



# Property as an Asset of Resilience: Rethinking Ownership, Communities and Exclusion Through the Register of Resilience

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Accepted: 21 March 2023  
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## Abstract

This article sets out a new conception of ‘property as an asset of resilience’. Building on Fineman’s emphasis on ‘webs’ of resilience, and applying insights from Actor-Network Theory and Resilient Property Theory, we examine how the rhetorical claims asserted by owners and non-owners, individually and collectively, and the ways that law recognizes and endorses those claims, affect the production of property-as-resilience. Applying Fineman’s framework, we argue that the ‘embodiment’ and ‘embeddedness’ of human vulnerability is revealed by the necessary and inevitable relationship we have with land, housing and place. Everyone—including homeless people—must ‘be’ somewhere (embodiment); however, it is our ability to access ‘assets of resilience’ through our social embeddedness in institutional structures and relationships that mitigates (or not) our experience and life opportunities. In this article we analyze the nature of real property as an asset of resilience, the consequences of exclusionary concepts of ownership for how resilience is allocated, and the implications for how we think and talk about ‘exclusion’ and ‘inclusion’ in property theories and property law. We consider the roles that states perform in the allocation of property as an asset of resilience: both directly, through the protection and enforcement of private property rights and official narratives about the nature of private property; and indirectly, as owners leverage the hinterland of privilege extended to ‘ownership’ and owners to deepen their own networks of resilience.

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## 1 Introduction

The ability to 'hang a sign' that signals the owner's right to exclude is a primary trope in private property law.<sup>1</sup> Property law's 'information theories' conceptualize these signs as unidirectional communications from owners to the rest of the world—an instruction to 'keep out!' or shout 'hands off, it's mine'—and identify their purpose as to enable coordinated interactions between people (owners and non-owners) with respect to property. Information theorists argue that property transactions and respect for private property require clear and simple signals about how others should behave with regard to owners' property,<sup>2</sup> and that property 'works' as a social ordering system: "by providing clear signals recognizable to all the world about how to behave with respect to things owned by others."<sup>3</sup> Merrill and Smith argued the 'moral' force of private property is anchored in the human instinct to exclude. In this frame, the world is divided into two populations: 'owners' as rights-bearers; and the rest of the world as duty-bearers. Information theories posit that, by structuring property law in ways that produce 'simple signals' about ownership, the rest-of-the-world can recognize, understand and respect the (exclusionary) rights of owners.

In one sense, the simplification of property conflicts to binary interactions between owners and outsiders is an inherent feature of the scaled production of law, which reduces complex and unique fact patterns to simplified, legible conceptual terms. It sorts, groups and categorizes 'things, people and qualities in terms of relative degrees of elevation or centrality',<sup>4</sup> for example, by recognizing 'ownership' as a *de jure* right with hierarchical priority over 'non-ownership', and conferring special standing on 'owners' in relationship to land through constitutional and legal protections.<sup>5</sup> Another dimension of the simplification of property signals to a communication between the owner and the 'rest of the world' is the inference that (legally constituted) property communications flow directly between owners and non-owners, with little direct consideration of the role of the state. Resilient

<sup>1</sup> HE Smith, 'Exclusion and property rules in the law of nuisance' (2004) 90 *Virginia LR* 965–1049, 984. HE Smith, 'Property and property rules' 79 (2004) *New York Univ LR* 1719–1798 at 1754.

<sup>2</sup> TW Merrill & HE Smith, 'The Morality of Property' (2007) 48 *William and Mary LR* 1849–1895, 1850. Merrill and Smith argued that the coordinating function of property relies on the effective communication of property rights (rights in *rem*): "...to a wide and disparate group of potential violators... Because property rights need to coordinate the behavior of large numbers of unconnected people, they must be easily comprehended and must resist possible misinterpretation. Law, including criminal prosecution and civil enforcement actions, is almost certainly inadequate to achieve this degree of coordination and compliance. Self-help, such as erecting fences and hiring guards, is also too feeble to assure the required degree of near-universal respect for property rights. Property can function as property only if the vast preponderance of persons recognize that property is a moral right, and this requirement has important consequences for the study of property."; *ibid*.

<sup>3</sup> J Baron, *The Contested Commitments of Property* 61 Hastings LJ 917 at 918 (2011).

<sup>4</sup> ES Carr & M Lempert, *Introduction: Pragmatics of Scale* in *Scale: DISCOURSES AND DIMENSIONS OF SOCIAL LIFE* (ES Carr & M Lempert, eds., 2016).

<sup>5</sup> This starting point is criticised by some progressive property scholars, who argue that law's implied preference for ownership leads to practices of adjudication that begin (wrongly, or unhelpfully) with the question of who owns the property. See JW Singer, *The Reliance Interest in Property*, 40 *Stanford Law Review* 611–751 (1988); R Dyal-Chand, Chand, *Sharing the Cathedral*, 46 *Connecticut Law Review* 647 (2013).

Property Theory<sup>6</sup> offers an alternative perspective, revealing the role of the state in enabling, endorsing and enforcing the messages embedded in these communications. By applying insights from Resilient Property Theory, we can reflect on how property communications are leveraged to support the resilience needs of owners, non-owner outsiders, and aggregated interests in neighbourhoods and communities. In doing so, we observe that property claims operate on a register of resilience that interacts with the resilience needs of the state, and that this frames the state's ability to see and respond to the resilience needs of owners and outsiders.

The owner's ability to hang a sign on property that reads "keep out" asserts a moral right or entitlement to exclude others. It functions as a form of aesthetic signaling: simplifying and rhetorically upscaling contextualized, on-the-ground experience to a simplified register of 'exclusion'. Information property theories, and moral property rights-based theories that define 'exclusion' as the 'essence' of property ownership and property law<sup>7</sup> reinforce these claims. Models of property relations that define 'exclusion' as the essence of property are challenged by pluralist and progressive property theories, which seek to open up broader conversations about the values and relationships that property supports, the outcomes it produces, and whether or not these amount to a 'good enough' social order. Yet, as Van der Walt observed: "...the right to exclude still tends to dominate the theoretical discussion about property. According to the information theorists, the property system pivots on the right to exclude because that exclusion consolidates a large number of powers in one property owner."<sup>8</sup>

In this article we explore the semiotics of 'exclusion' in property practices. Using Fineman's Vulnerability Theory and Resilient Property Theory (RPT), we re-imagine the concept of exclusion through the prism of 'property as an asset of resilience'. Building on Fineman's account of the 'webs' of resilience that human subjects are embedded within, and applying insights from Actor-Network Theory, we examine how the rhetorical claims asserted by owners, both individually and collectively along exclusionary and inclusionary registers, affect the production of, and access to, networks of property-as-resilience. By applying Fineman's concept of 'assets of resilience' to discourses of property and ownership, we demonstrate how property's putatively oppositional narratives and norms of 'exclusion' and 'inclusion' reflect a structured bifurcation of the fundamental and universal human claim to property as an asset of 'resilience'. For exclusionary-insiders and excluded-outsiders alike, the advancement of claims to property, housing and home emanate from the same root-stock: the human need to mitigate their inevitable embodied vulnerability within the sheltering ambit of property's resilience.

<sup>6</sup> See L FOX O'MAHONY AND M L ROARK, *SQUATTING AND THE STATE: RESILIENT PROPERTY IN AN AGE OF CRISIS* (2022); M L Roark and L Fox O'Mahony, *Comparative Property Law and the Pandemic: Vulnerability Theory and Resilient Property in an Age of Crisis* (2022) 82(3) LOUISIANA LAW REVIEW Article 8.

<sup>7</sup> T W Merrill, *Property and the Right to Exclude* 77 NEBRASKA L. REV 730–55 (1998).

<sup>8</sup> A.J. Van der Walt, 'The Systemic Marginality of Property' (2014) JOURNAL OF LAW, PROPERTY AND SOCIETY, 15 at 23. Van der Walt added: "Such a simple and strong exclusion rule helps to preserve the simplicity of the property system and therefore information theorists argue that exclusion strategies rightly occupy the core of the property system, while governance strategies, insofar as they exist, feature on its periphery." *Id.*, pp 23–24.

This fundamental unity of purpose is concealed behind legal structuring techniques that define the claims of owner-insiders through the language of legitimacy and entitlement; and non-owning-outsiders through the language of deviance and exclusion. This labelling practice has a polarizing effect: it tends to emphasize difference and opposition between identity groups (owners and non-owners), rather than recognizing the universal nature of human vulnerability and the universal human need to shore up our vulnerabilities through the social institution of (private) property. The 'embodiment' and 'embeddedness' of human vulnerability is revealed by the necessary and inevitable relationship we have with land, housing and place. Everyone—including homeless people—must 'be' somewhere (embodiment); however, it is our ability to access 'assets of resilience' through our social embeddedness in institutional structures and relationships that mitigates (or not) our experience and life opportunities. Applying Fineman's insights to reflect on the nature of property and the articulation and assertion of property claims, we develop a more realistic understanding of property as 'networks of resilience'. Finally, we consider the roles that states perform in the allocation of property as an asset of resilience: both directly, through the protection and enforcement of private property rights and official narratives about the nature of private property; and indirectly, as owners leverage the hinterland of privilege extended to 'ownership' and owners to deepen their own networks of resilience.

## 2 Vulnerability Theory and 'Assets of Resilience'

Fineman's Vulnerability Theory is rooted in her rejection of the idealized, imagined "autonomous and independent subject asserted in the liberal tradition".<sup>9</sup> The alternative model she advances anchors legal subjectivity in the inherent, universal and constant human vulnerability of "real-life subjects".<sup>10</sup> Fineman argues that this "vulnerable subject", who is "embodied and embedded",<sup>11</sup> 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."<sup>12</sup> 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"<sup>13</sup>; and which remains a constant feature of our human experience. Fineman describes 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

<sup>9</sup> M.A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 2 (2008).

<sup>10</sup> *Id.* at 10.

<sup>11</sup> 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).

<sup>12</sup> *Id.*

<sup>13</sup> 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).

at various stages of normal development”.<sup>14</sup> Nevertheless, she argues that our state of constant embodiment means that: “...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.”<sup>15</sup> Fineman deploys the concept of ‘resilience’ to articulate how universal ‘flesh-and-blood’ vulnerability is mitigated and managed: by the accumulation, access to or acquisition of resources<sup>16</sup> that enable adaptation, amelioration, compensation, or containment of our vulnerability.

