Chapter 8
Homeownership, Debt, and Default:
The Affective Value of Home and the
Challenge of Affordability
Lorna Fox O’Mahony

Introduction

The promotion of homeownership as a national housing strategy has been a central element of American housing policy since the National Housing Act of 1949. Indeed, in recent decades, successive administrations have emphasized the role of the expanding homeownership sector, particularly for low-income and minority households, in realizing the “American Dream.” Yet, as the recent mortgage lending crisis 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 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 while 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 occupants 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 numerous positions of those caught up in the current subprime mortgage lending crisis have received much attention in the media—with considerable concern 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 occupants lose their homes through foreclosure proceedings or through bankruptcy, and which affect not only dispossessed occupants (and their families) but also significantly impact other stakeholders across society.

Homeownership and the American Dream

It is difficult to overstimate 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 of the unfolding of our daily lives. In the United States, homeownership is a legal concept, and the U.S. has described an "ideology of home, where the protection of home and all it stands for is an American virtue." 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, if necessary, are 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.

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." Many Americans are willing to take a second job, to give up time with their young children, placing them in child care, to take jobs further away from their homes, and to spend a large portion of their income (more than half of their monthly disposable income on mortgage repayments alone.) Furthermore, as Fennell has recently noted: "Current legal arrangements make homeowners high-stakes gamblers. Homeowners routinely take on crushing debt loads to put huge sums of money into risky, undervalued ventures that are utterly out of their personal control - local housing markets." 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."

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 totem of 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." Indeed, the goal of a private, often suburban, single-family detached house has become a core concept 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 norm, 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 many 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 for every man, with opportunity for each according to his ability or achievement." 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, and included

6. Id.
7. Williams, supra note 1 at 327.
freedom, independence, security, self-determination, and hard work. Indeed, it is not difficult to see that for "successful" homeowners—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 homeowners 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."

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 predatory strategies of debt packages to borrowers who will never be able to repay the loan, predatory lending, and the growth of subprime lending, particularly to vulnerable households. The 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. 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 disproportionately high percentage of house-cost loans. In a sample of loans made in 2005, it emerged that women received 37.3 percent of high-cost conventional loans and just 28 percent of the market-rate conventional loans; men, in contrast, received a higher percentage of market-rate loans (66.8%) than high-cost loans (60.2%). 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-cost loans than white borrowers, even after controlling for legitimate differences in risk factors. Subprime loans have already led to one million American families losing their homes in the last decade; statistics on foreclosures in New York alone showed an increase of 50 percent in the last year, 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. Three million homeowners with subprime loans


14 Supra note 12.
16 In the U.K., the Chancellor of the Exchequer recently intervened in an effort to restore consumer confidence in Britain's banking institutions when the shock-waves across the credit economy that 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. 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.

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, defaults, and foreclosures, alongside evidence relating to the issues that result from creditor actions against the owners of the 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 as a whole—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 homeowners 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 to focus on the occupiers of the home as the parties affected by the loss of home in foreclosure, rather than viewing consideration to the creditor—debtor relationship. 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,

acknowledging Northern Rock. An occupant cannot to withdraw their money outside bonds 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/7000535.stm.


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 occupants (for example, children) and other family and household members) to neighborhoods, as well as broader social and economic impacts. 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 (now) long-accepted, classical law and economics discourse that often tends to downplay other considerations (for example, social and psychological, experiential meanings of home, or behavioral or socio-cultural economic considerations) in the context. The fourth part then considers the ways in which the meanings of home have been influenced by the political ideology and promotion of homeownership as an aspirational tenure and, particularly, policies promoting the expansion of homeownership to lower-income and minority households. The fifth part considers the tensions that these policies create, between the promotion of homeownership, as a component 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-stage approach—around the protection of homeowners, 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. As Brewis points out that “there’s no place like home,” that “home is where the heart is,” and


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 sociocultural disciplines has eviscerated a considerable amount of research, in the form of both empirical studies and theoretical analyses, to explore experiences of home and to analyze the meanings and values that home represents to its occupants. 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 owner-occupied 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 fulfillment 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. While much of the scholarship concerning home has focused on the intangible attachments identified as the “2 factors” meanings [if home = hosting + 2], occupants also place considerable value on the tangible aspects of home that is, the house itself. Home provides physical shelter for its occupants; “... [homes 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 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 set of legal and property rules defining the area over which a person has particular control.”30 Territorial control, 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 exerciser of territorial behavior is characterized generally as: “... the relationship between an individual or group and a particular physical setting that is characterized by a feeling of possessiveness, and by attempts to control the appearance and use of space.”32 The idea that occupants would exercise 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 core 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 “[t]he stable circumstances a deep embeddedness can be beneficial by providing a stable sense of well being in connection with environment.”35

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

25 The expression “An Englishman’s home is his castle” is a misquotation from the decision in Somers v Case (1864) 5 CS Rep 91 at 91b, 77 ER 194 at 195, where Coke CJ commented that “... the house of everyone is to him his castle and fortress.”


