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URBAN HOMESTEADING: A COMPROMISE BETWEEN SQUATTERS AND THE LAW

Even what a person has produced by his individual toil, unaided by anyone, he cannot keep, unless by the permission of society. Not only can society take it from him, but individuals could and would take it from him, if society only remained passive; if it did not either interfere *en masse*, or employ and pay people for the purpose of preventing him from being disturbed in the possession.

John Stuart Mill¹

INTRODUCTION

There is a clash today in many of the country's major cities caused by people who lack adequate, low-cost housing and who actively oppose the cities' housing policies. Restricted by city practices which promote temporary solutions such as shelters, transitional housing, and welfare hotels,² many people who are desperate for permanent housing turn to squatting; they move into abandoned buildings.³ This self-help strategy

1. 1 J.S. MILL, *PRINCIPLES OF POLITICAL ECONOMY* 258 (New York 1865).

2. Hirsch & Wood, *Squatting in New York City: Justification and Strategy*, 16 N.Y.U. REV. L. & SOC. CHANGE 605, 610 (1988). Temporary shelter is provided in such places as church basements and armories, sometimes accommodating up to 1000 people. While the city provides shelter for approximately 10,000 adults a night, many homeless would rather take their chances on the street than share a room in an armory with 850 to 1000 others, and risk losing their privacy and few belongings to drug addicts and the mentally ill. Murphy, *A View from City Hall: Poverty Fought by Fighting Poor*, *Newsday*, July 17, 1989, at 19, col. 2.

A number of states, however, have initiated programs which provide more than temporary solutions, such as giving housing assistance to the chronic mentally ill, and rental assistance and grants to low-income people to prevent eviction and homelessness. O'Connor, *State Legislative Initiatives for the Homeless*, 3 N.Y.L. SCH. HUM. RTS. ANN. 309, 310-13, 319 (1986) (discussion of legislative actions being taken to assist the homeless). See also Langdon & Kass, *Homelessness in America: Looking for the Right to Shelter*, 19 COLUM. J.L. & SOC. PROBS. 305, 350-51 (1985) (suggesting a plan for a nationwide program to be implemented with the goal of a long-range approach for permanent housing).

3. Abandoned housing may be defined as "buildings which are unoccupied and have

has increased in popularity as the housing situation has worsened.⁴ For those without adequate housing and those who reject the unpleasantness and dangers of shelters, squatting in these abandoned buildings presents a solution to their daily struggle for survival.⁵

Historically, squatting in the United States occurred primarily in unsettled rural areas, with the motivation of settling and cultivating the land.⁶ A squatter is defined as

[o]ne who settles on another's land, without legal title or authority. A person entering upon lands, not claiming in good faith the right to do so by virtue of any title of his own or by virtue of some agreement with another whom he believes to hold the title. Under former laws, one who settled on public land in order to acquire title to the land.⁷

The expansion of settlements across the United States, led by the Pilgrims of the Mayflower, was accomplished through squatting.⁸ As the country's rural squatters pushed west, they settled on land without title.⁹ The first significant instances of urban squatting occurred during the

been vandalized, boarded, deteriorated, or dilapidated, or have unmaintained grounds." Project, *Abandonment of Residential Property in an Urban Context*, 23 DE PAUL L. REV. 1186, 1186 (1974).

4. See generally Woodward, *Homelessness: A Legal Activist Analysis of Judicial Street Strategies*, 3 N.Y.L. SCH. HUM. RTS. ANN. 251, 303 (1986) ("street strategies" have the most potential for combatting the homeless situation).

5. Hirsch & Wood, *supra* note 2, at 605. The lives of those who are homeless and living on the streets are filled with hunger, filth, and fear. On a daily basis, these people experience a lack of food, security, and shelter while being confronted with inclement weather, harassment from passers-by, and the possibility of physical attacks. Their food may come from soup kitchens, meal programs, or from scrounging in garbage cans. In addition, the homeless suffer from severe hygiene problems due to a lack of access to toilets, showers, and laundry facilities. Langdon & Kass, *supra* note 2, at 314-15. While immediate shelter is the primary need of the homeless to combat the "threats of street life," emergency shelter should be only one step in a plan that will provide long-term housing. *Homeless Families: Do They Have a Right to Integrity?*, 35 U.C.L.A. L. REV. 159, 166-67 (1987) [hereinafter *Homeless Families*].

6. Manaster, *Squatters and the Law: The Relevance of the United States Experience to Current Problems in the Developing Countries*, 43 TUL. L. REV. 94, 99 (1968).

7. BLACK'S LAW DICTIONARY 1403 (6th ed. 1990). See also *McPhail v. Persons Unknown*, [1973] 1 Ch. 447, 456 (C.A.) (a squatter is "one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can").

8. Manaster, *supra* note 6, at 99.

9. *Id.*

California gold rush in San Francisco.¹⁰ Additionally, squatters inhabited major cities across the United States during the Depression of the 1930s.¹¹

Another common practice during the settling of the United States was for the government to provide people with tracts of land to encourage development of the frontier.¹² Through the Federal Homesteading Act of 1862,¹³ the federal government granted settlers up to 160 acres of public land for a nominal filing fee and the promise to settle on and to cultivate the land for a specified length of time.¹⁴ After five years, provided the homesteader had not abandoned the land for a period of more than six months, the homesteader received the land free of charge.¹⁵

In addition to the desire for western expansion, the purpose of homesteading, which is applicable to urban centers today, was to "reduce poverty, allay discontent in populated centers, and better distribute surplus population."¹⁶ In today's large cities, the lack of low-income housing has generated a surge of urban homesteading.¹⁷ New York City's abundance of abandoned, city-owned housing units¹⁸ has led many who cannot afford the city's high rents to contract with the city to rehabilitate the buildings in return for the right to occupy.¹⁹ The city provides private

10. *Id.* at 100.

11. *Id.*

12. Note, *Homesteading Urban American After Moore v. Detroit: The Constitutionality of Detroit's Nuisance Abatement Plan and Its Implications for Urban Homesteading Legislation*, 34 WAYNE L. REV. 1609, 1609 (1988).

13. An Act to Secure Homesteads to Actual Settlers on the Public Domain, 12 Stat. 392 (1862) (codified as amended at 43 U.S.C. § 161) (repealed 1976).

14. Note, *supra* note 12, at 1609.

15. *Id.*

16. C. ABRAMS, *SQUATTER SETTLEMENTS: THE PROBLEM AND THE OPPORTUNITY* 6 (1966).

17. Note, *supra* note 12, at 1609-10, 1619.

18. In New York City, 10,000 city-owned housing units sit vacant, while an estimated 70,000 to 90,000 are homeless. Hirsch & Wood, *supra* note 2, at 608 (citing M. HOPE & J. YOUNG, *THE FACES OF HOMELESSNESS* 20 (1986)); *U.S. Census to Include Homeless*, Christian Sci. Monitor, Mar. 13, 1990, at 6, col. 1 (estimate by Coalition for the Homeless); *New Mayor Should Continue Housing Program That Is Working*, N.Y. Times, Oct. 10, 1989, at A28, col. 4. It is also estimated that one-third of New York City's renters (660,000 households) live in overcrowded, dilapidated housing, with approximately 100,000 families doubled-up with relatives because of their inability to afford the city's excessively high rents. Cohen, *To House the Poor, Abandon the Private Market*, Newsday, Oct. 31, 1989, at 60, col. 1 (city ed.).

