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## The Value(s) of Foreclosure Law Reform

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# The Value(s) of Foreclosure Law Reform

Melissa B. Jacoby\*

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## I. INTRODUCTION

If you want a difficult research task, try to find staunch defenders of existing residential mortgage foreclosure law in the legal scholarship of recent decades. There aren't many.<sup>1</sup> For years, the literature featured

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1. A possible exception is Alex M. Johnson, Jr., *Critiquing the Foreclosure Process: An Economic Approach Based on the Paradigmatic Norms of Bankruptcy*, 79 VA. L. REV. 959, 962 (1993), who argued that the system is not necessarily flawed merely because it produced below-market auction prices. However, Johnson's article did not suggest that the process is problem-free, and offered suggestions for reform. See generally *id.* In the early 1990s, Michael Schill defended the system against charges of inefficiency, but nonetheless observed other problems with sale prices. Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489, 538 (1991) (“[O]ther government interventions, such as mortgagor protection laws, may promote economic efficiency in ways that are not immediately apparent, nor easily provable.”).

complaints about the delay and expense inherent in state foreclosure laws and their impact on mortgage markets.<sup>2</sup> It also included concerns that foreclosure sales often fail to produce fair market value, leading borrowers to forfeit equity and to face deficiency judgments.<sup>3</sup>

As correctives, real estate scholars traditionally proposed doctrinal and procedural changes to alter the details of the foreclosure process: their suggestions would have made the process longer or shorter, harder or easier, more judicial or less, federally preempted or uniform.<sup>4</sup> The goals reflected in these proposals were often sensible and laudable. But, as Prentiss Cox has recently observed, these goals and proposals tread on fairly limited ground.<sup>5</sup>

The recent spike in foreclosure filings spawned many proposals premised on very different goals from the traditional law review scholarship. Saving homes became expressly more important and drove various efforts to incentivize private loan modification. However, other proposals sought to save homes without necessarily saving homeownership. For example, the economist Dean Baker proposed a “right to rent.”<sup>6</sup> Under this plan, some homeowners would retain a possessory right to their homes as renters after completion of foreclosure.<sup>7</sup> Other authors have offered similar rent or lease-back ideas.<sup>8</sup>

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2. See, e.g., William C. Prather, *A Realistic Approach to Foreclosure*, 14 BUS. LAW. 132, 132 (1958) (citing non-uniform “chaotic” foreclosure laws as the “largest single deterrent to the free flow of mortgage money”); Committee on Mortgage Law and Practice, *Cost and Time Factors in Foreclosure of Mortgages*, 3 REAL PROP. PROB. & TR. J. 413, 413 (1968) (noting a “great deal of criticism” of foreclosure laws and their impact on mortgage credit).

3. For a discussion of the concern expressed in legal literature regarding delinquent borrowers, see *infra* notes 27–38 and accompanying text.

4. See *infra* Part II.

5. Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 HOUS. L. REV. 683, 720 (2008) (“The focus of much of legal scholarship on the adequacy of foreclosure sale procedures has led to a formalistic debate of limited relevance in practice.”).

6. Dean Baker, *Subprime Borrowers Deserve an Own to Rent Transition*, ECONOMISTS’ VOICE, Feb. 2008, at 2–3, <http://www.bepress.com/ev/vol5/iss1/art5>.

7. *Id.* This article does not address the constitutionality of this kind of proposal. For some discussion elsewhere, see Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 979 n.13 (2000) (noting that under the Contracts Clause, courts upheld “[d]epression-era mortgage foreclosure moratoria by reading the sovereign’s emergency powers into contracts as a postulate of the legal order” (citing *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 435 (1934) (quotation omitted))); Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 90 n.151 (1998) (noting that “the Court upheld the Minnesota Mortgage Moratorium Act as a reasonable exercise of state powers during an emergency and rejected the argument that the act impaired the obligation of a private contract within the meaning of the Contract Clause.” (citing *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934))).

8. Daniel Alpert, Op-Ed, *Why Own when You Can Lease?*, N.Y. TIMES, Aug. 1, 2009, at A17 (proposing that lenders accept deeds in lieu of foreclosure and lease properties to former owners who would have the option to repurchase the home in five years at fair market value).

One need not favor a right to rent to recognize how it refocuses the values of foreclosure law reform. Far more so than the traditional foreclosure reform law review literature, the right to rent addresses discrete housing policy concerns like shelter, involuntary dislocation on residents with special needs such as school-age children, and externalities beyond preservation of a robust mortgage market.<sup>9</sup>

Furthermore, a proposal premised on conversion to leasehold rights separates the concept of saving homes from saving homeownership.<sup>10</sup> The proposal thus usefully challenges the assumption that ownership is essential or optimal to achieving certain housing objectives.

Part II of this Article identifies the themes of the traditional foreclosure law review scholarship.<sup>11</sup> Part III discusses the right to rent proposal in the context of the three examples of values noted above.<sup>12</sup> Part IV emphasizes the utility of disaggregating ownership from these values.<sup>13</sup> Part V concludes.<sup>14</sup>

## II. TRADITIONAL FORECLOSURE LAW SCHOLARSHIP: A ZOOM LENS ON DEBT ENFORCEMENT<sup>15</sup>

Foreclosure on the mortgage of a principal residence is, in its most direct sense, private contract enforcement that divests the household of its ownership interest.<sup>16</sup> Two sets of complaints about this process appeared to motivate traditional law review scholarship on residential mortgage foreclosure. The first set was usually framed in terms of efficiency.<sup>17</sup>

9. See Baker, *supra* note 6, at 2–3.

10. See *id.*

11. See *infra* notes 15–41 and accompanying text. I use the term “traditional” to refer to the last several decades of foreclosure law scholarship preceding the mortgage crisis produced by real estate scholars.

12. See *infra* notes 42–73 and accompanying text.

13. See *infra* notes 74–90 and accompanying text.

14. See *infra* note 91 and accompanying text.

15. Jabeen Ahmad contributed substantially to the production of this section of the article.

16. See, e.g., James B. Hughes, Jr., *Taking Personal Responsibility: A Different View of Mortgage Anti-Deficiency and Redemption Statutes*, 39 ARIZ. L. REV. 117, 122–23 (1997). For an analysis of the shift from a property to contract paradigm over time, see Frank S. Alexander, *Mortgage Prepayment: The Trial of Common Sense*, 72 CORNELL L. REV. 288 (1987).

