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A Theoretical Justification for Treating the Contract for Deed as a Mortgage

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**A THEORETICAL JUSTIFICATION FOR TREATING THE CONTRACT FOR DEED AS
A MORTGAGE**

Matthew J. Blaney[†]

Abstract

Millions of Americans finance their home using the treacherous contract for deed. Denied access to the conventional mortgage, the contract for deed often is the only alternative for Americans seeking the stability of homeownership. Historically, however, this deceptive financing device disrupted the lives of thousands of individuals by forfeiting their property and all payments made on the contract—even where only one installment was overdue. Low-income Americans and immigrant families disproportionately experience the brunt of the contract for deed. Furthermore, as Americans experience rising prices and increasing financial instability, there is reason to fear sellers—equipped with insight into lenders’ former mistakes—could revive the contract for deed, using it to swindle unsuspecting buyers. Several scholars previously addressed the necessity of treating the contract for deed as a mortgage. However, none addressed the critical underlying question: What is property, and what role does it play in society? This Article analyzes natural law, personhood, utilitarian, and civic republican theories of property as applied to the dilemma of the forfeiture clause. Whether it is because of the stifling of community, the destruction of an individual’s external sphere of freedom, or the inhibiting of a citizen’s ability to participate in democracy, channeling the insight of some of the world’s greatest philosophers compels the conclusion that change is necessary. Lastly, courts are not without guidance. The Indiana & Kentucky Supreme Courts established clear doctrine treating the contract for deed as a mortgage. Thus, given that enforcing forfeiture clauses in contracts for deeds is incongruent with the philosophical foundations of property law, it is time for society to follow the Indiana and Kentucky approaches and treat this financing device as a mortgage.

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I. INTRODUCTION

Imagine working tirelessly for years to save sufficient funds to achieve your lifelong goal of buying a reliable, peaceful home where your family can rest at night. Due to your poor credit, the bank denies your application for a conventional mortgage. However, you learn of the contract for deed—a mortgage substitute for buyers who do not qualify for the traditional mortgage. The home is not flawless, but you want the stability of homeownership, so you enter a contract for deed and dedicate \$10,000 of your savings to repair the home’s shortcomings.

Two and a half years later, you have made \$20,000 in payments toward your contract for the home. You feel a sense of relief, but then disaster hits. Because of significant revenue losses, your employer decided to lay off employees, and you were among those who received the unfortunate news. Unable to find employment, you fail to make monthly payments toward your contract for deed. Despite pleas to the seller, you cannot persuade them to exhibit even the slightest bit of compassion. Without regard for the work and money you put into the home, the seller terminates your contract. As a result, the seller forfeits your \$30,000 in

contractual payments and home repair costs, and you have no place you can feel at home.

Unfortunately, the preceding narrative is hardly uncommon for many citizens striving to achieve the American dream. Homeownership is one of the most appreciable means to build personal wealth, and if denied a traditional mortgage, the treacherous contract for deed may be the only reasonable alternative for potential homeowners.¹

A contract for deed, also referred to as a land installment contract or land sale contract, is an alternative to the traditional mortgage—predominantly used by poorly advised, poorly protected, and low-income purchasers to finance their purchase.² In a typical transaction, the buyer agrees to pay the purchase price in installments over a fixed period of time.³ When the contract is signed, the buyer immediately takes possession of the property.⁴ However, the buyer only retains title to the property once all contractual payments are made.⁵ Despite not possessing title to the property, the buyer is generally responsible for property maintenance, property taxes, and home insurance during the contract term.⁶

In pursuit of the American dream, millions of low-income Americans use the contract for deed to purchase a home.⁷ As a result, vulnerable homeowners—disproportionately Black, Latino, and immigrant families—may feel the American dream is now achievable.⁸ Nevertheless, the informality of the agreement they entered into has potentially catastrophic consequences.⁹

The forfeiture clause is among the most cataclysmic features of the contract for deed. Traditionally, forfeiture clauses are included in a contract and are liberally enforced, with courts going as far as to enforce the clause after a single missed payment.¹⁰ As a further matter, to the extent

1. The Editorial Board, *Homeownership and Wealth Creation*, N.Y. TIMES, (Nov. 29, 2014), <https://www.nytimes.com/2014/11/30/opinion/sunday/homeownership-and-wealth-creation.html> [<https://perma.cc/8QV4-6Y6N>].

2. Eric T. Freyfogle, *The Installment Land Contract as Lease: Habitability Protections and the Low-Income Purchaser*, 62 N.Y.U. L. REV. 293, 305 (1987).

3. JOHN G. SPRANKLING & RAYMOND R. COLETTA, *SPRANKLING AND COLETTA'S PROPERTY: A CONTEMPORARY APPROACH* 584 (5th ed. 2021).

4. *Id.*

5. *Id.*

6. Heather K. Way & Lucy Wood, *Contracts for Deed: Charting Risks and New Paths for Advocacy*, 23 J. AFFORDABLE HOUS. & CMTY. DEV. L. 37, 38 (2014).

7. Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 119, 128 (2009).

8. *Id.* at 126, 158.

9. *Id.* at 116–17.

10. Eric T. Freyfogle, *Vagueness and the Rule of Law: Reconsidering Installment Land*

that the forfeiture provision is effective, the contract for deed enables sellers to avoid a purchaser's equity of redemption, the foreclosure process, and other basic protections typically afforded to purchasers under mortgage law.¹¹

Although swiftly brushed over in many law school property courses each year, the contract for deed is a force that low-income Americans have struggled with for years.¹² Millions of people continue to live under the constant fear of being exploited by the contract for deed.¹³ In order to aid those vulnerable homeowners, when will courts generally treat a contract for deed as a mortgage upon its inception? The number of Americans financially constrained from entering the housing market is rising, an increasing number of immigrants are moving into American cities, and employment rates among lower-income Americans are declining.¹⁴ Because low-income and immigrant families are among those who, historically, have fallen victim to the contract for deed, there is a need to act soon on a wide scale.

Courts have taken it upon themselves to prescribe various remedies meant to alleviate consumers of the harsh consequences of the contract for deed.¹⁵ Although those remedies are favorable compared to enforcing forfeiture provisions in contracts, treating the contract for deed as a mortgage is best at protecting consumer's rights.¹⁶

Contract Forfeitures, 1988 DUKE L.J. 609, 610 (1988).

11. Grant S. Nelson, *The Contract for Deed as a Mortgage: The Case for the Restatement Approach*, 1998 BYU L. REV. 1111, 1113 (1998).

12. See *infra* Section I.A.

13. Sophie Quinton, *States Contend With 'The Underbelly of Real Estate'*, THE PEW CHARITABLE TRUSTS (June 1, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/06/01/states-contend-with-the-underbelly-of-real-estate> [<https://perma.cc/5HAF-D3ZE>]. In 2009, the United States Census Bureau's American Housing Survey found that 3.5 million U.S. homebuyers had entered into contracts for deed. *Id.*

14. See *infra* Section III.

15. For example, the Supreme Court of California opined that a buyer who has made substantial payments on a land installment sale contract and whose default consists solely of failure to pay further amounts due, has a right to a reasonable opportunity to pay the entire remaining balance plus damages before the seller is allowed to quiet title. *Petersen v. Hartell*, 707 P.2d 232, 242 (Cal. 1985). As a different remedy, some courts have elected to provide restitution to the defaulting purchaser as a condition of the forfeiture clause being enforced. RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 3.4 (AM. L. INST. 1997). The court in *Petersen* maintained that should the defaulting purchaser fail to make payments toward their contract for deed within a reasonable time the adjudication that plaintiffs have no further interest in the property should become effective only upon defendant's payment of the sums due to plaintiffs as restitution. *Petersen*, 707 P.2d at 242.

16. In *Slone v. Calhoun*, the Court of Appeals of Kentucky held that "[t]he forfeiture provisions set forth in the agreement are invalid as a matter of law and are otherwise

If buyers receive the same protections as mortgagees, American jurisprudence will increasingly protect property owners' rights. A buyer would be entitled to protections such as the "equity of redemption," which allows the defaulting mortgagor to redeem the property, and which the mortgagee can only eliminate by a foreclosure proceeding.¹⁷ In several states, mortgagees can reinstate their mortgage before the lender accelerates the loan.¹⁸ In the absence of such protections, the forfeiture clause in the contract gives the seller a remedy similar to foreclosure without the burden of appearing in front of a judge.¹⁹ Consequently, the seller, now free from judicial oversight, may take advantage of a buyer unaware of their rights.

