

# PROPERTY AND THE PROBLEM OF DISUSE

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## ABSTRACT

*Property often lies idle, even in times of dire need. Property scholars have largely overlooked this enduring social problem. The oversight is surprising, since the same scholars often write that property's purpose is to help people put things to use. Some even contend that the right to exclude is and ought to be property's essential core because it helps serve this purpose. Yet the right to exclude empowers owners to leave resources idle, even during times of need. One influential theory suggests that conflicts over disuse should be addressed by a shift toward governance, in the form of doctrinal, legislative, and customary exceptions to the right to exclude. But when the right to exclude leads to disuse during a time of need, what happens in practice? This Article analyzes how people have repeatedly dealt with the problem of disuse in a major American city. This reveals a practice of brokering, which helps people in need by letting them use idle property. I call this practice the "use fix."*

*The Article introduces and analyzes the use fix through a case study of urban agriculture in Chicago. This presents a paradigmatic example of the four property practices that constitute the use fix: matching idle resources with potential users; mapping the extent and location of disuse; articulating social interests in use; and cultivating a norm against letting resources lie idle. From the Progressive Era to the present, Chicago's reformers have periodically deployed these practices, in various forms, to activate idle land and alleviate poverty and unemployment. Looking further afield, we can observe similar practices in efforts to house people in vacant homes, restart*

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*idled workplaces, and provide space for quarantine and isolation during the Covid-19 pandemic.*

*The use fix sheds new light both on property law and on urban governance. Urban reformers often contend with disuse that is a result of the very property rules that, at least in theory, are often said to promote use. Yet despite its ubiquity and its utility, the use fix has repeatedly failed to become an enduring institution. The political-economic circumstances of its retrenchment help to explain dynamics of governance, and the remarkable resilience of the right to exclude. For urban reformers working to activate idle resources and address urban inequality, the use fix remains a helpful if underappreciated tool. It offers a promising strategy for making cities more productive, equitable, and resilient.*

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## INTRODUCTION

*“Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right.”*

— Thomas Jefferson<sup>1</sup>

Disuse has long posed a problem for property, especially when paired with human need. Imagine Thomas Jefferson walking the streets of Englewood, a neighborhood on Chicago’s south side. What would he see? First, vacant land. In recent years, the City of Chicago held over one thousand vacant lots in Englewood alone; this inventory has accounted for nearly one-tenth of the neighborhood’s total area.<sup>2</sup> Several thousand more

1. THOMAS JEFFERSON TO JAMES MADISON, PAPERS 8:681–82 (Oct. 28, 1785), *reprinted in* 1 THE FOUNDERS’ CONSTITUTION 539, 539 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter JEFFERSON LETTER].

2. Figures are based on author’s analysis of data downloaded from the City of Chicago Data Portal on November 11, 2013, October 3, 2015, and February 23, 2019. *City-Owned Land Inventory*,

vacant lots are privately owned.<sup>3</sup> Jefferson would likely see residents living in poverty. Nearly half of Englewood's households scrape by on income that puts them below the poverty line.<sup>4</sup> And he would meet people out of work. Over one-quarter of Englewood's adult residents are unemployed; others, who have stopped looking for jobs, are not counted in this figure.<sup>5</sup> In short, Jefferson would see a place of disused land and unemployed poor.

How could such a situation fit with property's purpose? To Jefferson, walking in the French countryside in 1785, the answer seemed clear. We allow the earth to be owned, he wrote to James Madison, "for the encouragement of industry."<sup>6</sup> The point of property, put simply, is to help people put resources to use. Yet as he walked among hunting lands reserved for the French king, Jefferson met a woman out of work who could not afford her daily bread. Something was amiss. As Jefferson saw it, uncultivated lands paired with unemployed poor demanded property reform.<sup>7</sup> Today, Jefferson's appeal to natural rights might seem quaint. But his sense that there is something amiss when disuse is paired with human need remains intuitive, almost natural.

Lately, property scholars have embraced the notion that property's purpose is to help people put resources to use.<sup>8</sup> This turn to thinking of

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CHI. DATA PORTAL, <https://data.cityofchicago.org/Community-Economic-Development/City-Owned-Land-Inventory/aksk-kvfp> [<https://perma.cc/LZ9M-5HGR>] (last visited Feb. 22, 2023).

3. CHI. DEP'T OF PLAN. & DEV., GREEN HEALTHY NEIGHBORHOODS, [http://www.cityofchicago.org/city/en/depts/dcd/supp\\_info/green-healthy-neighborhoods.html](http://www.cityofchicago.org/city/en/depts/dcd/supp_info/green-healthy-neighborhoods.html) [<https://perma.cc/7HZL-45U5>] (last visited Feb. 22, 2023) (envisioning a neighborhood sustainable development plan that was adopted by the City of Chicago in 2014).

4. See City of Chi., *Census Data - Selected Socioeconomic Indicators in Chicago, 2008–2012*, CHI. DATA PORTAL (Sept. 12, 2014), <https://data.cityofchicago.org/Health-Human-Services/Census-Data-Selected-socioeconomic-indicators-in-C/kn9c-c2s2> [<https://perma.cc/67UT-MLA7>]. Other residents have likely stopped looking for work and thus are not officially counted as unemployed. In the West Englewood community area, which is often considered part of "Greater Englewood," things are little better: 34% of households fell below the poverty line, and 35% of residents over sixteen years old were unemployed. *Id.*

5. See *id.* The Bureau of Labor Statistics defines people who are actively looking for work as unemployed; those who have not looked for work in the past four weeks and have no job are considered no longer part of the labor force. See *How the Government Measures Unemployment*, U.S. BUREAU LABOR STAT., [https://www.bls.gov/cps/cps\\_htgm.htm](https://www.bls.gov/cps/cps_htgm.htm) [<https://perma.cc/G9FV-Z7MD>] (last visited Feb. 22, 2023).

6. JEFFERSON LETTER, *supra* note 1.

7. *Id.*

8. See, e.g., Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012); JAMES E. PENNER, *THE IDEA OF PROPERTY IN LAW* (1997); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998); Eric R. Claeys, *Property, Concepts, and Functions*, 60 B.C. L. REV. 1, 44–45 (2019); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008); Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869 (2013). Property scholars influenced by Ronald Coase have also focused on use, to the point where Merrill and Smith summarize their approach to property law as "simply a list of use rights in particular resources." Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359 (2001).

property law in terms of use has motivated ongoing debates over whether property law has some essential core—whether that is the right to exclude, or the right to use.<sup>9</sup> Critics of this trend toward essentialism also appeal to property law’s role in promoting use. Some suggest property rules should promote transfers that help maximize social welfare; others contend those rules should serve a diverse range of values and promote access to the things people need for flourishing lives.<sup>10</sup>

Yet even as property theorists have become increasingly interested in use, they have largely overlooked the problem of disuse that seemed so obvious to Jefferson.<sup>11</sup> The oversight is puzzling, since thinking about property law in terms of use would presumably draw attention to its opposite. It is all the more puzzling because the problem has not simply disappeared—as made clear by the landscape of Englewood and many other neighborhoods in American cities.

What accounts for the oversight? Part of the story is property theorists’ tendency to see disuse as just another type of intentional use.<sup>12</sup> This renders the existence of idle resources unproblematic, at least for the proposition that property’s purpose is to help people put things to use. Yet this interpretive sleight of hand obscures the fact that, in practice, people are often troubled by resources lying disused, especially during times of need.

For scholars who argue that the right to exclude is and ought to be the essential core of property law, disuse poses a particular challenge. The right to exclude, after all, is what empowers an owner to leave property lying idle, even when others are in need.<sup>13</sup> Nevertheless, Henry Smith, among others,

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9. See, e.g., Smith, *supra* note 8; PENNER, *supra* note 8; Katz, *supra* note 8; Claeys, *supra* note 8; di Robilant, *supra* note 8.

10. Katrina Wyman describes critics of essentialism as insisting “that in reducing property to a single idea, it understates the extent to which property can, and should, develop a multiplicity of institutions to respond to a plurality of values.” Katrina M. Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183, 203 (2017). Gregory Alexander has been one of the leading proponents of the view that property law should promote human flourishing. See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009). The position that property law should maximize social welfare, meanwhile, has been advanced by scholars of law and economics. See, e.g., Eric A. Posner & E. Glen Weyl, *Property Is Only Another Name for Monopoly*, 9 J. LEGAL ANALYSIS 51 (2017).

11. Not all property scholars, to be sure, have overlooked disuse. See, e.g., Oskar Liivak & Eduardo M. Peñalver, *The Right Not to Use in Property and Patent Law*, 98 CORNELL L. REV. 1437 (2013).

12. See *infra* Section II.B.1.

13. The coercive potential of an owner willing to exercise the right to exclude and prohibit access and use by others has been recognized for at least a century at this point. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). At the same time, an owner does not have a complete right to leave property idle; there is a minimal duty to maintain. Nadav Shoked, *The Duty to Maintain*, 64 DUKE L.J. 437 (2014).

suggests that the right to exclude serves the interest in use.<sup>14</sup> Only when important use conflicts arise, Smith suggests, does the property law regime shift from exclusivity to what he terms “governance.”<sup>15</sup> This catch-all term refers to legislative rules and judicial doctrines that address particular uses and users with competing interests.<sup>16</sup> Since disuse is considered simply another use, then, at least in theory, governance must also address *disuse* conflicts. Yet the move to position the right to exclude as property’s core, while suggesting governance manages conflict at its supposed margins, is a conceptual one, supported by reasoning based on information costs. It does not seek to explain how people deal with disuse in practice.

This Article takes an empirically grounded approach to the problem of disuse. Rather than starting with theory and taking disuse as a residual problem, it asks how urban reformers have in fact dealt with disuse as it has appeared and reappeared in the landscape of a major American city.<sup>17</sup> By comparing past and present projects to let people in need use idle land that they do not own, the Article reveals patterns in the practices by which reformers have addressed the problem of disuse.<sup>18</sup> Working from the ground up both sheds new light on essentialist theories of property, and points to a

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14. Smith, *supra* note 8. In more recent work, Smith has moved away from describing the right to exclude as the core property right, and toward understanding it as part of a complex system characterized more by spectrums and differences in degree than by sharp distinctions between core and periphery. See, e.g., Henry E. Smith, *Property Beyond Flatland*, 10 BRIGHAM-KANNER PROP. RTS. CONF. J. 9 (2021).

15. Smith, *supra* note 8, at 1693.

16. Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S455 (2002).

17. Throughout, I use “reformers” as an expansive and open-ended category. The term refers to people who envision and try to implement changes to how property is used, and to the norms and rules of property law. But reformers’ motivation for these changes has varied dramatically, ranging from radical to reformist to conservative. So too has their social position: reformers may work inside or outside government, and in roles that range from public intellectual to community organizer, nonprofit executive to garden volunteer.

18. Throughout the Article, I refer to “people in need” who are living in landscapes characterized by disuse. I do not mean to suggest that poverty is characterized by a *lack* of the individual attributes necessary to pull oneself out of poverty, or the resources that would be needed to do so. Instead, the account here is a *relational* one. See Matthew Desmond & Bruce Western, *Poverty in America: New Directions and Debates*, 44. ANN. REV. SOCIO. 305, 310 (2018) (“A relational perspective recognizes that poverty is not simply the byproduct of one’s attributes or historical outcomes but is also actively produced through unequal relationships between the financially secure and insecure. A relational perspective on inequality studies the bonds or transactions between actors or organizations occupying different positions in a social hierarchy . . . . By analyzing processes and transactions between connected groups that are unequal in power or capital, a relational perspective asserts that the drivers of poverty cannot be understood by analyzing the poor in isolation.” (citations omitted)). Just as Jefferson noted available resources that owners prevented people in need from using, see JEFFERSON LETTER, *supra* note 1, the story throughout the article is of resources that exist but are disused, and of people who might be eager to use them. The question is whether the social and legal relations between owners, potential users, and resources is one that produces exclusion and disuse, or access and use.

promising if underappreciated strategy for putting idle urban resources to productive use.

America's cities, it turns out, help explain how people deal with disuse. The heart of the Article is a case study that reveals how social reformers in Chicago have periodically worked to solve the problem of uncultivated lands and unemployed poor. Drawing on archival documents and five years observing, interviewing, and partnering with people working to make land available for farms and gardens, I compare historical moments when reformers made unused land available for urban agriculture. Rather than telling this story from past to present, I proceed analytically, identifying patterns in reformers' practices across different periods.

The case study reveals four property practices that I refer to collectively as the "use fix." Through these linked practices, reformers tackle the problem of disuse by brokering access and use of idle land by people in need. First, they create organizations to match idle land with people in need.<sup>19</sup> Second, they map the location and extent of disused land.<sup>20</sup> Third, they articulate the social interests in use.<sup>21</sup> Finally, they work to cultivate a social norm against leaving land lying idle.<sup>22</sup>

The case study of urban agriculture in Chicago offers a paradigmatic example of how reformers have applied the use fix to vacant land. But the Article also looks beyond Chicago, and beyond land. I explain how reformers have developed similar strategies to reactivate vacant housing, restart idled workplaces, and provide places for isolation and quarantine during the Covid-19 pandemic.<sup>23</sup>

I draw lessons based on the case study for both property theory and urban governance. When the right to exclude results in widespread disuse, reformers often turn first to the use fix, rather than to legislative or doctrinal projects to directly limit the right to exclude.<sup>24</sup> By demonstrating the value of letting people in need put disused resources to work, however, the use fix has indirectly inspired proposals to limit that right. Such proposals, as the case study illustrates, have been routinely and decisively blocked. The political-economic circumstances of why the use fix has failed to become entrenched help to explain the remarkable resilience of the right to exclude—despite its propensity to leave resources lying idle even during times of need. If the story that places the right to exclude as property's

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19. See *infra* Section III.A.1.

20. See *infra* Section III.A.2.

21. See *infra* Section III.A.3.

22. See *infra* Section III.A.4.

23. See *infra* Section III.B.

24. Doctrinal and legislative fixes are the focus of much work by pluralist scholars of property, as well as property scholars writing in the law and economics tradition. See, e.g., Alexander, *supra* note 10; Posner & Weyl, *supra* note 10.

essential core is a functionalist account of information-cost reduction,<sup>25</sup> what emerges here is a story of periodic political-economic struggle. In the face of rules that treat land, food, and other resources as commodities, reformers have struggled to create and defend projects that provide social protection from market forces.

The use fix offers a way to promote productive use of a city's resources. The case study reveals the deep roots of this form of property-based local governance, and how it remains with us today.<sup>26</sup> Because cities' public powers to redistribute via tax and transfer are typically quite constrained, local officials have explored ways to reallocate resources by other means. The use fix offers an alternative means of redistribution, helping people in need by granting them use of idle property. Whether applied to vacant land or other idle resources, the use fix is a promising strategy for urban reformers working to promote productivity, equity, and resilience.

The Article proceeds in three parts. Part I describes the recent trend toward understanding property in terms of use, and accounts for why this trend has largely overlooked the problem of disuse. Part II presents a case study of the use fix, focused on efforts to grant land access for urban agriculture in Chicago. It then briefly examines instances of the use fix beyond vacant land and beyond Chicago. Part III draws lessons for property theory and urban governance based on seeing property and cities the way reformers often have: through the lens of disuse.

### I. PROPERTY, USE, AND DISUSE

Legal scholars lately have turned to understanding property's purpose in terms of use. Yet despite this turn to seeing the function of property law as helping people put things to use, scholars have not tended to see disuse as problematic. This Part explores why this is so. I focus on the theoretical account that places the right to exclude as property's essential core and posits a shift to governance as the response to conflicts over use (and disuse). To understand what governance involves in such situations, we need empirical accounts of how people actually deal with the problem of disuse in practice.

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25. Smith, *supra* note 8.

26. The term "property-based governance" is coined by Carol M. Rose. Carol M. Rose, *Public Property, Old and New*, 79 NW. U. L. REV. 216, 219 (1984) (reviewing HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870* (1983)).



### A. *Use as Property's Purpose*

In recent years, lively debates in property theory have seen scholars disagree over fundamental questions. Does property law have an essential structure? If so, what might that be, and why? If not, how might plural values be served by treating property rights and duties like sticks in a bundle, which we might divide, then re-bundle to serve social ends? The definitional debates have become familiar. As they have, the answers that scholars offer have divided into theoretical schools. One group, which Katrina Wyman has helpfully termed “essentialists,” has focused on defining property law’s core essence. Essentialists divide over whether property law’s core right is the right to exclude or the right to determine use. Meanwhile, a second group, which Nadav Shoked and David Dana have described as property “pluralists,” has argued that property law serves multiple social functions.<sup>27</sup>

Amid these debates, property scholars tend to agree that property’s purpose is to help people put things to use. Henry Smith’s influential writing on the right to exclude as the essential core of property law provides an entry point to surveying this turn toward use. For Smith, “There is no interest in exclusion *per se*”; the right to exclude simply “serve[s] the interest in use.”<sup>28</sup> Here Smith builds on the work of J.E. Penner, who argues that the centrality of the right to exclude in property law derives from its power to give owners the ability to use things, free of interference by nonowners.<sup>29</sup> Even as the question of exclusivity has come to define debates among essentialists, the stance that exclusion is itself the purpose of property—conceptually prior to the right to use—has become an outlier.<sup>30</sup>

Other essentialists contend that the right to use, or to determine a thing’s use, defines property law’s conceptual core. Larissa Katz distinguishes the exclusive right to set the agenda for how something is used from the right to exclude others from using that thing.<sup>31</sup> And Eric Claeys concludes that “the function of property rights is to facilitate the beneficial use of

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27. See Wyman, *supra* note 10; David A. Dana & Nadav Shoked, *Property's Edges*, 60 B.C. L. REV. 753, 766 (2019).

28. Smith, *supra* note 8, at 1693.

29. PENNER, *supra* note 8, at 71–72.

30. As Wyman notes, Arthur Ripstein is outside the mainstream in arguing for the priority of exclusion over use. Wyman, *supra* note 10, at 199 n.49 (quoting Arthur Ripstein, *Possession and Use*, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 156 (James Penner & Henry E. Smith eds., 2013)).

31. Katz, *supra* note 8, at 275 (“[Property law’s] central concern is not the exclusion of all nonowners from the owned thing but, rather, the preservation of the owner’s position as the exclusive agenda setter for the owned thing. So long as others – whether they be holders of subsidiary property rights or strangers to the property – act in a way that is consistent with the owner’s agenda, they pose no threat to the owner’s exclusive position as agenda setter.”).

resources.”<sup>32</sup> Similarly, Anna di Robilant places the right to use at the center of a “tree” theory of property, which blends the essentialist impulse to define property law’s core with the pluralist instinct to see a divisible bundle of sticks.<sup>33</sup> In this vision, “[t]he trunk of the tree is the owner’s entitlement to control the use of a resource, mindful of property’s ‘social function.’”<sup>34</sup> Whether as the core right itself or as justification for centering the right to exclude, use has become central to the essentialist project.<sup>35</sup>

### B. *Dealing with Disuse, in Theory*

Despite this turn to understand property’s purpose in terms of use, scholars have largely overlooked disuse—especially the problem of disuse paired with human need.<sup>36</sup> This flows from seeing disuse as simply another type of intentional use. In Smith’s influential account, conflicts over disuse are presented as matters for resolution by governance.

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32. Claey's, *supra* note 8, at 45.

33. di Robilant, *supra* note 8.

34. *Id.* at 872.

35. The connection between property law and use also figures in nonessentialist projects. Pluralists have promoted a vision of property that supports human flourishing. *See, e.g.*, Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 744 (2009) (“[P]roperty laws should promote the ability of each person to obtain the material resources necessary for full social and political participation.”). From this perspective, disuse becomes a problem of democratic order, to the extent that it may unilaterally deprive nonowners of the means of flourishing. Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1319–21 (2014) (describing disused land in downtown Boston as a problem of democratic order that poses the question of when the government should exercise eminent domain and transfer to an owner who could put it to use). Another group of scholars writing in the tradition of law and economics take property law as a means of maximizing social welfare. They tend to ask how ownership (or use rights) might be transferred to people who could best put resources to use. *See, e.g.*, Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); Posner & Weyl, *supra* note 10; Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355 (2010).