17. See, e.g., James Geoffrey Durham, *In Defense of Strict Foreclosure: A Legal and Economic Analysis of Mortgage Foreclosure*, 36 S.C. L. REV. 461, 463–64 (1985) (“Mortgage foreclosures are part of an economic transaction. As such, mortgage foreclosures should and can be analyzed as economic transactions. Efficiency should be the primary goal in devising a mortgage foreclosure process because, in a broad sense, efficiency benefits all parties to the mortgage foreclosure process.”); see also *id.* at 504 (“Current mortgage law is inefficient.”). Prentiss Cox recently

Writers expressed concern about the time and expense of the process for lenders, particularly if judicial foreclosure was required,<sup>18</sup> and questioned the utility of substantive mortgagor protections such as redemption rights and prohibitions on deficiency judgments.<sup>19</sup> As the argument often went, the expense and delay associated with longer and more debtor-protective foreclosure processes decreased the attractiveness of investing in mortgage-backed securities on the secondary market and affected the cost of and access to mortgage credit for future borrowers.<sup>20</sup> Like many articles in the real estate finance literature,<sup>21</sup> law review articles commonly suggested that

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observed the dominance of this framework across authors in this field. See Cox, *supra* note 5, at 717.

18. See, e.g., John Mixon & Ira B. Shepard, *Antideficiency Relief for Foreclosed Homeowners: ULSIA Section 511(b)*, 27 WAKE FOREST L. REV. 455, 477–79 (1992) (arguing that the goal of foreclosure is to liquidate the lender’s interest as quickly as possible when the borrower has no possibility of curing the mortgage, and yet noting that foreclosure remains a “time-consuming, complex undertaking”); see also Durham, *supra* note 17, at 477; Patrick A. Randolph, Jr., *The Future of American Real Estate Law: Uniform Foreclosure Laws and Uniform Land Security Interest Act*, 20 NOVA L. REV. 1109, 1119–20 (1996) [hereinafter Randolph, *Uniform Foreclosure Laws*] (“[The] cost of judicial foreclosure is far out of proportion to the number of borrowers truly protected from unfair or overreaching foreclosure practices.”); Debra Poggrund Stark, *Foreclosing on the American Dream: An Evaluation of State and Federal Foreclosure Laws*, 51 OKLA. L. REV. 229, 232 (1998).

19. See generally Schill, *supra* note 1. See also Durham, *supra* note 17, at 472 (finding that reinstatement statutes “may result in inefficiency”); *id.* at 484–86 (critiquing anti-deficiency laws and post-sale redemption rights on efficiency grounds); Hughes, *supra* note 16, at 120, 124 (discussing mortgagor protection devices that can “relieve the mortgagor of the obligation to fulfill certain of its promises to the mortgagee” and categorizing statutes that prohibit deficiency judgments); Mixon & Shepard, *supra* note 18, at 455; Marshall E. Tracht, *Renegotiation and Secured Credit: Explaining the Equity of Redemption*, 52 VAND. L. REV. 599 (1999). Some writers conceptualize mortgagor protection laws as compulsory insurance in a situation in which individuals tend to under-insure privately. See Duncan Kennedy, *Cost-Benefit Analysis of Debtor Protection Rules in Subprime Market Default Situations*, in BUILDING ASSETS, BUILDING CREDIT: CREATING WEALTH IN LOW-INCOME COMMUNITIES 266, 279 (Nicolas P. Retsinas & Eric S. Belsky eds., 2005) (“From the point of view of the borrower, debtor protection rules function as insurance against the adverse consequences of default.”); Schill, *supra* note 1, at 591.

20. Debra Poggrund Stark, *Facing the Facts: An Empirical Study of the Fairness and Efficiency of Foreclosures and a Proposal for Reform*, 30 U. MICH. J.L. REFORM 639, 652 (1997) [hereinafter Stark, *Facing the Facts*]; see also Mixon & Shepard, *supra* note 18, at 477–79 (1992) (observing that judicial foreclosure and statutory redemption heightened expenses for lenders and increased mortgage credit prices for future borrowers); Randolph, *Uniform Foreclosure Laws*, *supra* note 18, at 1111 (noting that lenders are more likely to lend when they can “readily predict the performance of their investment” and that foreclosure laws are a “significant impediment to making those predictions”).

21. See, e.g., Karen M. Pence, *Foreclosing on Opportunity: State Laws and Mortgage Credit*, 88 REV. ECON. & STAT. 177, 180 (2006) (estimating that loan sizes are smaller in judicial foreclosure states and concluding that this reflects reduced supply of credit). See also Terrence M. Clauretie, *State Foreclosure Laws, Risk Shifting, and the Private Mortgage Insurance Industry*, 56 J. RISK & INS. 544, 552 (1989) (concluding that judicial foreclosure, statutory right of redemption, and anti-deficiency statutes add significantly to mortgage risk, and also citing a 1975 study finding large differences between loan losses and the presence of mortgagor protection features); Terrence M. Clauretie & Thomas Herzog, *The Effect of State Foreclosure Laws on Loan Losses: Evidence from*

mortgagor protection did in fact affect mortgage credit cost and access, with commentators making various judgments about the size of the burdens and whether the benefits outweighed them.<sup>22</sup>

Proposals to respond to these types of concerns included shortening the foreclosure process, removing substantive protections for defaulting borrowers (e.g., anti-deficiency laws, rights to redemption), and encouraging more jurisdictions to adopt power of sale or other, faster non-judicial procedures.<sup>23</sup> To the extent that a lack of uniformity in foreclosure law from state to state<sup>24</sup> also burdened mortgage markets,<sup>25</sup> writers also proposed reducing or eliminating non-uniformity in residential mortgage law,

*the Mortgage Insurance Industry*, 22 J. MONEY, CREDIT & BANKING 221, 231 (1990) (predicting borrowers in more protective states eventually will pay higher private mortgage insurance premiums); Charles M. Kahn & Abdullah Yavaş, *The Economic Role of Foreclosures*, 8 J. REAL EST. FIN. & ECON. 35, 46 (1994) (mortgagor protection laws have substantial effects on market); Richard A. Phillips & James H. VanderHoff, *The Conditional Probability of Foreclosure: An Empirical Analysis of Conventional Mortgage Loan Defaults*, 32 REAL EST. ECON. 571, 584 (2004) (less protective laws will reduce costs and will lower mortgage interest rates).

