Basic Income Scheme* WORLD ECONOMIC FORUM (August 20, 2020).

¹²⁵ *Coronavirus response €150 million of Cohesion policy funding reprogrammed to mitigate the social impact of the pandemic in Spain*, European Commission [available at] https://ec.europa.eu/regional_policy/en/newsroom/news/2020/08/08-11-2020-coronavirus-response-eur150-million-of-cohesion-policy-funding-reprogrammed-to-mitigate-the-social-impact-of-the-pandemic-in-spain.

¹²⁶ Graham Perkins, Sarah Gilmore, David S.A. Guttormsen, & Stephen Taylor, *Analyzing the Impacts of Universal Basic Income in the Changing World of Work: Challenges to the Psychological Contract and a Future Research Agenda*, 2021 HUMAN RESOURCE MANAGEMENT J. 1, 3 (2021).

¹²⁷ I. Ortiz, C. Behrendt, A Acuna-Ulate, & N.Q. Ahn, *Universal Basic Income Proposals in Light of ILO*

unpaid labor in the home, and providing financial headroom for women to leave abusive relationships.

The novel coronavirus pandemic raised fresh interest in UBI policies, as governments around the world implemented radical policies to provide economic assistance during the crisis. In Spain, UBI has been a policy objective for progressive social movements including PAH (*Platforma de Afectados por la Hipoteca*) (Platform for people affected by Mortgages) and the *Indignados* Movement (associated with Spain's anti-austerity platforms and demonstrations)¹²⁸ since the 2008 housing crisis. Between 2011 and 2016, four UBI pilot programs were launched in Spain.¹²⁹ In 2016, the most recent pilot ('B-Mincome') was launched by the City of Barcelona. B-Mincome was a pilot program to study the effects of Universal Basic Income on three local neighborhoods. The city program provided between €100 and €1676 per month per household for 644 randomly selected residents. In 2015, the former leader of PAH Ada Colau was elected mayor on a platform of prioritizing social change, addressing poverty including housing insecurity, and income inequality.¹³⁰ *Indignados* member, Carlos Declós, described universal basic income as a leading legislative priority for PAH, whose tactics since 2013 have included advocacy for housing affordability, as well as political squatting to highlight the urgent need for affordable housing.¹³¹

The background and success of Barcelona's B-Income Program, along with the heightened insecurity brought on by the pandemic, opened a policy window for the much broader adoption of Basic Income nationwide. As the lack of economic resilience amongst Spain's large population of temporary workers posed a major threat to the economic and social stability of the country, the state deployed Universal Basic Income protections on a national scale. The national UBI plan is a means-tested regimen aimed at shoring up

Standards: Key Issues and Global Costing, ESS Working Paper No. 62, at 5, [available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3208737]

¹²⁸ PHILLIPE DE PAJIS, BASIC INCOME: A MODEST PROPOSAL FOR A FREE SOCIETY AND A SANE ECONOMY 192 (2017) (noting that the Radical Left party emerged from the *Indignados* movement associated with M-11 associated with anti-austerity policies, including Universal Basic Income).

¹²⁹ Laura Colini, *The B-Mincome Project Journal No 1*, THE URBAN LAB OF EUROPE (December 2017). The four programs are *Programa De recualificación profesional de las personas que agoten la protección por desempleo* (2011), *Prepara* (2011), and *Programa Extraordinario de Activación para el empleo PAE* (2015). B-Mincome was launched by the City of Barcelona in 2016.

¹³⁰ Laura Colini, *The B-Mincome Project Journal No 1*, THE URBAN LAB OF EUROPE 10 (December 2017).

¹³¹ In March 2019, the Young Foundation published a report titled *Getting By in Barcelona: A portrait of life before basic income*, depicting how income-to-housing gaps prompted by high unemployment and evictions since the 2008 housing crisis had led to Spain having the "highest income inequality of any country in Europe."; Amanda Hill Dixon, Hannah Green, Hannah Davis, Victoria Boelman, & Sergio Sanchez, *Getting By in Barcelona: A Portrait of Life before Basic Income*, Report of Young Foundation 8 (March 2019). Laura Colini, *The B-Mincome Project Journal No 1*, THE URBAN LAB OF EUROPE (December 2017).

the resilience gap generated by extreme income disparity. Qualifying recipients receive between €462 and €1015 per month.¹³² Recognizing that many workers in Spain work temporarily, the UBI plan excluded short-term work in the income means-test for determining eligibility. The plan was also designed to be responsive to changing economic needs, and legislators took the opportunity to address the particular economic and housing precarities experienced by women and girls, by waiving pre-existing conditions that typically disadvantage on the basis of gender.¹³³

One question that has been raised in the context of these initiatives is how states will offset new, unexpected expenditures brought on by the pandemic. In the U.K., Treasury reported a deficit of £337 Billion, making up 15% of the total UK GDP.¹³⁴ Likewise, in Spain, where the pre-pandemic economy relied heavily on outside tourism, the economic impact of the pandemic has been severe. In the U.S., local and state governments feared massive tax shortfalls as normally reliable sales tax revenues flattened in 2020, reflecting lower consumer demand.¹³⁵ U.S. state and local governments expected to counter the shortfalls through federal infrastructure funding, which aimed to bridge the spending gap through a series of redirections, reclamations, and delays on other spending priorities.¹³⁶ In Argentina, the already cash-strapped government passed a one-time tax levy (up to 2%) on its wealthiest citizens (approximately 12,000 people), raising U.S.\$3 billion to offset new costs associated with social distancing and social safety-net enhancements during the pandemic. In the short-term, governments have largely borne the fiscal costs of the pandemic, relying on forecast future economic growth to generate tax revenue which is hypothecated to fund current endeavors. This ‘tax increment financing’ strategy presumes that the future taxes collected on current investments will outpace the deficits over time.¹³⁷ These strategies are often

¹³² Jennifer Waidler & Maja Gavrilovic, *From Crisis Comes Opportunity: Spain’s Basic Income Response to Covid-19*, UNICEF CONNECT (July 1, 2020) [available at] <https://blogs.unicef.org/evidence-for-action/from-crisis-comes-opportunity-spains-basic-income-response-to-covid-19/>.

¹³³ *Id.*

¹³⁴ B. Peccarelli, *What UK Taxes could be raised to cover Covid-driven spending*, ITR (August 24, 2020) [available at] <https://www.internationaltaxreview.com/article/b1n0qc7y0cttlh/what-uk-taxes-could-be-raised-to-cover-covid-driven-spending>

¹³⁵ H. Gillers & P. Santilli, *States Expected Covid-19 to bring widespread tax shortfalls: L It didn’t happen* WALL STREET JOURNAL (March 10, 2021) [available at] <https://www.wsj.com/articles/states-expected-covid-19-to-bring-widespread-tax-shortfalls-it-didnt-happen-11615372201>

¹³⁶ N. Goodkind, *Explainer: What’s in the \$1.2 Trillion Infrastructure bill*, FORTUNE (July 29, 2021) [available at] <https://fortune.com/2021/07/29/explainer-infrastructure-bill-biden-congress-roads-bridges-clean-energy-railroads-public-transportation-internet-water-cybersecurity-airports-pollution-ports-evs-safe-streets/>

¹³⁷ M. Sandford & K. Muldoon-Smith, *Covid-19 has emphasized the importance of the local state – but how to solve a problem like local government funding*, LONDON SCHOOL OF ECONOMICS POLICY BRIEF (May 7, 2020) [available at] <https://blogs.lse.ac.uk/politicsandpolicy/local-government-funding/>. The National debt or deficit spending has often been malignd as irresponsible fiscal policy in austerity-promoting analysis. These views often draw on folksy common-sense rationales rather than on data, which suggests that

financialized through the bond market, where private investors lend money to the government at a fixed rate to enable the government to meet urgent spending demands. These dependencies, on economic growth and private investment to shore up the fiscal resilience of states, will impact on the background resilience of governments as states continue to adapt their strategies for mediating the immediate public health threats of the pandemic, and laying the foundations for economic recovery.

B. Bringing homeless people into shelter

The global shutdown and urgent ‘shelter in place’ directives re-framed political concepts of risk in relation to homeless populations and the precariously housed. Homelessness scholars and advocates have long argued that applying criminal justice or public order frames to homelessness—for example, regulating to punish homeless persons for sleeping in public spaces—fails to address the causes of homelessness. The embodiment of the human condition means that, inherently and unavoidably, everyone needs to ‘be’ somewhere. As such, responses to homelessness based on deterrence—when these do not also provide alternative shelter solutions—are simply ineffective: they are seeking to ‘move along’ people who have nowhere else to go.¹³⁸ The rapid responses of governments that, faced with the public health crisis of the pandemic, intervened with funded initiatives to bring homeless people into shelter signaled that—notwithstanding homelessness policies that were notionally framed around deterrence and choice—the ‘no-choice’ nature of homelessness is fundamentally understood and accepted by policy-makers. As cities and states grappled with the imperatives of enforcing ‘shelter at home’ directives, punitive policies towards homeless people¹³⁹ gave way to the more urgent narrative of public health.

