

Chapter 8

Homeownership, Debt, and Default:
The Affective Value of Home and the
Challenge of Affordability

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Introduction

The promotion of homeownership as a national housing strategy has been a central element of American housing policy since the National Housing Act 1949. Indeed, in recent decades, successive administrations have emphasized the role of the expanding homeownership sector, particularly for low-income and minority households, in enabling citizens to realize the "American Dream." Yet, as the recent mortgage lending crisis has highlighted the risks associated with homeownership, debt, and default, the tensions that exist between the political ideology of homeownership and the promotion of owner-occupation as the *sine qua non* of the American Dream, on the one hand, and the crisis of affordability and debtor default facing many American families on the other, are brought into sharp relief. This chapter focuses on these tensions by scrutinizing a paradox of government housing policies which promote an ideology of homeownership yet which run parallel to a legal context that does not adequately protect homeowners, particularly those who are at high risk, from foreclosure and repossession.

This chapter offers a more coherent analysis of the ways that law protects (or does not protect) the homeownership interest in the context of foreclosure, with a particular focus on the losses that are suffered by home occupiers in the event of losing their homes. In societies where homeownership has been promoted as the most desirable tenure, owning a home is heavily loaded with social and cultural meanings. Homeownership is not only associated with financial security, but is also strongly associated with personal and family security. Government policies seeking to extend homeownership often employ a rhetoric of homeownership as empowering, that it gives citizens a stake in society, that it enhances stability, security, control and so contributes to the "social fabric." Yet, alongside the potential benefits, borrowers must bear a range of risks in order to finance the purchase of their homes, and so to pursue this financial, personal, and family security. While the perilous positions of those caught up in the current subprime mortgage lending crisis has received much attention in the media—with considerable concerns particularly for the exposure of low-income households to increased risks of foreclosure—it

is important that, alongside the debate on rescue schemes, responses to this crisis include reflection on the underlying legal, theoretical, and phenomenological issues associated with default and foreclosure. This chapter considers the affective values of *home* as they have been socio-culturally embedded in *homeownership*, and identifies a range of costs—both financial and non-financial—that can result when occupiers lose their homes through foreclosure proceedings or through bankruptcy, and which affect not only dispossessed occupiers (and their families) but also significantly impact other stakeholders across society.

Homeownership and the American Dream

It is difficult to overstate the importance of our homes, both in everyday life and, by extension, in law. Our homes provide the backdrop for our lives, and are often the scene or the subject of legal disputes. Recent analysis of home as a legal concept in the U.S. has described an: “ideology of home, where the protection of home and all it stands for is an American virtue.”¹ This is not surprising: indeed, in this respect, the American ideology of home echoes the experiences of many other societies. As Irwin Altman and Carol Werner noted in the Introduction to their collection *Home Environments*:

... people in every society usually have some type of residence. Although their form and permanence vary widely from one group to another, homes are more or less a universal. Second, in many societies, homes are one of the most important places. Homes offer physical amenities that sustain and support the residents, and they are often essential to the very survival of their occupants. Furthermore, homes are important centres for the development and manifestation of certain psychological meanings. Individuals develop identities and regulate privacy in homes; families establish, grow, bond themselves to a unit in homes and often bond themselves to the larger society through their homes. Thus homes are the repository of central and essential psychological and cultural processes.²

In fact, it is not only “home” (in the sense of a dwelling place) but *homeownership* that is revered in many post-industrial societies, and has been described as an “American obsession,” such that: “... most Americans are willing to make dramatic sacrifices in order to own a home.”³ Many Americans are willing to take a second job, to give up time with their young children, placing them in childcare, to take jobs further away from their homes, and to spend a large portion (sometimes more

1 D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006).

2 Irwin Altman & Carol M. Werner, *Introduction to HOME ENVIRONMENTS*, at xix (Irwin Altman & Carol M. Werner eds., 1985).

3 Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 326 (1998).

than half) of their monthly disposable incomes on mortgage instalments alone.⁴ Furthermore, as Fennell has recently noted: “Current legal arrangements make homeowners high-stakes gamblers. Homebuyers routinely take on crushing debt loads to put huge sums of money into risky, undiversified ventures that are utterly out of their personal control – local housing markets.”⁵ Fennell went on to add that, while these markets may typically deliver positive returns, this is: “... of little comfort to those caught on the downside of housing market volatility.”⁶

This willingness to sacrifice time, money, effort, and energy has been linked to two different types of goals: on the one hand, to the pursuit of financial security, with homeownership regarded as the most effective form of wealth accumulation for most Americans, while on the other hand, homeownership may even be viewed as: “... a metaphor for *personal* and *family* security ... owning one’s home is, in essence, an empowering act, giving people a stake in society and a sense of control over their lives ... homeownership strengthens the social fabric.”⁷ Indeed, the goal of a private, often suburban, single-family detached house has become a core element of the proverbial “American Dream.” In the midst of the subprime mortgage lending crisis, a swell of legislative activity has sought to provide emergency relief for American homeowners in foreclosure or default. In the 110th Congress (2007–08), 44 Bills relating to the foreclosure crisis were introduced, for example, the Foreclosure Prevention and Homeownership Protection Act of 2007, which sought to establish the “Commission to Preserve the American Dream.” Yet, the recent rush to enact legislation to “rescue” homeowners facing foreclosure captures an important paradox in the promotion of homeownership in the United States: the tension between the *promotion* of homeownership as a (strongly) preferred tenure, and the development of effective policies to *protect* homeowners in the event of default or foreclosure.

The phrase “American Dream” is, of course, emotionally loaded and resonates with several aspirations, deeply embedded in the socio-cultural fabric of America. Historically these values include individual freedom, social justice, the ability to participate in the consumer economy, the hope for a better life for one’s children, “that dream of a land in which life should be better and richer and fuller for every man, with opportunity for each according to his ability or achievement.”⁸ It is interesting to note that in the original meaning of “American Dream,” “better and richer and fuller” was not defined in terms of money (only) but encapsulated a range of meanings which were both financial and non-financial,⁹ and included

4 *Id.*; see also Peter D. Hart & Robert Teeter, *Fannie Mae National Housing Survey*, FANNIE MAE (1992).

5 Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047 (2008).

6 *Id.*

7 Williams, *supra* note 3 at 327.

8 JAMES TRUSTOW ADAMS, *THE EPIC OF AMERICA* 404 (1931).

9 See, e.g., JIM CULLEN, *THE AMERICAN DREAM: A SHORT HISTORY OF AN IDEA THAT SHAPED A NATION* 7 (2003).

freedom, independence, security, self-determination, and hard-work. Indeed, it is not difficult to see that for "successful" homebuyers—those who remain in steady employment, meet their mortgage instalments as they fall due, and eventually discharge the debt, thus becoming homeowners—owner-occupation (albeit subject to a mortgage) may provide a route by which the advantages associated with outright ownership—for example, freedom, continuity, security—can be delivered. Yet, it is also important to recognize that when an occupier faces the threat of losing their home through foreclosure, the position is inverted, as they risk losing both the property and all the meanings and values associated with its function as their home. Indeed, for homebuyers exposed to such risks, a new discourse has recently emerged to challenge the idea that homeownership, particularly for low-income, minority, and vulnerable households who are at greatest exposure to the risks associated with subprime and predatory lending, is more accurately described as an "American nightmare."¹⁰

While the potential rewards of homeownership are deeply ingrained in our psyches, less attention has been focused on the risks that some borrowers are willing to (or must) take in order to finance the purchase of their homes, and on the potential costs of achieving the financial, personal, and family security associated with homeownership. As the housing boom of expanding homeownership, especially amongst low-income and minority households, has given way to mounting defaults and rising foreclosure rates which will leave many more households at risk of losing their homes, considerable attention has focused on the impact of mortgage default for the American housing market, the American economy, and even the global economy. Meanwhile, concerns are also mounting about creditors who employ inappropriate lending strategies, mis-sales of debt packages to borrowers who will never be able to afford to repay the loan, predatory lending, and the growth of subprime lending, particularly to vulnerable households.¹¹ The

¹⁰ See, e.g., Anne B. Shlay, *Low-income Homeownership: American Dream or Delusion?* 43 URBAN STUDIES 511 (2006); RICHARD LORD, AMERICAN NIGHTMARE: PREDATORY LENDING AND THE FORECLOSURE OF THE AMERICAN DREAM (2004); GREGORY D. SQUIRES, WHY THE POOR PAY MORE: HOW TO STOP PREDATORY LENDING (Gregory D. Squires ed., 2004); Kristopher Gerardi, Adam Hale Shapiro & Paul S. Willen, *Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosures* (Federal Reserve Bank of Boston, Working Paper No. 07-15, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1073182; for a general discussion, see National Community Reinvestment Coalition, *The 2005 Fair Lending Disparities: Stubborn and Persistent II*, NCRC REPORT (2006), available at http://www.ncrc.org/policy/analysis/policy/2006/2006-05-23_2005HMDAreport.pdf.

¹¹ See, e.g., Roberto G. Quercia, Michael A. Stegman & Walter R. Davis, *The Impact of Predatory Loan Terms on Subprime Foreclosures: The Special Case of Prepayment Penalties and Balloon Payments*, 18 HOUSING POLICY DEBATE 311 (2005); Allen Fishbein & Harold Bunce, *Subprime Market Growth and Predatory Lending*, HOUSING POLICY IN THE NEW MILLENNIUM: PROCEEDINGS (Susan M. Wachter and R. Leo Penne eds., 2005); Harold L. Bunce, Debbie Gruenstein, Christopher E. Herbert & Randall M. Scheessele, *Subprime*

Center for Responsible Lending has recently estimated that 15.6 percent of all subprime loans originated since 1998 either have ended or will end in foreclosure and the loss of homeownership.¹² Meanwhile, a study published by the National Community Reinvestment Coalition in 2006 indicated that minorities, women, and low- and moderate-income borrowers across the U.S. continue to receive a disproportionate amount of high-cost loans. In a sample of loans made in 2005, it emerged that women received 37.3 percent of high-cost conventional loans but just 28 percent of the market-rate conventional loans; men, in contrast, received a higher percentage of market-rate loans (66.8 percent) than high-cost loans (60.2 percent).¹³ Furthermore, a study for the Center for Responsible Lending in 2006 found that for most types of subprime home loans, African-American and Latino borrowers were more than 30 percent more likely to receive higher-rate loans than white borrowers, even after controlling for legitimate differences in risk factors.¹⁴

Subprime loans have already led to one million American families losing their homes in the last decade;¹⁵ statistics on foreclosures in New York alone showed an increase of 50 percent in the last year,¹⁶ and the ripple effect of the crisis in the U.S. mortgage market is continuing to cause shock-waves across the national, and indeed the global economy.¹⁷ Three million homeowners with subprime loans

Foreclosures: The Smoking Gun of Predatory Lending?, HOUSING POLICY IN THE NEW MILLENNIUM: PROCEEDINGS (Susan M. Wachter and R. Leo Penne eds., 2005); Dan Immergluck, *Stark Differences: Explosion of the Subprime Industry and Racial Hypersegmentation in Home Equity Lending*, HOUSING POLICY IN THE NEW MILLENNIUM: PROCEEDINGS (Susan M. Wachter and R. Leo Penne eds., 2005); Baher Azmy & David Reiss, *Modeling a Response to Predatory Lending: The New Jersey Home Ownership Security Act of 2002*, 35 RUTGERS L.J. 645 (2004).

¹² Center for Responsible Lending, *Subprime Lending: A Net Drain on Homeownership*, CRL ISSUE PAPER No. 14, March 27, 2007, at 2, available at <http://www.responsiblelending.org/pdfs/Net-Losership-3-26.pdf>. See also Ellen Schloemer, Wei Li, Keith Ernst & Kathleen Keest, *Losing Ground: Foreclosures in the Subprime Market and Their Cost to Homeowners*, CENTER FOR RESPONSIBLE LENDING PUBLICATION (2006), asserting that one in five subprime mortgages originated in 2005 and 2006 will end in foreclosure, an increase of 200 percent from 2002.