22. See, e.g., Patrick B. Bauer, *Judicial Foreclosure and Statutory Redemption: The Soundness of Iowa's Traditional Preference for Protection over Credit*, 71 IOWA L. REV. 1, 6, 75 (1985) (observing that "critics of judicial foreclosure and statutory redemption commonly contend that both generate costs that greatly outweigh their actual benefits" but reaching an opposite conclusion); Schill, *supra* note 1, at 491 (finding that interest rates were relatively insensitive to the presence of mortgagor protection and offering justifications for mortgagor protections).

23. See Cox, *supra* note 5, at 700 (discussing proposals for power of sale or foreclosure by appraisal); Durham, *supra* note 17 (arguing that strict foreclosure is the most economic efficient method for foreclosure); Basil H. Mattingly, *The Shift from Power to Process: A Functional Approach to Foreclosure Law*, 80 MARQ. L. REV. 77, 114–20 (1996) (arguing for strict foreclosure when borrowers or other lien holders fail to object); Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1444–46 (2004) (discussing foreclosure by appraisal); Schill, *supra* note 1, at 535 (proposing a compulsory foreclosure insurance program as substitute for substantive mortgagor protections).

24. Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N.C. L. REV. 293, 295 (1993) [hereinafter Alexander, *Federal Intervention*] ("No two states have identical mortgage laws.").

25. See Mixon & Shepard, *supra* note 18, at 482 ("Uniformity is essential for efficient secondary market operation [because it allows investors] to assess portfolio values on a rate-of-return basis without worrying about jurisdictional differences . . ."); Nelson & Whitman, *supra* note 23 (citing changes in the mortgage market as a factor favoring uniformity in foreclosure law); Randolph, *Uniform Foreclosure Laws*, *supra* note 18, at 1111 (noting that mortgage market investors were "national and international sources unrelated to the location of the project" and were "more likely to lend it if they can readily predict the performance of their investment," but also justifying uniform foreclosure law on other grounds, including fairness and secure and predictable title); Patrick A. Randolph, Jr., *The New Federal Foreclosure Laws*, 49 OKLA. L. REV. 123 (1996) [hereinafter Randolph, *New Federal Foreclosure Laws*] (suggesting that states should create their own foreclosure laws). For a general discussion of the broader pressures toward national uniformity and federalization in real estate law, see generally Alexander, *Federal Intervention*, *supra* note 24, at 295.

although they disagreed on the desirability of federal preemption in the event that uniform state foreclosure law projects continued to fail.<sup>26</sup>

Defenders of debtor-protective features of foreclosure law and longer timelines sometimes justified their positions on preserving homeownership.<sup>27</sup> Nonetheless, writers frequently assumed that a forced sale was inevitable and focused primarily on addressing below-market-value auction prices.<sup>28</sup> Writers sometimes tied concerns about low sale prices to efficiency, but also questioned fairness.<sup>29</sup> Specifically, they worried that borrowers forfeited equity or faced deficiency judgments (were state law to permit) because of depressed foreclosure sale prices.<sup>30</sup> Although lenders were affected when lower sale prices did not cover their debt,<sup>31</sup> their greater ability to successfully credit bid their debt in the auction and later re-sell for fair market value (albeit with additional transaction costs) offered lenders more protection than the debtors losing their homes.<sup>32</sup>

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26. Compare Nelson & Whitman, *supra* note 23, at 1512–13 (suggesting federal legislation for pragmatic reasons), with Randolph, *Uniform Foreclosure Laws*, *supra* note 18, at 1120–25, 1128 (concluding that “federally preemptive foreclosure laws are not the answer” and that state legislatures are in the best position to evaluate how to integrate a roughly uniform law into its own state’s existing situation), and Randolph, *New Federal Foreclosure Laws*, *supra* note 25, at 134 (calling federal preemption foreclosure statute a “blunderbuss” and suggesting that the states should decide on their own foreclosure laws), and Alexander, *Federal Intervention*, *supra* note 24 (urging caution to those pursuing federal preemption).

27. See, e.g., Patrick B. Bauer, *Statutory Redemption Reconsidered: The Operation of Iowa’s Redemption Statute in Two Counties Between 1881 and 1980*, 70 IOWA L. REV. 343 (1985); Stark, *Facing the Facts*, *supra* note 20, at 657 (noting the perceived benefit of a longer timeline for the homeowners who might be able to reinstate mortgage or redeem home). Schill has also justified protections on the *ex ante* insurance benefits even if they are rarely used. Schill, *supra* note 1, at 591.

28. Bauer, *supra* note 27, at 344–45; Mattingly, *supra* note 23, at 95 (“By their historical nature, foreclosure sales are not designed to produce the best possible price for the property. A good price at a foreclosure sale is an accident.”); Robert M. Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. CAL. L. REV. 843, 843 (1980) (“The inadequate price problem . . . is acute in certain real estate markets and under certain financial conditions[,] and will remain a problem due to structural deficiencies in the foreclosure process that prevent the mortgagor from receiving an adequate price for his property.”).

29. Examples of articles expressing this viewpoint were written by Basil Mattingly, Debra Stark, James Geoffrey Durham, Dale Whitman, and Grant Nelson. See, e.g., Mattingly, *supra* note 23; Stark, *Facing the Facts*, *supra* note 20.

30. Stark, *Facing the Facts*, *supra* note 20, at 645 (“[I]f the amount bid is less than the final judgment, the lender sometimes seeks a deficiency judgment against the borrower following confirmation of the judicial sale . . .”).

31. See, e.g., Durham, *supra* note 17, at 509–10 (arguing for mortgage enforcers’ entitlement to full recovery independent of property value and arguing against anti-deficiency statutes).

32. Stark, *Facing the Facts*, *supra* note 20, at 665 (“The main criticism of the foreclosure process is that the lender obtains an unfair double recovery by bidding less than the debt due to her, bringing a deficiency action against the borrower, and then reselling the property within one year for more than she bid.”). Stark found this was rare in her dataset from Cook County, Illinois. *Id.* Yet the successful third-party bidders tended to be buyers with substantial experience in foreclosure sales who were seeking a bargain. *Id.* at 677 (referring to “third party scavengers”). For a general discussion of the debate and earlier sources, see generally Nelson & Whitman, *supra* note 23 and

Factors blamed for depressing foreclosure sale prices included lack of information about the property, and the possibility of redemption.<sup>33</sup> Proposals that responded to concerns about sale prices included requiring property appraisals,<sup>34</sup> appointing trustees to make equity determinations and ensure price maximization,<sup>35</sup> conducting “commercially reasonable” private sales or negotiating sales so that they are more market-mimicking,<sup>36</sup> requiring disgorgement of surplus from lenders’ future re-sales,<sup>37</sup> and limiting or eliminating mortgagor protections that decreased the finality of foreclosure sales and thus may depress sales prices.<sup>38</sup>

On the whole, the traditional legal real estate literature articulated the values at stake in foreclosure reform as the right to an expeditious collection process for the mortgagee (with benefits for future borrowers in the form of more access to mortgage credit), and the preservation of the economic value of home equity for the borrower through fair market sale prices, with some writers seeking ways to balance these interests.<sup>39</sup>

While analyses varied, they generally stemmed from the doctrinal conception of foreclosure as enforcement of debtor-creditor contracts, and

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Mattingly, *supra* note 23, at 100.