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 in counterpoint to the presumed “invulnerability” of another. Because it resists labelling individuals as ‘vulnerable’ or ‘not vulnerable’ it reminds us to avoid conferring normatively loaded-up identities onto legal subjects or populations (for example, victim/aggressor; owner/trespasser and so on). Fineman re-locates 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. Instead, Vulnerability Theory focuses on differences in people’s *opportunities* to accumulate and access ‘assets of resilience’ through their interactions with social institutions. These assets of resilience are comprised of ‘background resilience’ that is accumulated over time; and resilience that is allocated by state actors or agencies to mitigate vulnerability in moments of crisis.

A second trope of Fineman’s theory is *embeddedness*. Each individual’s experience of vulnerability is structured through their social embeddedness in the institutional structures and relationships that provide resilience.<sup>17</sup> Fineman explained that:

“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

<sup>14</sup> Fineman (2015) at 2090.

<sup>15</sup> *Id.*

<sup>16</sup> 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).

<sup>17</sup> In this article we connect this concept of embeddedness with the focus on ‘webby relations and practices’ in actor-network theory.

risks or recognize and choose among options and opportunities as they arise over the life course.”<sup>18</sup>

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.”<sup>19</sup> 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, including the physical and material, social and relational, environmental and existential capabilities to weather misfortune and disaster, and opportunity to avail ourselves of good fortune when it arises.

Vulnerability Theory centers the institutions that produce and provide resilience to mitigate our vulnerabilities because it is these institutional structures and relationships, in which vulnerable subjects are ‘embedded.’ That embeddedness determines each individual’s particular experience of vulnerability, through the quality and quantity of resources (*resilience*) that we inherit, accumulate or are capable of accessing in any given moment.<sup>20</sup> Fineman argued that: “[w]e are not born resilient; it is produced over time and within state-created institutions and in social, political, and economic relationships.”<sup>21</sup> Finally, Fineman 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. Societal institutions of resilience are created, maintained and regulated through law; and through this relationship, law confers legitimacy on their operation and power over individuals.<sup>22</sup> For example, the a priori respect for ownership that is built into liberal legal systems is central to the ways that resilience is allocated to some individuals in preference others.

The embodiment and embeddedness of human vulnerability is revealed by the observation that humans have a necessary and inevitable relationship with land, housing and place: that everyone, even people who are homeless, must be somewhere, and so exist in relation to land and housing. Access to land and housing is typically regulated through private property rules, the creation and enforcement of which reflects the state’s role in governing land relationships, as well as the rhetorical power that land claims have over social institutions. Building on Fineman’s focus on ‘assets of resilience’, in this article we analyze the nature of real property as an asset of resilience, in the context of how we think and talk about ‘exclusion’ and ‘inclusion’ in property theories and property law. We consider the roles that states perform in the allocation of property as an asset of resilience: both directly, through

<sup>18</sup> M. A. Fineman & G. Shephard, *Homeschooling: Choosing Parental Rights over Children’s Interests*, 46 U. BALT. L. REV. 57, 61 (2016–2017).

<sup>19</sup> *Id.* at 62.

<sup>20</sup> M. A. Fineman & A. Grear, *Introduction, Vulnerability as a Heuristic: An Invitation to Future Exploration* [in] M. A. FINEMAN & A. GREAR (EDS), *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* 21 (Farnham: Ashgate 2013).

<sup>21</sup> Fineman (2015) at 2090.

<sup>22</sup> Fineman (2011) at 16.

enduring support for property systems, property law and the protection and enforcement of private property rights; and indirectly, as owners leverage the hinterland of privilege extended to ‘ownership’ and owners to deepen their networks of resilience.

### 3 Property, Scale and Identity

The signals that property owners send about their property produce forms of discourse within property and ownership systems. Signs posted on land that read “No Trespassing” or “Keep Out” are generally endorsed in society. This is evident in the respect given to these signals by the public at large and their mass production and widespread availability in hardware stores. As a discursive practice, these signals represent a form of resilience conferred on owners of land. They reflect the normative expectations of so-called ‘rights to exclude’, and shape general social expectations of the powers of owners to communicate these expectations with confidence that they are endorsed by law. In short, these signals communicate what owners expect law to do in the face of unwanted intrusions on their land.

These discursive signals also reflect how law scales down disputes around trespass as binary between owners and outsiders. Law generally, and property law specifically, are scaled exercises that reduce the complexity of empirical problems by structuring and defining conflicts in relationship to individuals, things, and claims.<sup>23</sup> Understood as a production of the state, property law reveals how states use scale to perceive, prioritize and resolve collective problems.<sup>24</sup> Property law simplifies conflicts by imposing structured rules on messy real-life problems. Crucially, the choices that are made in these simplification processes are not neutral artifacts of an uninterested state; rather they reveal the state’s own interests in the management of resources, including land and housing, as a source of its own self-seeking resilience claims. Individuals, communities, state actors and institutions send powerful signals about their relative claims to land and resources to audiences that include within-group insiders and out-of-group property outsiders. These communications seek to reflect, embody and advance the resilience of owners and neighborhoods and—to the extent that they are directly or indirectly endorsed and upheld by the state—the state’s own interests in the maintenance of the property system. The substantive content of the property law system that is produced through these processes reflects both how states perceive land and resource relationships vis-à-vis their own

<sup>23</sup> The often-quoted phrase that appears at the beginning of the classic Dukeminier case book is that “property is not the study of things but rather the study of relationships between people in relation to things.”

<sup>24</sup> James Scott defines this as a process of making problems more legible. Thus, just as states used maps to make tax collection more efficient and adopted official languages to make government bureaucracy accessible, law adopts approaches that seek to reduce problems into solvable units. J. C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* NACHDR. ED. (New Haven: Yale University Press 2008). Property law’s reliance on existing entitlements as a starting point for understanding how and when entitlements shift helps courts and law makers understand how the property system operates. G. Calabresi & A. D. Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARVARD LAW REVIEW 1089–1128 (1972).



institutional interests, and how they perceive the relative positions of owner-insiders and non-owner-outsiders in relation to the state itself.

Law is scaled as a discursive practice in the ways that both insiders (for example, owners) and outsiders (non-owners) relay and validate claims.<sup>25</sup> Property law uses scale to re-produce complex and unique fact patterns in simplified, legible conceptual terms: for example, the recognition of ownership as a *de jure*<sup>26</sup> right with conceptual priority over *de facto* possession.<sup>27</sup> Law scales conflicts by creating hierarchies of actors, rights and claims.<sup>28</sup> Scale-making is inherently relational and comparative, often “conflating what is geographically, geopolitically, temporally, or morally ‘near’ while simultaneously distinguishing that nearness from that which is ‘far.’”<sup>29</sup> Real property law similarly operates as a scaled hierarchy, by sorting, grouping, and categorizing: “things, people, and qualities in terms of relative degrees of elevation or centrality.”<sup>30</sup> For example, real property claims are usually organized around the identities assigned to the individuals who assert them:<sup>31</sup> for example, ‘owners’ have special standing in relationship to land through both constitutional recognition and legal protections afforded to their claims; in contrast, depending on the detailed rules in place in each jurisdiction, ‘trespassers’ may or may not accrue or attract resilience in relation to their property claims. These categories create *de facto* hierarchies of interests:<sup>32</sup> defining the actors and conferring a legally determinative property ‘identity’ based on their relationship to the land.<sup>33</sup>

Our ‘property identities’ are implicated in our abilities to draw down on state-backed allocations of resilience to mitigate our inevitable human vulnerability. Competing claimants draw on different types of resources—economic, rhetorical or legal—in interacting and overlapping ways, to support their claims to property

<sup>25</sup> GJ Postema, *Custom, Normative Practice, and the Law*, 62 DUKE L. J. 707 (2012).

<sup>26</sup> R. Hickey, *Possession as a Source of Property at Common Law* [in] E. Descheemaeker, THE CONSEQUENCES OF POSSESSION 77–94 (Edinburgh: Edinburgh University Press 2014). Hickey (2014); J.C. Tate, *Ownership and Possession in the Early Common Law*, 48 THE AMERICAN JOURNAL OF LEGAL HISTORY 280–313 (2006); J. Gordley & U. Mattei, *Protecting Possession*, 44 THE AMERICAN JOURNAL OF COMPARATIVE LAW 293–334 (1996).

<sup>27</sup> Hickey, *ibid.*

<sup>28</sup> ES Carr & M Lempert, *Introduction: Pragmatics of Scale* [in] E.S. CARR & M. LEMPERT (EDS.) (2016).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> This starting point has raised criticism from progressive scholars, like Joseph Singer, who have articulated that law’s implied preference for ownership by noting that property disputes often wrongly start from the question of who owns the property. J. W. Singer, *The Reliance Interest in Property*, 40 STANFORD LAW REVIEW 611–751 (1988). Likewise, other scholars have focused on the question of “who” gets to assert claims to ownership through structural problems like racism, access to wealth, or geographic isolation (ruralism). Roark (2017); Singer (1988).

<sup>32</sup> These are not the only forms of categorization that property law employs to create hierarchies around land relationships. For example, property law categorizes land claims around time (fee simple owners versus life estate holders, versus tenants); around persons (in gross easements (as held by individuals) and appurtenant easements (as held by specific types of individuals—namely owners of land); around succession rights in land, such as between joint tenants with specific rights of survivorship and tenants in common with general rights of survivorship; and around relative rights of the grantor to place limits on a freehold (and much more).

<sup>33</sup> M. L. Roark, *Homelessness at the Cathedral*, 80 MISSOURI LAW REVIEW 53 (2014).



resilience. Economic or physically measurable resources<sup>34</sup> include financial, physical, geographic, or time investments. Rhetorical or discursive resources<sup>35</sup> refer to the types of arguments that actors use to advance and validate their claims to legal protection. Hierarchical resources relate to the ordering of resources backed by either legal or rhetorical sources.<sup>36</sup> For example, the hinterland of constitutional or legal protections extended to ‘ownership’ and ‘owners’ are communicated through rhetorical and normative claims about private property rights, while specifically ordering the claims that owners and nonowners can assert through courts.<sup>37</sup>

The relative position of claimants seeking access to resilience through property—whether they are property-insiders or property-outsiders<sup>38</sup>—affects their ability to draw down on these three types of scalable resources. Law scales these resources by making them cognizable through entitlements that confer state-backed endorsement for individuals or groups to exercise control, for example, over access to land.<sup>39</sup> Ab initio allocations of *de facto* resources and *de jure* rights enable insider-owners to articulate their claims in ways that deploy their resilience-advantage over outsider claims. From the practical ‘self-help’ actions owners take to stake their claims, to the aggregation of assets of resilience in neighborhoods and communities, and the challenges that outsiders bring to advance their own claims to property as an asset of resilience, law forms an essential backdrop outlining the relative ease with which parties can access this form of resilience.