In the short term, some states took unprecedented steps to house homeless populations: providing rooms in vacant hotels,¹⁴⁰ converting empty buildings into temporary accommodations,¹⁴¹ repurposing ghost towns to

deficit spending as a product of economic opportunity fuels economic growth rather than limits it. See J. Clingmayer, & B. Dan Wood, *Disentangling Patterns of State Debt Financing*, 89 AMERICAN POLITICAL SCIENCE REVIEW 108-120. (1995); Phillip Coggan, *Does Government Debt Matter Anymore?*, PROSPECT (May 3, 2021) [available at] <https://www.prospectmagazine.co.uk/magazine/does-government-debt-matter-any-more-austerity-deficit-spending-borrowing>.

¹³⁸ T. Mulvaney & J. Singer, ‘Move Along to Where? Property in Service of Democracy (A Tribute to André van der Walt)’ in G MULLER, R BRITS, B SLADE & J VAN WYK (EDS) TRANSFORMATIVE PROPERTY LAW, Festschrift in Honour of Andrew Van der Walt (2018, Cape Town: Juta), pp1-20.

¹³⁹ M. L. Roark, *Homelessness at the Cathedral*, 80 MISSOURI L. REV. 55, 128 (2015); J. Waldron, *Homelessness and Community*, 50 U. TORONTO L. JOURNAL 371 (2000).

¹⁴⁰ Alicia Victoria Lozano, *California Fast Tracks Plans to House homeless residents amid Covid-19 outbreak*, NBC NEWS (April 9, 2020) [available at] [HTTPS://WWW.NBCNEWS.COM/NEWS/US-NEWS/CALIFORNIA-FAST-TRACKS-PLANS-HOUSE-HOMELESS-RESIDENTS-AMID-COVID-19-N1179656](https://www.nbcnews.com/news/us-news/california-fast-tracks-plans-house-homeless-residents-amid-covid-19-n1179656)

¹⁴¹ *Regions Shelter Homeless During Coronavirus lockdown*, PROGRESSIVE SPAIN (March 24, 2020)

house homeless people,¹⁴² and in some local areas, reinvigorating ‘housing first’ plans to put homeless people in stable housing so that they could shelter in place with sufficient social distancing measures.¹⁴³ In some places, state agencies took stock of empty properties, or places that had the potential to be empty, leveraging state resources to provide shelter for ‘at risk’ populations. In what was perhaps the most notable extension of the Overton window, governments commandeered empty buildings to bring homeless people off the streets and into safer environments.¹⁴⁴ In Ireland, temporarily empty hotels were block-booked and a large amount of Airbnb accommodation—left empty as travel and tourism ceased—was leased by government-commissioned organizations to house homeless people. In England, an ‘Everyone In’ initiative, funded by the Government, block-booked empty hotels to house rough sleepers in the initial months of the pandemic. News media reported that, for one hotel in Manchester, about half of the homeless people who had stayed there under the ‘Everybody In’ initiative had been moved on to other accommodation, usually supported housing or temporary accommodation.

Initiatives to bring homeless people into shelter were generally delivered through local authorities, under the political cover—enabled through allocations of funding and powers to act—of central or national governments. Central governments allocated political and economic resilience to local authorities, who provided front-line responses to the urgent local challenges of street homelessness during periods of lockdown. As with many aspects of initial state responses to the pandemic, there were significant local variations in the nature, extent and impact of these initiatives. In England, the Local Government Association—the national membership body for local authorities—commissioned a rapid report to identify lessons learnt from the ‘Everyone In’ response to the COVID-19 crisis, across 343 local authorities: to inform future policies and practices to tackle rough sleeping and those at risk of it, and to inform planning for winter 2020/21.¹⁴⁵ The report concluded that:

[available at] <http://progressivespain.com/2020/03/24/regions-shelter-homeless-during-coronavirus-lockdown/>

¹⁴² Juan Carlos De Santos Pascual, *Spain’s Homeless Help Repopulate Rural Ghost Towns*, EURO NEWS (December 31, 2020) [available at] <https://www.euronews.com/2020/12/30/spain-s-homeless-help-repopulate-rural-ghost-towns>

¹⁴³ One group known as WINNYC revealed in May 2020 its *Aftermath Plan: Responding to Homelessness in the Wake of Covid-19*. The plan urged city, state and federal government to reinvest in housing resources that enabled precariously housed persons to remain housed during moments of crisis, target and identify families who have lost homes to find new housing resources, and develop new affordable housing measures to combat the increase in homelessness. See WINNYC, *The Aftermath Plan: Responding to Homelessness in the Wake of Covid-19* (May 2020).

¹⁴⁴ See e.g., Cameron Parsell et al., (2020); Association of State and Territorial Health Officials, *How States are Housing the Homeless During a Pandemic*, ASTHO EXPERTS BLOG [available at] <https://www.astho.org/StatePublicHealth/How-States-are-Housing-the-Homeless-During-a-Pandemic/05-20-20/>

¹⁴⁵ *Lessons Learnt from Councils’ Response to Rough Sleeping During the Covid-19 Pandemic*, LOCAL GOVERNMENT ASSOCIATION (Nov. 19, 2020) [available at]

“The success of Everyone In demonstrates that, given the mandate and funding, councils, working with their partners, have the means to end the vast majority of rough sleeping.”

This report identified key factors of success—including the importance of the commitments governments made to delivering a rapid and expansive response, targeted at people sleeping rough, and people living in unsafe conditions who were at risk of sleeping rough. Crucially, in England the initiative extended to include people who were not normally eligible for public services due to their immigration status. This can be contrasted with debates in the U.S. which continued to reference exclusionary tropes, such as whether non-citizens were entitled to state assistance.¹⁴⁶ For the ‘Everyone In’ initiative, and through the lens of public health, the identity of the homeless person did not determine the offer of shelter and support. Other features of local schemes that were seen to have worked well in England included comprehensive needs assessment, including health, substance abuse and a focus on the specific needs of women; the use of hotel accommodation, giving homeless people important feelings of safety and self-worth; the presence of multi-agency services in the emergency accommodation, encouraging engagement with services; and rapid turnaround in ‘moving on’ the low-needs cohort. Where the initiative worked well, multi-agency partnership—across health, criminal justice, housing associations and the voluntary and charitable sectors—was a key enabler. The report found that this led to a better understanding between partners about what they each could do, and opened up future potential to bring together and allocate their respective resources in new ways.

Where it worked well, the initiative also strengthened resilience between levels of government and across state agencies. The LGA report highlighted the positive impact of enhanced trust between councils operating across two-tier geographies—where counties and districts with interdependent responsibilities had worked together both vertically and horizontally to secure the best outcomes. By utilizing the opportunities of new technologies to adopt new ways of working—for example, conducting remote meetings between agencies—the state’s capacity to meet the challenge of bringing homeless people into shelter was bolstered. In a study published in *The Lancet*, Lewer *et al* found that, while an estimated 24 homeless people died due to SARS-CoC-2

<https://www.local.gov.uk/publications/lessons-learnt-councils-response-rough-sleeping-during-covid-19-pandemic>.