33. See, e.g., Nelson & Whitman, *supra* note 23, at 1418–24 (explaining the connotation of public auction of real property as a “distress sale” and then reviewing the features of real estate foreclosure sales that make it harder for third party bidders to, *inter alia*, arrange financing or learn about the property); see also Mattingly, *supra* note 23.

34. Steven Wechsler, *Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 CORNELL L. REV. 850, 894–95 (1985) (“To protect the interests of mortgagors . . . a statute could empower the court to require an independent appraisal of the current retail market value of the property.”); Stark, *Facing the Facts*, *supra* note 20, at 686–88 (proposing bifurcated strict foreclosure/judicial foreclosure based on results of appraisal).

35. See Johnson, *supra* note 1, at 981 (also attributing the trustee concept to Nelson and Whitman).

36. Nelson & Whitman, *supra* note 23, at 1440–45 (recommending negotiated sales and foreclosure by appraisals as set forth in Uniform Nonjudicial Foreclosure Act); see also Stark, *Facing the Facts*, *supra* note 20, at 686–87; Mattingly, *supra* note 23, at 114–20 (discussing ways to promote competitive bidding).

37. Wechsler, *supra* note 34, at 887–89.

38. *But see* Bauer, *supra* note 22, at 74–75 (arguing that statutory redemption reduces the problem of price inadequacy).

39. *Id.* at 13 (discussing standard tension between protection and credit availability); see also Mattingly, *supra* note 23, at 81, 133 (concluding that balancing efficiency for lenders with fairness for borrowers entails a system that puts upward pressure on foreclosure bid prices); Stark, *supra* note 18, at 236 (describing how a fair system balances the interests of lenders and non-defaulting borrowers in a fast and inexpensive system with the interests of defaulting borrowers in having opportunities to be heard and in maintaining equity); Wechsler, *supra* note 34, at 884 (discussing “objectives of providing competitive bidding and fair prices, while preserving mortgagees’ rights to collect deficiencies”) (footnote omitted).



the perceived importance of well-functioning debt enforcement to mortgage markets.<sup>40</sup> The consequent cost-benefit analysis in which many authors engaged was expressly and intentionally limited.<sup>41</sup>

### III. FORECLOSURE LAW REFORM THROUGH A WIDE-ANGLE LENS

Rising subprime mortgage foreclosure rates prompted newer contributions that expressly called for a broader range of objectives to shape foreclosure law reform.<sup>42</sup> These writings questioned whether changing the mechanics of the foreclosure process would be sufficient to reflect the goals of housing policy writ large.

As foreclosure initiation rates rose more generally, housing experts and academics proposed temporary changes to foreclosure law that also departed from the premises of the traditional scholarship reviewed in Part II.<sup>43</sup> For example, Martin Feldstein proposed that, at the borrower's option, underwater mortgages be written down to 120% of the value of the collateral, but that the borrower must commit to full personal liability for the loan and could not discharge that liability in a federal bankruptcy case.<sup>44</sup>

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40. See Anthony B. Sanders, *Barriers to Homeownership and Housing Quality: The Impact of the International Mortgage Market*, 14 J. HOUSING ECON. 147, 151–52 (2005). Sanders has set forth a nonexclusive taxonomy of factors that influence the development of mortgage market in any given country, including: “(1) legal systems that delay foreclosure proceedings, (2) incomplete or weak financial institutions, (3) high inflation, and (4) cultural barriers to mortgage market development and homeownership.” *Id.*

41. For example, the analysis tends not to include benefits (or costs) to which it is difficult to assign a numerical value, whose numerical value is not consistent, or whose numerical value cannot be determined. See LORNA FOX, *CONCEPTUALISING HOME: THEORIES, LAWS AND POLICIES* 436 (2007) [hereinafter FOX, *CONCEPTUALISING HOME*] (identifying values that are not easily quantified and thus usually not weighed against creditors' quantifiable interests); Lorna Fox, *Re-Possessing “Home”: A Re-Analysis of Gender, Homeownership and Debtor Default for Feminist Legal Theory*, 14 WM. & MARY J. WOMEN & L. 423, 444 (2008) [hereinafter Fox, *Re-Possessing “Home”*] (“The meanings associated with home and homeownership include both the readily identifiable, measurable, and easily recognizable ideas of financial investment in the property and the physical structure of the home, as well as the social, psychological, emotional and cultural meanings associated with *home*, which are intangible and immeasurable, and so have tended to be more problematic for lawyers.”).

42. The foreclosure crisis has generated many articles discussing foreclosure reform, but two recent examples that expressly make the point about reform reflecting goals other than those in the traditional scholarship are Cox, *supra* note 5, at 686, 717, and Melissa B. Jacoby, *Home Ownership Risk Beyond a Subprime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV. 2261 (2008) [hereinafter Jacoby, *Home Ownership Risk*]. Prentiss Cox argues that “state foreclosure laws should be evaluated by their impact on desired social outcomes for housing” and that “[n]ational housing policy goals, however construed, should drive foreclosure law reform.” Cox, *supra* note 5, at 723, 745. Cox identifies “high levels of homeownership” and “community stability and housing quality” as the guiding principles for foreclosure reform. *Id.* at 723. The proposals he advances stay within the general parameters of adjusting the foreclosure process. *Id.* at 739–41 (proposing longer timelines and better information about rights to object and to save one's home).

43. See *supra* notes 15–41 and accompanying text.

44. Martin Feldstein, *How to Save an ‘Underwater’ Mortgage*, WALL ST. J., Aug. 8, 2009, at

Full and non-dischargeable personal liability means that other non-homestead property could be repossessed for unpaid mortgage amounts.