19. Erlanger, *New York Turns Squatters into Homesteaders*, N.Y. Times, Oct. 12, 1987, at A1, col. 1.

persons with the possession of abandoned housing in return for the agreement that they make improvements. The theory underlying urban homesteading is that

homeownership fosters a higher degree of parcel maintenance and specific attachment. The objective is to make previously unattractive units available to qualified owners for little or no initial cost, with the result that parcels which have been economically nonviable can come back on the market simply for the cost of rehabilitation.²⁰

Despite the attractiveness of homesteading as a solution to upgrading rundown neighborhoods and providing a permanent form of housing, New York City prefers to encourage temporary solutions.²¹ Temporary solutions actually may add to problems of homelessness if long-term solutions are not also considered. Long-term permanent housing must be offered or the homeless population will become dependent on these emergency shelters as their "permanent homes."²²

With a focus on New York City, this Note will discuss how the law can serve the needs of society²³ by making beneficial use of land rather than restricting its use²⁴ by allowing abandoned buildings—both city- and privately-owned—to remain vacant. The challenge is for the law to strike an equitable balance between the competing needs and interests of landowners and the equally legitimate needs of large groups of people who are paralyzed by population growth and economic deprivation.²⁵

20. J. HUGHES & K. BLEAKLY, URBAN HOMESTEADING 3-4 (1975).

21. Hirsch & Wood, *supra* note 2, at 610. See also *Homeless Families*, *supra* note 5, at 166-68 (recommending a three-tier approach as an effective, long-term solution to the homeless problem).

22. *Homeless Families*, *supra* note 5, at 166-68.

23. For the purposes of this Note, the needs of society may be described as rehabilitating rundown housing, thus upgrading neighborhood conditions, and providing adequate, permanent housing for the poor.

24. Property rules encouraging the active use of land go as far back as the thirteenth century. J. DUKEMINIER & J. KRIER, PROPERTY 157, 173 (1988). Restrictions on the alienation of land are discouraged because they: (1) render the property unmarketable; (2) promote the perpetual concentration of wealth; (3) discourage improvements of the land; and (4) prevent creditors (or the state) from reaching the property. *Id.* at 159-60. *But cf. id.* at 35 ("[p]rivate ownership implies that the community recognizes the right of the owner to exclude others from exercising the owner's private rights"); see also Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964) (private property "performs the function of maintaining independence, dignity and pluralism in society. . . . the owner may do what all or most of his neighbors decry").

25. See Manaster, *supra* note 6, at 95 (discussing the problems and causes of urban

As squatting is an activity which is arguably in opposition to prevailing legal standards of conduct, it may be necessary to implement a solution that addresses the underlying needs of those affected by squatting.²⁶ This Note will identify the roles of squatting and homesteading in combatting the present urban housing shortage, and will critically analyze and assess the practices of each to weigh their purpose, legality, and efficiency.²⁷ Section I surveys the squatter and homesteader movements in New York City.²⁸ Section II examines takings and weighs its pros and cons with regard to the public interest.²⁹ Section III explores the role of the judiciary in encouraging reform in property law when the legislature is slow to implement desirable changes.³⁰

I. SQUATTERS AND HOMESTEADERS IN NEW YORK CITY

A. *The Squatter Movement*

There are currently thousands of persons in New York City who are homeless because adequate low-income housing is unavailable.³¹ Poverty is at the heart of this crisis. The poverty rate in New York City is sixty percent above the national average with approximately twenty-two percent of the city's residents existing on incomes below the national poverty level.³² This increase is caused partially by a decrease in investment and

squatting worldwide, and evaluating the legal means of dealing with squatters).

26. *Id.*

27. See Hirsch & Wood, *supra* note 2, at 605 (when a severe housing crisis exists, strategies such as squatting and homesteading should be considered to add to the city's low-income housing stock).

28. See *infra* text accompanying notes 31-72.

29. See *infra* text accompanying notes 73-114.

30. See *infra* text accompanying notes 115-142.

31. Hirsch & Wood, *supra* note 2, at 606; Langdon & Kass, *supra* note 2, at 311. Homelessness is

simultaneously a housing problem, an employment problem, a demographic problem, a problem of social disaffiliation, a mental health problem, a substance abuse problem, a criminal justice problem, a family violence problem, a problem created by the cutbacks in social welfare spending, a problem resulting from the decay of the traditional nuclear family, and a problem intimately connected to the recent increase in the number of persons living below the poverty level.

J. WRIGHT, ADDRESS UNKNOWN 32 (1982).

32. O'Neill & O'Neill, *Problem of the Poor: Dependency, Not Poverty*, *Newsday*, Oct. 27, 1989, at 72, col. 1. See also *Homeless Families*, *supra* note 5, at 169 (poverty rate, unemployment rate, and homelessness are closely linked).

mortgaging in poor areas,³³ a rise in unemployment,³⁴ and current federal welfare policies.³⁵ These factors are compounded by the burgeoning population and the constant rural migration to large cities.³⁶

Squatting is a strategy used to overcome an insurmountable situation caused by these market processes and political policies which create a large number of unhoused people and abandoned housing.³⁷ Squatting itself is not a spontaneous movement but a retaliatory stance, largely attributable to an unequal distribution of wealth.³⁸ Modern squatters

33. Hirsch & Wood, *supra* note 2, at 606-07 (citing Meyerson, *Housing Abandonment: The Role of Institutional Mortgage Lenders*, in CRITICAL PERSPECTIVES ON HOUSING 184-201 (1987)). Additionally, displacement by gentrification is also a frequent occurrence. Variations of displacement have occurred for decades with low-income residents being forced to move into less desirable neighborhoods. *Id.* at 608; Langdon & Kass, *supra* note 2, at 311; Ratliff & Calhoun, *Use of Last Resort Housing Benefits and Redevelopment: A Case History*, 22 CLEARINGHOUSE REV. 442, 443 (1988). The squatters call gentrification "spatial deconcentration," and believe gentrification to be a bureaucratic plan to clear out the poor and minorities to permit neighborhood revitalization. Ferguson, *Occupied Territories: Inside the Squatters Movement*, VILLAGE VOICE, July 18, 1989, at 22, 24.

34. Hirsch & Wood, *supra* note 2, at 607 (number of manufacturing jobs in New York City dropped from over one million in 1947 to 400,000 in the mid-1980s) (citing W. TABB, *THE LONG DEFAULT: NEW YORK CITY AND THE URBAN FISCAL CRISIS* 75 (1982)); Murphy, *supra* note 2, at 19 (New York City lost 14,900 manufacturing jobs in 1988 and a total of 72,000 since 1981; gains in employment have been mainly in the service sector, which provides lower wages).

Unemployment creates both a monetary and psychological strain which may lead to the loss of housing. If a shift in productivity continues away from the heavy industry sector, unemployment will continue to increase, and with it, homelessness. Langdon & Kass, *supra* note 2, at 313. The connection between homelessness and unemployment is self-perpetuating; the search for housing is frustrated by lack of employment and, without housing, it is almost impossible to keep a job. *Homeless Families*, *supra* note 5, at 169-70.

