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**HOME OWNERSHIP, DEBT AND DEFAULT:
THE AFFECTIVE VALUE OF HOME AND THE CHALLENGE OF
AFFORDABILITY**

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Abstract

This paper focuses on the political ideology of home ownership against the backdrop of affordability and debtor default. The paper considers the affective values of home as they are associated with home *ownership*, as well as the costs that result from losing one's home in a creditor possession action. In societies which have promoted home ownership, including the UK, USA and other jurisdictions, owning a home is heavily loaded with social and cultural meanings. Home ownership is not only associated with financial security, but is often viewed as a metaphor for *personal* and *family* security. Policies seeking to extend home ownership often advance the argument that home ownership is 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, the risks that some borrowers are willing to take in order to finance the purchase of their homes, and so to pursue this financial, personal and family security, have been brought into sharp relief by the recent crisis in 'sub-prime' lending. Rising rates of mortgage delinquency and foreclosure have highlighted concern for borrowers and lenders, and focused the attention of government agencies, non-profit groups such as the Centre for Responsible Lending and the National Community Reinvestment Coalition, and the national and global media, on the impact of mortgage default for the American housing market, the American economy, and even the global economy.

While the perilous positions of those caught up in the sub-prime mortgage lending crisis has received much attention in the media in recent months - with considerable concerns particularly for the exposure of low-income households to

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increased risks of foreclosure – this paper explores some of the underlying legal, theoretical and phenomenological issues associated with default and foreclosure. The paper focuses on the costs - both financial and non-financial - of foreclosure and repossession for the dispossessed occupier, as well as the costs for other stakeholders in society. The paper also discusses how and why these issues are recognised (or not) in legal discourse.

I. INTRODUCTION

It is difficult to overstate the importance of our homes, both in everyday life and, by extension, in law. Our homes provide the backdrop for our lives, and are often the scene or the subject of legal disputes. Recent analysis of home as a legal concept in the US has described an: ‘ideology of home, where the protection of home and all it stands for is an American virtue’.² In fact, it is not only ‘home’ (in the sense of a dwelling place) but home *ownership* that has become an ‘American obsession’, as: ‘...most Americans are willing to make dramatic sacrifices in order to own a home’.³ Many Americans are willing to take a second job, to give up time with their young children, placing them in child care, to take jobs further away from their homes, and to spend a large portion (sometimes more than half) of their monthly disposable incomes on mortgage instalments alone.⁴ The motivation to sacrifice time, money, effort and energy - to work harder - has been linked to two different types of goals: on the one hand, to the pursuit of financial security, with home ownership regarded as the most effective form of wealth accumulation for most Americans; while on the other hand, homeownership may even be viewed as: ‘...a metaphor for *personal* and *family* security...owning one’s home is, in essence, an empowering act, giving people a stake in society and a sense of control over their lives...homeownership strengthens the social fabric.’⁵

Yet, alongside these potential rewards, the risks that some borrowers are willing to take in order to finance the purchase of their homes, and so to pursue this financial, personal and family security, have been brought into sharp relief by the

² D BENJAMIN BARROS, *Home as a Legal Concept* 46 SANTA CLARA LAW REVIEW 255 (2006).

³ JOAN WILLIAMS, *The Rhetoric of Property* 83 IOWA LAW REVIEW 277 at 326 (1998)

⁴ *Id.*; see also FANNIE MAE, MANNIE MAE NATIONAL HOUSING SURVEY (1992).

⁵ *Id.*, at 10; quoted in Williams, *supra* note 2 at 327.

recent crisis in sub-prime lending.⁶ Rising rates of mortgage delinquency and foreclosure have focused the attention of borrowers, lenders, government agencies, non-profit groups such as the Centre for Responsible Lending and the National Community Reinvestment Coalition, and the national and global media, on the impact of mortgage default for the American housing market, the American economy, and even the global economy. In a press release dated March 29, 2007, Representative Maxine Waters, Chairwoman of the House of Representatives Subcommittee on Housing and Community Opportunity, referred to: ‘...growing evidence about the perils of the subprime lending market and the rise in foreclosures, with estimates as high as 2 million mortgage loan defaults predicted by years’ end.’⁷ The Centre for Responsible Lending have recently estimated that 15.6% of all subprime loans originated since 1998 either have ended or will end in foreclosure and the loss of homeownership,⁸ while a study published by the National Community Reinvestment Coalition in 2006, indicated that minorities, women, and low- and moderate-income borrowers across the US continue to receive a disproportionate amount of high cost loans. In a sample of loans made in 2005, it emerged that women received 37.3 percent of high-cost conventional loans but just 28 percent of the market-rate conventional loans; men, in contrast, received a higher percentage of market-rate loans (66.8 percent) than high-cost loans (60.2 percent).⁹

As the Senate Banking Committee investigate the role of the US Federal Reserve and other agencies in the rise of defaults and foreclosures,¹⁰ the House Committee on Financial Services has responded to the recent crisis by introducing the EXPANDING HOMEOWNERSHIP ACT of 2007, which is intended to ‘revitalize the Federal Housing Administration (FHA), a provider of mortgage insurance to low and moderate income families seeking the American dream of homeownership’.¹¹

⁶ For a general discussion, see NATIONAL COMMUNITY REINVESTMENT COALITION, THE 2005 FAIR LENDING DISPARITIES: STUBBORN AND PERSISTENT II (2006), available online at: http://www.ncrc.org/policy/analysis/policy/2006/2006-05-23_2005HMDAreport.pdf (NCRC Report)

⁷ Available online: http://www.house.gov/apps/list/press/financialsvcs_dem/press033007.shtml

⁸ CENTRE FOR RESPONSIBLE LENDING, SUBPRIME LENDING IS A NET DRAIN ON HOMEOWNERSHIP, (CRL Issue paper No 14, March 27, 2007); available online at <http://www.responsiblelending.org/pdfs/Net-Losership-3-26.pdf>, 2.

⁹ NCRC Report, *supra* note 5.

¹⁰ On March 22 2007, the US Senate Committee on Banking, Housing and Urban Affairs, launched a Hearing on ‘Mortgage Market Turmoil: Causes and Consequence’; details are available online at: http://banking.senate.gov/index.cfm?FuseAction=Articles.Detail&Article_id=125&Month=3&Year=2007

¹¹ *Id.*

The success of such measures remains to be seen, although there may be an interesting contrast to be made with the UK experience of mortgage indemnity insurance in recent years. Mortgage indemnity insurance in the UK functions primarily to protect the creditor, although it is paid for by the debtor, and for this and other reasons, take-up on optional mortgage indemnity insurance in the UK has been poor.¹² Meanwhile the decision of the Federal Reserve Committee to drop the US federal lending rate by 0.5 percentage points highlights the magnitude of current concerns about borrowing, housing debts and their implications for the health of the wider economy.¹³ Sub-prime loans have already led to one million American families losing their homes in the last decade,¹⁴ statistics on foreclosures in New York alone showed an increase of fifty percent in the last year,¹⁵ and as the ripple effect of the crisis in the US mortgage market causes waves across the national, and indeed the global economy,¹⁶ it is apposite to consider the impact of these developments from a broader perspective. While the perilous positions of those caught up in the mortgage lending crisis has received much attention in the media in recent months - with considerable concerns particularly for the exposure of low-income households to increased risks of foreclosure - this article explores some of the underlying legal, theoretical and phenomenological issues associated with default and foreclosure.

II. 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

¹² See, for example, JANET FORD, DEBORAH QUIGLARS, ROGER BURROWS & DAVID RHODES, HOMEOWNERS RISK AND SAFETY-NETS: MORTGAGE PAYMENT PROTECTION INSURANCE (MPPI) AND BEYOND (London, Office of the Deputy Prime Minister, 2004); these policies are discussed in more detail in LORNA FOX, CONCEPTUALISING HOME: THEORIES, LAWS AND POLICIES (2006), pp220-228.

¹³ For discussion in the financial press, see, for example,

http://www.thisismoney.co.uk/news/article.html?in_article_id=424447&in_page_id=2&ct=5

¹⁴ *Supra*, note 7.

¹⁵ NEIGHBORHOOD ECONOMIC DEVELOPMENT ADVOCACY PROJECT, PAYING MORE FOR THE AMERICAN DREAM: A MULTI-STATE ANALYSIS OF HIGHER-COST HOME PURCHASE LENDING (March 2007); available online at http://www.nedap.org/pressroom/documents/2007_Report-2005_HMDA.pdf

¹⁶ In the UK, the Chancellor of the Exchequer recently intervened in an effort to restore consumer confidence in British banking institutions when the shock-waves across the credit economy that have followed the US housing market crisis hit the UK lending institution 'Northern Rock'. As customers queued to withdraw their money outside branches on high streets across the UK, the Government promised that the Bank of England would guarantee the security of all existing deposits; see <http://news.bbc.co.uk/1/hi/business/7000035.stm>

of home has received surprisingly little attention.¹⁷ As laypersons we know that ‘there’s no place like home’, that ‘home is where the heart is’, and we may even believe that the law recognises that ‘a man’s home is his castle’.¹⁸ However, notwithstanding some important recent work on this subject in the US,¹⁹ 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 in the social sciences has stimulated a considerable amount of research, in the form of both empirical studies and theoretical analysis, to explore experiences of home and to analyse the meanings and values which the home represents to its occupiers. Drawing from a vast body of home scholarship across broad social science disciplines, it is possible to identify different types of values associated with home: from ‘home as a financial investment’ to ‘home as a physical structure’; from ‘home as territory’ to ‘home as identity’, and ‘home (especially the owned home) as a cherished socio-cultural indicator. Within home scholarship, these meanings are broadly regarded as positive attributes. For example, in the introduction to their collection ‘Home Environments’, Altman and Werner wrote that:

Homes offer physical amenities that sustain and support the residents, and they are often essential to the very survival of their occupants. Furthermore, homes are important centres for the development and manifestation of certain psychological meanings. Individuals develop identities and regulate privacy in homes; families establish, grow, bond themselves to a unit in homes and often bond themselves to the larger society through their homes. Thus homes are the repository of central and essential psychological and cultural processes.²⁰

¹⁷ See FOX (2006), *supra* note 11, pp33-41.

¹⁸ The expression ‘An Englishman’s home is his castle’ is a misquotation from the decision in *Semayne’s Case* (1604)5 Co Rep 91a at 91b, 77 ER 194 at 195, when Coke CJ commented that: ‘...the house of everyone is to him as his castle and fortress’.