36. This section focuses on essentialist theories of property, since they have placed exclusion at property’s core based on a contention that this serves the interest in use. Pluralists, for their part, have paid somewhat more attention to disuse. *See, e.g.*, Liivak & Peñalver, *supra* note 11 (noting that doctrines of nuisance, necessity, and adverse possession limit an owner’s ability to leave property unused, or to exclude nonowners under any circumstances, without having to take the consequences into account); Shoked, *supra* note 13 (arguing that various doctrines create a broad duty that owners maintain land to a minimum standard, such that it does not impose harms on others); Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1172–77 (2007).

Pluralist attention to disuse, however, has been critiqued for justifying doctrinal limitations on the right to exclude on the basis of morality or efficiency, rather than focusing on human need and maldistribution. *See, e.g.*, Laura S. Underkuffler, *The Politics of Property and Need*, 20 CORNELL J.L. & PUB. POL’Y 363, 365 (2010); Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 112 (2013).

### 1. *Disuse as Use*

Interpreting disuse as one possible use of a thing renders unproblematic an owner's power to leave resources lying idle.<sup>37</sup> Folding disuse into the category of use undergirds essentialist property theory. Penner defines "use" broadly enough to include simply waiting for an asset's price to rise—a use which others might reasonably interpret as disuse.<sup>38</sup> The right to exclude serves the interest in use by protecting an owner's choice of how to use her property—whether that means doing something with it or doing nothing.

Intentionality becomes central to how we perceive disuse. Katz, for example, argues that an owner's exclusive right to set the agenda (or determine the use) for a thing defines property law's essence. An owner may, by these terms, set an agenda that involves *not* putting something to use. A problem arises, however, when owners do not consciously intend to leave things lying idle.<sup>39</sup> In one such case, Katz notes, a court observed a "hint of artificiality, and even mysticism, in the notion of a person 'using' land by doing nothing other than to hold it in the hope of a profitable sale at some indefinite time in the future."<sup>40</sup> Katz concludes that "[t]he problem here might be cast simply as the absence of any real agenda."<sup>41</sup> From this angle, disuse is unproblematic so long as it forms part of an owner's conscious agenda.<sup>42</sup>

### 2. *Governance and (Dis)use Conflicts*

Whether defined as the right to exclude or the exclusive right to set an agenda, the essentialist position is that exclusivity promotes the interest in use. This is so because it permits an owner to decide when to put something to use, and when not to.

But *whose* interest in use is being served? Here, there is some ambiguity. Smith and Merrill, for example, have articulated the connection between the right to exclude to the interest in use in slightly different ways. Exclusion

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37. The interpretation also fits with common sense, because in choosing what use to make of a thing, an owner may simply opt to leave it lying idle until later.

38. PENNER, *supra* note 8, at 70–71.

39. Katz notes this issue in discussing adverse possession. Katz, *supra* note 8, at 291 n.50.

40. *Bradford Invs. (1963) Ltd. v. Fama* (2005), 77 O.R. 3d 127, para. 99 (Can. Ont. Sup. Ct. J.).

41. Katz, *supra* note 8, at 291 n.50.

42. The interpretation of disuse as a form of use is not limited to essentialist scholars. In analyzing the right not to use property, Oskar Liivak and Eduardo Peñalver observe that "[t]angible property law looks at nonuse with a balanced eye that aims to make room for a great deal of owner control over the timing of use." Liivak & Peñalver, *supra* note 11, at 1492. This perspective appreciates nonuse of a thing on roughly the same terms as use itself. The appropriateness of either nonuse or use, as we will see below, is to be judged in relation to whether it harms others, or others' ability to use their own property.

variously may “relate to *our* interest in using things,”<sup>43</sup> or “serve *the* interest in use,”<sup>44</sup> or “promote the effective use of things.”<sup>45</sup> To support their argument, Merrill and Smith cite Penner’s 1997 book, which for its part, refers to “the” interest in use.<sup>46</sup> The shift between “the” interest in use and “our” interest in use begs the question: Are we talking about the interest of owners, about “our” interest *as* owners (assuming we are such owners), or our *societal* interest (which might be understood as the aggregation of the individual interests of owners and nonowners)?<sup>47</sup>

As the case study in the next Part suggests, reformers have repeatedly seen individual owners’ interest in leaving their property to lie disused as conflicting with a societal interest in ensuring that vital resources are deployed. Smith offers an approach for how property law might resolve such conflicts—though because he takes disuse as a type of use, he considers conflicts *between* uses rather than conflicts *over disuse*.<sup>48</sup> When the stakes of allocating particular uses are high, Smith explains, people will turn to options other than exclusion.<sup>49</sup> He brands these options as “governance,” a concept that encompasses everything from contractual arrangements, such as covenants, to doctrinal exceptions to an owner’s right to exclude, to complex systems of norms that govern common pool resources.<sup>50</sup> Although “governance” covers a diverse set of rules, norms,

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43. Smith, *supra* note 8, at 1693 (emphasis added).

44. *Id.* (emphasis added).

45. Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 4 (2014).

46. Merrill, *supra* note 8, at 734 n.10 (citing PENNER, *supra* note 8, at 71); Merrill, *supra* note 45, at 4 (citing PENNER, *supra* note 8, at 71); Smith, *supra* note 8, at 1693 n.5 (citing PENNER, *supra* note 8, at 70); PENNER, *supra* note 8, at 70–71.

47. The reference to both “our interest in using things” and “the interest in use” in these accounts renders ambiguous how precisely the right to exclude promotes use. One interpretation might be that the right to exclude empowers individual owners to determine the best use of their property (including nonuse), which ultimately serves our collective, societal interest in putting things to use. By that account, the right to exclude would create the individual incentives needed to promote investment and development, by leaving the choice of when and how to use resources up to their owners.

Whether giving individual owners the freedom to determine use and nonuse does in fact serve broader societal interests is an empirical, sociolegal question, which would require evidence to answer. Legal geographer Nicholas Blomley has made a similar point concerning Smith and Merrill’s related hypothesis that boundaries communicate simple messages about exclusion. In that case, Blomley has argued that sociolegal evidence reveals a far more complex and ambiguous picture. Nicholas Blomley, *The Boundaries of Property: Complexity, Relationality, and Spatiality*, 50 L. & SOC’Y REV. 224 (2016).

An empirical account would also require specifying whose interests in use are served by exclusion, and how. Jonathan Klick and Gideon Parchomovsky have sought to measure the value of the right to exclude, which might be understood as one way of understanding the (economic) interests vindicated by its existence; however, they acknowledge that in doing so they have little way to quantify the value of the interests served by creating exceptions to exclusivity. See Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. PA. L. REV. 917, 922 (2017).

48. See Smith, *supra* note 8, at 1693.

49. See *id.*

50. See *id.*

and contractual arrangements, Smith is clear that these means of addressing use conflicts constitute a “periphery” in relation to the core right to exclude.<sup>51</sup>

### 3. *Dealing with Disuse, in Practice*

“[T]he right to exclude is absolute,” Elizabeth Glazer has observed, “except when it is not.”<sup>52</sup> Similarly, the right to exclude might be said to serve the interest in use, except when it does not. Moments when it fails to serve that interest could present instances of the “important potential use conflict[s]” that Smith contemplates. At such moments he notes that “law specifies uses more directly, either through private law (property governance regimes, torts, contracts), public regulation, or custom.”<sup>53</sup>

The proposition that people shift to governance when the right to exclude fails to deliver presents an empirical puzzle. How does that shift happen? Under what circumstances do people recognize use conflicts—or conflicts over disuse—as important? How do they work to bring about new regimes, regulations, or customs? And what prevents governance from becoming the norm if exclusivity repeatedly fails to help people put things to use? Put differently: Why is the right to exclude so resilient, despite its failings?

Existing theories offer some possible answers. Smith suggests that courts and parties to disputes can (and should) do a fair amount of tinkering, limited by the *numerus clausus* principle.<sup>54</sup> For more basic changes to the structure of property, we should expect the legislature to step in.<sup>55</sup> However, because information costs associated with governance regimes are presumed to be higher than those associated with exclusivity,<sup>56</sup> the regime might be expected to shift back from governance when use conflicts become less salient.<sup>57</sup>

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51. Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 964–65 (2009).

52. Elizabeth M. Glazer, Response, *Rule of (Out)Law: Property’s Contingent Right to Exclude*, 156 U. PA. L. REV. PENNUMBRA 331, 339 (2008).

53. Smith, *supra* note 8, at 1693.

54. *See id.* at 1724.

55. *See id.*

56. *See id.* at 1708.

57. Pluralist theorists, for their part, would see disuse paired with need as an example of the right to exclude failing to further human flourishing. That would call for further recognition and incorporation of social-obligation norms into property law. We might see property outlaws test the limits of how existing rules serve human needs. But ultimately, we would look for courts and legislatures to adapt doctrine or pass legislation to limit the right to exclude.

The case study that follows asks how people deal with disuse before conflicts generate legislative or doctrinal fixes.<sup>58</sup> It turns out, there are other practices for putting idle resources to use, despite exclusivity being the default rule. Tracing how urban social reformers have repeatedly sought to address the problem of disuse helps identify those practices—and, by attending to property law in action, reveals how people deal with disuse conflicts.<sup>59</sup> This points to other explanations for how and why exclusivity remains resilient despite its propensity to leave vital resources lying disused.

## II. THE USE FIX

When urban land lies disused, reformers in and out of local government have repeatedly tried to broker a solution. Granting the poor and unemployed the ability to use vacant land offers a tempting way to provide social supports with less resort to taxation. During the Progressive Era and the Great Depression, reformers hailed the opening of disused land as a way to support people in need. As urban farms and gardens have reappeared in America's cities since the 1990s, this practice of brokering has received relatively less attention.

Across these periods, what brokering looks like has varied. But the basic mechanism remains the same: grant the poor and unemployed the ability to use an otherwise disused resource. I call this the “use fix.” As a strategy of redistribution, it lets people in need use, but not own, idle resources. This alters who can use urban landscapes where the right to exclude otherwise empowers owners to leave their land lying idle.

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58. As sociologists of law have long understood, many injurious experiences are never transformed into grievances, and many grievances do not become disputes that actors seek to resolve in courts. See, e.g., William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631, 631 (1980).

59. Methodologically, the case study extends work by the comparative-historical sociologist Jeffrey Haydu that examines how actors have addressed enduring problems through sequential periods of pragmatic problem-solving. See generally Jeffrey Haydu, *Making Use of the Past: Time Periods as Cases to Compare and as Sequences of Problem Solving*, 104 AM. J. SOCIO. 339 (1998). This is not the first study that has suggested local government could play a special role in making idle property more useful. Michael Heller, in explaining how the tragedy of the anticommons can result in disuse, points to how local governments might redefine and reallocate property rights. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 641 (1998). But, ultimately, Heller is doubtful about the prospects for local reform, because existing rights-holders would remain invested in the existing property regime, and demand compensation that fiscally constrained local governments would struggle to provide. See *id.* Urban reformers in the United States have not had to grapple with the anticommons to the same degree as reformers in formerly socialist societies following paths to privatization, but they are still confronted by residents who live in need, surrounded by disused resources. Here, however, the situation might be less intractable than Heller's tragedy of the anticommons. The problem is not that many overlapping rights must be disentangled and rebundled, but rather that individual owners have no duty to put their property to use, or let people in need make use of it.

### A. *Four Property Practices*

The experience of farms and gardens periodically emerging and disappearing from the landscape of America's cities reveals a set of practices that reformers have repeatedly deployed to make disused property socially useful. This has involved working with the law rather than against it,<sup>60</sup> by setting up organizations to match idle resources and potential users. In the process, reformers map just how much property is lying idle—and assert that putting it to use will help both poor and unemployed residents, and the broader community. As reformers articulate the social interests in putting property to use, they also envision how temporary practices that activate disused land might be made permanent.

This Part identifies patterns in how reformers have diagnosed and sought to remedy the problem of disuse. Four practices stand out: creating organizations for brokering the use of idle property; mapping the extent and location of disused land; defining social interests in use; and cultivating a social norm against leaving land lying disused. I examine each practice in turn, comparing the forms in which it emerged during the Progressive Era and the Great Depression, and appears to be reemerging over the past two decades.<sup>61</sup>

#### 1. *Brokering Organizations*

During each of the moments when farms and gardens have sprung up in America's cities, new organizations facilitated their emergence.<sup>62</sup> Organizational forms have varied, but the basic approach has been similar.

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60. PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* 108–220 (1998) (distinguishing forms of legal consciousness that work with the law from those that work against it).

61. The case study draws on original archival research, and five years of ethnographic fieldwork in Chicago. The historical accounts draw on documents from archival collections in Chicago, as well as the U.S. National Archives, the Wisconsin State Historical Society, and the Michigan State University Archives. Contemporary data draws on participant observation and interviews with actors involved in the ongoing process of developing land tenure institutions for urban farms and gardens. From 2011 to 2015, this included participatory research with the Chicago Food Policy Action Council; interviews with growers, urban agriculture policy advocates, and municipal officials; and observations of and participation in meetings in Chicago, Detroit, New York, Pittsburgh, and Baltimore concerning land access strategies for urban farms and gardens.

62. For more detail about the land access projects of the Progressive Era and the Great Depression discussed in this section, see Nate Ela, *Use-Based Welfare: Property Experiments in Chicago, 1895–1935*, 43 *SOC. SCI. HIST.* 319 (2019).

Reformers create some entity—private, public, or hybrid—to match unused property with potential users.

*The Progressive Era*—Between 1893 and the First World War, vacant lot gardening associations emerged in cities around the United States.<sup>63</sup> Many found inspiration in the project set up by Detroit Mayor Hazen Pingree in the wake of the Panic of 1893. Pingree’s program let the unemployed use land offered by private owners; the project turned 430 acres of vacant lots into gardens. Pingree promised this blend of public coordination and private charity would reduce the burden on the city’s taxpayers, and ordered the poor commission to strike from its rolls anyone who did not apply for a garden.<sup>64</sup> Word of “Pingree’s Potato Patches” spread quickly. Vacant lot cultivation associations sprung up in New York, Philadelphia, and beyond. Reformers hailed how gardens let the unemployed help themselves.<sup>65</sup>

In 1895, the *Chicago Tribune* solicited an article from Pingree, describing Detroit’s garden programs.<sup>66</sup> The Chicago Bureau of Charities launched a project to let the poor garden in vacant lots.<sup>67</sup> Growers formed a club that met at the Hull House social settlement, one of the founding sites of social work in America.<sup>68</sup> Although the vacant lot gardening project withered after a few seasons, the landless gardeners kept gathering at Hull House.<sup>69</sup>

In 1909, Hull House resident Laura Dainty Pelham founded the City Gardens Association (CGA), to make land available to members of the People’s Friendly Club. She appealed for land and money, and received offers of lots scattered around Chicago.<sup>70</sup> International Harvester, one of the world’s largest manufacturers of tractors and farm machines, offered ninety acres next to its flagship factory in Chicago. The CGA picked twenty acres and set up its first gardens.<sup>71</sup>

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63. LAURA J. LAWSON, *CITY BOUNTIFUL: A CENTURY OF COMMUNITY GARDENING IN AMERICA* 21 (2005).

64. Joseph Stanhope Cialdella, *A Landscape of Ruin and Repair: Parks, Potatoes, and Detroit’s Environmental Past, 1879-1900*, 40 *MICH. HIST. REV.* 49, 61–63 (2014).

65. See BOLTON HALL, *A LITTLE LAND AND A LIVING*, 95–104 (1908); MARY FELS, JOSEPH FELS: HIS LIFE-WORK 21–24 (1916); LAWSON, *supra* note 63, at 31–34.

66. H. S. Pingree, *Food for the Poor: Pingree’s “Detroit Plan” Lets Them Raise It for Themselves*, *CHI. DAILY TRIB.*, Apr. 1, 1895, at 4.

67. BUREAU OF ASSOCIATED CHARITIES OF THE CITY OF CHI., *FOURTH ANNUAL REPORT* 16–17 (1898).

68. Laura Dainty Pelham, *The Chicago City Gardens Association*, 22 *SURVEY* 423, 423 (1909).

69. See *The People’s Friendly Club*, *HULL-HOUSE BULL.* (Hull-House, Chi., Ill.) no. 1, 1905–1906 at 14, 14.

70. Pelham, *supra* note 68, at 423–24.

71. *Poor of City Get 90 Acres to Till*, *CHI. DAILY TRIB.*, Mar. 24, 1909, at 7.



Each spring, families lined up at Hull House, paying \$1.50—roughly \$40 in today’s dollars<sup>72</sup>—to claim an eighth-acre plot. The CGA acted as a broker, offering licenses to use Harvester’s land. “The gardener virtually possesses a ‘deed’ to the land,” the association reported, “but must keep its condition up to a required standard.” Gardeners were “subject to dispossession when the owner wants to use the land.”<sup>73</sup>

The Harvester Garden set a model that spread across Chicago. Within a few years, it migrated from private to public land. In 1910, the Western Electric company offered up land; in 1912, the CGA gained access to ten acres that were part of a family estate.<sup>74</sup> That May, the *Tribune* published a letter from an out-of-state subscriber, offering up vacant lots. Pelham used the letter to launch a campaign to recruit more land.<sup>75</sup> By 1913, city agencies joined the effort. The directors of Chicago’s park districts discussed creating demonstration gardens. Pelham hoped these would “encourage the general utilization of waste spaces for growing vegetables.”<sup>76</sup> In 1915, the city’s Department of Welfare made the CGA responsible for cataloging offers of land. During a recession that year, the Sanitary District offered thirty-five hundred acres, some of which were allotted for small farms.<sup>77</sup> Noting the successful experience of small farms near European cities, the *Chicago Tribune* donated money for the experiment.<sup>78</sup>

In the spring of 1917, after the United States entered the war in Europe, the city moved brokering in-house. Rather than having the CGA continue its efforts to match public and private land with gardeners, a city gardens bureau was set up in the mayor’s office in City Hall.<sup>79</sup> Bureau officials worked to make as much land available as possible for gardens, facing concerns that the city could face food shortages and even bread riots come fall.<sup>80</sup> The garden bureau initially enjoyed strong support from the city’s

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72. Samuel H. Williamson, *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount, 1774 to Present*, MEASURINGWORTH, <http://www.measuringworth.com/calculators/uscompare> [https://perma.cc/K5KZ-4BPM] (last visited Feb. 22, 2023).

73. “Back to the Soil” Cure: Bringing the Wholesome Influence of the Farm to the Back Yards of the City, CHI. SUNDAY TRIB., June 5, 1910, at G4.

74. See *Gardens Given to the Poor*, CHI. DAILY TRIB., Apr. 4, 1910, at 7; *Toilers to Farm Empty City Lots*, CHI. DAILY TRIB., Apr. 15, 1912, at 22.

75. *City “Farms” for the Poor*, CHI. SUNDAY TRIB., May 26, 1912, at F12.

76. Henry M. Hyde, *Sample Gardens in Public Parks for City ‘Farmer,’* CHI. DAILY TRIB., Oct. 3, 1913, at 1.

77. Henry M. Hyde, *Plans to Put Idle on Farms Are Under Way*, CHI. DAILY TRIB., Feb. 18, 1915, at 1.

78. Henry M. Hyde, *Sanitary Body Quick to Vote Small Farms*, CHI. DAILY TRIB., Mar. 19, 1915, at 1.

79. *Gardens Get Mayor’s Room*, CHI. NEWS, March 21, 1917.

80. *US Facing Famine, Is Warning: Thompson Declares Every Available Inch of Ground Must Be Planted to Avert Suffering*, CHI. AM., April 4, 1917; *Predicts Riots; Says U.S. Will Dole Out Food*, CHI. DAILY TRIB., April 14, 1917, at 3.

business community.<sup>81</sup> But as we will see below, this changed when a bureau staffer suggested that the city conscript idle land, or simply let gardeners use it without owners' permission.<sup>82</sup>

*The Great Depression*—Gardens and the brokering of access to idle land returned to Chicago's landscape during the early years of the Great Depression. With the City Gardens Association no longer in existence, Chicago's firms and government officials experimented with new ways to match growers with land.<sup>83</sup> They made two significant changes. First, they brokered land access themselves, rather than partnering with a community-based organization. Second, firms provided gardens for their own laid-off workers, rather than Chicagoans generally.