Many legal scholars have taken it upon themselves to argue that treating the contract for deed as a mortgage is the proper way to move forward with this alternative financing device.²⁰ Nevertheless, none of them have sought to argue as such by addressing the underlying question: What role does property play in society? By turning to various theories of property, this Article seeks to promote a theoretical justification for treating the contract for deed as a mortgage.

This Article gives a broad background of the contract for deed in Section II. This discussion includes how they typically operate in the marketplace, who primarily uses this financing device, and how various courts have addressed the contract's most common feature—the forfeiture clause—when buyers default.

Section III, first, sets out two particularly concerning situations in light of the contract for deed's impact: (1) the number of Americans struggling to make it financially is on the rise; and (2) the number of immigrants entering the U.S. is rising at an unprecedented rate. Because

not enforceable. Regardless of who defaulted under the terms of the land contract . . . the only recourse for the parties is to seek judicial sale, which will result in a judgment that will quiet title as well as determine the parties' respective rights to the proceeds therefrom." 386 S.W.3d 745, 748–49 (Ky. 2012). In *H&L Land Co. v. Warner*, the court held that "an installment land sale contract is, in essence, a mortgage, and . . . the safeguards for the debtor and the remedies for the creditor are the same as those between a mortgagor and mortgagee." 258 So.2d 293, 296 (Fla. Dist. Ct. App. 1972). Through their holding, the court sought to "afford well-established safeguards to an installment buyer and to allow an installment seller a reasonable and traditional remedy." *Id.*

17. Grant S. Nelson & Dale A. Whitman, *The Installment Land Contract—A National Viewpoint*, 1997 BYU L. REV. 541, 550 (1977).

18. SPANKLING & COLETTA, *supra* note 3, at 621.

19. *Id.* at 542–43.

20. Haesun Burris-Lee, *Predation, Exploitation, and History Repeating: Reforming the Modern Contract for Deed of Sale*, 93 TEMP. L. REV. 211, 213 (2020); Freyfogle, *supra* note 2, at 293; Richard H. Lee, *Remedies for Breach of the Land Installment Contract*, 19 UNIV. MIAMI L. REV. 550, 551 (1965).

the contract for deed, historically, has preyed on these two groups, a demand for reform is articulated. Furthermore, this Article argues that the Supreme Courts of Indiana and Kentucky (also discussed in Section II.C.4.) have paved the way for a realistic solution.

Finally, Section IV of this Article contains an in-depth discussion of the natural law, personhood, utilitarian, and civic republican theories of property. Following a description of each theory, this Article analyzes real-world situations to explain how the theory supports treating the contract for deed as a mortgage.

II. THE DECEPTIVE CONTRACT FOR DEED

A. *What is the Contract for Deed?*

A contract for deed, also referred to as a land installment contract or land sale contract, is a substitute or alternative to the traditional mortgage.²¹ In a typical transaction, the buyer agrees to pay the purchase price in installments over a fixed period.²² Often payments are made on an amortization schedule, meaning that a written schedule sets forth the date of each periodic payment and the amount of each periodic payment applied to the principal balance.²³ However, contracts for deed frequently call for balloon payments, meaning a payment that is more than the regular periodic payment charged during the contract.²⁴

When the contract for deed is signed, the buyer is permitted to take immediate possession of the property.²⁵ Nevertheless, the buyer will only retain the title once they make all the payments.²⁶ Despite not possessing title to the property, the buyer, during the contract term, is generally responsible for property maintenance, property taxes, and home insurance.²⁷ Moreover, buyers often acquire the property under contract “as is,” meaning they must spend a significant portion of their disposable income on repairs and renovations.²⁸

In the aftermath of World War II, the contract for deed was a common device used to sell farmland in Kansas.²⁹ Additionally, in the 1960s,

21. Long v. Smith, 776 S.W.2d 409, 413 (Mo. Ct. App. 1989).

22. SPRANKLING & COLETTA, *supra* note 3, at 584.

23. 765 ILL. COMP. STAT 67/5 (2020).

24. *Id.*

25. SPRANKLING & COLETTA, *supra* note 3, at 584.

26. *Id.*

27. Way & Wood, *supra* note 6, at 38.

28. Matthew Goldstein & Alexandra Stevenson, ‘Contract for Deed’ Lending Gets Federal Scrutiny, N.Y. TIMES, May 11, 2016, at B1.

29. Caelin M. Miltko, “What Shall I Give My Children?": Installment Land Contracts,

Chicago saw contracts for deed become highly prevalent in predominately Black neighborhoods.³⁰ It was not until after the 2008 housing crisis, however, that contracts for deed—as a replacement for subprime mortgages—regained prominence.³¹

Once the 2008 housing crisis commenced, large national firms bought thousands of properties, reselling properties “as is” through contracts for deed.³² The deceptive nature of those agreements led the National Consumer Law Center to label the contract for deed as a predatory transaction built to fail and a benefit to sellers at the expense of low-income and minority buyers.³³ Further, the predatory aspect of the contract for deed primarily stems from the forfeiture clause.

The forfeiture clause is one of the most common and controversial aspects of the contract for deed, and they are found in virtually every contract.³⁴ The language contained in forfeiture clauses makes “time of the essence,” and provides that if the purchaser fails to comply with the terms of the contract, then the vendor has the option to declare it terminated, retake possession of the property, and retain all of the purchaser’s prior payments as liquidated damages.³⁵ If the forfeiture clause is effective, contracts enable sellers to avoid the buyer’s equity of redemption, the foreclosure process, and other traditional protections afforded to mortgagees.³⁶ Thus, as “forfeiture provisions are viewed as quick remedies for sellers with defaulting buyers,” it comes as no surprise that sellers may prefer contracts to contain these provisions.³⁷

B. *The “Poor Man’s Mortgage”: Targeting Vulnerable Consumers*

As if the deceptive nature of contracts for deed in the marketplace is not abhorrent enough, these transactions also disproportionately impact certain classes of people.³⁸ Historically, the contract for deed has

Homeownership, and the Unexamined Costs of the American Dream. 87 U. CHI. L. REV. 2273, 2282 (2020).

30. *Id.* at 2308.

31. *Id.* at 2277.

32. Alexandra Stevenson & Matthew Goldstein, *Law Center Calls Seller-Financed Home Sales ‘Toxic Transactions,’* N.Y. TIMES, July 14, 2016, at B3.

33. *Id.*

34. RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 3.4 (AM. L. INST. 1997).

35. *Id.*

36. *Id.*

37. Donna R. Roper, *Forfeiture Clauses in Land Installment Contracts: Time for Equitable Foreclosure*, 8 SEATTLE U. L. REV. 85, 92 (1984).

38. See *Ellis v. Butterfield*, 570 P.2d 1334 (Idaho 1977).

been referred to as the “poor man’s mortgage.”³⁹ The name of this financing device is primarily attributable to the fact that contracts for deed are predominantly used by poorly advised, poorly protected, and lower-income purchasers to finance their purchases.⁴⁰ Shockingly, it is estimated that, in Chicago alone, the Black community lost between \$3.2 billion and \$4 billion through contract for deed forfeitures.⁴¹

A 2021 study showed that lenders were 40% more likely to turn down Latino applications for loans, 50% more likely to turn down loans for Asian/Pacific Islander applicants, 70% more likely to deny Native American applicants, and 80% more likely to turn down Black applicants than similar White applicants.⁴² Denied access to the traditional mortgage, millions of low-income Americans use the contract for deed to purchase a home.⁴³ As a result, vulnerable homeowners—predominantly Black, Latino, and immigrant families—may feel that the American dream is now achievable.⁴⁴ Nevertheless, the informality of these agreements, the lack of legal resources for poor Americans, and the typical absence of third-party oversight may produce a wide array of title issues and other legal challenges.⁴⁵

A study by the National Consumer Law Center shows the shocking impact that forfeiture clauses have had on African American citizens in Georgia.⁴⁶ Charles Wright paid \$17,000 in contractual payments to his property manager and spent \$12,000 on repairs, only to be evicted after missing several monthly payments.⁴⁷ Like many other consumers who entered contracts for deed, Charles thought he was purchasing a home, so he put money into the property.⁴⁸ Charles is not alone in this misconception.