¹⁹ See BARROS, *supra* note 1; MEGAN J BALLARD, *Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy* 56 SYRACUSE LAW REVIEW 277 (2006). For some recent literature in the UK, see FOX (2006), *supra* note 11; LORNA FOX, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?* 29 J.L.SOC’Y 580 (2002); LORNA FOX, *The Idea of Home in Law* 2 HOME CULTURES 25 (2005); and in Israel, AVITAL MARGALIT, *The Value of Home Ownership* 7.

²⁰ IRWIN ALTMAN & CAROL M. WERNER, ‘Introduction’ in HOME ENVIRONMENTS (Irwin Altman & Carol Werner, eds., 1985), preface, at xix.

Yet, until relatively recently, this ‘home’ discourse did not penetrate the legal domain. Indeed, it is only in the last five years or so that legal scholarship has begun to turn its attention towards the conceptualisation of home in law, with the publication of a range of articles focusing on the meanings and values of home, and assessing the legal status of the occupier’s interest in property that is occupied as a home, across different jurisdictions.²¹

III. THE CREDITOR/OCCUPIER CONTEST: US 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. In many states in the US, mortgage lenders can force the sale of the occupier’s home in the event of default through either non-judicial foreclosure, subject to the lender following the procedures set out by the relevant state legislature; or by bringing foreclosure proceedings through the court (judicial foreclosure). Although the procedure for foreclosure varies from state to state, it is important to recognise that, across the board, once the borrower has defaulted the balance of power lies firmly with the lender: in balancing the commercial interests of the creditor against the home interests of the occupier, the very structures put in place by law – perhaps unsurprisingly, in light of the emphasis on the enforceability of contractual agreements - has tended to strike the balance on the side of the creditor.

One option that is open to occupiers seeking to protect their homes is to apply for bankruptcy, with a view to invoking the homestead exemptions, which provide a special protection for the bankrupt’s *home* against actions to force the sale of the property by creditors. The protection afforded to the debtor’s primary residence under homestead legislation varies, but 46 out of 50 states offer some form of homestead exemption to protect equity in the home from the general reach of creditors.²² The amount of the exemption ranges from \$500 in Iowa, to \$200,000 in

²¹ In the United States, see BALLARD, *supra* note 19; BARROS, *supra* note 1; in the United Kingdom, see FOX (2006), *supra*, note 11, FOX (2005) *supra* note 19; and FOX (2002), *supra* note 19; and in Israel, AVITAL MARGALIT, *The Value of Home Ownership* 7 THEORETICAL INQUIRIES IN LAW 467 (2006).

²² The only states offering no exemption are Delaware, New Jersey, Pennsylvania, and Rhode Island.

Minnesota, with only five States²³ offering total exemption. Where a total exemption is offered, the home itself will be preserved, since creditors are barred from forcing the sale of the property. However, where only a partial exemption is available, the creditor may still force a sale if the value of the property is greater than the amount of the exemption. In these cases, if the borrower files for bankruptcy, the bankrupt may receive a share of the equity raised on sale. Nevertheless, the home itself will most likely still be sold.

The links between debtor default, bankruptcy and forced sale of the owner-occupied home have important ramifications in a socio-cultural environment that has placed a premium on owner-occupation. Yet, against a socio-political framework that extols the advantages of home ownership (including low-income home ownership) it is important to temper the benefits and opportunities presented by home ownership with the potential costs and the risks that home buyers are exposed to if they default on their debts.

The nature of the competing claims of creditors and occupiers highlights the values at stake when seeking to balance their competing interests in the disputed property. The creditor, on the one hand, is primarily interested in the capital asset which the property represents. Occupiers, on the other hand, have interests which may include the financial value of the property, but also extend beyond the asset value of the home to include both its function as a shelter and the complex amalgam of social, psychological, cultural and emotional values that attachments to home can foster. Between these claims, it is reasonable to surmise that in states where total exemption is available the importance of the home to occupiers is prioritised over and above the need to ensure that creditors can recoup their debts. On the other hand, in states with weaker homestead exemptions, or none at all, the claims of creditors to recover their debts are prioritised over the interests of occupiers in retaining the property for use and occupation *as a home*.

The impacts of losing one's home for the individual occupier's quality of life, social status and identity, personal and family relationships, and for their emotional, psychological and physical health and well-being have been well-established in housing and health literature.²⁴ While home ownership has been promoted as

²³ Florida, Kansas, Oklahoma, South Dakota, Texas.

²⁴ See, for example, SARAH NETTLETON, *Losing a home through mortgage repossession: a 'new' public health issue* 8 CRITICAL PUBLIC HEALTH 47 (1998); SARAH NETTLETON & ROGER

enhancing the positive meanings of home for occupiers, the extent to which the benefits of home ownership are available to individual occupiers and households is determined according to their ability to sustain home ownership, and thus to avoid foreclosure or bankruptcy. Yet, another important issue is the oft-cited danger that increasing the *home* protection available to occupiers would give rise to a corresponding reduction in the availability of credit for such occupiers, thus increasing their reliance on the sub-prime market.

IV. THE CREDITOR/OCCUPIER CONTEST: UK CONTEXT

A brief analysis of the comparable UK context indicates that while the detail of the law may differ, the overall picture so far as the likely outcome is concerned is substantially similar between both jurisdictions. The legislative provisions and judicial principles that determine the ability of a creditor to bring a successful action for the possession or sale of an occupied home are scattered across different areas of law, ranging from the regulation of co-owned land to mortgages, from bankruptcy law to family law. The form that these proceedings will take depends on several factors: whether the debtor is a single individual or part of a ‘family unit’; whether the action for sale of the home arises in the context of bankruptcy proceedings; whether the debt is secured by way of a mortgage or some other form of proprietary security; whether the disputed property is solely or co-owned; whether the property is occupied as a dwelling house, as a matrimonial home, or as a ‘family home’. Furthermore, the principles by which the outcome of a case will be decided vary from one form of action to another. In some of these contexts, home-type arguments appear to have been taken into account – for example, the status of the occupier as someone who is *in situ* in the property (and, arguably, is discoverable by the creditor),²⁵ or the special

BURROWS, *When a capital investment becomes an emotional loss: the health consequences of the experience of mortgage possession in England* 15 HOUSING STUDIES 463 (2000); ELAINE KEMPSON, ALEX BRYSON & KAREN ROWLINGSON, HARD TIMES? HOW POOR FAMILIES MAKE ENDS MEET, (1994); SUE MIDDLETON, KARL ASHWORTH & ROBERT WALKER, FAMILY FORTUNES: PRESSURES ON PARENTS AND CHILDREN IN THE 1990S (1994); ELAINE KEMPSON, LIFE ON A LOW INCOME (1996).

²⁵ A person who has (a) an equitable interest in the property, (b) is in ‘actual occupation’ of the property, and (c) from whom the creditor has not made an inquiry prior to the transaction can ‘override’ the creditor transaction, thus giving their equitable interest priority over subsequent legal interests such as that obtained by the creditor. Overriding interests are interests that bind a creditor or other purchaser even though they are not registered. Section 70(1)(g) of the LRA 1925 provided that ‘the rights of every person in actual occupation of the land or in receipt of rents and profits thereof,

protection of properties that are designated ‘family homes’.²⁶ Thus, although the English legislature and judiciary have, at various stages and in the context of different legislative frameworks and judicial principles, been required to address specific instances of the conflict between creditors and non-debtor occupiers, these disputes have generally been viewed within their specific contexts and without, generally, giving any explicit consideration to the overall balance struck between the claims of creditors and the interests of occupiers.

Yet, despite the absence of a single coherent policy approach for creditor/occupier conflicts, particularly in relation to the basis of any protection afforded to occupiers vis-à-vis creditors, one overwhelmingly consistent trend can be identified. Regardless of the basis on which occupier’s interests are recognised, the interests of creditors are routinely elevated over those of occupiers. In fact, even when it has appeared, from time to time, that the ‘home’ interest has been recognised as a relevant factor in a contest between creditor and occupier, this has been of little practical value. The decision in *Alliance and Leicester Building Society v Slayford*,²⁷ highlighted the fact that even though the occupier’s interests may prevail over those of the creditor in one discrete context, for example where an occupier who has joint ownership of the property is able to successfully establish the priority of their interest over that of the creditor, or where a spouse has registered a right of occupation, a number of avenues remain open to the creditor. For example, in cases involving non-debtor occupiers, so long as the debt is well secured against the debtor’s interest in the property, a creditor may continue to proceed against the debtor’s ‘share’ of the property. Ultimately, a creditor may instigate proceedings for bankruptcy to ensure satisfaction of the debt and, as indicated below, in the context of bankruptcy the court

save where inquiry is made of such a person and the rights are not disclosed’ were overriding interests. The purpose of this section was to protect the rights of those persons actually living in the property, who might risk losing their interests ‘in the welter of registration’ (*Strand Securities Ltd v Caswell* [1965] Ch 958 at 979, *per* Lord Denning). The emphasis on ‘discoverability’ is emphasised in the current provision (paragraph 2 of Schedule 3 to the Land Registration Act 2002) which conferred overriding status on: ‘...interest[s] belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for... (c) an interest – (i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and (ii) of which the person to whom the disposition is made does not have actual knowledge at that time.’ (emphasis added).

²⁶ See LORNA FOX, *Creditors and the concept of ‘family home’: A Functional Analysis* 25 LEGAL STUDIES 201-227 (2006).

²⁷ [2001] All ER (Comm) 1.

has determined to order sale unless the circumstances are truly exceptional.²⁸ The prevailing approach is that: ‘...where there are debts outstanding, a sale should be ordered’;²⁹ and that: ‘...one must be just before one is generous.’³⁰

This strict approach has also been extended outside the context of bankruptcy, to cases involving ordinary secured creditors. In *Lloyd’s Bank Ltd v Byrne*³¹ and *Barclay’s Bank Plc v Hendricks*³² the court extended the principle that applications for sale ought to be granted, notwithstanding opposition from a co-owning occupier, unless the circumstances were exceptional. Even after the enactment of the trusts of Land and Appointment of Trustees Act 1996, which purported to recognise the importance of ‘use value’ in co-owned domestic properties, the courts have, with little exception,³³ continued to favour sale over retention of property when balancing commercial claims with home interests.³⁴ For instance, in *TSB Bank plc v Marshall*,³⁵ Judge Wroath exercised his discretion to order the sale of a matrimonial home under section 14 on the grounds that: ‘...where there is a conflict between the chargee’s interest in a matrimonial home and the interests of an innocent spouse, the interest of the chargee will prevail except where there are exceptional circumstances.’³⁶

In cases involving bankruptcy, the balance has remained firmly weighed towards the creditor and sale. The Trusts of Land and Appointment of Trustees Act amended the Insolvency Act 1986 to extend the protection ostensibly provided by section 336 to co-owned land. However, section 335A also replicates the presumption that when an application for sale is brought more than one year after bankruptcy proceedings are instigated, the court must order sale unless the circumstance is exceptional, and the court has accepted that the circumstances are exceptional in only the most extreme of cases. In fact, to date it has generally only

²⁸ The trustee in bankruptcy’s statutory duty to realise the debtor’s assets in favour of his creditors has led the English courts to conclude that its application for sale should generally be acceded to; *In re McCarthy, A Bankrupt*, [1975] 1 WLR 807 at 808; .