International Harvester emerged as a leader in company gardening, both in Chicago and nationwide.<sup>84</sup> The company maintained tight oversight over the gardens. Its extension department prepared seed packets for distribution and created plans for planting. Gardeners could only grow vegetables that could be canned. People on government cash relief received seeds for free, but employees receiving unemployment relief loans from Harvester were charged.<sup>85</sup> While gardening gave a worker "an outlet for the worker's latent activity," it also helped the company keep him integrated into the management hierarchy, despite being unemployed.<sup>86</sup> By giving its long-term employees access to land, Harvester helped ensure that they would be nearby and still connected to the company when the economy finally improved and it could rehire laid-off workers.

The company maintained strict control over the gardeners. "Each gardener must care for his plot in a way satisfactory to those in charge," an article in the company magazine noted. "Neglect is not tolerated."<sup>87</sup> A newspaper feature in the fall of 1932 observed that "[p]enalties for shirking ranged from a dressing down by the foreman, to the withdrawal of a man's garden privileges."<sup>88</sup> Given that the gardens were often far from home—some growers traveled twenty miles each way—gardeners had to invest

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81. *Business Men Aid Garden Idea*, CHI. HERALD, March 23, 1917.

82. *See infra* Section II.A.4.

83. Pelham died in 1924. *See Hull House Pays Last Tribute to Laura D. Pelham*, CHI. DAILY TRIB., Jan. 26, 1924. Jensen, after leaving the park district, turned to work for private clients. *See* ROBERT E. GRESE, *JENS JENSEN: MAKER OF NATURAL PARKS AND GARDENS* 94 (1992).

84. U.S. DEP'T OF COM., *SUBSISTENCE GARDENS* 1–4 (1932).

85. L. A. Hawkins, *Harvester Employe [sic] Garden Project*, Harvester Agric. Extension Dep't 1 (on file with Wisconsin Historical Society in McCormick-International Harvester collection, Box 738).

86. *See id.*

87. *Harvester's Relief and Garden Plans*, 3 INDUS. RELS. 398, 402 (1932).

88. Ronald Millar, *It's Harvest Time for Chicago's New Army of City Farmers*, SUNDAY TIMES, CHI., Oct. 9, 1932, at 10.

time and effort to prove they were not neglecting their plot.<sup>89</sup>

Like other cities, Chicago also saw the creation of public relief gardens during the Depression. With assistance from Harvester, Cook County set up a subsistence gardens service which found land for gardens on Chicago's outskirts.<sup>90</sup> The office recruited people from the county relief rolls to take up gardening; paid for transit fares to the end of the line, where gardeners could ride in trucks to the fields; and trained and supervised gardeners.<sup>91</sup> As we will see in the next section, it was challenging to match available land with potential users. But during the early years of the Depression, the program gave thousands of Chicagoans access to land and inspired visions of how the practice might be made permanent.

*Contemporary Reemergence*—Since the 1990s, reformers in U.S. cities have returned to gardens and farms as a way to both put vacant land to use and support people facing poverty and unemployment. This time around, they have turned to nonprofit urban farms and land trusts to broker use of idle land.

Unlike previous periods, today's nonprofit farms do not pitch agriculture as a basis for household subsistence. Growers may take home some food for themselves, but Chicago's leading nonprofit farms—Growing Home, the Urban Growers Collective, and Windy City Harvest—are mainly dedicated to producing crops for donations and market sales.<sup>92</sup> These sales have often been divided between expensive downtown restaurants eager to present hyperlocal produce, and neighborhood farmers markets and stands, where

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89. *See id.*

90. COOK CNTY. SUBSISTENCE GARDEN SERV., ANNUAL REPORT 1934 (1935).

91. *See id.*

92. *See Our Farm's History*, GROWING HOME, <https://www.growinghomeinc.org/our-farms/> [<https://perma.cc/LB37-FEF3>] (last visited Feb. 22, 2023) (“Since our first year of farming, in 2002, we have operated our farms as a social enterprise, bringing in approximately 10% of our annual revenues through produce sales.”).

the same produce is more affordable.<sup>93</sup> One farm, Chicago FarmWorks, grows exclusively for food pantries.<sup>94</sup>

Growers on these farms generally earn a stipend.<sup>95</sup> Gardeners during the Progressive Era could make money by selling their surplus, but they paid a nominal sum to use the land.<sup>96</sup> During the Depression, gardeners had money subtracted from their cash relief to use a plot and could not sell what they grew.<sup>97</sup> Today, organizations such as Growing Home and Urban Growers Collective use public funding for adult job training and youth summer programs to pay the teens and adults who work the land on urban farms.<sup>98</sup>

These organizations act as brokers in two senses. They broker rights to use and benefit from land, though unlike organizations during prior periods, the point is not simply or even primarily to let users consume the fruits of mixing their labor with idle land. This is because many urban farms today also broker access to social services and income supports. When you work on a farm you may get access to land, but along with it you get a stipend and help in doing things like learning job skills or sealing a criminal record. This second type of brokering aligns with the broader shift since the 1990s toward welfare supports that come as social services provided by community-based organizations, rather than as cash transfers provided by state agencies.<sup>99</sup>

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93. See, e.g., Dave Cantor, *Inside the Chicago Urban Farm Cultivating the Means to Fight Food Insecurity*, EATER CHI. (Aug. 30, 2021, 2:40 PM), <https://chicago.eater.com/2021/8/30/22648603/growing-home-chicago-food-depository-south-side-urban-farm-skills-training> [<https://perma.cc/3BNR-ZHX8>] (describing how Growing Home sold 80% of its produce outside of Englewood until around 2020).

94. Pascal Sabino, *A West Side Urban Farm that Grows Produce for Food Pantries Is Poised to Expand*, BLOCK CLUB CHI. (Nov. 4, 2021, 7:45 PM), <https://blockclubchicago.org/2021/11/04/a-west-side-urban-farm-that-grows-produce-for-food-pantries-is-poised-to-grow/> [<https://perma.cc/T8FD-MUC6>].

95. For example, in 2013, Growing Home trainees earned up to \$3,500 over the course of a fourteen-week program. 2014 *Annual Report: Employment*, GROWING HOME, <http://growinghomeinc.org/report2014/employment.html> [<https://perma.cc/E2Z6-UXYH>] (last visited Feb. 22, 2023). This equates to \$6.25/hour—well below the federal minimum wage of 7.25/hour. See, e.g., 29 U.S.C. § 206.

96. See “Back to the Soil” Cure, *supra* note 73.

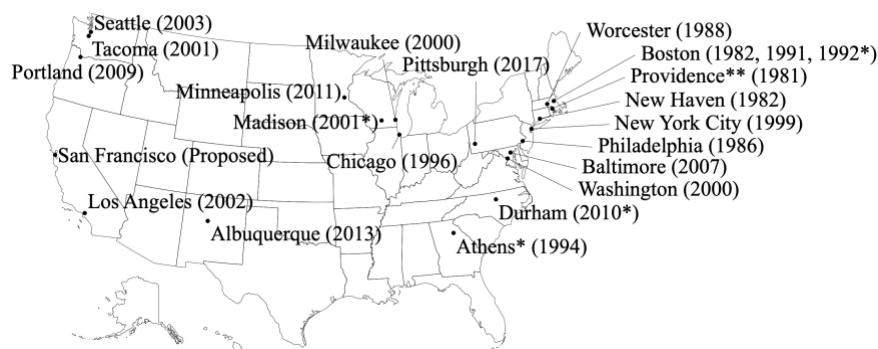
97. COOK CNTY. SUBSISTENCE GARDEN SERV., *supra* note 90.

98. See 2014 ANNUAL REPORT: EMPLOYMENT, *supra* note 95; see also *Our Impact*, URB. GROWERS COLLECTIVE, <https://urbangrowerscollective.org/our-impacts/> [<https://perma.cc/XB2H-MFAG>] (last visited Feb. 22, 2023) (noting \$81,610 was paid in Youth Corps stipends to 188 teens in 2021).

99. STEVEN RATHGEB SMITH & MICHAEL LIPSKY, NONPROFITS FOR HIRE, at vii–viii (1993); see generally LESTER M. SALAMON, PARTNERS IN PUBLIC SERVICE: GOVERNMENT-NONPROFIT RELATIONS IN THE MODERN WELFARE STATE (1995). Growing Home has received major grants from the City of Chicago Department of Family and Support Services and the Illinois Department of Corrections, in addition to a wide range of foundations. See 2014 *Annual Report: Private, Corporate, and Government Grants*, GROWING HOME, <http://growinghomeinc.org/report2014/grants.html> [<https://perma.cc/9XE7-EPGN>] (last visited Feb. 22, 2023); GROWING HOME, ANNUAL REPORT 2012 – 2013 at 11,

In Chicago and beyond, people are increasingly looking to land trusts as vehicles for conserving land for urban agriculture.<sup>100</sup> Since the 1980s, activists have brought into the city an organizational form originally developed to conserve rural and suburban open lands. After emerging first in New England, urban agriculture land trusts have sprouted up in cities around the country.

FIGURE 1. DIFFUSION OF URBAN AGRICULTURE LAND TRUSTS, 1981–2017.



Dates refer to date of founding. (\* = date that community land trust founded for housing began supporting agriculture; \*\* = CLT originally created for agriculture.) Data collected by author.

In Chicago, a 1996 intergovernmental agreement between the city, the parks district, and the county forest preserve created the NeighborSpace land trust.<sup>101</sup> The initial impetus was not to broker access to land for farms in neighborhoods with high rates of unemployment and vacancy. Instead, NeighborSpace came in response to a study that ranked Chicago poorly in terms of open space per capita, as compared to other big cities.<sup>102</sup> “To remain competitive,” the report warned, “Chicago must provide the quality

<http://growinghomeinc.org/docs/GrowingHome12-13AnnualReport.pdf> [https://perma.cc/FWB4-BZ3F] (last visited Mar. 5, 2023) [hereinafter ANNUAL REPORT 2012–2013].

100. See Greg Rosenberg & Jeffrey Yuen, *Beyond Housing: Urban Agriculture and Commercial Development by Community Land Trusts* 7–12 (Lincoln Inst. of Land Pol’y, Working Paper, Paper No. WP13GR1, 2013), [http://www.lincolnst.edu/sites/default/files/pubfiles/2227\\_1559\\_rosenberg\\_wp13gr1.pdf](http://www.lincolnst.edu/sites/default/files/pubfiles/2227_1559_rosenberg_wp13gr1.pdf) [https://perma.cc/JAW4-7CRJ].

101. CITY COUNCIL OF THE CITY OF CHI., ILL., JOURNAL OF THE PROCEEDINGS OF THE CITY COUNCIL, at 18969–18979 (Mar. 26, 1996) [https://chicityclerk.s3.us-west-2.amazonaws.com/s3fs-public/document\\_uploads/journals-proceedings/1996/032696.pdf](https://chicityclerk.s3.us-west-2.amazonaws.com/s3fs-public/document_uploads/journals-proceedings/1996/032696.pdf) [https://perma.cc/7XEF-THKH].

102. CITY OF CHI., CHI. PARK DIST. & FOREST PRES. DIST. OF COOK CNTY., CITYSPACE: AN OPEN SPACE PLAN FOR CHICAGO, at ii (1998), [https://www.chicago.gov/city/en/depts/dcd/supp\\_info/cityspace\\_plan.html](https://www.chicago.gov/city/en/depts/dcd/supp_info/cityspace_plan.html) [https://perma.cc/9ADF-42JW].

of life factors that attract businesses and residents, including open space amenities comparable to or better than what other metropolitan areas offer.”<sup>103</sup> The land trust initially worked to protect community gardens at risk of being displaced by development.

NeighborSpace is formally an independent nonprofit organization. In practice, its powers and resources come largely through support from the local governmental entities that created and continue to support it.<sup>104</sup> Ben Helphand, the land trust’s current Executive Director, calls it “a government-nonprofit Frankenstein.”<sup>105</sup> To support the land trust, each governmental partner has pledged \$100,000 per year.<sup>106</sup> In return, representatives of the governmental sponsors control a majority of the seats on the NeighborSpace board.<sup>107</sup> Close ties to city hall have let the land trust buy parcels from the city’s inventory of vacant land for one dollar apiece. Schnell, the former director, estimates that up to ninety percent of NeighborSpace’s holdings came from the city’s land bank.<sup>108</sup>

In 2010, NeighborSpace began holding land for commercial farms. Since then, city officials, donors, and urban growers have increasingly enrolled the land trust in visions and plans for scaling up Chicago’s farming sector.<sup>109</sup> After the city council created the city’s first urban agriculture districts in Englewood, plans envisioned a trust that would hold land for urban farms that provided job training and supplemental income for residents.<sup>110</sup>

As part of realizing these plans, community organizers in Englewood founded the Ujamaa Community Land Trust to hold urban farmland.<sup>111</sup>

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103. *Id.* at 15.

104. Interview with Mary Jo Schnell, Former Exec. Dir., NeighborSpace, in Chi., Ill. (Aug. 10, 2012) (on file with author).

105. Ben Helphand, NeighborSpace Executive Director, Address at New School for Social Research Vacant Acres Symposium (Apr. 23, 2014).

106. See Interview with Mary Jo Schnell, *supra* note 104.

107. *Id.*

108. *Id.*

109. CHI. DEP’T OF PLAN. & DEV., *supra* note 3, at 41–43; CITY OF CHI., DEP’T OF HOUS. & ECON. DEV., A RECIPE FOR HEALTHY PLACES: ADDRESSING THE INTERSECTION OF FOOD AND OBESITY IN CHICAGO 17–21 (2013), [https://www.chicago.gov/content/dam/city/depts/zlup/Sustainable\\_Development/Publications/Recipe\\_For\\_Healthy\\_Places/Recipe\\_for\\_Healthy\\_Places\\_Final.pdf](https://www.chicago.gov/content/dam/city/depts/zlup/Sustainable_Development/Publications/Recipe_For_Healthy_Places/Recipe_for_Healthy_Places_Final.pdf) [<https://perma.cc/7HRD-RNMW>] (adopted by the Chicago Plan Commission in January 2013); RODGER COOLEY, PRODUCTIVE LANDSCAPES IN CHICAGO AND THE SOUTHLAND: A FRAMEWORK FOR FOSTERING A VIBRANT COMMUNITY-BASED URBAN AGRICULTURE CLUSTER 5 (Nate Ela ed., 2017) <https://static1.squarespace.com/static/5a8c555751a5846fc4c22984/t/5c5868699140b702e21c6401/1549297807546/Productive+Landscapes+Printer+version+8-17.pdf> [<https://perma.cc/EQ9A-2HZK>].

110. See CHI. DEP’T OF PLAN. & DEV., *supra* note 3, at 30; URB. FARM PATHWAYS PROJECT, ENGLEWOOD COMMUNITY FARMS PROSPECTUS AND BUSINESS PLAN 1 (2015), <https://dokumen.tips/documents/englewood-community-farms-prospectus-and-business-englewood-community-farms-will.html?page=1> [<https://perma.cc/WAW6-7PDC>].

111. UJAMAA COMMUNITY LAND TRUST (archived webpage as captured on Mar. 7, 2018), <https://web.archive.org/web/20180307054049/http://ujamaact.com/> [perma.cc link not available due to dynamic content in archived webpage].

Community Land Trusts (CLTs) have become well known as a form of land tenure tailored to supporting community control over affordable housing.<sup>112</sup> Organizers' move to use a CLT to protect and govern urban farmland represents a return to its roots. The CLT form was first developed in the 1960s to conserve Black-owned farmland in Georgia.<sup>113</sup> In Englewood, Ujamaa aimed to ensure that a Black-run organization decides who can access and use farmland in this predominantly African American neighborhood.<sup>114</sup>

The land trust has spread as a model for brokering land use for food production. Today the U.S. has around two dozen urban agriculture land trusts. Some, like NeighborSpace, were created originally as open space land trusts. Others are community land trusts created originally to provide affordable housing, which later began to hold land for gardens and urban farms.<sup>115</sup> NeighborSpace remains uncommon in that local government played a leading role in its founding, funding, and governance. However, it also offers a point of reference as promoters of urban farming look for land tenure models that could be scaled up and adapted to new settings.<sup>116</sup>

## 2. Mapping Disuse

Addressing the problem of disuse requires a second practice: assessing the scale and location of disused resources. When the resource in question is idle urban land, reformers have often mapped the location and extent of vacant lots to inspire visions of what people might produce in those spaces. This practice, of course, is not limited to Chicago, or something that began only after the Panic of 1893. It is apparent in Thomas Jefferson's imagination of how uncultivated land might support the landless poor in Europe. In other work, I describe how other social thinkers, radical and reformist alike, envisioned how people displaced by the enclosure of Europe's common lands might support themselves by either retaking those

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112. Anna di Robilant, *Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law*, 62 AM. J. COMPAR. L. 367, 376–79 (2014).

113. Karen A. Gray, *Community Land Trusts in the United States*, 16 J. CMTY. PRAC. 65, 70 (2008).

114. For a more extended discussion of Ujamaa CLT, see Nate Ela, *The Promise of Property: Legal Optimism and Collective Efficacy in Chicago's Urban Agriculture District*, 69 SOC. PROBS. 743, 751–54 (2020).

115. In the wake of the 2008 economic recession, community land trusts grew interested in how urban farms might provide an additional source of revenue. See Rosenberg & Yuen, *supra* note 100, at 17.

116. Nate Ela & Greg Rosenberg, *Land Tenure for Urban Farming: Toward a Scalable Model*, in GOOD FOOD, STRONG COMMUNITIES: PROMOTING SOCIAL JUSTICE THROUGH LOCAL AND REGIONAL FOOD SYSTEMS 24 (Steve Ventura & Martin Bailkey eds., 2017).

lands, or being allotted parcels of waste lands for gardening.<sup>117</sup> One of the more radical of these visions was the calculation by the Russian anarchist Prince Peter Kropotkin that the residents of Paris could produce all of their own food by using the land on the city's outskirts.<sup>118</sup> The Paris Commune of 1870, Kropotkin concluded, had failed in part because of a lack of support from reactionary rural peasants.<sup>119</sup> But, if land were appropriately put to use, future urban revolutionaries could sustain themselves.

*The Progressive Era*—In 1901, Kropotkin stayed at Hull House during a visit to Chicago, and shared his thinking about how urban workers might shift between fields, factories, and craft workshops.<sup>120</sup> Over the following years, Hull House's reformers became interested in how Chicago's land might be used to support the poor. Pelham mapped out where land might be available for gardens. She wrote an appeal to the city's landowners, asking for vacant parcels that a group of landless gardeners could use.<sup>121</sup> This set off a project to identify and put to use privately owned land, which later spread to include public lands.

During the First World War, city officials took over the work of mapping Chicago's idle land and calculating its potential. The mayor tasked agency heads with reporting their available land, and the police department sent officers on motorcycles to survey vacant lots and take soil samples.<sup>122</sup> Based on the number of acres of land that were available, the garden bureau drew up estimates of how much food could be produced and how many residents fed.<sup>123</sup> The city had thousands of acres available, if owners would agree to let the land be used.<sup>124</sup> The agriculture expert on loan from International

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117. Nate Ela, *Reclaiming the Commons*, (SOCARXIV Working Paper, 2018), <https://osf.io/preprints/socarxiv/ruwbp/> [<https://perma.cc/J9GB-KFPG>]; see also GERARD WINSTANLEY ET AL., *THE TRUE LEVELLERS STANDARD ADVANCED* (1649), <http://diggers.org/diggers-ENGLISH-1649/True-Levellers-Standard-Advanced-1649.pdf> [<https://perma.cc/CV55-7HNQ>]; ARTHUR YOUNG, *AN INQUIRY INTO THE PROPRIETY OF APPLYING WASTES TO THE BETTER MAINTENANCE AND SUPPORT OF THE POOR* (1801).