A listing for a four-bedroom home in St. Louis prompted Justine to enter into a contract for deed.⁴⁹ The home’s ideal location on an acre of

39. *Id.* at 1337.

40. Freyfogle, *supra* note 2, at 304.

41. Burris-Lee, *supra* note 20, at 214.

42. Emmanuel Martinez & Lauren Kirchner, *The Secret Bias Hidden in Mortgage-Approval Algorithms*, THE ASSOCIATED PRESS (Aug. 25, 2021), <https://apnews.com/article/lifestyle-technology-business-race-and-ethnicity-racial-injustice-b920d945a6a13db1e1aee44d91475205> [<https://perma.cc/C5SA-48WU>].

43. Way, *supra* note 7, at 129.

44. *See id.* at 116–17.

45. *Id.* at 136–37.

46. SteStevenson & Goldstein, *supra* note 32.

47. *Id.*

48. *Id.*

49. Steve Vockrodt & Laura Ziegler, *Contract for Deed: The Promise of Homeownership that Often Leaves Midwest Buyers Out in the Cold*, KANSAS REFLECTOR (Mar. 5, 2022, 9:30 AM), <https://kansasreflector.com/2022/03/05/contract-for-deed-the-promise->

land near the bus line drove Justine to be infatuated with the idea of planting her roots in St. Louis.⁵⁰ However, Justine's admiration was short-lived.⁵¹ After making 18 monthly payments and fixing the house to make it livable, the seller took Justine to court for missing one monthly payment of \$500.⁵²

Similarly, Jennifer Gaines was ousted from her suburban, white brick house in Minnesota because her home was foreclosed.⁵³ Interestingly, Jennifer's foreclosure was no fault of her own.⁵⁴ Instead, Jennifer's misfortune was attributable to her seller's declaration of bankruptcy.⁵⁵ As a result, Jennifer not only lost the \$25,000 she paid toward the contract, but also she lost the first place that ever felt like home to her.⁵⁶

C. *Judicial Remedies for the Enforcement of Forfeiture Clauses*

Given the dreadful consequences that may injure a defaulting buyer at the hands of the seller, one may ask: How do courts remedy the damage done by forfeiture provisions? No univocal explanation may be supplied to answer that pressing question. As is displayed by the calamities mentioned above, some courts will permit the seller to rescind a contract—forfeiting the property and all associated payments from the buyer. Notwithstanding that, there are varying remedies in jurisdictions that decline to take the absolute forfeiture approach. Moreover, the various remedies all have different forms of application, as well as differing consequences for the parties involved.

1. Enforcing the Clause, Seizing the Property, & Forfeiting All Contractual Payments

The first and undoubtedly most controversial remedy is fully enforcing the forfeiture clause in the contract for deed. The language commonly contained in forfeiture clauses makes “time of the essence” and, if the buyer defaults on their payments, allows the seller to declare the

of-homeownership-that-often-leaves-midwest-buyers-out-in-the-cold/
[<https://perma.cc/W653-322B>].

50. *Id.*

51. *Id.*

52. *Id.*

53. Jeffrey Meitrodt, *Contract for deed can be house of horror for buyers*, STARTRIBUNE (July 15, 2013, 5:27 AM), <https://www.startribune.com/jan-14-contract-for-deed-can-be-house-of-horror-for-buyers/185756982/> [<https://perma.cc/M8P6-FHJP>].

54. *Id.*

55. *Id.*

56. *Id.*

contract terminated, to retake possession of the property, and to keep all the buyer's prior payments as liquidated damages.⁵⁷ In application, the devastating effects of the forfeiture clause are glaring.

The New Mexico Supreme Court enforced a forfeiture clause against a defaulting purchaser who paid 40% of the price due under the contract.⁵⁸ Holding in favor of the seller, the court in *Russell v. Richards* concluded that, despite paying 40% of the contract, there were no circumstances that would shock the conscience of the court as the parties to a contract agreed to accept the burdens of the contract together with its benefits.⁵⁹

Further, in *Burgess v. Shiplet*, where the buyer paid 30% of the contract price, the Montana Supreme Court reversed a trial court's decision to (1) treat the contract for deed as a mortgage and (2) refuse to enforce the forfeiture clause.⁶⁰ The *Burgess* court reasoned that when a buyer enters a contract for deed, he or she runs the risk of defaulting on the payments and facing the consequences of losing the property and forfeiting their payments.⁶¹ If the forfeiture causes a harsh result, the court explained that it is up to the legislature to provide a remedy, not the courts.⁶²

2. The Equity of Redemption

Unlike courts that strictly enforce forfeiture clauses, many jurisdictions grant the defaulting buyer a final opportunity to tender the contract balance before forfeiture of the land to the seller—also known as the “equity of redemption.”⁶³ For example, the California Supreme Court, in *Petersen v. Hartell*, opined that a buyer who has made substantial payments on a land installment contract and whose default consists solely of failure to pay further amounts due has a right to a reasonable opportunity to pay the entire remaining balance plus damages before the seller is allowed to quiet title.⁶⁴

In *White v. Brousseau*, a Florida district court similarly recognized a buyer's right to the equity of redemption.⁶⁵ There, the buyers failed to

57. Nelson, *supra* note 11, at 1113.

58. *Russell v. Richards*, 702 P.2d 993, 955 (N.M. 1985).

59. *Id.*

60. 750 P.2d 460, 462 (Mont. 1988).

61. *Id.* at 462.

62. *Id.*

63. RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 3.4 cmt. b (AM. L. INST. 1997).

64. 707 P.2d 232, 240 (Cal. 1985).

65. 556 So.2d 832, 835-36 (Fla. Dist. Ct. App. 1990).

pay their first installment on their contract for deed.⁶⁶ As a result, the seller notified the buyers that the contract was terminated due to the forfeiture provision.⁶⁷ The *Brousseau* court held in favor of the buyer, reasoning that:

the land contract buyer has an 'equity of redemption' which is a right recognized in equity to redeem his land from the consequences of default in payment of the debt secured by the land, by fully paying the debt at any time before the judicial sale of the land becomes final.⁶⁸

3. The Restitution Remedy

Courts additionally recognize a third, unique category for accommodating the parties to the contract for deed in the event of default: the remedy of restitution. Unlike other remedies, restitution is not directly based on a plaintiff's loss.⁶⁹ Instead, the restitution remedy focuses on the unjust enrichment of a defendant.⁷⁰ Thus, in the case of a defaulting buyer, the proper focus is on the excess damages that a seller incurs due to the forfeiture clause.

In *Freedman v. Rector*, the California Supreme Court, in effect, precluded sellers whose awarded damages exceeded the actual damages caused by the buyer's default from collecting penalties and forfeitures on that excess amount.⁷¹ The seller in *Freedman* resold the property in question for \$2,000 more than the plaintiff had agreed to pay for it.⁷² Accordingly, the seller ultimately suffered no damages due to the buyer's default, and if the defendant retained the excess amount, they undoubtedly would be unjustly enriched.⁷³

66. *Id.* at 833.

67. *Id.*

68. *Id.* at 835–36. “Even where time is made material, by express stipulation, the failure of one of the parties to perform a condition within the particular time limited will not in every case defeat his right to specific performance, if the condition be subsequently performed, without unreasonable delay, and no circumstances have intervened that would render it unjust or inequitable to give such relief.” *Nigh v. Hickman*, 538 S.W.2d 936, 937 (Mo. Ct. App. 1976) (quoting *Parkhurst v. Lebanon Pub. Co.*, 204 S.W.2d 241, 247 (Mo. 1947)).

69. *Restitution*, BLACK'S LAW DICTIONARY (11th ed. 2019).

70. *Id.*

71. *See Honey v. Henry's Franchise Leasing Corp. of Am.*, 415 P.2d 833, 835 (Cal. 1966).

72. *Freedman v. Rector*, 37 Cal. 2d 16, 18 (Cal. 1951).

73. *Id.* at 19–20.