¹³ NCRC Report, *supra* note 10.

¹⁴ See Debbie Gruenstein Bocian, Keith S. Ernst & Wei Li, *Unfair Lending: The Effect of Race and Ethnicity on the Price of Sub-Prime Mortgages*, CENTER FOR RESPONSIBLE LENDING PUBLICATION (2006), available at http://www.responsiblelending.org/pdfs/rtr011-Unfair_Lending-0506.pdf.

¹⁵ *Supra* note 12.

¹⁶ Neighborhood Economic Development Advocacy Project, *Paying More for the American Dream: A Multi-State Analysis of Higher-Cost Home Purchase Lending*, NEIGHBORHOOD ECONOMIC DEVELOPMENT ADVOCACY PROJECT REPORT (March 2007), available at http://www.nedap.org/pressroom/documents/2007_Report-2005_HMDA.pdf.

¹⁷ In the U.K., the Chancellor of the Exchequer recently intervened in an effort to restore consumer confidence in British banking institutions when the shock-waves across the credit economy that have followed the U.S. housing market crisis hit the U.K. lending

are expected to enter foreclosure during the next two years, with 2 million of these households forecasted to lose their homes.¹⁸ Furthermore, the ripple effect of foreclosure, beyond the bilateral relationship of creditor and debtor, is emphasized by the projection that another 40 million homeowners will see their home values decline by \$200 billion due to nearby subprime foreclosures.¹⁹

It is therefore timely to re-consider the consequences of foreclosure for occupiers who lose their homes at the hands of creditors. The second part of this chapter begins to consider how the tensions between *promotion* and *protection* of homeownership can be re-analyzed in light of the exposure of home occupiers in the ownership sector to the *risks* associated with mortgage debt, default, and foreclosures, alongside evidence relating to the *losses* that result from creditor actions against the owned home. The objective of the chapter is to offer a more coherent legal analysis of the home protections available to American homeowners, by focusing not only on the benefits—for the borrower, their household, society, and the economy—of successful expansions of homeownership, but also taking account of the countervailing costs—for the borrower, their household, society, the economy, other homeowners—when homeownership is unsuccessful.

While the perilous positions of homebuyers who are exposed to heightened risk by the subprime lending crisis, and the human costs of foreclosure, have received much attention in the media in recent months, this chapter explores the deeper legal, theoretical, and phenomenological issues underpinning this crisis in default and foreclosure, with a view to considering if, and, if so, how, law should respond to this new crisis of affordability for homeownership. The second part of the chapter sets out the framework for an emerging legal concept of home, which would facilitate a more coherent legal analysis of *home* protections that reflects the loss suffered when home occupiers experience foreclosure. One important aspect of this analysis is its focus on the *occupiers* of the home as the parties affected by the loss of home in foreclosure, rather than limiting consideration to the creditor-debtor relationship.²⁰ It is perhaps not surprising that the legal framework for foreclosure tends to focus on a bilateral view of the credit agreement, given the emphasis on legal structures and doctrines from contract law and real property law in this context. However, as recent events have clearly illustrated, debt, default,

institution Northern Rock. As customers queued to withdraw their money outside branches on high streets across the U.K., the government promised that the Bank of England would guarantee the security of all existing deposits; see BBC, "Savers Return" to Northern Rock, BBC News, September 18, 2007, available at <http://news.bbc.co.uk/1/hi/business/7000035.stm>.

18 Center for Responsible Lending, *Protect States' Rights to Prevent Foreclosures: Support Miller-LaTourette Amendment*, CENTER FOR RESPONSIBLE LENDING POLICY BRIEF, May 7, 2008, available at <http://www.responsiblelending.org/pdfs/protect-states-rights-support-miller-latourette.pdf>.

19 *Id.*

20 This focus on occupiers in the context of the homeownership sector also bears useful parallels for analysis of security of tenure for occupiers in the rental sector.

and foreclosure also have significant consequential impacts beyond the contracting parties—from impacts on other occupiers (for example, children²¹ and other family and household members) to neighbourhoods,²² as well as broader social and economic impacts.²³ This analysis therefore seeks to weigh in the balance of the legal reasoning process, the range of consequential losses that flow from foreclosure actions and loss of home through bankruptcy, beyond the traditional legal focus on potential losses to the two contracting parties, creditor and debtor.

The third part of the chapter proceeds to analyze the nature and application of current legal provisions and procedures in the event of default. This section considers the limits of the (narrowly conceived, classical) law and economics discourse that often tends to dominate over other considerations (for example, social and psychological, experiential meanings of home, or behavioral or socio-cultural economic considerations) in this context. The fourth part then considers the ways in which the meanings of home have been influenced by the political ideology and promotion of ownership as an aspirational tenure and, particularly, policies promoting the expansion of homeownership to low-income and minority households. The fifth part considers the tensions that these policies create, between the *promotion* of homeownership, as constituent of the "American Dream," and the *protection* of homeowners when their ownership—and by extension their occupation—of the home becomes unsustainable as a result of challenges to affordability. Finally, the sixth part concludes the chapter by proposing a two-strand approach—around the protection of homebuyers, on the one hand, and the promotion of homeownership on the other—to address some of the underlying issues and problems associated with homeownership, debt and default.

The Emerging Legal Concept of Home

It is perhaps somewhat surprising that, despite the centrality of home in our lives, and the impact of legal regulation on the occupier's experience of home, the legal concept of home has received surprisingly little attention.²⁴ As laypersons we know that "there's no place like home," that "home is where the heart is," and

21 See LORNA FOX, *CONCEPTUALISING HOME: THEORIES, LAWS AND POLICIES*, Chapter Nine (2007); Phillip Lovell & Julia Isaacs, *The Impact of the Mortgage Crisis on Children and Their Education*, FIRST FOCUS, April 2008, available at http://www.brookings.edu/~media/Files/rc/papers/2008/04_mortgage_crisis_isaacs/04_mortgage_crisis_isaacs.pdf.

22 Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17:1 HOUSING POLICY DEBATE 57 (2006), available at http://www.fanniemae.foundation.org/programs/hpd/pdf/hpd_1701_immergluck.pdf.

23 See Fox, *supra* note 21, at 109–18 and Chapter Five.

24 See Fox, *supra* note 21, at 33–41.

we may even believe that the law recognizes that "a man's home is his castle."²⁵ However, notwithstanding some important recent work on this subject in the U.S.,²⁶ the development of home scholarship in legal discourse remains in its early stages. This is in marked contrast to the critical attention that the subject of "home" has attracted in other disciplines in recent decades. The blossoming of interest in home across social science disciplines has stimulated a considerable amount of research, in the form of both empirical studies and theoretical analysis, to explore experiences of home and to analyze the meanings and values that home represents to its occupiers. Drawing from these analyses it is possible to identify five sets of values associated with home: (1) home as a financial investment; (2) home as a physical structure; (3) home as territory; (4) home as identity; and (5) home (especially the owned home) as a cherished socio-cultural indicator.²⁷

The idea of the home as a financial investment is probably the most readily comprehensible aspect of the *home* interest for legal scholarship. The value associated with the "home as a financial investment" is the factor that distinguishes the meaning of the owner-occupied home most clearly from the meaning of home for tenants, requires and connotes participation in the ideology of the market, and appears to be the most salient aspect of home as the fulfilment of the "American Dream" for contemporary perspectives. Indeed, the political, social, and cultural ideologies of homeownership have contributed much to the meanings and values associated with the owner-occupied home, and particularly to the idea of home as a financial investment.

Secondly, the value of the home as a physical structure is concerned with the tangible "bricks and mortar" elements of *home*. Whilst much of the scholarship concerning *home* has focused on the intangible attachments identified as the "x factor" meanings [if *home* = house + x], occupiers also place considerable value on the tangible aspects of home: that is, the house itself. Home provides physical shelter for its occupiers: "... [h]omes offer physical amenities that sustain and support the residents, and they are often essential to the very survival of their occupants."²⁸ There can be no doubt that, from a practical perspective, the need for physical shelter is the most immediately pressing consequence of losing one's

25 The expression "An Englishman's home is his castle" is a misquotation from the decision in *Semayne's Case* (1604) 5 Co Rep 91a at 91b, 77 ER 194 at 195, when Coke CJ commented that: "... the house of everyone is to him as his castle and fortress."

26 See Barros, *supra* note 1; Megan J. Ballard, *Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy*, 56 SYRACUSE L. REV. 277 (2006). For some recent literature in the U.K., see Fox, *supra* note 21; Lorna Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?*, 29 J.L. Soc'y 580 (2002); Lorna Fox, *The Idea of Home in Law*, 2 HOME CULTURES 25 (2005); Avital Margalit, *The Value of Home Ownership*, 7 THEORETICAL INQUIRIES IN LAW (2006).

27 See Fox, *supra* note 21, especially Chapter 4.

28 Altman & Werner, *supra* note 2, at Preface, xix.

home. In fact, it is the loss of this physical shelter, "houselessness," which is politically and popularly referred to as "homelessness."

The concept of home as a physical structure is also closely associated with the *territoriality* of home.²⁹ "Territoriality" has been defined as: "... the act of laying claim to a geographic area, marking it for identification, and defending it when necessary against others of the same kind."³⁰ Territorial behavior, in both animals and humans, is linked to the instinct for survival, to safety and security, and to protecting one's family: "... mating, safeguarding the nest, and protecting the food supply, functions that are basic to the survival of the organism and the perpetuation of the species."³¹ For humans, the exercise of territorial behavior is characterized generally as: "... the relationship between an individual or group and a particular physical setting that is characterised by a feeling of possessiveness, and by attempts to control the appearance and use of space."³² The idea that occupiers would exhibit territorial behavior in the *home* environment is evident, since the occupied home is clearly a "primary territory"—that is, a place: "... where one spends most of one's time and interacts with one's primary reference group."³³ In fact, the function of the home as territory satisfies a range of social and psychological needs: home is the sole area of control for the individual; home is the most appropriate physical framework for family and family life; home is a place of self-expression; and home provides a feeling of security.³⁴ These responses are generally recognized as positive for the occupier, since: "[i]n stable circumstances a deep embeddedness can be beneficial by providing a stable sense of self in connection with environment."³⁵

It is important to recognize, however, that not all home occupiers will experience the positive benefits associated with territoriality, identification, security, family, privacy, autonomy, and control within the home environment. Indeed, the expectation that *home* will provide stability and security is likely to exacerbate

29 This feature is heavily emphasized by Sebba and Churchman, who argue that: "... the uniqueness of the home lies in its psychological and social meaning and in the opportunity it affords the occupants to exert control over the space and the behaviour within it"; Rachel Sebba & Arza Churchman, *The Uniqueness of Home*, 3 ARCHITECTURE AND BEHAVIOUR 7, 21 (1986).

30 Sidney N. Brower, *Territory in Urban Settings*, in ENVIRONMENT AND CULTURE 179–80 (Irwin Altman, Amos Rapoport & Joachim F. Wohlwill eds., 1980).

31 *Id.* at 180.

32 *Id.*

33 *Id.* at 184–5.

34 Amos Rapoport, *A Critical Look at the Concept 'Home'*, in THE HOME: WORDS, INTERPRETATIONS, MEANINGS, AND ENVIRONMENTS 30 (David Benjamin ed., 1995); see also Sebba & Churchman, *supra* note 29. Brown and Perkins also noted that: "[p]lace attachments clearly promote and reflect stability, signifying long term bonds between people and their homes and communities."; Barbara B. Brown & Douglas D. Perkins, *Disruptions in Place Attachment*, in PLACE ATTACHMENTS 280 (Irwin Altman & Sebba M. Low eds., 1992).