²⁹ *Re Lowrie* [1981] 3 All ER 353 at 355-6, *per* Walton J.

³⁰ *Id.*, at 284.

³¹ [1993] 1 FLR 369.

³² [1996] 1 FLR 258.

³³ In *Edwards v Lloyd’s TSB Bank* [2004] EWHC 1745, the court adopted a much more ‘home-oriented approach’ to the issue of sale where the welfare of minor occupiers was in issue; see FOX, (2006) above note 14, chapter 9.

³⁴ See for example, *TSB Bank plc v Marshall* [1998] 39 EG 308; *Bank of Ireland Home Mortgages Ltd v Bell* [2001] 2 All ER (Comm) 920; *First National Bank plc v Achampong* [2003] EWCA Civ 487.

³⁵ *Id.*

³⁶ *Id.*

been possible to delay the realisation of the matrimonial home in bankruptcy proceedings where an occupier of the property is suffering from a serious illness. In *Judd v Brown*,³⁷ the court held that: ‘...a sudden and serious attack of cancer was an exceptional event...and was clearly distinguishable from problems such as organising substitute housing or rearranging children’s schooling.’³⁸

In *Bank of Ireland Home Mortgages Ltd v Bell*,³⁹ the Court of Appeal set out the policy to be followed in respect of applications for sale under the Trusts of Land and Appointment of Trustees Act 1996, and indicated that the weight attached to the interests of the creditor continues to dominate the court’s analysis. The court’s enduring pro-creditor bias was demonstrated by Gibson LJ’s comments that:

...a powerful consideration is and ought to be whether the creditor is receiving proper recompense for being kept out of his money, repayment of which is overdue. In the present case it is plain that by refusing sale the judge has condemned the bank to go on waiting for its money with no prospect of recovery from Mr and Mrs Bell and with the debt increasing all the time, that debt already exceeding what could be realised on a sale. That seems to me to be very unfair on the bank.⁴⁰

This approach typifies the general ethos of English law in the context of creditor possession actions,⁴¹ and highlights the strength of the pro-creditor policy.

V. THE MEANING OF THE OWNED HOME

Although the rise in scholarly analysis of the meanings and value of home is relatively recent, the impulse to investigate the relationship between occupiers and the properties in which they reside is rooted in a long-established and instinctive sense that *home* is a positive phenomenon. From the philosophical foundations of home as

³⁷ [1998] 2 FLR 360.

³⁸ See also *Cloughton v Charalamabous* [1999] 1 FLR 740, where the bankrupt’s wife suffered from renal failure and chronic osteoarthritis, which imposed severe restrictions on her mobility; and *Re Raval (A Bankrupt)* [1998] 2 FLR 718, where the court allowed a postponement due to the wife’s paranoid schizophrenia, notwithstanding that the condition was long term and of indeterminate duration. The court took account of the impact which ‘adverse life events’ such as moving to less suitable accommodation could have on Mrs Raval’s health, and postponed the order for a year to enable suitable alternative accommodation to be found.

³⁹ [2001] 2 All ER (Comm) 920.

⁴⁰ *Id.*

⁴¹ See, for example, *Re A: A v A* [2002] EWHC 611; *First National Bank plc v Achampong* [2003] EWCA Civ 487.

a dwelling place that enables the occupier to become oriented in the world,⁴² to the five clusters of contemporary home meanings based on empirical and theoretical research, identified by the author in *CONCEPTUALISING HOME*: home as financial asset; home as physical structure; home as territory; home as identity; and home as socio-cultural unit;⁴³ *home* discourse has generally presumed that the home is a source of positive meanings, attachments and experiences for occupiers. Furthermore, the expansion of home ownership – including low-income home ownership - has been relentlessly pursued in many jurisdictions, including the US, on the presumption that owner-occupiers experience considerable and incontrovertible benefits compared to renters. The additional social and economic benefits that, according to political rhetoric, are associated with owning one's own home – especially for low-income households - have been extensively analysed in recent years.⁴⁴ 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

⁴² See, for example, Heidegger's philosophy of dwelling: MARTIN HEIDEGGER, *BAUEN, WOHNEN, DENKEN* (1951) ['Building Dwelling Thinking'] and the 1951 lecture ...*DICHTERISCH WOHNEN DER MENSCH* ['...Poetically man dwells...'], translated by ALBERT HOFSTADTER, *POETRY, LANGUAGE, THOUGHT* (1971); MARTIN HEIDEGGER, *SEIN UND ZEIT* (1927); ('Being and Time'), translated by JOHN MACQUARRIE & EDWARD ROBINSON (1962). Bachelard also described a fundamental need to take shelter from the world within the home, and highlighted the role of the home as a place of safety, security and warmth: '[b]efore he is "cast into the world"...man is laid in the cradle of his house...Life begins well, it begins enclosed, protected, all warm in the bosom of the house'; GASTON BACHELARD, *THE POETICS OF SPACE* (1964), at 7. This metaphor of home as a dwelling place also has connotations of family: references to the cradle and the bosom conjure up images of the home as a motherly body. For a philosophical perspective on the relationship between home and self-identity, see generally, JEFF E. MALPAS, *PLACE AND EXPERIENCE: A PHILOSOPHICAL TOPOGRAPHY* (1999); on the territoriality of home, see EDWARD S. CASEY, *GETTING BANK INTO PLACE – TOWARD A RENEWED UNDERSTANDING OF THE PLACE-WORLD* (1993).

⁴³ FOX (2006), above, note 11.

⁴⁴ For a detailed discussion of the promotion of low income home ownership in the US, see *LOW INCOME HOMEOWNERSHIP: EXAMINING THE UNEXAMINED GOAL* (Nicholas P. Retsinas & Eric S. Belsky, eds., 2002); and several reports published by Harvard University's Joint Centre for Housing Studies as part of its Low-Income Homeownership Working Paper Series: see, for example, MARK DUDA & ERIC S. BELSKY, *THE ANATOMY OF THE LOW-INCOME HOMEOWNERSHIP BOOM IN THE 1990S* (2001), MICHAEL COLLINS, DAVID CROWE & MICHAEL CARLINER, *EXAMINING THE SUPPLY-SIDE CONSTRAINTS TO LOW-INCOME HOMEOWNERSHIP* (2001); DONALD R. HAURIN, TOBY L. PARCEL & R. JEAN HAURIN, *THE IMPACT OF HOMEOWNERSHIP ON CHILD OUTCOMES* (2001); WILLIAM M. ROHE, SHANNON VAN ZANDT & GEORGE MCCARTHY, *THE SOCIAL BENEFITS AND COSTS OF HOME OWNERSHIP: A CRITICAL ASSESSMENT OF THE RESEARCH* (2001); see also GEORGE MCCARTHY, SHANNON VAN ZANDT & WILLIAM M. ROHE, *THE ECONOMIC COSTS AND BENEFITS OF HOME OWNERSHIP: A CRITICAL ASSESSMENT OF THE RESEARCH* (2001). ROGER BURROWS AND STEVE WILCOX, *HALF THE POOR: HOME OWNERS WITH LOW INCOMES* (2000) highlighted the on-going difficulties experienced by low-income home owners in the UK, particularly in light of the low level of financial support currently afforded by the government for home-owning households living in poverty.

processes⁴⁵ is compounded by the additional cultural value attached to homes by owner occupiers.⁴⁶ Culturally, home ownership has been perceived as conferring greater freedom and independence, and owner occupation has been linked, by some commentators, with a greater sense of control within the home territory, and increased ontological security.⁴⁷ The status conferred by home ownership has been linked to an occupier's self-identity.⁴⁸ Even when considering the meaning of the home as a physical structure, which may ostensibly appear to be neutral across tenures, it has been suggested that the value that the occupier puts upon the physical structure of the house is enhanced by ownership.⁴⁹

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 idealised vision of home. To this end, it is significant to recognise that, alongside the benefits of widespread home ownership, a series of costs – both social and economic - have also been identified.⁵⁰ The increase in risk and the potential costs associated with home ownership are brought into particularly stark relief by the rise in *unsustainable* home ownership, particularly amongst low-income households, as highlighted by the current crisis in the US sub-prime mortgage market. 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 sub-prime mortgages – predominately minorities, women, and low- and middle-income borrowers⁵¹ - 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

⁴⁵ ALTMAN & WERNER, *supra*, note 20 at xix.

⁴⁶ JANET M. FITCHEN, *When Toxic Chemicals Pollute Residential Environments: The Cultural Meanings of Home and Home Ownership* 48 HUMAN ORGANISATION 313 (1989) at 318.

⁴⁷ See SANDY G. SMITH, *The essential qualities of a home* 14 JOURNAL OF ENVIRONMENTAL PSYCHOLOGY 31 (1994); PETER SAUNDERS, A NATION OF HOME OWNERS (1990); MARJORIE BULOS & WAHEED CHAKER, *Sustaining a sense of home and personal identity in THE HOME: WORDS, INTERPRETATIONS, MEANINGS AND ENVIRONMENTS* (David Benjamin, ed., 1995).

⁴⁸ 'Owning one's own home grants membership in a respected category of people in part because it demonstrates one's commitment to the work ethic. The owned home, the largest single expenditure most people ever make, requires many years of earning and saving, and represents a long-term commitment to the work ethic.'; FITCHEN, *supra*, note 46, at 320.

⁴⁹ See for example, CRAIG GURNEY, *Lowering the Drawbridge: A Case Study of Analogy and Metaphor in the Social Construction of Home-Ownership* 36 URBAN STUDIES 1706 (1999); CRAIG GURNEY, *Pride and Prejudice: Discourses of Normalisation in Public and Private Accounts of Home Ownership* 14 HOUSING STUDIES 163 (1999).

⁵⁰ See, for example, ROHE ET AL, *supra* note 44; MCCARTHY ET AL, *supra*, note 44.