118. Kropotkin, one of the best-known anarchists of his day, was also a proponent of the type of intensive gardening methods he had observed in France and Belgium. See PETER KROPOTKIN, *FIELDS, FACTORIES AND WORKSHOPS OR INDUSTRY COMBINED WITH AGRICULTURE AND BRAIN WORK WITH MANUAL WORK* (Thomas Nelson & Sons new, revised, and enlarged ed. 1912) (1898). Based on these observations, he calculated the land and labor needed to feed all of Paris. See PETER KROPOTKIN, *THE CONQUEST OF BREAD* 256–81 (G.P. Putnam 1907) [hereinafter KROPOTKIN, *THE CONQUEST OF BREAD*].

119. See KROPOTKIN, *THE CONQUEST OF BREAD*, *supra* note 118, 275 (observing “What if the peasants, ignorant tools of reaction, starve our towns as the black bands did in France in 1793—What shall we do?” and answering, “Let them do their worst! The large cities will have to do without them.”)

120. *World Improves, Says Kropotkin*, CHI. DAILY TRIB., Apr. 18, 1901, at 5.

121. Pelham, *supra* note 68.

122. *Motorcycles to Aid Gardens*, CHI. NEWS, Apr. 2, 1917.

123. P.G. Holden, *Gardens on Vacant Lots Could Feed Half of City*, CHICAGO EXAM'R, March 7, 1917.

124. *Mayor Asks City Heads to be Farmers*, CHI. AM., Apr. 18, 1917.



Harvester concluded that, if owners cooperated, the city could produce half of its own food—a major step toward reducing high costs of living.<sup>125</sup>

*Great Depression*—After the stock market crashed and unemployment spiked in 1929, companies and local governments again started looking for land that employees and residents might put to use. A garden committee at International Harvester's McCormick Works plant in Chicago looked for suitable land in and around the city.<sup>126</sup> The company rented several fields, which it plowed, fertilized, divided into plots, and allotted to workers' families. By 1932, it had made available one thousand acres for gardens in and around Chicago, and another twelve hundred acres elsewhere around the country.<sup>127</sup>

Harvester officials soon began advising local officials on how to set up public relief gardens.<sup>128</sup> The Cook County subsistence garden service took the lead. Public agencies and private owners donated land on the city's outskirts, largely in the county forest preserves.<sup>129</sup> In 1932, the service made available 1,121 plots; by 1935, this had increased to nearly nine thousand.<sup>130</sup> The county also ran a farm where men from Chicago's shelters grew food for their shelters' kitchens.

County garden service officials took on the project of mapping not only where disused land might be put into production, but also how many people might become gardeners. This took some effort. The new garden service had to shift its own staff from preparing plots to actively recruiting relief recipients. Some other cities and states required the poor to work a plot of land in order to receive other forms of support, adopting the slogan "No garden—no relief."<sup>131</sup> But in Cook County, the gardens service did not make gardening mandatory, possibly because they didn't have enough land available for all the families that were already on the relief rolls.

In 1932, fields were prepared by June 1, but there were not enough gardeners on hand to use all the available plots. The head of the garden service sent out an appeal to churches, urging pastors to survey their congregations for potential gardeners.<sup>132</sup> The county faced a similar

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125. Holden, *supra* note 123.

126. *Harvester's Relief and Garden Plans*, *supra* note 87, at 400–01.

127. *Id.* at 401.

128. *Plan Gardens for Jobless in County Forests: Plowing Already Begun on Some Preserve Land*, CHI. DAILY TRIB., Apr. 20, 1932, at 4; *Start Plowing 3,000 acres for Relief Gardens: Land, Tools and Seeds to be Furnished Needy*, CHI. DAILY TRIB., May 6, 1932, at 20.

129. COOK CNTY. SUBSISTENCE GARDEN SERV., *supra* note 90, at 15.

130. *See id.*

131. JOANNA C. COLCORD & MARY JOHNSTON, COMMUNITY PROGRAMS FOR SUBSISTENCE GARDENS 28 (1933).

132. John Evans, *Calls Churches to Help Allot Gardens to Poor: Episcopalians to Gather Produce for Needy*, CHI. DAILY TRIB., June 4, 1932, at 4.

problem the next spring, despite a state official's prediction that when five thousand relief recipients and several thousand more not on the rolls all claimed plots, the gardens would be oversubscribed.<sup>133</sup> *Tribune* editors apparently were not satisfied with this assurance, running an editorial that shamed relief recipients who had not yet applied for a garden. By that point, the editorial pointed out, only one thousand garden applications had been received, out of the 170,000 families on the county's rolls.<sup>134</sup> In the end, the county made plots available to 3,219 gardeners in 1933.<sup>135</sup>

*Contemporary Reemergence*—Today, technology makes it easy to map the location and extent of disused land. This is especially true for publicly owned parcels, which Chicago lists in an online database.<sup>136</sup> Growers and their allies calculate the possibilities for yield and employment if all the city's idle land were put in cultivation, while skeptics point out barriers to realizing such grand visions.

For some growers it is hard not to dream big. Ken Dunn, who has been farming in Chicago for decades, has long imagined the potential of the city's vacant land. If eighty thousand vacant lots were converted into farmland, he suggests, they could replace the rural fields lost to sprawl and “provide a living for twenty thousand families.”<sup>137</sup> Urban farmer and MacArthur “genius” grantee Will Allen has likewise noted “with a mischievous smile” that “Chicago has [some] 77,000 vacant lots.”<sup>138</sup> Grand visions are not limited to Chicago. One recent article noted that Cleveland has enough idle land to meet all of its residents' demand for fresh vegetables and honey, along with half of the demand for chicken and eggs.<sup>139</sup>

Some criticize these visions as unrealistic. “Maybe I'm less utopian and less revolutionary than other people,” Helphand, the NeighborSpace director, confessed to me. “There's studies that we can, if we take every ounce of, every speck of available land and grow on it, we could feed the

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133. *Predicts Idle Will Take All Garden Space: Ryerson Explains 2 Types of Relief*, CHI. DAILY TRIB., May 3, 1933, at 17.

134. *Garden Plots but No Gardeners*, CHI. DAILY TRIB., May 5, 1933, at 14.

135. COOK CNTY. SUBSISTENCE GARDEN SERV., *supra* note 90, at 23.

136. City of Chi., *City-Owned Land Inventory*, CHI. DATA PORTAL (Feb. 21, 2023), <https://data.cityofchicago.org/Community-Economic-Development/City-Owned-Land-Inventory/aksk-kvfp> [<https://perma.cc/FM27-MK22>].

137. MIRA ENGLER, *DESIGNING AMERICA'S WASTE LANDSCAPES* 172 (2004).

138. Elizabeth Royte, *Street Farmer*, N.Y. TIMES MAG. (July 1, 2009), <http://www.nytimes.com/2009/07/05/magazine/05allen-t.html> [<https://perma.cc/XKU6-GP8R>].

139. Miguel Altieri, *How Urban Agriculture Can Improve Food Security in U.S. Cities*, CONVERSATION (Feb. 13, 2019, 6:49 AM), <https://theconversation.com/how-urban-agriculture-can-improve-food-security-in-us-cities-106435> [<https://perma.cc/QQ7S-FRAZ>].

city.” But, he noted, “[t]here’s a logistical problem there.”<sup>140</sup> It is simply not possible to farm every square inch of vacant land in the city.

Environmental contamination is one such logistical problem. When looking for land, growers and their allies often dig up historic fire insurance maps to figure out whether prior uses contaminated the soil.<sup>141</sup> City plans leading up to the designation of Englewood as an urban agriculture district included maps that revealed thousands of publicly and privately owned vacant lots.<sup>142</sup> At a community meeting in 2015, organizers pored over a zoomed-in map of particular parcels that might become an urban farming corridor. Sites were color-coded, reflecting results of environmental testing; wide swaths of red parcels indicating contaminated soil underscored the challenge of growing food in every vacant lot.<sup>143</sup>

### 3. *Articulating Social Interests in Use*

Despite the practical obstacles, periods when people are living in need amid a landscape of disuse have repeatedly triggered doubts about whether the right to exclude serves anyone’s interest in use. Part of the work for reformers hoping to put vacant land into cultivation involves defining whose use interests are at stake. To do this, they explain how putting idle resources to use generates both economic and moral value.

Recall here the contrasting perspectives on exclusivity and use developed by essentialist property theorists. As articulated by Smith, the right to exclude is said to best serve our societal interest in use by protecting each owner’s interest in use.<sup>144</sup> Katz, by contrast, suggests that property law defines an owner as the exclusive agenda-setter for a resource.<sup>145</sup> Projects by reformers to articulate social interests in use reflect one step in a strategy of suggesting that others might help set the agenda—so that, should owners leave resources disused and prevent productive use, broader societal interests might prevail.

*Progressive Era*—During this period, advocates routinely claimed that using idle land for gardens generated economic value. The *Tribune* reported

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140. Interview with Ben Helphand, Exec. Dir., NeighborSpace, in Chi., Ill. (Aug. 23, 2012) (on file with author).

141. Interview with Mary Jo Schnell, *supra* note 104. A historic insurance map can reveal, for example, a buried tank or prior industrial use that may have contaminated the land.

142. CHI. DEP’T OF PLAN. & DEV., *supra* note 3, at 5.

143. Photo of people examining map of Englewood parcels, taken by the author, May 5, 2015. (on file with author.)

144. *See, e.g.*, Smith, *supra* note 8, at 1693 (“[B]y enjoying the right to exclude through torts like trespass, an owner can pursue her interest in a wide range of uses . . .”).

145. Katz, *supra* note 8, at 278–79.

on the value of harvests, and of gardeners' sales of surplus produce.<sup>146</sup> In the fall of 1909, for example, most Harvester Garden families received enough vegetables to support themselves, plus \$30 in sales; the CGA invested just \$6 per family.<sup>147</sup> Such figures, together with the promise that gardening could reduce the costs of private charity and public relief, convinced *Tribune* editors that the project should be expanded. In Philadelphia and New York, poor families farmed "thousands of acres" with "splendid results," the paper observed; "the necessity for bread lines and other forms of charity has been greatly lessened."<sup>148</sup> In Chicago "there are hundreds of acres," the paper noted, "which might be used for this purpose if the owners would let the association have them for a term of years."<sup>149</sup>

Pelham, meanwhile, suggested that letting the unemployed use land would lead them to leave the city. This, she hoped, would increase workers' leverage. Companies "know a line of laborers stand waiting, forced by their necessities to accept anything," she wrote in a letter, "and this condition is held as a club over the heads of unskilled workmen."<sup>150</sup> The problem of the unemployed posed "a menace," but companies would be less likely to lock out employees or cut wages "[i]f the army of unemployed were diverted away from the congested labor centers."<sup>151</sup> Publicly, Pelham reported that the Harvester Garden offered growers "a real taste of farm life . . . . Many of these have taken to the open air and started larger farms in the country."<sup>152</sup> In later years, she dropped this claim. If enticing the unemployed away from Chicago was her aim, it never bore much fruit.

Proponents also claimed that activating disused land cultivated moral values. Landowners, Pelham noted, initially thought "it would be impossible to start a garden because of the proclivities for 'lifting' among the boys of the neighborhood."<sup>153</sup> She reported, however, that letting people use vacant land actually *increased* respect for property. Even without fences, "nothing is ever pilfered or damaged by hoodlums," she wrote.<sup>154</sup> Officials from the prison across the street reported "a great change in the

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146. *Gardens for Poor Lesson to Women: Educational Farms Cause Respect for Agriculturalists' Ability*, CHI. DAILY TRIB., Oct. 20, 1909, at 11; W.A. Evans, *How to Keep Well: Farming in the City*, CHI. DAILY TRIB., May 25, 1913, at F4.

147. *A Use for Vacant Lots*, CHI. DAILY TRIB., Oct. 21, 1909, at 10.

148. *Id.*; *Gardening in the Garden City*, CHI. DAILY TRIB., Jan. 4, 1910, at 10.

149. *Gardening in the Garden City*, *supra* note 148; *A Use for Vacant Lots*, *supra* note 147.

150. Charles E. Carroll, *Industrial Peace Through Social Justice* 219 (1912) (Master of Arts Thesis, University of Nebraska-Lincoln) (ProQuest).

151. *Id.*

152. *Uses Small Farm to Lure City People to Country*, CHI. DAILY TRIB., Mar. 21, 1910, at 15.

153. *City "Farms" for the Poor*, *supra* note 75.

154. *Toilers to Farm Empty City Lots*, *supra* note 74.

attitude of the residents toward other people's property since we started the gardens."<sup>155</sup>

Promoters also asserted that gardens "[i]ncreased industry, thrift, self-respect, self-confidence, . . . and honesty."<sup>156</sup> Reformers were eager to instill these values in immigrant women. The "laziness of the housewife," the sociologists William I. Thomas and Florian Znaniecki wrote in *The Polish Peasant*, "seems to be brought about by the changes in the nature and bearing of housework."<sup>157</sup> Such work in Chicago was less varied than in Poland, where it involved tending a garden. By gardening, women could "positively contribute[] to the income and property of the family."<sup>158</sup> The *Tribune* noted approvingly that gardens were "almost like the early days, when women worked in the fields."<sup>159</sup> Claims like these echo in contemporary arguments that the purpose of property is to promote human flourishing, but it is hard to miss the paternalistic lens through which Progressive Era promoters viewed flourishing.

Finally, promoters promised that gardening disused land would improve residents' health and the city's aesthetics. The "mentally and physically incapable," the CGA asserted, were improved "morally, mentally, and physically without pauperizing them."<sup>160</sup> Thanks to the Harvester Garden's fresh air and "soft, spongy earth," a boy reportedly gained ten pounds in a single summer.<sup>161</sup> These benefits came as the association turned "[w]aste places . . . into beautiful gardens," by converting disused land into "artistic asset[s] for the city."<sup>162</sup>

*Great Depression*—Both International Harvester and the Cook County gardens service noted how making disused land available for gardens generated value. Harvester officials observed that company gardens created economic benefits. One internal memo noted that by supplementing other unemployment relief, gardens reduced the direct burdens of relief upon both the company and employees. Before they could receive loans or allowances from the company relief fund, employees had to apply for a garden.<sup>163</sup>

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155. *Id.*

156. "Back to the Soil" *Cure*, *supra* note 73.

157. WILLIAM I. THOMAS & FLORIAN ZNANIECKI, 5 *THE POLISH PEASANT IN EUROPE AND AMERICA* 211 (1920).

158. *Id.*

159. *Poor of City Get 90 Acres to Till*, *supra* note 71.

160. "Back to the Soil" *Cure*, *supra* note 73.

161. *Gardens for the Poor Lesson to Women*, *supra* note 146.

162. "Back to the Soil" *Cure*, *supra* note 73; Paul T. Gilbert, *Vacant Lot Gardening*, W. CHRISTIAN ADVOC., Sept. 16, 1914, at 8.

163. Confidential Memorandum Concerning Relief Activities of the International Harvester Company (June 1, 1932) (on file with the McCormick Collection, Box 714, University of Wisconsin-Madison Libraries).

Harvester also stressed the gardens' non-economic value. The need for employee gardens "goes deeper than the mere monetary value of the foodstuffs raised," another internal memo observed.<sup>164</sup> "It reaches down to supply an equally real need in the mental and moral life of the worker, namely that of furnishing a healthful activity to take the place of the vacuum created by his lack of work in the factory."<sup>165</sup> Gardens helped prevent "the despair and discouragement that is particularly dangerous to the morale of not only the workers and their families but also of the community as a whole."<sup>166</sup>

County officials were more meticulous in tallying gardens' economic value. Among other calculations, they estimated that the total value of garden produce for 1934, at wholesale prices, was \$69,799.22—about \$1.25 million in 2022 dollars.<sup>167</sup> Each dollar invested produced \$2.74 worth of food. Through these figures, they made the case that letting growers use land offered a good investment.

County officials also reported that gardens boosted morale. In the 1934 annual report, economic figures were buried at the back. The report opened with caricatured (and sometimes outright racist) anecdotes depicting hope and joy: a widow who "forgot myself and my troubles;" a "colored man" who said it was hard at first, "but the ha'vest in fall made it wo'th wo'king fo';" a German gardener who exclaimed "[i]t was so good to work in the soil." The report proposed opening more farms, to "aid in solving the morale problem" of the thousands living in shelters.<sup>168</sup>

*Contemporary Reemergence*—Today's proponents of urban agriculture focus on the economic value created by growing food on disused land. They often point to the quantity and market value of their produce. Growing Home, for example, publicizes how much food it produces (thirty thousand pounds from its two Englewood farms in 2015)<sup>169</sup> and its market value (nearly \$1 million from 2002 through 2013).<sup>170</sup> Chicago FarmWorks, meanwhile, boasts of harvesting and donating ten thousand pounds of

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164. Hawkins, *supra* note 85.

165. *Id.*

166. Industrial Relations Policies of the International Harvester Company (on file with the McCormick Collection, Box 714, University of Wisconsin-Madison Libraries).

167. COOK CNTY. SUBSISTENCE GARDEN SERV., *supra* note 90, at 25; Williamson, *supra* note 72.

168. COOK CNTY. SUBSISTENCE GARDEN SERV., *supra* note 90, at 4–5, 43.

169. GROWING HOME, 2015 ANNUAL REPORT, [https://www.growinghomeinc.org/docs/GrowingHome\\_AnnualReport\\_FY2015.pdf](https://www.growinghomeinc.org/docs/GrowingHome_AnnualReport_FY2015.pdf) [<https://perma.cc/6RNM-WJQ5>] (last visited Feb. 22, 2023).

170. *Our Employment Training Model*, GROWING HOME, <http://growinghomeinc.org/our-model> [<https://perma.cc/QP5J-VU44>] (last visited Feb. 22, 2023); ANNUAL REPORT 2012 - 2013, *supra* note 99, at 3 (reporting \$980,440 in earned revenue from Growing Home's farms over this period).

produce in 2016.<sup>171</sup> Windy City Harvest reports having grown and sold one hundred thousand pounds of produce from its youth farm since 2003, and boasts of growing over one hundred thousand pounds per year on its fifteen farms.<sup>172</sup>

Urban farms also emphasize job creation and training. Growing Home trained over four hundred workers between 2002 and 2014.<sup>173</sup> For its part, Urban Growers Collective trains over one hundred and eighty teens in Chicago each year.<sup>174</sup> Chicago FarmWorks reports having helped one hundred people find full-time employment after their transitional jobs on the farm.<sup>175</sup> In 2016, Windy City Harvest reported that about 91 percent of the roughly 200 graduates of its apprenticeship program had been placed in jobs.<sup>176</sup> Although these numbers are not huge, they have inspired city officials and local foundations to see promise in career pathways that could give would-be farmers a plot of urban farmland to use, if not own.<sup>177</sup>

Today's farming boosters typically do not tout their projects as alternatives to cash welfare. But some do still make the connection. Dave Snyder, the head farmer at Chicago FarmWorks for its first three seasons, notes that "transitional jobs have been shown to decrease recidivism and lower reliance on public benefits." Snyder quotes a transitional jobs expert at the farm's umbrella organization, who says that keeping people out of prison and off benefits "represent[s] significant public benefits saving."<sup>178</sup> This echoes past promises that having people work the land will reduce public spending and burdens on taxpayers.

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171. Dave Snyder, *Farm to Table, By Way of the Food Pantry*, HEARTLAND ALL., <https://www.heartlandalliance.org/story/storyfarm-table-way-food-pantry> [https://perma.cc/B5CW-86B5] (last visited Feb. 22, 2023); Dave Snyder, *Plants, Watching Things Grow, Harvesting, and Fighting Poverty*, HEARTLAND ALL., <https://www.heartlandalliance.org/story/plants-grow-harvest> [https://perma.cc/6K4U-U4FL] (last visited Feb. 22, 2023) [hereinafter Snyder, *Plants, Watching Things Grow*].

172. *Windy City Harvest Youth Farm*, CHI. BOTANIC GARDEN, <https://www.chicagobotanic.org/urbanagriculture/youthfarm> [https://perma.cc/6BZK-CNEG] (last visited Feb. 22, 2023); *Windy City Harvest*, CHI. BOTANIC GARDEN, <https://www.chicagobotanic.org/urbanagriculture> [https://perma.cc/FHR9-PGLT] (last visited Feb. 22, 2023).

