

DO WE NEED A RIGHT TO HOUSING?

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I. INTRODUCTION

Many scholars and policymakers have advocated a right to housing.¹ This Article takes a slightly different approach. Rather than starting from the proposition that a right to housing is both useful and necessary, the Article begins with no such assumption. Instead, its purpose is to answer the question, “Do we need a right to housing?” The Article formulates an answer by first breaking the question into two parts. First, do we need a *right* to housing, as opposed to a goal or another kind of policy initiative? Second, do we need a right to *housing*, as opposed to a right to health care, a right to a living wage, or another kind of entitlement? Accordingly, the first half of the Article focuses on the nature of rights, and especially the unique challenges and benefits associated with rights. The second half of the Article focuses on the nature of housing, particularly the way in which housing may be uniquely connected to notions of personhood and dignity.² The Article concludes by answering the title’s question in the affirmative and presenting a model for a right to housing that capitalizes on the benefits of rights while also taking seriously the significant challenges a right to housing presents.

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¹ One of the best compilations of articles arguing for a right to housing is *AMERICA’S HOUSING CRISIS: WHAT IS TO BE DONE?* (Chester Hartman ed., 1983). In addition, a Canadian website entitled, “Housing Again,” which is maintained by Michael Shapcott, Co-Chair of the National Housing and Homelessness Network, and David Hulchanski, Director of the Centre for Urban and Community Studies at the University of Toronto, provides a useful, if incomplete, bibliography of articles advocating for housing as a human right. Housing Again, Resources, <http://action.web.ca/home/housing/resources.shtml?x=67203> (last visited Feb. 25, 2009).

² *Housing, Personhood, and Dignity* was the title of a symposium issue of the *Stetson Law Review* for which I served as faculty coordinator. Symposium, *Housing, Personhood, and Dignity*, 36 *Stetson L. Rev.* 1 (2006). In my introduction, I described the purpose of the symposium and provided a selected annotated bibliography for those who may be interested in exploring the connections between housing, personhood, and dignity. See generally Kristen David Adams, *Introduction: Housing, Personhood, and Dignity*, 36 *STETSON L. REV.* 1 (2006).

II. WHY A RIGHT?

Before analyzing the particular advantages associated with rights, it is important to recognize the considerable corresponding challenges. Because rights are a relatively modern concept,³ some scholars have suggested that creating new rights is unnecessary or even wholly inappropriate, as a general proposition.⁴ Discussing rights also can generate significant controversy and powerful emotions.⁵ For these and other reasons, John Stuart Mill famously denounced the notion of rights as “monstrous.”⁶

A. *Is the Notion of Rights Wrong-Headed?*

Some scholars have argued that tackling difficult societal problems, such as poverty and homelessness, by seeking to create new rights is simply wrong-headed. Arguments against establishing additional rights take a number of different forms. Some scholars believe that creating new rights is the wrong approach to protecting the interests of low-income persons because there are other, more effective strategies available.⁷ Others argue that focusing on rights is too polarizing because rights are inherently controversial, particularly due to their association with redistribution.⁸ A third argument against establishing additional rights is that doing so is inherently in conflict with the emphasis on liberties that otherwise dominates American jurisprudence.⁹ Still others claim that focusing on rights interrupts the natural functioning of the market system in a way that is both unnecessary and inappropriate.¹⁰ The following section addresses each of these arguments, in turn.

³ H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 163 (1982). Hart describes Jeremy Bentham and John Austin as pioneers in seeking to define legal rights, noting, as a preliminary matter, that the ancient Greeks and Romans did not recognize the concept. *Id.*

⁴ ROBERT C. SOLOMON, *A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGIN OF THE SOCIAL CONTRACT* 191 (1990) (noting that, among other scholars' dismissive references to rights, one of the most famous is Jeremy Bentham's description of rights as “nonsense on stilts”).

⁵ See *infra* Part II.A.2.

⁶ JOHN STUART MILL, *ON LIBERTY* 89-90 (Stefan Collini ed., 1989). The full quote is too deliciously acerbic to exclude:

A theory of “social rights,” the like of which probably never before found its way into distinct language: being nothing short of this—that it is the absolute social right of every individual, that every other individual shall act in every respect exactly as he ought; that whosoever fails thereof in the smallest particular, violates my social right, and entitles me to demand from the legislature the removal of the grievance. So monstrous a principle is far more dangerous than any single interference with liberty; there is no violation of liberty which it would not justify; it acknowledges no right to any freedom whatever, except perhaps to that of holding opinions in secret, without ever disclosing them: for, the moment an opinion which I consider noxious passes any one's lips, it invades all the “social rights” attributed to me The doctrine ascribes to all mankind a vested interest in each other's moral, intellectual, and even physical perfection, to be defined by each claimant according to his own standard.