⁵¹ NCRC Report, *supra* note 6, 3.

of their greater need for the positive values of home (security, safety, wealth creation, privacy, identity and so on) because of lower income levels,⁵² for children,⁵³ for the elderly,⁵⁴ for those who are physically or mentally disabled,⁵⁵ or for minorities.⁵⁶ Empirical studies have also suggested that when a person's economic and social resources are limited, the home and neighbourhood environment play a critical role in that person's life chances and identity.⁵⁷ If, as political rhetoric has suggested, *ownership* of one's home inherently enhances the occupier's ability to experience the positive values of home, then the growth of home ownership would support these positive meanings.

While for the 'successful' home owner, a range of additional 'benefits' – freedom, continuity, security – are associated with the security of tenure which is thought to flow from owner-occupation, for the occupier who is threatened with the loss of their home through foreclosure or bankruptcy, the converse applies, and it is low-income households - and others who are forced to rely on subprime lending - who

⁵² See, for example, LEE RAINWATER, *Fear and the house-as-haven in the lower class* 32 JOURNAL OF THE AMERICAN INSTITUTE OF PLANNERS 23 (1966).

⁵³ See, for example, ROSS D. PARKE, *Children's Home Environments: Social and Cognitive Effects*, in CHILDREN AND THE ENVIRONMENT (Irwin Altman & Joachim F. Wohlwill, eds., 1978); LOUISE CHAWLA, *Childhood Place Attachments*, in PLACE ATTACHMENTS (Irwin Altman & Setha M. Low, eds., 1992); LOUISE CHAWLA, *Home is Where You Start From: Childhood Memory in Adult Interpretations of Home*, in THE MEANING AND USE OF HOUSING (Ernesto G. Arias, eds., 1993); PIA CHRISTENSEN & MARGARET O'BRIEN, CHILDREN IN THE CITY: HOME, NEIGHBOURHOOD AND COMMUNITY (2003).

⁵⁴ PIA C. KONTOS, *Resisting Institutionalization: Constructing Old Age and Negotiating Home* 12 JOURNAL OF AGING STUDIES 167 (1998); JULIANA MANSVELT, *Working at Leisure – Critical Geographies of Ageing* 29 AREA 289 (1997); GRAHAM MOWL, RACHEL PAIN & CAROL TALBOT, *The ageing body and homespace* 32 AREA 189 (2000).

⁵⁵ The issues associated with access to, and support of, homeownership for people with disabilities have attracted considerable critical attention: see, for example, SUELLEN GALBRAITH, *A Home of One's Own*, in THE FORGOTTEN GENERATION: THE STATUS AND CHALLENGES OF ADULTS WITH MILD COGNITIVE LIMITATIONS (Alexander J. Tymchuck, K. Charlie Lakin & Ruth Luckasson, eds., 2001); E HEPP & C SOPER, *One family's story of homeownership* 15 JOURNAL OF VOCATIONAL REHABILITATION 79 (2000); JAY KLEIN, *The history and development of a national homeownership initiative* 15 JOURNAL OF VOCATIONAL REHABILITATION 59 (2000); JAY KLEIN & MERRILL BLACK, EXTENDING THE AMERICAN DREAM: HOME OWNERSHIP FOR PEOPLE WITH DISABILITIES (1995); JAY KLEIN & DEBRA NELSON, *Homeownership for people with disabilities: The state of the states in 1999* 15 JOURNAL OF VOCATIONAL REHABILITATION 67 (2000); JAY KLEIN, B. BOYD WILSON & DEBRA NELSON, *Postcards on the Refrigerator: Changing the power dynamic in housing and assistance*, in PART OF THE COMMUNITY: STRATEGIES FOR INCLUDING EVERYONE (Jan Nisbet & David Hagner, eds., 2000); JOHN O'BRIEN, *Down stairs that are never your own: Supporting people with developmental disabilities in their own homes* 32 MENTAL RETARDATION 1 (1994).

⁵⁶ The positive relationship between home, gender and race was explored by BELL HOOKS (1990) *supra*, note 85.

⁵⁷ SUSAN SAEGERT, *The role of housing in the experience of dwelling* in Altman & Werner (eds), *supra*, note 20, pp289-90; see also ALVIN L. SCHORR, SLUMS AND SOCIAL INSECURITY (1964).

experience the greatest risk of possession actions. It is ironic indeed if those for whom *home* is most salient are also most vulnerable to the risk of losing their homes through default and foreclosure.⁵⁸

The relative analytical neglect of *home* interests in legal discourse (until fairly recently), as well as the fact that – unless there is a total homestead exemption - the commercial claims of creditors tend to prevail in possession actions, conforms to a classic market economy model of real property law as a discipline that favours: ‘...self-interested and rational individuals in the market place, overrid[ing] the needs of those who are different: weaker or poorer, or in a different way defined as Other.’⁵⁹ It is interesting to note that 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.⁶⁰ This is substantiated by evidence that, as the home ownership sector has expanded to include low-income households, these occupiers are disproportionately exposed to the risk of losing their homes through default and foreclosure.⁶¹

⁵⁸ Low-income is an obvious issue in relation to vulnerability to repossession: see, for example, PETER MCCARTHY & BOB SIMPSON, *ISSUES IN POST-DIVORCE HOUSING* (1991) while the high proportion of low-income households in the owner occupied sector emphasises the extent of the potential for default. One study suggested that for low-income home owners, the social and economic value of ownership was mitigated by the fact that ownership increases financial and psychological stress among families living on the economic margin: DANNY BALFOUR & JANET SMITH, *Transforming lease-purchase housing programs for low-income families: Towards empowerment and engagement* 18 *JOURNAL OF URBAN AFFAIRS* 173 (1996). The experiences of children in the context of repossession actions are considered in SARAH NETTLETON, *Losing a Home through Mortgage Repossession: the Views of Children* 15 *CHILDREN AND SOCIETY* 82 (2001). Elderly people may be rendered particularly vulnerable as occupier for various reasons, including health problems and financial circumstances, at a time when ‘home’ can play a critical role in maintaining their sense of personal identity and independence: see, for example, ANN DUPUIS & DAVID C. THORNS, *Meanings of Home for Older Home Owners* 11 *HOUSING STUDIES* 485 (1996); ANN DUPUIS & DAVID C. THORNS, *Home, Home Ownership and the Search for Ontological Security* 46 *THE SOCIOLOGICAL REVIEW* 24 (1998). Race also appears to have implications on the availability, and sustainability of owner occupation: see, for example, JOHN W. FRASIER, FLORENCE M. MARGAI & EUGENE TETTLEY-FIO, *RACE AND PLACE: EQUITY ISSUES IN URBAN AMERICA* (2003); DALTON CONLEY, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA* (1999), WENDY WEBSTER, *IMAGINING HOME: GENDER, ‘RACE’ AND NATIONAL IDENTITY, 1945-64* (1998).

⁵⁹ KATE GREEN, *Being Here – What a Woman Can Say About Land Law* in *FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW* (Anne Bottomley, ed., 1996) at 93-94.

⁶⁰ IRIS MARION YOUNG, *House and Home: Feminist Variations on a Theme*, in *RESISTANCE, FLIGHT, CREATION: FEMINIST ENACTMENTS OF FRENCH PHILOSOPHY* (Dorothea Olkowski, ed., 2000), 68-70.

⁶¹ A range of factors render low-income households more vulnerable to default. These include higher risk and lower, and less certain, returns on housing investment; links between housing and labor markets which increase the likelihood that local job losses will be coupled with house price declines; the likelihood that low income households ‘will have lower cash reserves to help them weather an

Furthermore, it has been argued that the financial and psychological stresses experienced by low-income home buyers, not only by the final eventuality of losing their home in a foreclosure, but by the increased levels of risk that are clearly prevalent in the current mortgage market, may outweigh any social and economic value to be gained from having entered the homeowner sector.⁶²

This analysis is, crucially, embedded in the socio-cultural significance of homeownership for American society, with a strong emphasis on *ownership* for delivery of the benefits of *home*. The political ideology of home ownership has been fostered through numerous government initiatives which have promoted, and which continue to promote the expansion of home ownership. In fact, even in the face of the current crisis in mortgage default, the government has responded with the EXPANDING HOMEOWNERSHIP ACT 2007. These 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. This has important implications in relation to the meanings of home for owner-occupiers, as the relationships between home, homeownership and affordability have highlighted the need for financial security to ensure that homeownership – and, by extension, positive *home* meanings - is successful and sustainable.⁶³ The following section considers the significance of homeownership for the availability of *home* meanings against this backdrop.

VI. HOME OWNERSHIP AND AFFORDABILITY

interruption in income or unforeseen expenses’; and the increased risk that follows from better access to credit; MCCARTHY ET AL, *supra*, note 44, pp31-32.

⁶² DANNY BALFOUR & JANET SMITH, *Transforming lease-purchase housing programs for low-income families: Towards empowerment and engagement* 18 JOURNAL OF URBAN AFFAIRS 173 (1996); see also LEE RAINWATER, *Fear and the house-as-haven in the lower class* 32 JOURNAL OF THE AMERICAN INSTITUTE OF PLANNERS 23 (1966).

⁶³ One of the most striking accounts of government rhetoric concerning the function of home ownership in binding the citizen to the state can be found in then-President Andrew Johnson’s treatise in support of the Homestead Act in 1850 – historically one of the most significant triggers for the expansion of home ownership in the US. The twin aims of the homestead legislation were to enable more people to own their own homes, and to protect those homes against creditor possession actions. In his speech to introduce the first Homestead Act, Johnston predicted that, by facilitating the ownership of land amongst the population at large, the Act would: ‘...create the strongest tie between the citizen and the government.’; United States Congress, CONGRESSIONAL GLOBE Appendix, June 20, 31st Cong., 1st Sess., 1850, Pt 3, p951; see PETER MARCUSE, *The ideologies of Ownership and Property Rights*, in HOUSING FORM AND PUBLIC POLICY IN THE UNITED STATES (Richard Plunz, ed., 1980); for more a recent critical analysis of the relentless promotion of home ownership in the US, see RETSINAS & BELSKY(eds), *supra*, note 44.