In *Morris v. Sykes*, two Utah residents—Melville Morris and Dwane Sykes—contracted for the sale of a parcel of land.⁷⁴ After Morris made \$23,216 in payments, Sykes terminated the contract because Morris frequently made delinquent payments and he had an outstanding balance on the property.⁷⁵ Subsequently, Sykes entered into an agreement with his brother-in-law to purchase the property for \$20,663—precisely the amount Sykes would have received if Morris had fully performed the contract.⁷⁶ With that in mind, the trial court in *Morris* ordered the defendant to return \$14,121 to the plaintiff because allowing the defendant to retain the entire \$23,216 “would constitute a forfeiture so unconscionable that the court could not approve it.”⁷⁷ The Utah Supreme Court affirmed the trial court’s ruling, holding that—under Utah law—where a forfeiture under the terms of a contract results in award damages disproportionate to any damages the seller may have suffered, it “shocks the conscience of the court.”⁷⁸

4. Treating the Contract for Deed as a Mortgage.

Last, and indeed the most significant defenders of buyer’s rights, are the courts who treat the contract for deed as a mortgage. The Indiana Supreme Court in *Skendzel v. Marshall* held that:

[a] conditional land contract in effect creates a vendor’s lien in the property to secure the unpaid balance owed under the contract. This lien is closely analogous to a mortgage—in fact, the vendor is commonly referred to as an ‘equitable mortgagee.’ . . . [Therefore,] it is only logical that such a lien be enforced through foreclosure proceedings.⁷⁹

The Kentucky Supreme Court, relying on *Skendzel*, reached the same conclusion in *Sebastian v. Floyd*, treating Sebastian’s contract as a mortgage, even though they missed seven monthly installments in 21 months.⁸⁰ The court in *Sebastian* reasoned that when the buyer enters the contract, equitable title passes to them, and the seller holds nothing but bare legal title as security for payment of the purchase price.⁸¹

74. See 624 P.2d 681, 681–83 (Utah 1981).

75. See *id.* at 683.

76. *Id.*

77. *Id.*

78. *Id.* at 684.

79. 301 N.E.2d 641, 648 (Ind. 1973).

80. 585 S.W.2d 381, 382 (Ky. 1979).

81. *Id.*

Following *Sebastian*, the effects of treating the contract for deed as a mortgage displayed the encouraging value of the newly imagined remedy. For example, in *Slone v. Calhoun*, the Kentucky Court of Appeals relied on *Sebastian* to conclude that “the only judicial remedy to resolve the alleged breach of the land contract between the parties is a judicial sale of the property.”⁸²

In 2005, Slone entered into a land installment contract with Calhoun to purchase a lot and a mobile home.⁸³ Four years into her contract, Slone claimed that Calhoun had contracted with another prospective buyer to sell the land where she presently lived.⁸⁴ As a consequence, Slone took it upon herself to discontinue payments to Calhoun and vacate the property.

Unbeknownst to Slone, Calhoun had mistakenly labeled Slone’s property as the parcel which he sought to convey to the new purchaser.⁸⁵ Nevertheless, this did not stop the trial court from penalizing Slone for abandoning the property. The trial court ruled against Slone—concluding that she voluntarily terminated her land contract with Calhoun by vacating the premises.⁸⁶ Moreover, the trial court held that, under the land contract forfeiture provisions, Slone forfeited her interest in the property, including all payments made during the contract term.⁸⁷

On appeal, the *Slone* court held that “no practical distinction [exists] between the land sale contract and a purchase money mortgage.”⁸⁸ Thus, the forfeiture provisions contained in the contract for deed are unenforceable, and the only judicial remedy available to sellers was to seek foreclosure.⁸⁹

III. PROTECTING FUTURE BUYERS: TREATING THE CONTRACT FOR DEED AS A MORTGAGE IS NOT ONLY POSSIBLE—IT IS NECESSARY

Enforcing the forfeiture provision in a contract outright may be the simplest solution for a court. However, as the preceding section displayed, it may have disastrous implications for the rights of property owners. On the other hand, several other remedies assuredly have positive qualities. For example, allowing a defaulting buyer to collect

82. 386 S.W.3d 745, 748 (Ky. Ct. App. 2012).

83. *Id.* at 746.

84. *Id.*

85. *See id.*

86. *Id.* at 747.

87. *Id.*

88. *Id.* (quoting *Sebastian v. Floyd*, 585 S.W.2d 381, 383 (Ky. 1979)).

89. *Id.* at 749.

restitution to avoid unjust enrichment of the seller is seemingly an excellent balance between the buyer and seller's rights. Even where the buyer receives restitution, however, the fact remains that a substantial amount of their payments may have been forfeited, and the contract was terminated without affording them specific procedural rights to retain possession of the property.

Furthermore, the equity of redemption—at least in theory—gives the defaulting buyer a chance to pay any missed contractual payments. In spite of that, supporting this remedy ignores why people who enter into contracts for deed most often use that financing device in the first place: they could not qualify for the traditional mortgage, have poor credit, and often do not have enough funds to purchase a home. Thus, granting extra time for buyers to settle their unpaid balance to the seller may be pointless.

With that said, treating the contract for deed as a mortgage seems to be the best method a court may use to protect buyers' property rights. As previously mentioned, a handful of scholars have already sought to justify treating the contract for deed as a mortgage—albeit doing so on other grounds. However, the matter has taken on a new form of urgency in recent years. The American way of life is in flux, and if the contract for deed is not treated as a mortgage on a broad scale, the future may be dreary for American property rights.

Given that the successful enforcement of a forfeiture provision enables a seller to avoid a purchaser's equity of redemption, the foreclosure process and other basic protections typically afforded to purchasers under mortgage law, it is no surprise that treating the contract for deed as a mortgage will prejudice sellers.⁹⁰ But what are the costs to future buyers?

In recent years, employment rates among lower-income Americans—especially low-income men—declined.⁹¹ Furthermore, in 2018, marriage rates fell to their lowest point since 1867—and strained finances seem to be at the root of couples deciding not to marry.⁹² In 2022, inflation, gas prices, and other rising costs continued to hike—creating housing issues for buyers and renters alike.⁹³

90. See Nelson, *supra* note 11, at 1113.

91. Wendy Wang, *The Share of Never-Married Americans Has Reached a New High*, INST. FOR FAM. STUD. (Sept. 9, 2020), <https://ifstudies.org/blog/the-share-of-never-married-americans-has-reached-a-new-high> [<https://perma.cc/2ZWZ-MSA3>].

92. Janet Adamy, *U.S. Marriage Rate Plunges to Lowest Level on Record*, WALL ST. J. (Apr. 29, 2020, 12:01AM), <https://www.wsj.com/articles/u-s-marriage-rate-plunges-to-lowest-level-on-record-11588132860> [<https://perma.cc/CW7N-W6LA>].

93. Tim McPhillips, *5 Reasons Housing Is So Expensive Right Now*, PBS (Aug. 5, 2022,

In addition to the exacerbation of financial struggles, the total percentage of the U.S. population compromising immigrants today is 13.7%, almost triple as there was in 1970.⁹⁴ Moreover, as of January 2023, monthly encounters between U.S. Border Patrol agents and migrants attempting to enter the United States at the U.S.–Mexico border remain at levels unseen in the past two decades.⁹⁵

The previously mentioned details call for alarm because the contract for deed is predominantly used by low-income purchasers⁹⁶ like immigrant families⁹⁷ and others. As times continue to get more challenging, the chances that an individual may fall prey to the deceptive contract for deed may continue to grow. For those unfortunate people who are victims of the forfeiture clause, the result may be as unpleasant as homelessness—effectively depriving individuals of playing a full part in social and economic life.⁹⁸

Such a result is contrary to American ideals and deprives the lowliest in a society of the opportunity to flourish. But there is no need to turn over and give up on the fight. Instead, an analysis of several prevailing theories of property may adequately explain why courts should follow the Indiana⁹⁹ and Kentucky¹⁰⁰ Supreme Courts.

IV. THE THEORETICAL UNDERPINNINGS OF PROPERTY LAW

A. *Natural Law Theories*

A natural law ethics theory aims to identify objective and true standards which allow one to act for some intelligible end.¹⁰¹ During the

3:43 PM), <https://www.pbs.org/newshour/nation/5-reasons-housing-is-so-expensive-right-now> [<https://perma.cc/H2Y8-7Y52>].

94. Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/> [<https://perma.cc/F4Z9-FSVB>].

95. John Gramlich, *Monthly Encounters with Migrants at U.S.-Mexico Border Remain Near Record Highs*, PEW RSCH. CTR. (Jan. 13, 2023), <https://www.pewresearch.org/fact-tank/2023/01/13/monthly-encounters-with-migrants-at-u-s-mexico-border-remain-near-record-highs/> [<https://perma.cc/XT4C-G4N7>].

96. Freyfogle, *supra* note 2, at 305.

97. Way, *supra* note 7, at 130.

98. Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 323 (1991) (“Everything we call a social or economic opportunity depends cruelly on a person’s being able to do certain things—for example, his being able to wash, to sleep, and to base himself somewhere. When someone is homeless he is, as we have seen, effectively banned from doing these things . . .”).

99. *Skendzel v. Marshall*, 301 N.E.2d 641, 648 (Ind. 1973).

100. *Sebastian v. Floyd*, 585 S.W.2d 381, 383–84 (Ky. 1979).

101. JOSEPH BOYLE, *NATURAL LAW ETHICS IN THEORY AND PRACTICE* 2 (John Liptay &

middle ages, the code of natural law first took on a real substance and importance.¹⁰² In England, legal scholars saw the common law as the perfect ideal of law, for its reasoning was based on the most profound principles and the law of nature implanted by God into many generations.¹⁰³ And, among other rights, the common law held the rights of liberty and private property as sacred—since a free government cannot allow rights to be dependent upon the legislature’s will without restraint.¹⁰⁴

The English common law, however, is hardly a sufficient basis for arguing the existence of a property right. As Justice Oliver Wendell Holmes rightly pointed out, “beliefs and wishes have a transcendental basis in the sense that their foundation is arbitrary.”¹⁰⁵ According to Justice Holmes, the right to eat and drink may be *absolutely* necessary.¹⁰⁶ On the other hand, living in society is *practically* necessary but necessary to a *lesser extent* than eating and drinking.¹⁰⁷ Thus, there are apparent disagreements about the degree to which the right of property is necessary for individual life. Notwithstanding that, the works of two philosophers—Aristotle and Locke— provide a narrative for supporting property rights as a necessary right.

1. Aristotle’s “Political Animal” Argument

In Aristotle’s view, humans are political animals, meaning that we are social creatures and characteristically choose to live with other people.¹⁰⁸ Beyond the mere need for companionship, Aristotle maintains that humans feel a more profound need to be involved in the political community, where we experience more prosperous and complete lives than when left alone.¹⁰⁹ In other words, our human nature demands that we cooperate with others in social or political organizations to achieve a well-lived life.¹¹⁰

Christopher Tollefsen eds., 2020).

102. Edward S. Corwin, *Natural Law and Constitutional Law*, 3 NAT. L. INST. PROC. 45, 49 (1950).

103. *See id.* at 50–51.

104. *See id.* at 58.

105. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

106. *See id.* at 41.

107. *See id.* at 41–42.

108. GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 80 (2012).

109. *Id.*

110. *See id.* at 81.

Although not explicit in Aristotle's text, it may be reasoned that property plays a central role in achieving a well-lived life. As a consequence, the property right is a natural right for humans. The forfeiture clause inevitably destroys the community by displacing residents, which ultimately inhibits the Aristotelian right to property. The unfortunate circumstances that flow from such displacement have been examined by social science researchers studying residential stability¹¹¹ and civic engagement.

Within the landscape of a city, collective civic action is concentrated ecologically and better explained by the density of community organizations in an area, as opposed to individual social ties.¹¹² Social conflict and civic engagement have a symbiotic relationship in a well-functioning democracy; thus, even if the interaction between community members may be uncomfortable, this is the essence of community organization¹¹³—which ultimately leads to more “collective efficacy.”¹¹⁴

However, because assimilating newcomers into the social fabric of a neighborhood is a temporal process, “residential mobility operates as a barrier to the development of extensive friendship and kinship bonds and widespread local associational ties.”¹¹⁵ Moreover, although “individuals who live in one place for a long time are not necessarily going to be involved in the community,” residents who have formed a bond with their living environment, community, and city are more likely to be actively involved in community development.¹¹⁶

The forfeiture clause shows no regard for community considerations. By tearing residents away from the social fabric, the forfeiture clause threatens the ultimate development of the community that “political animals” have a natural tendency toward. Accordingly, an Aristotelian view of property law necessarily demands that the protections extended to those with mortgages also be offered to those who entered into contracts for deeds. If buyers in a contract for deed receive the same protections as a mortgagee, they will at least have procedural rights before

111. By residential stability, I mean the process by which people either remain or relocate from a particular community.

112. See ROBERT J. SAMPSON, *GREAT AMERICAN CITY* 183 (2013).

113. *Id.* at 184.

114. “Viewed through this theoretical lens, collective efficacy is a task-specific construct that highlights shared expectations and mutual engagement by residents in local social control.” Jeffrey D. Morenoff et al., *Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence*, 39 *CRIMINOLOGY* 517 (2001).

115. John D. Kasarda & Morris Janowitz, *Community Attachment in Mass Society*, 39 *AM. SOCIO. REV.* 328, 330 (1974).

116. Jiyon Shin & Hee Jin Yang, *Does Residential Stability Lead to Civic Participation?: The Mediating Role of Place Attachment*, 126 *CITIES* 1, 7 (2022).

forfeiture and, as a result, may have a greater chance of forming the community that human nature desires.

2. Locke's Labor Theory

Another significant aspect of the natural law theory justification for private property comes from the work of John Locke. According to Locke:

[E]very Man has a Property in his own Person. . . . The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property.¹¹⁷

Locke starts with the idea that we have an initial private property right in our person,¹¹⁸ and when one uses the labor in their person to exert dominion over something, it becomes their property. Accordingly, for Locke, property is an acquired right, which is obtained as a result of actions that men undertake on their own initiative.¹¹⁹ Therefore, it is plausible that many individuals who enter into the contract for deed acquire rights to the property itself.

Take, for example, Samuel Rankin from Arkansas who entered a contract for a rent-to-own home for himself and his daughters.¹²⁰ After Samuel moved into his home, he discovered that there was no carpeting or linoleum floors, the walls were covered with a tar-like substance, and the local water department had condemned the septic tank.¹²¹

Samuel not only took it upon himself to fix all the flooring issues, but he also put \$8,000 of his own money into installing a new septic system, all of which increased the property's value from \$38,000–\$60,000.¹²² With such substantial improvements made to the property, it could hardly be argued that Samuel has no interest or connection with this property. Despite that, it could all be taken away from him in a heartbeat.

Assume for a second that Samuel defaulted on his payments, and the seller decided to proceed to evict him. In a state that applies the traditional approach, the forfeiture clause would be enforced, and Samuel

117. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 27 (1689).

118. PAUL KELLY, LOCKE'S SECOND TREATISE OF GOVERNMENT 64 (2007).

119. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 138 (1988).

120. Alexandra Stevenson & Matthew Goldstein, *Rent-to-Own Homes: A Win-Win for Landlords, a Risk for Struggling Tenants*, N.Y. TIMES, Aug. 21, 2016, at A1.

121. *Id.*

122. *Id.*

would lose the property, all payments made toward the contract, and the \$22,000 in improvements he made to the property.

Is that what we call justice? As a nation that labels itself as a “shining city upon a hill” and a “beacon of democracy,” how can such a result be tolerated?¹²³ Compare Samuel’s position to that of various figures in Locke’s second treatise:

Though the water running in the fountain be every one’s, yet who can doubt, but that in the pitcher is his only who drew it out? His labour hath taken it out of the hands of nature, where it was common, and belonged equally to all her children, and hath thereby appropriated it to himself. Thus this law of reason makes the deer that Indian’s who hath killed it; it is allowed to be his goods, who hath bestowed his labour upon it, though before it was the common right of every one.¹²⁴

Fundamentally, there are differences between Samuel and the Indigenous American. Samuel altered a private property to which the seller held title, and the Indigenous American appropriated a natural resource. However, like the Indigenous American using their labor to kill the deer for their use, Samuel took it upon himself to use his labor and resources to transform the property into something it was not before.