Id.

⁷ See *infra* Part II.A.1.

⁸ See *infra* Part II.A.2.

⁹ See *infra* Part II.A.3.

¹⁰ See *infra* Part II.A.4.

1. Are There Better Strategies for Responding to the Housing Crisis?

Even a staunch proponent of affordable housing might reasonably be cautious about the idea of a right to housing.¹¹ Robert Solomon has argued that emphasizing rights can be destructive insofar as it takes the focus away from human compassion.¹² Solomon sees rights as a second-best means of providing for the needy—a backup when compassion fails to motivate the privileged members of society as it should.¹³ Even so, and despite his preference for provision based on compassion, Solomon acknowledges the special role of rights: Rights protect needy persons in a way that does not depend on good will.¹⁴ Thus, as a strategic matter, perhaps a right to housing is a second-best approach that society should consider only after other means of providing for the needy have failed.

Another reason establishing additional rights may be an inferior means of responding to the problem of need is that focusing on rights may distract policymakers from addressing the cycle of poverty, arguably a more urgent issue.¹⁵ Creating a right to housing may also lead to resentment, insofar as some might see it as a sign of a universal welfare state.¹⁶

Other scholars suggest that emphasizing rights tends to place primary focus on the wrong social priorities, especially when the rights become their own end, rather than a means to achieve some other goal. Bruce Ackerman constructs his theory of liberal society without placing significant weight on the assumption that people have rights; instead, he describes rights as a response to scarcity and the resulting dialogue about distribution of assets.¹⁷ Thus, for Ackerman, rights exist to protect what he calls “Neutral dialogue,”¹⁸ rather than as a self-justifying means of protecting some privileged list of endow-

¹¹ See, e.g., PERCIVAL & PAUL GOODMAN, *COMMUNITAS: MEANS OF LIVELIHOOD AND WAYS OF LIFE* 189 (2d ed. 1960) (describing “give-away money” as an economic trap).

¹² SOLOMON, *supra* note 4, at 171, 189. Solomon is a well-known advocate for the interests of low-income persons.

¹³ *Id.* at 190. Like Solomon, H.L.A. Hart would resort to rights discourse only when other justifying vocabulary does not exist. MICHAEL P. ZUCKERT, *LAUNCHING LIBERALISM: ON LOCKEAN POLITICAL PHILOSOPHY* 173 (2002).

¹⁴ SOLOMON, *supra* note 4, at 190. He adds, “To talk of basic rights is to recognize the urgency of basic needs.” *Id.* at 191.

¹⁵ Barry Goodchild, *Implementing the Right to Housing in France: Strengthening or Fragmenting the Welfare State?*, 20 *HOUSING, THEORY & SOC’Y* 86, 86 (2003).

¹⁶ *Id.* at 87.

¹⁷ BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 5 (1980). The Bill of Rights, in this conception, exists to protect the integrity of the ongoing liberal dialogue that forms the foundation of Ackerman’s jurisprudence on justice. *Id.* at 341-42. As the discussion below will show, Ackerman does acknowledge the existence of certain rights, including the right to “material subsistence” and the right to citizenship. *Id.* at 82-83. In Ackerman’s words, the right to material subsistence must not require that the person in need of subsistence demonstrate that he or she is “lovable.” *Id.* To require otherwise, Ackerman argues, would be to impose a kind of slavery. *Id.* Ackerman’s terminology brings to mind the debate over the “deserving” poor and also raises the question, discussed elsewhere in this paper, of whether our poorest members of society in the United States are citizens or slaves. *Id.*

¹⁸ *Id.* at 10-11 (“A power structure is illegitimate if it can be justified only through a conversation in which some person (or group) must assert that he is (or they are) the privileged moral authority . . .”).

ments and outcomes.¹⁹ Ackerman's conception of rights' place in society ties in with this Article's later discussion of how property—and particularly housing—can be a vehicle for participation in society.²⁰ Applying Ackerman's argument, the goal of participation in society, rather than any tool (such as rights) that makes such participation possible, may deserve primary emphasis. If so, then emphasizing rights is necessary only to the extent that doing so enables or supports participation.