The state’s endorsement of different types of property claims, and its allocation of resources to support claim-making, shifts over time in response to the changing pressures felt by state actors. The use of criminal justice tools to protect private property—for example, through the criminalization of trespass—illustrates how the power of law can be ‘scaled up’ to increase the resilience that is directly afforded to owners by the state. Rhetorical claims are advanced to garner political and public

<sup>34</sup> Physically measurable resources can be scaled in a variety of ways, including distance between types of resources, size or quantity of the resource, or time in which the resource is available. See Marc L. Roark, *Scaling Commercial Law in Indian Country*, 8 TEXAS A&M L. REV. 89, 92 (2020).

<sup>35</sup> Rhetorical scale measures discourse both in terms of claims of validity (moral absolutism versus moral relativity) as well as frequency and impact of arguments as legal discourse.

<sup>36</sup> Scales of capabilities (or hierarchies) measure the ability to exercise power, from the view of competencies (what powers can an entity exercise *legally*) and procedures (what barriers may exist that limit the exercise or access to powers).

<sup>37</sup> Liberal property theories variously justify and advance these rights-claims based on competing moral and utilitarian ideas about how property (as an asset of resilience) is, and should be, protected or reallocated between competing claimants.

<sup>38</sup> L. Fox O’Mahony, *Property Outsiders and the Hidden Politics of Doctrinalism* 67 CURRENT LEGAL PROBLEMS 409 (2014).

<sup>39</sup> For example, Guido Calbesi and Douglas Melamed describe the way rules that shift entitlements through either bargaining or through court decisions relate to the state allocation of entitlements through law. In some resources, the state vests the power of individuals to bargain or not bargain to shift resources—giving that person both hierarchical standing *vis-à-vis* that resource. Those claims are often bolstered by discursive claims that support why owners should be granted exclusive dominion to bargain or not bargain for resources that the state vests in them as owners. When conflicts emerge and the state chooses to shift entitlements through objective criteria (liability rules) the entitlement is reset, accompanied by the discursive claims that validate the state’s choice.

support for the extension of criminal sanctions in respect of property.<sup>40</sup> When states criminalize particular behaviors in respect of property—for example, by conferring criminal sanction on certain types of trespass—the narratives advanced to justify such steps are often framed in response to specific pressures, crises or moral panics about the ‘sanctity of private property’ or the ‘public order threat’ putatively posed by property outsiders. Dialectical in nature, the ‘defining up’ of offences re-interprets the language of property as well as imbuing property terms with greater or different significance than they had before.<sup>41</sup>

The rhetorical claims that animate property theories—and, in turn, contemporary property politics—also draw on the hinterland of the stories we tell about how property rights emerged in our societies.<sup>42</sup> These narratives are challenged through critical discourses of power that offer alternative accounts of property relations and resilience. For example, Lockean accounts of property, based in narratives of ‘first possession’ in the mythical ‘blank canvas’ of the ‘New World’, with the labour of the euphemistic ‘first possessor’,<sup>43</sup> have been challenged in post-colonial accounts of property that foreground the prior occupation of indigenous people who were deemed “culturally different or morally inferior”.<sup>44</sup> Narratives that advance absolutist accounts of the sanctity of private property rights are challenged by social movements (for example, the *Occupy* movement), highlighting the consequences of property rights absolutism for excluded populations and the impacts of socio-economic inequality for political instability.

While insider-owners lay claim to state-backed allocations of resilience on the basis of ownership’s exclusionary norms; advocacy for property outsiders highlights the injustice of exclusion from essential assets of resilience or advances inclusionary claims (for example, through ‘right to housing’ discourses). The oppositional tropes of ‘exclusion’ and ‘inclusion’ also compete for rhetorical power in property discourses and debates. Philosophical theories of property<sup>45</sup> are often structured

<sup>40</sup> See L Fox O'Mahony, D O'Mahony & R Hickey (eds), *MORAL RHETORIC AND THE CRIMINALISATION OF PROPERTY: VULNERABLE DEMONS?* (2016).

<sup>41</sup> See M. Silverstein, *Semiotic Vinification and the Scaling of Taste* in *SCALE: DISCOURSES AND DIMENSIONS OF SOCIAL LIFE 197–98* (E.S. Carr & M. Lempert eds, 2016).

<sup>42</sup> See L FOX O'MAHONY AND M L ROARK, *SQUATTING AND THE STATE: RESILIENT PROPERTY IN AN AGE OF CRISIS* (2022), Chapter One, for a detailed account of these property hinterlands as they emerged in the U.S., England, Ireland, Spain and South Africa.

<sup>43</sup> J LOCKE, *TWO TREATISES OF GOVERNMENT* (1689); L STRAUSS, *NATURAL RIGHT AND HISTORY* 246 (1950) (presenting Locke’s theory of property as aligned with capitalism as morally justified towards a limitless and self-interested accumulation of property); B ARNEIL, *JOHN LOCKE AND AMERICA: THE DEFENCE OF ENGLISH COLONIALISM* (1996). See also C Rose, *Property as Storytelling*, in C ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP* (1994); L Underkuffler, *Teaching Property Stories* 55 *JOURNAL OF LEGAL EDUCATION* 152 (2005); G KORNGOLD & A MORISS, *PROPERTY STORIES* (2009).

<sup>44</sup> U Chandra, *Liberalism and its Other: The Politics of Primitivism in Colonial and Post-Colonial Indian Law*, 47 *LAW & SOC’Y REV.* 135, 139 (2013).

<sup>45</sup> 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

around bifurcated frames that reflect underpinning political commitments along an inclusion–exclusion, left–right, community-liberty, public interest-private rights spectrum. Through these frameworks, adversarial arguments are advanced on behalf of competing claimants to property’s putatively rivalrous resources.

The binary structure of private property discourse has significant implications for property scholarship. The use of binary frames potentially reinforces the neoliberal world-view, which—rhetorically at least—relies on these distinctions to position private power, embodied in “the market,” as the source of individual freedom and wealth maximization. Simultaneously, public power, embodied in “the State” is characterized as “oppressive, inefficient and [to] be restrained and limited at all costs.”<sup>46</sup> These oppositional structures—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...”<sup>47</sup>

Complex problems involving multiple layered and intersecting choices are rendered ‘legible’<sup>48</sup> using simplified, oppositional, binary tropes. For example, the ‘property/sovereignty’ binary<sup>49</sup> posits a zero-sum, rivalrous contest between liberal commitments to individual freedom and the private sovereignty of property rights on the one hand, and the role of state institutions, including law, in allocating resilience on the other. This is problematic because the anchoring of property theories in distinct and competing frames runs the risk that property problem-solving collapses into rhetorical deadlock. Property problems are positioned either as simple allocations of (or entitlements to) resources to owners, and therefore the rules relating to those disputes should also be simple and clear to ensure that audiences understand these (information theories). Competing for airspace in this property universe are more complex, contextualized conversations about the bases on which access to property resources should be governed in the interests of society as a whole (progressive theories). As we will demonstrate in the sections that follow, both accounts

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Footnote 45 (continued)

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).

<sup>46</sup> P. O’Connell, *The Death of Socio-Economic Rights*, 74 MLR 532, 535 (2011); *see also* G. ALBO, S. 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).

<sup>47</sup> S. L. Winter, *The Next Century of Legal Thought?* 22 CARDOZO L. REV. 747, 748 (2001).

<sup>48</sup> JAMES C SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (2008).

<sup>49</sup> M.R. Cohen, ‘*Property and Sovereignty*’, CORNELL LAW QUARTERLY 13:1 (1928): 8–30.

are underpinned by the fundamental imperative of property as networked resilience. By recognizing this common rootstock, and its meanings in the universality of human experience, we argue that the concept of property as an asset of resilience opens up new avenues for understanding common ground between competing ideas about property.

## 4 Property as Networks of Resilience

The signs and signals that communicate owners' expectations with respect to the state's endorsement of their resilience needs reflect one set of pressures states face in respect of competing resilience needs linked to land and housing. Information theories read the signals owners send in binary terms: as a statement to the world at large that the owner's resilience needs must be respected. Yet, states, and other stakeholders, are also audiences to other property communications, expressing other resilience needs linked to shared and sustainable access to land resources. In mediating these competing resilience claims, the state's role is not passive (refereeing disputes from a putatively 'neutral' position) but active. Crucially, through the lens of Resilient Property Theory, the state's role in these disputes is framed by the state's own stake in the property and housing systems, which have a recursive effect on the state's own resilience—manifest in economic accumulation and political legitimacy.<sup>50</sup> RPT acknowledges that, when states allocate resilience, whether this is by endorsing communications by owners or non-owners, this is both 'other-regarding' (promoting the interests of the owners or non-owners) and 'self-regarding' (revealing and advancing the interest of the state).

Through this lens, we recognize the state's own resilience stake in non-owner claims for access to the property resources of shelter, housing and home. Demands on the state to mitigate the physical embodiment of the vulnerable legal subject are not bounded by justiciable positive obligations on the state but include the broader socio-political contexts in which claims to access housing and home are expressed. A state's legal obligations may be set out in national constitutions (for example, in South Africa, that 'Everyone has the right to have access to adequate housing')<sup>51</sup> or under international rights instruments that define the role and responsibilities of states in respect of the 'right to housing' (i.e., Article 25 of the Universal Declaration of Human Rights (UDHR)),<sup>52</sup> although legal obligations on states

<sup>50</sup> Fox O'Mahony & Roark (2022), *op cit*, p290.

<sup>51</sup> Constitution of South Africa, Sect. 26(1). For a treatment of how South African law attempts to reconcile the right to housing and the right to property found in the South African Constitution, see GUSTAV MULLER AND SUE-MARI VILJOEN, *PROPERTY IN HOUSING* (Cape Town: Juta Press 2021).