35. See *Homeless Families*, *supra* note 5, at 170-71 (Reagan administration cutbacks in federal benefits and programs eliminated thousands from welfare eligibility); see also Ferguson, *supra* note 33, at 30 (housing conditions in the East Village of New York City worsened during the Reagan years when federal housing subsidies for low- and middle-income housing were cut by over 80%); Cohen, *supra* note 18, at 60, col. 1 (Reagan administration's slashing of federal housing assistance from \$32 billion to \$8 billion has been the "most damaging factor" to the housing situation); Murphy, *supra* note 2, at 19 (Reagan and Bush administrations created homeless problem by cutting federal housing programs, discontinuing disability payments for the mentally ill, and failing to thwart international drug traffic).

36. Manaster, *supra* note 6, at 97. While the situation of homelessness is created by a combination of elements, the single definitive characteristic of a homeless person is the absence of permanent, stable housing. *Homeless Families*, *supra* note 5, at 168. The reasons for the culmination of the state of homelessness are almost irrelevant, for once homeless, the economic feasibility of attaining housing is overwhelming because of the reality of simply existing. *Id.* at 169.

37. Hirsch & Wood, *supra* note 2, at 605.

38. It has been posited that any act labeled as a deviation is a failure to follow the

usually join others in community organized groups, united by a common political thread.³⁹ Politically motivated, these squatters are not self-seeking "lawless individuals," but are actually participants in "social movements of great magnitude."⁴⁰

There is, however, diversity among the movement. Some are artists seeking autonomy by forsaking the nine-to-five lifestyle and all of its trappings.⁴¹ Others are social and political activists who cannot afford the city's high rents.⁴² The movement also includes "revolutionaries" whose

standards set by the dominant group. Chester, *Perceived Relative Deprivation as a Cause of Property Crime*, 22 CRIME & DELINQUENCY 17, 22 (1976) (unequal distribution of wealth is a cause of deviance from societal norms). Thus, these retaliations among the subordinate group of squatters and homeless increase as their perceptions of the contrast between their living standards and the middle class grow. This is caused by feelings of discontent and a stimulation of desires. *Id.*

As if through a one-way mirror, the urban poor watch the outside world speed by in expensive automobiles. They see steel and glass skyscrapers of affluent America rise from the slums where they used to live They see out from the slums, but few see in In the past nearly all were poor. Now in America the poor are a small minority. The frustration arising from this fact, not experienced by the poor heretofore, compound the anguish of the interdependence of urban life.

Id. (quoting R. CLARK, CRIME IN AMERICA 40 (1971)). The poor's perception of their lives is exacerbated by the closeness of wealth and compounded by the constant flaunting of wealth in the media. *Id.* at 29-30.

39. Allen, *A Frontier Challenge to the Urban Landowner: Squatters in New York*, 49 J. URB. LAW 323, 325 (1971). In Washington, D.C., squatters attempted to camp in a park near the White House to protest the plight of the homeless. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Supreme Court recognized, for purposes of argument, that sleeping in Lafayette Park to demonstrate concern for the homeless was expressive conduct that fell within the protection of the first amendment. *Id.* at 296. However, the Court upheld the ban on sleeping in the park because it was content-neutral and would deter other demonstrators in the future. *Id.* Professor Laurence H. Tribe found that the restriction of this forum was not content-neutral because it was necessary to the expression of one group of speakers. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 599-600 (1985). Tribe noted that as the purpose of the message was to express concern over the plight of the homeless, complete access to the park, including sleeping, was necessary to fully voice the message; thus the ban resulted in restricting only some speakers. *Id.*

40. Manaster, *supra* note 6, at 95 (urban squatters are motivated by the need for housing amid unparalleled population growth); *see also* Allen, *supra* note 39, at 326-27. After being ousted from Tompkins Square Park in early 1989, squatters in New York City's East Village compared the police action to that of the Chinese army, by posting signs reading: "From Tompkins Square to Tiananmen Square, One World Police State." Ferguson, *supra* note 33, at 24.

41. Ferguson, *supra* note 33, at 27.

42. *Id.*

goal is to overthrow the government,⁴³ craftsmen and carpenters who want to build their own homes,⁴⁴ and the needy who have nowhere else to go.⁴⁵

Despite the differences in their professed needs, there is a common goal: to secure housing. Behind the movement is the collective belief that "housing—not shelter—is a human right."⁴⁶ Thus, consistent with classic civil disobedience, they fight the system believing they are "morally right."⁴⁷ Squatters pursue their goals by attempting to prevent the city from demolishing vacant buildings, encouraging the city to take over and renovate privately owned abandoned buildings, and instituting programs for the creation of low- and moderate-income housing.⁴⁸

Squatters are faced with legal, political, and economic problems. Their position is controversial because: (1) they violate traditional property law rights; (2) they take over property at the expense of those who are on waiting lists for public housing; and (3) they antagonize neighborhood residents when acting without obtaining community support.⁴⁹ Squatting also poses problems for the participants themselves. Along with the ever-present potential for arrest, squatters pay a significant physical and

43. *Id.*

44. *Id.*

45. Many New York City squatters come from other cities with hopes or promises of employment, but find it impossible to make ends meet once in New York. In an open letter to a New York newspaper, one such squatter, Julie Rankin, found herself without housing and living in a tent in Tompkins Square Park. She was interviewed by members of a squat to see if she would be an asset to their group. After being accepted, Rankin related her feelings about homelessness and squatting:

Being homeless changes everything: the way people look at you, and the way you look at yourself. It makes you feel degraded, less of a human being than people who have even the barest necessities In return [for being allowed into the squat], I have worked on our building to make it a better place to live. I am no longer homeless, because I have made myself a home. That I am a squatter does not mean I am a delinquent and break the law every chance I get. What it does mean is that I cannot afford the high rents in this city. The basic necessities of life are shelter, food, clothing and medical care.

Rankin, "I Will Not Give Up My Home," *Newsday*, Nov. 20, 1990, at 54, col. 1.

46. Ferguson, *supra* note 33, at 27 (quoting Frank Morales, an Episcopal priest and evicted squatter).

47. *Id.*

48. Allen, *supra* note 39, at 326-27.

49. Hirsch & Wood, *supra* note 2, at 605. Squatters often do not invite community support. In early 1990, when squatters in New York City's East Village were evicted from an abandoned schoolhouse, neighborhood residents were pleased because of the construction noise and garbage accumulation they attributed to the squatters. Slayton, *ABC Squatters Evicted*, *Village Beat*, Feb. 1990, at 3, col. 1.

financial contribution to the repair of the dilapidated buildings that they occupy.⁵⁰

Squatters try to make the most of the unpleasant circumstances they confront when moving into squats by plowing through rubble, replacing entire floors, and patching the roofs and walls.⁵¹ Despite these efforts, the city often tries to make abandoned buildings unlivable by punching holes in roofs and stairs, and plugging sewer lines.⁵² Instead of directly addressing the squatter issue, the city sometimes uses safety regulations, such as the presence of asbestos or the lack of plumbing, as a "pretense to evict . . . squatters."⁵³ They "selectively address[]" regulations that are generally not enforced to circumvent confronting the squatters.⁵⁴

The history of squatter settlements in rural and urban locations demonstrates a direct correlation between the extent of improvements the city allows the squatters to make to the dwellings and the degree of security and stability the squatters perceive they have in their locality.⁵⁵ This correlation is an important factor which should be considered in the development of policies regarding squatters. Legal conveyance or leasing to the squatters will give them an incentive to improve the property, and consequently, will further the rejuvenation of neighborhood housing.⁵⁶ Thus, by clarifying the squatters' legal position and establishing their rights, the city would prove its interest in the needs of its citizens, and thereby demonstrate a willingness to adapt its laws when necessary.⁵⁷

50. Hirsch & Wood, *supra* note 2, at 605.

51. *Id.* Most of the squats are buildings that have been abandoned by the city for 15 to 20 years, which sit vacant and rotting, while the city waits for developers to purchase them. *Give Squatters Title, and You Will See Neighborhoods Bloom*, N.Y. Times, Nov. 15, 1990, at A26, col. 4 [hereinafter *Give Squatters Title*].