¹⁴⁶ Felicia Persaud, *The Public Charge Rule and Covid 19*, The New York Amsterdam News (March 19, 2020) at 14 (criticizing the failure of states and the Trump administration to specifically tailor messages to non-citizens, both documented and undocumented for how to access public services during the pandemic); H. Dilek, M. Tonyali, N. Çolapkulu, O. Alimiglu, *The impact of Covid-19 on Ethnicity, Minorities and Immigrants: Are we all in the same ship*, 42 CMJ REVIEW 236 (2020).

up to May 31st 2020, preventative policies implemented in the U.K. to protect the homeless population during the first wave of COVID-19 (between February and May 2020) were likely to have very significantly reduced the rate of infection for this population, preventing 21,092 infections, 266 deaths, 1164 hospital admissions and 338 ICU admissions.¹⁴⁷

A major concern—with respect to much of this emergency provision—was with what would happen once the initial funding ran out.¹⁴⁸ Like many other aspects of the state’s response to the uncertainties of the pandemic, the time horizon of emergency policies continually shifted as the pandemic progressed. This created a ‘stop-start’ dynamic, with piecemeal policy updates routinely extended for a few months more as the expected end-date approached. In the U.K., the Government indicated that, by June 2020, local authorities had accommodated 14,610 people (although a significant proportion of these were not rough sleepers before the pandemic: some were brought into accommodation to enable greater social distancing than shelters or hostels could afford, and others to prevent them becoming rough sleepers). The U.K.’s central government allocated £3.2 billion to local authorities to allow them to meet local needs during the pandemic, including protecting the most vulnerable and rough sleepers. In June 2020, the Government announced an £85 million fund to provide emergency accommodation for 5,400 rough sleepers to avoid them having to return the streets when hotels re-opened for business.¹⁴⁹ A further £433 million was committed: “...to provide 6,000 long-term, safe homes to support thousands of rough sleepers currently housed in emergency accommodation to move on to more sustainable accommodation.”¹⁵⁰ And in December 2020, the UK Government pledged a further £310 million to local authorities in 2021, targeted at areas with high numbers of homeless people, those at risk of homelessness or living in temporary accommodation. This was pitched as a £47m increase on the 2020 budget for this part of the initiative and was described as part of an overall investment of more than £750 million to tackle homelessness and rough sleeping in 2021. By the end of 2020, the Government claimed to have helped

¹⁴⁷ D. Lewer, I. Braithwaite, M. Bullock, M.T. Eyre, P.J. White, R.W. Aldridge, A. Story & A.C. Hayward, *COVID-19 among people experiencing homelessness in England: a modelling study*, 8 LANCET RESPIR MED 1181 (2020). One report claimed that in Paris, where state responses were seen as less effective, 40% of the homeless population was infected (*Homelessness and COVID: High infection rates and social marginalisation haunts Paris’ homeless*, EURONEWS (Feb. 3 2021) [available at <https://www.euronews.com/2021/02/03/homelessness-and-covid-high-infection-rates-and-social-marginalisation-haunts-paris-homele>].

¹⁴⁸ *Homeless Figures and the Impact of Covid-19*, FOCUS IRELAND [available at <https://www.focusireland.ie/homeless-figures-and-the-impact-of-covid-19/>].

¹⁴⁹ *Treasury announces £85m for rough sleeper accommodation* THE GUARDIAN (June 24, 2020) [available at <https://www.theguardian.com/society/2020/jun/24/treasury-announces-85m-for-rough-sleeper-accommodation>].

¹⁵⁰ *Id.*

more than 29,000 vulnerable people, with two-thirds of these moved on to settled accommodation.¹⁵¹

It is important to recognize that these emergency investments to tackle homelessness came on the heels of a decade of austerity. A report published in February 2020 highlighted increased demand for homelessness services over the last decade, in a context of austerity-era cuts to local authority budgets.¹⁵² The Homelessness Reduction Act 2017 expanded local authorities' legal duties for households who are homeless or at risk of homelessness, widening the pool of people entitled to receive support from local authorities in relation to their homelessness. However, the report found that, in the period immediately preceding the pandemic, local authority expenditure on homelessness related services was significantly lower than it had been a decade previously. It argued that, if local authorities were going to meet the Government's manifesto commitment to end rough sleeping by 2024, they would require sufficient funding and an assurance that future funding would be guaranteed in the long term; as well as clear direction to ensure that funding was focused on homelessness and not diverted to other local priorities.

Although bringing homeless people into shelter was a common feature of state responses to the pandemic, the approach adopted in specific initiatives varied depending on the jurisdiction—with a range of approaches and degrees of success both between and within nation states. In the U.S., there was no national initiative to bring the homeless into shelters, and there was significant variation in approaches as states, cities and local authorities experimented with different policy options.¹⁵³ This reflects the different scales of response that can be undertaken in the U.S., by local municipalities versus federal or regional authorities. Many cities and states across the U.S. took extraordinary measures to get homeless persons off the streets and into viable housing. One homeless

¹⁵¹ UK Government Press Release, *Government pledges further £310 million to tackle homelessness* (Dec. 21 2020) [available at]

<https://www.gov.uk/government/news/government-pledges-further-310-million-to-tackle-homelessness>. An evaluation of responses to homelessness and rough sleeping during the pandemic, published by the London School of Economics, noted that—as is often the case in relation to official data on homelessness—the statistics published by the Government may not have presented a wholly accurate picture. For example, the count of homeless people supported may have been skewed where people left emergency shelters voluntarily, and then re-presented (perhaps multiple times); and they included an unknown proportion of people who were already 'in the system'; C. Whitehead, K. Scanlon, A. Edge, N. Holman, M. Rotolo & F. Blanc, *Homelessness and rough sleeping in the time of COVID-19* (May 5 2021) LSE London, [available at] <https://www.trustforlondon.org.uk/publications/homelessness-and-rough-sleeping-in-the-time-of-covid-19/>.

¹⁵² WPI Economics, *Local authority spending on homelessness: 2020 update* (February 2020). <https://www.homeless.org.uk/sites/default/files/site-attachments/Local%20authority%20homelessness%20spending%202020.pdf>.

¹⁵³ The U.K.'s Local Government Association commissioned a review of lessons learned from the Everyone In response to the COVID-19 crisis in dealing with rough sleeping and those at risk of it and how this can inform future policy and practice. See *Lessons Learned* (November 19, 2020).

advocate in San Francisco observed that the pandemic had revealed the depth of inequalities between those who are sheltered and those who are not: “The very visual impact of wealth disparity that homelessness brings to the table has [been magnified] because we’re talking about municipal governments asking everyone to shelter in place and they have thousands of people without an ability to shelter in place.”¹⁵⁴

As cities and states mobilized to protect homeless people, it was clear that the homeless population was not only extremely vulnerable to the disease, a threat to others: as ‘vectors’ of infection. When the U.K.’s Housing Minister wrote to local government officers to explain the measures that central government was asking local authorities to deliver, he explained that:

“The Government was aware of the need to prevent displacement and homelessness, in the light of the public health risk this poses in relation to the spread of infection, and to reduce pressures on essential public services during this time....The Government’s primary consideration is public health and the potential strain on...an already overstretched National Health Service and local authority services.”¹⁵⁵

In the U.S., this public health risk framing enabled Federal Authorities, Cities and States to take measures previously unthought-of to ensure that homeless people did not exacerbate the spread of the disease. Typically, disaster relief shelters utilize large, open spaces, where many people are gathered temporarily until other accommodations can be arranged. Many homeless shelters follow this model, providing large auditorium-like spaces where cots, mats, or other temporary bedding can shelter hundreds of people at a time. Covid-19 forced policy makers to rethink this strategy, as both FEMA,¹⁵⁶ and the governors of several states, authorized funding to provide for “non-congregant” shelters, or shelters that provided individualized private closed off spaces to prevent further spread of the disease.¹⁵⁷ The State of California and the State of Louisiana housed homeless people in hotel rooms to reduce their exposure—and the risk that they would spread infection—in (crowded) shelters or on the streets.¹⁵⁸ The New Hampshire Governor took

¹⁵⁴ Catherine Kim, *It Took a Pandemic for Cities to Finally Address Homelessness*, VOX (April 21, 2020), [available at] <https://www.vox.com/2020/4/21/21227629/coronavirus-homeless-covid-19-las-vegas-san-francisco>

¹⁵⁵ *Letter from Ministry of Housing, Communities and Local Government to local authorities* (September 7 2020) [available at] <https://www.gov.uk/government/publications/coronavirus-act-2020-residential-tenancies-protection-from- eviction-amendment-england-regulations-2020-letter-to-local-authorities>.

¹⁵⁶ See FEMA Policy 104-009-18 (Version 3), FEMA Emergency Non-Congregate Sheltering During the Covid-19 Public Health Emergency (Interim) (June 1, 2020 – June 30, 2021).

¹⁵⁷ Governors in Alabama, Alaska, Connecticut, Ohio, and Vermont issued executive orders to identify non-congregant housing options for individuals experiencing homelessness or unable to safely self-quarantine. Association of State and Territorial Health Officials, *How States are Housing the Homeless During a Pandemic*, ASTHO EXPERTS BLOG [available at] <https://www.astho.org/StatePublicHealth/How-States-are-Housing-the-Homeless-During-a-Pandemic/05-20-20/>

¹⁵⁸ Other cities chose not to bring homeless people indoors: for example, Las Vegas used a public

the extra step in ordering that all hotel space be used *only* for emergency non-congregate housing or emergency workers.¹⁵⁹ Additional resources were also directed to target assets of resilience towards protection of women against domestic violence in shelters, funds for food and transportation during the lock down, and additional funding for health providers providing services to homeless populations.