<sup>52</sup> "Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." By enumerating 'housing' within the broader context of an adequate standard of living, the concept of housing embedded in the UDHR nests 'housing' within what is 'adequate' to support health and wellbeing. Similarly, Article 11 of the International Covenant

to advance the right to housing have been ‘notoriously underachieved.’<sup>53</sup> The complexity of these challenges is reflected in the pressures applied through legal and adjudicatory methods to hold states to these housing commitments. Human rights to housing claims place new pressures on states to recognize not only shelter, but also geographic suitability, fair access to housing resources, the psychic value of home in the context of social relationships, and the suitability of housing to the needs and demands of individuals. These demands are raised in the context of legal systems that give presumptive preferences to property claims by owners reflected in property communications, and state endorsement of those property communications that seemingly inoculate owners against further demands on their property expectations. Political and social movements that foreground the failures of the state to meet the housing resilience needs of citizens, or the collective resilience needs of sustainable land use, highlight the recursive impact of state responses to property communications from both owners and non-owners for the state’s own resilience. In this section we focus on competing networked claims on property as an asset of resilience.

Progress towards the realization of collective housing resilience intersects with the governance of private property. These are often portrayed as competing, or even oppositional goals: between the inclusionary aims of housing resilience and the exclusionary rights of private property; between tenants (housing) and landlords (property); between excluded property outsiders and insider property-owning interests. Real property rights are attached to assets of resilience that remain fixed in place—both physically and legally. Our status in relation to property shapes our identities—in ways that may be wanted or unwanted: we are owners, tenants, homeless, squatters, investors, neighbors. The ‘fixedness’ of these identities is compounded by private property law’s commitment to the taken-for-granted assumption that property rights will be upheld. Underkuffler explained: “[t]he promise of property law, and its critical social function, is to *protect* what it identifies as ours. Whatever the distributional fairness or unfairness that may exist, whatever the vagaries of the moment, property law promises that entitlements will not change.”<sup>54</sup> Describing the ‘constitutional conundrum’ imbricated in the distribution of property-as-resilience, Underkuffler observed 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.”<sup>55</sup> Tacit acceptance of the claim that certainty and predictability are essential ‘property values’ reflects the perceived role of property law in locking

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Footnote 52 (continued)

on Economic, Social and Cultural Rights (ICESCR) sets out: “...the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”.

<sup>53</sup> Hohmann, p19.

<sup>54</sup> L.S. Underkuffler, *Lessons from Outlaws*, 156 UNIVERSITY OF PENNSYLVANIA LAW REVIEW: PENNUMBRA 262 (2007).

<sup>55</sup> L.S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. 2015, 2016 & 2030 (2013).

things [or, assets of resilience] in place. This is operationalized by tagging outcomes to pre-existing rights, and by the self-fulfilling power of 'ownership'.<sup>56</sup>

John Law described how narrative and normative 'hinterlands' (like ownership/exclusion) create realities by constructing 'standardized packages' that shape our 'choices'.<sup>57</sup> The hinterland of ownership frames how property problems are understood, articulated and resolved using property law. In developing our analysis of property as an 'asset of resilience', we draw on Actor Network Theory to acknowledge the recursive relationship between *embodied* actors (owners, non-owners, the state) and the networks in which they are *embedded* (neighbourhoods, communities, social organisations, and institutions).<sup>58</sup> While actors and networks have their own agency, networks are produced from the actors that comprise them, and affect the agency of the actors within them.<sup>59</sup> Humans do not belong to single networks, but are embedded in multiple communities that mediate how they express their identities, and determine their ability to accumulate and accrue resilience.<sup>60</sup> Likewise, networks themselves interact not only with their members, but with other networks and other humans in seeking out and expressing opportunities to access resilience, as well as communicating resilience gaps and needs.<sup>61</sup>

One reason that we focus on this recursive perspective is that property law is a primary site for networks to assert, advance, advocate and accrue assets of resilience. From the physical proximity of neighboring property owners to abstract networks like markets, affinity interests, property taxpayers, and more, owners and non-owners are required to participate in various 'propertized' networks if their most fundamental resilience needs are to be met. These networks are structured by interests secured, created, endorsed and upheld under the property law system of the jurisdiction in which they are located. Within these networks, property performs different functions as an 'asset of resilience'. For some, including city-level state actors

<sup>56</sup> R. Dyal-Chand, *Sharing the Cathedral*, 46 CONNECTICUT LAW REVIEW 647 (2013).

<sup>57</sup> J LAW, (2004) AFTER METHOD: MESS IN SOCIAL SCIENCE RESEARCH (New York: Routledge Press), at 33.

<sup>58</sup> *Ibid.*, at 157 (an approach to socio-technical analysis that treats entitles and materialities as enacted and relational effects, and that explores the configuration and reconfiguration of those relations. Its relationality means that major ontological categories (for instance 'technology' and 'society' [or in our case 'property']) are treated as effects or outcomes, rather than as explanatory resources."); J Law & V Singleton, (2013), *ANT and Politics: Working in and On the World*, QUAL. SOCIOLOGY 36: 485–502, at 490 ("What's important is that the relations also define or characterize the "actors" caught up in that unfolding web. The shape they take depends on all the webby relations").

<sup>59</sup> E. Sayes, (2014). *Actor-Network theory and Methodology: Just what does it mean to say that nonhumans have agency?* SOCIAL STUDIES OF SCIENCE 44 (1) 134–149, at 141–142 (noting that for non-human agency (including gatherings, associations and the like) that agency involves a question of whether any difference can be observed in another entity or actor as a result of the action); see also N Crossly, (2022) *A Dependent Structure of Interdependence: Structure and Agency in Relational Perspective*. SOCIOLOGY 56 (1): 166–182, at 171.

<sup>60</sup> Dwiartama & Rosin ("actors are constantly reforming networks, and by so doing, position themselves in different and changing roles. In a society, human and nonhuman actants develop a social ordering similar to the structure found in other social theories. Yet these modes of social ordering are not constant, varying in time and space.").

<sup>61</sup> *Id.*

and agencies,<sup>62</sup> the property network provides a financial network of economic security with market value foregrounded within the register of resilience.<sup>63</sup> For others, property serves as a conduit for social relationships, building on geographic proximity to neighbors and neighborhoods, or the social proximity of shared economic status.<sup>64</sup>

The *legal* recognition of property claims by the state confers legal resilience on certain (owner-insiders') interests and on the networks to which they belong. While property insiders benefit from the resilience afforded by state recognition and enforcement of property rights, property outsiders (and their networks) articulate their resilience needs in terms of property or access claims. Whether inside the ambit of property's protection or outside, the ability to mitigate our inevitable human vulnerability is shaped by state-backed allocations of resilience through property law; and the recursive, self-fulfilling and deepening impacts of the spaces these create for the production of 'self-help' resilience through embedded networks. In this way, networks of interest seek to access and accrue state-backed resilience. In doing so, their transactional interaction with the state may hold out an offer to shore up the state's own resilience needs in the context of property systems.

## 5 Reflexive and Aesthetic Communications in Property

Neighborhood signs, like individual no-trespassing signs, rely on state-backed resilience claims. These claims represent the interests of collective owners around different forms of resilience embedded in the collective identity of the neighborhood, as well as the identity claims of individuals who live in the neighborhood. For example, in some neighborhoods, neighborhood rules prohibit the posting of individual signs by owners in public-facing view (for example, political signage) on the basis

<sup>62</sup> Recent scholarship has observed the shifting demands on municipalities and their needs to create greater opportunities for tax revenue from property sources, rather than using those property assets for public purposes. See e.g., J. Hackworth (2006), *THE NEOLIBERAL CITY: GOVERNANCE, IDEOLOGY, AND DEVELOPMENT IN AMERICAN URBANISM* (Cornell University Press) (observing that the shifting priorities of cities from use of land to carry out public functions to use of land as a way to marshal more tax revenue).

<sup>63</sup> See e.g., L. Fox (2007) *CONCEPTUALIZING HOME: THEORIES, LAWS AND POLICIES* (Oxford: Hart Publishing) 146–155 (cataloguing the views of financializing home as an asset for owners). Several recent works have highlighted the inequity that recent turns to financialization (where ownership is valued for either the credit it affords owners or the investment for future value) have exacerbated in homeownership societies: see C. Odinet (2018) *FORECLOSED: MORTGAGE SERVICING AND THE HIDDEN ARCHITECTURE OF HOMEOWNERSHIP IN AMERICA* (New York: Cambridge University Press); D. Brown (2020) *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (New York: Crown Publishing); R. Rolnik (2015), *URBAN WARFARE: HOUSING UNDER THE EMPIRE OF FINANCE* (London: Verso Press).

<sup>64</sup> B. Jones, *COMMUNITY: THE WORKING CLASS IN MID TWENTIETH CENTURY ENGLAND* (Manchester: Manchester University Press) (describing how social networks, everyday sociability, patterns of association, and networks based on reciprocal aid changed during the twentieth century England due to suburbanization and rising standards of affluence). Numerous other works have been written lamenting the loss of communities of connection over the last few years including: M. Ducklesman, (2014) *THE VANISHING NEIGHBOUR: THE TRANSFORMATION OF THE AMERICAN COMMUNITY* (New York: W.W. Norton and Co.); Putnam, Robert D. (2001) *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF THE AMERICAN COMMUNITY* (New York: Simon & Schuster Co.).



the collective resilience of neighborhood cohesion may be threatened by the assertion of individual owners' political affiliations. In these neighborhoods, the individual's expectation of entitlement to use property for political expression is subordinated to the collective identity needs of the community. Inferred in the acceptance of these rules is the owner's adoption of the collective identity demands of the neighborhood as higher than his own individual needs to express his individual identity through his property. Other types of signs in neighborhood communities validate the collective identity of the neighborhood, whether that takes the form of community making, rule enforcement, or exclusion of outsiders. The neighborhood as a network actor draws on the validation of its members (as a network of property holders) as it asserts claims to govern through inclusion and/or exclusionary communications, to promote neighborhood resilience.