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

A significant shift in home ownership affordability has occurred since the mid-1970s for less well educated and lower income households. Falling real wages have combined with rising constant quality real home prices to make lower quality homes, which were affordable in 1974, unaffordable to many comparable households in the 1990s. This problem promises to worsen in the near term as real wages of low skilled workers continue to erode in an increasingly global economy and as ever higher quality homes continue to filter down the housing stock. Virtually no new housing is being produced that is of low enough quality to be affordable to low skill households who want to own.⁶⁴

Much of the government’s attention has been focused on the consequences of affordability for *access* to homeownership: one study published by the Department for Housing and Urban Development (HUD) in 2005 indicated that while homeownership rates are currently at historically high levels for all sections of the US 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.’⁶⁵ This study identified several factors accounting for the home ownership gap, including not only race and ethnicity, but also differences due to income, wealth, marital status and age of household. Yet, while concerns about home ownership rates have triggered major policy initiatives under both the Clinton and Bush

⁶⁴ JOSPEH GYOURKO, *The Changing Strength of Socioeconomic Factors Affecting Home Ownership in the United States: 1960-1990* 45 SCOTTISH JOURNAL OF POLITICAL ECONOMY 466 (1998) at 487.

⁶⁵ CHRISTOPHER E. HERBERT, DONALD R. HAURIN, STUART S. ROSENTHAL & MARK DUDA, HOMEOWNERSHIP GAPS AMONG LOW-INCOME AND MINORITY BORROWERS AND NEIGHBOURHOODS (2005), available online at <http://www.huduser.org/Publications/pdf/HomeownershipGapsAmongLow-IncomeAndMinority.pdf>. The Executive Summary to this report went on to state that: ‘[a]s of 2004, the white homeownership rate was 76 percent while African-American and Hispanic homeownership rates remained below 50 percent, and the Asian rate was 60 percent. At the same time households with very-low income had a homeownership rate that was 37 percentage points below the rate for high-income households.’; at v.

administrations to increase access to home ownership,⁶⁶ it is also important to note that it is not only access, but the *sustainability* of home ownership that will have a significant impact on national home ownership rates over the medium- and long-term.⁶⁷

Although those who step onto the housing ladder are colloquially known as ‘home owners’, many are more accurately described as being in the *process* of buying their homes, subject to a mortgage: as ‘home buyers’ rather than ‘home owners’. For the vast majority of households, the purchase of a dwelling house is only possible with funding from loan capital, which is usually secured against a mortgage over the property. In a standard repayment mortgage, as the borrower makes repayments on the mortgage loan, their equity in the property increases until the mortgage is discharged and the ‘home buyer’ finally becomes an outright owner.⁶⁸ Yet, while the journey from initial purchase to outright ownership will usually require periodic payments over several years, in socio-cultural terms home buyers obtain the badge of ‘owner occupier’ as soon as the purchase is made. Nevertheless, it is important to recognise that the status associated with owner occupation, and the putative benefits of home ownership, are only as stable as the mortgagor’s ability to make repayments on debts secured against the property. Successful home ownership – including the benefits associated with acquiring positive *home* meanings as an owner – is clearly dependent on income levels. Similarly, the negative aspects of *home* are strongly

⁶⁶ President Clinton’s policy for increasing home ownership rates was the *National Homeownership Strategy*. In a letter to Henry Cisneros (then-Secretary of HUD) dated November 3, 1994, President Clinton wrote that: ‘Homeownership is the American Dream. Our nation has embraced this dream since the National Housing Act of 1949 made ‘a decent home and a suitable living environment for every American family’ a goal of national policy. The United States is the first major industrial country to make homeownership a reality for a majority of its people. Thanks to effective cooperation between industry and government, the doors of homeownership have been opened to millions of families in the past 45 years. However, since 1980, the national homeownership rate has been declining. Reversing this trend is vital to American families, to communities, and to our economy. Homeownership strengthens families and stabilizes communities. It encourages savings and investment and promotes economic and civic responsibility. Expansion of homeownership is an integral part of the Administration’s economic plan. It spurs new investment, strengthening the economy and creating jobs. A stronger economy in turn enables more people to buy homes. For all these reasons, it is in our national interest to expand homeownership opportunities for all Americans.’; quoted at http://www.globalurban.org/housing_us.htm. See YONGHENG DENG & STUART GABRIEL, *Risk-Based Pricing and the Enhancement of Mortgage Credit Availability among Underserved and Higher Credit-Risk Populations* 38 JOURNAL OF MONEY, CREDIT, AND BANKING 1431 (2006).

⁶⁷ See, for example, DONALD R. HAURIN & STUART R. ROSENTHAL, *THE SUSTAINABILITY OF HOMEOWNERSHIP: FACTORS AFFECTING THE DURATION OF HOMEOWNERSHIP AND RENTAL SPELLS* (2004); available online at <http://www.huduser.org/publications/affhsg/homeownsustainability.html>.

⁶⁸ The position in relation to interest-only or endowment mortgages is obviously different, since the borrower does not accumulate equity in the property itself throughout the mortgage term, but rather accumulates payments in a fund, which may expose the borrower to additional layers of market risk.

associated with financial insecurity, default and loss of one's home at the hands of a creditor.

The sustainability of home ownership for low-income households was explored in a recent study by Haurin and Rosenthal, which found that while home ownership *was* sustainable for 'typical' low-income households a number of factors rendered some households 'atypical', and:

[a]mong the demographic variables, being (and remaining) married, greater education and cognitive ability, a smaller family size, and greater age of the respondent all reduce the likelihood of terminating a spell of ownership. Race, particularly being Black, substantially increases the probability of terminating a spell of homeownership.⁶⁹

This study also noted, unsurprisingly, that low-income households experienced a higher risk of losing their homes at the hands of a creditor.⁷⁰ 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 home ownership. Such changes can, for example, result from a change in the number of earners and the termination of marriage.⁷¹ Although this study did not explicitly focus on gender in the termination of home ownership, it did emphasise the vulnerability of some households, particularly lower-income households, to the risk of repossession.

The idea that owning (or buying, subject to a mortgage) one's own home enhances feelings of security, including ontological security, has been reflected in the political ideology of home ownership, as policies promoting home ownership have suggested that owner-occupation – as opposed to renting – enables occupiers to develop a stronger sense of autonomy and control in relation to their homes.⁷² The

⁶⁹ DONALD R. HAURIN & STUART S. ROSENTHAL, *THE GROWTH OF EARNINGS OF LOW-INCOME HOUSEHOLDS AND THE SENSITIVITY OF THEIR HOMEOWNERSHIP CHOICES TO ECONOMIC AND SOCIO-DEMOGRAPHIC SHOCKS* (2005), Executive Summary at iv.

⁷⁰ The authors noted that: '[b]ecause we expect low-income respondents to have stretched their income when committing to a mortgage payment, this relationship of decreasing income and loss of ownership is not surprising.'; *id.*, at 12.

⁷¹ The authors noted that: '[o]f 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.

⁷² See for example, ROBERT M. RAKOFF, *Ideology in Everyday Life: The Meaning of the House* 7 *POLITICS AND SOCIETY* 85 (1977); SANDY G. SMITH, *The essential qualities of a home* 14 *JOURNAL OF ENVIRONMENTAL PSYCHOLOGY* 31 (1994); PETER SAUNDERS, *A NATION OF HOME OWNERS* (1990); MARJORIE BULOS & WAHEED CHAKER, *Sustaining a sense of home and personal identity* in *THE HOME: WORDS, INTERPRETATIONS, MEANINGS AND*

argument that home ownership provides a means by which to achieve greater ontological security was also a central element in Saunders' analysis of policies promoting owner-occupation, and a mainstay of his overwhelming support for the expansion of the owner-occupied sector in the UK. In *A Nation of Home Owners*,⁷³ Saunders argued that home ownership enhanced the positive meanings of home for occupiers; that 'most people...would prefer to own their homes rather than rent them';⁷⁴ that '...owner-occupation is the preferred tenure of most ordinary people'; and that: '[t]he evidence of an overwhelming aspiration to own is, of course, too compelling to deny'.⁷⁵ Furthermore, Saunders argued that although: '[t]here is a literal sense in which the desire for home ownership cannot be 'natural', for owner-occupation is a distinct cultural-legal phenomenon of recent origin...';⁷⁶ the desire to own one's own home satisfies a natural desire to possess, and enhances feelings of security, privacy, and the sense of self and self-identity.⁷⁷ For Saunders, *ownership* very definitely enhanced the experience of *home*, in respect of both 'the house' (as financial investment and physical structure) and the 'x-factor' meanings of home (as territory, as identity and as socio-cultural unit). This was evident in his account of the two principal advantages of owning one's own home:

One is financial – buying is seen as cheaper in the long run, or rent is seen as a waste of money, or rising house prices are seen as a means of saving for the future or accumulating capital. The other has to do with the sense of independence and autonomy which ownership confers – the freedom from control and surveillance by a landlord and the ability to personalize the property according to one's tastes.⁷⁸

Saunders claimed that the meanings of home - both economic and social – were enhanced by home ownership. In short, he claimed that: '...owners were more likely to identify their house as *home*.'⁷⁹ However, Saunders' unmitigated enthusiasm

ENVIRONMENTS (David Benjamin, ed., 1995). See, however, arguments to the contrary in PETER MARCUSE, *The Ideologies of Ownership and Property Rights* in HOUSING FORM AND PUBLIC POLICY IN THE US (R Plunz, ed., 1980); CRAIG GURNEY, THE MEANING OF HOME IN THE DECADE OF OWNER OCCUPATION: TOWARDS AND EXPERIENTIAL PERSPECTIVE (1990).

⁷³ SAUNDERS, *id.*

⁷⁴ *Id.*, at 3.

⁷⁵ *Id.*, at 65.

⁷⁶ *Id.*, p69.

⁷⁷ *Id.*, p80.

⁷⁸ *Id.*, p84.

⁷⁹ *Id.*, p272, emphasis added.

for the benefits of home ownership has attracted considerable criticism,⁸⁰ not least for his failure to recognise the ambiguities of home, for example, by balancing the benefits of home ownership against the costs for occupiers who are unsuccessful and lose their homes in possession actions.

One of the central controversies raised by housing scholars throughout the 1980s and 1990s has been the extent to which home meanings are regarded as ‘tenure-specific’:⁸¹ specifically, whether the meanings and values of *home* are enhanced through ownership, so that owner occupiers have a superior *home* experience, compared to renters. This question is clearly significant when it comes to evaluating housing policies that promote home ownership, and, by extension, residualise the rental sector. These issues have fundamental importance for housing policy choices.