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

28 Altman & Werner, supra note 2, at Preface, ix.

29 This feature is heavily emphasized by Sebba & Chamberlain, who argue that “... the uniqueness of the home lies in its psychological and social meaning and in the opportunity it affords the occupant to exercise control over the space and the behaviour within it.” Rachel Sebba & Azra Chamberlain, The Unspoken of Home, 3 Architecture and Behavior 7, 21 (1966).

30 Sidney N. Brown, Territory in Urban Settings, in Environment and Culture 179–
301 (James Altman, Arms Rapoport & Isaac E. Wolfswill, eds., 1980).

31 Id. at 180.

32 Ibid.

33 Id. at 184-4.


35 Brown & Perkins, supra note 34, at 282.
the impact of disruptions to home, since: "[p]ersonally homes provide a secure and private place where one’s identity is protected." 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." 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 sociopolitical 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" meaning depends entirely on the legal framework that governs "home-type" interests in any particular jurisdiction. As such, Marceau 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 government chose to do so, as a matter of policy, factored into the law that governs rental property.

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 were 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 research 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.

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

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 define 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 stress, one’s claims to ineffective types of occupancy. The last two strategies may well result in the abandonment of territorial claims.

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." 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. In addition, the presence of child occupants exalts the psychological barriers to giving up the home. Thus, Warren has argued that:

To see economic reversals for myself may be very much easier than imposing those reversals on someone else, especially a much-loved child, to give up an
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. This feature of home ownership also resonates strongly with the social and cultural significance of home, particularly the owned home—and the impact of losing one’s home through foreclosures. In essence, 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. 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 context, the possibility of focusing on a protection for the possession of occupiers is strongly evoked in the property law tradition. For example, Rome argued that “[w]hen generally fix their affections more on what they are possessors of than on what they never enjoyed . . . it would be greatly cruelty to dispossess a man of anything that is not to give it to him.” 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 to 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 projecting 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 with the interests of others?”

49 See, e.g., CONSTANCE PERL, 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 “perfect citizenship,” which qualifies them for full “American social personae.”
50 See supra note 48.
51 See supra note 48.
52 See infra, “The Meaning and Expectations of ‘Owning’ One’s Home,” infra, discussing the letter associated with the experience of foreclosure.
with ownership. 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 seizin has been described as a reflection of a fundamental impulse to acknowledge: "... the organic element in the relationship between man and land..." 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. 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 seizin 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."

Tay claimed that: "[t]he role of the underlying seizin-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..." In fact, it was this recognition of the use value of land that was identified as: "... the base and support of the social sentiment that shrinks with distrust from the forcible eviction." 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." In fact, the idea that possession ought to be protected often seems to have been derived from 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 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," 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 opinions, 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.

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. 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." 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." 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.

55 Thus Gray & Symes wrote that: "[i]n its technical sense seizin 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.
57 Id.
58 Id.
59 Pollock & Maitland, supra note 53, at 42-3.
60 Tay, supra note 56, at 11.
61 Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 477 (1897).
64 Kahneman et al., supra note 63, 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 thrust of interest in this area 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 discourse 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.65 However, considering the transaction from the perspective of the risk borne by the borrower, it is important to recognize that:

The 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 breaching other promises, the lender has the option to do more than bring an action for breach of promise or act upon the unpaid installment or the accelerated debt. The lender also has the option to foreclose.66

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 Inland, supra note 26; Mora, supra note 1. In the United Kingdom, see Fox (2006), supra note 21; Fox (2005), supra note 24; and Fox (2002), supra note 26. In Japan, see Margalian, supra note 26.


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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 clergies 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 her home. Indeed, this pre-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 homeowners, thus underwriting the policy goal of expanding homeownership. Yet, while the idea that creditors must prevail is 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, 171 HOUSING POLICY DATES 57 (2006), in which the authors lay the impact of foreclosures on neighboring property values.
Llewellyn cautioned in 1931: "Remove the legal sanction and men will give credit with more care." Yet, Llewellyn also acknowledged that this argument was rooted in assumption rather than fact, and that: "Expectation 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 overestimate heavily the effects of law..."