Additionally, the property Samuel contracted to own was private property—only open to change by a willing purchaser; on the other hand, the water running in the fountain is a natural resource. But that does not change the fact that similar to the person who drew water from the fountain in a pitcher, Samuel took the property as it was and fixed flooring issues, installed a septic tank, and ultimately increased the property’s value from \$38,000–\$60,000.¹²⁵ Accordingly, like a pitcher of water now in an entirely different form, Samuel’s home took on a form unseen before he purchased the property.

Lastly, similar to a laborer who gathers acorns or apples or who encloses and cultivates a parcel of land, Samuel created “an item of social wealth he may wish to claim as private wealth” by implementing improvements to the property.¹²⁶ And “[s]uch creative acts ‘put a distinction’ between the product and what remains in common”¹²⁷ Thus,

123. Brian Klaas, *America’s Self-Obsession Is Killing Its Democracy*, THE ATLANTIC, <https://www.theatlantic.com/ideas/archive/2022/07/american-democracy-break-down-authoritarianism-rise/670580/> [https://perma.cc/DK5S-7BK8] (last visited Nov. 12, 2022).

124. LOCKE, *supra* note 117, at §§ 29–30.

125. Stevenson & Goldstein, *supra* note 120.

126. See JAMES W. HARRIS, PROPERTY AND JUSTICE 198 (1996).

127. *Id.*

to an extent, Samuel claimed as his property the home which he distinguished from the original property sold to him.

Therefore, under Locke's natural law theory, Samuel acquired the property he contracted for. Accordingly, the law should afford him a remedy to save the product of his labor in the event of default. That remedy may be obtained by affording buyers, like Samuel, the protections guaranteed to mortgagees.

B. *Personhood Theory of Property*

1. Hegel's Philosophy of Right

Unlike natural law, the personhood theory of property does not claim humans have an inherent property right. Instead, the various approaches that argue for property rights from a personhood perspective maintain that property is, in one way or another, essential to a person's development. The most notable of these theorists is Georg Wilhelm Friedrich Hegel.

Hegel subscribes to one of the oldest and most common justifications for private property—the claim that there is a connection between private property and freedom.¹²⁸ For Hegel, property is not to be seen merely as an “economic category or the result of utilitarian calculus”; instead, property is a political and philosophical necessity essential for the development of men as rational beings.¹²⁹ In order to use property to develop ones' personality fully, Hegel contends that “[a] person must give to his freedom an external sphere”¹³⁰ Further, property is the medium through which the embodiment of the will is manifest in that external sphere.¹³¹

For a person, the first step in the “externalization” process is to establish the basic principle of his personality in the world of material objects.¹³² Some scholars contend that the reason for Hegel's “externalization” requirement is that property is an “abstract right,” not an inherent one.¹³³ Thus, it follows that if a person's rights are to be promoted and

128. ALAN PATTEN, *HEGEL'S IDEA OF FREEDOM* 139 (1999).

129. Peter G. Stillman, *Property, Freedom, and Individuality in Hegel's and Marx's Political Thought*, in 22 *NOMOS* 130, 133 (1980).

130. GEORG WILHELM FRIEDRICH HEGEL, *PHILOSOPHY OF RIGHT* 55 (Samuel Waters Dyde trans., Prometheus Books, 1996) (1896).

131. DAVID ROSE, *HEGEL'S PHILOSOPHY OF RIGHT: A READER'S GUIDE* 37 (2007).

132. WALDRON, *supra* note 119, at 355–56.

133. Stephen Houlgate, *Property, Use and Value in Hegel's Philosophy of Right*, in *HEGEL'S ELEMENTS OF THE PHILOSOPHY OF RIGHT: A CRITICAL GUIDE* 37, 43 (David James ed., 2017).

respected, an individual must make others aware of their existence.¹³⁴ By appropriating, owning, and controlling objects, Hegel claims that a person can establish his will as an objective feature of the world.¹³⁵ That is because when a person appropriates property, that amounts to possession.¹³⁶ Possession, in turn, gives an individual tangible existence in the world, and Hegel indicates that this is properties true and legal nature.¹³⁷

But how does treating the contract for deed as a mortgage ultimately lead to an individual fully developing their personhood? “The premise underlying the personhood perspective is that to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment.”¹³⁸ Moreover, Hegel’s property theory is an occupancy theory—meaning that the owner’s will must be present in the object;¹³⁹ and if an individual is not an “abstract unit of free will [and] autonomy,” then they are not a person in a Hegelian sense.¹⁴⁰ The contract for deed—which often allows its treacherous forfeiture clause to reign terror on unsuspecting individuals—frustrates the underlying premise of Hegel’s theory by annihilating individuals’ external spheres of freedom.

Consider the story of a Cincinnati resident named Earnest Heyward.¹⁴¹ Like many other individuals who chose to enter a contract for deed, Earnest was thrilled when he saw a sign labeled “lease 2 own.”¹⁴² Entering a contract for deed could have been the start of the American dream for Earnest, but that was hardly the result.

Earnest entered a contract where he only had \$1,156 down to purchase the property, and his monthly rent was only \$406.¹⁴³ Reasonable rent, right? According to Earnest, “when you look into it further, it’s actually not.”¹⁴⁴ Stuck with having to make all repairs to the beat-up property and a long 20 years until he obtained the deed, Earnest stopped

134. *Id.* at 43–44.

135. *Id.* at 45.

136. HEGEL, *supra* note 130, at 57.

137. *Id.* at 58.

138. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982).

139. *Id.* at 973.

140. *See id.* at 972.

141. James Leggate, ‘Predatory’ property investors agree to pay Cincinnati, change practices to settle lawsuit, WCPO CINCINNATI (Dec. 12, 2018), <https://www.wcpo.com/longform/predatory-property-investors-agree-to-pay-cincinnati-change-practices-to-settle-lawsuit> [<https://perma.cc/H2R8-R22H>].

142. *Id.*

143. *Id.*

144. *Id.*

making payments and was evicted for falling behind \$2,200 on his contract.¹⁴⁵ According to Earnest, “[t]hey bait you with the American dream, and switch it with a third-world hut.”¹⁴⁶

At the end of the day, Earnest was left with a broken dream, which is what the traditional approach to enforcing forfeiture clauses achieves. Because sellers of the property who use contracts for deed may sell “as is,”¹⁴⁷ baiting those who want the American dream is all sellers must do to reap the benefits of the deceptive contract they presented to buyers. Also, with a buyer like Earnest officially evicted, under the traditional approach applied by courts, a property owner may now retake possession of the property and keep all of the buyer’s prior payments as liquidated damages.¹⁴⁸ Accordingly, the consequence for an individual’s external sphere of freedom is enormous when the forfeiture clause wreaks havoc—especially considering that most buyers are comparatively impoverished.

Moreover, consider the story of Patricia Howard, a 54-year-old woman who, similar to Earnest, entered into a contract for deed with Harbour.¹⁴⁹ Patricia entered into a contract for deed for \$28,800 and, soon after, fell behind on her monthly payment of \$280.¹⁵⁰ From the plumbing to the gutters, one thing after another with Patricia’s house kept falling apart.¹⁵¹ Harbour themselves admitted that the repairs fell on the residents, not the company.¹⁵² As a result, Patricia will either find a way to make both contractual payments and repairs—*while living off disability checks*—or she will forfeit her payments, the property, and any value she put into the property.¹⁵³ Faced with such a choice, Patricia must choose between purchasing basic necessities or paying her monthly installments. Thus, Patricia’s actions are not truly free in a Hegelian sense since it seems external pressure is shaping her life—as opposed to her shaping the external sphere autonomously.

What if, instead, the courts followed the approach from *Sebastian*? For one thing, deceptive sellers—such as Harbour—would be forced to seek judicial sale and could not strictly enforce the forfeiture clause.¹⁵⁴

145. *Id.*

146. *Id.*

147. Goldstein & Stevenson, *supra* note 32.

148. Nelson, *supra* note 11, at 1113.

149. Alexandra Stevenson & Matthew Goldstein, *Market for Fixer-Uppers Traps Low-Income Buyers*, N.Y. TIMES, Feb. 20, 2016, at A1.

150. *Id.*

151. *Id.*

152. *Id.*

153. *See id.*

154. *See Slone v. Calhoun*, 386 S.W.3d 745 (Ky. 2012).