35 Brown & Perkins, *supra* note 34, at 282.

the impact of disruptions to home, since: "[n]ormally homes provide a secure and private place where one's identity is protected."³⁶ The object of establishing a territorial space is to achieve privacy and control, to: "create predictable environments with an accompanying sense of order and security."³⁷ Many of the values associated with territoriality are also associated with the idea that the occupier who enjoys the home as territory has a satisfactory degree of *control* over their home territory. For this reason, the ideologies of homeownership, with their expectations of enhanced control, privacy, and security, heighten the notion of "home as territory." Yet, notwithstanding the emphasis on *ownership* in socio-political constructions of positive home meanings, it is important to note that the construction of a legal concept of home has important critical potential for analysis of debates concerning rental property, for example, around security of tenure. The extent to which homeownership in fact "delivers" on the "x-factor" meanings depends entirely on the legal framework that governs "home-type" interests in any particular jurisdiction. As such, Marcuse has argued that the characteristics associated with *home*—such as control, status, and privacy—are *not* inherently attributable to homeownership. Rather, the features of home allegedly enhanced by ownership—security of tenure, control, and so on—could be, if governments chose to do so as a matter of policy, factored into the law that governs rental property.³⁸

It is also pertinent to consider the effectiveness of the "owned home" as a source of satisfaction for territoriality, in light of the risk of foreclosure, which has major implications for the meaning of the owner-occupied home as territory. On the one hand, the occupier's sense of territoriality at home is likely to be heightened when the home is placed under attack. When occupiers are faced with the forced loss of their homes through creditor possession actions, there is a tendency to become *more* territorial in order to counter the threats made to personal security, to self-esteem, or to self-identity. Empirical research³⁹ has shown that: "... as anxiety, stress, and nervousness increased there was an increased tendency for individuals to become territorial with respect to their own beds, chairs, and spaces at the table. On the other hand, as levels of stress and anxiety decreased, territorial behaviour became less evident."⁴⁰

One particular aspect of territorial defensiveness that is interesting with reference to foreclosure is the different types of responses occupiers may have to the threat of interference with their home territory. Brower has claimed that:

36 *Id.* at 285.

37 Brower, *supra* note 30, at 181.

38 Peter Marcuse, *The Ideologies of Ownership and Property Rights*, in HOUSING FORM AND PUBLIC POLICY IN THE U.S. 41 (Richard Plunz ed., 1980).

39 See Irwin Altman, Dalmas A. Taylor & Ladd Wheeler, *Ecological Aspects of Group Behaviour in Social Isolation*, 1 JOURNAL OF APPLIED SOCIAL PSYCHOLOGY 76 (1971).

40 Brower, *supra* note 30, at 182.

As threat or the perception of threat increases, territorial behaviour tends to become more defensive ... There are several different ways of handling increased threat. One is to defend all claims more aggressively. Another is to shrink the boundaries of one's claims, falling back to the territories that are most defensible—much like retreating to one's bedroom to avoid having to face unwelcome guests in the living room. Yet another strategy is to renounce, or at least not to press, one's claims to ineffective types of occupancy ... The last two strategies may well result in the abandonment of territorial claims.⁴¹

Occupiers' responses to the threat of possession can be mapped onto the types of responses identified above, in relation to territorial threats: that is, they may defend claims more aggressively, shrink the boundaries of their claims, or renounce their claims to ineffective types of occupancy.

On the one hand, the occupier who willingly gives up possession of the property at the request of the creditor can be viewed as renouncing their claim to ineffective occupancy. As the threat of foreclosure sweeps across the U.S., there is indeed evidence that many occupiers have responded by relinquishing territoriality over the property. There are various systemic reasons that make it more desirable for the occupier to give up possession of the property voluntarily, including the resources which are saved, through administrative and court costs, and time, by avoiding litigation. However, abandonment of homes is also resource-wasteful, through the non-use of vacant properties, and the consequent risks of vandalism, illegal activity, and so on in such properties.

Another possibility is that the occupier's response is motivated by alternative, territorial factors: for example, research has indicated that: "[h]ouseholds with children were more likely to want to stay put, regardless of how they now viewed the house and all the associated financial problems."⁴² Such households are arguably more likely to "defend all claims more aggressively," a response which may prove counter-productive from a legal perspective. While the rational argument suggests that, in the event of default, debtors should negotiate with lenders to mitigate their losses, for example, by downsizing to a cheaper property or by re-negotiating the mortgage or re-structuring payments, there is evidence to indicate that the presence of children in a home makes downward economic adjustment more difficult.⁴³ In addition, the presence of child occupiers exacerbates the psychological barriers to giving up the home. Thus, Warren has argued that:

To face economic reversals for oneself may be very much easier than imposing those reversals on someone else, especially a much-loved child. To give up an

41 *Id.* at 190–91.

42 Hazel Christie, *Mortgage Arrears and Gender Inequalities*, 15 HOUSING STUDIES 877, 896 (2000).

43 Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. 1003, 1022 (2002).

expensive home may be hard enough for an adult, but when it means that a child may be forced to change schools and leave friends, resistance may deepen.⁴⁴

Indeed, Warren has also suggested that there are practical reasons for clinging on to the home, even after default, since: "[m]oving out of a home entails high transaction costs, and families with deteriorating credit know they are unlikely to qualify for another home loan."⁴⁵

"Home as identity" represents another significant cluster of meanings associated with the phenomenon of home, and provides the principal framework within which the emotional connotations of home are expressed. While the role of the home as a financial investment, as a physical structure providing shelter, and even as a valued territory, can all be regarded as having a "strong cognitive element," the meanings of home associated with identity are: "... primarily affective and emotional, reflecting the adage *home is where the heart is*."⁴⁶ It is important to recognize that while the idea of "home" as an emotional attachment may not easily fit within the value structures of the traditional law-and-economics approach to property law, the significance of the home as identity is undoubtedly real for occupiers. In fact, the significance of the home as a reflection of the occupier's identity is very easy to grasp from a lay perspective: for one thing, the sense of pride that dwellers take in their homes reflects the importance of the home as a symbol of identity. Empirical studies have shown that: "[p]hysical settings and artefacts both reflect and shape people's understandings of who they are as individuals and as members of groups."⁴⁷ The importance of the home as a physical setting for everyday life, combined with the significance attached to the way that the home is presented, indicates the extent to which the home is felt to reflect the occupier's identity.

There are two main constituent elements to home as identity, both of which are principally associated with the symbolic significance of home for its occupiers. On the one hand, the psycho-analytical perspective addresses the importance of home in an occupier's self-identity: that is, "home as a symbol of one's self," and suggests a deep connection between the home and the human spirit.⁴⁸ "Home as identity" is also evidenced in the socio-psychological theory that home is an integral element of the occupier's social identity. The ideologies of homeownership have also promoted the idea of the owned home as a means of achieving control, ontological security, and autonomy. Owning one's own home is significant for social identity, since it grants membership to a respected category of people—in

44 *Id.* at 1023.

45 *Id.* at 1023.

46 Kim Dovey, *Home and Homelessness*, in *HOME ENVIRONMENTS* 40 (Irwin Altman & Carol M. Werner eds., 1985).

47 Brown & Perkins, *supra* note 34, at 280.

48 Dovey, *supra* note 46, at 40.

part because it demonstrates one's commitment to the work ethic.⁴⁹ The owned home, the largest single expenditure most people ever make, requires many years of earning and saving, and represents a long-term commitment to the work ethic.⁵⁰ This feature of home meanings also resonates strongly with the social and cultural significance of the home—particularly the owned home—and the impact of losing one's home through foreclosure. In societies in which homeownership is culturally cherished—including the U.S., U.K., Australia, New Zealand, and Canada—the socio-cultural significance of home is intrinsically linked to *owning* one's own home, and this necessarily exacerbates the practical, emotional, and psychological impacts of losing one's home.⁵¹ Furthermore, the expansion of homeownership, and the additional meanings and expectations associated with "owning one's own home," have played a major role in embedding these meanings, both socially and culturally.

When considering the potential for taking account of the impact of loss of home within property law, it is interesting to bear in mind that, although there is little evidence that these values have weighed heavily on the balancing scales against the creditor's claim to the capital value of the property in a foreclosure or bankruptcy contest, the possibility of focusing on a protection for the *possession* of occupiers is strongly rooted in the property law tradition. For example, Hume argued that: "[m]en generally fix their affections more on what they are possess'd of than on what they never enjoyed ... it would be greater cruelty to dispossess a man of anything than not to give it to him."⁵² However, the question of *why* law would, or should, treat interests in possession as carrying some special status, rendering them worthy of particular protection, is brought into particularly sharp relief when the claim of a person in possession of land comes into conflict with a competing interest bearing a relatively superior title or ownership interest. In Pollock and Maitland's analysis of *possession* they asked: "Why should law, when it has on its hand the difficult work of protecting ownership and other rights in things, prepare puzzles for itself by undertaking to protect something that is not ownership, something that will from time to time come into sharp collision

49 See, e.g., CONSTANCE PERIN, *EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA* (1977), which described homeowners as being near the top of life's ladder, and having achieved a sort of "perfected citizenship," which qualifies them for full "American social personhood."

50 See also Janet M. Fitchen, *When Toxic Chemicals Pollute Residential Environments: The Cultural Meanings of Home and Home Ownership*, 48 *HUMAN ORGANISATION* 313, 320 (1989).

51 See further, "The Meaning and Experience of 'Owning' One's Home," *infra*, discussing the losses associated with the experience of foreclosure.

52 DAVID HUME, *A TREATISE OF HUMAN NATURE: BEING AN ATTEMPT TO INTRODUCE THE EXPERIMENTAL METHOD OF REASONING INTO MORAL SUBJECTS*, Book III, Part II, Sect. 1 (1817).

with ownership?"⁵³ While one may recognize, as a matter of fact, that certain interests carry value in some intangible sense, it is another matter entirely to attribute sufficient weight to such interests to outweigh other claims, for example, proprietary interests, such as those that are vested in secured creditors.

The value conferred on *possession* in the medieval doctrine of *seisin* has been described as a reflection of a fundamental impulse to acknowledge: "... the organic element in the relationship between man and land ..."⁵⁴ This focus on the relationship between the occupier and the property gives the idea of *possession* as an organizing concept considerable contemporary relevance for the conceptualization of home in law.⁵⁵ The enduring relevance of *possession* as symbolic of a significant relationship between the occupier and the land was reflected in Tay's suggestion that: "... it is because all proprietary and possessory rights ultimately stem from enjoyment that *seisin* lies at the very root of the development of the English law of property and of the Englishman's concept of freedom—of his home as his castle."⁵⁶

Tay claimed that: "[t]he role of the underlying *seisin*-possession concept in the common law is to recognise and protect those still important areas in which men live, work and plan as users—owners ..."⁵⁷ In fact, it was this recognition of the use value of land that was identified as: "... the base and shaper of the social sentiment that shrinks with distaste from the forcible eviction."⁵⁸

This proposition is also linked to the economic theory of the "endowment effect." The endowment effect is the idea that principles of rational choice can be displaced by the fact of possession, so that the person in possession of an item of property values that property more highly than a non-possessor. Pollock and Maitland reasoned that: "[p]ossession as such deserves protection ... He who possesses has by the mere fact of his possession more right in the thing than the non-possessor has."⁵⁹ In fact, the idea that possession *ought* to be protected often seems to be derived from an instinctive awareness that the value that an item of property represents to the possessor of that property is greater than the value that the property holds for a non-possessor, *because of the fact of possession*. Consequently, the degree of harm caused to a possessor (for example, the home occupier) by losing that property would be greater than the harm suffered by

53 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I* 40 (2d ed. 1898).

54 K.J. GRAY & P.D. SYMES, *REAL PROPERTY AND REAL PEOPLE* 48–9 (1981).

55 Thus Gray & Symes wrote that: "[i]n its technical sense *seisin* is no longer of importance today. However the emphasis which it placed upon possession rather than title continues to influence several areas of modern law"; *Id.* at 49.

56 Alice Ehr-Soon Tay, *Law, the Citizen and the State*, in *LAW AND SOCIETY: THE CRISIS IN LEGAL IDEAS* 11 (E. Kamenka, R. Brown, and A. E-S Tay eds., 1978).