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," 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. The consequences, for the borrower, may take various forms including higher interest rates and higher qualification requirements for loans, increased collateral requirements of loan applications, and higher interest rates and higher rates of default. Although Posner acknowledges that the outcome of his analysis is ambiguous, 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 pre-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 determinants factors for the development and optimal performance of the credit market than high legal protections for creditors.

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 debts, 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. 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 gatekeepers. While high creditor protections may encourage creditors to lend money, particularly to low-income households, this may also result in creditors assuming unrestricted risks, which in turn are linked to higher rates of bankruptcy. Yet, while lower creditor protections encourage entrepreneurship they may also lead to higher interest rates and higher rates of default. Although Posner acknowledges that the outcome of his analysis is ambiguous, 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 pre-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 determinants factors for the development and optimal performance of the credit market than high legal protections for creditors.

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 ANALYSTS OF LAW 440-41 (1992).
77 Similarly, Padilla and Requio’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 on credit market efficiency, see note 73.

70 Id. at 725, footnote 47.
72 Id.
74 Id. at 6. See also Michael Manove & A. Jorge Padilla, Bankruptcy (Conservatively) with Optimism, 30 RAND JOURNAL OF ECONOMICS 254 (1999); Michael Manove, A. Jorge Padilla & Marco Pagano, Collateral versus Project Screening: A Model of Lazy Bank, 32 RAND JOURNAL OF ECONOMICS 4, 726–44 (2001).
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 tenets of homeownership in the U.S. have suggested, inter alia, that the long-term indebtedness associated with the mortgage contract (which usually turns the homeowner into a permanent debtor) reflects the real estate and credit industry perspective that indebtedness functions as a social good. 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 living standards." 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")* 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 virtue of individuals, and that there was something left to dream about in America ... at a time when it appeared to many Americans, if not all, that the American dream had been replaced by a nightmare ...

Shlay has noted that homeownership, particularly low-income homeownership, is rooted in a "deterministic tradition" which premises "a wide range of social, behavioural, political, economic, and neighborhood changes." Yet, amidst rising concerns that homeownership as a "fix it all" tenure has been oversold, a large body of literature has considered its impact on a range of variables, including child outcomes, economic well-being, and social stability.

Analysis of empirical studies indicates that homeownership bears costs as well as benefits; 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 foreclosed. 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," 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." Furthermore, the authors also noted that: "[m]ortgage default is costly for families and numerous other stakeholders," and that low-income households are more exposed to these costs than other homeowners. 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; the likelihood that low-income households "will have lower cash reserves to help them weather an interruption in income or unforeseen expenses." McCarthy et al. concluded that: "... affordable lending efforts might be exposing these households to higher default risk."

Yet, in the event of default, and assuming 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

87 Shlay notes that: "[r]esearch has not provide uniform support for [homeownership] as a tool for asset accumulation, neighborhood development, or social and political goals." supra note 10, at 511.
88 McCarthy, Van Zandt & Reha, 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.
avoid foreclosure or bankruptcy. Between these claims, it is reasonable to assume that in states where total exemption is available, the importance of the home to occupants is prioritized over and above the need to ensure that creditors can recover 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 occupants 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 occupants 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 Contextualizing Home—home as financial asset, home as physical structure, home as territory, home as identity, and home as socio-cultural unit,98 home discourse has generally presumed that home is a source of positive meanings, attachments, and experiences for occupants. 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-occupancy experiences 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

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94 Malloy and Smith have noted that: “In both cases [largest foreclosure and judicial foreclosures], the mortgagor loses her equity of redemption if she does not pay by the political deadline”. In: 65, 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.
97 See, e.g., Heidegger’s philosophy of dwelling: Martin Heidegger, INNERN WERDEN DER MENSCH (BUILDING DWELLING THINKING) (Arthur Hofstadter trans., 1951), and the 1911 lecture, Martin Heidegger, _Die Begründung der Daseinsauffassung_ ("... Poetically man dwells ..."), POETRY, LANGUAGE, THOUGHT (Albert Hofstadter trans., 1951); Martin Heidegger, NEIN UND ZWEI (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: “[Before he is ‘cast into the world’... man is laid in the cradle of his house... Life begins well, a being enclosed, protected, all warm in the bosom of the home”]. Gaston Bachelard, THE PSYCHE OF SENSES (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. MALM, PLACE AND EXPERIENCE: A PHILOSOPHICAL TOPOGRAPHY (1995); on the territoriality of home, see EDWARD S. CABLE, GETTING BACK INTO PLACE — TOWARD A REMEMBERED UNDERSTANDING OF THE PLACE-WORLD (1995).
affordable Housing and Public-Private Partnership

households—have been extensively analyzed in recent years. 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” is enhanced by the additional cultural value attached to homes by owner-occupiers. 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 one-occupier security. The status conferred by homeownership has been linked to an occupier’s self-identity. Even when considering the meaning of the home as a physical structure, which may ostensibly appear to be neutral social tenure, it has been suggested that the value that the occupier puts upon the physical structure of the house is enhanced by ownership.