In Dean Baker's proposed right to rent, a completed foreclosure would not necessarily result in ejection of the former homeowner.<sup>45</sup> Instead, the former homeowner could remain in the home if she could pay the fair market rent.<sup>46</sup> Especially during the housing crisis, the fair market rent was supposed to be more affordable than homeowners' prior mortgage payments in at least some areas, increasing the feasibility of this proposal.<sup>47</sup> For a set time period, residents' leasehold rights would survive subsequent sales of the property.<sup>48</sup>

The right to rent and similar leaseback proposals were cast as temporary changes in foreclosure laws in response to a crisis.<sup>49</sup> Although efforts to contain crises raise different issues than those raised by ordinary lawmaking,<sup>50</sup> the right to rent or leaseback idea reframes the values of foreclosure law in ways that are useful for permanent foreclosure reform discussions. Three examples follow.

#### A. *Shelter*

As a pragmatic starting point, a right to rent proposal resolves the question of whether a former homeowner will have a place to live. To the extent the government intervenes in housing at all, shelter seems like a fairly fundamental objective. Yet, the traditional law review scholarship generally did not discuss how existing foreclosure law addressed shelter concerns or how the law could be reformed to deal with such problems.<sup>51</sup>

A13.

45. See Baker, *supra* note 6.

46. *Id.* See also *The Science of Insolvency: Hearing Before the Subcomm. on Investigations and Oversight of the H. Comm. on Science and Technology*, 111th Cong. (2009) (statement of Dean Baker, Co-Dir. For the Ctr. for Econ. and Pol'y Research).

47. See *id.*

48. See *id.*

49. See *id.*, *supra* note 6; see also Alpert, *supra* note 8, for his proposal to have lenders accept deeds in lieu of foreclosure and then lease properties to former owners.

50. See generally Anna Gelpern, *Financial Crisis Containment*, 41 CONN. L. REV. 1051, 1051 (2009) (arguing that financial crisis containment decisions made by the government are brief, predictable, and costly, and that mapping containment efforts will help reshape crisis policy debates and "make crisis response more transparent and accountable").

51. As previously reviewed, these scholars considered some legal issues that take place after the auction of a foreclosed home, such as whether the lender can pursue a deficiency judgment and if the debtor has post-sale statutory redemption rights. See *supra* notes 17–32 and accompanying text. Some scholars in the United Kingdom and Israel have expressly incorporated shelter concerns into discussions of foreclosure law. See, e.g., Janet Ford et al., *Widening the Mortgage Safety Net: Some*

Perhaps scholars thought that shelter would not be a problem for families who lose their homes to foreclosure.<sup>52</sup> Presumably, such assumptions flowed from the overall demography of the homeless.<sup>53</sup> That assumption should be reconsidered. Recently, advocacy organizations and the news media have recognized that at least temporary homelessness flows from foreclosure for some families.<sup>54</sup> After all, families who have just gone through foreclosure tend to have both limited means and a damaged credit rating, both of which hamper access to quality rental housing.<sup>55</sup>

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*Questions of Effectiveness*, 12 BENEFITS 95 (2004) (discussing the United Kingdom); Avital Margalit, *The Value of Home Ownership*, 7 THEORETICAL INQ. L. 467 (2006) (discussing home ownership in Israel). Of course, scholars sometimes work within legal regimes that already reflect shelter concerns such as laws conditioning foreclosure completion on whether a delinquent homeowner has secured reasonable living accommodations, or laws granting judges discretion to consider a variety of factors when scheduling a sale. See, e.g., *id.* at 482 (discussing a mortgagor's right to shelter due to Israel's Tenant Protection Law). However, as Margalit notes, advance waivers erode this principle to some extent. *Id.* at 483. See also FOX, CONCEPTUALISING HOME, *supra* note 41, at 79–130 (discussing laws in Britain that give judges discretion to consider, *inter alia*, a menu of factors even though most judges primarily consider the lenders' position).

52. For a recent observation, see, e.g., Rachel D. Godsil & David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership*, 77 FORDHAM L. REV. 949, 985 (2008) ("The mortgage crisis has not generally been viewed as likely to lead to a rash of homelessness—rather, it has raised the specter of people losing homes they purchased. In other words, most who are concerned about the mortgage foreclosure debacle recognize that homeowner status is at issue.").

53. See, e.g., Jane B. Baron, *Homelessness as a Property Problem*, 36 URB. LAW. 273, 282–83 (2004) (reporting on research finding that homeless are largely drawn from the very impoverished). Kim Hopper and Jill Hamberg have more broadly discussed temporary displacement from housing. Kim Hopper & Jill Hamberg, *The Making of America's Homeless: From Skid Row to New Poor, 1945–1984*, in CRITICAL PERSPECTIVES ON HOUSING 12–13 (Rachel G. Bratt et al. eds., 1986). Hopper and Hamberg conclude that "the threat of homelessness . . . is not limited to the already disenfranchised or marginally situated." *Id.* at 37; see also A. R. Veness, *Home and Homelessness in the United States: Changing Ideals and Realities*, 10 ENV'T & PLAN. D: SOC'Y & SPACE 445, 445 (1992) (discussing less visible and more contested examples of homelessness). Moreover, laws and norms in the United States make it harder to combine multiple families into a single dwelling or hinder nontraditional housing options. Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L. J. 1231 (2005); Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1130–31 (2009) (noting that lack of legal protection for and outright prohibition of some dwellings that residents identify as homes calls into question earnest policy interest in "residential stability as a psychological requisite.").

54. FORECLOSURE TO HOMELESSNESS 2009: THE FORGOTTEN VICTIMS OF THE SUBPRIME CRISIS 5 (2009), [www.nationalhomeless.org/advocacy/ForeclosuretoHomelessness0609.pdf](http://www.nationalhomeless.org/advocacy/ForeclosuretoHomelessness0609.pdf); Peter S. Goodman, *Foreclosures Force Ex-Homeowners to Turn to Shelters*, N.Y. TIMES, Oct. 19, 2009, at A1 (discussing reports of homelessness of foreclosure defendants, including former homeowner who slept in car, stayed with various friends and family for over a year, and then checked into homeless shelter); Jonathan D. Glater, *Another Hurdle for the Jobless: Credit Inquiries*, N.Y. TIMES, Aug. 7, 2009, at A1 (discussing a man who lost his house to foreclosure, filed for bankruptcy, and lived in a homeless shelter while looking for new employment). More readily recognized is the possibility that foreclosures create shelter risk for renter-occupiers. See, e.g., THE NAT'L LAW CTR. ON HOMELESSNESS & POVERTY & THE NAT'L COALITION FOR THE HOMELESS, HOMES, NOT HANDCUFFS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 8, 14 (2009).