Bruce Ackerman's work suggests that recognizing new rights may not be necessary to protect low-income persons. Michael Walzer goes one step further, asserting that rights may not be particularly helpful in advancing the goal of distributive justice²¹ and that multiplying the number of rights society recognizes may cause those rights to lose force and become farcical.²² Walzer's concern about whether seeking to establish additional rights helps or harms the cause of distributive justice is relevant to the discussion below regarding the possible tension between rights and the kinds of liberties that are traditionally associated with the American system of law.²³ Walzer's warning that adding new rights could weaken existing rights sets up the question that opens the second part of this Article: Assuming that it is not possible (or at least not appropriate) to create a right supporting every valid human need, is it better to

¹⁹ *Id.* at 341.

²⁰ *See infra* Part III.A.2.

²¹ The origin of the term “distributive justice” has been attributed to Aristotle, specifically Book V of his *Nicomachean Ethics*. ZUCKERT, *supra* note 13, at 183. *See also* THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS, bk. V, at 176-77 (J.A.K. Thomson trans., Penguin Books rev. ed. 1976) (“One kind of particular justice, and of that which is just in the corresponding sense, is that which is shown in the distribution of honour or money or such other assets as are divisible among the members of the community (for in these cases it is possible for one person to have either an equal or an unequal share with another); and another kind which rectifies the conditions of a transaction.”).

²² MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY, at xv (1983). To understand Walzer's viewpoint, it may be helpful to include the following fairly lengthy quote:

[I]n the pages that follow I shall imitate John Stuart Mill and forego (most of) the advantages that might derive to my argument from the idea of personal—that is, human or natural—rights. Some years ago, when I wrote about war, I relied heavily on the idea of rights. For the theory of justice in war can indeed be generated from the two most basic and widely recognized rights of human beings—and in their simplest (negative) form: not to be robbed of life or of liberty. What is perhaps more important, these two rights seem to account for the moral judgments that we most commonly make in time of war. They do real work. But they are only of limited help in thinking about distributive justice. . . . The effort to produce a complete account of justice or a defense of equality by multiplying rights soon makes a farce of what it multiplies. To say of whatever we think people ought to have that they have a right to have it is not to say very much. Men and women do indeed have rights beyond life and liberty, but these do not follow from our common humanity; they follow from shared conceptions of social goods; they are local and particular in character.

Id. The final point in this paragraph about the “local and particular” character of rights brings to mind a statement that Walzer makes elsewhere in the book, in which he argues that, although needy persons do have a right to provision of some kind, they have no generalized right to any particular set of goods; instead, each community must decide for itself what the minimum provision for all members of the community will be. *Id.* at 78.

²³ *See infra* Part II.A.3.

create a right to some other important component of human existence, such as health care or a living wage, rather than a right to housing?²⁴

In addition to the possibility that rights may be ineffectual, presented below in Part II.B.3, it is important to understand that rights cannot present a full and coherent picture of how society is to be run. As Robert Nozick stated, “Rights are not simply the other side of responsiveness, whereby we always would have a right to be treated as others ought to treat us.”²⁵ Nozick does not wholly deny the power of rights,²⁶ but does suggest that it is important not to assume that creating new rights can present a complete solution to the problems facing society.

The previous discussion, taken as a whole, suggests that any evaluation of the rights of low-income persons must not ignore other valid reasons—such as compassion—to make provision for needy persons a priority. In addition, it is important to understand that merely creating additional rights cannot solve the problem of poverty. Instead, other tools—such as ensuring that low-income persons have the opportunity to participate fully in society—can and must also be a part of the solution. Furthermore, creating a new right may cause resentment. Accordingly, the next section explores the controversial nature of rights.

2. *Are Rights Too Controversial?*

The controversy and potential resentment associated with rights provide additional reasons to be cautious about establishing a right to housing. Ronald Dworkin has stated, “[T]he scope of . . . rights will be controversial whenever they are important.”²⁷ Dworkin also claims that judges’ decisions in hard cases will be controversial and debatable, even when correct, in part because such decisions often involve rights.²⁸ Emphasizing rights may also exacerbate majority-minority tensions. According to Dworkin, the majority will act based on its own notion of minority rights and will often disagree with the rights that the minority claims.²⁹ Thus, linking several of Dworkin’s assertions, one should probably expect that judges’ decisions in hard cases will be particularly controversial when based upon the rights of minority groups. Because rights

²⁴ See *infra* text preceding note 205.