57 *Id.*

58 *Id.*

59 Pollock & Maitland, *supra* note 53, at 42–3.

depriving the non-possessor (for example, the creditor, or landlord) of the property. Tay described this impulse to preserve the status quo as a "bias in favour of the factual situation";⁶⁰ while the idea that possession is worthy of legal protection—whether or not it is supported by ownership—because it nurtures an attachment to the property, was reflected in Oliver Wendell Holmes' comment that:

It is in the nature of a man's mind. A thing which you enjoyed or used as your own for a long time, whether property or opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.⁶¹

Evidence of the endowment effect provides a modern basis for the idea that possessors have a natural interest in retaining property, and supports the argument that possessors of property tend to *value* that property more highly than non-possessors.⁶² The existence of an "endowment effect" resonates with the nature of the *value* that *home* represents for occupiers—who are in possession—as compared to the value that the property holds, as a financial asset, for creditors. It is also interesting to note that studies exploring the "endowment effect" have shown that the desire to maintain the status quo in terms of one's possessions is rooted in *loss aversion*. In fact, it has been suggested that: "... the main effect of endowment is not to enhance the appeal of the good one owns, only the pain of giving it up."⁶³ In the context of creditor possession or foreclosure actions, the endowment effect will therefore function to increase the loss to the possessor (occupier), compared to the loss suffered by the non-possessor (creditor, landlord). Finally, for the purposes of the debate surrounding the *promotion* of homeownership as the "American Dream," without *protection* in the event of default, it is significant to note that: "[a]n implication of the endowment effect is that people treat opportunity costs differently than 'out-of-pocket' costs. Foregone gains are less painful than perceived losses."⁶⁴ It is therefore arguable that a homeowner who suffers the loss of their home as a result of default may suffer greater loss than a tenant who never entered into the homeownership sector at all.

60 Tay, *supra* note 56, at 11.

61 Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

62 See Colin Camerer, *Individual Decision Making*, in *THE HANDBOOK OF EXPERIMENTAL ECONOMICS* 665–70 (J.H. Kagel & A.E. Roth eds., 1995), for an account of empirical studies of the endowment effect, and some possible psychological explanations for such effects.

63 Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion and Status Quo Bias*, 5 JOURNAL OF ECONOMIC PERSPECTIVES 193, 197 (1991); see George Loewenstein & Daniel Kahneman, *Explaining the Endowment Effect* (Department of Social and Decision Sciences, Carnegie Mellon University, Working Paper, 1991).

64 Kahneman et al., *supra* note 63, at 203.

Until relatively recently, the idea of seeking to capture the meanings and values of home—as a financial investment, as a physical structure, as territory, as identity, and as socio-cultural unit—had not impacted significantly on legal discourse. The recent flourish of interest in this area⁶⁵ is timely in light of concerns about the impact of growing foreclosure rates in the U.S. The next section considers the balance struck between the creditor's commercial claim against the capital value of property and the occupier's interest in continuing to live in the property as a home in the contexts of foreclosure and bankruptcy. This section considers whether, and, if so, how, the meanings and values that the home represents to occupiers at risk of dispossession might be filtered into legal discourses around foreclosure and bankruptcy in the U.S.

The Creditor/Occupier Contest: U.S. Context

Creditor actions against the owner-occupied home are generally triggered by the debtor's default on repayment, leading the creditor to respond by seeking to recover the capital value of the property through foreclosure, thus forcing the eviction of the occupier and the sale of the property. The object of the foreclosure process is to ensure that secured creditors are able to exercise their proprietary rights against the property itself if the debtor goes into default. In the context of prime lending, the grant of proprietary rights over the property by a borrower may benefit both parties: the lender reduces its risk and the borrower benefits from a resultant reduction in the price of the debt.⁶⁶ However, considering the transaction from the perspective of the risk faced by the borrower, it is important to recognize that:

[t]he point of a lender's seeking a mortgage is to reduce the risks of unsecured credit, and the primary reason why a mortgage reduces these risks is that the lender can foreclose if need be ... [T]he main reason ... why the mortgage reduces risk is that if the borrower defaults by failing to pay the debt or by breaking other promises, the lender has the option to do more than bring an action for breach of promise or an action on the unpaid instalments or the accelerated debt. The lender also has the option to foreclose.⁶⁷

State law varies on the processes for foreclosures, which may take place out-of-court, either by strict foreclosure, which extinguishes the mortgagor's equity of

⁶⁵ In the United States, see Ballard, *supra* note 26; Barros, *supra* note 1. In the United Kingdom, see Fox (2006), *supra* note 21; Fox (2005), *supra* note 26; and Fox (2002), *supra* note 26. In Israel, see Margalit, *supra* note 26.

⁶⁶ See ROBIN PAUL MALLOY & JAMES CHARLES SMITH, *REAL ESTATE TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS* 764 (2d ed. 2002).

⁶⁷ *Id.*

redemption, by power-of-sale foreclosure, whereby the mortgage lenders can foreclose by selling the property without the need for a court order, or by bringing foreclosure proceedings through the court (judicial foreclosure). Yet, although the procedure for foreclosure varies from state to state, it is important to recognize that, across the board, once the borrower has defaulted on repayments, the balance of power lies firmly with the lender.

Mortgage law provides a range of protection for borrowers—from barring clogs on the equity of redemption to requiring that secured creditors follow proper foreclosure procedures. However, it is important to recognize that, once the debtor is in default, and so long as the secured creditor follows the proper procedure, a defaulting occupier who remains unable to discharge the debt and faces foreclosure will lose her home. From a law-and-economics perspective, this represents the *sine qua non* of the creditor's security: in the event of default, the borrower who cannot pay will ultimately lose their home. Indeed, this pro-creditor position can be justified on several grounds. Since the debtor owes a contractual obligation to the creditor, by facilitating foreclosure, the law is merely enforcing that contract. It is also suggested that creditors must be protected in order to ensure that they remain willing to lend money to homebuyers, thus underwriting the policy goal of expanding homeownership. Yet, while the idea that creditors must prevail in the event of default is often accepted without much question, the economic and social consequences of repossession and forced sale are not straightforward but highly complex.

The proposition that valid contracts—freely entered into—should be enforced between the parties is, at a basic level, difficult to dispute. However, it is important to bear in mind that, when balancing the interests of creditors and occupiers, the outcome will often have significant impact beyond the contracting parties themselves. Although a creditor has no direct right of action against the non-debtor occupier, the exercise of remedies against the secured property itself has obvious implications on other occupiers—either non-debtor adults or children. Non-debtor occupiers stand outside the contractual relationship between the creditor and the debtor: they stand outside the transaction, although they are clearly going to be affected by the exercise of the mortgagee's remedies. Indeed, while the costs of foreclosure are clearly most acute for the debtor and other members of her household, the financial impact beyond the debtor's household has also recently been quantified at 0.9 percent decline in value for every conventional foreclosure within an eighth of a mile of a single-family home.⁶⁸

Another law-and-economics justification for the prioritization of the secured creditor's right to foreclose might be the possible consequences of refusing the creditor's action for economic efficiency and the availability of credit; as Karl

⁶⁸ See, e.g., Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17:1 HOUSING POLICY DEBATE 57 (2006), in which the authors track the impact of foreclosures on neighboring property values.

Llewellyn cautioned in 1931: "Remove the legal sanction and men will give credit with more care."⁶⁹ Yet, Llewellyn also acknowledged that this argument was rooted in assumption rather than fact, and that: "[s]peculation is unfortunately much easier than finding out, as well as less useful ... My own guess is that in the main writers, both legal and other, tend to over estimate heavily the effects of law ..."⁷⁰ More recently, empirical analysis has suggested that higher borrower protections have: "... a significant, positive effect on the probability that households will be turned down for credit or discouraged from borrowing";⁷¹ and that the effect of lowering creditor protections on credit availability is distributed disproportionately across borrower income groups. While high-income households had the most to gain from high exemptions—that is, when creditor protections are lowered—low-income households experienced greatest difficulty obtaining credit in these circumstances.⁷² The consequences, for the borrower, may take various forms including higher interest rates and higher qualification requirements for loans, increased collateral requirements, more vigorous screening of loan applications. Again, these consequences are likely to create greater difficulty for low-income borrowers seeking credit.

It is interesting to note that any economic analysis underpinning the pro-creditor presumption in foreclosure necessarily focuses on the *availability* of credit over and above other measures of economic efficiency in credit markets, and regardless of the debtor's ability to repay. The prioritization of credit *availability* is rooted in the premise that: "the primary economic function of the credit market is to provide cheap funds, and that this function can only be accomplished when creditor rights are protected and sanctions on non-performing debtors are enforced."⁷³ This approach has been criticized on the basis that, in assessing the performance of the credit market, the availability of cheap credit has been inappropriately emphasized at the expense of other important factors—such as effective screening by the lender, insuring risk-averse entrepreneurs and protecting overconfident individuals and households.⁷⁴ These factors also resonate with the prevailing condition of the larger credit market. Thus, when funds are readily available, as they had been from the turn of the century until the recent credit crunch, the motivation to ensure the

69 Karl Llewellyn, *What Price Contract? – An Essay in Perspective*, 40 YALE L.J. 704, 725 (1931).

70 *Id.* at 725, footnote 47.

71 Reint Gropp, John Karl Scholz & Michelle J. White, *Personal Bankruptcy and Credit Supply and Demand*, 112 QUARTERLY JOURNAL OF ECONOMICS 217, 220 (1997).

72 *Id.*

73 A. Jorge Padilla & Alejandro Requejo, *The Costs and Benefits of the Strict Protection of Creditor Rights: Theory and Evidence 5* (Washington, D.C.: Inter-American Development Bank, Research Network Working Paper #R-384, 2000).

74 *Id.* at 6. See also Michael Manove & A. Jorge Padilla, *Banking (Conservatively) with Optimists*, 30 RAND JOURNAL OF ECONOMICS 324 (1999); Michael Manove, A. Jorge Padilla & Marco Pagano, *Collateral versus Project Screening: A Model of Lazy Banks*, 32 RAND JOURNAL OF ECONOMICS 4, 726–44 (2001).

availability of cheap credit tends to "trump" all other considerations: however, the mortgage crisis has functioned as a cautionary reminder of the range of issues at stake, and has triggered a new wave of economic analysis seeking to unpack the connections between the inability of some borrowers to repay subprime debt, leading to high and rising delinquency rates of subprime mortgages, which in turn triggered a downturn in the housing economy and the global credit crisis that followed in 2007.⁷⁵

The links between legal policies in the context of creditor protections and broader measures of economic efficiency were highlighted by Posner, who argued that when considering law's attitude towards creditor protections, it is important to take account of the role of creditors as effective gate-keepers. While high creditor protections may encourage creditors to lend money, particularly to low-income households, this may also result in creditors assuming unjustified risks, which in turn are linked to higher rates of bankruptcy.⁷⁶ Yet, while lower creditor protections encourage entrepreneurship, they are also linked to higher interest rates and higher rates of default. Although Posner acknowledges that the outcome of his analysis is ambiguous,⁷⁷ the complexity of economic efficiency arguments in the context of creditor protections must cast some doubt on the narrow approach that has appeared to inform legal analysis, and which has tended to prioritize the *availability* of credit over and above other measures of economic efficiency in credit markets. While the pro-creditor position can be justified by reference to the need for widely available credit to fund homeownership, a focus on lending *volume*, at the exclusion of other measures of market performance including default rates, is questionable. Indeed, some studies have suggested that an *effective judicial system* and *macroeconomic stability* are more significant as determining factors for the development and optimal performance of the credit market than high legal protections for creditors.⁷⁸

75 Ben S. Bernanke, Chairman of the Federal Reserve System, Speech at the Women in Housing and Finance and Exchequer Club Joint Luncheon (January 10, 2008), available at <http://www.federalreserve.gov/newsevents/speech/bernanke20080110a.htm>.

76 "Some [U.S.] states have generous household exemptions for insolvent debtors, others chintzy ones. In the former states, the risk of entrepreneurship is reduced because the cost of failure is less, but interest rates are higher because default is more likely and the creditor's position in the event of default is weaker. And note that higher interest rates make default all the more likely. Cutting the other way, however, is the fact that in low-exemption states lenders' risk is less, which induces lenders to make more risky loans, i.e., loans likely to end in bankruptcy. It is therefore unclear whether there will be more bankruptcies in the high-exemption states or in the low-exemption states"; RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF LAW* 440–41 (1992).