52. Ferguson, *supra* note 33, at 28.

53. Slayton, *supra* note 49, at 3, col. 1.

54. *Id.*

55. Manaster, *supra* note 6, at 97. Squatters are often motivated by a strong work ethic, which they refer to as "sweat equity." Because of the work and improvements they put into the formerly abandoned buildings, squatters believe that they have earned the right to inhabit their homes. As one squatter expressed: "Squatters are not standing in the way of decent housing; we are proving there is a low-cost, human-powered alternative to expensive, ineffective government programs. Furthermore, we urge genuinely nonprofit housing groups to find truly abandoned buildings to rehabilitate." *Give Squatters Title*, *supra* note 51, at A26, col. 4.

56. Manaster, *supra* note 6, at 97.

57. *Id.* at 97-98. By demonstrating this interest and flexibility, the city also benefits by promoting a greater respect for its laws.

B. *Urban Homesteaders*

There have been recent compromises between squatters and the legal system with respect to homesteading. Unlike squatters, homesteaders acquire their living quarters through legal channels. Homesteading groups are comprised of neighborhood residents and formal organizers who unite to combat their area's housing problems; primarily, the lack of adequate low-income housing. Because homesteading is legal,⁵⁸ it is easier for homesteaders to get financial support from the city and other sources.⁵⁹

The city provides homesteaders with buildings from its in rem (tax foreclosed) stock, along with funds to rehabilitate the buildings.⁶⁰ The homesteaders acquire the buildings for a nominal price with the agreement to renovate and not make a profit on resale.⁶¹ The city retains title with the first right to repurchase at the cost/investment of the owners, not the market price, if the homesteader-owners choose to sell.⁶² This relationship between homesteaders and the city may be viewed as "a new form of social contract between the city and its poorer residents."⁶³

During the past five years, amidst a bitter struggle involving many arrests, The Association of Community Organizations for Reform Now (ACORN) has persuaded squatters to give up squatting in favor of homesteading.⁶⁴ ACORN focuses its organized efforts on abandoned housing—not homelessness.⁶⁵ Its purpose is to rehabilitate abandoned housing in neighborhoods with high crime rates and low property values

58. Federal homesteading laws use federally-owned housing stock to provide ownership and assist in the preservation and revitalization of selected neighborhoods. *See* 24 C.F.R. §§ 590.1-.31 (1988). Under these programs, federally owned property is provided with a fee simple title for no consideration. *Id.* § 590.7(b)(7). For the conveyance of property, the homesteader agrees to repair and continue to improve the property, to occupy for not less than five consecutive years, and to surrender the property upon any material breach of the agreement. *Id.* § 590.7(b)(5). *See also* 12 U.S.C. § 1706c(b)(6) (1988) (providing for the transfer of real property without payment as a "coordinated approach toward neighborhood improvement . . . and the upgrading of community services and facilities").

59. Hirsch & Wood, *supra* note 2, at 606.

60. *Id.* at 616.

61. *Id.*; Erlanger, *supra* note 19, at D11, col. 1.

62. Erlanger, *supra* note 19, at D11, col. 5.

63. *Id.* (quoting Ronald Shiffman, director of the Pratt Institute Center for Community and Environmental Development); *see also* Hirsch & Wood, *supra* note 2, at 616.

64. Erlanger, *supra* note 19, at D11, col. 1.

65. Hirsch & Wood, *supra* note 2, at 612.

due to the dilapidated buildings.⁶⁶

In New York City, squatters-turned-homesteaders have received city funds and city-owned buildings as members of neighborhood collectives that promote homesteading versus squatting.⁶⁷ The squatters/homesteaders are rewarded once "community passion [is] channeled shrewdly by institutes and foundations into paths acceptable to government officials."⁶⁸ Because getting the city to commit to such programs is difficult, ACORN carefully selects applicants to guarantee the success of its efforts. This includes ensuring that the homesteaders possess the dedication to work hard to improve their buildings, and also requires screening out anyone who lost their former housing due to nonpayment of property taxes.⁶⁹

The strength of any given squatting or homesteading action depends largely on the internal structure of the organization, coupled with its use of demonstrations and other political pressures.⁷⁰ A tense political situation may help squatters in their negotiations, whether their opponent be the city or a private owner.⁷¹ There is, however, external support and recognition of the extensive time and physical effort required in their commitment to their property.⁷²

Such homesteading agreements as described above benefit the city in several ways: (1) supporting homesteading efforts encourages squatters to accomplish their goals through legal channels and alleviates neighborhood tensions caused by squatters; (2) providing homesteading groups with abandoned housing brings previously unusable housing units back on the market for the cost of rehabilitation; and (3) neighborhoods with dilapidated, abandoned housing are renewed, thereby reducing the crime rate and drug use that often accompany vacant buildings.

66. *Id.*

67. Erlanger, *supra* note 19, at D11, col. 1.

68. *Id.*

69. Hirsch & Wood, *supra* note 2, at 612, 615.

70. Allen, *supra* note 39, at 338-39.

71. *Id.* at 339-40 (in the early 1970s, squatters successfully negotiated with the city to continue occupancy and receive status as "on site tenants" because of political pressure over an urban renewal plan); Hirsch & Wood, *supra* note 2, at 613 (ACORN homesteaders focused their efforts solely on city-owned buildings, finding the city particularly vulnerable to political pressure).

72. *In rem* tax Foreclosure Action No. 29 Borough of Manhattan, 115 Misc. 2d 663, 454 N.Y.S.2d 919 (1982) (court strictly construed statutory requirements of foreclosure, while acknowledging extensive effort contributed by homesteaders to improve the foreclosed parcels of land).

II. TAKINGS AND THE PUBLIC INTEREST

A. *Eminent Domain Versus Police Power*

One problem underlying urban homesteading laws is that the property must be city-owned, otherwise the seizing of private property may be considered a taking under the eminent domain clause of the fifth amendment.⁷³ The United States Supreme Court has found that the promotion of a city's interest in public welfare justifies the taking of private property.⁷⁴ Although the taking of private property may appear contrary to due process rights granted by the Constitution, the Court has recognized that it is within the realm of government power to "execute laws or programs that adversely affect recognized economic values."⁷⁵ Therefore, since the city has an interest in providing its residents with permanent housing, upgrading low-income neighborhoods, and ending friction between squatters and law enforcers, it may be within the city's power to seize vacant buildings in rundown neighborhoods that are rampant with drugs and crime, and utilize them in an urban homesteading program. To allow homesteaders to take over abandoned, dilapidated buildings would be an instance where the "health, safety, morals, or general welfare" of both the neighborhood and city would be promoted.⁷⁶

The question arises whether the private property owner is protected from such takings by the eminent domain clause or whether these takings fall under the city's police power; under the city's police power, owners do not have to be compensated for the taking.⁷⁷ In 1983, Detroit amended

73. U.S. CONST. amend. V provides "nor shall private property be taken for public use without just compensation." The eminent domain clause was applied to the states in *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896).