55. For examples of media coverage of these circumstances, see Dinah Eng, *Renters Again, but*

Ultimately, a right to rent may not be the right temporary or permanent policy response. But the proposal reminds us that shelter should be a part of the foreclosure law reform conversation.<sup>56</sup>

### *B. Residents With Special Needs: The Example of Children*

Forced exit from homeownership poses challenges for households comprised of members at various stages of the life cycle or with special needs. Families with school-aged children are a common example.<sup>57</sup> The most visible issue is the potential disruption to education, particularly if children are enrolled in local public schools.<sup>58</sup> According to Lorna Fox, writing about the United Kingdom, some children experience anguish and fears about their uncertain future in anticipation of foreclosure.<sup>59</sup> Even if

*with an Asterisk; A Foreclosure Damages Credit. But Landlords May Ease the Way for Some Who Lost Homes*, L.A. TIMES, Dec. 16, 2007, at K1 (“The good news is that there are plenty of rentals available. The bad news is that a foreclosure taints a credit record, making it harder to rent a place. . . . A common mistake people facing foreclosure make, he said, is trying to hold onto the house as long as possible by maxing out credit cards and not making car payments. Such actions damage credit ratings even more.”); *id.* (“Typically, foreclosures are viewed as negatively as an eviction is in our industry,” Sans said. “As we evaluate things, it’s possible we may change our rental criteria to accommodate renters in this situation.”); *see also* Conor Dougherty, *In the Boonies, the American Dream Is Up for Rent*, WALL ST. J., March 30, 2009, at A18 (reporting on the growth of the home rental market at the suburban fringe due to single-family home owners who have been forced to break their homes into rental units); Motoko Rich, *TURF; A Blacklist for Renters*, N.Y. TIMES, April 8, 2004, at F1 (discussing the impact of past allegations of housing defaults on ability to rent elsewhere).

56. For a discussion of whether there should be a right to housing, see Kristen David Adams, *Do We Need a Right to Housing?*, 9 NEV. L.J. 275 (2009).

57. Still, “[v]oting-age adults who currently have no children in the public-school pipeline form a majority in most jurisdictions.” WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 148 (2001).

58. *See* FOX, *CONCEPTUALISING HOME*, *supra* note 41, at 441 (“[R]esearch has indicated that the effects of mortgage arrears and the threat of repossession begin to take their toll on children long before the children actually become homeless.”). The McKinney-Vento Homeless Education Assistance Improvements Act of 2001, 42 USC § 11431 (2009), provides for education needs of “homeless children.” This law is designed to give homeless children the ability to remain in a school even as they move between temporary residences that straddle school districts, but school districts determine the district based on best interest of the child. Homeless children is defined in 42 U.S.C. § 11434a(2) to mean “individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of section 11302(a)(1) of this title),” and includes sharing homes due to loss of housing. *See generally* Erik Eckholm, *Surge in Homeless Children Strains School Districts*, N.Y. TIMES, Sept. 5, 2009 (discussing practical impact on schools of trying to create continuity for homeless children).

59. *See id.*

they readily recover from the experience,<sup>60</sup> financially distressed parents' fears of the impact of foreclosure on their children drive them to hold onto homeownership longer than they reasonably should.<sup>61</sup>

Even though homeownership is often touted for its benefits to children, the traditional foreclosure law scholarship in the United States rarely addressed children in an explicit way. Writing more recently about the United Kingdom, Lorna Fox gave considerable treatment to the question of children and foreclosure in her book, *Conceptualising Home*. The book observed the stark contrast between the attempt to incorporate children's needs and best interests into some legal doctrines, such as in family law, and the relative absence of such concerns in the law governing the termination of homeownership.<sup>62</sup> Fox noted that most U.K. courts did not take children's school or other interests into account.<sup>63</sup>

Fox's book highlighted one example of a judge postponing a foreclosure sale until the youngest child in the home reached the age of majority.<sup>64</sup> The court determined that the lender would not be unduly prejudiced by the delay.<sup>65</sup> The court also noted the mother's difficulties in finding a suitable alternative residence given that the value of her current home was on the low end of housing values in the area.<sup>66</sup> Fox ultimately concluded that the "collective" interests of child-occupiers—as opposed to the interests of the specific children at issue—should be taken more expressly into account in the foreclosure process.<sup>67</sup>

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60. Stephanie Stern reports that children adjust fairly quickly after forced relocation. Stern, *supra*, note 53, at 1117–18. But it is not clear that her cited examples arise from foreclosure as opposed to other types of forced relocation (such as eminent domain) that carry different connotations. Stern also suggests that the children who are at risk due to the negative effects of excessive mobility tend not to be the children who benefit from home-protective legislation. *Id.* at 1118. Presumably this has become less true due to the expansion of highly-leveraged homeownership to more economically marginalized families.

61. FOX, *CONCEPTUALISING HOME*, *supra* note 41, at 445 (noting that people cling to homes they cannot afford rather than downward-adjusting because of their children and because they know they will not qualify for another home loan); KATHERINE S. NEWMAN, *FALLING FROM GRACE: THE EXPERIENCE OF DOWNWARD MOBILITY IN THE AMERICAN MIDDLE CLASS* 224–25 (1988) (noting that many divorced mothers cling to the old family home “in an effort to provide their children with as much *social* continuity as possible, believing they need[] to protect their kids from any more disruption than they ha[ve] already faced as a result of divorce”); Hazel Christie, *Mortgage Arrears and Gender Inequalities*, 15 *HOUSING STUDIES* 877, 896 (2000) (discussing how households with children were more likely to be reluctant to move); Elizabeth Warren, *Bankrupt Children*, 86 *MINN. L. REV.* 1003, 1023 (2002) (discussing the complex financial factors families with children must weigh when considering the decision to move).

62. FOX, *CONCEPTUALISING HOME*, *supra* note 41, at 411–12, 419 (2007).

63. *Id.* at 416.

64. *Id.* at 417. Even though most U.K. courts primarily consider the financial claim of the lender, the applicable laws make the welfare of child-occupants a permissible factor. *Id.* at 427, 430.

65. *Id.* at 433 (discussing the judge's finding that the lender had an equity cushion).

66. *Id.*

67. *Id.* at 437.