In Ireland, the coincidence of a national General Election in the Spring of 2020 added immediate political weight to public assessments of the state's response. The housing and homelessness crisis was already a major issue going into this election, and the prospect of immediate electoral implications brought the Government's political self-interest in responding to the property dimensions of the crisis into sharp relief. As we have noted elsewhere in the book, the Irish Government was already under significant pressure from activists and social movements to tackle the housing and homelessness crises that had endured since the 2008 'Great Recession' burst the remnants of the 'Celtic Tiger' bubble. In Spring 2021, the Chief Executive of one of Dublin's homelessness charities was quoted in *The Irish Times* as observing that the coronavirus pandemic: "...had provided a 'hidden opportunity' for homeless services, allowing them to move more people off the streets and into housing."¹⁶⁰ While responses that utilized vacant hotel or AirBnB rooms were heavily reliant on vacancies opened up by the impact of lockdowns on tourism, other interventions—including supported housing and physical modification and different ways of working within shelter accommodation—were potentially more sustainable. Pleace *et al* noted that in Ireland—where the state has come under major social movement pressure to tackle housing over the last decade—homelessness policy was already undergoing a sustained transition towards greater use of prevention and housing-led/Housing First services.¹⁶¹ Pleace *et al* suggested that, where the pandemic accelerated an approach that was already underway, this was more likely to create more sustainable solutions.¹⁶²

parking area with sections taped off to create safe outdoor sleeping spaces for homeless in their community.

¹⁵⁹ New Hampshire Governor Emergency Order No. 27, Restriction of Hotels and Other Lodging providers to provision of lodging for vulnerable populations and essential workers (March 13, 2020).

¹⁶⁰ *Covid-19 a 'hidden opportunity' for homelessness services* THE IRISH TIMES (April 1, 2021) [available at] <https://www.irishtimes.com/news/social-affairs/covid-19-a-hidden-opportunity-for-homeless-services-1.4526596>.

¹⁶¹ M. ALLEN, L. BENJAMINSEN & V. BUSCH-GEERTSEMA, *ENDING HOMELESSNESS IN DENMARK, FINLAND AND IRELAND* (Bristol: Policy Press, 2020) cited in N. Pleace, I. Baptista, L. Benjaminsen, V. B. Geertsema, E. O'Sullivan & N. Teller, *European Homelessness and COVID 19* (March 2021) [available at] [https://www.feantsaresearch.org/public/user/Observatory/2021/European_Homlessness_and_COVID-19Web_\(1\).pdf](https://www.feantsaresearch.org/public/user/Observatory/2021/European_Homlessness_and_COVID-19Web_(1).pdf).

¹⁶² Pleace et al, (2021) *id.*, p31.

In March 2021, the European Observatory on Homelessness published an initial analysis evaluating the short-term, and potential long-term, effects of COVID-19 on homelessness and housing exclusion.¹⁶³ The report concluded that while: “...there are many reasons to be concerned about the current state of homelessness policies, especially in light of a pandemic...there are also reasons to be hopeful.”¹⁶⁴ Their multi-state analysis noted that, over the period of the pandemic, countries across Europe and elsewhere had modified their homelessness interventions. Many European countries managed to get most homeless people off the street into safe accommodation in record time; many ‘night-only’ shelters had been converted to 24/7 shelters, with more single occupancy rooms made available; and there was a significant shift towards housing-led and ‘Housing First’ approaches to homelessness.¹⁶⁵ With significant numbers of homeless people brought off the streets:

“[o]n a temporary basis, the ‘complex’ problem of street homelessness was largely and rapidly stopped. While there were still operational problems and, sometimes, an absence of a clear strategy to prevent an eventual return to the streets, there were also reports of gains in wellbeing and health as people who had been experiencing street homelessness were moved into hotels.”¹⁶⁶

While some of these jurisdictions had already adopted housing-led strategies before the pandemic, in others—such as England—the pandemic triggered a sudden and significant shift to a new policy paradigm.

Of course, it is important not to under-estimate the challenges (and costs) of delivering on commitments to support rough sleepers into accommodation, either in the emergency context of the pandemic, or into the longer term, and the ‘success’ of these initiatives is yet to be fully evaluated.¹⁶⁷ The scale of responses reflected concerns that widespread infection amongst the homeless population would accelerate the spread of contagion across the population as a whole, with the prospect that once the immediate risk of infection has passed—and with that, the immediate threat to state resilience—governments would roll back on political support and commitments to adequate long-term funding. Pleace *et al* speculated that:

“There is the possibility that some EU Member States and other

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 4.

¹⁶⁵ *Id.* (“The Corona-crisis made abundantly clear that access to adequate and affordable housing is the best protection against the virus, and that housing people experiencing homelessness is the most logical public health intervention.”)

¹⁶⁶ *Id.* at 7.

¹⁶⁷ The official narrative surrounding the U.K. Government’s initiative was: “to offer accommodation to as many rough sleepers as possible in order to help them stay safe during the pandemic.” (Statement by Luke Hall, M.P., Minister for Rough Sleeping and Housing, U.K. Parliamentary business, Written Questions and Answers and Written Statements, Rough Sleeping: COVID-19 Response: Written Statement – HCWS263 (03 June 2020).

European countries will simply ‘switch off’ specific measures at a given point, ending eviction bans and extra support for people experiencing street homelessness in an unplanned way, leading to sudden, perhaps significant, spikes in homelessness. However, much depends on how these policies are wound down and, as appears to be the case for a few EU Member States, whether the pandemic has prompted a wider re-think of homelessness policy, prompting reorientation towards more integrated housing-led/Housing First strategies that are likely to produce sustained falls in homelessness.”¹⁶⁸

Sustainable solutions to street homelessness will require infrastructure and significant investment in affordable, secure homes, in a period when some countries are likely to be facing post-pandemic economic problems. From the vantage point of 2021, it remains unclear how sustainable initiatives to shelter homeless populations will be in each jurisdiction. Equally, however, it remains to be seen what the impact of the economic crises triggered by the pandemic will be on the scale of the problem, and what fresh threats this may present for governments seeking to restore, and maintain, political, economic and social equilibrium.

From a Resilient Property perspective, the political, economic, and social pressures brought to bear on states; and, crucially, political and public attitudes to social and economic hardship after the pandemic in each jurisdiction; will shape the window of political possibility in relation to property, housing and shelter in the wake of the pandemic. To the extent that the allocation of resilience to homeless people aligns with the national mood in some jurisdictions in the post-pandemic period, state action to tackle homelessness—for example, through sustained public investment in housing-led services for homeless people—may remain a political possibility. At the very least, the disruption of pre-pandemic narratives: individualized responsibility for homelessness, the non-responsibility of states, and the ‘unsolvable’ nature of street homelessness; are important legacies of the pandemic. Echoing our discussion in previous chapters, Pleace *al* explained that:

“The problem of people experiencing street homelessness, so often presented as ‘complex’ and hence ‘difficult’ to resolve, using a very longstanding political narrative of ‘high and complex’ individual needs needing to be met, while the effects of multiple systemic failures across economy, society, and the State were downplayed was suddenly addressed through increased public spending. ‘Everyone In’ very rapidly cleared the streets of people experiencing street homelessness and, for the most part, appears to have kept them in the hotels and

¹⁶⁸ Pleace *et al* (2021) at 8.

temporary accommodation that was employed for the purpose. The specialist taskforce, set up to orchestrate the next phase, has been working with local authorities and the homelessness sector to ensure those accommodated through ‘Everyone In’ are helped into longer-term accommodation, with a stated goal that as few people as possible return to life on the streets. This policy is radical because it undermines earlier government narratives that street-based homelessness was a ‘complex’ social problem which was used to explain why levels were increasing, drawing attention away from expenditure cuts and other systemic drivers of street-based homelessness and because the Government itself claims that it appears to be working.”¹⁶⁹

Reflecting on parallel initiatives in Australia, Parsell *et al* argued that the re-framing of homelessness through the public health lens—re-defining active state responses to tackle homelessness as essential to the goal of containing COVID-19—“[broke] with the prevailing neoliberal/individualizing framework that has dominated homelessness policy in recent decades.”¹⁷⁰ Rough sleepers were re-cast as people who were ‘at risk’, and who needed state-funded support to keep them (and others) safe. The framing of homelessness changed: from public order to safety; punishment to support; an individual failing to a collective, public challenge. Policy initiatives that had previously been ‘unthinkable’ in terms of political viability and popular support were rapidly implemented, with widespread support. The *nomos* (or ‘normative universe’) within which state responses are formulated and implemented changed, and states pivoted in response.