77 Similarly, Padilla and Requejo's empirical study of the costs and benefits of strict creditor protections found no conclusive evidence on the sign and magnitude of the effect of creditor rights protection on credit market efficiency; *supra* note 73.

78 Rafael La Porta, Florencio Lopez-De-Silanes, Andrei Shleifer & Robert W. Vishny, *Legal Determinants of External Finance*, 52 JOURNAL OF FINANCE 1131–50 (1997);

It is also important to recognize that a policy of facilitating the widespread availability of credit—particularly for low-income households—is intrinsically linked to the political ideology of homeownership and the *expectation* that homeownership should be a legitimate aspiration for all U.S. citizens, as a central tenet of the “American Dream.” Furthermore, while the ideology of homeownership is often assumed to derive from the desire to enable citizens to achieve an enhanced level of social and financial security for their own well-being, critical analyses of the ideological veneration of homeownership in the U.S. have suggested, *inter alia*, that the long-term indebtedness associated with the mortgage contract (which usually turns the homebuyer into a permanent debtor) reflects the real estate and credit industry perspective that indebtedness functions as a social good.⁷⁹ Indeed, Shlay has argued that the “real reason” for the federal government’s promotion of homeownership, in the wake of the collapse of the U.S. economy in the 1920s, was as “a tool to stimulate consumption and increase production while improving American’s housing conditions.”⁸⁰ This view also resonates with Vincent’s observation that the publication of Adams’ *The Epic of America* in 1931 (which coined the phrase “American Dream”),⁸¹ sought to revive the belief that:

America was a land of infinite possibilities, that hard work, honesty and determination could be enough, that the surrounding economic system was not stronger than the willpower and fortitude of individuals, and that there was something left to dream about in America ... at a time when it appeared to many Americans, if not to all, that the American dream had been replaced by a nightmare ...⁸²

Shlay has noted that homeownership, particularly low-income homeownership, is rooted in a “deterministic tradition” which promises “a wide range of social, behavioural, political, economic and neighbourhood changes ...”⁸³ Yet, amidst rising concerns that homeownership as a “fits all” tenure has been oversold, a major body of literature has considered its impact on a range of variables,

Rafael La Porta, Florencio Lopez-De-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 JOURNAL OF POLITICAL ECONOMY 1113–55 (1998); Mark Meador, *The Effects of Mortgage Laws on Home Mortgage Rates*, 34 JOURNAL OF ECONOMICS AND BUSINESS 143, 147 (1982).

79 Perin, *supra* note 49.

80 Shlay, *supra* note 10, at 511.

81 Adams, *supra* note 8.

82 Bernard Vincent, *The American Dream – When was the Phrase Born?*, PRINTEMPS 81, 86 (2005).

83 Shlay, *supra* note 10, at 513.

including child outcomes,⁸⁴ economic well-being,⁸⁵ and social stability.⁸⁶ Analysis of empirical studies indicates that homeownership bears costs as well as benefits:⁸⁷ the putative advantages of owning your own home for the realization of *home* meanings (the economic, social, and personal rewards which have been associated with greater security of tenure, financial well-being, autonomy, privacy, enhanced social- and self-identity, and so on) must be tempered in the context of increased levels of risk and foreclosure. For example, McCarthy et al.’s analysis of empirical studies across a range of jurisdictions concluded that: “... homeownership may not always be a good investment, particularly for low-income ... owners”;⁸⁸ but that: “... while homeownership brings considerable economic benefits for families and the country, these benefits are not evenly distributed across income groups. Low- and moderate-income families are likely to gain less and risk more through homeownership.”⁸⁹ Furthermore, the authors also noted that: “[m]ortgage default is costly for families and numerous other stakeholders”;⁹⁰ and that low-income households are more exposed to these costs than other homebuyers. A range of factors render low-income households more vulnerable to default, including higher risk and lower, and less certain, returns on housing investment; links between housing and labor markets which increase the likelihood that local job losses will be coupled with house price declines;⁹¹ the likelihood that low income households “will have lower cash reserves to help them weather an interruption in income or unforeseen expenses.”⁹² McCarthy et al. concluded that: “... affordable lending efforts might be exposing these households to higher default risk.”⁹³

Yet, in the event of default, and presuming that the borrower is no more able to pay the money owed by the time foreclosure proceedings are brought, the law is clearly on the side of the lender. There can be little doubt that the growth of

84 Donald R. Haurin, Toby L. Parcel & Ruth J. Haurin, *The Impact of Homeownership on Child Outcomes* (Joint Center for Housing Studies of Harvard University, Low-Income Homeownership Working Paper Series LIHO-01.14, 2001).

85 George McCarthy, Shannon Van Zandt & William M. Rohe, *The Economic Costs and Benefits of Home Ownership: A Critical Assessment of the Research*, RESEARCH INSTITUTE FOR HOUSING AMERICA (2001).

86 William M. Rohe, Shannon Van Zandt & George McCarthy, *The Social Benefits and Costs of Home Ownership: A Critical Assessment of the Research*, HARVARD UNIVERSITY JOINT CENTER FOR HOUSING STUDIES (2001).

87 Shlay notes that: “[r]esearch does not provide uniform support for [homeownership] as a tool for asset accumulation, neighbourhood economic development or other social and political goals.”; *supra* note 10, at 511.

88 McCarthy, Van Zandt & Rohe, *supra* note 85, at 18.

89 *Id.* at 1.

90 *Id.* at 32. See also Immergluck & Smith, *supra* note 68 and associated text, concerning the financial costs in declining property values for neighboring properties.

91 *Id.*

92 *Id.* at 31.

93 *Id.* at 32.

homeownership, particularly low-income homeownership, would not have been possible without major government interventions in the market—in the form of credit market participation and regulation, tax subsidies, and other investment—over several decades. However, when it comes to protecting those borrowers who have been exposed to the risk of losing their home, law has adopted a non-interventionist approach. Once a borrower is in default, the options available to her include seeking to renegotiate with the lender, or agree to a restructure of payments. However, it is important to recognize that where a borrower simply does not have the money owed, and the creditor is not inclined to wait, the creditor has a clear advantage as far as legal principles of foreclosure are concerned:⁹⁴ there is no opportunity, at this stage, for a court to balance the competing interests of the creditor and the debtor, and the impact of foreclosure on the debtor home-occupier (and other co-occupiers) is not considered relevant.

Of course, another option that may be open to occupiers seeking to protect their homes would be to apply for bankruptcy, with a view to invoking the homestead exemptions, which provide a special protection for the bankrupt's *home* against actions to force the sale of the property by creditors. The protection afforded to the debtor's primary residence under homestead legislation varies, but 46 out of 50 states offer some form of homestead exemption to protect equity in the home from the general reach of creditors.⁹⁵ The amount of the exemption ranges from \$500 in Iowa, to \$200,000 in Minnesota, with only five states⁹⁶ offering total exemption. Where a total exemption is offered, the home itself will be preserved, since creditors are barred from forcing the sale of the property. However, where only a partial exemption is available, the creditor may still force a sale if the value of the property is greater than the amount of the exemption. In these cases, if the borrower files for bankruptcy, the bankrupt may receive a share of the equity raised on sale. Nevertheless, the home itself will most likely still be sold.

The links between debtor default, bankruptcy, and forced sale of the owner-occupied home have important ramifications in a socio-cultural environment that has placed a premium on owner-occupation. Yet, against a socio-political framework that extols the advantages of homeownership (including low-income homeownership) it is important to temper the benefits and opportunities presented by homeownership with the potential costs and the risks that homebuyers are exposed to if they default on their debts. While homeownership has been promoted as enhancing the positive meanings of home for occupiers, the extent to which the benefits of homeownership are available to individual occupiers and households is determined according to their ability to sustain homeownership, and thus to

94 Malloy and Smith have noted that: "In both cases [strict foreclosure and judicial foreclosure] the mortgagor loses her equity of redemption if she does not pay by the judicial deadline"; *supra* note 66, at 768.

95 The only states offering no exemption are Delaware, New Jersey, Pennsylvania, and Rhode Island.

96 Florida, Kansas, Oklahoma, South Dakota, Texas.

avoid foreclosure or bankruptcy. Between these claims, it is reasonable to surmise that in states where total exemption is available, the importance of the home to occupiers is prioritized over and above the need to ensure that creditors can recoup their debts. Conversely, weaker homestead exemptions, or none at all, indicate that the claims of creditors to recover their debts are prioritized over the interests of occupiers in retaining the property for use and occupation as a *home*.

The Meaning and Experience of "Owning" One's Home

Although the rise in scholarly analysis of the meanings and value of home is relatively recent, the impulse to investigate the relationship between occupiers and the properties in which they reside is rooted in a long-established and largely intuitive sense that *home* is a positive phenomenon. From the philosophical foundations of home as a dwelling place that enables the occupier to become oriented in the world,⁹⁷ to the five clusters of contemporary home meanings based on empirical and theoretical research, identified by the present author in *Conceptualising Home*—home as financial asset; home as physical structure; home as territory; home as identity; and home as socio-cultural unit⁹⁸—home discourse has generally presumed that the home is a source of positive meanings, attachments, and experiences for occupiers. Furthermore, the expansion of homeownership—including low-income homeownership—has been relentlessly pursued in many jurisdictions, including the U.S., on the presumption that owner-occupiers experience considerable and incontrovertible benefits compared to renters. The additional social and economic benefits that, according to political rhetoric, are associated with owning one's own home—especially for low-income

97 See, e.g., Heidegger's philosophy of dwelling: MARTIN HEIDEGGER, *BAUEN WOHNEN DENKEN* (BUILDING DWELLING THINKING) (Albert Hofstadter trans., 1951), and the 1951 lecture, Martin Heidegger, ... *Dichterisch Wohnt Der Mensch* ... ("... Poetically man dwells ..."), *POETRY, LANGUAGE, THOUGHT* (Albert Hofstadter trans., 1951); MARTIN HEIDEGGER, *SEIN UND ZEIT* (BEING AND TIME) (John Macquarrie & Edward Robinson trans., 1927) (1962). Bachelard also described a fundamental need to take shelter from the world within the home, and highlighted the role of the home as a place of safety, security, and warmth: "[b]efore he is 'cast into the world' ... man is laid in the cradle of his house ... Life begins well, it begins enclosed, protected, all warm in the bosom of the house"; GASTON BACHELARD, *THE POETICS OF SPACE* 7 (1964). This metaphor of home as a dwelling place also has connotations of family: references to the cradle and the bosom conjure up images of the home as a motherly body. For a philosophical perspective on the relationship between home and self-identity, see generally, JEFF E. MALPAS, *PLACE AND EXPERIENCE: A PHILOSOPHICAL TOPOGRAPHY* (1999); on the territoriality of home, see EDWARD S. CASEY, *GETTING BACK INTO PLACE - TOWARD A RENEWED UNDERSTANDING OF THE PLACE-WORLD* (1993).

98 Fox, *supra* note 21.

households—have been extensively analyzed in recent years.⁹⁹ For example, studies of home meanings have suggested that the significance of a person's home as a "repository of central and essential psychological and cultural processes"¹⁰⁰ is compounded by the additional cultural value attached to homes by owner-occupiers.¹⁰¹ Culturally, homeownership has been perceived as conferring greater freedom and independence, and owner occupation has been linked, by some commentators, with a greater sense of control within the home territory, and increased ontological security.¹⁰² The status conferred by homeownership has been linked to an occupier's self-identity.¹⁰³ Even when considering the meaning of the home as a physical structure, which may ostensibly appear to be neutral across tenures, it has been suggested that the value that the occupier puts upon the physical structure of the house is enhanced by ownership.¹⁰⁴

99 For a detailed discussion of the promotion of low-income homeownership in the U.S., see LOW INCOME HOMEOWNERSHIP: EXAMINING THE UNEXAMINED GOAL (Nicholas P. Retsinas & Eric S. Belsky eds., 2002); and several reports published by Harvard University's Joint Center for Housing Studies as part of its Low-Income Homeownership Working Paper Series: see, e.g., Mark Duda & Eric S. Belsky, *The Anatomy of the Low-Income Homeownership Boom in the 1990s* (Harvard University Low-Income Homeownership Working Paper Series, Working Paper No. LIHO.01-1, 2001); Michael Collins, David Crowe & Michael Carliner, *Examining the Supply-Side Constraints to Low-Income Homeownership* (Harvard University Low-Income Homeownership Working Paper Series, Working Paper No. LIHO.01.5, 2001); Haurin et al., *supra* note 84; Rohe et al., *supra* note 86; see also McCarthy et al., *supra* note 85. ROGER BURROWS & STEVE WILCOX, *HALF THE POOR: HOME OWNERS WITH LOW INCOMES* (2000) highlighted the ongoing difficulties experienced by low-income homeowners in the U.K., particularly in light of the low level of financial support currently afforded by the government for homeownership households living in poverty. For further analysis of the meanings associated with home across tenures, see Fox, *supra* note 21, especially Chapter Five.