74. *See, e.g., Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (city may place restrictions on development of private property in order to preserve historical district); *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (zoning restriction allowed because of city's interest in preserving the quality of urban life); *Berman v. Parker*, 348 U.S. 26 (1954) (act providing for use of eminent domain power to develop slum areas and for possible resale of land to private interests was constitutional); *Miller v. Schoene*, 276 U.S. 272 (1928) (court justified cutting down trees on one parcel of land as means of preventing spread of disease to other orchards in vicinity); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning ordinance resulting in the reduction of private land value was justified by the promotion of health and security achieved by the diversion of the industrial flow from residential districts).

75. *Penn Central*, 438 U.S. at 124.

76. *Id.* at 125; *see also Berman*, 348 U.S. at 32.

77. Under the power of eminent domain, a taking is one for public use or for the state's own enjoyment. In comparison, a taking under the city's police power is to regulate

its nuisance abatement ordinance to include a provision which grants occupancy to abandoned housing to which the city does not have title.⁷⁸ Because the tax reversion process often takes years, this ordinance was established to prevent losing these buildings to vandalism and decay, thus allowing for restoration before the city takes title.⁷⁹ Finding that the abundance of abandoned buildings scattered throughout the city created an unsafe and immoral atmosphere, the ordinance was enacted to eliminate the "public nuisance" and "blighting influence on the surrounding neighborhood" created by these buildings.⁸⁰ The ordinance allows families to move into abandoned homes and repair them, thereby "preserv[ing] the residential housing stock of the city, increas[ing] neighborhood stability and provid[ing] needed homes for Detroit citizens."⁸¹

In *Moore v. City of Detroit*,⁸² the Michigan Court of Appeals considered whether the Detroit nuisance abatement ordinance

use of the property and to "further the public health, safety, or welfare." Note, *supra* note 12, at 1630-31 (citations omitted).

78. DETROIT, MICH., CODE § 12-11 (1983). See also Note, *supra* note 12, at 1610.

79. DETROIT, MICH., CODE § 12-11-46.1(e). See also Note, *supra* note 12, at 1611.

80. DETROIT, MICH., CODE § 12-11-46.1(c).

81. *Id.* § 12-11-46.1(f). The Detroit city council relied on the following legislative findings when enacting the homesteader's ordinance:

(a) Scattered throughout the city are a large number of unoccupied dwellings which are constantly broken into, vandalized, used for unsanitary or immoral purposes and are potential fire hazards.

(b) There are many unoccupied dwellings in the city which, because of their vacant status, constitute hazards to the health, safety, and welfare of the public.

(c) Certain vacant dwellings have reached a stage of disrepair and deterioration which create a public nuisance or exert a downgrading or blighting influence on the surrounding neighborhood, resulting in discouraging neighbors from making improvements to properties and thus adversely affecting the tax revenue of the city.

(d) Throughout the city, the number of vacant and deteriorated dwellings constituting public nuisances has become so high that traditional means of abating such nuisances have been ineffectual, and blight and deterioration of emergency proportions have resulted.

(e) Currently, tax delinquent abandoned dwellings revert to the state and are then deeded to the city through the state tax reversion process. However, this process takes several years, during which time many dwellings are lost through vandalism and deterioration.

(f) Permitting families to repair and move into abandoned homes within the city will preserve the residential housing stock of the city, increase neighborhood stability and provide needed homes for Detroit families.

Id. § 12-11-46.1.

82. 159 Mich. App. 199, 406 N.W.2d 488 (1986).

"unconstitutionally deprives property owners of their property interests without due process of law or just compensation."⁸³ The due process challenge of the ordinance was based on the theory that the city was authorized to confiscate private property without just compensation in violation of its powers of eminent domain.⁸⁴ The court found that the ordinance falls within the city's police power to "provide for the public peace and health of its citizenry and promote the safety of persons and properties within its boundaries" and, therefore, was constitutional.⁸⁵

The court distinguished a taking under the ordinance from the city's power of eminent domain because the burden put on the property owner under the ordinance was not one which should be "borne by the public."⁸⁶ Since the nuisance put upon society by the abandoned housing was due to "the action or inaction" of the owner, it was not unjust to impose the burden of abatement upon the owner rather than upon the public.⁸⁷ The court also noted, however, that while taking without compensation was within the police power of the city, the taking must be "reasonable under the surrounding circumstances."⁸⁸ Since the city was allowed to demolish or order repairs without providing compensation, allowing a third party to occupy and make repairs was obviously "not more intrusive than demolition."⁸⁹ Therefore, the taking was found to be reasonable because of the need to reduce the public nuisance of unsafe and unsanitary conditions.⁹⁰

83. *Id.* at 201, 406 N.W.2d at 489 (citation omitted).

84. *Id.*, 406 N.W.2d at 489.

85. *Id.* at 202, 406 N.W.2d at 490 (citation omitted). *But cf.* Note, *supra* note 12, at 1639-40 (contending that the Detroit ordinance is "constitutionally deficient" because it "significantly expands the ability of state and local governments to assert control over abandoned property without the need for providing just compensation to the title owner").

86. 159 Mich. App. at 203, 406 N.W.2d at 490 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978)).

87. *Id.*, 406 N.W.2d at 490. *But cf.* Note, *supra* note 12, at 1615-19 (structural abandonment and urban decay are caused by society as a whole).

88. 159 Mich. App. at 203, 406 N.W.2d at 491.

89. *Id.* at 205, 406 N.W.2d at 491.

90. *Id.* at 203, 406 N.W.2d at 490. The court found that rundown, unsafe buildings created a blight on the neighborhood which the public should not have to bear.

In a disordered society, vacant houses develop into public nuisances . . . partly because of the action or inaction of their owners. It is neither unfair nor unjust for the city to impose the burden of abating these nuisances upon the individual owners rather than upon the public as a whole.

Id., 406 N.W.2d at 490.

B. *Weighing the Interests*

The issues presented in a takings situation offer conflicting interests, and choosing between the interests is a political choice.⁹¹ As previously noted, the interests involved in squatting and homesteading include landowners' property rights, the needs of the homeless and poor for adequate, permanent housing, and the city's interest in rehabilitating and upgrading rundown neighborhoods. The legal system must decide which of these interests are entitled to favor.