C. Moratoria on tenancy evictions and mortgage repossessions

In parallel to the launch of major programs of fiscal support, furlough payments and shelter for homeless populations, states also acted swiftly to extend temporary protections to mortgagors and tenants to protect against the risk of evictions for non-payment of rent. Concerns about widespread evictions due to lost economic opportunities during the pandemic triggered eviction bans in many states. These frequently applied to both rental evictions and mortgage repossessions or foreclosures, with legal remedies that owners (for example, landlords) and creditors (mortgagees) were normally entitled to exercise to recover their properties following non-payment restricted or withdrawn. Landlords and creditors were prevented from evicting precariously housed tenants who defaulted on rent or mortgages due to Covid-19. In some cases, eviction moratoria did not excuse the payment of rent, but merely stayed the enforcement mechanism (eviction); although some states intervened to limit the accrual of liabilities.

¹⁶⁹ *Id.* at 33.

¹⁷⁰ Parsell *et al* (2020) at 5.

The moratoria on evictions were temporary—and often extended piecemeal as the pandemic continued. In the U.S., at least six different approaches to eviction moratoria were implemented by state, local and federal authorities.

1. The most basic step was the *de facto* moratorium on evictions that resulted from the closure of courts. Nineteen states took no direct action at the level of the state to pass legislation or otherwise order a moratorium on evictions, but the closing of courts due to lockdowns effectively halted temporarily evictions: Alabama, Arkansas, Georgia, Idaho, Iowa, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, West Virginia, Wisconsin, Wyoming.
2. In these states, there were also some limitations on evictions because of the federal CARES Act, (which included a limited moratorium on evictions for economically vulnerable persons) or the CDC's Public Health State of Emergency, which limited evictions on public health grounds. Both moratoria were limited to those cases in which individuals were unable to pay rent due to the economic downturn and who had no other shelter options available to them. One state (Colorado) imposed by law a requirement that landlords inform tenants of Federal Relief Programs under the CARES Act or the CDC Emergency Public Health Order as a requirement for proceeding with an eviction. Oklahoma and Kentucky further limited state eviction protections to only those that would qualify for protection under either the CARES Act or the CDC moratorium.
3. Thirty states imposed their own moratoria on eviction, proceedings to enforce evictions or collection of fines relating to non-payment of rent: Alaska, Arizona, California, Colorado, Connecticut, Delaware (may file but are stayed), District of Columbia, Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, Washington.
4. Alaska, Arizona, Arkansas, and California imposed an additional moratorium on utility shut offs for non-payment.
5. Maine and Michigan extended the time periods for notice and cure of eviction proceedings, giving tenants more time to pay up rent liabilities accrued during the pandemic.
6. Delaware allowed landlords to continue to file eviction proceedings but stayed enforcement until after the emergency period ended.

Across the U.S., many of the orders contained common language: for example, explicitly stating that the moratorium only applied to evictions linked to for non-payment of rent due to pandemic-related economic hardship. Some stipulated other reasons why tenants *could* be evicted, including damaging the property, committing violence against another resident or the landlord, or if the landlord or their family required the property for use as a primary residence. While many of the orders disallowed the imposition of fines or penalties for nonpayment of rent, and even extended the period in which rent would be deemed to be delinquent, orders also commonly reiterated that they did not forgive or alleviate the obligation to pay rent, or past amounts owed to the landlord. In September 2020, the U.S. Centers for Disease Control (CDC) issued a nationwide moratorium, through December 31, 2020, on certain evictions as a public health measure. The order applied to tenants who either earned less than \$99,000 individually or \$198,000 in 2019 as a married couple; who were not required to report income to the Internal Revenue Service in 2019; or who received an Economic Impact Payment under the Cares Act. The CDC also required that recipients had used best efforts to attain government assistance for housing; were able to certify that they were unable to pay rent due to a substantial loss of income; were making best efforts to make a timely payment of rent; and would become homeless or need to move into a shared living setting if they were evicted.

In England, notice periods on rented housing were extended;¹⁷¹ and all possession proceedings were stayed, initially until at least 20th September 2020.¹⁷² After the initial stay on possession *proceedings* (arguably, to protect the resilience of the court system) expired, landlords were permitted to progress their claims through the courts, with courts directed to prioritize ‘the most egregious cases, such as those involving anti-social behavior and other crimes.’¹⁷³ When a third lockdown was extended from early January 2021 to June 2021, the eviction ban (residential and commercial) was reinstated until 31st May 2021, and then further extended to 20th September 2021. While bailiffs were (until 31 May 2021) barred by legislation from serving eviction notices or carrying out evictions (tenant or mortgage repossessions), there were also exceptions for: ‘the most serious circumstances that present the most strain on landlords’:¹⁷⁴ ‘illegal occupation, false statement, anti-social behavior, perpetrators of domestic violence in the social rented sector, where a

¹⁷¹ Coronavirus Act 2020, Schedule 29.

¹⁷² Civil Procedure (Amendment No. 2) (Coronavirus) Rules 2020 S.I. 2020/582; Civil Procedure (Amendment no. 5) (Coronavirus) Rules 2020 S.I. 2020/889; *Hackney LBC v Okoro* [2020] EWCA Civ 681.

¹⁷³ Ministry of Housing, Communities and Local Government, *Guidance for Landlords and tenants* (July 20, 2021) [available at] <https://www.gov.uk/government/publications/covid-19-and-renting-guidance-for-landlords-tenants-and-local-authorities/coronavirus-covid-19-guidance-for-landlords-and-tenants>

¹⁷⁴ *Id.*

property is unoccupied following the death of a tenant, and serious rent arrears of more than 6 months.”¹⁷⁵

One consequence of the eviction bans in England was that that, by September 2021, almost no legal evictions had taken place; and there was little evidence of illegal evictions.¹⁷⁶ A key concern in relation to the temporary nature of eviction bans was the risk of a ‘tsunami’ of evictions once the bans are lifted—although Whitehead and Holman, evaluating the likely impact of lifting the ban in England suggested that limits on court capacity to process significantly higher volumes of eviction cases would likely result in a ‘slow burn’ rather than an explosion of evictions.¹⁷⁷ In July 2020, UK housing charity *Crisis* published a report reflecting on the impact of the pandemic crisis response, and possible exit strategies.¹⁷⁸ They noted that, while the ‘Everyone In’ initiative had been associated with very low levels of infection amongst homeless people, and the speed and clarity of the early Government response had ensured an effective public health strategy for this vulnerable population, there was cause for concern that a spike in family homelessness would follow as the evictions ban and financial support (for example, the furlough scheme) came to an end.¹⁷⁹ The *Crisis* report urged the Government to keep additional protections in place, to avoid a new eviction and homelessness crisis once emergency measures were lifted.

While CDC and federal legislation afforded temporary relief from eviction to some occupiers, many in the U.S. were similarly concerned that a ‘ticking time-bomb’ awaits tenants when those moratoria lift, and accrued rent or mortgage payments owed become actionable through eviction. Indeed, as temporary moratoria on eviction come to an end, many were concerned that the legacies of the pandemic would further deepen the affordable housing crisis. One analysis indicated that: “nearly 12 million U.S. renters were expected to owe an average of almost \$6,000 in late rent and utility payments per household by January 2021.”¹⁸⁰ Some U.S. states offered rental assistance

¹⁷⁵ *Id.* In June 2021, the Ministry of Housing, Communities and Local Government issued updated guidance for landlords and tenants, requiring (in most cases) four months’ notice to quit, dropping to two months from 1 August 2021—except for the ‘most serious’ cases. One difference between the 2021 Regulations (Public Health (Coronavirus) (Protection from Eviction) (England) Regulations 2021) and the 2020 Regulations was that the ‘substantial rent arrears’ exception to the ban was reduced from 9 months to 6 months. With no stipulation as to when these arrears accrued, a claim for possession could be based on 6 months of arrears accrued during the pandemic.

¹⁷⁶ C. Whitehead & N. Holman, Evictions: where are we now? What needs to change?, <https://www.trustforlondon.org.uk/news/evictionswherearewenow/>

¹⁷⁷ *Id.*

¹⁷⁸ *Crisis, Homelessness Monitor England 2020: Covid-19 Crisis Response Briefing* (July 2020) [available at <https://www.thinkhouse.org.uk/site/assets/files/2188/crisis0820.pdf>].