The focus of the paper is on the meanings of home in the context of creditor possession actions, and for home occupiers facing possession proceedings with a creditor, the relative merits of renting are not really the issue. The pertinent issues for owner-occupiers facing default and the prospect of losing their home at the hands of a creditor, are the extent of any protection afforded through government welfare provision, and the weight attached to their home interests, relative to the creditor’s commercial claim in the context of legal proceedings. Nevertheless, for critical analysis of the treatment of *home* interests in law, the debate surrounding home meanings across tenures is clearly important. Although the financial and other consequences of possession actions are serious and wide-reaching, impacting on not only the occupier and the creditor, but on central and local government, health services, the labour market and the housing market, legal policy has been forged on the basis of *promoting* but not *protecting* home ownership. The incongruity of policies that promote the expansion of home ownership, yet do not recognise the need to protect the owner-occupier’s home interest against a creditor possession actions, is

⁸⁰ See, for example, GURNEY, *supra*, note 72; LYN RICHARDS, *NOBODY’S HOME: DREAMS AND REALITIES IN A NEW SUBURB* (1990).

⁸¹ See, for example, RAY FORREST, *The Meaning of Home Ownership* 1 *SOCIETY AND SPACE* 205 (1983); JIM KEMENY, *THE MYTH OF HOME OWNERSHIP: PRIVATE VERSUS PUBLIC CHOICES IN HOUSING TENURE* (1981); RICHARDS, *id*; Gurney, *supra* n72; KIM DOVEY, *Model Houses and Housing Ideology in Australia* 7 *HOUSING STUDIES* 177 (1992); SAUNDERS, *supra* n66; ANN DUPUIS & DAVID C. THORNS, *Home, Home ownership and the search for ontological security* 48 *SOCIOLOGICAL REVIEW* 24 (1998). On the question of home ownership and the meanings of home for women, see JANE DARKE, *Women and the meaning of home*, in ROSE GILROY & ROBERTA WOODS (eds) *HOUSING WOMEN* (1994); CRAIG GURNEY, ... “*Half of me was satisfied*”: *making sense of home through episodic ethnographies* 20 *WOMEN’S STUDIES INTERNATIONAL FORUM* 373 (1997).

highlighted by housing policy debates concerning the meanings of the owned home in the United Kingdom.

It is important to emphasise that across the spectrum of academic analyses on the meanings and values of the owned home – from Kemeny to Saunders – the significance of *home per se* is implicitly recognised. Where these analyses depart from one another, is on the question of whether the ‘owned home’ creates a more meaningful relationship between the occupier and the dwelling place than another home, for example, a rented property. Furthermore, some commentators, such as Gurney, have sought to take account of the costs, as well as the benefits, of home ownership, when considering home meanings across tenure. Gurney highlighted the importance of tempering the perceived benefits of home ownership against the risks of losing one’s home through possession actions. He claimed that: ‘...whilst owner occupation may represent a chance to carve out feelings of niche and belonging for some, for others it represents a housing situation of financial uncertainty, worry and lack of control.’⁸² In his assessment of the relative advantages of home ownership and renting for the achievement of positive home meanings, Gurney sought to take account of both the benefits and the costs of each tenure, rather than limiting his analysis to the positive aspects of home ownership.

Marcuse has argued that, as a result of the socio-cultural significance of home ownership in jurisdictions which have strongly promoted its benefits over other tenures, owner-occupation now: ‘...has a mystique, independent of any real difference it makes legally or economically.’⁸³ Similarly, in Kemeny’s seminal analysis of *The Myth of Home-Ownership*,⁸⁴ he emphasised the central significance of the individual rewards of home ownership in government rhetoric, which was reflected in the ‘almost mystical reverence for home-ownership’ presented in government ‘eulogies’.⁸⁵ In fact, Kemeny argued that it was the portrayal of home ownership in these terms that embedded ‘built in prejudices and assumptions’ and created ‘misconceptions’ regarding the superiority of home ownership over other forms of tenure. The rhetoric employed in policy makers’ descriptions of home ownership – specifically, the use of the words independent, control, shelter, security, steady saving and capital asset – conjures up many of the positive images associated with the home

⁸² GURNEY, *supra* n72, p8.

⁸³ MARCUSE, *supra* n72, p4.

⁸⁴ KEMENY, *supra* n81.

⁸⁵ *Id*, p11.

as a financial investment, home as shelter, and home as a valued territory in which the occupiers enjoy security, autonomy and control. Rather, Kememy claimed that the vigorous promotion of home ownership had restricted real choice for individual households, had led to greater indebtedness for individual households than private renting,⁸⁶ and was more expensive to manage and maintain than public renting.⁸⁷ Kemeny also claimed that: '[t]he high economic cost of homeownership is paralleled by a high social cost.'⁸⁸

The case for taking account of the costs of unsuccessful home ownership for individuals at a general policy level is brought into sharp relief by evidence that, in the contemporary climate of home ownership, when debtors default on repayments – rendering their ownership 'unsustainable' – this is often attributable to extrinsic economic factors, rather than 'individual failure'. As Hunter and Nixon wrote in relation to the last significant housing recession in the UK:

...the increasing propensity to arrears that arose during the late 1980s cannot simply be seen in the context of individual failures. Several structural factors are also involved, some relating directly to government policies that precipitated the individual circumstances.⁸⁹

Similarly, in the current climate of mortgage lending – whether in the US or in the UK - default by debtors, particularly sub-prime debtors, cannot be viewed as a personal failure by the debtor but must be evaluated in light of the bigger picture. This re-casts the experiences of those who are rendered vulnerable to creditor possession action, displacing the instinctive legal assumption that debtors must bear the costs of their own default (failure), to emphasise the likelihood that contemporary debtor default may be attributable to many other factors, which are not the fault of the debtor but rather a consequence of the socio-economic landscape for mortgage borrowers (including, it might be argued, irresponsible lending practices), and broader macro-economic policies more generally.

⁸⁶ *Id*, p141.

⁸⁷ *Id*, p142.,

⁸⁸ *Id*, p143.

⁸⁹ CAROLINE HUNTER & JUDY NIXON, *The Discourse of Housing Debt: The Social Construction of Landlords, Lenders, Borrowers and Tenants* 16 HOUSING, THEORY AND SOCIETY 165 at 167 (1999).

Even in the absence of the current crisis, in their analysis of risk in relation to mortgage possession actions in the UK, Ford *et al.*,⁹⁰ pointed to factors such as labour market restructuring, demographic changes, the expansion of the home ownership sector, and the erosion of traditional safety-nets for mortgagors, which have increased the levels of risk systemically associated with home ownership. Furthermore, a range of studies have also suggested that, putting aside these macroeconomic factors, at the micro-level, default is usually triggered by random ‘biological disruptions’, for example, job loss, marital disruption and health problems.⁹¹ The consequences of these extrinsic and somewhat ‘random’ events for home owners who find themselves unable to keep up repayments in their mortgage include finding the home itself and all of the meanings associated with the home vulnerable to actions by the creditor, possibly through no ‘fault’ of their own. Meanwhile, the deeply embedded importance of *home* meanings in policies promoting home ownership also raises another important question: if the meanings and values of *home* are utilised in the *promotion* of home ownership, what is the justification for failing to recognise these same values when it comes to *protecting* those home interests against the consequences of default?

VII. DEBT, DEFAULT AND REPOSSESSION ACTIONS

Mortgage default and repossession are clearly matters of considerable personal stress and distress for the occupiers of the home. A considerable body of research literature has developed in recent years exploring the mental and physical health implications of living with mortgage arrears and the experience of repossession.⁹² While the loss of

⁹⁰ See generally, JANET FORD, ROGER BURROWS & SARAH NETTLETON, HOME OWNERSHIP IN A RISK SOCIETY: A SOCIAL ANALYSIS OF MORTGAGE ARREARS AND POSSESSIONS (2001).

⁹¹ DONNA EASTERLOW & SUSAN J SMITH, *Housing for health: can the market care?* 36 ENVIRONMENT AND PLANNING A 999 (2004); see also JOHN QUIGLEY & ROBERT VAN ORDER, *Spatio-Temporal Measurement of House Price Appreciation in Underserved Areas* 11 JOURNAL OF HOUSING RESEARCH 1 (1995); KARL E CASE & ROBERT J SHILLER, *Mortgage Default Risk and Real Estate Prices: The Use of Index-Based Futures and Options in Real Estate* 7 JOURNAL OF HOUSING RESEARCH 243 (1996); DENNIS R CAPOZZA, DICK KAZARIAN & THOMAS A THOMSON, ‘Mortgage Default in Local Markets’ (1997) 25 *Real Estate Economics* 631; PETER J ELMER & STEEN A SEELING, THE RISING LONG-TERM TREND OF SINGLE FAMILY MORTGAGE FORECLOSURE RATES (Federal Deposit Insurance Corporation Working Paper Series 98-2), (1998); see MCCARTHY *et al.*, *supra* n44, p29.

⁹² See, for example, SARAH NETTLETON, *Losing homes through mortgage possession: a ‘new’ public health issue*, 8 CRITICAL PUBLIC HEALTH 47 (1998); SARAH NETTLETON & ROGER BURROWS, *When a Capital Investment Becomes an Emotional Loss: The Health Consequences of the*

one's home is indeed a subjective experience, the negative (or positive) effects of which will vary from case to case, there appears to be sufficient evidence of the potentially adverse effects of dislocation from one's home to justify further consideration of the specific consequences of loss of home through creditor possession actions when evaluating the broader policy context of creditor/occupier disputes. One useful source in this regard is Ford, Burrows and Nettleton's qualitative study of the experiences and perceptions of 30 families with children following mortgage repossession.⁹³ This social analysis adopted a wide ranging perspective in relation to the costs of mortgage arrears and possession actions. Alongside analysis of the economic factors that have rendered home ownership unsustainable, this study classified the potential range of costs associated with mortgage arrears and possessions, to demonstrate how the impact of possession actions is embedded in society. These costs are experienced by a range of actors, including borrowers and lenders, but also extending to include insurers, central government, local government, housing market institutions, labour market institutions and health services. It is suggested that the impact on non-debtor occupiers sharing a home with the borrower could be added to this list.

Ford *et al* classify these costs as social, social psychological, health, administrative, financial, political and organisational. For example, lenders and insurers endure the social costs of loss of trust when debtors fall into default and actions for possession are brought. Housing market institutions experience the social psychological cost of reduced confidence in the sector, while insurers and the labour market may experience health-related costs through increased risk of accident claims and employee absenteeism. Parties affected by administrative costs include the lender, who must invest resources in pursuing the debt and bringing an action for default; central government, through arrangements for the payment of ISMI (income support for mortgage interest);⁹⁴ local government, through increased demand for

Experience of Mortgage Possession in England 15 HOUSING STUDIES 463 (2000); ELAINE KEMPSON, ALEX BRYSON, & KAREN ROWLINGSON, *HARD TIMES? HOW POOR FAMILIES MAKE ENDS MEET* (1994); SUE MIDDLETON, KARL ASHWORTH & ROBERT WALKER, *FAMILY FORTUNES: PRESSURES ON PARENTS AND CHILDREN IN THE 1990S* (1994); ELAINE KEMPSON, *LIFE ON A LOW INCOME* (1996).