173. *2014 Annual Report*, GROWING HOME, <http://growinghomeinc.org/report2014/> [https://perma.cc/3X2U-VZ4Z].

174. *Farmers for Chicago: Youth Corps*, URB. GROWERS COLLECTIVE, <https://urbangrowerscollective.org/youth-corps/> [https://perma.cc/GU8A-MB8E] (last visited Feb. 22, 2023).

175. Snyder, *Plants, Watching Things Grow*, *supra* note 171.

176. Chi. Botanic Garden, *Windy City Harvest*, YOUTUBE (Sept. 30, 2016), <https://www.youtube.com/watch?v=kX25RXLQnKM> [https://perma.cc/DD2S-PXYG] (at 0:54).

177. See Press Release, Office of the Mayor of the City of Chi., Mayor Emanuel Launches New "Farmers for Chicago" Network for Chicago Urban Farmers (Mar. 15, 2013), [http://www.cityofchicago.org/city/en/depts/mayor/press\\_room/press\\_releases/2013/march\\_2013/mayor\\_emanuel\\_launchesnewfarmersforchicagonetworkforchicagourban.html](http://www.cityofchicago.org/city/en/depts/mayor/press_room/press_releases/2013/march_2013/mayor_emanuel_launchesnewfarmersforchicagonetworkforchicagourban.html) [https://perma.cc/RSA4-BQ4A].

178. Snyder, *Plants, Watching Things Grow*, *supra* note 171.

Advocates elsewhere have also framed urban farming as a complement or alternative to tax and transfer. One white paper notes that urban farms in Philadelphia and Madison, Wisconsin created opportunities for welfare-to-work jobs.<sup>179</sup> A Detroit journalist, noting that Michigan was cutting its welfare rolls, wrote a column asking, “Welfare Politics: Is Urban Farming the Answer?”<sup>180</sup> The column cites one urban farmer’s claim that Detroit residents could grow 20 percent of their food and concludes that with the economy “still sending people to the unemployment lines,” people should be encouraged to start growing. Overseas, scholars may be more likely to note the connection between urban agriculture, welfare, and poverty alleviation. After Dublin’s real estate bubble burst, one study noted that allotment gardeners preferred growing their own food to receiving welfare.<sup>181</sup> And in international development circles, scholars often analyze urban agriculture as a means of reducing urban poverty in the global south.<sup>182</sup>

Farming organizations still present their work as cultivating moral values. On its website, Growing Home tells the stories of redemption of several farm trainees. Antwann came to the farm after two decades in prison and reports it “is a physical source of strength for me, it’s my network, it keeps me motivated.” Now, he is “a happy and hardworking family man.”<sup>183</sup> Colette had been in prison and addicted to heroin. Working on the farm turned her life around: “I love smelling the dirt . . . Growing Home taught me the importance of teamwork and how to build positive relationships.”<sup>184</sup>

Personal transformation has always been part of Growing Home’s vision. “People without jobs are often without roots,” its founder observed. The farm “is a way for them to connect with nature . . . When you get involved in taking responsibility for caring for something, creating an

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179. See Jerry Kaufman & Martin Bailkey, *Farming Inside Cities: Entrepreneurial Urban Agriculture in the United States* (Lincoln Inst. of Land Pol’y Working Paper, Paper No. WP00JK1, 2000), <http://www.lincolninst.edu/publications/working-papers/farming-inside-cities> [https://perma.cc/93JN-E7RR].

180. Bankole Thompson, *Welfare Politics: Is Urban Farming the Answer?*, MICH. CHRON. (Sept. 28, 2011), <https://michiganchronicle.com/2011/09/28/welfare-politics-is-urban-farming-the-answer/> [https://perma.cc/87BR-2799].

181. See Mary P. Corcoran, Patricia Healy Kettle, & Cian O’Callaghan, *Green Shoots in Vacant Plots? Urban Agriculture and Austerity in Post-Crash Ireland*, 16 ACME 306, 318 (2017).

182. See generally David D. Mkwambisi, Evan D. G. Fraser, & Andy J. Dougill, *Urban Agriculture and Poverty Reduction: Evaluating How Food Production in Cities Contributes to Food Security, Employment and Income in Malawi*, 23 J. INT’L DEV. 181 (2010); Alberto Zezza & Luca Tasciotti, *Urban Agriculture, Poverty, and Food Security: Empirical Evidence from a Sample of Developing Countries*, 35 FOOD POL’Y 265 (2010).

183. *Antwann’s Story*, GROWING HOME, <http://growinghomeinc.org/antwann/> [https://perma.cc/RY5R-4HKX] (last visited Feb. 22, 2023).

184. *Colette’s Story*, GROWING HOME, <http://growinghomeinc.org/colette/> [https://perma.cc/XV72-9TE9] (last visited Feb. 22, 2023).



environment that produces growth, then it helps you build self-esteem and feel more connected.”<sup>185</sup> Other programs use a similar discourse. At the Windy City Harvest youth farm, “vulnerable youth can connect to the healing power of plants,” allowing teens to “become accountable—to themselves, their fellow farmers, and to their employers.”<sup>186</sup> Urban farms promise both to activate idle land and to cultivate productive, moral citizens.

Across time, promoters of using idle urban land for farms and gardens have promised that their projects will create a pastoral urban landscape, both productive and beautiful. The social interest in bringing about such a city, inhabited by striving and self-sufficient workers, motivates efforts to find ways around owners’ right to exclude potential users from their idle land. Rather than simply proclaiming that the right to exclude serves “our” interest in use—and assuming that this “we” is made up of individual owners—these projects cultivate a sense of an interdependent community, where both landowners and nonowners could benefit from putting idle property to use.

#### 4. *Cultivating Social Norms Against Disuse*

Articulating the social interest in putting things to use lays a basis for the claim that it is antisocial to leave resources disused—and that owners should be obliged not to do so. Urban agriculture’s boosters have developed and advanced arguments in favor of a social norm that would obligate owners to share rather than exclude, and to permit use rather than leaving resources disused.

Here I build on Gregory Alexander’s work on social-obligation norms in property law, which describes the creation of such norms via doctrinal innovation by judges.<sup>187</sup> In this case, a quite different set of actors have tinkered with ways to cultivate social obligation norms, through projects to make idle land available for people in need to use.<sup>188</sup>

Urban agriculture promoters have worked as norm entrepreneurs.<sup>189</sup> Part of their work has been directed at the needy themselves. Should disused

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185. *Mission and Vision*, GROWING HOME, <http://growinghomeinc.org/about-us/> [https://perma.cc/435M-QADE] (last visited Feb. 22, 2023).

186. *Windy City Harvest Youth Farm*, CHI. BOTANIC GARDEN, (archived webpage as captured on Mar. 5, 2016), <https://web.archive.org/web/20160305010257/https://www.chicagobotanic.org/urbanagriculture/youthfarm> [https://perma.cc/E4PY-XL5S?type=image].

187. See Alexander, *supra* note 10.

188. I am interested in property law in practice, rather than on the books—a time-honored sociolegal distinction. Rather than finding a gap between law on the books and law in action, the point here is there may be multiple avenues to realizing a new social norm—whether by writing the norm into common law doctrine, or by building enduring organizations and forms of local governance.

189. See generally Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) (defining norm entrepreneurs).

land be made available for use, the argument goes, then people in need should have a duty to use it rather than living entirely on cash welfare supports. Here, however, I focus on efforts to cultivate a norm that owners are obligated to let nonowners use their surplus property.<sup>190</sup>

In advocating for this norm, reformers build off the success of existing projects and point to the availability of additional idle resources that might be activated. If efforts already underway let nonowners put disused land in production, and those projects generate economic and moral value, then it follows that other landowners can and should do the same. This argument often appears as claims that more—or even all—disused land should be put to use, or that temporary experiments with sharing idle property should become permanent.

As we will see, efforts to convert emergent practices into ongoing, enduring institutions have taken different forms. Past proposals to make the use fix a permanent feature of Chicago's landscape by using powers of eminent domain or regulation of private property were swiftly blocked. More recent efforts to institutionalize a social-obligation norm by gradually increasing the amount of land held in trust and made available for use by the city's residents appear, at least for the moment, to be gaining some traction.

*Progressive Era*—Season by season, through deals with private and public landowners, favorable coverage in local newspapers, and presentations to civic groups, Pelham and other advocates worked as norm entrepreneurs—people interested in changing social norms who, as defined by Cass Sunstein, can “alert people to the existence of a shared complaint and can suggest a collective solution.”<sup>191</sup> Following the creation of the Harvester Garden, an ever-increasing number of people in Chicago—from settlement reformers to company managers and municipal officials—joined in a norm bandwagon.<sup>192</sup> Such bandwagons, Sunstein explains, occur “when the lowered cost of expressing new norms encourages an ever-increasing number of people to reject previously popular norms, to a ‘tipping point’ where it is adherence to the old norms that produces social disapproval.”<sup>193</sup>

The founding of the City Gardens Association reduced the difficulty of matching available land with potential users. For landowners, agreeing to offer up disused land drew public approbation. Meanwhile, Pelham and others touted the success of the venture in newspaper reports and to social

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190. For reasons of space, I do not dwell on reformers' work to cultivate a norm that would require people in need to use resources when they are made available.

191. Sunstein, *supra* note 189, at 929.

192. *See id.* at 912 (defining norm bandwagon).

193. *Id.*

clubs. This enrolled new private and public landowners into the project, encouraging “the general utilization of waste spaces for growing vegetables.”<sup>194</sup>

By 1915, people began to imagine the use fix becoming permanent. If farms on sanitary district land were successful, the *Tribune* argued, “there is no reason why the plan cannot be carried out on a great scale in future years.”<sup>195</sup> One superintendent at a Harvester factory hoped “to see every available foot of tillable soil in Chicago made available to laborers’ families throughout the city without special reference to IHC families.”<sup>196</sup>

Soon after the United States entered the war in 1917 and the city took over the process of matching idle land with gardeners, a municipal official proposed a radical new rule. The idea was apparently called for by the failure of voluntary offers of land to meet demand or avert impending food shortages.<sup>197</sup> Leroy Boughner, an employee of the garden bureau in the mayor’s office, proposed to realtors that leaving land idle be a crime, even in peacetime. The city should seize vacant lots, he argued, and allow gardeners to use them without owners’ permission, requiring compensation if owners destroyed gardeners’ crops.<sup>198</sup>

Boughner drew on his experience running a pre-war beautification campaign in Minneapolis.<sup>199</sup> There, gardeners simply “took possession of the lots and settled with the owners afterward.”<sup>200</sup> Few owners opposed this use of their idle property, and garden club leaders found it easier to deal with objectors and compensate gardeners for any losses, rather than identify owners and secure advance permission.<sup>201</sup> Given the wartime urgency, Boughner probably hoped his proposed rule would speed the matching of land with growers.

Instead, the opposite happened. Boughner’s proposal to make gardening someone else’s land a legal privilege,<sup>202</sup> and thereby limit owners’ right to exclude, fell flat. Business support for a city-run garden bureau evaporated. Within a week, the Chicago Association of Commerce and Industry moved the bureau out of City Hall and into its own offices.<sup>203</sup> The new director wondered if Chicagoans would “understand that we refer to each of them *individually* and to their *own* yards and lawns when we say, ‘Grow a

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194. Hyde, *supra* note 76.

195. Hyde, *supra* note 78.

196. Edith S. Reider, *With Our Harvester Gardeners*, HARVESTER WORLD, Mar. 1915, at 23.

197. *Demand Very Great for Gardening Space*, CHI. POST, Apr. 18, 1917.

198. *See Favors Seizing Land in Big Food Campaign*, CHI. NEWS., Apr. 17, 1917.

199. *See Alden Fearing, A City Full of Gardens*, COUNTRY LIFE IN AM., May 1916, at 90.

200. *Id.* at 94.

201. *Id.*

202. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913–1914) (defining legal privilege).

203. *Association of Commerce as Garden Chief*, CHI. DAILY TRIB., May 2, 1917, at 6.

garden.”<sup>204</sup> By early June, the campaign was shuttered, ostensibly for lack of funding.<sup>205</sup> The garden bureau’s director, however, noted that money was in fact raised, and seeds purchased.<sup>206</sup>

A renewed attempt to make gardens a permanent feature of Chicago’s landscape came soon after the war. In 1918, the commissioners of Chicago’s West Park District asked landscape architect Jens Jensen to develop a plan for expanding the city’s parks. Jensen had designed the Harvester Garden and sat on the CGA board. He drew up a plan for a network of parks, including a municipal farm and a dozen market gardens.<sup>207</sup> Jensen modeled these on the Harvester Garden, which he relabeled an “present municipal kitchen garden.”<sup>208</sup> He called for condemning private land and creating public land for gardeners to use.<sup>209</sup>

At a meeting to approve Jensen’s plan, one commissioner promised the cost would be “surprisingly low,” since the land plotted out included few obstacles.<sup>210</sup> Yet Jensen hadn’t made obstacles apparent. He had, for example, included a photo of Harvester’s property, captioned simply as vacant land “to be condemned for parks.”<sup>211</sup> Within months, Jensen and the entire board of commissioners were fired.<sup>212</sup> Jensen later reflected that “Chicago was once called a garden city,” asking, “What has become of the gardens?” He explained: “What has happened in Chicago has happened in many other large cities where speculation has been the guiding force.”<sup>213</sup> In each case, Boughner and Jensen’s attempts to make public gardens a permanent feature of the landscape—whether by formalizing a social obligation norm, or through eminent domain—were swiftly and decisively blocked by people invested in defending the right to exclude.

*Great Depression*—Harvester’s experiments with company gardens in the early 1930s fed into broader thinking about social policy and to a growing sense that idle land should be pressed into use to help solve the unemployment problem. After Harvester’s first season supporting company

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204. *See id.* (emphasis added).

205. *Garden Bureau Closed by Commerce Board*, CHI. EXAM’R, June 3, 1917, at 10.

206. Annotation by Perry Holden, Garden Bureau Director (1917) (on file at Michigan State University Archives) (written on *Lack of Funds May End Garden Bureau*, CHI. HERALD, May 15, 1917).

207. WEST CHICAGO PARK COMMISSIONERS, A GREATER WEST PARK SYSTEM: AFTER THE PLANS OF JENS JENSEN (1920).

208. *Id.* at 28 (labeling map of proposed gardens with “present municipal kitchen garden” on the site of the Harvester Garden).

209. *See, e.g., id.* at 15 (identifying vacant land that was to be condemned for parks).

210. *Chicago to Be Just One Park After Another*, CHI. DAILY TRIB., Nov. 27, 1919, at 12.

211. *See* WEST CHICAGO PARK COMMISSIONERS, *supra* note 207, at 15 (identifying vacant land along Chicago River that was to be condemned for parks).

212. *Lowden “Fires” Entire West Parks Board*, CHI. DAILY TRIB., Jul. 29, 1920, at 1; *Lowden Charges Against Park Board Listed*, CHI. DAILY TRIB., Jul. 30, 1920, at 15.

213. JENS JENSEN, SIFTINGS 94 (1990).

gardens, the company's president joined industry and labor leaders to discuss unemployment relief and report to President Hoover. They met in Chicago immediately after the Illinois Manufacturers Association released a report declaring voluntary, company-run relief projects to be preferable to state-mandated unemployment insurance.<sup>214</sup> According to the chairman, the goal was "[w]ork—not the dole;" industry would address the economic crisis as "a matter of enlightened selfishness."<sup>215</sup> This approach played to President Hoover, ever keen to promote self-help and reluctant to involve the federal government in welfare provision.<sup>216</sup> The committee report called for "a special emergency measure"—surveying "the possibility for transfer of surplus labor from cities to farms, on a work-for-keep and/or other basis, with a view to . . . relieve pressure upon urban relief agencies."<sup>217</sup>

Once again, gardens fed visions of unemployed workers leaving the city. As president-elect, Franklin Roosevelt observed that a migration of millions of the urban unemployed to the country might end the economic crisis.<sup>218</sup> In response, Chicago's civic leaders pitched grand plans. One proposed that tax-delinquent rural farmers cede title to ten or twenty acres, which the state could allot to urban workers on a rent-to-own basis.<sup>219</sup> Another argued for resettling some of Cook County's eight hundred thousand relief recipients to homesteads just outside the city, which would allow them to still seek part or full-time work.<sup>220</sup> A University of Chicago history professor observed that "free lands" had repeatedly solved mass unemployment before the closing of the frontier. Now, he argued, the state could create a new frontier and allow the urban unemployed to again resettle in the country.<sup>221</sup>

These plans drew critics. An agricultural economist argued in the *Tribune* that competition from homesteaders would turn commercial growers into bankrupt peasants; a letter to the editor warned homesteaders "would have to resort to hand methods," marking "the [f]irst [s]tep toward

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214. See *Job Committee Named by Hoover Will Meet Today*, CHI. DAILY TRIB., Sept. 28, 1931, at 8.

215. Philip Kinsley, *Jobs Not Dole, Slogan as Hoover Group Debates Relief Measures in Chicago*, CHI. DAILY TRIB., Sept. 29, 1931, at 4.

216. See MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 222 (10th ed. 1996).

217. Press Release, President's Org. on Unemployment Relief, Employment Conditions and Unemployment Relief, Program for Promotion of Employment (Oct. 29, 1931) (appearing in 33 MONTHLY LAB. REV. 1341, 1342 (1931)).

218. See *City Idle Must Go to Country: F. D. Roosevelt*, CHI. DAILY TRIB., Jan. 17, 1933, at 1.

219. See Philip Kinsley, *General Bolles Offers Plan for Retreat to Land*, CHI. DAILY TRIB., Feb. 10, 1933, at 7.

220. *Chicago Considers Land Colonization Plan*, N.Y. TIMES, Apr. 9, 1933, at E8.

221. William E. Dodd, *Back-to-the-Land?*, CHI. SUNDAY TRIB., Mar. 19, 1933, at 12.

American peasantry.”<sup>222</sup> Yet with the creation in 1933 of the federal subsistence homesteading program, it appeared, however briefly, that allotting gardens to unemployed Chicagoans might help facilitate an exodus.<sup>223</sup> “[F]or the successful relief gardener,” the county gardens service noted, a plot “may well become the proving ground for him to take a subsistence homestead.”<sup>224</sup>

The prospect that use of land for gardens would become permanent, or provide a stepping stone to small farms on the outskirts of cities, provoked opposition. Agriculture Secretary Henry Wallace felt compelled to respond. In an open letter to the Vegetable Growers Association of America, Wallace explained that although vegetable farmers faced surpluses, several million families were unemployed, broke, and hungry.<sup>225</sup> Wallace assured commercial growers that relief gardeners would not affect their market, since the government prohibited sales of garden produce. “This whole movement is to be viewed as an emergency proposition,” he concluded; “when the emergency is over, most of these families will probably go out of the gardening and will be buyers of more fresh vegetables than before.” The past was prelude: “That was the way it worked out after the war, and that is doubtless the way it will work this time.”<sup>226</sup> If a norm was emerging that idle land should be pressed into use to help people in need, it was apparently not going to last.

Wallace was right that gardens would not become permanent, and the emerging norm would not last. But not for the reason he supposed. In 1935, Cook County’s gardens drew more growers than ever.<sup>227</sup> The Depression’s worst years had passed, but unemployment rates remained dire. Nationally, unemployment had fallen to around 20 percent in 1935, from a peak of nearly 25 percent a few years earlier.<sup>228</sup> In Chicago, African American unemployment remained dire, with nearly half of African American domestic servants, one-third of semi-skilled workers, and one-quarter of the unskilled still jobless.<sup>229</sup>

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222. Benjamin Horace Hibbard, “*Back to the Land?*”, CHI. SUNDAY TRIB., June 18, 1933, at 14; H.G. Davis, Letter to the Editor, *Peasantry*, CHI. DAILY TRIB., Feb. 14, 1933, at 12.

223. JESS GILBERT, *PLANNING DEMOCRACY: AGRARIAN INTELLECTUALS AND THE INTENDED NEW DEAL* 89 (2015).

224. COOK CNTY. SUBSISTENCE GARDEN SERV., *supra* note 90, at 44.

225. The letter by Secretary Wallace was reprinted in *id.* at 3.

226. *Id.*

227. *Relief Garden Plots Assigned to 800 Families*, CHI. DAILY TRIB., Jun. 14, 1935, at 8 (reporting that 16,000 Cook County families would grow vegetables in the summer of 1935 through the subsistence garden program).