¹⁷⁹ *Id.*

¹⁸⁰ Abby Vesoulis, *Millions of Tenants Behind on Rent, small landlords Struggling, Eviction Moratoriums Expiring Soon: Inside the Next Housing Crisis*, TIME (February 18, 2021) available at

programs for tenants who were financially impacted by the pandemic.¹⁸¹

Activists, advocates and social movements articulated demands for sustained solutions to housing precarity, framing moratoria on evictions, suspension of mortgage payments and provision of shelter for the most vulnerable on Airbnb or hotel rooms as precedents for what could be achieved in the post-pandemic social struggle.¹⁸² We have noted that, in the initial stage of the pandemic, the framing of the crisis as a public health challenge reopened ‘spaces of contestation’ that were previously regarded as closed (viewed as outside the ‘Overton window’). Social movements articulated concerns about ongoing housing shortages and precarity. For example, in May 2020, the National Law Center on Homelessness and Poverty released a four page fact sheet titled Racisms, Homelessness and Covid-19 in which it highlighted the intersections between these two problems in communities of color in the U.S. The fact sheet provided details explaining why how people of color are particularly impacted by housing costs, lack of access to healthcare, housing precarity and homelessness, and articulated key demands that advocates should make on state and local officials.¹⁸³ Many of these demands

<https://time.com/5940505/housing-crisis-2021/>.

¹⁸¹ Nine states provided for supplemental support for at risk renters to assist with paying rent: Iowa, Kentucky, Michigan, New York, Texas, Vermont, Virginia, Washington, Wisconsin.

¹⁸² L. Mendes, *How can we Quarantine without a Home? Responses of Activism and Urban Social Movements in Times of Covid-19 Pandemic Crisis in Lisbon*, 111 J. OF ECONOMIC AND SOCIAL GEOGRAPHY 318, 327-38 (2020).

¹⁸³ *Id.* These included:

- Actions that support people experiencing homelessness, who are disproportionately Black and people of color:
 - House people experiencing homelessness in hotels, motels and/or RVs for the duration of the crisis, and plan now for permanent housing after the crisis ends.
 - Place moratoria on sweeping encampments, seizing tents, and enforcing laws prohibiting resting and sheltering oneself in public space.
 - Place moratoria on vehicle ticketing, towing and impoundment.
 - Immediately and safely decrease the number of people incarcerated for laws criminalizing homelessness and other non-violent offenses.
 - Schools and universities must take students experiencing homelessness into account as they close down, including ensuring students have the necessary tools to complete schoolwork remotely.
 - Ensure that any emergency cash relief measures designed to assist people with the economic impact of the Coronavirus crisis are also made available to and reach people experiencing homelessness.
- Require public collection of data on COVID-19 cases and deaths by race and ethnicity on federal, state, and local levels. Some states and cities are still not publishing racial and ethnic data on COVID-19 cases and deaths.
- Ensure adequate access to testing among communities of color.
- Implement rent relief: Eviction and rent moratoriums help with keeping families in their homes during the crisis, but do not necessarily ensure families’ housing security once the crisis is over.
- Paid sick leave and paid family medical leave.
- Provide hazard pay for essential workers.

were addressed in federal or state policies, in some form. However, commitments to sustaining these measures waned as the crisis shifted from public health to an economic crisis.

Rachael Walsh has described how, alongside eviction bans, legislative intervention to prevent rent increases during Ireland's first lockdown: "mobiliz[ed] political support for a less conservative attitude towards the protection of property rights."¹⁸⁴ Rent control has been a controversial issue in Ireland since two Supreme Court decisions¹⁸⁵ in the 1980s cast doubts on the constitutionality of such measures. Indeed, against the backdrop of the pre-pandemic, post-2008 housing and homelessness crises, political resistance to such policies remained strong, with opposition justified on the grounds that prohibitions on rent increases were likely to be unconstitutional. Walsh explained that "[t]he Covid-19 crisis apparently prompted politicians to reconsider their views on the constitutional parameters for legislative interventions that balance legal protections for landlords and tenants." In analyzing how the Residential Tenancies and Valuation Act 2020 (apparently successfully) navigated this constitutional risk, Walsh highlighted the background resilience of landlords as a group: "that grup was large and apparently well-positioned to defend its interests politically...the Irish Supreme Court in 2005 suggested that the property rights of vulnerable, politically weak group should receive particularly strong legal protection." Although subsequent interventions placed greater emphasis on potential hardship for landlords, Walsh suggested that: "...most fundamentally, the Covid-19 crisis may prove to be a turning point in softening political views on the strength of constitutional property rights, paving the way fo a better alignment of Irish housing law and policy with...the common good and social justice."

In Barcelona, media linked the resumption of evictions once the ban was lifted to a rise in suicides. As Spain continued to grapple with the legacies of the 2008 housing crisis, unemployment and precarious housing had depleted the resilience of economically marginalized populations. The pandemic afforded some temporary relief from evictions. Court closures left owners unable to exercise their legal power to evict tenants. In addition to protections against possession actions, Spain adopted a moratorium on mortgage payments. Private rental tenancy agreements due to end during the crisis were

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- Reduce jail and prison populations and ensure that those who are released can access non-congregate living situations.

¹⁸⁴ R. Walsh, 'Securing Possession of the Home in the COVID-19 context: The Irish experience' in ZT Boggenpoel, E van der Sijde, MT Tlale & S Mahomedy (ed) *Property Responses to a Global Pandemic*, (forthcoming, Juta, 2021).

¹⁸⁵ *Blake v Attorney General* [1982] IR 117 and *Re Article 26 and the Housing (Private Rented Dwellings) Bill 1981* [1983] IR 181.

extended by six months; a ban on tenancy evictions was introduced; rents were frozen and in some cases (for landlords who owned 10 properties or more) reduced; and renters were provided with access to government-backed bank loans to help them to pay rent.¹⁸⁶ However, these protections were not available to all: while the moratorium protected those who lost income due to the pandemic, it did not protect those who were previously unemployed. Indeed, in the last three months of 2020, with the country was still deep into the pandemic's second wave, 11,202 evictions were carried out, many of which were in the Catalan Region, which includes the City of Barcelona.

This gap in the protection program was highlighted when a 60-year-old Ecuadorian immigrant living in Barcelona committed suicide after receiving an eviction notice. Although he had been unemployed for two years, and was dependent on food banks for subsistence, he did not fit the vulnerability criteria laid out in the state's pandemic protection program.¹⁸⁷ While people whose housing claims were precarious *before* the pandemic were equally vulnerable to eviction *during* the pandemic, extending the eviction ban beyond the limits set out in the legislation would have risked disrupting the commitments the state had made pre-pandemic. While the Irish Government adapted its position on rent control, the Spanish state responded to pressures to maintain these commitments. This curtailed its scope for innovation during the crises, with consequences that in turn generated new pressures and strains, as political leaders were judged by the human-impacts of their decisions, in the new context of public attitudes and opinions.

IV. Property, Crises and Equilibrium

By early summer 2021, with vaccination programs underway in the US, the UK, Ireland, Spain and South Africa, and the end of the pandemic seemingly in sight, states began to transition from emergency measures to business as usual. With eviction moratoria in the U.S. either ended or due to come to an end by June 30, 2021, the focus turned to the aftermath of the pandemic for housing and property claims, in the context of the economic crisis and the need to stabilize the economy. A new set of questions emerged concerning legal recourse for landlords and creditors in relation to accruals of unpaid rent. In early 2021, Congress passed a \$1.9 trillion 'American Rescue Plan' to provide many Americans with an additional \$1400 one time relief payment, while setting aside funding for schools, vaccine programs, and direct payments

¹⁸⁶ J Simpson, 'How Europe's housing sector has responded to the COVID-19 crisis' (25 May 2020), *Inside Housing*.

¹⁸⁷ S. Burgen, *Barcelona Mayor Calls for Rethink on Evictions in Wake of Suicides*, THE GUARDIAN (June 15, 2021) [Available at] https://www.theguardian.com/world/2021/jun/15/barcelona-mayor-calls-for-rethink-on-evictions-in-wake-of-suicides?fbclid=IwAR3tbE6ceNSddO5eduS4c4ML8o3K8DkLxgduhPfb9uNX8SRGxUyO04_09TA.

to cities that were facing significant budgetary shortfalls to fund key infrastructure needs, such as police and fire protection, transit, and libraries. By May 2021, the U.S. had fully vaccinated nearly 40% of the adult population (125,453,423 Americans), while nearly 50% of the adult population had received at least one dose of a vaccine. In Spain, the national state of emergency—which provided the legal authority for curfews, lockdowns, and other measures that constrained individuals’ civil liberties—expired on May 3, 2021. However, on the eve of the state of emergency being lifted, the Deputy Prime Minister indicated that regional authorities could seek permission from the court to re-impose follow-on restraints. At the same time, the Spanish government extended protections for vulnerable tenants and homeowners at risk of eviction (previously linked to the state of emergency) through to August 9, 2021.¹⁸⁸