⁹³ *Supra*, n84.

⁹⁴ ISMI is a benefit to pay mortgage interest. It is available, subject to restrictions, to borrowers claiming income support, jobseekers allowance or pension credit. Although the costs of central government expenditure on ISMI has decreased with the reduction in state-sponsored safety-nets for

homelessness provision; and even health services and insurers, which are liable to face additional demand for services as a result of the stress and associated health consequences linked to repossession. The financial costs are particularly widespread: the creditor, obviously, faces the prospect of real financial losses, but the borrower also faces a range of financial costs, such as administrative charges from the creditor, the burden of residual debt, increased payments and falling into poverty. Insurers face financial costs through payout on mortgage insurance; financial costs for central government include payments of ISMI and on ‘mortgage rescue’ schemes; local government bodies face the financial costs of increased homelessness provision and the provision of housing advice. The housing market is affected by reduced revenue and a fall-off in housing transactions when home ownership becomes less popular, while the health services face financial costs in respect of additional demand from repossessed occupiers whose mental health and well-being are affected by the loss of their homes.⁹⁵

While financial costs, and administrative or resource costs are readily identifiable, and tend to be persuasive both in government policy and legal decision making, it is the social, social psychological and health costs visited upon borrowers and other occupiers that are more difficult to capture. Ford, Burrows & Nettleton suggested that the costs of mortgage default and possession actions for borrowers include the social costs of social exclusion, insecurity and reduced standards of living; the social psychological costs include experiencing the stigma of debt as well as reported relationship difficulties, and that these factors, along with the experience of possession itself – which, the study found, led to an increase in feelings of sadness, loss and insecurity – could have implications for mental health and well-being. The combination of factors linked to the social, social psychological and health consequences of losing one’s home through creditor possession actions are most readily conveyed by listing the range of impacts that emerged from this study.⁹⁶ Ford *et al* identified consequences linked to quality of life; social status and identity; personal and family relationships; future aspirations; and health and well being.

The adverse consequences, both physical and psychological, of creditor possession actions and the loss of the owner-occupied home have been clearly

home-buyers (see ch 5) total state expenditure on ISMI in 1998/99 was estimated at £650 million; BURROWS & WILCOX, *supra* n44, p60.

⁹⁵ See FORD, BURROWS & NETTLETON, *supra* n90, Table 5.1.

⁹⁶ The factors listed below are set out in Ford, Burrows & Nettleton, above n90, Figure 5.1.

established in housing literature. Loss of one's home at the hands of a creditor is undeniably traumatic, and these difficulties are often compounded as the occupiers pass through various stages of the repossession, foreclosure or bankruptcy process. Problems usually begin with the accrual of arrears, but this in itself is often associated with other stressful life events such as relationship breakdown, illness, unemployment, or even the death of a partner. Christie's research found that of twenty defaulting households involved in her study, nine households had experienced relationship breakdown, as either the cause or an effect of falling into arrears. In three cases the breakdown of the relationship was a primary cause of arrears, although for the other six separated households the relationship had broken down *after* payments had been missed. Christie noted that the breakdown of these relationships also: '...contributed to new kinds of gender inequalities.'⁹⁷ as in six out of these nine cases, the male partner left the house, leaving the female partner in occupation and therefore with the ongoing responsibility of dealing with the practical and psychological impacts of arrears.

While there is little evidence in the US literature to indicate that this issue has been explicitly addressed, studies conducted in the UK have explored the impact of debtor default and possession actions and the psychological, emotional and health consequences of living with arrears and of loss of home through repossession. These studies indicate that when any household is exposed to the threat of repossession, the positive attributes of home may be overtaken by negative emotions, including fear and insecurity. It is also important to bear in mind that low-income households are generally regarded as being at a higher than average risk of falling into arrears and exposed to the threat of possession actions. It is perhaps unsurprising to learn that, in addition to this, the effects of being in arrears are particularly acute for low-income households. For example, Nettleton's research indicated that when low-income households experience problems with debt, they are often forced to: '...forego basic necessities such as food and fuel, especially in households with children where parents have been found to prioritise their children's needs over and above their own.'⁹⁸

In addition to the work involved in managing a household that is struggling with debt, other features of living with debt include social isolation, strain on personal

⁹⁷ CHRISTIE, *id.*, at 901.

⁹⁸ *Id.*, at 54; KEMPSON, *supra*, note 92, at 28.

relationships, and feelings of shame and stigma,⁹⁹ all of which have been identified as factors contributing to poor health. A further cause of stress for occupiers at risk of repossession is the uncertainty, insecurity and lack of control which characterises such processes, and which feeds into the potentially adverse health implications of living with debt. Empirical research in the UK has also indicated that for households living with debt, once they were confronted with the risk of losing their homes through creditor possession actions, they:

...were rarely able to plan, or exert any control over the nature and location of their post possession housing, and...they found it difficult to exert any control over the processes involved in the transition from owner occupation to renting.¹⁰⁰

It is significant to note, once again, that the effects of this uncertainty and lack of control are especially heightened when the household includes children. Christie's survey of households facing repossession found that the desire to maintain the status quo was particularly strong in households that included children, since - as Warren has also noted in the US bankruptcy context - they: '...were more likely to want to stay put, regardless of how they now viewed the house and all the associated financial problems.'¹⁰¹

The repossession process itself has been described as: '...a long process characterised by uncertainty';¹⁰² and a defining feature for most occupiers is the loss of control.¹⁰³ Evidence from Christie's study indicated that: '[w]orry and stress were intensified by going to court for a repossession hearing, to the extent that the health and well-being of individual household members was affected.'¹⁰⁴ It is arguable that these experiences may even have a stronger impact on women than men, if the lack of control resonates with existing feelings of insecurity, vulnerability, anxiety, apprehension and fear that have been more generally associated with women's responses to incurring debt and default. Finally, it has been noted that: '[a]t the end of

⁹⁹ NETTLETON, *supra*, note 92; KEMPSON, *supra*, note 92 at 37.

¹⁰⁰ NETTLETON, *supra*, note 92 at 55.

¹⁰¹ HAZEL CHRISTIE, *Mortgage Arrears and Gender Inequalities* 15 HOUSING STUDIES 877 (2000) at 896; see also ELIZABETH WARREN, *Bankrupt Children* 86 MINNESOTA LAW REVIEW 1003 [2002].

¹⁰² NETTLETON, *supra*, note 92, at 53; see also FORD, BURROWS & NETTLETON, *supra*, note 90, Chapter Six.

¹⁰³ Nettleton cited as examples, the policies and practices of lenders, the attitudes of judges and the resources available to the households themselves; *id.*

¹⁰⁴ CHRISTIE, *supra*, note 101, at 899.

the day, the hardship incurred by these women was not likely to come to an end when the household was repossessed. Moving from one temporary home to another brings new sets of problems including repeated moves, living in poor estates, downward spiralling health profiles and disruption to children's schooling.'¹⁰⁵

This research indicates that: '...the social, social psychological and health related consequences of mortgage possession are both dramatic and overwhelmingly negative.'¹⁰⁶ Typical characteristics of the experience of arrears and repossession, which include living with debt, uncertainty and lack of control – 'a stressful life event', also represent: '...important psychosocial mechanisms which may help to explain the link between problematic homeownership and poor health.'¹⁰⁷ Nettleton has noted that: '...stressful life events, and this includes the anticipation of events, are associated with both physical and mental health.'¹⁰⁸ Thus, it is argued, the experiences of being in arrears on mortgage payments, living with debt, and the incipient threat – or even ultimately the reality – of repossession, are potentially damaging to the occupier's physical and mental health:

Psychosocial factors have a negative impact on health when associated with a sudden and dramatic change or life event and where a high stress environment is endured over the long term. Such changes are made worse when there is a lack of control over events and circumstances. All these features – long term insecurity, lack of control, changed social status and financial stress – are intimately bound up with the social processes of mortgage possession.¹⁰⁹

Meanwhile, empirical findings from a range of studies conducted in various jurisdictions which have strongly promoted owner occupation - including low-income home ownership - have highlighted a rise in 'normal'¹¹⁰ levels of debtor default and creditor possession actions.¹¹¹ Nettleton has argued that the combination of higher

¹⁰⁵ *Id*; see also JAMES CONNELLY & JUNE CROWN, *HOMELESSNESS AND ILL HEALTH* (1994); ROSALIND EDWARDS, *Making temporary accommodation permanent: the cost for homeless families* 15 *CRITICAL SOCIAL POLICY* 60 (1995); JANE HOPTON & SONJA HUNT, *The health effects of improvements to housing: a longitudinal study* 11 *HOUSING STUDIES* 271 (1996).

¹⁰⁶ FORD, BURROWS & NETTLETON, *supra* n90 at 113.

¹⁰⁷ NETTLETON, *supra*, note 92.

¹⁰⁸ *Id*, at 56.

¹⁰⁹ *Id*.

¹¹⁰ That is, in the absence of economic downturn.