100 Allison & Warner, supra note 2, at 28.


103 “Understanding one’s own commitment to the work ethic: The owning home, the largest single expenditure most people ever make, requires many years of earning and saving, and represents a long-term commitment to one’s work ethic,” Fitchett, supra note 50, at 32.


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 homeowners.

The increase in risk and the potential costs associated with homeownership are brought into particularly stark relief by the rise in unenforceable homeownership, particularly amongst low-income households. 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—predominantly minorities, women, and low- and middle-income borrowers—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, family, wealth creation, privacy, identity, and so on) because of lower income levels, for children, for the elderly, for those who are physically or mentally

105 See, e.g., Rohr 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.


disabled, or for minorities. 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. 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 occupier's self-identity and social-identity. One consequence to emerge from this study was the impact of the change in their social status for displaced occupants, and the experience of having their homes repossessed, also raised issues of stigma and shame for occupants. Thus: 

"... a number of people said they had been caught short by the awful realisation that they were now 'homeless'. Many respondents also emphasized the significance of the shift from 'owner' to 'renter' for their social identity. The researchers reported that:

as a number of people said that they felt they were now regarded as 'second-class citizens' who were 'declassed' on the state. A few respondents even said that they felt that debt would now be classified as part of the 'undesirables'.

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,

The experience had far-reaching consequences for some people's self-confidence and self-esteem. 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." For some occupants:

... 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 definitive ideas about the 'shameful' and 'deceivering' ones. One couple reported how they still felt shame and embarrassment some four and a half years after the actual possession.

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 both study's claim that: 

"(the) 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.

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 'loss' 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 more salient are also more vulnerable to the risk of losing their homes through default and foreclosure.


118 The positive relationship between home, gender, and race was explored by Bell Hooks, YENNAKING FACE, GENRES, AND CULTURAL POLICY (1990).


114 Jocely Ford, Roger Brookes & Sarah Heath, Home Ownership is a Risk

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 & Dave Simpson, Issues in Post-Divorce Homelessness (1991) while the high proportion of low-income households in the owner-occupied sector emphasizes the weight of the potential for default. One study suggested that for low-income homeowners, the social and economic value of homeownership was mitigated by the fact that ownership increases financial and psychological stress among families living in the economic margins. Lennart Billie & Janet Smith, Transforming Low-Income Housing Programs for Low-Income Families: Towards Empowerment and Engagement, 18 J. of URBAN AFFAIRS 173 (1996).

The experience of children in the context of repossession actions are considered in Strudt, Neill, Losing a Home through Mortgage Repossession: The View of Children, 14 Homelessness 89 (2001). Falvey's novel may have been particularly vulnerable.
The relative analytical neglect of home interests in legal discourse (until fairly recently), as well as the fact that—unlike there is a total homestead exemption—the commercial claims of creditors will prevail in foreclosure actions, conform to a classic market economy model of real property law as a discipline that favours: "... self-interested and rational individuals in the market place, over[ing] the needs of those who are different: weaker or poorer, or in a different way defined as Other."

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.

This is substantiated by evidence that the homeowner sector has expanded to include low-income households, these occupants have been disproportionately exposed to the risk of losing their homes through default and foreclosure. Indeed, if the financial and psychological stresses experienced by low-income homeowner-buyers, not only by the real actuality of losing their home in a foreclosure, but by the increased levels of risk that are clearly present 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 occupants.

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 once affordable, by 1974, unaffordable to many comparable homeowners 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-skilled households who can afford it.

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."

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...
access to homeownership, 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.

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 the 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 “homeowner” finally becomes an outright owner. Yet, while the journey from initial purchase to outright ownership will usually require periodic payments over several years, in socio-cultural terms homeowners obtain “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 mortgagee’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 7, 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" a goal of national policy. The 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 communities 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, strengthens the economy and creates 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."