²⁵ ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 498-99 (1981). Elsewhere, Nozick states that political philosophy does not contemplate every moral claim, however sound, although it does have an important role in protecting rights because of the state’s monopoly on the legitimate use of force. *Id.* at 503.

²⁶ Rights do, however, go further than to protect us only in situations in which “neglect would be serious.” *Id.* at 499. Nozick provides the example of a right to enforce a one dollar debt, which the rights-holder is free to do if he or she so desires, even though neglect of this right would probably not be deemed serious. *Id.*

²⁷ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 205 (4th prtg. 1978).

²⁸ *Id.* at 128. Dworkin notes that the judge (he terms his fictional judge “Hercules”) will take the moral values of the community into account in reaching his opinion, but denies any notion that the judge will, or should, make his or her decision in a hard case based on public opinion. *Id.* at 125, 129. Dworkin famously stands by the proposition that there is only one correct answer to a hard case, even if others would debate the correctness of the judge’s decision. *Id.* at 290. Dworkin also asserts that, despite the inevitable mistakes that judges will sometimes make, judges are the correct decisionmakers to determine individual institutional legal rights in hard cases. *Id.* at 130.

²⁹ *Id.* at 205.

have traditionally played an important role in protecting the interests of minority groups, judges may face hard, controversial cases involving minority rights with particular frequency.³⁰

Dworkin is not alone in describing rights as controversial. John Locke has also acknowledged the inherent controversy over the nature, source, and substance of rights.³¹ Robert Solomon makes a related point, arguing that members of society tend to agree on abstract principles of equality, but disagree on how to apply these principles to specific cases.³² Thus, it is possible that members of society would agree, in the abstract, that all persons should have access to housing, yet still disagree on whether establishing a right to housing is the best approach.

Rights can be closely associated with governmental redistribution, another topic that tends to generate significant controversy. Some scholars believe that redistribution should have no role whatsoever in provision for low-income persons. Francis Fukuyama, for example, describes the welfare state as one of the most significant problems facing modern society.³³ Even some scholars who believe it is “indecent” to fail to respond when others face tremendous need also believe governmental redistribution can cause more problems than it solves.³⁴ The concern that governmental redistribution causes more harm than good dates back to the time of Roman Tribune Tiberius Gracchus and his ill-fated efforts at land reform.³⁵

In addition, even some who believe that redistribution can be appropriate nevertheless raise caution regarding particular challenges associated with redistribution. Because redistribution has the potential to isolate needy persons from the community,³⁶ if it is to be successful, it must not interfere with the dignity

³⁰ See *infra* notes 179-81 and accompanying text.

³¹ ZUCKERT, *supra* note 13, at 170.

³² SOLOMON, *supra* note 4, at 171.

³³ FRANCIS FUKUYAMA, *THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTITUTION OF SOCIAL ORDER* 64-68, 86, 115-17 (1999).

³⁴ One example is author Bertrand de Jouvenel, whose book *The Ethics of Redistribution*, explores this concept in detail. BERTRAND DE JOUVENEL, *THE ETHICS OF REDISTRIBUTION* (1990). De Jouvenel does not quarrel with the notion that some level of provision must be made for needy persons. *Id.* at 22. Indeed, he takes this concept one step further, acknowledging that having too much, or too little, is “indecent.” *Id.* at 23. He argues, however, that the real effect of governmental redistribution efforts is inevitably to move money from individuals to the state, rather than from wealthy persons to poor ones. *Id.* at 72.

³⁵ H.H. SCULLARD, *FROM THE GRACCHI TO NERO: A HISTORY OF ROME FROM 133 B.C. TO A.D. 68*, at x, 25-28 (5th ed. 1982) (providing a chronological table and discussion of the relevant period in Roman history, including Gracchus’ land reform). Roman Tribune Tiberius Gracchus proposed certain land reform in 133 B.C. that was opposed by deposed Tribune Octavius. *Id.* The land-reform law passed, reallocating to Roman citizens certain parcels of public land previously claimed by squatters, and establishing Gracchus’ land commission. *Id.* Gracchus was murdered as a result. *Id.* Notably, his brother Gaius Gracchus, a gifted orator who became Tribune after his brother’s murder, was also criticized for his efforts at redistribution, albeit in a different context. *Id.* at 33. Gaius Gracchus sought to provide governmental support of the corn market through bulk purchases and sales to citizens at below-market prices. *Id.* These efforts were criticized as “demoralizing.” *Id.*