By comparison, Baker's right to rent proposal gives parents more control over the timing of a geographical transition without forestalling the lender's foreclosure of the ownership interest.<sup>68</sup> Although the proposal was meant as only an emergency intervention, it should stimulate consideration of whether foreclosure law or related laws could better reflect the needs of children or other residents with special needs.<sup>69</sup>

### C. Externalities

The traditional foreclosure law reform scholarship focused primarily on one externality: the impact of foreclosure law on the market for residential mortgages. By contrast, Baker's right to rent proposal seems to be driven by a far wider array of third-party effects of foreclosure and foreclosure law.<sup>70</sup> Examples include foreclosure's impact on neighbors' property values, neighborhoods that become more unkempt and unsafe, and declines in local governments' tax revenues contemporaneous with a need to expend money to address the problem of abandoned homes.<sup>71</sup> Baker's proposal is of a piece with other recent scholarship discussing ways to combat this fallout from widespread mortgage default.<sup>72</sup> Presumably, Baker's approach could be targeted towards neighborhoods that are subject to a particularized risk of severe decline due to the concentration of delinquent mortgages.<sup>73</sup> More generally, though, the right to rent illustrates the wider array of third-party effects that could be taken into account in permanent foreclosure law reform beyond that of the mortgage market impact.

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68. *Id.*

69. Baker, *supra* note 6, at 2–3. For example, students might be permitted to remain at their public school even though they no longer reside in the district. For a discussion of the law promoting school stability for homeless children, see *supra* note 58.

70. See Baker, *supra* note 6.

71. Cox, *supra* note 5, at 693–95 (discussing the blight from rising foreclosures); Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 356–60 (2006) (discussing the problem in the context of predatory lending).

72. See, e.g., Engel, *supra* note 71, at 360–70; see also Cox, *supra* note 5, at 726–27; Creola Johnson, *Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1180–93 (2008) (noting that foreclosure law does not provide remedies to compensate large costs borne by neighborhoods, communities, and governments when homes are foreclosed, and discussing how three cities have handled the effects of mortgage foreclosure).

73. See Melissa B. Jacoby, *Bankruptcy Reform and the Financial Crisis*, 13 N.C. BANKING INST. 115, 119 (2009) (explaining that despite many interventions to save homes, such as proposed mortgage modification in bankruptcy, the law lacks mechanisms that take neighborhood characteristics into account).

#### IV. BEYOND FORECLOSURE: DISAGGREGATING HOME AND OWNERSHIP

Part III employed Baker's right to rent proposal to illustrate how reform of the foreclosure process could account for a wider range of values than those reflected in the traditional law review scholarship.<sup>74</sup> At least on an *ex post* basis, Baker's proposal directly addresses three sets of significant housing and community questions.

Although other recent proposals also consider these kinds of questions, the right to rent and other leaseback proposals are distinctive because they disaggregate these values from continued ownership. Thus, for example, Baker's idea illustrates quite well that a response to the "where will they live" shelter question is not dependent upon continued homeownership. Furthermore, by giving parents of school-aged children a continued possessory interest, the proposal gives parents more control over the timing of residential transitions and thus offers a way to prevent disrupted education during financial distress.<sup>75</sup> This could increase parents' incentives to terminate unsustainable homeownership and redeploy their limited resources in ways that promote the wellbeing of their children. Finally, continuing occupation without ownership addresses some of the externalities that arise due to abandonment of property in foreclosure without forestalling the foreclosure of the ownership interest itself.<sup>76</sup>

The disaggregation of owner-occupation from concepts of home or various housing objectives is controversial but important.<sup>77</sup> Although some argue that homeownership benefits communities in distinct ways,<sup>78</sup> it is far from clear that the level of investment required for homeownership is appropriate or desirable for all households.<sup>79</sup> Historian Thomas Sugrue

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74. See *supra* Part III.

75. See *supra* Part III.B.

76. For other suggestions on how to reduce the community impact of foreclosure, see, for example, Johnson, *supra* note 72, at 1237–53.

77. See generally Jacoby, *Home Ownership Risk*, *supra* note 42. Recently, Kristen Adams has also suggested that certain attributes often associated with homeownership, such as independence and wealth building, do not perfectly correlate. Kristen David Adams, *Homeownership: American Dream or Illusion of Empowerment?*, 60 S.C. L. REV. 573, 596 (2009) (“[H]omeownership sometimes brings dependence and loss of wealth rather than the expected independence and increased wealth.”).

78. For example, William Fischel argues that because homeowners have so much wealth tied up in their homes, they actively take positions on local government issues in an effort to maximize their household values. FISCHEL, *supra* note 57, at 5–6. However, Fischel acknowledges that something must be done to combat homeowners' excessive “NIMBYism” (which stands for “not in my backyard”). *Id.* at 9–11. He proposes insurance contracts to protect homeowners against declines in asset value from undesirable uses. *Id.* at 269. I have discussed a collection of studies on the asserted relationships between owner-occupation and community benefits in Jacoby, *Home Ownership Risk*, *supra* note 42, at 2276–80.

79. See Lee Anne Fennell, *Homeownership 2.0*, 102 Nw. U. L. REV. 1047, 1059 (2008) (discussing the “onsite investment facet of homeownership”). Fennell notes that traditional

recently observed that “[e]very generation has offered its own version of the claim that owner-occupied homes are the nation’s saving grace.”<sup>80</sup> The message has been quite successful in recent years; research in the 1990s estimated that between 80% and 90% of Americans will own a home at some point in their lives.<sup>81</sup> But some authors in the legal literature have recently suggested that homeownership has been over-promoted, or that the stated benefits of homeownership are illusory for some people.<sup>82</sup> In addition to the possibility that a homeowner could lose wealth, scholars raise concerns about the mobility cost of a home that is worth less than its debt.<sup>83</sup> Scholars in other disciplines have long been expressly critical of, or at least open to questioning, the push for homeownership.<sup>84</sup> Likewise, feminist scholars have long been skeptical of the notion that men and women experience and benefit equally from homeownership or even from the (supposedly comforting) concept of home.<sup>85</sup>

leveraged homeownership is a highly undiversified investment, leaving families quite vulnerable to market downturns. *See id.* at 1051; *see also* FISCHER, *supra* note 57, at 74–75 (“The owner of a home . . . has a large fraction of her wealth tied up in the property. . . . Owners of homes cannot diversify their portfolios by spreading out ownership of their asset . . . .”); Melissa B. Jacoby, *Bankruptcy Reform and Homeownership Risk*, 2007 U. ILL. L. REV. 323, 324 (“Incurring home mortgage debt has expanded . . . opportunities, but it has also expanded . . . risk—for many individuals, the largest financial risk of their lifetimes.”).