State responses to the property crises of the pandemic can be conceptualized in terms of distinct phases. The first phase was defined by the immediate public health crisis: in a context of global ‘lockdowns’, many states took radical steps to bring the homeless into shelter and to ban tenancy and/or mortgage evictions. While government initiatives to keep people in their homes, and to bring the homeless into shelter, had a significant impact in preserving the health and wellbeing of homeless and precariously housed people, these measures were not exclusively—or perhaps even primarily—motivated by the need to protect the resilience of homeless or precariously housed people themselves. In many places, the ‘public health crisis’ lens rapidly converted previously ‘unthinkable’ policy interventions into viable policy options—because the resilience needs of homeless and precariously housed people had become aligned with the resilience needs of the wider community and governments themselves. Contrasting the unprecedented scale of commitment, investment and ambition demonstrated by governments such as those in the U.K., U.S. and elsewhere to tackling homelessness and housing precarity *during* the pandemic with the ‘policy stasis and poverty of ambition’ that characterized state responses to homelessness in the decade *before* the pandemic,¹⁸⁹ Parcell *et al* observed that: “...the potential impact of the disease on the health of the homeless is not the sole driver of these drastic interventions; rather, it is the risk that their heightened vulnerability to contracting and spreading the disease poses to the health of the housed population.”¹⁹⁰

¹⁸⁸ *Spain’s Regions need Court backing for Covid-19 Restrictions*, REUTERS (May 4, 2021) [available at <https://www.reuters.com/world/europe/spain-let-regions-decide-covid-19-restrictions-may-9-2021-05-04/>]

¹⁸⁹ Parcell *et al.*, (2020) at 3.

¹⁹⁰ *Id.* at 3-4.

However, as the public health crisis receded, and the homelessness crisis, eviction crisis, property crisis and post-pandemic economic crisis was foregrounded, the state's resilience needs were re-calibrated, creating new policy imperatives. A second phase, overlapping with the first, emerged as states transitioned from 'lockdown' to 're-opening'. For many, this included the re-opening of courts and resumption of evictions, enforcement and bailiff procedures—raising questions about the impacts of a return to 'normal' enforcement practices for evictions, repossessions, and foreclosures. Without the state-backed resilience of the eviction ban, the vulnerability of households that were already in a precarious financial position prior to the pandemic; or those who had lost income and accumulated housing debt during the pandemic; and who were unable to sustain their housing costs was exposed. A key consideration in this second phase concerned which types of response were most likely to generate resilience for states that are seeking economic recovery.

The state's ability to be responsive to new challenges in times of crises (such as mobilizing resources to address housing shortages even for a short time) requires flexibility, adaptation, recovery, and innovation. In this recovery phase, a crucial question facing city, local, regional and national authorities was which adjustments were temporary—time-limited to the immediate public health crisis; and which adjustments or commitments would have an ongoing impact beyond this initial period—becoming part of the 'new normal'. Jason Hackworth has argued that the 'Overton window' of U.S. urban politics shifted dramatically to the political right following the 2008 housing crisis: normalizing the "entrepreneurial state" and moving the political debate to question whether the state had *any* role to play in managing urban affairs. Hackworth described the role of policy think-tanks in "...shift[ing] the policy dialogue to the right to make once unrealistic policy ideas possible, or if they are really successful, inevitable."¹⁹¹ Likewise, in the U.K., Ireland, Spain and elsewhere, neoliberal-leaning governments responded to the 2008 housing and financial crisis with 'austerity policies'.¹⁹² These resonated with transnational

¹⁹¹ Jason Hackworth, *The Normalization of Market Fundamentalism in Detroit: The Case of Land Abandonment*, in M. PETER SMITH AND L. OWEN KIRKPATRICK (EDS.), *REINVENTING DETROIT: THE POLITICS OF POSSIBILITY* 77 (Transaction Publishers 2015).

¹⁹² Iker Barbero, 'When Rights Need to Be (Re)Claimed: Austerity Measures, Neoliberal Housing Policies and Anti-Eviction Activism in Spain', *Critical Social Policy*, 35 (2015), 270–80; Colin Coulter and Angela Nagle, *Ireland Under Austerity: Neoliberal Crisis, Neoliberal Solutions* (Oxford University Press, 2015); Walter Korpi and Joakim Palme, 'New Politics and Class Politics in the Context of Austerity and Globalization: Welfare State Regress in 18 Countries, 1975-95', *Amerpolisciervivi The American Political Science Review*, 97.3 (2003), 425–46; Héloïse Nez, "'We Must Register a Victory to Continue Fighting': Locating the Action of the Indignados in Madrid', in *Street Politics in the Age of Austerity*, ed. by Héloïse Nez, Marcos Ancelovici, and Pascale Dufour, From the Indignados to Occupy (Amsterdam University Press, 2016), pp. 121–46 <www.jstor.org/stable/j.ctt1d8hb8t.8> [accessed 6 December 2019]; Stephens, Mark and Stephenson, Adam, 'Housing Policy in the Austerity Age and Beyond', in *Social Policy Review: Analysis and Debate in Social Policy*. (Bristol University Press, 2016), pp. 63–86 <<https://www.jstor->

trends of urban restructuring around a: “rentist, extractivist, and predatory model of austerity urbanism that generated numerous phenomena of accumulation by dispossession taking advantage of capital gains produced by an overheated housing market...”¹⁹³

Around the world, social movements mobilized against these austerity responses, arguing that pre-pandemic housing crises were produced by policies of: “transactional gentrification, real estate speculation, and financialization of housing.” However, and notwithstanding the scale of global visibility achieved by movements like *Occupy*, the impact of these groups in achieving lasting change—in moving the Overton window of political possibility—was dissipated by the persuasive power of the “think tanks, banks, corporations, and advocacy groups...advanc[ing] a disembodied market agenda.”¹⁹⁴ Those who opposed the social movements’ agendas in favor of market-led approaches were: “far more organized, funded, numerous and established than the forces seeking to advance postcapitalist solutions...”¹⁹⁵ Yet, notwithstanding limited success in achieving their goals in the Great Recession period, these same social movements, which had organized around affordable housing policy, anti-austerity, and rising inequalities in the pre-pandemic period, provided the early critiques that framed the scale of the property challenges triggered by the pandemic as a reflection of failed housing and austerity policies over the previous ten years.

The global pandemic revealed the capacity for states to respond in flexible ways, at least temporarily, to particular problems. However, that ability to be flexible may be conditional on the ‘public health’ frame. As states attempt to return to a state of normalcy, and to lay the foundations for economic recovery in the face of recession and economic downturn following the pandemic, it is not yet clear whether the experience of the crises—the widening of the Overton window—will have a lasting impact on the property *nomos*, property politics and property law. Of course, the nature and scale of any lasting impacts is likely to vary by jurisdiction—contextualized by the (evolving) national *nomos*, and by political and public responses across national jurisdictions (national, state/regional, city/local).

A key question in this phase, as states/governments work to recover political and economic equilibrium, concerns the potential scope for state

org.sulaw.idm.oclc.org/stable/j.ctt1t89drw.8>; Stephens, Mark and Stephenson, Adam.

¹⁹³ Luís Mendes, *How can we Quarantine without a Home? Responses of Activism and Urban Social Movements in Times of Covid-19 Pandemic Crisis in Lisbon*, 111 J. of Economic and Social Geography 318, 327-38 (2020)

¹⁹⁴ Jason Hackworth, *The Normalization of Market Fundamentalism in Detroit: The Case of Land Abandonment*, in M. PETER SMITH AND L. OWEN KIRKPATRICK (EDS.), *REINVENTING DETROIT: THE POLITICS OF POSSIBILITY* 75 (Transaction Publishers 2015).

¹⁹⁵ *Id.* at 75.

actors to anticipate how the politics of public opinion will be affected by the crises. The pandemic has made newly visible these demands for resilience, and the acceptance by states of responsibility—as well as their success in implementing responses—has revealed the capacity of state actors and agencies to tackle housing and property crises when sufficient pressure is brought to bear, and there is sufficient public support. At the same time, as the use and occupation of cities has been transformed—initially through lockdowns, and now as city workers, city dwellers, city authorities and planners re-evaluate the post-pandemic landscape (both figuratively and literally)—new models are emerging for the re-structuring of the city.¹⁹⁶ Urban scholars have forecast four potential areas for change: loss of social opportunity during lockdowns and lingering trepidation around large scale-gatherings; a more or less successful experiment with remote working and shopping experiences; changes to public security around public spaces—for example, enhanced sanitary standards; and adaptations to the physical form of the built environment during the pandemic that have lasting effects.¹⁹⁷

Some evidence has suggested a modest urban exodus since the pandemic began in March 2020.¹⁹⁸ One unexpected impact of this movement of people in the U.S. was the artificial inflation of real estate prices elsewhere, as city-dwellers relocated from pricey urban real estate markets to newly-more desirable locations. One analyst observed that “[f]or employees in many industries, working remotely during the pandemic effectively has untethered them from their physical offices. Historically, but even more so during the pandemic, those with higher-income jobs are the most likely to work from home.¹⁹⁹ As higher-paid workers have chosen to move from expensive urban housing to lower-cost locations,²⁰⁰ a new type of housing gap has emerged, prompted by the pressure on housing supply in previously lower-cost areas as well-to-do buyers have outpriced markets. The high-end homes left behind by city-dwellers opting to relocate may be converted to upscale short-term rentals rather than permanent housing. While the entrepreneurial city thrives on attracting talent, it does not necessarily need that talent to settle there for the

¹⁹⁶ R. Florida, A. Rodríguez-Pose, & M. Storper, *Cities in a Post-Covid World*, 2021 URBAN STUDIES 1, 2 (2021).