100 Altman & Werner, *supra* note 2, at xix.

101 Fitchen, *supra* note 50, at 318.

102 See Sandy G. Smith, *The Essential Qualities of a Home*, 14 JOURNAL OF ENVIRONMENTAL PSYCHOLOGY 31 (1994); PETER SAUNDERS, *A NATION OF HOME OWNERS* (1990); Marjorie Bulos & Waheed Chaker, *Sustaining a Sense of Home and Personal Identity*, in *THE HOME: WORDS, INTERPRETATIONS, MEANINGS AND ENVIRONMENTS* (David Benjamin ed., 1995).

103 "Owning one's own home grants membership in a respected category of people in part because it demonstrates one's commitment to the work ethic. The owned home, the largest single expenditure most people ever make, requires many years of earning and saving, and represents a long-term commitment to the work ethic." Fitchen, *supra* note 50, at 320.

104 See, e.g., Craig Gurney, *Lowering the Drawbridge: A Case Study of Analogy and Metaphor in the Social Construction of Home-Ownership*, 36 URBAN STUDIES 1706 (1999); Craig Gurney, *Pride and Prejudice: Discourses of Normalisation in Public and Private Accounts of Home Ownership*, 14 HOUSING STUDIES 163 (1999).

Yet, one of the overriding issues to bear in mind in critical analysis of *home* is the importance of taking a real measure of the meanings and experiences of home, rather than pursuing an idealized vision of home. To this end, it is significant to recognize that, alongside the benefits of widespread homeownership, there are also potential social and economic costs to be borne by unsuccessful homebuyers.¹⁰⁵ The increase in risk and the potential costs associated with homeownership are brought into particularly stark relief by the rise in *unsustainable* homeownership, particularly amongst low-income households.¹⁰⁶ However, it is also important to bear in mind, when considering the proposition that *home* can be embraced as a universal value, the way in which households who have taken out subprime mortgages—predominately minorities, women, and low- and middle-income borrowers¹⁰⁷—are exposed to rising interest rates and the risk of default and foreclosure. On the one hand, research has suggested that the meanings and values of *home* may be particularly salient for certain categories of owner-occupier, as a result of their greater need for the positive values of home (security, safety, wealth creation, privacy, identity, and so on) because of lower income levels,¹⁰⁸ for children,¹⁰⁹ for the elderly,¹¹⁰ for those who are physically or mentally

105 See, e.g., Rohe et al., *supra* note 86; McCarthy et al., *supra* note 85.

106 See discussion above, *supra* notes 15–19 and associated text.

107 NCRC Report, *supra* note 10, at 3.

108 See, e.g., Lee Rainwater, *Fear and the House-as-Haven in the Lower Class*, 32 J. OF THE AMERICAN INSTITUTE OF PLANNERS 23 (1966).

109 See, e.g., Ross D. Parke, *Children's Home Environments: Social and Cognitive Effects*, in *CHILDREN AND THE ENVIRONMENT* (Irwin Altman & Joachim F. Wohlwill eds., 1978); Louise Chawla, *Childhood Place Attachments*, in *PLACE ATTACHMENTS* (Irwin Altman & Setha M. Low eds., 1992); Louise Chawla, *Home is Where You Start From: Childhood Memory in Adult Interpretations of Home*, in *THE MEANING AND USE OF HOUSING* (Ernesto G. Arias ed., 1993); Pia Christensen & Margaret O'Brien, *CHILDREN IN THE CITY: HOME NEIGHBOURHOOD AND COMMUNITY* (2003).

110 Pia C. Kontos, *Resisting Institutionalization: Constructing Old Age and Negotiating Home*, 12 J. OF AGING STUDIES 167 (1998); Juliana Mansvelt, *Working at Leisure – Critical Geographies of Ageing*, 29 AREA 289 (1997); Graham Mowl, Rachel Pain & Carol Talbot, *The Ageing Body and Homespace*, 32 AREA 189 (2000).

disabled,¹¹¹ or for minorities.¹¹² Empirical studies have also suggested that when a person's economic and social resources are limited, the home and neighborhood environment play a critical role in that person's life chances and identity.¹¹³ If, as political rhetoric has suggested, *ownership* of one's home inherently enhances the occupier's ability to experience the positive values of home, then the growth of homeownership would support these positive meanings.

However, research into the social costs of mortgage possession actions in England has also indicated the impact of loss of home on values such as the occupiers' self-identity and social-identity.¹¹⁴ One consequence to emerge from this study was the impact of the change in their social status for dispossessed occupiers, and the experience of having their homes repossessed, also raised issues of stigma and shame for occupiers. Thus: "... a number of people said they had been caught short by the awful realisation that they were now 'homeless'."¹¹⁵ Many respondents also emphasized the significance of the shift from "owner" to "renter" for their social identity. The researchers reported that:

[a] number of people said that they felt they were now regarded as "second-class citizens" who were "dependent" on the state. A few respondents even said that they felt that they would now be classed as part of the "underclass" ... People described how the experience had impacted on how they felt about themselves and also what they felt they could and could not do. In particular,

111 The issues associated with access to, and support of, homeownership for people with disabilities have attracted considerable critical attention: *see, e.g.*, Suellen Galbraith, *A Home of One's Own*, in *THE FORGOTTEN GENERATION: THE STATUS AND CHALLENGES OF ADULTS WITH MILD COGNITIVE LIMITATIONS* (Alexander J. Tymchuck, K. Charlie Lakin & Ruth Luckasson eds., 2001); E. Hepp & C. Soper, *One Family's Story of Homeownership*, 15 J. OF VOCATIONAL REHABILITATION 79 (2000); Jay Klein, *The History and Development of a National Homeownership Initiative*, 15 J. OF VOCATIONAL REHABILITATION 59 (2000); JAY KLEIN & MERRILL BLACK, *EXTENDING THE AMERICAN DREAM: HOME OWNERSHIP FOR PEOPLE WITH DISABILITIES* (1995); Jay Klein & Debra Nelson, *Homeownership for People with Disabilities: The State of the States in 1999*, 15 J. OF VOCATIONAL REHABILITATION 67 (2000); Jay Klein, Boyd Wilson & Debra Nelson, *Postcards on the Refrigerator: Changing the Power Dynamic in Housing and Assistance*, in *PART OF THE COMMUNITY: STRATEGIES FOR INCLUDING EVERYONE* (Jan Nisbet & David Hagner eds., 2000); John O'Brien, *Down Stairs That Are Never Your Own: Supporting People with Developmental Disabilities in Their Own Homes*, 32 MENTAL RETARDATION 1 (1994).

112 The positive relationship between home, gender, and race was explored by BELL HOOKS, *YEARNING: RACE, GENDER, AND CULTURAL POLITICS* (1990).

113 Susan Saegert, *The Role of Housing in the Experience of Dwelling*, in *HOME ENVIRONMENTS* (Irwin Altman & Carol M. Werner eds., 1985), *supra* note 2, at 289-90; *see also* ALVIN L. SCHORR, *SLUMS AND SOCIAL INSECURITY* (1964).

114 JANET FORD, ROGER BURROWS & SARAH NETTLETON, *HOME OWNERSHIP IN A RISK*

the experience had far-reaching consequences for some people's self-confidence and self-esteem.¹¹⁶

The impact of losing the home for identity was also reflected in the finding that: "... for many, social isolation was intensified by both felt and enacted stigma."¹¹⁷ For some occupiers:

... people whom they had considered to be friends lost contact with them after the possession. For some, the experience undermined relationships with family as well as friends, especially where people had definite ideas about the "deserving and undeserving poor." One couple reported how they still felt shame and embarrassment some four and a half years after the actual possession.¹¹⁸

Children and young people who experienced repossession found it embarrassing to have to tell their friends, and found the change in social identity, from "owner" to "renter," to be difficult. In weighing the social and personal costs of foreclosure, it is important to take account of this study's claim that: "[t]he vast majority of the participants in the study felt that they had lost self-confidence and self-esteem. The majority also said they had been severely depressed, many receiving medication for it."¹¹⁹

While for the "successful" homeowner, a range of additional "benefits"—freedom, continuity, security—are associated with the security of tenure which is thought to flow from owner-occupation, for the occupier who is threatened with the loss of their home through foreclosure or bankruptcy, the converse applies, and it is low-income households—and others who are forced to rely on subprime lending—who experience the greatest risk of possession actions. It is ironic indeed if those for whom *home* is most salient are also most vulnerable to the risk of losing their homes through default and foreclosure.¹²⁰

116 *Id.* at 149.

117 *Id.* at 161.

118 *Id.* at 161.

119 *Id.* at 162.

120 Low income is an obvious issue in relation to vulnerability to repossession: *see, e.g.*, PETER MCCARTHY & BOB SIMPSON, *ISSUES IN POST-DIVORCE HOUSING* (1991), while the high proportion of low-income households in the owner-occupied sector emphasizes the extent of the potential for default. One study suggested that for low-income homeowners, the social and economic value of ownership was mitigated by the fact that ownership increases financial and psychological stress among families living on the economic margin: Danny Balfour & Janet Smith, *Transforming Lease-Purchase Housing Programs for Low-Income Families: Towards Empowerment and Engagement*, 18 J. OF URBAN AFFAIRS 173 (1996). The experiences of children in the context of repossession actions are considered in Sarah Nettleton, *Losing a Home through Mortgage Repossession: The Views of Children*, 16 CHILDREN AND SOCIETY 82 (2001). Elderly people may be rendered particularly vulnerable

The relative analytical neglect of *home* interests in legal discourse (until fairly recently), as well as the fact that—unless there is a total homestead exemption—the commercial claims of creditors will prevail in foreclosure actions, conforms to a classic market economy model of real property law as a discipline that favours: "... self-interested and rational individuals in the market place, overrid[ing] the needs of those who are different: weaker or poorer, or in a different way defined as Other."¹²¹ In her discussion of *home* as "privilege," feminist scholar Iris Marion Young suggested that while the "privilege" of home was traditionally viewed as a *gender* privilege, it is now more likely to be linked to privileges of class and race.¹²² This is substantiated by evidence that as the homeowner sector has expanded to include low-income households, these occupiers have been disproportionately exposed to the risk of losing their homes through default and foreclosure.¹²³ Indeed, if the financial and psychological stresses experienced by low-income homebuyers, not only by the final eventuality of losing their home in a foreclosure, but by the increased levels of risk that are clearly prevalent in the current mortgage market, are taken into account, it may be arguable that these risks and the impacts when the risks are actualized outweigh any social and economic value to be gained from having entered the homeowner sector, for dispossessed occupiers.¹²⁴

a time when "home" can play a critical role in maintaining their sense of personal identity and independence: see, e.g., Ann Dupuis & David C. Thorns, *Meanings of Home for Older Home Owners*, 11 HOUSING STUDIES 485 (1996); Ann Dupuis & David C. Thorns, *Home, Home Ownership and the Search for Ontological Security*, 46 THE SOCIOLOGICAL REVIEW 24 (1998). Race also appears to have implications on the availability and sustainability of owner occupation: see, e.g., JOHN W. FRASIER, FLORENCE M. MARGAI & EUGENE TETTLEY-FIO, *RACE AND PLACE: EQUITY ISSUES IN URBAN AMERICA* (2003); DALTON CONLEY, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA* (1999); WENDY WEBSTER, *IMAGINING HOME: GENDER, "RACE" AND NATIONAL IDENTITY 1945–64* (1998).