³⁶ I have addressed this risk in an earlier work. See Kristen D.A. Carpenter, *Promise Enforcement in Public Housing: Lessons from Rousseau and Hundertwasser*, 76 TUL. L. REV. 1073, 1090 (2002) (“Public-housing residents often report feeling isolated from the

and societal membership of those on the receiving end.³⁷ Richard Sennett acknowledges the same risk of isolation, citing the shame of dependency and the risk of condescension and hostility as potential causes.³⁸ Immanuel Kant and others used stronger language, condemning welfare as creating a loss of will and integrity and a degradation of character.³⁹

In addition to the problem of dependency on the part of those who receive governmental assistance, redistribution also frequently generates resentment on the part of others in society.⁴⁰ Addressing the problem of resentment toward low-income persons in the housing context, Bo Bengtsson has stated, "Having a right is often seen as being entitled to something without having to pay for it—except perhaps a symbolic or small nominal sum."⁴¹ He argues that an entitlement model is particularly unworkable, insofar as housing is concerned, because societal norms and expectations dictate that all persons should pay for their own housing.⁴² Instead, Bengtsson contends, the government should provide only limited "correctives" to the housing system, while the system as a whole remains primarily administered by private contract.⁴³ Bengtsson's view is consistent with the way Barry Goodchild describes the right to housing in France; Goodchild calls the French government a facilitator, rather than a guarantor, of housing.⁴⁴ Another way of emphasizing Bengtsson's point is to argue

community. In addition to their physical and social separation from the outside world, public-housing developments have been described as providing little internal interaction and therefore little opportunity for the development of social capital.").

³⁷ WALZER, *supra* note 22, at 78 ("Goods must be provided to needy members because of their neediness, but they must also be provided in such a way as to sustain their membership.").

³⁸ RICHARD SENNETT, *RESPECT IN A WORLD OF INEQUALITY* 134 (2003). Sennett also notes the related difficulty in responding to the needs of persons without ignoring their autonomy or treating them as dependents lacking personal competency and responsibility. *Id.* at 174. He cautions that "[t]he poor must participate in the conditions of their own need," assuming some level of personal competency in working toward a solution for their own poverty. *Id.* at 176, 178. Elsewhere, using an expression I find particularly compelling, Sennett urges that low-income persons must be given what he calls "mental credit." *Id.* at 177. As I will note in the conclusion of this Article, Sennett's arguments are consonant with what I call Promise Enforcement, treating low-income persons as being capable of making and keeping promises and worthy of having promises made to them and kept. *See infra* Part IV.

³⁹ SENNETT, *supra* note 38, at 109 (citing the work of Nancy Fraser and Linda Gordon, as well as Kant).

⁴⁰ Two statements of resentment in popular culture come to mind. First is the common bumper sticker, "Work Hard: People on Welfare Depend on You!" Second is a lyric from country superstar Garth Brooks' song *American Honky-Tonk Bar Association*: "When Uncle Sam dips in your pocket/For most things you don't mind/But when your dollar goes to all of those/Standing in a welfare line/Well rejoice you have a voice/If you're concerned about the destination/Of this great nation/It's called the American Honky-Tonk Bar Association . . ." GARTH BROOKS, *American Honky-Tonk Bar Association*, *on IN PIECES* (Capitol 2000) (1993).

⁴¹ Bo Bengtsson, *Housing as a Social Right: Implications for Welfare State Theory*, 24 *SCANDINAVIAN POL. STUD.* 255, 256 (2001).

⁴² *Id.* at 257.

⁴³ *Id.*

⁴⁴ Goodchild, *supra* note 15, at 90 ("The right to housing is about the "possibility," to use the interpretation of the Constitutional Council, rather than the necessity of public authorities making housing available.").

that “[h]ousing is a social right, but people should be able to exercise that right in the market.”⁴⁵ Thus, society’s expectation that housing is to be acquired in the market, rather than provided by the government, presents a particular obstacle to a right to housing in the United States.⁴⁶

As the foregoing section demonstrates, rights are controversial, especially when minority groups, scarcity, and redistribution are part of the equation. Redistribution, in particular, invokes resentment and potential loss of personal autonomy. The concern for personal autonomy is further explored in the next section, which addresses the interplay between rights and liberties.