¹⁹⁷ *Id.* at 3.

¹⁹⁸ Stephen D. Whitaker, *Did the Covid-19 Pandemic Cause an Urban Exodus*, FEDERAL RESERVE BANK OF CLEVELAND POLICY PAPER (Feb. 5, 2021), available at <https://www.clevelandfed.org/en/newsroom-and-events/publications/cfed-district-data-briefs/cfddb-20210205-did-the-covid-19-pandemic-cause-an-urban-exodus.aspx>

¹⁹⁹ S. Lund et al., *What's Next for Remote work? An Analysis of 2000 Tasks, 800 Jobs and Nine Countries*, MCKINSEY GLOBAL INSTITUTE (NOV. 23, 2020) [available at] <https://www.mckinsey.com/featured-insights/future-of-work/whats-next-for-remote-work-an-analysis-of-2000-tasks-800-jobs-and-nine-countries>.

²⁰⁰ Ali Wolfe, *Here's Who will be Left behind in the Housing Boom*, NEW YORK TIMES (July 13, 2021) available at <https://www.nytimes.com/2021/07/13/opinion/covid-housing-phoenix-austin.html?smid=tw-share>.

long-term.

Newly-emerging patterns in housing preferences and use of housing stock could not have been predicted by cities or analysts before the pandemic. Indeed, in *Farsighted: How we make the Decisions that Matter the Most*, Steven Johnson highlighted the ways that limited foresight amongst decision-makers restricts their ability to respond effectively to longer-term problems. Drawing on the much-lampooned statement of Donald Rumsfeld during the Iraq War—that they faced “unknown unknowns”—Johnson highlighted the critical importance of developing and adopting methods of mapping problems that identify the blank spaces.²⁰¹ As Johnson explained, mapping problems involves identifying not only the things we are certain of (the known knowns), but also the things we don’t know (the known unknowns) and the blind spots we don’t yet know we know about (the unknown unknowns). Reflecting on how this can be achieved, Johnson cited Tetlock’s landmark study on long-term forecasting, which identified the most important factor for successful forecasters: that they were characterized not by *what* they knew but by *how* they thought. He observed that:

“One group tended to organize their thinking around Big Ideas, although they didn’t agree on which Big Ideas were true or false. Some were environmental doomsters (“We’re running out of everything”); others were cornucopian boomsters (“We can find cost-effective substitutes for everything”). Some were socialists (who favored state control of the commanding heights of the economy); others were free market fundamentalists (who wanted to minimize regulation). As ideologically diverse as they were, they were united by the fact that their thinking was so ideological. They sought to squeeze complex problems into the preferred cause-effect templates and treated what did not fit as irrelevant distractions...As a result they were unusually confident and likelier to declare things ‘impossible’ or ‘certain’...The other group consisted of more pragmatic experts who drew on many analytical tools, with the choice of tool hinging on the particular problem they faced. These experts gathered information from as many sources as they could...They talked about possibilities and probabilities, not certainties. And while no one likes to say ‘I was wrong’, these experts more readily admitted it and changed their minds.”²⁰²

Tetlock’s description resonates with the approach we have developed in Resilient Property: that the most effective methodological approaches to tackle

²⁰¹ STEVEN JOHNSON, *FARSIGHTED: HOW WE MAKE THE DECISIONS THAT MATTER THE MOST* 59 (2020).

²⁰² *Id.* at 84 (citing P. E. TETLOCK & D. GARDNER, *SUPERFORECASTING: THE ART AND SCIENCE OF PREDICTION* (New York: Crown/ Archetype 2015)).

complex problems: not through linear problem solving methods or the application of grand theories; but by mapping the problem space, while maintaining a sense of epistemic humility.

As states, legal, property and market systems and the individuals and groups who participate in or are governed by these prepare to tackle the complex problems of the post-pandemic periods, the exact contours of which are not yet clear, flexibility to adapt to new information as it is revealed will remain vital. Flexibility is a fundamental determinant of resilience. The urgency with which actions were taken in the coronavirus pandemic provide a sightline into the capacity—and willingness, under sufficient pressure to do so—for (even some erstwhile ‘neoliberal’) states to up-scale putatively social-welfarist norms without depleting their own resilience. Indeed, in the context of the pandemic, these responses enhanced the resilience of states, as they faced their own crises of hegemony. They needed to be seen to take decisive and effective actions to control the virus and restore political and economic equilibrium, as well as tackling the public health crisis.

While longer term forecasts are highly speculative—and we remain committed to epistemic humility—property theorists will inevitably reflect on what, if any, lasting legacy the pandemic crises might hold for property politics, property law and legal thought. In liberal property systems, we are accustomed to thinking about evictions (whether landlord/tenant or mortgagor/mortgagee) as ‘private’ disputes, between two transactional parties. Since the withdrawal of safety nets and the depletion of statutory protections for tenants from the 1980s, the state’s role in these property law actions has been seen as largely limited to the recognition and enforcement of rights-based claims. Yet, the scale of the global pandemic has brought the state’s own stake in property transactions, particularly in relation to homelessness and housing precarity, into clearer view. However the scales of political and public opinion settle upon these questions in each jurisdiction, in the decades to come, we have seen behind the curtain of putatively ‘private’ property law. The state’s own stake in these property actions has been revealed.

V. Conclusions

The first major global pandemic in the western world was the Black Death, from 1346 to 1353. Robert Palmer traced the impact of the Black Death on English (private) law, describing the transformation that followed: from an old-paradigm based on the King’s authority, to a new acceptance of the inherent authority of ‘the state’.²⁰³ Palmer argued that one consequence of this

²⁰³ ROBERT PALMER, *ENGLISH LAW IN THE AGE OF THE BLACK DEATH 1348-1381: A TRANSFORMATION OF GOVERNANCE AND LAW* (Chapel Hill: University of North Carolina Press 2000).

transition—which embedded the legitimacy of ‘law’ as a function of the inherent authority of the state—was the ‘scaling up’ of previously ‘local’ concerns to the national legal jurisdiction. Private disputes between subjects—for example, contract disputes, tortious wrongdoing and remedies, labor and employment issues, and, crucially, property rights—were brought under the newly developed jurisdiction of ‘private law’. Palmer argued that this paradigm shift was a mechanism for re-establishing the social status-quo that had existed prior to the pandemic. In the aftermath of the pandemic, English aristocratic leaders set out to create a new national legal system, organizing the power of the state through law. They needed to re-establish social equilibrium—adapting to the changed context to ensure that pre-pandemic power dynamics between the lower levels of society and the upper levels would be sustained. Although the inherent power of the state’s private law jurisdiction would later be concealed behind putatively neutral legal structures, the paradigm shift was necessary to restore equilibrium after the pandemic: the state acted to preserve the social order that gave it power.

Palmer’s account of the evolution of private law in line state self-interest: to shore up its resilience following a period of crisis; resonates with our theory of Resilient Property. Periods of crises draw back the curtain on the state’s often-unseen role in private property law, casting fresh light on how organizing structures are deployed to advance individual and collective agendas, and on how these align with state self-interest. In moments of crises, the so-called ‘public/private divide’ becomes permeable and the state’s stake in the ‘private realm’ becomes visible—as states ‘direct’ what were erstwhile ‘private’ matters. In moments of crises, the pressures and risks that states face for *failing* to act in the face of urgent property problems often trump the pressures and risks they face if they are seen to have over-reached the scope of their legitimate authority. The fact that states can actively direct property systems during these times, and that these actions function to shore up rather than deplete the state’s resilience, provides an important corrective to claims that state actors and agencies, private property systems, legal techniques and toolkits lack the *capacity* to respond to property’s wicked problems. Rather, it reveals the question of active state responses to wicked property problems as one of political possibility.