¹²¹ Kate Green, *Being Here – What a Woman Can Say About Land Law*, in *FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW* 93–4 (Anne Bottomley ed., 1996).

¹²² Iris Marion Young, *House and Home: Feminist Variations on a Theme*, in *RESISTANCE, FLIGHT, CREATION: FEMINIST ENACTMENTS OF FRENCH PHILOSOPHY* 68–70 (Dorothea Olkowski ed., 2000).

¹²³ A range of factors render low-income households more vulnerable to default. These include higher risk and lower, and less certain, returns on housing investment; links between housing and labor markets which increase the likelihood that local job losses will be coupled with house price declines; the likelihood that low income households "will have lower cash reserves to help them weather an interruption in income or unforeseen expenses"; and the increased risk that follows from better access to credit; McCarthy et al.,

Homeownership and Affordability

Although homeownership rates in the U.S. are currently at an all-time high, the issue of affordability is increasingly problematic across the sector, and especially for low-income households. This has important ramifications for the sustainability of homeownership for those already within the sector. In the last decade, some housing researchers have identified significant "gaps" in affordability, which undoubtedly impact on the sustainability of the owner-occupier sector. For example, Gyourko's research suggested that:

A significant shift in home ownership affordability has occurred since the mid-1970s for less well educated and lower income households. Falling real wages have combined with rising constant quality real home prices to make lower quality homes, which were affordable in 1974, unaffordable to many comparable households in the 1990s. This problem promises to worsen in the near term as real wages of low skilled workers continue to erode in an increasingly global economy and as ever higher quality homes continue to filter down the housing stock. Virtually no new housing is being produced that is of low enough quality to be affordable to low skill households who want to own.¹²⁵

Much of the government's attention has been focused on the consequences of affordability for *access* to homeownership: one study published by the Department of Housing and Urban Development (HUD) in 2005 indicated that while homeownership rates are currently at historically high levels for all sections of the U.S. population: "... dramatic gaps in homeownership rates have been stubbornly present over the last several decades, and even increased somewhat during the decade of the 1990s."¹²⁶ This study identified several factors accounting for the homeownership gap, including not only race and ethnicity, but also differences due to income, wealth, marital status, and age of household. Yet, while concerns about homeownership rates have triggered major policy initiatives to increase

¹²⁵ Joseph Gyourko, *The Changing Strength of Socioeconomic Factors Affecting Home Ownership in the United States: 1960–1990*, 45 SCOTTISH J. OF POLITICAL ECONOMY 466, 487 (1998).

¹²⁶ Christopher E. Herbert, Donald R. Haurin, Stuart S. Rosenthal & Mark Duda, *Homeownership Gaps Among Low-Income and Minority Borrowers and Neighbourhoods* (2005), available at <http://www.huduser.org/Publications/pdf/HomeownershipGapsAmongLow-IncomeAndMinority.pdf>. The Executive Summary to this report went on to state that: "[a]s of 2004, the white homeownership rate was 76 percent while African-American and Hispanic homeownership rates remained below 50 percent, and the Asian rate was 60 percent. At the same time households with very-low income

access to homeownership,¹²⁷ it is not only access to, but the *sustainability* of, homeownership that will have a significant impact on national homeownership rates over the medium and long term.¹²⁸

Although those who step onto the housing ladder are colloquially known as "homeowners," many are more accurately described as being in the *process* of buying their homes, subject to a mortgage: as "homebuyers" rather than "homeowners." For the vast majority of households, the purchase of a dwelling house is only possible with funding from loan capital, which is usually secured against a mortgage over the property. In a standard repayment mortgage, as the borrower makes repayments on the mortgage loan, their equity in the property increases until the mortgage is discharged and the "homebuyer" finally becomes an outright owner.¹²⁹ Yet, while the journey from initial purchase to outright ownership will usually require periodic payments over several years, in socio-cultural terms homebuyers obtain the badge of "owner occupier" as soon as the purchase is made. Yet the status associated with owner occupation, and the putative benefits of homeownership, are only as stable as the mortgagor's ability to make repayments on debts secured against the property. Successful homeownership—

127 President Clinton's policy for increasing home ownership rates was the *National Homeownership Strategy*. In a letter to Henry Cisneros (then-Secretary of HUD) dated November 3, 1994, President Clinton wrote that:

Homeownership is the American Dream. Our nation has embraced this dream since the National Housing Act of 1949 made "a decent home and a suitable living environment for every American family" a goal of national policy. The United States is the first major industrial country to make homeownership a reality for a majority of its people. Thanks to effective cooperation between industry and government, the doors of homeownership have been opened to millions of families in the past 45 years. However, since 1980, the national homeownership rate has been declining. Reversing this trend is vital to American families, to communities, and to our economy. Homeownership strengthens families and stabilizes communities. It encourages savings and investment and promotes economic and civic responsibility. Expansion of homeownership is an integral part of the Administration's economic plan. It spurs new investment, strengthening the economy and creating jobs. A stronger economy in turn enables more people to buy homes. For all these reasons, it is in our national interest to expand homeownership opportunities for all Americans.

Quoted from Marc A. Weiss, National Housing Policy in the U.S. for the 21st Century, PRAGUE INSTITUTE FOR GLOBAL URBAN DEVELOPMENT, available at http://www.globalurban.org/housing_us.htm. See Yongheng Deng & Stuart Gabriel, Risk-Based Pricing and the Enhancement of Mortgage Credit Availability among Underserved and Higher Credit-Risk Populations, 38 J. OF MONEY, CREDIT, AND BANKING 1431 (2006).

128 See, e.g., Donald R. Haurin & Stuart R. Rosenthal, *The Sustainability of Homeownership: Factors Affecting the Duration of Homeownership and Rental Spells* (2004), available at <http://www.huduser.org/publications/affhsg/homeown sustainability.html>.

129 The position in relation to interest-only or endowment mortgages is obviously different, since the borrower does not accumulate equity in the property itself throughout the mortgage term, but rather accumulates payments in a fund, which may expose the borrower to additional layers of market risk.

including the benefits associated with acquiring positive *home* meanings as an owner—is clearly dependent on the ability to discharge the debt. Similarly, the negative aspects of *home* are strongly associated with financial insecurity, default, and loss of one's home at the hands of a creditor.

The sustainability of homeownership for low-income households was explored in a recent study by Haurin and Rosenthal, which found that while homeownership was sustainable for "typical" low-income households, a number of factors rendered some households "atypical," and: "[a]mong the demographic variables, being (and remaining) married, greater education and cognitive ability, a smaller family size, and greater age of the respondent all reduce the likelihood of terminating a spell of ownership. Race, particularly being Black, substantially increases the probability of terminating a spell of homeownership."¹³⁰ This study also noted, unsurprisingly, that low-income households experienced a higher risk of losing their homes at the hands of a creditor.¹³¹ Haurin and Rosenthal also highlighted the significance of changes in family income as a factor in exposing households to unsustainability in relation to the repayment of debts, and, by extension, to unsustainable homeownership. Such changes can, for example, result from a change in the number of earners or the termination of marriage.¹³²

The idea that owning (or buying, subject to a mortgage) one's own home enhances feelings of security, including ontological security, has been reflected in the political ideology of homeownership, as policies promoting homeownership have suggested that owner-occupation—as opposed to renting—enables occupiers to develop a stronger sense of autonomy and control in relation to their homes.¹³³ Yet, the argument that homeownership provides a means by which to achieve greater ontological security must be tempered in light of growing evidence of unsustainable homeownership in the U.S.¹³⁴ When considering the landscape of affordable housing, it is crucial that we recognize the costs of homeownership for those occupiers who are exposed to the risk of losing their homes in foreclosure actions alongside the potential benefits to be reaped from homeownership, as well as

130 DONALD R. HAURIN & STUART S. ROSENTHAL, THE GROWTH OF EARNINGS OF LOW-INCOME HOUSEHOLDS AND THE SENSITIVITY OF THEIR HOMEOWNERSHIP CHOICES TO ECONOMIC AND SOCIO-DEMOGRAPHIC SHOCKS, Executive Summary at iv (2005).

131 The authors noted that: "[b]ecause we expect low-income respondents to have stretched their income when committing to a mortgage payment, this relationship of decreasing income and loss of ownership is not surprising"; *Id.* at 12.

132 "Of those low-income respondents terminating homeownership, twice as many ended a marriage as became married during the year of termination of homeownership"; *Id.* at 13.

133 See, e.g., Robert M. Rakokff, *Ideology in Everyday Life: The Meaning of the House*, 7 POLITICS AND SOCIETY 85 (1977); Smith, *supra* note 102; Saunders, *supra* note 102; Bulos & Chaker, *supra* note 102. See, however, arguments to the contrary in Marcuse, *supra* note 38; CRAIG GURNEY, THE MEANING OF HOME IN THE DECADE OF OWNER OCCUPATION: TOWARDS AN EXPERIENTIAL PERSPECTIVE (1990).

134 *Supra* notes 15–19 and associated text.

the argument that these risks appear to be differentiated along fault-lines including race, ethnicity, income levels, wealth, marital status, and age, thus rendering some households particularly vulnerable to the heightened risk of foreclosure.

Although the financial and other consequences of possession actions are serious and wide-reaching, impacting on not only the debtor and the creditor, but on co-occupiers (including co-occupying children), on neighboring homeowners (who may suffer a decline in the value of their own properties as well as loss of social capital in the neighborhood), on agencies tasked with re-housing the dispossessed occupiers, and on the labor market and healthcare services where the negative effects of foreclosure lead to mental or physical ill-health, legal policy has been forged on the basis of *promoting* but not *protecting* homeownership. The rhetoric employed in policymakers' descriptions of homeownership—specifically, the use of the words independent, control, shelter, security, steady saving, and capital asset—conjures up many of the positive images associated with the home as a financial investment, home as shelter, and home as a valued territory in which the occupiers enjoy security, autonomy, and control. However, the case for taking account of the costs of unsuccessful homeownership for individuals at a general policy level is brought into sharp relief by evidence that, in the contemporary climate of homeownership, when debtors default on repayments—rendering their ownership “unsustainable”—this is often attributable to extrinsic economic factors, rather than “individual failure.” As Hunter and Nixon wrote in relation to the last significant housing recession in the UK: “... the increasing propensity to arrears that arose during the late 1980s cannot simply be seen in the context of individual failures. Several structural factors are also involved, some relating directly to government policies that precipitated the individual circumstances.”¹³⁵ Similarly, in a climate of high mortgage delinquency and foreclosure rates, it is arguable that regarding default by debtors, particularly subprime debtors, as a personal failure by the debtor is overly simplistic. Rather, the risks borne by those who are most vulnerable to foreclosure must be re-evaluated in light of the broader socio-economic context for mortgage borrowers (including irresponsible and predatory lending practices), and macroeconomic policies more generally.

In a study carried out in England, Ford et al.¹³⁶ pointed to a range of factors, such as labor market restructuring, demographic changes, the expansion of the homeownership sector, and the erosion of traditional safety nets for mortgagors, which have increased the levels of risk systemically associated with homeownership. Furthermore, studies in the U.S. and in other jurisdictions experiencing patterns of unsustainability in homeownership have also suggested that, putting aside these macroeconomic factors, at the micro-level, default is usually triggered by random “biological disruptions,” for example, job loss, marital disruption, and

¹³⁵ Caroline Hunter & Judy Nixon, *The Discourse of Housing Debt: The Social Construction of Landlords, Lenders, Borrowers and Tenants*, 16 HOUSING, THEORY AND

health problems.¹³⁷ The consequences of these extrinsic and somewhat “random” events for homeowners who find themselves unable to keep up repayments in their mortgage include finding the home itself and all of the meanings associated with the home vulnerable to actions by the creditor, possibly through no “fault” of their own. From this position, (property) law’s instinctive assumption that debtors must bear the costs of their own default (failure) appears to favor a market framework which focuses on the opportunity to participate in home purchase transactions rather than the sustainability of the ongoing creditor/debtor relationship.