The Supreme Court has acknowledged that slum neighborhoods fraught with crime are an "admittedly serious problem[]," and when dealing with deteriorated areas where crime is rampant, cities should be allowed to "experiment with solutions."⁹² While property owners' rights must be considered, the Court has established that a city's interest in promoting the quality of life and public welfare "must be accorded high respect."⁹³ New York City's interest in preventing the deterioration of

91. Alexander, *History as Ideology in the Basic Property Course*, 36 J. LEGAL EDUC. 381, 383 (1986). For the purposes of this Note, the term political refers to the notion that the categorization of property is dependent on biases toward the status quo at any given time. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 746 (1988). Property may be seen as a political relationship between people because the enforcement of property as a "right" is the role of the state. MacPherson, *The Meaning of Property*, PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 4 (1978) [hereinafter CRITICAL POSITIONS]. MacPherson proposes that changes in the way property is perceived are due to shifts in the needs of the dominant class. Since property is a concept conceived by humans, and is designed to serve human needs, the meaning changes with the needs of the majority at any given time. *Id.* at 1, 11.

The idea of property as political is not new. Eighteenth century philosopher Jean-Jacques Rousseau asserted that property was a concept developed by the rich, resulting in an abridgment of natural freedom. With property came inequality and servitude. Rousseau, *The Origin of Inequality*, in CRITICAL POSITIONS, *supra*, at 36. Rousseau proposed that the rich instituted property rights for their own protection and to the detriment of the poor:

[T]he rich being so to speak vulnerable in every part of their goods, it was much easier to harm them; they consequently had more precautions to take in order to protect themselves from harm; and finally it is reasonable to believe that a thing was invented by those to whom it is useful rather than by those whom it wrongs.

Id. at 37.

92. *Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976); *see also Moore*, 159 Mich. App. at 201, 406 N.W.2d at 491 (ordinance allowing city to take over vacant, deteriorated buildings and turn them over to families to live in and repair was justified as a "reasonable effort to solve a difficult problem").

93. *Young*, 427 U.S. at 71; *accord Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) ("[where] the public interest is involved preferment of that interest over the property interest of the individual . . . is one of the distinguishing characteristics of every exercise of the police power which affects property . . .") (citations omitted). *But cf.* "So great . . . is the regard of the law for private property, that it will not authorize the lea[s]t

its neighborhoods is within the limits of the police power as defined by the Supreme Court.⁹⁴ Coinciding with the Supreme Court's reasoning behind takings, a New York court found that the "menace of the slums" created a situation serious enough to justify the taking of private property.⁹⁵ In *New York Housing Authority v. Muller*,⁹⁶ the Court of Appeals lacked a controlling precedent, but found that the situation justified the taking of private property to confront the problems of juvenile delinquency, crime, and disease in slum areas.⁹⁷

The *Muller* court's accounting for externalities in the allocation of property rights is similar to the concept of absolute dominion,⁹⁸ which bars property owners from using property in ways which intrude on the rights of others.⁹⁹ Externalities exist when one person uses a resource,

violation of it; no, not even for the general good of the whole community." 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 135 (Oxford 1765).

94. See *Young*, 427 U.S. at 75; *Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

95. *New York City Hous. Auth. v. Muller*, 270 N.Y. 333, 341, 1 N.E.2d 153, 155 (1936).

96. 270 N.Y. 333, 1 N.E.2d 153 (1936).

97. *Id.* at 340, 1 N.E.2d at 155 (the court stated that the case should be decided on its individual facts and that "[t]he law of each age is ultimately what that age thinks should be the law") (quoting *People ex rel. Durham Realty Corp. v. LaFetra*, 230 N.Y. 429, 450, 130 N.E. 601, 608 (1921)). See also Friedman, *Capitalism and Freedom*, in *ECONOMIC FOUNDATIONS OF PROPERTY LAW* 77, 91 (B. Ackerman ed. 1975). Friedman refers to such nuisances as "neighborhood effects." As these effects are hard to identify, it is difficult for government to regulate them. Therefore, when judging how to overcome effects and distribute costs, it is necessary to consider the effects by the specific facts of each individual case.

98. The rigid Blackstonian concept of property as "absolute dominion over things" has shifted to a more incorporeal, less readily definable position. Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325, 331, 360 (1980). The transition began with a shift toward a more dynamic philosophy concerning the use of property which encouraged productivity and development. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 31 (1977). The eighteenth century natural use (the right to keep the land in its natural state) and priority (the first user obtains prescriptive rights over time to prevent interference with the property) theories were balanced in order to promote economic efficiency. *Id.* at 32-33. Although the theory of efficiency was still competing with other interests, property rights were appraised by their ability to encourage economic growth. *Id.* at 34. Because the first priority theory encouraged economic development rather than restricting the use of property, it soon became dominant over natural use. *Id.* Because natural use was anti-developmental, making property useless for manufacturing or agricultural purposes, and first priority was monopolistic, courts began to use the "reasonable use" standard, giving judges free reign to institute social policy. *Id.* at 32, 38-39, 43, 45.

99. See M. HORWITZ, *supra* note 98, at 31.

e.g., property, in a way which has an effect on others.¹⁰⁰ Consequently, this "misallocation" of resources has an adverse effect on society or, in other words, may be used in a more efficient manner that is beneficial to society as a whole.¹⁰¹ In the context of abandonment, abandonment spreads geographically within neighborhoods; as neighborhood buildings begin to deteriorate socially and physically, surrounding buildings become infected.¹⁰² The externalities caused by the abandonment, such as the crime and lower property rates, should be regulated when the cost brought upon their interaction with society is greater than the benefit received by the owner.¹⁰³

New York City is replete with abandoned buildings, bringing not only a visual blight to these neighborhoods, but health hazards and crime, as well. During the lapse between owner abandonment, city response, and subsequent tax proceedings, abandoned buildings are havens for children and drug users, and thus vandalism.¹⁰⁴ While a causal relationship between these buildings and crime has not been proven, abandoned buildings are definite facilitators of crime.¹⁰⁵ As the neighborhoods continue to deteriorate, desirable owners, residents, and investors are scared away and the structures cease to be viable shelters.¹⁰⁶ Additionally, the city's attempts to alleviate the problems and effects of abandonment through auctioning of its in rem stock have failed; the process is cyclical as the same buildings are usually in tax arrears within four years and are once again repossessed by the city.¹⁰⁷

In the consideration of the entitlement of the rights of the party's involved, abandonment, with its deleterious effects and its contagious and cyclical nature, has proved to be economically inefficient.¹⁰⁸ Where buildings are abandoned and, during the time it takes for tax sale proceedings, the buildings physically deteriorate to the point of uninhabitability, economic efficiency may be the most basic reason for the

100. J. DUKEMINIER & J. KRIER, *supra* note 24, at 38-39.

101. *Id.* at 39.

102. J. HUGHES & K. BLEAKLY, *supra* note 20, at 57.

103. *Id.*

104. *Id.* at 56.

105. *Id.*

106. *Id.* at 58.

107. Hirsch & Wood, *supra* note 2, at 610.

108. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093 (1972) (the economic efficiency of each party's rights is essential to the determination of the entitlement of rights).

entitlement.¹⁰⁹ In choosing between the competing economic interests, the most effective selection would ideally produce the greatest product for the least effort.¹¹⁰

In weighing the merits of the interests, the focus should be on which result will "produce external benefits for society as a whole."¹¹¹ If one party's use of his property constitutes a nuisance, then the loss to the party imposing the externality may be a benefit to the public.¹¹² While landowners have a right to use their property in the manner which they desire, as discussed in *Moore v. City of Detroit*, it is possible that they have forfeited this right by abandoning the property, thus allowing it to become a societal nuisance.¹¹³

The city's interests, like those of the squatters and homesteaders, are focused on improving the quality of slum areas, particularly in neighborhoods where abandoned buildings proliferate. These buildings can be used efficiently by the city if put to use by either squatters or homesteaders. The city benefits from the improvements to the neighborhood and the creation of a permanent low-income housing solution for some of its poorer citizens. The improvement to the housing market may be of greater importance than any possible intended use the vacant property may have.¹¹⁴ The city's promotion of such a program encourages the active use of land and demonstrates its willingness to adapt its laws as society's needs require. The benefits received by the neighborhood residents and those who are provided housing would outweigh the injury or harm to the property owner.