If that were the case, deceptive sellers would be forced to go to court and live up to the fact that they trick people into entering contracts where there is little hope they will ever own a house.

It is not certain that forced judicial sales will deter sellers from entering into deceptive contracts with unsuspecting buyers, but it is reasonable to assume it could make a difference. Thus, this may be a step in protecting the homeownership of those not fortunate enough to qualify for a mortgage. And if impoverished buyers receive increased protection through judicial oversight, it may allow them to use their property in a manner that displays their personhood in an external sphere.

2. Marxian Critique of Hegel's Philosophy of Right

Karl Marx, voicing his opposition to the political state of Germany in his lifetime, explained the repressive result of living under the reign of a system of private property.¹⁵⁵ Contrary to Hegel, Marx maintained that the ultimate emancipation of Germany could only result from “the unique theory which holds that man is the supreme being for man.”¹⁵⁶ Based on that principle, Marx rejects Hegel's argument that individuals give themselves an external, worldly existence as an idea through material objects. Instead, according to Marx, Hegel claims that individuals owe their existence to a mind other than their own; therefore, they are determinations established by a third party—not self-determinations.¹⁵⁷ Accordingly, an individual's empirical actuality may be rational, “but not rational because of its own reason.”¹⁵⁸ Instead, one's empirical actuality is rational “because the empirical fact in its empirical existence has a significance which is other than itself.”¹⁵⁹

Marx certainly makes an excellent point regarding Hegel's attempt to justify property in an individual's life. For if one owes their existence to things other than themselves, how are they ever fully autonomous?

As applied to the controversy surrounding the contract for deed, Marxian philosophy falls short in critiquing Hegel. Marx assumes that

155. “The proletariat thus has the same right relative to the new world which is coming into being as has the German king relative to the existing world, when he calls the people his people and a horse his horse. *In calling the people his private property the king merely expresses the fact that the owner of private property is king.*” See KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF HEGEL'S PHILOSOPHY OF RIGHT 142 (Joseph O'Malley ed., Annette Jolin & Joseph O'Malley trans., Cambridge University Press 1967) (1843).

156. *See id.*

157. *See id.* at 8–9.

158. *Id.* at 9.

159. *Id.*

because Hegel's concept of freedom derives from third parties recognizing their existence, individuals are not truly free. However, Marxian theory did not develop in modern American society—where “[h]omeownership has long been accepted as a core component of the American dream.”¹⁶⁰ In Western society, culture is largely dependent on consumption.¹⁶¹ Housing, which “plays an intermediary role in the transmission of socioeconomic status from one generation to the next,” is a critical part of Western society's consumption culture.¹⁶² Therefore, the externalization of one's self through tangible property—at least in modern America—is integral to their freedom and existence within society,¹⁶³ given housing's hierarchical and symbolic role in American society.¹⁶⁴

C. *Utilitarian Theory*

Another theory of property, entirely distinct from natural law or personhood theories, is Jeremy Bentham's utilitarianism. Bentham's theory posits that the end the legislator should seek to obtain is that of happiness.¹⁶⁵ In matters of legislation, the principle of utility should guide achieving that end.¹⁶⁶ According to Bentham, the utility principle consists of comparing the estimate of pains and pleasures and not allowing any other idea to intervene.¹⁶⁷ Furthermore, in using the terms pain and pleasure, Bentham speaks of what everybody feels—peasant and prince alike.¹⁶⁸

Applying the principle of utility to property, Bentham maintains that property's role in society is to maximize overall societal happiness.¹⁶⁹ In

160. See Brian H. Robb, *Homeownership And The American Dream*, FORBES (Sept. 28, 2021, 7:15 AM), <https://www.forbes.com/sites/forbesrealestatecouncil/2021/09/28/homeownership-and-the-american-dream/?sh=2dee286523b5> [<https://perma.cc/8ZJR-RSPD>].

161. GRANT McCracken, *CULTURE AND CONSUMPTION: NEW APPROACHES TO THE SYMBOLIC CHARACTER OF CONSUMER GOODS AND ACTIVITIES* xi (1988).

162. See Dalton Conley, *A Room with a View or a Room of One's Own? Housing and Social Stratification*, 16 SOCIO. F. 263, 275 (2001).

163. Housing may have many effects that increase one's freedom in society. See *id.* at 264 (explaining that Housing conditions can then affect educational outcomes through household and neighborhood-level mechanisms).

164. Hierarchical, as used here, is meant to call attention to the idea that housing in America largely separates people by social class. As for symbolic, I mean to draw attention to how America's consumption culture places value in buying nice homes. Thus, an individual's home speaks to their socioeconomic status.

165. See JEREMY BENTHAM, *BENTHAM'S THEORY OF LEGISLATION* 1 (1914).

166. See *id.*

167. *Id.* at 4.

168. *Id.*

169. See SPRANKLING & COLETTA, *supra* note 3, at 3.

a utilitarian property system, property is a “*means toward an end*,” and property rights are distributed and defined in a manner that seeks to best promote the welfare of *all citizens* in a given society.¹⁷⁰

Moreover, Bentham asserts that there is no such thing as natural property; rather, property is entirely a creation of the law.¹⁷¹ And because property is a creature of the law, the legislator owes tremendous respect to the “security” of property—meaning that there should be no shock or disturbance to an individual’s expectations founded on the law or of their enjoyment of a portion of the wealth derived from property.¹⁷²

On its face, the utilitarian view of property appears to be fairly desirable—achieving overall happiness for society is an impeccable goal. As one scholar put it, “[w]hat could be more appealing than a code of ethics that insists the right action is the one that most increases the amount of happiness in society?”¹⁷³ That raises an important question, however: how is the principle of utility calculated? The “Cotton Kingdom”—namely, the antebellum southern United States—culturally and economically relied on the institution of slavery,¹⁷⁴ but few would likely argue that fact is a justification for the institution of slavery and the enormous wrongs it produced.¹⁷⁵

Over 160 years later, American slavery may not exist as it did throughout the nation. However, many wrongs are still done unto not only Black citizens but a plethora of minority groups as well—especially when the devastating impact of the contract for deed comes into play.¹⁷⁶ Today, the mortgage is the traditional security instrument used in purchasing a home,¹⁷⁷ and since the 2008 housing crisis, mortgage practices have appeared to improve—displaying evidence of a lack of widespread discrimination by race in mortgage rates.¹⁷⁸ Nevertheless, continuing

170. *Id.* at 3–4.

171. BENTHAM, *supra* note 165, at 145.

172. *See id.* at 147.

173. Leigh Raymond, *The Ethics of Compensation: Takings, Utility, and Justice*, 23 *ECOLOGY L. Q.* 577, 580 (1996).

174. Jack E. Eblen, *Growth of the Black Population in ante bellum America, 1820-1860*, 26 *POPULATION STUD.* 273, 273 (1972).

175. This article in no way seeks to compare the horrible wrong of American slavery to the ills of the contract for deed. Rather, it is used as an example because, generally, the dynamic between the wealthy, white southern planter class and the slave class may be understood enough to help any reader comprehend the analogy.

176. Way, *supra* note 7, at 117.

177. SPRANKLING & COLETTA, *supra* note 3, at 606.

178. *Racial Differences in Economic Security: Housing*, U.S. DEP’T OF THE TREASURY (Nov. 4, 2022), <https://home.treasury.gov/news/featured-stories/racial-differences-in-economic-security-housing> [<https://perma.cc/8JDB-ENFL>].

racial discrimination remains a possible explanation for the persistent “white/black gap in homeownership.”¹⁷⁹

In any event, for those who do not receive approval for a mortgage, the “cycle of housing insecurity” continues.¹⁸⁰ Sellers have reached into the past and retrieved a predatory lending device so blatantly racist and discriminatory that it helped expose redlining and hasten its demise.¹⁸¹ And what is the “pleasure” of letting the forfeiture clause of a contract for deed ruin the lives of individuals across the nation? For one thing, the contract for deed is often the only financing device available to those denied the traditional mortgage,¹⁸² so it opens a channel through which impoverished individuals may apply payments to a contract—with a property at the end of the series of payments—instead of casting their money away in rent. Additionally, the forfeiture clause in the contract for deed gives sellers a remedy through which they may redeem the property and possibly any payments to compensate themselves for overdue installments. All of this seemingly renders becoming a seller of contracts for deed a reliable, profitable business for those who can afford it—considering that you can sell the property “as is,” leaving it in a wretched condition for the buyer to fix on his own.¹⁸³ And if a seller is lucky enough, they may get a buyer like Samuel, who made thousands of dollars worth of repairs.¹⁸⁴

For all the benefits a seller may derive from a contract for deed, what are the negative consequences of the botched transaction? The “pain” of the forfeiture clause is a concerning phenomenon. Upon default, the seller may retake the property and keep the buyer’s payments as liquidated damages;¹⁸⁵ therefore, the buyer is likely left homeless and worse

179. Laurie S. Goodman & Christopher Mayer, *Homeownership and the American Dream*, 32 J. ECON. PERSPECTIVES 31, 38 (2018). Continued gaps exist in homeownership that may also be attributed to economic factors such as family status, education, and income *See id.* at 32.