Conclusions

While the expansion of homeownership has been, and continues to be, premised on the grounds that it provides greater opportunities for occupiers to acquire positive home values, economic and non-economic—and to fulfill the “American Dream,”—it is important to remember that the positive meanings associated with *home* (and homeownership) are contingent on the (financial) ability to sustain that ownership by avoiding default on the repayment of debts secured against the property. Furthermore, mortgage default and the loss of a home through foreclosure are clearly matters of considerable personal stress and distress for the occupiers of the home. In addition to the financial costs of increased foreclosure rates, as well as the associated administrative or resource costs, empirical studies have indicated that a range of serious social, social psychological, and health costs are visited upon borrowers and other occupiers as a result of loss of their home, including the social costs of social exclusion, insecurity, and reduced standards of living; the social psychological costs include experiencing the stigma of debt as well as reported relationship difficulties, and that these factors, along with the experience of possession itself—which led to an increase in feelings of sadness, loss, and insecurity—have significant implications for mental health and well-being.¹³⁸

In the past, it has perhaps been arguable that the impact of foreclosures, although undoubtedly serious for the individual households involved, remained relatively uncommon, that any downside should be viewed against the backdrop of a broadly

¹³⁷ Donna Easterlow & Susan J. Smith, *Housing for Health: Can the Market Care?*, 36 ENVIRONMENT AND PLANNING A 999 (2004); see also John Quigley & Robert Van Order, *Spatio-Temporal Measurement of House Price Appreciation in Underserved Areas*, 11 J. OF HOUSING RESEARCH 1 (1995); Karl E. Case & Robert J. Shiller, *Mortgage Default Risk and Real Estate Prices: The Use of Index-Based Futures and Options in Real Estate*, 7 J. OF HOUSING RESEARCH 243 (1996); Dennis R. Capozza, Dick Kazarian & Thomas A. Thomson, *Mortgage Default in Local Markets*, 25 REAL ESTATE ECONOMICS 631 (1997); Peter J. Elmer & Steven A. Seeling, *The Rising Long-Term Trend of Single Family Mortgage Foreclosure Rates* (Federal Deposit Insurance Corporation, Working Paper Series 98-2, 1998); see McCarthy et al. *supra* note 85, at 29.

beneficial tenure, and that: "[i]f more people are to be given the opportunity to buy a home, then we have to accept an increased risk of default."¹³⁹ However, while on the one hand foreclosure rates, particularly for subprime borrowers, have been increasing exponentially, it is also increasingly difficult to avoid the conclusion that these foreclosures are not always attributable to individual failures on the part of the borrower, but part of a broader national crisis in mortgage lending and affordability for homeowners. It is becoming more difficult to dismiss the evidence relating to detrimental effects of default and foreclosure for both the individual debtor and across the sector, and that:

[t]he financial benefits of [homeownership] are a double edged sword. As more and more "marginal borrowers" have taken on mortgages to pass property on to their children, or as financial investments, the negative effects of home ownership have become apparent. One thing is certain. Households facing mortgage arrears, or essential repairs they cannot afford, seem unlikely to derive the feelings of niche and belonging from home described by Saunders.¹⁴⁰

Indeed, Gurney has suggested that a general rise in foreclosure rates across the sector can undermine positive *home* meanings for indebted homeowners, since: "[e]ven if a home of one's own does foster feelings of ontological security, the continual worry and struggle to avoid being 'behind with the mortgage' seems likely to deaden the effect of such a psychological boost."¹⁴¹ Similarly, Harris and Pratt have claimed that: "... for many Canadians the home as a place of security and personal control is intermingled with stress, related to lack of affordability and insecurity of tenure."¹⁴²

139 Peter Saunders & Colin Harris, *Home Ownership and Capital Gains* 18 (Urban and Regional Studies, Working Paper No. 64, 1988).

140 Gurney, *supra* note 133, at 8.

141 *Id.* at 10. Gurney claimed that:

For many people who took out mortgages in the late 1980s the feelings of niche and belonging described by Saunders were far from their experience of home ownership. Instead, paying off a housing loan in a period when interest rates were constantly rising created profound personal anxieties, and uncertainty. The fact that people's homes are at risk if repayments on a mortgage or any other loans secured on it cannot be met has meant that fear and uncertainty of getting behind with the mortgage may have been one of the strongest emotions linked to home ownership ... [suggested] links between marriage break-up, attempted suicide, child sexual abuse and the fears and uncertainty associated with mortgage arrears. Rapid increases in repossessions as a result of mortgage arrears ... have meant that the threat of becoming homeless is one which more and more mortgagees now fear.

Id. at 8.

142 Richard Harris & Geraldine Pratt, *The Meaning of Home, Homeownership and Public Policy*, in *THE CHANGING SOCIAL GEOGRAPHY OF CANADIAN CITIES* 297 (L.S. Bourne

The recent mortgage lending crisis provides a timely opportunity to re-consider the ideology of homeownership in the U.S., taking account of the affective value of *home* for occupiers and the struggle for affordability, particularly for low-income homebuyers. While activities associated with homeownership—such as personal investment in home and neighborhood—have been linked with improving social, psychological, emotional, and financial health,¹⁴³ and the social status and personal freedoms associated with homeownership have been linked to higher levels of self-esteem and perceived control over life,¹⁴⁴ it is important to recognize that the socio-psychological benefits of homeownership are also countered by the negative effects of default and possession actions. Thus, it has been suggested that:

... homeowners, particularly lower-income homeowners, do not have as much actual control as some have claimed. Financial instability puts lower-income households at risk of losing their homes due to mortgage foreclosure. The psychological impact of homeownership could be negative if a person is unable to pay their mortgage and is forced from his or her home.¹⁴⁵

The proposition that home meanings are threatened when a borrower falls into default is uncontroversial, and such events are also significant for, amongst other things, physical and psychological health. These are important factors to bear in mind when considering a range of issues relating to the meaning of the *owned home* within the legal concept of home, not least, the vigor with which the government promotes homeownership, welfare support for homeowners, and the degree of *legal protection* afforded to borrowers who fall into arrears and default.

This chapter therefore concludes by proposing a two-strand approach to help address some of the underlying issues and problems associated with homeownership, debt, and default. The first strand of these conclusions focuses on law's response to the debtor's default. In striking a balance between the creditor's claim to the capital asset tied up in the home and the occupier's interest in staying in possession of their home, the foreclosure procedure clearly prioritizes the enforcement of the creditor's proprietary security over and above any claim that the occupier might have in the use and occupation of the property *as a home*. The foreclosure procedure applies a strict property law approach to reach the conclusion that the creditor's superior claim must prevail. Any other outcome might arguably be rejected as an unjustifiable intervention with the market, which allows borrowers the freedom to enter into contracts, trade on their property rights, and live with the consequences in the event of default. Against this argument, however, it might alternatively be suggested that the phenomenon of widespread low-income homeownership—and with that, unsustainable homeownership—resulted from government interventions

& D.F. Ley eds., 1993).

143 Rohe, Van Zandt & McCarthy, *supra* note 86, at 2.

144 *Id.*

145 *Id.* at 6.

in the market through credit market participation and regulation, tax subsidies, and other incentives that set out to encourage citizens to choose homeownership over renting. If the current crisis is a result of market intervention to promote homeownership, is it still reasonable to argue that, having been exposed to risk as a result of government intervention, policymakers, including those of us who engage with legal policy, can retreat into a policy of non-intervention with respect to protecting homeowners? Furthermore, in cases where creditors have failed to act as effective gate-keepers, advanced capital to low-income borrowers in the knowledge that the debtor cannot afford to repay the loan, or adopted other abusive lending practices, should the law enforce the creditor's strict proprietary claim?

Of course, in some states the austerity of foreclosure is tempered, to varying degrees, by the possibility that the defaulting debtor can file for bankruptcy and so claim the protections of the homestead provisions. The homestead provisions provide a useful context for re-thinking law's response to the balance struck between the interests of the creditors and defaulting homebuyers. If one were to accept the argument that the meaning of the home to the occupier and the experiences of that occupier in the event of (what is increasingly likely to be viewed as systemic rather than individual failures leading to) default, and creditor possession actions should be weighed in the balance against the commercial claims of creditors to the capital value of the property, provisions in the nature of the homestead laws could potentially supply the mechanism for realizing this policy. This process could draw upon existing research into the structural factors (for example, ethnicity, low income) that expose households to risk,¹⁴⁶ or, alternatively, could focus on evidence relating to the differential impact of loss of home on certain groups, for example, children.¹⁴⁷ This approach might follow similar precepts to special protections in some states for elderly and/or disabled occupiers.¹⁴⁸ In addition to this, the very nature of the homestead exemption model, which usually involves exemptions for the home up to a maximum value, is equipped to distinguish between cases on the basis of property value if, for example, it were considered appropriate to focus protections on low-income households, or occupiers living in lower-value properties, rather than higher-income earners living in high-value properties.

The second strand concerns the (largely) uncritical prioritization of homeownership as the aspiration tenure for all citizens, and the *sine qua non* of the American Dream. Vincent's historical account describes the first documented use of the phrase "American Dream" in 1931 as a call to citizens to embrace the American

146 See *supra* notes 108–113 and associated text. For more detailed discussion of the income as a structural factor in debtor default, see Lorna Fox, *Re-Possessing "Home": A Re-Analysis of Gender, Home Ownership and Debtor Default for Feminist Legal Theory*, 14 WM. & MARY J. WOMEN & L. 423 (2008).

147 See Fox, *supra* note 21, particularly Chapter Nine.

148 See, e.g., in Massachusetts, MASS. GEN. LAWS ch. 188, § 1 and § 1A (for persons

Dream as a means of "... get[ting] out of the current crisis and overcom[ing] the relapse of America into poverty and social disgrace."¹⁴⁹ Similarly, in describing the origins of U.S. government intervention in housing policy, including measures to promote homeownership, Carliner has suggested that:

... in most cases ... the principal reason they were adopted was not to facilitate or encourage homeownership [but] to stimulate construction activity and the overall economy ... to improve the physical quality of the housing stock, to bail out existing homeowners or financial institutions, or to meet other objectives, such as to reward veterans for serving the country in war-time.¹⁵⁰

Nevertheless, the (unsurprisingly popular) political rhetoric of the "American Dream" continues to dominate housing policy initiatives, and it is interesting to note that recent events in the U.S. housing and mortgage market led to the establishment of the "Commission to Preserve the American Dream" through the Foreclosure Prevention and Homeownership Protection Act of 2007.¹⁵¹

There can be little doubt that homeownership has enabled many Americans to accumulate wealth (and other benefits) in ways that would not otherwise have been available to them. Yet, the expansion of homeownership appears to have gone beyond the "Dream," so that: "Homeownership policy ... has not been about imagining the unattainable but about creating the expectation of owning one's own home. Ideologically, homeownership has been portrayed as a political right seemingly more popular than voting."¹⁵² There is a real danger that the relentless promotion of homeownership functions both to deflect attention and energies from the pursuit of alternative policies for affordable housing,¹⁵³ and to encourage borrowers to take on debts that they will never be able to repay. A sustainable policy for the expansion of homeownership must be predicated not merely on access to homeownership but on the *affordability* of the debts undertaken in order to pursue this aspect of the "American Dream." Unsustainable homeownership generates significant losses, for both the dispossessed occupier(s) and for other stakeholders, and these costs must be properly taken into account in the formation of housing policies that enable citizens—both practically and socio-culturally—to exercise real and informed tenure choices.

149 Vincent, *supra* note 82, at 87.

150 Michael S. Carliner, *Development of Federal Homeownership "Policy"*, 9(2) HOUSING POLICY DEBATE 299, 299 (1998).

151 See discussion *supra* in "Introduction."

152 See, e.g., Fox, *supra* note 21, at 10.