129 The previous 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—clearly depends 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 “stigmatic,” and: “among 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 homeownership. Race, particularly being Black, substantially increases the probability of terminating a spell of homeownership.” This study also noted, unsurprisingly, that low-income households experienced a higher risk of losing their homes at the hands of a creditor. 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.

The idea that owning (or buying, subject to a mortgage) one’s own home enhances feelings of security, including psychological security, has been reflected in the political ideology of homeownership, as policies promoting homeownership have suggested that owner-occupation—as opposed to renting—makes occupiers to develop a stronger sense of autonomy and control in relation to their homes. Yet, the argument that homeownership provides a means by which to achieve a greater ontological security must be tempered in light of growing evidence of unsustainable homeownership in the U.S. 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


131 The authors noted that: “[W]hereas low-income respondents have stretched their income when committing to a mortgage payment, its relationship to decreasing income and loss of ownership is not surprising,” id. at 32.

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. Raskin, Ideology in Everyday Life: The Meaning of the House, 7 POLITICS AND SOCIETY 85 (1977); Smith, supra note 102; Shrimer, supra note 102; Buls & Chaker, supra note 102. See, however, arguments to the contrary in Marcuse, supra note 38; Craig Glenna, The PRIVILEGE OF HOME IN THE ENGAGE OF OWNER OCCUPIATION: TOWARDS AN EXPERIMENTAL 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 reducing 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-occupants (including co-occupants 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 occupants, 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 tilted on the basis of promoting but not protecting homeownership. The rhetoric employed by policymakers’ descriptions of homeownership — specifically, the use of the words independent, control, shelter, security, steady earning, 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 occupants 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 systemic 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 default 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.”

Similarly, in a climate of high mortgage delinquency and foreclosure rates, it is arguable that a large default by debtors will be considered both reasonable and predictors of future failure. 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.16 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 systematically 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, defaults is usually triggered by random “biological disruptions,” for example, job loss, marital disruption, and


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:

"[The financial benefits of homeownership are a double edged sword. As more and more "marginal" borrowers have taken on mortgages to own property, or to their children, or as financial investments, the negative effects of home ownership have become apparent. One thing in veritas. Household facing mortgage arrears, or essential errors 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 meaningless with stress, related to lack of affordability and insecurity of tenure."142

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. Indeed, 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 houses are at risk if they fail to make a mortgage or any other loans secured on it cannot but have meant that fear and uncertainty of getting behind with the mortgage may have been one of the most potent forces linked to home ownership. ... [suggested] links between marriage breakup, attempted suicide, child sexual abuse and the fears and uncertainty associated with mortgage arrears. Racial 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 (J.A. Bouma

The recent mortgage lending crisis provides a timely opportunity to reconsider 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 homeowners. While activities associated with homeownership—such as personal investment in home and neighborhood—have been linked with improving social, psychological, emotional, and financial health,138 and the social states and personal freedoms associated with homeownership have been linked to higher levels of self-esteem and perceived control over life,139 it is important to recognize that the socio-psychological benefits of homeownership are also counteracted by the negative effects of default and possession. Thus, it was 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-stage 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 interference" 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

143 ibid.
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 gatekeepers, 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. The homestead provisions provide a useful context for re-examining law’s response to the balance struck between the interests of the creditors and defaulting homeowners. If one were to accept the argument that the meaning of the homestead is in the occupant and the experiences of that occupant in the event of (what is increasingly likely to be viewed as systemic rather than individual failures leading to) default, and creditor position actions should be weighted in the balance against the commercial interests 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 (e.g., ethnicity, low income) that expose households to risk, or, alternatively, could focus on evidence relating to the differential impact of loss of home on certain groups, for example, children. This approach might follow similar precepts to special protections in some states for elderly and/or disabled occupants. 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) uncontrolled prioritization of homeownership as the aspiration tenure for all citizens, and the one quo non of the American Dream. Vincent’s historical account describes the first documented use of the phrase “American Dream” in 1933 as a call to citizens to embrace the American

Dream as a means of “. . . get[ting] out of the current crisis and overcoming the relapse of America into poverty and social disgrace.” Similarly, in describing the origins of U.S. government intervention in housing policy, including measures to promote homeownership, Carlino 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 . . . promote veterans for serving the country in war-time. 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.

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.”

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, 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 occupant(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.

146 See supra notes 108–113 and associated text. For more detailed discussion of the income as a structural factor in debate, see Lorna Fox, Re-Persuading “Home”: A Re-Analysis of Gender, Home Ownership and Deutor Default for Feminist Legal Theory, 14 WM. & MARY L. 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

149 Vincent, supra note 22, at 87.


151 See discussion supra in “Introduction.”