III. IMPLEMENTING CHANGES

Squatters have few, if any, legal defenses to their actions. Because of awareness of the housing shortage, however, statutory and jurisdictional requirements in summary ejectment proceedings are strictly enforced in favor of squatters,¹¹⁵ even at the risk of the denial of equitable justice

109. *Id.*

110. *Id.* at 1094.

111. Freeman, *Give and Take: Distributing Local Environmental Control Through Land Use Regulation*, 60 MINN. L. REV. 883, 896 (1976). An analysis of economic efficiency should consider the merits of the conflicting rights. Merit is difficult to measure, however, because it requires an appraisal of the values that make one person's interests more deserving than the other's. *Id.* at 894-96.

112. *Id.* at 910.

113. 159 Mich. App. 199, 201, 406 N.W.2d 488, 490 (1986).

114. Allen, *supra* note 39, at 325, 327.

115. N.Y. REAL PROP. ACTS. LAW § 713(3) (McKinney 1990) provides that those

for the property owner.¹¹⁶ As a result, a property owner's case against squatters may fail if it does not meet procedural and jurisdictional requirements.¹¹⁷ It may be that this rigid implementation is carried out to fulfill conceptions of a desirable social change.¹¹⁸ The reluctance to actually bestow upon squatters the right to take over abandoned property, however, is because realization of such rights would contravene existing property laws, and could be perceived as judicial "tyranny."¹¹⁹

If we view legal thought as a "process of categorization," how property is categorized by society is important in the determination of what are to be defined as property rights.¹²⁰ The categorization of

who have "intruded into or squatted upon the property without the permission of the person entitled to permission and the occupancy" are entitled to be served a ten-day notice to leave. The law requiring notice to squatters is more benevolent than for holdover tenants, who initially entered the property with permission. *See Mullman v. Hogan*, 121 Misc. 2d 719, 720, 468 N.Y.S.2d 839, 840 (1983) (notice of termination not required for a holdover tenant).

116. *See Murawski v. Melkun*, 71 Misc. 2d 575, 576-77, 336 N.Y.S.2d 845, 847 (1972) (squatter proceedings "must be interpreted in a strict, exact, and unyielding manner").

117. In denying a landlord's motion for summary judgment against a squatter, the New York City Civil Court found that notice to respondent/squatter failed to appraise him of the underlying facts, but merely tracked the statutory provisions. While noting that its dismissal was not based on the squatter's contention that the landlord's notice was void against public policy, the court declared that it was "offended" by the landlord's use of threats of criminal prosecution in a civil proceeding. *Valrose Realty Co. v. Dewinger*, N.Y.L.J., Feb. 7, 1990, at 23, col. 3 (N.Y. Civ. Ct. Jan. 17, 1990). *See also Stephen Estate, Inc. v. Kaplan*, 198 Misc. 948, 100 N.Y.S.2d 455 (1950) (landlord's use of an eviction certificate did not comply with statutory requirements).

118. *See Kaplan*, 198 Misc. at 955, 100 N.Y.S.2d at 463 ("In view of the tensions created by the acute housing shortage . . . [t]here must be strict compliance with [the] statutory requirements . . ."); *Allen*, *supra* note 39, at 334 (there are strict statutory requirements for challenges to squatters because few adequate defenses are available).

119. *See Singer*, *supra* note 91, at 744-45. Singer claims that when laws need adaptation, judges' reluctance to change is not due to legislative deference, but because they know that their decisions will be "controversial" and change the "existing social practice." Due to political pressures, judges will often "further concentrate property rights in the hands of those who already own property." Thus, the allocation of property rights may be seen as a political choice. *Id.* at 746.

120. Vandevelde, *supra* note 98, at 327. In a treatise on the modern concept of property, Vandevelde claims legal thought is generally grouped into categories: e.g., tort/contract; substance/process; private/public. He proposes that "[c]ategorizing phenomena determines how they will be treated by the legal system. Whether . . . the process of placement [in a category] is seen as mechanical, or . . . as politically motivated, the process is the core of legal thought." *Id.* at 327. However, while categorization is a necessary element of the legal process as a system of order, its use as such is deceptive. Because legal thought is always open to interpretation, the process of placement into categories can be shifted according to the reasoning the legal thinker desires. Kennedy, *The*

property may be perceived as a political choice: individual freedom versus state power.¹²¹ States have the ability to justify the use of power in the determination of property rights under the guise of protecting the health, safety, and welfare of the people.¹²² The interpretive nature of the law, however, sometimes creates a duality between legislation that is restrictive in nature, yet provides a benefit to society.¹²³

When the legislature is slow to react to changing needs of society, it is sometimes necessary for courts to take an active role in implementing the needed change. For example, in response to a reluctance on the part of the legislature to react to statutory laws which created a shortage of adequate low-income housing, New Jersey courts took an active role in instituting law promoting the establishment of low-income housing programs. In two separate decisions, both named *South Burlington County NAACP v. Mount Laurel*, (*Mt. Laurel I*)¹²⁴ and (*Mt. Laurel II*),¹²⁵ the Supreme Court of New Jersey determined that municipalities in growth areas have a "constitutional obligation" to provide a reasonable opportunity for housing to low- and moderate-income families.¹²⁶

Mt. Laurel I was brought by plaintiffs who were part of poor minority groups affected by a zoning ordinance that created an exclusion of low- and moderate-income housing in Mount Laurel.¹²⁷ The zoning ordinance

Structure of Blackstone's Commentaries, 28 BUFFALO L. REV. 205, 215-16 (1979).

121. Vandevelde, *supra* note 98, at 328.

122. *New York City Hous. Auth. v. Muller*, 270 N.Y. 333, 341, 1 N.E.2d 153, 155 (1936) (noting that the authority of the government allows it to apply whatever power is necessary to protect these rights).

123. *Id.* at 341-42, 1 N.E.2d at 155 (New York Court of Appeals allowed the taking of private property in a slum area in order to promote the general welfare of the neighborhood by building low-income housing).

124. 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

125. 92 N.J. 158, 456 A.2d 390 (1983).

126. *Id.* at 205, 456 A.2d at 413; *see also* N.J. STAT. ANN. § 52:27D-302(a) (West 1986).

127. 67 N.J. at 159, 336 A.2d at 717. The plaintiffs were comprised of four groups:

- (1) present residents of the township residing in dilapidated or substandard housing;
- (2) former residents who were forced to move elsewhere because of the absence of suitable housing;
- (3) nonresidents living in central city substandard housing in the region who desired to secure decent housing and accompanying advantages within their means elsewhere;
- (4) three organizations representing the housing and other interests of racial minorities.