180. *See* Burris-Lee, *supra* note 20, at 212.

181. *See id.*

182. Bankrate Staff, *What is a contract for deed?*, BANKRATE (Apr. 6, 2022), <https://www.bankrate.com/real-estate/what-is-contract-for-deed/> [<https://perma.cc/36KE-AMUF>].

183. “Harbour Portfolio had purchased hundreds of homes in Atlanta (and thousands nationwide) from Fannie Mae and Freddie Mac which had been foreclosed upon during the mortgage crisis. The homes were purchased, sometimes for as low as \$10,000, and then sold using ‘contracts for deed’ to low income minority Atlanta residents for \$40,000 or \$50,000.” 2018: *Harbour Portfolio*, ATLANTA LEGAL AID SOC’Y, <https://atlantalegalaid.org/portfolio-item/2018-harbour-portfolio/> [<https://perma.cc/F63A-WKAU>] (last visited Feb. 13, 2023).

184. *See* Stevenson & Goldstein, *supra* note 120.

185. *See* Burris-Lee, *supra* note 20, at 216.

financially than before their contract. The Black community in Chicago alone lost an estimated \$3.2 billion to \$4 billion through forfeitures;¹⁸⁶ and Black, Latino, and immigrant families continue to fall prey to the contract for deed due to a lack of legal resources, third-party oversight, etc.¹⁸⁷

If one is to estimate the pain and pleasures of the forfeiture clause, the balancing of interests must weigh in favor of the buyers. Although sellers may derive a significant financial benefit from forfeiting property and payments in the event of default, “Pain and Pleasure mean what everybody feels as such: peasant and prince alike, the unlearned man and the philosopher.”¹⁸⁸ Furthermore, it is clear that the pain of depriving minority populations of a home, money, and any other attendant benefit of homeownership is sufficiently evil to reduce the happiness of society.

D. *Civic Republican Theory*

All the previously mentioned individuals who fell victim to the forfeiture clause have several common elements to their stories: they lost their property, the payments made toward their contract, and any value they added through repairs or renovations. Although lingering in the background, there is another common element not explored by most scholars: citizens displaced by forfeitures have their opportunity to participate in democracy restrained.

Civic republican theory, which labels property rights as necessary to preserve freedom, posits that property facilitates democracy.¹⁸⁹ This theory may be less prominent today because most citizens obtain economic security from wages, not farming their own land; nevertheless, many scholars still suggest that property provides a person a “stake in society” through ownership, which ultimately provides political and social benefits to all.¹⁹⁰

According to one scholar, the most fundamental point of the relationship between property and democracy is that the right to private property has an essential effect on the relationship between the State and the individual.¹⁹¹ That effect—personal security and independence from the

186. Burris-Lee, *supra* note 20, at 214.

187. Way, *supra* note 7, at 116–17.

188. BENTHAM, *supra* note 165, at 3.

189. See SPRANKLING & COLETTA, *supra* note 3, at 5.

190. *Id.* at 6.

191. Cass R. Sunstein, *On Property and Constitutionalism Comparative Constitutionalism: Theoretical Perspectives on the Role of Constitutions in the Interplay Between Identity and Diversity*, 14 CARDOZO L. REV. 907, 914 (1992).

government—is guaranteed in a system in which public institutions protect property rights.¹⁹² Because of this effect, property can be seen as a necessity for the status of a citizen.¹⁹³

And what is one of the critical democratic rights promoted by owning property? Voting rights. Voting rights have come a long way since the colonial-era requirement that you hold property to vote.¹⁹⁴ Nonetheless, there appears to be a clear advantage democratically for homeowners. Homeowners participate at far higher rates, are electorally powerful, and compromise virtually all elected officials—even in areas with a large majority of renters.¹⁹⁵

Individuals displaced by forfeiture clauses may be deprived of these benefits. Homeowners possess disproportionate amounts of influence, and it ultimately impacts the lives of non-homeowners—creating land use and housing policies that raise housing prices, racial and economic segregation, and unequal access to high-quality public goods.¹⁹⁶

Further, it is entirely likely that individuals displaced by forfeiture clauses will rent, enter another contract for deed, or end up homeless—considering poor creditworthiness usually results in their denial of the traditional mortgage in the first place. Thus, on top of policy often favoring homeowners, transient individuals are disproportionately impacted by residency requirements.¹⁹⁷ Five percent of homeowners, compared to 28% of renters, move yearly.¹⁹⁸ Because residency requirements for voting are generally thirty days or less,¹⁹⁹ many constantly moving citizens may assume there is a barrier to registering to vote.

Accordingly, citizens displaced by forfeitures may ultimately not realize their ability to participate in American democracy fully. However,

192. *See id.*

193. *See id.*

194. *See* Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787–1828*, 33 J. EARLY REPUBLIC 219, 220 (2013).

195. Katherine Levine Einstein & Maxwell Palmer, *Land of the Freeholder: How Property Rights Make Local Voting Rights*, 1 J. HIST. POL. ECON. 499, 500 (2021).

196. *See id.*

197. *See id.* at 521 (explaining that residency requirements for voting strongly favor homeowners, who tend to stay in places far longer than renters).

198. Stephen Ansolabehere et al., *Movers, Stayers, and Registration: Why Age Is Correlated with Registration in the U.S.*, 7 Q. J. POL. SCI. 333, 359 (2012). On another note, I include this statistic about renters because, in reality, those who enter contracts for deed are renters with the possibility of buying if they can make all the scheduled payments. And one of the only true distinctions between renters and buyers in a contract for deed is that, generally, buyer's are responsible for property maintenance, property taxes, and home insurance. *See* Way & Wood, *supra* note 6, at 38.

199. Stephanie M. Stern, *Reassessing the Citizen Virtues of Homeownership*, 111 COLUM. L. REV. 890, 935 (2011).

treating the contract for deed as a mortgage—and as a result, protecting property rights for individuals—may promote the stability citizens need to stay homeowners and take advantage of their voting rights consistently.

V. CONCLUSION

From Illinois to Arkansas to Georgia, the forfeiture clause contained in the contract for deed depends the lives of citizens trying to make it in American society. The contract for deed may disproportionately impact particular classes of individuals, but the device hardly discriminates among the individual members of those classes when it chooses to victimize. Victims of the contract for deed, displaced from their communities, are deprived of homeownership and the attendant benefits of being an American homeowner. They are often left worse financially than if they had abstained from financing with this deceptive device.

This Article displayed that treating the contract for deed as a mortgage is feasible and necessary for modern society. Looking to some of the world's most renowned philosophers is the best way to justify the transition. Aristotle's approach displays how the contract for deed deprives citizens of the community they need as political animals; Hegel's personhood theory shows that the forfeiture clause strips citizens of their external sphere necessary to be free; Bentham's utilitarian calculus exhibits that the pain of disproportionately depriving certain classes of people housing outweighs sellers interest in speedy, cost-efficient eviction proceedings; and lastly, a Civic Republican analysis presents the harsh reality that upending individuals inhibits their participation in democracy.

Low-income Americans are becoming increasingly vulnerable, and immigrant families are arriving at unprecedented rates. If courts do not control the seller's ability to enforce the traditional forfeiture clause in the event of default, the future of American property rights could be grim.

Thus, it is on the shoulders of courts to follow the wisdom of the philosophers who have contemplated property rights to their most profound extent and afford mortgage protections to buyers in contracts for deeds.