Networks articulate their claims through a range of insider and outsider communications. Individuals and networks communicate in ways that signal their relative positions as resilience asset-holders, and their experiences of, or anxieties about, resilience deficits. Reflexive communication is framed by internalized signals, rules, and social structures.<sup>65</sup> The inward-facing 'cognitive' dimension of reflexive communication is directed at the 'self'—shaping self-identity according to the rules that have been internalized by the individual or within networks,<sup>66</sup> while 'aesthetic' communications interpret outside-information in relation to the self.<sup>67</sup> Cognitive and aesthetic communications send signals about access to and accumulations of property-based resilience between individuals<sup>68</sup> and networks,<sup>69</sup> as well as highlighting resilience deficits. Through these processes, they reflexively signal the resilience stores of both individuals and networks. For individuals, these signals or symbols are embedded in identities of self. Giddens described the identity of the self as:

“...a generic phenomenon [that] presumes reflexive awareness. It is what the individual is conscious “of” in terms of self-consciousness. Self-identity is not something that is just given, as a result of the continuities of the individual's action-system, but something that has to be routinely created and sustained in the reflexive activities of the individual.”<sup>70</sup>

<sup>65</sup> S LASH & J URRY, *ECONOMIES OF SIGNS & SPACE* (LONDON: SAGE PUBLICATIONS) at 5 (“reflexivity means broadly the application of a theory's assumptions to the theory itself, or more broadly the self-monitoring of an expert system in which the latter questions itself according to its own assumptions.”).

<sup>66</sup> *Id.* at 5 (describing cognitive reflexivity as the monitoring of self through social-structural rules).

<sup>67</sup> *Id.* (describing aesthetic reflexivity as interpretive).

<sup>68</sup> D P McAdams and K C McLean, *Narrative Identity*, *CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE* 22: 3: 233–238 (2012). <https://doi.org/10.1177/0963721413475622> (finding that resilience arises from reflexive narratives about stress); J M Silva, *Constructing Adulthood in an Age of Uncertainty*, *AMERICAN SOCIOLOGICAL REVIEW* 77: 4: 505–522 (2012). <https://doi.org/10.1177/0003122412449014> (finding that individual resilience is often framed in retelling narratives of prior stress).

<sup>69</sup> “Past experience of a crisis event shapes local narratives around resilience, which influences perceptions of the strength of community capacity to respond to risk”. L Faulkner, K Brown & T Quinn, (2018) *Analyzing Community Resilience as an emergent property of Dynamic Social Systems*. *ECOLOGY & SOCIETY* 23 (1): 24 <https://doi.org/10.5751/ES-09784-230124>.

<sup>70</sup> A GIDDENS, *MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE* (Stanford, CA: Stanford University Press) at p. 52.

This is reflected in the ways that individuals communicate—to themselves, within networks, and to the world at large<sup>71</sup>—their own resilience as property owners. For example, Davidson observed that, following the 2007 housing crisis, property shored up the concept of self through two modes: individuals saw themselves reflected in the property they owned, at the same time as they drew on their property assets and resilience to reinforce their sense of self.<sup>72</sup>

The role of property in shoring up our sense of self is reinforced through symbols that communicate the interconnection between the property and the individual. In *Conceptualizing Home*, Fox O'Mahony described how acts such as the selection of interior décor reinforced the occupier's sense of self as: "[t]hrough the investment of time and energy by the occupier[s] the house that the occupiers begin to dwell in become a home..."<sup>73</sup> People make and re-make their identities through their homes and home décor, including: the role of art and cultural representations in home ownership<sup>74</sup>; the zoning of the home into particular functional (and sometimes gendered) areas<sup>75</sup>; and the display of artifacts of individual and family life including awards, photographs, and the like.<sup>76</sup> This observation has also been made in relation to individuals who live in non-traditional housing. Occupiers in informal settlements, or even rough sleepers, embody their claims to 'home' through the objects

<sup>71</sup> This aspect is developed further in our discussion of 'information theory' in Sect. 4, below. John Fowles, in his novel *The Magus*, examines the nature of internalized identities and norms and outward presenting signalling about those norms. In one scene, where the backdrop of the characters discussing the masking of grief, his character Nicholas reflects:

"By this sinister elision, this slipping from true remorse, the belief that the suffering we have precipitated ought to enoble us, or at least make us less ignoble from then on, to disguised self-forgiveness, the belief that suffering in some way enobles life, so that the precipitation of pain comes, by such a cockeyed algebra, to equal the ennoblement or at any rate the enrichment, of life, by this this characteristically twentieth-century retreat from content into form, from meaning into appearance, from ethics into aesthetics, from *aqua* into *unda*".

JOHN FOWLES, *THE MAGUS* 399–400 (London: Little Brown Co. 1956) (revised: Little Brown Co. 1972) (New York City, NY: Back Bay Books 2001).

<sup>72</sup> N Davidson, (2012) *Property and Identity; Vulnerability and Insecurity in the Housing Crisis*. HARV. CIVIL. RIGHTS- CIVIL LIBERTIES L. REV. 47 (1): 119–140, at 120.

<sup>73</sup> Fox (2007) at 168.

<sup>74</sup> A Ahuvia, (2005) *Beyond The Extended Self: Loved Objects and Consumers' Identity Narratives*. JOURNAL OF CONSUMER RESEARCH 32 (1): 171–184; ROBERT A ORSI (2002) *THE MADONNA OF 115<sup>TH</sup> STREET: FAITH AND COMMUNITY IN ITALIAN HARLEM 1880–1950* (New Haven: Yale University Press) at 91–92 (describing the role of Italian faith in defining the Domus in Harlem apartment and home); RA Orsi, (1996) *THANK YOU ST. JUDE: WOMEN'S DEVOTION TO THE PATRON SAINT OF HOPELESS CAUSES* (New Haven: Yale University Press) (describing the role of identity formation around St. Jude and Catholic diaspora from Central and South American to Chicago in shaping home and home-based identity).

<sup>75</sup> D Spain, (2014). *Gender and Urban Space*. ANNUAL REVIEW OF SOCIOLOGY 40 (2014): 581–598. K Dethier, *The Spirit of Progressive Reform: The "Ladies' Home Journal" House Plans, 1900–1902*, JOURNAL OF DESIGN HISTORY 6(4): 247–261 (noting the influence of the women's movement in shaping the interior spaces of the home). In one American case dealing with the question of passing a gift to a female live-in companion in the nineteenth century, the Court observes that the furniture in question would belong to the "ladies' department of the household," reaffirming the social belief in male and female oriented spaces of the home 19<sup>th</sup> Century America. See *Newman v. Bost*, 29 S.E.848,850 (N.C. 1898).

<sup>76</sup> Fox (2007) at 168.

they display.<sup>77</sup> The power of self, reflected in their homes, famously animated Suzette Kelo and Wilhemna Derry to oppose attempted takings of their homes by the state for the purposes of economic development in the totemic U.S. takings law case of *Kelo v City of New London*.<sup>78</sup>

The communication of signals that deploy property or housing as an asset of resilience can also be outward looking, or aesthetic. The purpose of these 'aesthetic' signals is not primarily geared towards the self or self-identity, but to our social identities in the eyes of others. Gary Iseminger described 'aesthetic communications' as those that seek an appreciation.<sup>79</sup> Individual aesthetic resilience communicates to others the resilience that the individual or network has accrued through the ownership of property. Aesthetic resilience is not exclusively directed to outsiders and its objects can serve both reflexive and outward functions. For example, Winter's work on the meaning of terracotta roofs as a symbol of wealth, power, and class in seventh century Italy illustrates how individuals used their power over the design of their homes to communicate perceptions of self to the outside world and, in doing so, reaffirm the owner's own cognitive sense of self.<sup>80</sup> Damien le Bas described how members of the British-Traveller community use language and symbolic objects in home-settings to serve a similar function: communicating social-identities to both insiders and outsiders, while simultaneously reinforcing their self-identities.<sup>81</sup>

As individuals cognitively reflect on their own resilience needs, this is reflected in their behaviors. Sometimes these resilience-seeking behaviors are outwardly visible within the neighborhood, manifesting in aesthetic communications. For example, environmental norms have accrued powerful cognitive and aesthetic qualities within neighborhoods: cognitive, as owners embrace a norm of "doing their part"; while its aesthetic dimensions are evident as owners perform the role of participating in community recycling programs or installing solar panels on their home. While the norms of ownership impart a cognitive reflexive obligation, the outward facing self performs the act under

<sup>77</sup> See e.g., N Smith, (1992). *Contours of a Spatialized Politics: Homeless Vehicles and the Production of Geographic Scale*. *SOCIAL TEXT* 33(1992): 54–81, at 70 (noting the role of the homeless vehicle as a "borderless extension of home"—both home and anti-home simultaneously; likewise, identity construction around place and home have often solidified claims to informal settlements by occupiers. S Oldfield, (2014) Intertwining lives and logics: Household and informal economies in Cape Town. *Urbani izziv*, 25(supplement), pp. S36–S46. <https://doi.org/10.5379/urbani-izziv-en-2014-25-supplement-003>; A Steele, (2010) *A qualitative assessment of the housing needs and aspirations of older people in Leicestershire*. Research report. Leicester, Salford Housing & Urban Studies Unit University of Salford.

<sup>78</sup> *Kelo v. City of New London*, Conn., 125 S. Ct. 265 (2005). As Eduardo Peñalver described the metaphorical connotation of the home as castle is as strongly tied to the concept of dignity as it is to the concept of dominion: E Penalver, *Property Metaphors and Kelo v. New London: Two Views of the Castle*. *FORDHAM LAW REVIEW*. 74 (4): 2971–2976, at 2975.

<sup>79</sup> G ISEMINGER, (2004) *THE AESTHETIC FUNCTION OF ART* (Ithaca, NY: Cornell University Press) (describing communication that is outward facing—or made "with the aim and effect that someone appreciates it.") Iseminger suggests that three elements are necessary when detailing aesthetic communication—A maker/ designer, an object to be appreciated, and an appreciator.

<sup>80</sup> N Winter, (2009). *Symbols of Wealth and Power: Architectural Terracotta Decoration in Etruria and Central Italy, 640 -510 B.C., Memoirs of the American Academy in Rome. Supplementary Volumes*. 9: 1-720.

<sup>81</sup> D LeBas, *The Romani Language: A Signpost to Home* in S Bahun & B Petrić, (2018) *THINKING HOME: INTERDISCIPLINARY DIALOGUES* (London: Bloomsbury Academic Press), at 177.

the gaze of others. The owner's aesthetic-reflexivity means they may become bound to repeat the act, not just because it has been cognitively embraced, but because the owner feels bound to embody these norms over time. These aesthetic communications enable owners to leverage their embeddedness within the neighborhood to articulate, assert and advance their resilience both as individuals and as part of the neighborhood-network.