¹¹¹ In the US, see ROBERTO QUERCIA & MICHAEL STEGMAN, *Residential mortgage default: a review of the literature* 3 *JOURNAL OF HOUSING RESEARCH* 21 (1992); in the UK, FORD, BURROWS & NETTLETON, *supra*, note 90; in Australia, Berry has written that: '[f]rom the early 1970s onwards and particularly over the past 15 years, housing provision in Australia, both as a process

levels of exposure to repossession, and evidence concerning the effects of losing one's home at the hands of a creditor, have now made it: '...reasonable to suggest that mortgage possession and mortgage debt constitute a growing public health problem.'¹¹²

When investigating the relationship between loss of home through repossession actions and the impact on the occupier's psycho-social well-being, Ford, Burrows and Nettleton argued that it is the disruption caused to the 'x'-factor values – the social, psychological, emotional and cultural attachments that the occupier has with the property – that are most damaging. Although the 'tangible' dimensions of losing one's home - including the loss of financial investment as well as the practicalities of losing one's shelter - are, of course, significant when it comes to considering the effects of loss of home,¹¹³ the findings of this study supported the argument that:

losing a home in this way means more than that to most people. The [re]possession of a property constitutes a significant loss of a home that is invested with meaning and memories. Not only that but...the bureaucratic procedures associated with the administrative processes of possession mean that people have to endure long periods of insecurity and uncertainty. A whole set of events is set in train that is out of their control...according to the psychosocial literature on the social determinants of health it is these experiences (uncertainty and lack of control) that are coming to be regarded as among the most crucial determinants of poor health in contemporary societies.¹¹⁴

and as a set of outcomes, has become more uncertain, volatile and problematic...'; MIKE BERRY, *Unravelling the "Australian Housing Solution": the post-War Years Housing*, THEORY AND SOCIETY 106 (1999) at 107; see also MIKE BERRY, TONY DALTON, BENNO ENGLER, & KIM WHITING, *FALLING OUT OF HOME OWNERSHIP: MORTGAGE ARREARS AND DEFAULTS IN AUSTRALIA* (1999); in Finland, JOHN DOLING & HANNU RUONAVAARA, *Home ownership undermined: an analysis of the Finnish case in the light of the British experience* 11 NETHERLANDS JOURNAL OF HOUSING AND THE BUILT ENVIRONMENT 31 (1996); in Germany, P POTTER & S DREVERMAN, *Home ownership, foreclosure and compulsory auction in the Federal Republic of Germany* 3 HOUSING STUDIES 94 (1990); in Ireland, LAURENCE MURPHY, *Whose interest rates? Issues in the development of mortgage backed securitisation* 11 HOUSING STUDIES 581 (1996); and in Sweden, MIA BJORK, *Investigating the experiences of repossession: a Swedish example* 9 HOUSING STUDIES 511 (1994).

¹¹² NETTLETON, *supra*, note 92 at 56.

¹¹³ 'Of course the material aspects of losing a mortgaged home are very important...buying a property constitutes a capital investment and an important financial asset; something to ensure financial security in old age and something to 'pass on' to the children. '; Ford, Burrows & Nettleton, above n90, p163.

¹¹⁴ *Id.*

From the occupier's perspective: 'losing a home through mortgage possession involves more than just losing a property.'¹¹⁵ Rather, the experience of losing an owned home in the context of creditor possession actions has potentially significant repercussions beyond the issue of loss of shelter, and is likely to impact more profoundly on occupiers, with resultant costs both for the occupiers themselves and for society more generally.

VIII. CONCLUSIONS

While the expansion of home ownership has been, and continues to be premised on the grounds that it provides greater opportunities for occupiers to acquire positive values – both economic and non-economic – from their homes, it is important to be aware that these positive meanings associated with *home* (and home ownership) are contingent on the (financial) ability to sustain that ownership by avoiding default on the repayment of debts secured against the property. The significance of unsustainable home ownership in relation to the 'x-factor' meanings of home (to use my shorthand, home as territory, home as identity, home as socio-cultural signifier) is a key point of departure between Saunders and his critics. Saunders and Harris argued that the impact of possession actions, although undoubtedly serious for the individual households involved, was relatively uncommon and so should be viewed in the context of the broader economic and psychological benefits of home ownership. They reasoned 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.'¹¹⁶ On the other hand, commentators such as Gurney and Richards place much more emphasis on the detrimental effects which the rise in arrears and possession actions had on the owner-occupied sector as a whole, and on the ability of individual households to experience positive social and psychological benefits from *home* meanings. For one thing, Gurney highlighted the link between financial security and ontological security when he argued that:

[t]he financial benefits of [home ownership] are a double edged sword. As more and more 'marginal borrowers' have taken on mortgages to pass

¹¹⁵ *Id.*, p163.

¹¹⁶ PETER SAUNDERS & COLIN HARRIS, HOME OWNERSHIP AND CAPITAL GAINS (Urban and Regional Studies Working Paper 64), (1988), p18.

property on to their children, or as financial investments, the negative effects of home ownership have become apparent. One thing is certain. Households facing mortgage arrears, or essential repairs they can not afford, seem unlikely to derive the feelings of niche and belonging from home described by Saunders.¹¹⁷

Thus, Gurney argued that, when considering the individual social benefits of *home* which are often explicitly linked with home ownership: freedom; continuity; security; autonomy; control; it is also important to bear in mind the importance of security of tenure – in the context of home ownership, avoiding possession actions - in ensuring the delivery of these meanings.

The idea that the ‘security’ – whether characterised as financial security, ontological security, or emotional security – associated with owner occupation is tempered by the threat of losing one’s home in a possession action has been highlighted by various commentators. Writing at the high-point of mortgage possession actions in 1990, Gurney linked the meanings of home for owner occupiers with the risk of losing the home at the hands of a creditor. In fact, he suggested that even the threat of possession proceedings could undermine *home* meanings, 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.’¹¹⁸ A similar argument has been advanced in Canada, where Harris & Pratt noted that: ‘...for many Canadians the home as a place of security and personal control is intermingled with stress, related to lack of affordability and insecurity of tenure.’¹¹⁹ It is, of course, important to bear in mind the fact that the Saunders/Gurney debate is framed by a focus on the putative benefits of home ownership *relative to other tenures*. While Saunders sought to

¹¹⁷ GURNEY, *supra*, n72, p8.

¹¹⁸ *Id.*, p10. Gurney claimed that: ‘For many people who took out mortgages in the late 1980s the feelings of niche and belonging described by Saunders were far from their experience of home ownership. Instead, paying off a housing loan in a period when interest rates were constantly rising created profound personal anxieties, and uncertainty. The fact that people’s homes are at risk if repayments on a mortgage or any other loans secured on it can not be met has meant that fear and uncertainty of getting behind with the mortgage may have been one of the strongest emotions linked to home ownership...[suggested] links between marriage break-up, attempted suicide, child sexual abuse and the fears and uncertainty associated with mortgage arrears. Rapid increases in repossessions as a result of mortgage arrears...have meant that the threat of becoming homeless is one which more and more mortgagees now fear.’; *id.*, p8.

¹¹⁹ RICHARD HARRIS & GERALDINE PRATT, *The Meaning of Home, Homeownership and Public Policy* in THE CHANGING SOCIAL GEOGRAPHY OF CANADIAN CITIES (LS Bourne & DF Ley (eds), 1993), p297.

demonstrate the superiority of owning over renting, he did not dispute the possibility that renters could experience *home* meanings, albeit to a lesser degree. Thus, he wrote that: ‘...the fact that home ownership enables ontological security does not mean that non-ownership prevents it’.¹²⁰ Gurney, on the other hand, asserted that: ‘...home is where the heart is regardless of tenure.’¹²¹

Yet, for occupiers facing loss of their home through a possession action, the prospect that, had they rented instead of buying, they would have become equally attached to their home, is somewhat irrelevant. When it comes to balancing the commercial claims of creditors to the capital value of the secured property against the home interests of occupiers, legal policy should also be informed by the meaning of the home to the occupier and the experiences of that occupier in the event of (what is increasingly likely to be viewed as systemic rather than individual failures leading to) default and creditor possession actions. A similar argument might easily be made in reference to the balance struck between the tenant’s interest in the property *as a home*, compared to the landlord’s proprietary interest in the property as a capital and investment asset. Of course, the promotion of home ownership and the way in which home buyers have been encouraged to secure debts against their homes, is an important aspect of contemporary creditor/occupier disputes. However, when it comes to considering the weight to be attached to the occupier’s home interest, the object of conceptualising home is not to consider whether the owner-occupier’s home is more meaningful than a tenant’s home, but what balance should be struck between the occupier’s home interest, and the commercial interests of the creditor. To this end, it is significant to bear in mind the fact that, although the arguments discussed in this paper adopt different views on the significance of *ownership* in establishing a meaningful relationship with the home, there is a general consensus on the importance of the *home per se*.

When considering the affective value of home, particularly the owned home, the issues of affordability, and the challenges this presents, must be a central aspect of any policy-oriented analysis. Some empirical studies have supported the argument that activities associated with home ownership – such as personal investment in home and neighbourhood – may improve social, psychological, emotional and financial

¹²⁰ SAUNDERS, *supra* n47, p303.

¹²¹ GURNEY, *supra* n72, p45.

health.¹²² The social status and personal freedoms associated with homeownership have been linked to higher levels of self-esteem and perceived control over life.¹²³ However, it is important to recognise that the socio-psychological benefits of home ownership are countered by the negative effects of default and possession actions. Thus, it has been suggested that:

...homeowners, particularly lower-income homeowners, do not have as much actual control as some have claimed. Financial instability puts lower-income households at risk of losing their homes due to mortgage foreclosure. The psychological impact of homeownership could be negative if a person is unable to pay their mortgage and is forced from his or her home.¹²⁴

The proposition that home meanings are threatened when a borrower falls into default is uncontroversial, and, as this paper has demonstrated, 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 vigour with which the government *promotes* home ownership, welfare support for home owners, and the degree of *legal protection* afforded to borrowers who fall into arrears and default.

The political policy of encouraging home ownership has undoubtedly had positive effects – both economic and social - for many successful homeowners. Yet, it is important, in considering the balance struck between creditors and defaulting debtors, to take account of the extent to which legal and welfare policies protect home buyers from the risks endemic to the contemporary housing credit market. It would be useful, for example, to consider the framework of policies relating to renters who default on rent payments against the position for owner-occupiers with a view to ascertaining whether policy responses in each case are proportionate to the risks which the occupiers face.¹²⁵ This is particularly pertinent in light of increasingly evidence that default on secured credit is often caused by extrinsic factors, including the possibility that debt is mis-sold or lenders fail to act as responsible gatekeepers, and not by the ‘fault’ or profligacy of the debtor themselves.

¹²² ROHE, VAN ZANDT & MCCARTHY, *supra* n44, p2.

¹²³ *Id.*

¹²⁴ *Id.*, p6.

¹²⁵ For a similar analysis in the UK, see FOX (2006), *supra* note 11, pp217-220; 239-241.

The impact of failing to provide adequate protections against the risks inherent to the contemporary credit market, for not only the individual but the economy as a whole, have been played out in recent months on the world stage. One risk appertaining to the recent mortgage crisis is the risk that a downturn in the US economy, particularly when it is explicitly linked to mortgage credit markets, could impact in loss of confidence in the housing sector, and ultimately, perhaps ironically, threaten the very policy of expanding home ownership. The time is ripe for a critical review of law's role in regulating the creditor/occupier contest, taking account of the emerging literature which demonstrates the significant repercussions of loss of home on both a micro-level and, as has become increasingly clear, on national and international economies.

DRAFT