Id. at 159 n.3, 336 A.2d at 717 n.3.

established lot size requirements and limited housing to single family residences. As a result of the ordinance, housing became affordable to middle-income families at best. The few multi-family units allowed by the ordinance were out of reach of the low- and moderate-income group.¹²⁸ Finding shelter to be the "most basic human need[]," the court established the provision of adequate housing to be "an absolute essential in promotion of the general welfare,"¹²⁹ and created the right to obtain affordable housing.¹³⁰ The result of the decision, while limiting property owners' right of control over their property, created a "right of access to accommodate fundamental human needs."¹³¹

Eight years later in *Mt. Laurel II*, due to "widespread non-compliance" with the constitutional mandate issued in *Mt. Laurel I*, the New Jersey Supreme Court found it necessary to use a "strong judicial hand" to enforce the decision.¹³² While the court acknowledged that the rule they were instituting was better left to the legislature, it also found that the constitution of the state required the protection of the social and economic interests involved.¹³³ Because the legislature had not acted, the court explained its activism by stating, "[w]e may not build houses, but we do enforce the Constitution."¹³⁴

The court acknowledged, as it did in *Mt. Laurel I*, that regulations not providing the requisite opportunity for a fair share of housing violate the state's substantive due process and equal protection requirements.¹³⁵ Because the state controls the use of "all of the land," it cannot favor the rich over the poor.¹³⁶ The court in *Mount Laurel II* justified its activism by attempting to "fill the vacuum created by the coordinating branches' failure to respond meaningfully" to the problems of providing adequate, low-income housing.¹³⁷ This action by the court led to the enactment of

128. *Id.* at 163, 336 A.2d at 717.

129. *Id.* at 178, 179; 336 A.2d at 727. The court went further to say that "[n]egatively, [the municipality] may not adopt regulations or policies which thwart or preclude that opportunity." *Id.* at 179, 336 A.2d at 728.

130. Singer, *supra* note 91, at 698.

131. *Id.*

132. 92 N.J. at 199, 456 A.2d at 410.

133. *Id.* at 212, 456 A.2d at 417.

134. *Id.* at 213, 352, 456 A.2d at 417, 490.

135. *Id.* at 208-09, 456 A.2d at 415.

136. *Id.* at 209, 456 A.2d at 415 (emphasis in original).

137. Franzese, *Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30, 34 (1988) (analysis of the legal events surrounding the *Mt. Laurel* decisions which led to legislative action due to judicial activism).

the Fair Housing Act (FHA), which provided for a plan to implement the constitutional obligation to provide an opportunity for low- and moderate-income housing.¹³⁸ Under the FHA, the Council on Affordable Housing (COAH) was created, which, in effect, transferred jurisdiction of the *Mt. Laurel* cases from the courts to COAH.¹³⁹ Promoters of the *Mt. Laurel II* decision applaud the court's active role because the FHA and COAH may never have been established without its challenge to traditional law.¹⁴⁰

When dealing with those in need of low-income housing because of displacement or gentrification, the judiciary should follow the example of the *Mt. Laurel* cases by being sensitive to those who are most vulnerable to economic changes.¹⁴¹ It is necessary to account for the distribution of power that puts the homeless "at the mercy of the bureaucracy's interest in administrative efficiency."¹⁴²

While the *Mt. Laurel* court received a certain amount of criticism for its activism, the supporters of the decision claim it is the court's "judicial duty" to fill in gaps "when the political branches of government balk at enforcing a constitutional obligation." *Judicial Duty in New Jersey*, N.Y. Times, Feb. 24, 1986, at A14, col. 1.

138. See N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986). The constitutionality of the FHA was upheld in *Hills Dev. Co. v. Bernards Township*, 103 N.J. 1, 25, 510 A.2d 621, 634 (1986).

139. COAH's function under the FHA is to mediate and review claims which challenge the exclusionary impact of local zoning ordinances and to determine municipalities' obligations to provide affordable housing. N.J. STAT. ANN. §§ 52:27d-307, 315. The New Jersey Supreme Court, although relieved of its supervisory zoning role, achieved its goal by the establishment of COAH. *Judicial Duty in New Jersey*, *supra* note 137, at A14, col. 2.

140. Franzese, *supra* note 137, at 52 (*Mt. Laurel* decision described as "judicial activism as a legitimate catalyst to action by the legislature"). As noted by one commentator, through the *Mt. Laurel* decisions, the "[l]egislature finally realized, the way to curb that kind of judicial intervention is to make it unnecessary in the first place." *Judicial Duty in New Jersey*, *supra* note 137, at A14, col. 2.

141. Because private interests with financial support may be better equipped to utilize the tools of government more efficiently, government power will not impact all social groups evenly. This element of tension between power and vulnerability should be central to the analysis of property rights. Singer, *supra* note 91, at 751. In the consideration of squatters rights, courts first should determine who has the most power and then try to protect the rights of the subordinate group. The political choice to be made constitutes a selection between opposing social relationships: how things *are* organized versus how they *ought* to be organized. Alexander, *supra* note 91, at 383. The existence of this choice is contrary to the legal, historical categorization of property which "depict[s] the development of property rules as objective—that is, as apolitical." *Id.* at 382.

142. Tribe, *supra* note 39, at 601. In a discussion on *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), a constitutional case in which the Supreme Court upheld a ban on sleeping in Lafayette Park where the purpose of the activity was to protest the situation of the homeless, Professor Tribe accuses the Court of stopping short of

CONCLUSION

New York City squatters and homesteaders take over rundown, dilapidated buildings in neighborhoods where community residents are not strangers to poverty, drugs, and crime; the decline of these neighborhoods is hastened by housing abandonment. Squatting and homesteading may be solutions to eliminate the abominable housing situation. When conditions are so miserable, alterations in the law which elevate the quality of life and thereby promote the public good are warranted.

It may be necessary, first, for the courts to take a more active role in recognizing the rights of squatters who move into abandoned buildings. Through judicial recognition, as in *Mt. Laurel*, that a situation exists—dilapidated, abandoned housing, creating a blight on neighborhoods—which can be alleviated through economically efficient, and possibly socially desirable, means, the legislature may respond meaningfully to their action. Following the role of Detroit, New York City should take a more innovative position in creating permanent, productive solutions to the housing crisis, as well as the upgrading of deteriorating New York City neighborhoods.

If we believe that property should be put to its most efficient use in order to maximize efficiency and social wealth,¹⁴³ then a plan or contract between squatters, homesteaders, and the city should be employed as a means of adapting to changing external conditions. Once we begin to view property as an allocation of resources, it will become apparent that the regulation of property rights involves policy choices, not simply relationships between persons and land.¹⁴⁴

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confronting the real concern, which might expose uncomfortable issues and would require delving into a discussion of the distribution of wealth and power. The real issue, according to Tribe, is not keeping the order of the park as the Court claims, but exposing the "pathos of those with no more hospitable place to sleep." Tribe, *supra* note 39, at 601. *But see* Easterbrook, *The Supreme Court: 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 20 (1984) (the Court's decision was economically correct in *Clark* because, despite the worthiness of the demonstration, to relax the ban on sleeping would encourage less-worthy demonstrators or "impostors" to seek permits, thus using the park as living quarters). For a further discussion of *Clark*, see *supra* note 39.

143. See Alexander, *supra* note 91, at 386.

144. See generally *id.* at 385-86.