Networked owners communicate their identities, and define the identity of the neighborhood-territory, in ways that are both constitutive of, and reflective of, their self- and social-identities: "...laying claim to a geographic area, marking it for identification, and defending it when necessary against others..."<sup>82</sup> Signage performs an important role in the assertion of property identities by articulating aesthetically-reflexive and aesthetically-communicative positions. In some communities, homeowners and neighbors articulate their community identities through shared architectural standards that reinforce conformity and same-ness: their shared membership of an 'in-group'.<sup>83</sup> To the extent that these signals are reflexive, they function as outward signs of conformity and cohesion to the network (the neighborhood). For instance, Joan Faber McAlister's work on covenantal rhetoric described how neighborhood covenants use aesthetic rules and requirements of homogeneity to signal racial and class-based exclusionary norms.<sup>84</sup> Signage also plays an important role in the way communities accrue resilience through their identification as a group.<sup>85</sup> Signage may appear inward facing (aesthetically reflexive): for example, reinforcing neighborhood values<sup>86</sup> or community obligations, such as reminders to clean up after your pet; 'slow down' signs that reinforce the neighborhood community as a safe and welcome place for families and children; or the dressing up of municipal signage like 'stop' signs (away from standard metal on metal signposts to a more ornate wooden post). These signs communicate and reinforce the communities' collective perceptions of themselves—not only as a neighbourhood, but as individual owners. Other signs, such as 'community watch' or 'neighborhood watch' signs, may appear more outward facing (or purely aesthetic). Yet, each type of sign also serves cognitive functions. Signage defines the community's identity and normative expectations for insider-members as well as communicating to outsiders the norms and identities that the neighborhood seeks to project.

<sup>82</sup> S.N. Brower, *Territory in Urban Settings* [in] I. ALTMAN, A. RAPAPORT & J.F. WOHLWILL, ENVIRONMENT AND CULTURE (New York: Plenum Press, 1980) at 179.

<sup>83</sup> J M Grove, M Cadenasso, WR Burch, S Pickett, K Schwarz, M Wilson, M., et al. (2006). *Data and methods comparing social structure and vegetation structure of urban neighborhoods in Baltimore, Maryland. Social and Natural Resources*, 19(4), 117–136. D Mustafa, T A Smucker, F Ginn, R Johns & S Connely, (2010). *Xeriscape people and the cultural politics of turfgrass transformation*, ENVIRONMENT AND PLANNING D: SOCIETY AND SPACE, 28, 600–617. Aesthetic and architectural controls took the place of explicit racial restrictions embedded in covenants in the early twentieth century. See Brooks R.W. & Rose, Carol M., (2013) *Saving the Neighborhood: Racially Restrictive Covenants, Law and Social Norms* (Cambridge: Harvard University Press). Lemar., A.S., *Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics*, 90 INDIANA L. J. 1525 (2015).

<sup>84</sup> J F McAlister, (2010). *Good Neighbors: Covenantal Rhetoric, Moral Aesthetics, and the Resurfacing of Identity Politics*. HOWARD JOURNAL OF COMMUNICATIONS 21 (3): 273–293, at 280.

<sup>85</sup> See e.g., S TRINCH & E SNAJDR, WHAT THE SIGNS SAY: LANGUAGE, GENTRIFICATION, and PLACE-MAKING IN BROOKLYN (Nashville: Vanderbilt University Press).

<sup>86</sup> E PERRY (\*\*\*), LIVE AND LET LIVE: DIVERSITY, CONFLICT AND COMMUNITY IN AN INTEGRATED NEIGHBORHOOD (Chappel Hill: UNC Press) at 43 (describing the power of neighborhood action and expression through unity yard signs).







*Examples of Neighborhood Warning Signs Alerting Outsiders of Community Watches and Patrols in the U.S. (Top), Spain (Middle) and South Africa (Bottom).*

Informationalist accounts of property ownership draw primarily on an aesthetic conception of property signals that are both outward facing and state endorsed. Felix Cohen's classic embodiment of the exclusionary right as it is expressed by owners was as follows:

To the world:

Keep off X unless you have my permission, which I may grant or withhold.

Signed: Private Citizen

Endorsed: The State.

This traditional configuration of the aesthetics of exclusion configures the owner of land as the maker of the object; the object as the dominion under his control, and the recipient as the whole world, who is expected to appreciate the symbol that has been directed towards it.<sup>87</sup> The messaging that Cohen imagines property systems to

<sup>87</sup> Iseminger defined three elements of communication: (1) the maker of the thing; (2) the thing itself and (3) the audience, with the maker or designer of signals expressing how they expect the aesthetic symbol to be appreciated.

convey is primarily directed to 'outsiders' to the property interest. This is echoed in the 'information theory' approach to property, which defines property rights in terms of the duties they impose on the: "large and indefinite class of other person ('the world') who are excluded from 'the thing'".<sup>88</sup>

The role of the state in this traditional configuration is not as the maker of the statement but rather as the endorser, backing the assertion of property-based resilience by the owner.<sup>89</sup> Ironically, in this configuration, where the "whole world" is the audience of the message by an owner, the impact of endorsement by the state is ambiguous: is the state a neutral figure who ratifies the owner's claims against others?; or does the statement assume the tacit acceptance of the thing claimed by the owner—so that the state also falls into the category of those to whom notice has been given? This ambiguity was illustrated in the emergence of new owner-led property practices as apartheid came to an end in South Africa. White owner-communities re-interpreted the nature and extent of their ownership rights to infer that the state's endorsement extended far beyond the boundaries of their properties. This was epitomized in the commandeering of public roads to create private, gated communities, limiting access to outsiders. Over many years, owners took direct action to seize control over these spaces.<sup>90</sup> While this represented an interference with the rights of the public at large ('all the world') to access these public roads, the state did not respond, either because it tacitly endorsed their actions, or because it lacked the resilience to contest their claims. The owners, for their part, accepted state inaction as an implied endorsement of their claims.

## 6 Ownership, Exclusion and Resilience

Information theories simplify property communications by essentializing the meaning of ownership based on an exclusionary norm. These accounts assert the owner's 'right to exclude' as a message directed towards all comers. However, as we have demonstrated in this article, this framing collapses three distinct forms of resilience claims made by owners. Firstly, owners accrue resilience, additional to their assets of resilience as individuals, by developing and expressing a shared identity within neighbourhood networks. Second, by leveraging their individual and networked resilience, they set territorial boundaries to exclude 'outsiders'. And thirdly, they articulate expectations and demands directed at the state, invoking state support to back-up their resilience claims. By analyzing the tropes of property (for example, 'exclusion' and 'inclusion') as discourses, we can disentangle how owners express their resilience claims to different audiences, individually and as networked groups. The high-scale privilege extended to 'ownership' through state endorsement allows owners to seek out resilience through the signs they hang—on their own property

<sup>88</sup> TW Merrill & HE Smith, *What Happened to Property in Law and Economics* 111 Yale LJ 357 at 360 (2001).

<sup>89</sup> This characterization of the state's role in relation to property systems is challenged in, for example, S. Holmes & CR Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (2013).

<sup>90</sup> AJ van der Walt, *Enclosed Property and Public Streets*, 21 SAPR/PL 3, 8 (2006).



and in their neighborhoods. The property subject's resilience needs shape their internal (reflexive) and external (aesthetic) resilience claims, and communications directed to 'scaling up' these claims pool their networked capacities and resources, amplifying their claims and directing these, not only at 'non-owner' outsiders but towards the state.

The accrual of property-as-resilience by owners—both individually and in aggregation through the neighborhood network—is revealed through three forms of signaling: inference, translation, and longevity. Selected narratives 'upscale' and 'downscale' these different types of signals to produce (and deplete) resilience for populations of owners, depending on the context. For example: the ability of networked neighbors to hang signs that signal within-group inclusion and send exclusionary 'keep out' messages to outsiders to the network signals to the privileges of ownership and to the scaling-up potential of owner-networks.



*Example of 'private property' sign, Italy*

The long-term nature of the owner's interest means that these signals can be discreet and small, particularly when compared to the larger and bolder signs that outsider counter-claims express. Owners may simply hang signs that announce that the land is 'private property', leaving others to draw from this the inferred instruction to 'keep out'. In contrast, non-owners' demands for access or to be included are expressed in informal ways: marching through streets, hanging banners outside unowned but occupied buildings, or circulating flyers amongst supporters. While non-owner/outside claims to be

included need to be “large, loud, and unavoidable” because they are inherently tenuous and temporary, owners’ signs can be small, nuanced, and blend into the surroundings because their claims (either individually or collectively) are not threatened by sudden displacement. They have the accrued resilience of longevity, of being fixed in place, rooted and embedded in territory, capable of coalescing support through their sustained presence.



The resilience demands that owners make often respond to perceived threats, the sources of which reflect different audiences. In some cases, threats come from within the network, and signs function to maintain order and identity within the network. In other cases, threats are perceived to come from outside. Neighborhood identity can be recursive to the individual, so that collective efforts to exclude are internalized by individual owners. When owners experience strong identity attachments within their networked neighborhoods, perceived threats to their absolute power and entitlement to exclude others are not merely threats to an abstract concept of exclusion: rather, these are experienced as threats to their

personhood and identity: to their resilience. Thirdly, owners may perceive threats if they fear the dilution or withdrawal of state support for their entitlements to maintain the boundaries and identity of their neighborhood.

Territorial behaviors reflect our human instinct for survival, safety and security.<sup>91</sup> Brower argued that human territorial behavior in particular physical settings is: "... characterized by a feeling of possessiveness, and by attempts to control the appearance and use of space."<sup>92</sup> Logan and Molotch's account of neighborhood identity practices (for example, street naming) also supports our argument that the networked neighborhood collaborates to produce (or deepen) individual and collective resilience in ways that are both inclusionary and exclusionary. For example, neighborhood practices of naming places simultaneously reflect the neighbor network's insider-identity, both on its own terms and relative to other local networks, as well as signaling boundaries that exclude outsiders.<sup>93</sup> Communities of owners make 'boundary statements' to create and communicate literal and figurative boundaries around the community they are claiming to protect. These boundary statements are both exclusionary and inclusionary: they define both who belongs and who doesn't.<sup>94</sup> While boundary statements are intended to shore up the resilience of communities, the articulation of exclusionary neighbor norms may signal a neighborhood 'pathology'. Saff described how social capital was depleted within exclusionary communities in the U.S.'s 'sundown towns'—where racialized exclusionary norms were scaled down to neighborhoods that excluded black Americans after sundown unless they held a pass.<sup>95</sup> The effects of networked neighborhood resilience in galvanizing collective fearfulness of 'outsiders' is also manifest in practices of 'defensive homeownership',<sup>96</sup> leading individual owners within some communities to adopt

<sup>91</sup> See Fox (2007).