228. Stanley Lebergott, *Labor Force, Employment, and Unemployment, 1929–39: Estimating Methods*, 67 MONTHLY LAB. REV. 50, 51 (1948).

229. ST. CLAIR DRAKE & HORACE R. CAYTON, *BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY* 217 (2015).

Nevertheless, state officials abruptly canceled garden projects. Early in 1935, Congress had appropriated money for a federal relief program, and Roosevelt created the Works Progress Administration (WPA).<sup>230</sup> This would replace the Federal Emergency Relief Administration, which had funded state and local gardening programs.<sup>231</sup> The WPA had grand plans for Chicago: spending \$32 million to build one thousand miles of road and creating jobs for 108,000 people on county relief rolls.<sup>232</sup> That fall, the Illinois Emergency Relief Commission eliminated subsistence garden programs, “in view of the employment program of WPA.”<sup>233</sup>

During the nineteenth century, the federal government had “spen[t] land” to settle the western frontier, drain swamp land, and establish public universities.<sup>234</sup> In the early years of the Great Depression, federal officials mulled a similar strategy to address unemployment. Cities and companies created projects to let the unemployed use land, and the Hoover administration eagerly encouraged the practice.<sup>235</sup>

When the federal government under Roosevelt expanded its funding and coordination of relief, it moved in a different direction.<sup>236</sup> Rather than affirming an obligation of public and private landowners to let the needy use idle land, the government now funded relief jobs, making locally coordinated land access projects seem unnecessary. New experiments with using surplus agricultural commodities as welfare supports appealed to both rural producers and urban consumers.<sup>237</sup> In 1937, with the creation of the program that would become known as food stamps, all remaining federal funding for relief gardens ended.<sup>238</sup> The notion that landowners might owe a social obligation to share idle land with the unemployed reemerged at the outset of the Depression, but once again dried up and disappeared.

*Contemporary Reemergence*—Lately, promoters of urban agriculture have developed a new set of strategies for opening idle land to productive use, and for cultivating a norm that land should not go disused. In Chicago, advocates have asserted that both publicly and privately owned land should

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230. *Today in History – April 8: Work Progress Administration*, LIBR. OF CONG., <https://www.loc.gov/item/today-in-history/april-08/> [<https://perma.cc/2HPM-3FNK>] (last visited Feb. 22, 2023).

231. LAWSON, *supra* note 63, at 159–60.

232. *Order WPA Staff Geared up for Rush of Work*, CHI. DAILY TRIB., Sept. 14, 1935, at 2.

233. *Relief Economy Shakeup May Be Left to Horner*, CHI. DAILY TRIB., Sept. 14, 1935, at 2.

234. Rose, *supra* note 26.

235. See *supra* text accompanying notes 214–21.

236. See KATZ, *supra* note 216, at 224–28.

237. See Kenneth Finegold, *Agriculture and the Politics of U.S. Social Provision: Social Insurance and Food Stamps*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 199, 218–20* (Margaret Weir, Ann Shola Orloff & Theda Skocpol eds., 1988).

238. LAWSON, *supra* note 63, at 160.

be made available for farms and gardens, when it might otherwise lie idle. Advocates' strategies have gained support from public officials and have triggered little pushback from private owners. Compared to previous periods, these efforts have gained more traction toward making the use fix an enduring part of the landscape.

Reformers have turned to existing laws to provide leverage for claims that idle land should be put to use. When the Chicago Coalition for the Homeless (CCH) realized in the early 1990s that the Coast Guard was giving up a prime parcel on the downtown lakefront, they made a claim under the federal McKinney Act, which gives homeless service providers a right of first refusal to surplus federal land.<sup>239</sup> After years of negotiation, CCH struck a deal with city officials to grant a parcel of city-owned land for Growing Home, a farm that has anchored the reemergence of urban agriculture in Englewood.<sup>240</sup>

Local laws have also provided leverage in cultivating a norm that favors use. Since the enactment in 2008 of a weed abatement regulation, Chicago has collected over \$19 million in fines.<sup>241</sup> This risk for landowners has helped community garden organizers gain access to land; their use allows landowners to avoid paying for upkeep or fines.<sup>242</sup> Some garden organizers have experimented with gleaning programs and garden rules that limit gardeners' ability to exclude others from harvesting the produce they grow.<sup>243</sup> One instance of the duty to maintain described by Shoked helps users gain access to land; another pushes individual gardeners to attend to their plots, or have others come do it for them and keep some of the produce.<sup>244</sup>

Reformers are also working to cultivate a sense of obligation on the part of landowners. Erika Allen runs one of Chicago's largest farms and formerly served as a parks district commissioner.<sup>245</sup> She refers to urban farmland as a "commons," which, as she sees it, cannot be owned by anyone, but can be used by everyone.<sup>246</sup> Bringing farms and gardens to

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239. See Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (codified as amended in scattered sections of 7, 29, and 42 U.S.C.).

240. For more details about this process, see Nate Ela, *Urban Commons as Property Experiment: Mapping Chicago's Farms and Gardens*, 43 *FORDHAM URB. L.J.* 247, 275-81 (2016).

241. Benjamin Woodard, *Weeds or Wildflowers? City Collects Millions in Fines for 'Uncut Weeds'*, DNAINFO (Aug. 6, 2014, 4:30 AM), <http://www.dnainfo.com/chicago/20140806/rogers-park/weeds-or-wildflowers-city-collects-millions-fines-for-uncut-weeds> [<https://perma.cc/R9KT-6WYP>].

242. Ela, *supra* note 240, at 265-66.

243. *Id.* at 271-74.

244. Shoked, *supra* note 13, at 512-13.

245. *Our Board*, CHI. FOOD. POL'Y ACTION COUNCIL, <https://www.chicagofoodpolicy.com/board> [<https://perma.cc/4JF4-WTEJ>] (last visited Feb. 22, 2023).

246. See, e.g., Erika Allen, Chief Exec. Officer, Urb. Growers Collective, Public Address at the Rooting Symposium in Chicago (Oct. 13, 2013).



urban land, she explains, “activates the space in a nurturing, productive way.”<sup>247</sup> This framing suggests that developing a productive landscape involves rethinking and adjusting the rights of private and public owners who leave their property inactive.

Other community activists have developed similar framings. Brandon Johnson, a community organizer and city commissioner who has worked to develop farms on city-owned land, refers to unused land as “available land” rather than as “vacant land.”<sup>248</sup> Johnson cites Marshall Brown, a Chicago architect who frames unused land as desirable rather than useless, and suggests that availability should turn not on who owns land, but rather whether land is put to productive use.<sup>249</sup>

The expansion of land trusts has furthered efforts to reconceive the relationship between ownership and use, and cultivate a norm against disuse. By expanding its mission to also hold land for urban farms, NeighborSpace has taken on larger parcels of idle city-owned land. Rather than returning to the private market, these parcels are held as a new resource pool that garden organizers and nonprofit farms make available for residents to use.<sup>250</sup> Urban farms have focused on making land use possible for people who have obstacles to traditional employment.

The creation of Ujamaa CLT reflects a further development of the norm that unused land—at least, city-owned land—should be made available for residents to use. Instead of relying on NeighborSpace, organizers in Englewood have instead promoted a local, Black-run organization that could determine who can use farmland held in trust. Ujamaa reflects an effort to cultivate a norm not only in favor of making idle land available for community use, but prioritizing community control over the terms of that use.<sup>251</sup>

What accounts for the recent success of efforts to cultivate a norm that idle land should be made available for use? For one, the norm has largely not focused on private landowners. Instead, organizers have argued that city-owned land be put into trust and made permanently available for agricultural use. This reduces the likelihood that private owners will push

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247. *Creating Secure Communities: An Interview with Erika Allen*, LEXICON OF FOOD, <https://www.lexiconoffood.com/users/erika-allen> [<https://perma.cc/3SU7-XDPL>] (last visited Feb. 22, 2023).

248. Interview with Brandon Johnson, Former Exec. Dir., Wash. Park Consortium, in Chi., Ill. (July 13, 2015) (on file with author); *Brandon Johnson, County Board Commissioner, 1st District*, COOK CNTY. GOV'T, <https://www.cookcountyil.gov/all-people/brandon-johnson> [<https://perma.cc/A9AW-8Q8E>] (last visited Feb. 22, 2023).

249. See Marshall Brown, “Smooth Growth” Lecture at Future Cities; Livable Futures Conference, VIMEO (Nov. 9, 2013), available at <https://vimeo.com/80276106> [<https://perma.cc/8DC9-67T4>].

250. See *supra* text accompanying notes 109–10.

251. See di Robilant, *supra* note 112, at 376–79.

back. (Indeed, a former director of NeighborSpace explained to me how developers are excited about gardens increasing land values.<sup>252</sup>)

The success of this strategy might also stem from its incremental approach. A century ago, Boughner and Jensen sought to change Chicago's landscape in dramatic fashion, by limiting the rights of owners or condemning land by eminent domain.<sup>253</sup> These strategies to suddenly break with the status quo failed spectacularly. NeighborSpace, by contrast, has progressed gradually, in a piecemeal manner. Rather than a "ruptural" strategy, its work is symbiotic and interstitial.<sup>254</sup> When NeighborSpace adds a vacant lot to its inventory, it is more likely to serve than jeopardize the interests of nearby landowners. NeighborSpace staff have also deliberately focused on parcels that are not attractive for other uses; as Helphand puts it, "I'm a big fan of finding land that isn't going to be used for anything," like undevelopable parcels near the city's airports.<sup>255</sup> This avoids conflict with property developers and public officials who might be looking out for them. It also helps cultivate a norm that the city's disused interstitial spaces should be available for use by residents.

The success of recent efforts is somewhat ironic. Reformers have worked to cultivate a norm that favors activating idle land to help residents in need. While much of the idle land is held by private owners, projects to cultivate this norm have made more progress in respect to public property. Much of this vacant public land is owned by the city in the wake of tax foreclosures. This means the city's inventory of vacant land effectively serves as a pass-through entity—channeling some portion of the parcels private owners have forfeited to community use. Rather than pushing to reallocate use rights to private property directly, the city and NeighborSpace are in a sense relying on tax foreclosures to address the problem of disused private land, then pushing to put idle public land to productive use.

Reformers in Chicago have, however, been exploring ways to get private landowners to make their idle land more socially useful. But there are clear stumbling blocks to the most direct forms of pressure. Turning to eminent domain could be expensive, and would likely be both politically and legally contentious.<sup>256</sup> Regulations of the sort imagined by Boughner would be an

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252. Interview with Mary Jo Schnell, *supra* note 104; see also Ioan Voicu & Vicki Been, *The Effect of Community Gardens on Neighboring Property Values*, 36 REAL EST. ECON. 241, 243 (2008) ("We find that the opening of a community garden has a statistically significant positive impact on the sales prices of properties within 1,000 feet of the garden and that the impact increases over time.").

253. See *supra* text accompanying notes 198, 209.

254. See ERIK OLIN WRIGHT, ENVISIONING REAL UTOPIAS 303–05 (2010).

255. See Interview with Ben Helphand, *supra* note 140.

256. After *Kelo v. New London*, the city would presumably have the power to take private land and transfer it to land trust that holds farmland used by nonprofit organizations. 545 U.S. 469 (2005).

unconstitutional taking, at least without compensation.<sup>257</sup> Absent the threat posed by an outright taking, praising and cajoling have limited effect in convincing private owners to voluntarily share use of their land. This leaves cities to figure out some arrangement that might nudge owners to let nonowners use their property.<sup>258</sup>

Recently, people in Chicago and other cities have turned to taxation. Rather than raising the costs of disuse by levying additional taxes on unused land, laws in Illinois, Maryland, and California have empowered cities to mark down assessed values for owners who agree to let their land be farmed for a certain period.<sup>259</sup> In turning to tax laws to address the problem of disuse, cities have had to win additional authority from their states. That is easier when requesting authority to reduce taxes, rather than raise them. The contradiction is that reformers are seeking to extend the use fix to privately owned land by turning to tax and transfer—and in the process ceding some portion, however modest, of their tax base.

Across these different legal mechanisms, one can see today's reformers grappling with a puzzle that has long plagued promoters of the use fix. How can an emerging social norm in favor of productive use, and against disuse, be converted into a rule that legally constrains owners? As in past periods, reformers are tinkering with potential solutions to this puzzle. In doing so, they are conscious—perhaps more so than their predecessors—that to formalize a norm against disuse requires not provoking opposition. But in doing this work, they are not alone. Looking beyond land and beyond Chicago suggests that the use is emerging in other contexts as well.

### *B. The Use Fix Beyond Land*

With a lineage that stretches back centuries, using idle land for farms and gardens offers a paradigmatic case of how reformers have provided social supports for people in need by putting idle property to use. Urban farms and

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However, such an aggressive approach to making farmland available would likely trigger opposition or even litigation from legal advocacy groups that focus on property rights violations, such as the Institute for Justice clinic at University of Chicago Law School. *What We Do*, INST. FOR JUST. CLINIC ON ENTREPRENEURSHIP, <https://ij.org/ij-clinic-on-entrepreneurship/what-we-do/> [<https://perma.cc/C3BC-ZXCJ>] (last visited Feb. 22, 2023).

257. It is difficult to see how courts would defer to a regulation that prevented landowners from excluding non-owners from their property without any compensation, particularly after *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (holding that a California statute that permitted access to farmland by union organizers, without compensation to landowners, violated the Takings Clause).

258. This was the approach taken by the South African court in *Modder East Squatters v. Modderklip Boerdery (Pty) Ltd.* 2004 (8) BCLR 821 (SCA) (S. Afr.) (providing public compensation to owner of farm occupied by squatters, rather than issuing an injunction to remove the squatters).

259. Urban Agricultural Incentive Zones Act, CAL. GOV'T CODE § 51042 (West 2022); MD. CODE ANN. TAX—PROP. § 9–253 (West 2022); 2018 Ill. Laws 7821 (codified as scattered sections of 20 ILL. COMP. STAT., 35 ILL. COMP. STAT., 65 ILL. COMP. STAT.).

gardens extend that tradition to the present, while also opening up new ways of seeing how the use fix might be applied to other types of resources, and in other places. This section briefly surveys that terrain, identifying ongoing efforts to make urban space available for shelter, economic exchange, and production. Not all of these projects are as well-established instances of the use fix as that which has made possible the repeated reemergence of urban agriculture. In some cases, local officials have declined to enforce laws that would exclude users from public or private property, or have helped broker one-off deals to make resources available to users. In others, local governments have addressed the distributive consequences of disuse in a more ongoing way, often by supporting organizations working to make shelter available to people in need. But in all, local reformers have been working to increase equity and efficiency by putting disused public and private property to use.

### 1. *Vacant Housing*

Cities around the world have encouraged the use of vacant buildings for housing. In many cases, this has involved taking positions toward squatting that are more permissive than what one might expect if the state were understood to simply defend owners' right to exclude. In London, squatters in public housing received an amnesty and a right to rehousing.<sup>260</sup> Squats in New York City's Lower East Side were rendered legal through assistance from a nonprofit organization.<sup>261</sup> Hong Kong, for its part, has granted rights to squatters living not only on public land, but also on the water.<sup>262</sup>

The strategies for making property useful as housing are not limited to squatting. In the wake of the 2008 foreclosure crisis, many U.S. cities adopted ordinances that require owners to register vacant properties; by 2013, some 550 such local laws existed around the country.<sup>263</sup> Typically this mapping of disuse is intended simply to ensure that absent owners "maintain and secure" their propert[y], and may involve a small registration fee.<sup>264</sup> Such inventories, however, can be used for other purposes. Cities from

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260. Hans Pruijt, *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. URB. & REG'L RSCH. 133, 135 (2003); Steve Platt, *A Decade of Squatting: The Story of Squatting in Britain since 1968*, in SQUATTING: THE REAL STORY 14, 89–94 (Nick Wates & Christian Wolmar eds., 1980).

261. NICHOLAS BLOMLEY, UNSETTLING THE CITY: URBAN LAND AND THE POLITICS OF PROPERTY 21 (2004).

262. Lawrence W.C. Lai, Mark H. Chua & Frank T. Lorne, *The Coase Theorem and Squatting on Crown Land and Water: A Hong Kong Comparative Study of the Differences Between the State Allocation of Property Rights for Two Kinds of Squatters*, 44 HABITAT INT'L 247, 249–53 (2014).

263. Yun Sang Lee, Patrick Terranova & Dan Immergluck, *New Data on Local Vacant Property Registration Ordinances*, 15 CITYSCAPE 289, 289–90 (2013).

264. *Id.*

Hong Kong to Vancouver, New York, San Francisco, and Oakland have begun to consider taxing vacant land or housing units.<sup>265</sup>

The foreclosure crisis also spurred innovative thinking about how cities could help keep people in homes and put vacant houses to use. In 2013, the mayor of Richmond, California pursued a policy championed by Robert Hockett to use eminent domain to seize distressed mortgages and renegotiate them at more favorable terms.<sup>266</sup> The project ran into opposition from the financial industry but attracted nationwide attention among municipal officials.<sup>267</sup>

Meanwhile, other urban reformers have undertaken more deliberate attempts to match vacant buildings with people in need of shelter. Activists in Baltimore have asked whether the city might help house residents experiencing homelessness by opening up some of its sixteen thousand vacant homes.<sup>268</sup> In Philadelphia, activists helped residents experiencing homelessness to occupy vacant houses owned by that city's public housing authority, and then pressured the authority to transfer the deeds to the homes into a land trust.<sup>269</sup> A program in Utah to place residents experiencing homelessness in permanent housing has attracted interest from municipal

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265. Tony Cheung, Naomi Ng & Sum Lok-kei, *Owners of Empty Flats Could be Taxed Under New Plan to Tackle Hong Kong's Housing Shortage*, S. CHINA MORNING POST (Mar. 16, 2018, 10:30 PM) <http://www.scmp.com/news/hong-kong/economy/article/2137404/hong-kong-mulls-tax-vacant-properties-unsold-flats-pile-red> [https://perma.cc/U9GL-WMXD]; *Vancouver Declares 5% of Homes Empty and Liable for New Tax*, GUARDIAN (Mar. 7, 2018, 9:35 PM), <https://www.theguardian.com/world/2018/mar/08/vancouver-declares-5-of-homes-empty-and-liable-for-new-tax> [https://perma.cc/N5AY-X4AW]; Andrew Siff, *Vacancy Tax Suggested to Fix NYC's Skyrocketing Empty Storefront Problem*, NBC N.Y. (Nov. 25, 2017, 1:35 PM), <https://www.nbcnewyork.com/news/local/vacancy-tax-suggested-as-solution-to-new-yorks-vacant-storefront-problem-459840793.html> [https://perma.cc/CYK6-JBCY]; *Tax Vacant Lots, Empty Properties To House Homeless: Proposal*, PATCH (Feb. 8, 2018, 11:49 AM), <https://patch.com/california/rockridge/tax-vacant-lots-empty-properties-house-homeless-proposal> [https://perma.cc/PG8Y-DR62]; Brock Keeling, *San Francisco Lawmaker Wants to Tax Landlords Who Keep Apartments Vacant*, CURBED S.F. (July 12, 2017, 1:09 PM), <https://sf.curbed.com/2017/7/12/15961486/sf-tax-landlord-homes-apartments-vacant> [https://perma.cc/R8EA-GD9M].

266. Elizabeth Daigneau, *Can Eminent Domain Help End the Foreclosure Crisis?*, GOVERNING (July 12, 2012), <https://www.governing.com/archive/col-eminent-domain-help-end-foreclosure-crisis.html> [https://perma.cc/DSX3-BKLK]; Elizabeth Daigneau, *Foreclosure and the Eminent Domain Solution Explained*, GOVERNING (Aug. 14, 2013), <http://www.governing.com/archive/col-foreclosure-eminent-domain-solution.html> [https://perma.cc/7M9H-YD3N].