80. Thomas J. Sugrue, *The New American Dream: Renting*, WALL ST. J., Aug. 14, 2009; *see also* Godsil & Simunovich, *supra* note 53, at 955.

81. FISCHER, *supra* note 57, at 80 (citing a study published in 1998 by Jim Berkovec and Peter Zorn).

82. *See, e.g.*, Adams, *supra* note 77; A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, 84 IND. L.J. 189 (2009); Stern, *supra* note 53.

83. Godsil & Simunovich, *supra* note 53 at 972; Peter B. Meyer, Jerry Yeager & Michael A. Burayidi, *Institutional Myopia and Policy Distortions: The Promotion of Homeownership for the Poor*, 28 J. ECON. ISSUES 567, 572 (1994). The authors of this article observe that panel study of income dynamics data “further demonstrates the inability of lower income households to predict their mobility,” *id.*, and discuss how this has been given too little consideration in discussions of promoting homeownership: “If low- and moderate-income households cannot predict their own mobility, then they are clearly subject to unanticipated pressures on the capacity to sustain tenure.” *Id.*

84. CRITICAL PERSPECTIVES ON HOUSING, *supra* note 53; LOW-INCOME HOMEOWNERSHIP: EXAMINING THE UNEXAMINED GOAL (Nicolas P. Retsinas & Eric S. Belsky eds. 2002); Anne B. Shlay, *Low-Income Homeownership: American Dream or Delusion?*, 43 URB. STUD. 511 (2006).

85. For example, “second-wave” feminists often argued that home serves to reinforce patriarchy and saw the home as a locus of insecurity and inequality. *See* FOX, CONCEPTUALISING HOME, *supra* note 41, at 362–63 (reviewing literature); Fox, *Re-Possessing “Home,” supra* note 41 at 426 (“[T]he gender dimensions of homeowner debt, default, and the risk of losing one’s home in a foreclosure or bankruptcy present particular challenges for feminist theory, which has historically *rejected* the idea that home is a positive phenomenon for women, or that the relationship between a woman and her home is one that should be protected in law.”). *See also* Ruth Madigan, Moira Munro & Susan J. Smith, *Gender and the Meaning of the Home*, 14 INT’L J. URB. & REGIONAL RES. 625, 642 (1990)



Nonetheless, in a culture that ascribes homeownership as the “natural” and “normal” approach,<sup>86</sup> the rental sector has been viewed as a second-class housing tenure, and with suspicion.<sup>87</sup> In addition to the purported economic disincentives to renting as compared to ownership, contributions in the meaning of home literature sometimes perpetuate the view that homeownership offers more ontological security than renting.<sup>88</sup> Two-way movement between ownership and renting has thus been stigmatized and discouraged in various respects.<sup>89</sup>

Foreclosure reform proposals that reflect some of the objectives commonly associated with owner-occupation—but are not themselves contingent on homeownership—perform a useful function: they implicitly challenge the assumption that homeownership and mortgage market promotion should be the dominant concern of housing policy. They also suggest the benefits of developing a broader range of housing tenures to better reflect households’ diversity of preferences and circumstances.<sup>90</sup>

## V. CONCLUSION

According to Avital Margalit, “Mortgage foreclosures . . . allow us to examine the commitment of Israeli society to the value of home ownership in particular and to housing welfare in general.”<sup>91</sup> Indeed, if the oft-asserted

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(“We have argued in this section that all these meanings [of home] are gender-differentiated and that the expansion of owner occupation . . . may have enhanced these discrepancies.”)

86. Fox, *Re-Possessing “Home,”* *supra* note 41, at 453 (“[Government] initiatives have played an important role in establishing homeownership as the ‘normal’ tenure, and in linking the economic, social, and cultural meanings of ‘home’ with homeownership [and t]his has important implications in relation to the meanings of home for women . . . .”); Jim Kemeny, *A Critique of Homeownership*, in CRITICAL PERSPECTIVES ON HOUSING, *supra* note 53, at 272–73 (discussing “mystical reverence” for ownership and a supposedly natural desire to own a home).

87. See Adams, *supra* note 77, at 595–96 (“Americans have stigmatized renting and renters. I suggest that stigmatizing renters and over-privileging homeowners is unfounded.”); Veness, *supra* note 53, at 453–54 (recounting history of suspicion and perceived personal deficiency of renters in early 20th century that led to “unwillingness of some leaders to incorporate tenancy as a viable permanent housing alternative for many segments of US society”). This perception is not limited to the United States; renting in other countries is sometimes described as “a stream of ‘dead’ money,” or “throwing money down the drain.” Ann Dupuis & David C. Thorns, *Home, Home Ownership and the Search for Ontological Security*, 46 SOC. REV. 24, 32 (1998) (discussing New Zealand); Madigan et al., *supra* note 85, at 633 (describing generally how renting and owning are perceived).

88. For a recent review of the literature on this point, see, for example, Ade Kearns et al., *Beyond Four Walls: The Psycho-Social Benefits of Home: Evidence from West Central Scotland*, 15 HOUSING STUD. 387, 390, 406 (2000) (discussing articles, including some from the United States, that suggest that renting is “a tenure of insecurity and vulnerability” but find “no great divide” along housing tenure lines between owners and renters in this respect” based on original research presented in article). See generally Shelley Mallett, *Understanding Home: A Critical Review of the Literature*, 52 SOC. REV. 62 (2004) (discussing disciplinary contributions to the meaning of home literature).

89. Kemeny, *supra* note 86, at 273.

90. See Fennell, *supra* note 79, at 1049–50.

91. Margalit, *supra* note 51, at 469.

values of housing policy are not reflected in foreclosure law, it is legitimate to question the seriousness with which the government pursues those policies.

The traditional foreclosure law scholarship identified potential defects in the mechanics of the foreclosure process that undermined fairness or efficiency, but did not hold foreclosure law accountable to the yardstick of some very basic objectives of a rational housing policy. Whether or not one would want to enact a right to rent on a temporary or permanent basis, this idea at least directly deals with more of those questions.

At the same time, the right to rent concept demonstrates that honoring the values that undergird the public interest in private housing need not be equated to ownership *per se*. To a larger extent than often realized, the justifications for homeownership promotion can and should be disaggregated from a specific housing tenure.