<sup>92</sup> See S.N. Brower (1980) at 180.

<sup>93</sup> They explained that: "...people use place names to identify the general social standing of themselves and others. To do this, people must have a sense of neighborhood boundaries and connotations of names of other areas...[For example] 80–90 percent of...Chicago respondents were able to define clear boundaries for their place-named communities and boundaries to increase or protect their own status...Lower status individuals attempt through a 'halo' effect to become identified with a neighboring area of higher status, whereas those of higher status attempt to prevent this sort of borrowing of their status. The linkage people make between their location and their social standing means that residents' stakes in place go well beyond the actual material conditions of a given place...and involve the symbolic meanings that real estate takes on."; J. R. LOGAN & H. L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 107 (Berkeley: University of California Press, 1987).

<sup>94</sup> Grant Saff, *Exclusionary Discourse Towards Squatters in Suburban Cape Town*, 8 *ECUMENE* 87, 102 (2001).

<sup>95</sup> *Id.* at 840. Sundown towns were towns in which African Americans were not permitted after sundown without a pass. Exclusionary zoning occurred when cities passed zoning ordinances that limited access to certain areas of towns. Both sundown towns and exclusionary zoning epitomized a geographic landscape that literally drew boundaries around whole sections of the country and cities that excluded African Americans. Saff observes that neither sundown towns or exclusionary zoning was possible without strong social cohesion norms that emerged in neighborhoods.

<sup>96</sup> E.J. BLAKELY & M.G. SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* (Washington: DC Brookings Institution Press, 1997); L. Kern, *Selling the 'Scary City': Gendering Freedom, Fear and Condominium Development in the Neoliberal City*, 11 *SOCIAL AND CULTURAL GEOGRAPHY* 209 (2010); R. ATKINSON & S. BLANDY, *DOMESTIC FORTRESS FEAR AND THE NEW HOME FRONT* (Manchester: Manchester University Press, 2016).

increasingly aggressive approaches to defending their homes. For example, Mark and Patricia McCloskey were infamously captured on video waving and pointing guns from their front lawn as Black Lives Protestors walked through their white suburban neighborhood in 2020.<sup>97</sup>

When owner-neighbors believe that they are under threat, this can animate collective mobilization: creating a shared understanding of the threat as material, shared strategies for addressing the threat, and coalescing with other common stake holders to get the state to act in a way that bolsters their resilience.<sup>98</sup> Owners may seek out resilience through exclusionary communities, translating their desire for security in the face of perceived threats—whether this relates to bodily security (in the context of fear of crime) or financial security—into manifest claims for privately controlled space. For example, in South Africa, Gated Residential Developments (or GRDs) can be understood as a collective economic response rooted in the alleged failure of the public authorities to provide services and security.<sup>99</sup> In this frame, the home is (viewed as) an embattled territory and owners fear potential victimization. The resilience needs of owners are extended through a discourse of ‘urban fear’ that taps into concerns for personal safety and bodily security,<sup>100</sup> and that regards the right to exclude others not only from their homes but their communities and neighborhoods as a significant incident of home ownership.<sup>101</sup> This aspect of the exclusionary neighborhood can be understood as the converse of the official narrative (arguably rooted in the inclusion of ‘people like us’ and the exclusion of others) that homeownership stabilizes neighborhoods and strengthens communities.<sup>102</sup>

For people who have selected neighborhoods because the identity of the neighborhood reflects their own preferred identities, perceived threats to the neighborhood

<sup>97</sup> Jessica Lussenhop, *Mark and Patricia McCloskey: What really went on in St. Louis that day?*, BBC (August 25, 2020).

<sup>98</sup> P. ALMEIDA, *SOCIAL MOVEMENTS: THE STRUCTURE OF COLLECTIVE MOBILIZATION* 6 (Oakland: University of California Press, 2019).

<sup>99</sup> M. Morange, F. Folio, E. Peyroux, & J. Vivet, *The Spread of a Transnational Model: “Gated Communities” in Three Southern African Cities (Cape Town, Maputo, and Windhoek)*, 36 *INTERNATIONAL J. OF URBAN AND REGIONAL RESEARCH* 890, 891 (2012).

<sup>100</sup> S.M. Low, *The Edge and the Center: Gated Communities and the Discourse of Urban Fear*, 103 *AMERICAN ANTHROPOLOGIST* 1, 45 (2001); and a 2002 Special Issue of *Environment and Planning B: Planning and Design* (vol 29) charting the global spread in gated communities since the late 1980s.

<sup>101</sup> D.J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers* 105 *YALE L.J.* 761 (1996); C.P. Pow, *Securing the ‘Civilized’ Enclaves: Gated Communities and the Moral Geographies of Exclusion in (Post-)socialist Shanghai*, 44 *URBAN STUDIES* 1539, 1558 (2007); R. Atkinson & J. Flint, *Fortress UK? Gated Communities, The Spatial Revolt of the Elites and Time–Space Trajectories of Segregation*, 19 *HOUSING STUDIES* 875 (2007); but see S. Blandy, *Gated Communities in England as a response to crime and disorder: Context, Effectiveness and Implications* 1 *PEOPLE, PLACE AND POLICY ONLINE* (2007) (arguing that research in England revealed that residents’ motives are varied and complex and although security and fear of crime was an important issue, the major motivation for purchasers was maintenance of property values).

<sup>102</sup> See, e.g., W. M. Rohe & L. S. Stewart, *Homeownership and Neighbourhood Stability*, 7 *HOUSING POLICY DEBATE* 37 (1996); W. M. Rohe, S. Van Zandt, & G. McCarthy, *The social benefits and costs of homeownership: A critical assessment of the research* [in] J. R. TIGHE & E. J. MUELLER (EDS), *THE AFFORDABLE HOUSING READER* (2013).

are experienced as deeply personal, animating their desire to mobilize against that perceived threat.<sup>103</sup> The hanging of signs that say ‘keep out’ defines the owner’s territory as something to be defended, requiring gates, fences, walls, hedges and other barriers to safeguard ‘us’ from ‘them’. These protectionist practices can be read as a form of virtue signaling that identifies certain actors (insiders) as entitled to protection (or resilience), with others (outsiders) positioned as the audience to these exclusionary signals. They may also, simultaneously, be directed at state actors or agencies, who are characterised as having failed to protect (owner-insider) citizens from the threat that (non-owner) outsiders pose. For example, in Spain, national media reported on hundreds of neighbors in the Basque region who gathered in front of a squatted house, after a 94-year old woman returned to find her home occupied. The story circulated through the country’s news media as an example of neighbors ‘taking back control’ against a backdrop of the state (through policing) and the legal system’s failure to deter trespass.<sup>104</sup>

When property owners place exclusionary placards on their properties, or neighborhoods establish community signs signaling collective action they occupy a distinctive space of discourse, exhibiting what Felix Cohen described as a merging of “imperceptible degrees” into the coercive power of the state to define property.<sup>105</sup> The size and placement of these signs implies state endorsement. In the U.S., street level signs that mimic the style and form of ‘official’ signs erected by the state are regularly used to announce ‘neighborhood watch’ programs. These are frequently positioned next to or near other municipal signs or even on the same post as municipal signs (for example, signage relating to traffic patterns or speed limits). This scaling up of an abstracted right to property by announcing state endorsement simultaneously upscales the meaning of property claims from rhetorical expectation to concrete validation.

<sup>103</sup> Smythe explained how neighborhood identity motivated groups of affluent neighbors to influence local governments (particularly in smaller suburban locales) to adopt zoning ordinances to limit the provision of homelessness services in their locale, and to lobby for police action to control or relocate homeless persons from the neighborhood: Donald Smythe, *The Power to Exclude and the Power to Expel*, 66 CLEVELAND STATE L. REV. 367, 410 (2018). IN THE U.K., NEIGHBORHOOD OPPOSITION TO HOMELESS SHELTERS THAT CATERED TO SINGLE MEN DESCRIBED RESIDENTS AS “DEGENERATE,” “UNDESIRABLE,” AND “DELINQUENTS”: Alan Burnett and Graham Moon, *Community Opposition to Hostels for Single Homeless Men*, 15 AREA 161, 162 (1983). And in South Africa, in the late 1980s and 1990s, as squatter encampments emerged and expanded nearby, neighbors mobilized their communities to block off public road access to create de facto private communities. Andre van der Walt observed that the closing of public roads for private service essentially transforms the public road into a private thing not only factually but legally (de jure). He writes “when all adjoining land is owned by one person, a street that is not (necessarily), used as a public thoroughfare could lose its public character” because the conflict between adjoining land owners is cancelled out.” Andre Van der Walt, *Enclosed Property and Public Streets*, 21 SAPR/PL 3, 8 (2006). Later, after cities ended the practice of allowing neighborhoods to co-opt public roadways for private uses, neighborhoods again mobilized their resources to petition cities to create formalized processes that enabled public road closings with similar effect.

<sup>104</sup> Pedro Gorospe & Sandra López Letón, Angry crowd forces squatters out of elderly lady’s home in Basque Country in El Pais [available at] [https://english.elpais.com/elpais/2019/10/18/inenglish/1571406994\\_747830.html](https://english.elpais.com/elpais/2019/10/18/inenglish/1571406994_747830.html).

<sup>105</sup> Felix Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954).