267. Luke Norman, *Eminent Domain*, AGORA J. URB. PLAN. & DESIGN 42, 45–47 (2015).

268. Alana Semuels, *Could Baltimore's 16,000 Vacant Houses Shelter the City's Homeless?*, ATLANTIC (Oct. 20, 2014), <https://www.theatlantic.com/business/archive/2014/10/can-homeless-people-move-into-baltimores-abandoned-houses/381647/> [https://perma.cc/L386-4QL3].

269. Wes Enzinna, *No Vacancy: Can Empty Houses Help Solve Homelessness?* HARPER'S MAG., Feb. 2023, 39–46, 45, <https://harpers.org/archive/2023/02/no-vacancy-homelessness-land-trust-homes-philadelphia/> [https://perma.cc/4S22-RFHH].

officials in other states.<sup>270</sup> And in Seattle, a community nonprofit has worked to match families experiencing homelessness with vacant office buildings, hotels, and even restaurants, in a program that has gained support from Amazon and other property owners.<sup>271</sup>

## 2. *Idled Workplaces*

Reformers in Chicago looking to put idle land to use are thinking beyond farming. Organizers in Englewood hope to use a community land trust as a vehicle to make land secure and affordable not only for farms, but also for housing and retail development. For his part, Helphand sees the current moment as an opportunity to build its inventory, by “riding the wave of urban ag to try to get as much land in Chicago as possible.”<sup>272</sup> But he also realizes that someday the trust may not hold the land for gardening. “We might be using it for something else in five years, or ten years,” he observes.<sup>273</sup> “Some variation of people gathering together to sell things, to learn from each other, do taxes together, teach English to each other, you name it.”<sup>274</sup>

Helphand points to a sector—commercial exchange—in which cities have long worked to make public and private property available and useful. Sidewalks in particular have been made available as retail space for use by the poor and unemployed. In U.S. cities, this can be done at the discretion of particular police officers, when they choose not to enforce antipeddling laws.<sup>275</sup> Chicago’s own Maxwell Street Market stands as a historic example of opening up the use of city streets as public markets in order to alleviate poverty and unemployment.<sup>276</sup> In Latin American cities, state officials have developed a more deliberate and consistent practice of forbearance, as a way

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270. John M. Glionna, *Utah is Winning the War on Chronic Homelessness with ‘Housing First’ Program*, L.A. TIMES (May 24, 2015, 4:30 AM), <http://www.latimes.com/nation/la-na-utah-housing-first-20150524-story.html#page=1> [https://perma.cc/NQV6-R7B2].

271. *A Solution for Vacant Buildings Awaiting Redevelopment: House the Homeless*, MARY’S PLACE (Sept. 6, 2018), <https://www.marysplacesattle.org/newsroom-2/2018/10/14/a-solution-for-vacant-buildings-awaiting-redevelopment-house-the-homeless> [https://perma.cc/A23S-SXZP]; Kaya Yurieff, *Amazon to Build Homeless Shelter in New Seattle HQ*, CNN (May 10, 2017, 10:25 AM), <https://money.cnn.com/2017/05/10/technology/amazon-headquarters-homeless-shelter/> [https://perma.cc/M2EP-YMNZ]; Christa Wood, *That Vacant Building Has a Better Use*, PERKINS&WILL (May 31, 2018), <http://www.perkinswill.com/news/that-vacant-building-has-a-better-use/> [https://perma.cc/KCH5-7Y6W].

272. Helphand, *supra* note 105.

273. *Id.*

274. *Id.*

275. See MITCHELL DUNEIER, *SIDEWALK 231–89* (1999).

276. Alfonso Morales, *Peddling Policy: Street Vending in Historical and Contemporary Context*, 20 INT’L J. SOCIO. & SOC. POL’Y 80–85 (2000).

to both redistribute without resort to tax and transfer, and to build electoral support among the poor.<sup>277</sup>

Cities have also assisted efforts to put idled factories back in production. Buenos Aires offers the most notable recent example. At the time of the 2001 Argentine economic crisis, the city had laws that provided for the temporary expropriation of property for reasons of public utility. When worker cooperatives began taking control of factories that were slated for closing, this offered a two-year window in which the city could hold the property. In 2004, the city amended the provision to allow the permanent transfer of property to the worker cooperatives, with a time period for paying back the value of the property to the original owner.<sup>278</sup> This experience has inspired some U.S. labor activists to ask whether eminent domain might be a tool to support worker cooperatives in America's deindustrializing cities.<sup>279</sup>

### 3. *Activating Space During a Pandemic*

People also turned to the use fix during the Covid-19 pandemic. As it became apparent how easily the coronavirus can spread, everyone from public health officials to health care workers to advocates for the homeless began to look for alternative living arrangements that could reduce the risk of community transmission. This happened as lockdowns were being declared and business and leisure travel were plummeting, leaving hotels empty and their owners scrambling to avoid bankruptcy. It quickly became apparent that idle properties could offer shelter for essential workers and the homeless, and provide safe spaces for people exposed to and infected by the virus to isolate and quarantine.

The matching of people who needed a safe place to stay with empty dwellings took many forms. Early in the pandemic, some Americans realized that recreational vehicles could offer health care workers a way to live near their families while reducing the risk of spreading a hospital-acquired infection. After some people in Texas asked around for an RV to use, they set up an online portal to match doctors and nurses with empty

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277. ALISHA C. HOLLAND, *FORBEARANCE AS REDISTRIBUTION: THE POLITICS OF INFORMAL WELFARE IN LATIN AMERICA* 156–209 (2017).

278. Peter Ranis, *Argentina's Worker-Occupied Factories and Enterprises*, *SOCIALISM & DEMOCRACY*, Nov. 2005, at 1, 12; Ana Cecilia Dinerstein, *Workers' Factory Takeovers and New State Policies in Argentina: Towards an 'Institutionalisation' of Non-Governmental Public Action?*, 35 *POL'Y & POL.* 529, 536–39 (2007).

279. Peter Ranis, *Eminent Domain: Unused Tool for American Labor?*, 10 *WORKINGUSA: J. LAB. & SOC'Y* 193 (2007); Peter Ranis, *Promoting Cooperatives by the Use of Eminent Domain: Argentina and the United States*, *SOCIALISM & DEMOCRACY*, Mar. 2014., at 51.

RVs around the country.<sup>280</sup> The model soon spread, with other matchmaking services popping up online.<sup>281</sup>

Others turned to empty hotels as a place to house hospital employees. The City of Chicago at one point in 2020 paid “at least \$2 million per month” to rent out entire hotels where health care workers could stay, instead of returning home and running the risk of exposing loved ones to the virus.<sup>282</sup> Unlike the RV situation, this model involved payments from the government, though this subsidization of emergency housing was reportedly achieved at deeply discounted rates; hotel owners in Chicago and beyond described it as “the ‘bare minimum just to break even’” with a reduced staff, during a moment that “is not the time that we’re going to profit from anything.”<sup>283</sup> At one point, a bipartisan group of congressmen from Ohio introduced a bill alongside legislators from other states to provide \$1 billion in support for making hotel rooms available on this basis.<sup>284</sup>

In California and New York, officials turned to hotels as safe housing for people experiencing homelessness, who were at risk of being exposed to the virus in community shelters.<sup>285</sup> In San Francisco, estimates put the cost of the effort at up to \$59 million per month, with \$10 to \$40 million eligible to be covered with federal dollars.<sup>286</sup> Although a city supervisor and the City Attorney both noted that the Mayor and the city’s health officer each had unilateral authority to commandeer private property and later pay fair value,

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280. Stephanie Allmon Merry, *Dallas-Area Group Matches Healthcare Workers with RVs for Isolation Amid Coronavirus*, CULTUREMAP DALL. (Mar. 27, 2020, 10:49 AM), <https://dallas.culturemap.com/news/city-life/03-27-20-facebook-group-rvs-for-mds-coronavirus-healthcare-workers-isolate-campers> [<https://perma.cc/XL38-WT2L>]; *RVs 4 MDs to Fight the Coronavirus*, FACEBOOK, <https://www.facebook.com/groups/rvs4mds> [<https://perma.cc/5VW6-UDCW>] (last visited Feb. 22, 2023) (public Facebook group).

281. See, e.g., *About RVMatchMaker*, RVMATCHMAKER, <https://rvmatchmaker.org/budget/?ioby> [<https://perma.cc/KB3M-Y4NL>] (last visited Feb. 22, 2023) (providing a “scalable matching platform” for “high risk individuals” that has since closed).

282. Will Feuer & Emma Newburger, *Empty Hotels ‘Keep the Lights on’ by Converting into Coronavirus Quarantines, Emergency Housing for First Responders*, CNBC (Apr. 8, 2020, 12:58 PM), <https://www.cnbc.com/2020/04/07/empty-hotels-convert-into-coronavirus-quarantines-emergency-housing-to-keep-the-lights-on.html> [<https://perma.cc/5WJA-7RMF>].

283. *Id.*

284. Isolate Covid-19 Act of 2020, H.R. 7634, 116th Cong. (as introduced in House, July 16, 2020); Sabrina Eaton, *Ohio Congress Members Propose Quarantining Coronavirus Patients in Hotels*, CLEVELAND.COM (July 16, 2020, 4:56 PM), <https://www.cleveland.com/open/2020/07/ohio-congress-members-propose-quarantining-coronavirus-patients-in-hotels.html> [<https://perma.cc/74TG-28P5>].

285. Valeria Ricciulli, *NYC Commits to Housing More Homeless Individuals in Empty Hotel Rooms*, CURBED N.Y. (Apr. 13, 2020, 12:31 PM), <https://ny.curbed.com/2020/4/13/21218888/nyc-coronavirus-homeless-hotel-rooms-shelters> [<https://perma.cc/BGH8-FB97>].

286. Sarah Holder & Kriston Capps, *No Easy Fixes as Covid-19 Hits Homeless Shelters*, BLOOMBERG CITYLAB (Apr. 17, 2020, 4:34 PM), <https://www.bloomberg.com/news/articles/2020-04-17/no-easy-fixes-as-covid-19-hits-homeless-shelters> [<https://perma.cc/QK8V-N2X9>].



it did not come to that.<sup>287</sup> In San Francisco, one study showed success in freeing up hospital beds and reducing transmission.<sup>288</sup> While San Francisco's project scaled up to California's Project Roomkey, a statewide matching effort,<sup>289</sup> other cities matched homeless individuals with less suitable conditions. San Diego made space available in its convention center, while Las Vegas simply marked out squares in an empty parking lot.<sup>290</sup>

The act of putting empty hotels to use has been a global phenomenon, coming and going with successive waves of the pandemic. In September of 2020, Bali announced that resort hotels would be used for isolation.<sup>291</sup> As the Omicron wave hit Hong Kong, the city ramped up its quarantine hotel program, with a pledge to pay seventy percent of regular room rates for half of a hotel's occupancy and securing twenty thousand rooms in the matter of a week.<sup>292</sup> In the United Kingdom, hotels had been used since the beginning of the pandemic.<sup>293</sup> However, as the hotels became an ongoing feature of pandemic response in Britain, the opportunity to use other people's property without having to pay revealed an irony: at least some potential users found it inconceivable. As one community volunteer promoting isolation hotels put it, there was "[n]o interest whatsoever," in part because of anxiety that a huge bill would "eventually arriv[e] in the mail."<sup>294</sup> For at least some of the intended beneficiaries, the presumption that one cannot enter and use

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287. *Id.*; Memorandum on City Power to Commandeer Private Prop. for COVID-19 Emergency Purposes, from the Office of the City Att'y, S.F. to the Mayor of S.F., Bd. of Supervisors, and other Health Officials of the City of S.F., (Apr. 13, 2020), <https://www.sfcityattorney.org/wp-content/uploads/2020/04/City-Power-to-Commandeer-Private-Property-for-COVID-19-Emergency-Purposes.pdf> [<https://perma.cc/9VD6-ETFQ>].

288. See Jonathan D. Fuchs et al., *Assessment of a Hotel-Based COVID-19 Isolation and Quarantine Strategy for Persons Experiencing Homelessness*, JAMA NETWORK OPEN (2021), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2776930> [<https://perma.cc/V4CG-9ACN>].

289. Amy Scott & Anais Amin, *California's Project Roomkey "Has Really Worked for a Lot of People"*, MARKETPLACE (Dec. 13, 2021), <https://www.marketplace.org/2021/12/13/californias-project-roomkey-has-really-worked-for-a-lot-of-people/> [<https://perma.cc/M8EZ-BK62>].

290. Holder & Capps, *supra* note 286.

291. J.M. Daniels, *Bali Hotels Agreed as Isolation Centers*, BALI DISCOVERY (Sept. 13, 2020), <https://balidiscovery.com/bali-hotels-agreed-as-isolation-centers/> [<https://perma.cc/F7HT-5399>].

292. Cheryl Arcibal, Sandy Li & Pearl Liu, *Coronavirus Hong Kong: Will the Omicron Surge Turn Half-Empty Hotels into Quarantine Centers?*, S. CHINA MORNING POST (Feb. 19, 2022, 10:00 AM), <https://www.scmp.com/business/article/3167589/hong-kong-coronavirus-will-omicron-surge-turn-half-empty-hotels-quarantine> [<https://perma.cc/V4W8-VXXC>].

293. Tamara Thiessen, *From London to New York, How Empty Hotels May Turn into Coronavirus Hospitals*, FORBES (Mar. 16, 2020, 6:12 AM), <https://www.forbes.com/sites/tamarathiessen/2020/03/16/empty-hotels-could-turn-into-coronavirus-hospitals/?sh=2524260f3c2b> [<https://perma.cc/3VDT-QHET>].

294. David Segal, *The Pandemic Needs its Smokey Bear*, N.Y. TIMES (Mar. 8, 2021), <https://www.nytimes.com/2021/03/05/business/coronavirus-pandemic-safety-trust.html> [<https://perma.cc/7937-XDBU>].

another's property without paying was so deeply internalized as to make the use fix seem too good to be true.<sup>295</sup>

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Some of these proposals are radical; others, less so. Some are more advanced in their implementation; others remain more vision than reality. Together, they hold the potential to reshape how people can access spaces for living and working.

Many are sure to face opposition. Like Boughner's proposal a hundred years ago,<sup>296</sup> some contemporary projects have met swift pushback from people who stand to lose should the right to exclude nonowners from property be limited. But in various ways, each project represents an effort to increase urban productivity, equity, and resilience. Rather than seeing these as exceptional or radical, we might see them as recognizing the responsibility of local government to help put disused property to use—and as reflecting the reality that, so long as cities' power to tax and transfer remains limited, urban reformers will be drawn to this longstanding mode of redistribution.

### III. LEARNING FROM DISUSE

During times when resources are lying disused and people are in need, reformers have repeatedly turned to the use fix. This promises to solve the problem of disuse by letting people use resources that they do not own. In theory, the purpose of property law may be to help people put things to use. But in practice, reformers have repeatedly viewed both property rules and urban space through a lens of disuse. This section suggests lessons that such a perspective—focused on disuse rather than use—reveals for property theory and for urban governance.

#### A. *Disuse in Theory and in Practice*

The case of urban agriculture reveals how reformers have periodically come to see urban landscapes through a lens of disuse. This way of looking at property law and its effects has informed a set of practices aimed at

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295. In another contradictory twist, speculative investors in Los Angeles developed a scheme to match unhoused people with empty homes during the pandemic. See Francesca Mari, *Using the Homeless to Guard Empty Houses*, NEW YORKER (Nov. 30, 2020), <https://www.newyorker.com/magazine/2020/12/07/using-the-homeless-to-guard-empty-houses> [https://perma.cc/H7AR-XV8F]. Although the instinct aligned with the use fix, the aim was to ensure someone could keep out squatters—and assert the owner's right to exclude.

296. See *supra* text accompanying note 198.

mobilizing idle resources in socially beneficial ways. The use fix also offers a perspective on property law in practice that does not square neatly with any single theory. Instead, it offers a new way of considering property theorists' turn toward use as central to property's purpose. By recognizing that property rules often result in disuse rather than use, and how people in practice have responded to this fact, we can integrate insights from divergent accounts of how property law relates to use. And we can think concretely and creatively about how people respond when property rules result in disuse.

In his theory, Smith describes how use conflicts can provoke a shift toward governance.<sup>297</sup> Reformers' turn to organizations and brokering reflects such a move away from a property regime centered on exclusivity. Faced with the problem that the right to exclude—or owners' exclusive right to set an agenda for the use of their property—results in disuse, reformers have turned to a variety of tools. In the case of urban agriculture, the use fix represents a turn to contracting and to social norms against disuse. It has also involved creating special-purpose organizations that both broker between owners and potential users and push for a norm against leaving resources lying disused when people are living in need. This instance of governance relies on organizations dedicated to putting resources to use when a regime of exclusivity threatens to do otherwise.

At the same time, reformers' turn to the use fix aligns in certain respects with a theoretical perspective that focuses on property law's role in maximizing social welfare by transferring resources away from idle owners and toward active users.<sup>298</sup> Here, however, reformers' strategies have not looked to taxation or reforms to doctrines such as abandonment as a way to encourage such transfers.<sup>299</sup> While promising in theory, these tools have been nonstarters in practice. Even if owners wanted to abandon their land during moments of disuse, they would lack the right to do so.<sup>300</sup> In any event, reformers have not tended to advocate for such a right or to push for outright transfers of idle property to new owners. Instead, they have set up organizations to reallocate use rights.<sup>301</sup>

In advocating for the use fix, reformers' claims about the value of putting idle resources to use have resonated with assertions by pluralist property

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297. Smith, *supra* note 8, at 1693.

298. See e.g. Coase, *supra* note 35; Posner & Weyl, *supra* note 10.

299. Cf. Strahilevitz, *supra* note 35; Posner & Weyl, *supra* note 10.

300. See Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191 (2010) (discussing the common law's traditional prohibition on the abandonment of land).

301. See *supra* Section III.A.1. In recent decades, the City of Chicago's transfer of publicly held vacant parcels into trust has provided a de facto alternative to abandonment. But, rather than transfer resources directly to new owners, city officials have generally preferred to transfer them to a special-purpose trust such as NeighborSpace, that will in turn make land available for use.

theorists that property can and should foster human flourishing. But use-fix advocates have used different means to promote flourishing than those described by theorists. For example, apart from Boughner's tactic of using land for gardens first and asking permission later, use-fix promoters have generally not acted as property outlaws.<sup>302</sup> Their approach generally has been to put disused things to use by working *with* the law, rather than against it.<sup>303</sup>

In their attempts to cultivate a norm against leaving essential resources lying idle, reformers have tried to entrench the use fix as an enduring institution. Rather than appealing to judges to broaden the scope of doctrinal exceptions to exclusion, they have sought to formalize a norm against disuse through administrative action, contracting, and legislation. Boughner, for instance, proposed that City Hall decline to enforce rules prohibiting trespass by gardeners.<sup>304</sup> Jens Jensen, for his part, proposed to condemn land using eminent domain and pass special legislation to let the parks district manage a network of permanent municipal gardens that residents could use.<sup>305</sup> More recently, reformers' turn to land trusts has come in the form of the intergovernmental agreement that created NeighborSpace and the creation of the Ujamaa Community Land Trust as a neighborhood organization dedicated to putting land to use.<sup>306</sup>

What should we make of this repeated turn to organizations, rather than to taxation or doctrinal innovation, as a way to address the problem of disuse? Based on historical experience, the organizational approach might seem destined to fail. Reformers have repeatedly tried to make the property practices promoted by these organizations permanent, whether by declining to prohibit trespass by gardeners, using eminent domain to convert private property into public gardens, or securing ongoing company and government support for relief gardens. Such efforts have triggered swift opposition, which has put a decisive end to use-fix projects. Organizations may temporarily help put disused resources in production, develop arguments against permitting disuse, and inspire visions for institutions that would permanently put disused resources to productive use.<sup>307</sup> But they do not directly remake the rules of property law.

In the repeated rise and fall of the use fix as a governance strategy, there is a lesson for property theorists. Smith and Merrill explain the centrality of

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302. Cf. Peñalver & Katyal, *supra* note 36.

303. EWICK & SILBEY, *supra* note 60 (describing a mode of legal consciousness in which people feel themselves as working with the law, rather than standing before it or being positioned against it).

304. *City Urged to Conscript Lots for Gardeners*, CHI. DAILY TRIB., Apr. 18, 1917, at 14.