The neighborhood exclusionary norm, captured in the colloquial NIMBYism (“Not In My Backyard”) can also be seen in the shared agendas of ‘NIMBY-neighbors’, who seek to control the boundaries of the neighborhood under an extended form of private sovereignty.<sup>106</sup> The NIMBYism that has taken root in American zoning practices is a short form of translation communicating to city officials not to invade the self-referential space that neighborhoods and private owners claim. A key feature of NIMBYism is that the collective interest—the resilience claim—is framed not in general terms, but in specific opposition to certain types of activities and developments in the particular location of their homes and neighborhoods.<sup>107</sup> NIMBYism is inherently ‘low-scale’: focused on the community or locale; rather than being concerned with higher-scale political, economic or societal issues;<sup>108</sup> but the issues represent a ‘high-stake’ concern for the residents. Their ability to assert collective demands for state-backed allocations of resilience is enabled by the social cohesiveness that local geography produces.<sup>109</sup>

This social cohesiveness is reflected in a shared neighborhood identity, in which the self-identity of owners merges with the social identity of the neighborhood. In some instances, this process has been nurtured by legal frameworks that nurture the emphasis on ‘sameness’ that underpins exclusionary neighborhood norms. The neighborhood identity is then reinforced by individuals who ‘translate’ their own personal identities against the collective identities that neighborhoods foster.<sup>110</sup> The idea of ‘character’ has been deployed by neighborhoods to resist changes to the fabric of the neighborhood that were viewed as damaging.<sup>111</sup> It functions as a means of exclusion; a form of “elective belonging” in which “middle classes elect to move to places for partly symbolic reasons, settling in and often claiming moral rights over those places, with their place of residence subsequently becoming highly significant to their image of self.”<sup>112</sup> The processes by which exclusionary neighborhoods scale up their influence through territorial mobilization exacerbate power inequalities in decision-making about what happens in particular places and spaces. Jun and Musso described the collective power of neighbors to determine what happens in

<sup>106</sup> When a group of neighbors act in concert to address ‘NIMBY’ issues, this can be viewed as an assertion of what Carol Rose described as informal ‘limited common property’ regimes, which, Rose suggested, could be held together by custom as well as private constitutions; and in which the membership subscribed to a set of shared rights, obligations, practices and goals with respect to private property.

<sup>107</sup> I. Amézaga & S. Martí í Puig, *¿Existen los Yimbis? Las Plataformas de reivindicación territorial en Soria, Teruel y Zamora [Do the Yimbis Exist? Platforms of Territorial Claim in Soria, Teruel, and Zamora]*, 138 REVISTA ESPAÑOLA DE INVESTIGACIONES SOCIOLOGICAS 3, 4 (2012).

<sup>108</sup> I. Amézaga & S. Martí í Puig (2012) at 4.

<sup>109</sup> W. Nichols, B. Miller, & J. Beaumont, *Conceptualizing the Spacialities of Social Movements*, [in] B. MILLER, J. BEAUMONT, & W. NICHOLS (EDS), *SPACES OF CONTENTION: SPACIALITIES AND SOCIAL MOVEMENTS 5* (London: Routledge, 2013).

<sup>110</sup> The idea that neighborhoods have a distinctive ‘character’, and that this character should be sustained and protected through planning policies and decisions, was increasingly incorporated into English planning law from the 1980s: G. Davison, Kim Dovey, & I. Woodcock, *Keeping Dalston Different: Defending Place-Identity in East London*, 13 PLANNING THEORY & PRACTICE 47, 48 (2013).

<sup>111</sup> Davison, Dovey, & Beaumont (2012) at 48.

<sup>112</sup> *Id.* at 64.

the neighborhood—beyond their property lines—as: “privileging the parochial concerns of the wealthy rather than engaging a diversity of stakeholders in coming to a judgment.”<sup>113</sup>

It is important to recognize that individual and neighborhood resilience can, also, be bolstered through *inclusionary* acts. Kimberley Kinder’s account of resilience-boosting acts in declining Detroit neighborhoods offers an important corrective to the idea that resilience-seeking behaviours are *necessarily* exclusionary.<sup>114</sup> As neighborhoods that had once boasted modest middle-income populations struggled to attract new residents to buy or rent vacant homes, these empty properties became sites for scavengers seeking scrap metal, safe havens for illicit drug trades and prostitution, and generally decayed. In some neighborhoods, resident realtors became self-help ‘matchmakers’ in an effort to prevent property vacancies from exacerbating neighborhood decline. Some Detroit “matchmakers,” concerned with preserving their economic stake in the neighborhood, actively recruited squatters to help stabilize neighborhood values (or at least not cause them to further decline). Some saw matchmaking as a means to revitalize the social value that their neighborhoods had provided before the economic decline of the city. Similarly, YIMBY movements within neighbourhoods (particularly around affordable housing programs) advocate for inclusionary approaches to housing, rather than the exclusionary practices of NIMBY movements.<sup>115</sup>

Inclusionary neighborhoods build resilience by supporting the assimilation of outsiders: for example, by tolerating trespass or allowing the possibility of title acquisition through adverse possession. In these circumstances, the outsider can be socialized and assimilated into the community:

“In this narrative, over time, the squat dweller acquires both legitimacy in the eyes of his neighbors and a stake in the community...Both the squatter and his dwelling evolve toward the norms of the community...He moves from the position of a threatening, marginalized outsider to occupy a place in the community. He accepts community norms and fulfils his responsibilities in the community.”<sup>116</sup>

Examples of state-endorsed exclusionary strategies include programmes in England and the Netherlands in the 1960s and 1970s, and in the Lower East Side of New York in the late 1990s, when squatters were encouraged to force a correction in the

<sup>113</sup> Kyu-Nahm Jun & Juliet Musso, *Participatory Governance and the Spatial Representation of Neighborhood Issues*, 49 URBAN AFFAIRS REV. 71, 76 (2013).

<sup>114</sup> KIMBERLY KINDER, *DIY DETROIT: MAKING DO IN A CITY WITHOUT SERVICES* 8 (2016) (noting the trajectory of housing disinvestment in Detroit since the 1950s and following into the great recession).

<sup>115</sup> YIMBY (or yes, in my back yard) movements have emerged as individuals and neighbourhoods responses to NIMBY movements. See Tapp, R. (2021). INTRODUCING THE YIMBYS: RENTERS, HOUSING, AND SUPPLY-SIDE POLITICS IN LOS ANGELES. ENVIRONMENT AND PLANNING C: POLITICS AND SPACE, 39(7), 1511–1528. <https://doi.org/10.1177/23996544211044516>.

<sup>116</sup> Manjikian (2013) at 22.



market system.<sup>117</sup> The factors that shape and determine the relative 'openness' of neighborhoods are multi-layered and multi-scalar. They are local, in terms of the particular constitution of the neighborhood; national, in terms of nation state norms and narratives; and global, influenced by transnational trends that track the exclusionary political currents of the early twenty-first century. Crucially, the character of neighborhoods and communities (inclusionary or exclusionary) is not fixed but changes over time, in response to political, social, economic and cultural contexts.

Reflecting on the nature of 'community resilience', Magis observed that, at the aggregated level of the community, 'assets of resilience' can be understood as: "the ability of a system to sustain itself through change via adaptation and occasional transformation..."<sup>118</sup> At the system-level, communities develop resilience not by resisting or retreating from the changing neighborhood environment, but: "by actively building and engaging the capacity to thrive in an environment characterized by change..."<sup>119</sup> Community resilience is fostered not through avoidance or withdrawal from risk; rather, it is derived from: "the existence, development, and engagement of community resources by community members [in order] to thrive in an environment characterized by change, uncertainty, unpredictability, and surprise."<sup>120</sup> These knowledge practices are performative, enlisting both the agents that receive resilience from the practice and other individuals and institutions that do the same.<sup>121</sup> They occur in particular locations and circumstances, often obscuring the realities that the knowledge practice seeks to explain.

As knowledge practices reaffirm and reinforce their own validity, they can create new and excessive realities (or over-reliance on those created realities and actors). One example of such a knowledge practice is the idea that 'property' is a 'thing' (and, particularly, that it is a thing with both fixed and narrowly defined qualities, communicated through 'simple' and widely accepted rules) rather than a set of discourses through which the assets of resilience are allocated, accrued and accumulated. Through this lens, the strategies that neighborhoods adopt in seeking out resilience—through exclusionary or inclusionary tactics—are brought into sharp relief and the 'blind spots' that flow from focusing on second-order concepts such as 'exclusion', or 'inclusion', rather than first-order 'resilience', are revealed.

## 7 Conclusions

The features of property law that facilitate inclusion, and the inclusionary behaviors of owners (including non-enforcement of rights to exclude), enable owners to accumulate additional resilience. As such, the abilities of owners—both to exclude and

<sup>117</sup> H Puijt, *Is the Institutionalization of Urban Movements Inevitable? A Comparison of the Opportunities for Sustained Squatting in New York City and Amsterdam*, 27 INT'L J OF URBAN AND REGIONAL RESEARCH 133–157 (2003).

<sup>118</sup> K. Magis, *Community Resilience: An Indicator of Social Sustainability*, 23 Society & Natural Resources 401 (2010).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Law, J., *Reality Failures* in PASSOTH, J., PEUKER, B., SCHILLMEIER, M., AGENCY WITHOUT ACTORS? NEW APPROACHES TO COLLECTIVE ACTION (London: Routledge Press).

to include—can be understood as emanations of the higher-order concept of ‘property as resilience’. Access to (privatized) property resources also a key component of the resilience claims advanced by, or on behalf of, those property outsiders—non-owners—who are excluded from private property as an asset-of-resilience. The ‘zero-sum game’ of competing property claims implies a critical tension between the owner’s urge to ‘protect what is ours’ by asserting *exclusionary* rights; and the non-owner’s claim to access or *inclusion*. This is reflected in competing theoretical accounts of the nature of property and in competing normative prescriptions for property law. Viewed in oppositional terms, the conflict between ‘exclusionary’ and ‘inclusionary’ accounts of private property provides a proxy for polarized political positions to be played out in property scholarship. This, in turn, embeds all the risks and perils that scholarly debates, tracked along ‘conservative’ and ‘progressive’ lines, produce more heat than light.

By re-positioning ‘exclusion’ and ‘inclusion’ as second-order concepts, relative to the (first-order) universal lens of ‘resilience’, we recognize that—in practice—‘exclusion’ and the right to exclude are not ends in themselves, but means through which owners seek to shore up the opportunities and advantages embedded in ownership and the institution of private property as an ‘asset of resilience’. At the same time, in shifting our sights to ‘property as resilience’, we recognize both the ‘right to include’ and the ‘right to be included’ as mechanisms through which owners and non-owners alike assert resilience claims. By transitioning to the common register of resilience, we can more clearly recognize the universal human vulnerabilities of owners and non-owners alike, and their corresponding claims to property as an asset of resilience. By locating these second-order concepts on the register of ‘resilience’, we can better understand ‘exclusion’ and ‘inclusion’ as complementary tools and techniques for leveraging private property as an ‘asset of resilience’.

**Acknowledgements** Professor Roark receives support through an endowed professorship known as the Louisiana Outside Counsel of Health and Ethics Professorship, which is made available through the State of Louisiana Regents Support Fund.

## Declarations

**Conflict of interest** The authors have no financial or non-financial interests that are directly or indirectly related to the work submitted for publication.

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