305. See WEST CHICAGO PARK COMMISSIONERS, *supra* note 207.

306. CITY COUNCIL OF THE CITY OF CHI, *supra* note 101; UJAMAA COMMUNITY LAND TRUST, *supra* note 111.

307. See *supra* Sections III.A.1, III.A.3, and III.A.4.

the right to exclude by reference to how it reduces information costs, and thereby better serves an interest in use, as compared to negotiating over each of the discrete rights and duties that define ownership.<sup>308</sup> This offers a functionalist account of why exclusivity remains at property's core, while governance remains at its periphery.

The repeated failure of use fix organizations to endure suggests an alternative explanation. When reformers have tried to entrench and institutionalize the use fix, they have sought to convert a governance regime—in which organizations coordinate particular uses—into rules that would limit owners' right to exclude.<sup>309</sup> This has triggered a coordinated defense of owners' right to exclude nonowners, and to profit by treating land and food as commodities.<sup>310</sup> Rather than supporting the functionalist explanation, this suggests instead the need for a political-economic account of how and why the right to exclude has remained so central to property law. Moves for social protection from marketization have been met by countermoves that maintain the treatment of resources as commodities.<sup>311</sup>

The periodic emergence and disappearance of use-fix organizations provides a gloss on the account of the right to exclude as the essential core of property law and governance rules as the periphery. When the right to exclude results in vital resources lying disused during times of need, organizations emerge to broker use. Smith has described how certain property doctrines offer "safety valves" that prevent opportunism, while Carol Rose has noted forms of doctrinal "housekeeping" that expropriate owners to greater or lesser degrees in response to social or environmental stress.<sup>312</sup> Here, by contrast, we see the emergence of an *organizational* safety valve or response to stress. During times of social and economic stress, use-fix organizations let nonowners use essential resources.

Yet, repeatedly, these organizations have disappeared in the face of resistance, failing to produce permanent changes to property law that would limit owners' right to exclude. A functionalist account might suggest that such organizations naturally disappear once they have served their purpose. An explanation grounded in urban political economy, by contrast, explains the failure of organizations to endure as the result of pushback from

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308. Smith, *supra* note 8, at 1693; Merrill, *supra* note 8.

309. See *supra* text accompanying notes 198–202, 208–11.

310. See *supra* text accompanying notes 203–06, 212–13.

311. See generally KARL POLANYI, *THE GREAT TRANSFORMATION* (1944) (describing a double movement in which efforts to establish a free market economic order are countered by a push to reduce the destructive societal effects of an unrestrained market).

312. Smith, *supra* note 8, at 1714–15; Carol Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 5–6. On safety valves and the basic minima required for a functioning democracy, see Akhil Reed Amar, *Republicanism and Minimal Entitlements: Of Safety Valves and the Safety Net*, 11 GEO. MASON U.L. REV. 47 (1988).

coalitions invested in increasing property values and opportunities for profit.<sup>313</sup>

It is possible, however, that use-fix organizations could become entrenched and offer nonowners a path to long-term access and use of land and other urban resources. The turn to urban agriculture land trusts in the ongoing reemergence of the use fix points to how this might occur, even if the outcome remains uncertain. Rather than encountering resistance, this new organizational form has been embraced by city officials, foundation officers, and even property developers.<sup>314</sup>

Comparing the ongoing reemergence of the use fix with past efforts helps explain why land trusts have not met resistance. Past reformers attempted to change the rules of land access and use at the scale of the city, and in one fell swoop. NeighborSpace, by contrast, has proceeded incrementally. The land trust has expanded to take on specific parcels that often are not suitable for development, frequently located in neighborhoods where the real estate market is weak.<sup>315</sup> It has also provided support for farms that help solve social and economic problems that threaten to hold back neighborhoods where residents face barriers as they seek employment after periods of incarceration.<sup>316</sup> Rather than adopting a ruptural strategy, today's reformers have developed methods for making disused land available for use by nonowners that is interstitial and symbiotic.<sup>317</sup>

This suggests a pathway by which residents could gain the ability to use otherwise disused land without owning it, and without changes to property doctrine. When reformers develop organizations that solve problems faced not only by residents but also by municipal officials and developers, those organizations can become an enduring part of a city's institutional landscape, rather than springing up on a temporary basis only to meet opposition and be uprooted. City officials and civic leaders might come to rely on use-fix organizations' ability to put disused resources to productive use and to support residents in need without resort to new taxes. Of course,

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313. This would be consistent with a line of urban sociology which understands the political economy of cities as defined by a "growth machine." JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 50 (1987).

314. See *supra* text accompanying notes 100–10, 252.

315. See *supra* text accompanying note 255; NeighborSpace has focused its urban farming efforts on neighborhoods such as Englewood, where the market has left thousands of parcels vacant. See *supra* text accompanying note 142.

316. See *generally* text accompanying notes 173–78. Growing Home has pointed to its success in helping job trainees seal or expunge their criminal records, as a way of opening doors to long-term employment. See *2014 Annual Report: Records*, GROWING HOME, <http://growinghomeinc.org/report2014/records.html> [https://perma.cc/43KQ-JPRK] (last visited Mar. 5, 2023).

317. For the distinction between ruptural, interstitial, and symbiotic strategies of decommodification, see WRIGHT, *supra* note 254.

how far NeighborSpace or other use-fix organizations will be able to pursue this path remains to be seen.

### *B. Putting Cities to Use*

Reformers have repeatedly turned to disused land as a way to support urban residents living in need during hard times. By letting people use this key resource, rather than leaving it idle, use-fix organizations have promoted equity and efficiency. This section explains why urban reformers and municipal officials have found the use fix a powerful tool of local governance, and suggests how the use fix offers a new way to think about policies that bolster urban resilience.

It might seem surprising that cities continue to return to disused property as a basis for local governance. The history of local government law in the United States is often told as the increasing conceptualization of cities as public rather than private entities.<sup>318</sup> Cities' relationship to property was fundamentally altered as courts established this public-private distinction.<sup>319</sup> Against this trend, reformers' repeated and ongoing turn to disused property as a way to help residents in need might seem anachronistic.

The turn to property as a tool of local government has deep roots. In his seminal study of New York City, Hendrik Hartog describes the central role that property played in the city's power and functioning.<sup>320</sup> Both the land granted as real estate of the municipal corporation and all the governmental attributes in the city's charter "were confirmed as the private property of the [municipal] corporation."<sup>321</sup> Many of today's public functions, such as street construction, were first achieved thanks to the city's power to make grants of property. Granting waterfront lots tied to requirements that owners finance and build public streets "offered city authorities the opportunity to act without any costs to municipal administration."<sup>322</sup> In reflecting on how the municipal corporation used its property to achieve public ends, Carol Rose dubbed this practice "property-based governance."<sup>323</sup> Larissa Katz has described something similar in public officials' tendency to "govern through owners."<sup>324</sup>

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318. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Rose, *supra* note 26, at 218; HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870 (1983).

319. Frug, *supra* note 318, at 1101–05.

320. HARTOG, *supra* note 318.

321. *Id.* at 18–19.

322. *Id.* at 64.

323. Rose, *supra* note 26, at 219.

324. Larissa Katz, *Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power*, 160 U. PA. L. REV. 2029, 2048 (2012).

Even as courts and legislatures established a distinction between property as private and municipal power as public, reformers and city officials have continued to turn to property-based governance in the form of the use fix.<sup>325</sup> This played out in the shadow of another public-private distinction between the powers of cities, which could “legislat[e] for the public good, and [possess] property for municipal uses.”<sup>326</sup> Municipal property was protected from state control, but the city’s authority to legislate was not—a fact that has let states severely constrain the powers of cities.<sup>327</sup>

To understand why municipal reformers have repeatedly experimented with how disused property might serve the public good, we must see how the practice relates to fiscal powers, or the lack thereof. Although states have limited municipal taxing authority,<sup>328</sup> cities have largely retained power over property for municipal uses. Projects to mobilize disused property represent attempts to serve public functions that, but for constraints on local fiscal authority, might otherwise be funded by tax revenue.

Providing social supports is one such function. Were cities to have greater power to tax, some might create local regimes of welfare provision as supplements to the one funded by the federal government and administered by the states. But with fiscal powers generally limited, municipal officials and reformers outside government have repeatedly sought to support poor and unemployed residents by letting them use idle public and private property.

The possibilities for this type of property-based governance depend on whether the disused property in question is public or private. In a different context, Michael Heller has observed that local governments will be hard pressed to make private property more useful by reallocating use rights if such an effort threatens existing rights holders.<sup>329</sup> As the case study here suggests, efforts to convert disused private property into public resources that residents can use, whether via eminent domain or regulatory limits to the right to exclude, are also likely to trigger resistance.

But when property-based governance involves public property, the situation is different. Cities may broker access to public resources themselves, or they may delegate that task to a community-based organization, as Chicago’s Department of Welfare did with the sanitary

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325. Rose, *supra* note 26, at 223. (“In the modern vocabulary, ‘property’ is depoliticized into the ‘private’ property of individuals, and ‘government’ is de-propertyed into the range of ‘public’ activities best managed by the large-scale centralized state.”)

326. Frug, *supra* note 318, at 1104.

327. *Id.* at 1105–1109.

328. Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U.L. REV. 292, 296 (2016).

329. Heller, *supra* note 59.



district land on which the City Gardens Association placed urban farmers.<sup>330</sup> This may be done on a temporary, ad hoc basis. But it can also be institutionalized, by transferring public resources to an entity that serves as a broker for particular uses on an ongoing basis.

This is the role that NeighborSpace plays today in Chicago. Local governments have contributed land to a pool of resources for a dedicated purpose, while retaining some control over the process through reserved seats on the land trust's board.<sup>331</sup> This leverages property grants to an intermediary organization—and then on to user groups and nonprofits—to achieve something the city has determined to be part of its governmental function: maintaining dedicated spaces for commercial and noncommercial food production. This form of property-based local governance is different, of course, than New York City's use of grants of waterfront lots to build roads, or the examples that Katz cites of governing through owners.<sup>332</sup> But by making land available for urban farms and gardens that residents can use as social supports, Chicago has repeatedly leveraged property in support of a public function.<sup>333</sup>

For municipal officials and urban reformers, the challenge going forward will be to imagine and implement new ways to address disuse and create solutions that help residents in need. This will require a willingness to imagine forms of governance that transcend the public-private distinction.<sup>334</sup> Experimenting with ways to expand and achieve cities' public functions might entail not only seeking new powers vis-à-vis state governments, but also reclaiming municipal power over property.<sup>335</sup> A key

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330. See *supra* note 77.

331. See Interview with Helphand, *supra* note 140 (explaining that seven of the thirteen members of the Neighborspace board are government-appointed).

332. HARTOG, *supra* note 318, at 64; Katz, *supra* note 324.

333. Elsewhere, other cities have been active in supporting community land trusts as a vehicle to provide secure and affordable housing. This has included granting property on which CLTs develop housing. See JOHN EMMEUS DAVIS & RICK JACOBUS, LINCOLN INST. LAND POL'Y, THE CITY-CLT PARTNERSHIP: MUNICIPAL SUPPORT FOR COMMUNITY LAND TRUSTS (2008), <https://www.lincolninst.edu/sites/default/files/pubfiles/the-city-clt-partnership-full.pdf> [<https://perma.cc/AL44-VDPT>]. In the case of the Dudley Street Neighborhood Initiative in Boston, the city granted eminent domain powers to an intermediary entity that helps the city achieve its goals for affordable housing. See Elizabeth A. Taylor, Note, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061 (1995). Deindustrialization and the foreclosure crisis have left Chicago and other cities and municipal land banks holding large inventories of vacant land and homes. This poses a liability for cities, and the inability to quickly sell these properties to private buyers puts pressure on public officials to consider more creative possibilities. Chicago, for example, previously tried to sell much of its publicly owned residential parcels for one dollar each, through limiting sales to purchasers who live in the neighborhood. *Chicago's Large Lots Program Offers Vacant Lots for \$1*, CBS NEWS CHI. (May 18, 2018, 5:29 PM), <https://www.cbsnews.com/chicago/news/large-lots-vacant-lots-one-dollar/> [<https://perma.cc/QJ9M-X4LD>].

334. Frug, *supra* note 318, at 1151.

335. Cf. HARTOG, *supra* note 318 (describing how New York City leveraged municipal power over property to guide economic development).

element of this challenge will be to envision and create new entities that not only promote productive use of a city's resources, but do so in ways that increase community empowerment and control.<sup>336</sup> In this respect, Chicago's recent support for neighborhood CLTs is a sign of hope, even if it remains tentative and a work in progress.

Historical and ongoing experiments with putting idle property to use to help residents during hard times also provide a productive new way to think about urban resilience. As both urban systems ecologists and leading charitable foundations have grown increasingly interested in resilience over the past decade, people have turned to the question of how law and policy might support the ability of a city and its residents to bounce back from a crisis.<sup>337</sup> Urban ecologists, for their part, appreciate that policy must play some part in the functioning of an urban socio-ecological system, but have few fine-grained accounts of its role.<sup>338</sup> Donors, meanwhile, have focused on metrics and indicators as tools of governance.<sup>339</sup> The turn to indicators, however, overlooks the basic legal rules that shape a city's landscape and determine whether residents may or may not draw on available resources during moments of crisis.

A few scholars have suggested that property and land-use law can and should play a part in fostering urban resilience.<sup>340</sup> Craig Arnold, for example, has targeted takings jurisprudence in arguing that "[p]roperty law must change if cities, ecosystems, and society are to be resilient to changing

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336. Frug, *supra* note 318, at 1151.

337. Luis Bettencourt & Geoffrey West, Comment, *A Unified Theory of Urban Living*, 467 NATURE 912 (2010); J P Evans, *Resilience, Ecology and Adaptation in the Experimental City*, 36 TRANSACTIONS OF INST. OF BRIT. GEOGRAPHERS 223 (2011); Jörn Birkmann, Matthias Garschagen, Frauke Kraas & Nguyen Quang, *Adaptive Urban Governance: New Challenges for the Second Generation of Urban Adaptation Strategies to Climate Change*, 5 SUSTAINABILITY SCI. 185 (2010).

338. Manjana Milkoreit, Michelle-Lee Moore, Michael Schoon & Chanda L. Meek, *Resilience Scientists as Change-Makers—Growing the Middle Ground Between Science and Advocacy?*, 53 ENV'T SCI. & POL'Y 87, 93 (2015).

339. The Rockefeller Foundation, which has funded a \$100 million project to create resilience managers in one hundred cities around the world, has invested in promoting resilience indicators as a means of improving urban governance. The project, which was completed by ARUP, a global consulting firm, followed on earlier Rockefeller funded research on indicators as interventions in development projects. See *Facing Up to the Future: The City Resilience Index*, ARUP, <https://www.arup.com/perspectives/themes/cities/city-resilience-index> [<https://perma.cc/Q4E7-6X6M>] (last visited Feb. 22, 2023). See generally KEVIN E. DAVIS & BENEDICT KINGSBURY, INDICATORS AS INTERVENTIONS: PITFALLS AND PROSPECTS IN SUPPORTING DEVELOPMENT INITIATIVES (2011), <http://www.iilj.org/publications/indicators-as-interventions-pitfalls-and-prospects-in-supporting-development-initiatives/> [<https://perma.cc/W5Y3-6LJ5>].

340. See, e.g., Melissa M. Berry, *Thinking Like a City: Grounding Social-Ecological Resilience in an Urban Land Ethic*, 50 IDAHO L. REV. 117 (2014); Susan Sterett, *Disaster and Sociolegal Studies*, 3 OÑATI SOCIO-LEGAL SERIES 161 (2013); Kellen Zale, *Urban Resiliency and Destruction*, 50 IDAHO L. REV. 85 (2014).

conditions.”<sup>341</sup> Based on the case study of Chicago, this seems a sensible conclusion, if also a rather broad one. Regulatory takings doctrine could well limit creative approaches to putting disused private property to use.

The case study of the use fix reveals how people have grappled with both the constraints and the possibilities posed by property law during periods of crisis.<sup>342</sup> Periodic experiments with land access for farms and gardens in Chicago have, at various times and in various ways, put disused property to use by nonowners, despite the fact that owners tend to have duties only to maintain, and not necessarily to share property with people in need.<sup>343</sup> Rather than attempting to radically remake takings or necessity doctrine, reformers have experimented with organizations that help people support themselves during times of need by activating the city’s idle resources. To set up these organizations and build social and political support for making property useful, reformers have acted not as litigants but instead as organization builders, brokers, and norm entrepreneurs.

Urban reformers have long responded to periods of economic and social stress by figuring out ways to let people in need use idle resources. This strategy for bolstering a city’s ability to respond effectively to a crisis remains part of the urban legal toolkit. Reformers are once again looking at cities through the lens of disuse and imagining how property might better be put to use. This perspective suggests that the right to exclude, sometimes understood to serve an interest in use, too often does just the opposite.

A major challenge for reformers who hope to put cities’ disused resources to use is how to convert temporary responses to temporary crises into enduring institutions. The experiences of Chicago’s reformers suggest that rather than repeatedly setting up ad hoc brokering systems that make property useful to residents during moments of crisis, urban reformers might focus on building entities to play this role on an ongoing basis as new crises arise.<sup>344</sup> This could integrate use-fix organizations into local governance institutions, rather than thinking of property law and its problems as private and distinct from the public powers of local government. Setting up

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341. Craig Anthony (Tony) Arnold, *Resilient Cities and Adaptive Law*, 50 IDAHO L. REV. 245, 258 (2014).

342. See Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607 (2010).

343. See Shoked, *supra* note 13; Peñalver & Katyal, *supra* note 36, at 1172–77 (discussing limits to doctrine of necessity).

344. Nestor Davidson and Rashmi Dyal-Chand have observed recurring patterns of “property moments” during periods of economic and social crisis. Davidson & Dyal-Chand, *supra* note 342, at 1620. Their interest in these recurring patterns is similar to, and part of the inspiration for, the approach that I take here. Davidson and Dyal-Chand are interested in the problems that property poses at the scale of the nation, and in particular during the financial crisis of 2008. Here, I am interested in how property poses a problem and a source of possibility for local government, and in comparing solutions to property problems across historical periods.

enduring, publicly supported entities like NeighborSpace should help cities and their residents respond when the next crisis comes, rather than having to repeatedly reinvent organizations and processes for activating disused property.

To take seriously the challenge of bolstering urban resilience, then, involves a process of transformation. Rather than simply turning to big data and analyzing indicators, resilience entails transforming the rules, organizations, and practices that govern how residents may put a city's resources to use—and that sometimes empower owners to leave them lying disused. It also entails transforming the way we understand the mission of local government. Rather than simply seeing property law as something that helps people put things to use, we should attend to the problem of disuse and ways to address it. Municipal officials should embrace property-based local governance and support organizations that help people put idle property to use. This might sound like a radical new project for cities. But it isn't. The problem of disuse is one that reformers in and out of municipal government have long grappled with—and one that persists today.

#### CONCLUSION

The turn to thinking of property in terms of use has been productive. It has not ended debates among property scholars, but it offers a common point of reference. Scholars from different perspectives largely agree that a primary function of property law is to help people put things to use—even as they differ over how it serves this function or might better do so.

The problem of disuse presents an opportunity to better understand the dynamics of property law and possibilities for reform. Scholars have yet to make the most of this, in part because of the common move to treat disuse as simply another type of use. Rather than ask after disuse, scholars treat it as a way to confirm and advance their particular theory of property law.

This Article offers a new way of understanding both disuse and property law. By empirically examining how people have seen disuse as a problem, and what they have sought to do about it, we can learn what happens when property rules fail to put things to use. Disused urban land provides a key site for understanding the processes by which reformers have worked to activate idle resources. Recognizing the social practices by which reformers have responded to disuse reveals lessons that pull together insights from different theories of property law, while also pointing to an ongoing role for property in urban governance. But disused urban land remains just one resource, in one social context.

Seeing property law through the lens of disuse will reveal other lessons when scholars examine how people have worked to make other types of

resources, both tangible and intangible, more useful. Disuse offers fertile terrain for thinking about property law in productive new ways. Scholars of property law would do well to survey and till this fertile ground and see what it might produce.