3. *Are Rights Necessarily in Conflict with Liberties?*

One way of framing the argument regarding the appropriateness of redistributive rights is as a conflict between “rights” on the one hand and “liberties” on the other. In this conception, as recognized by H.L.A. Hart and others, “rights” are positive entitlements *to* something, while “liberties” are freedom *from* something, including the freedom from having some of one’s money taken to support another person’s entitlements.⁴⁷ An alternative way of describing “rights” and “liberties” is as “positive rights” and “negative rights,” respectively.⁴⁸ Applying the vocabulary of “positive” and “negative” rights, the right to housing would be a positive right. A right against eviction, by contrast, would be a negative right.⁴⁹ The idea that rights and liberties are in natural opposition with one another is associated with John Stuart Mill,⁵⁰ among others.⁵¹

⁴⁵ Bengtsson, *supra* note 41, at 260.

⁴⁶ This argument is of particular significance insofar as it relates to the discussion, elsewhere in this Article, of whether the market should govern the provision of housing without governmental interference. See *infra* Part II.A.4.

⁴⁷ ZUCKERT, *supra* note 13, at 174. This vocabulary sets up a comparison between John Locke and John Rawls. Locke is associated with a focus on negative rights, sometimes also called “rights against interference,” or “liberty.” *Id.* at 314-16. According to Locke’s jurisprudence, rights against interference are derived from property. Rawls, by contrast, is associated with both positive and negative rights, which he claims are derived from fairness. *Id.* at 312, 316. Insofar as Rawls addresses positive rights, such rights are sometimes called rights to provision or “welfare rights.” *Id.* at 314-15.

⁴⁸ HART, *supra* note 3, at 168 (referring to rights to “positive services” and “negative services,” respectively).

⁴⁹ See e.g., Goodchild, *supra* note 15, at 88 (“The right to housing in the 1989 [French] law protects the status quo, that is to say the tenant’s existing legal status and, in doing this, protects an individual, the tenant, from the actions of another, in this case the landlord. It is a negative right because it stops another person from interfering in existing housing rights.”).

⁵⁰ MILL, *supra* note 6, at 89 (speaking of “liberty” (or “freedom”) and “rights” as if they are necessarily in conflict with one another).

⁵¹ Another scholar whose jurisprudence is consistent with Mill’s on this point is Robert Nozick. In *Anarchy, State, and Utopia*, Nozick seeks to establish that nothing beyond what he calls “the minimal state” can be morally justified, because a more active state would violate others’ fundamental rights. ROBERT NOZICK 10 (David Schmidtz ed., 2002). See also ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 52 (1974) (laying out the roadmap for his argument that only the minimal state is morally justified). Thus, Nozick’s jurisprudence would suggest that redistribution of any kind is impermissible. Robert Solomon acknowledges the tension suggested by Nozick, noting that needs become controversial when they are converted into rights, which imply a demand on others. SOLOMON, *supra* note 4, at 188.

The distinction between rights and liberties is important in understanding what it means to create a new right—such as a right to housing—in the United States. As Maria Foscarinis has noted, scholars have traditionally framed rights in the United States in terms of liberties, not positive rights.⁵² Therefore, recognizing a new positive, redistributive right, such as a right to housing, may seem out-of-step with United States traditions and mores.⁵³

Even so, there may be a distinct advantage to pursuing a positive right to housing. Barry Goodchild has suggested there may be a direct link between positive rights and citizenship,⁵⁴ a possibility that is further explored later in this Article.⁵⁵ Thus, although negative rights, or liberties, sometimes seem to dominate contemporary American jurisprudence, positive rights may nevertheless be crucial to societal membership. Such positive rights, however, can be difficult to establish. As Jane Baron has noted, given the lack of positive *rights* to shelter⁵⁶ or property, some advocates for homeless persons have resorted to the weaker position of arguing for negative rights, or *liberties*, such as the right to sleep outside without being forced to leave.⁵⁷ Although such an argument is not nearly as appealing to housing advocates on a number of different levels as a positive right to housing would be, it may nevertheless provide the foundation for a powerful argument that homeless persons actually have fewer liberties than housed persons do. For example, many homeless persons lack access to a lawful means of keeping clean.⁵⁸ Thus, one may argue that homeless persons, unlike housed persons, have no right to keep themselves clean.⁵⁹ Using similar logic, Baron argues that propertylessness, which she equates with homelessness, is a legal disability.⁶⁰ It may be possible to take her argument one step further and argue that homeless persons ultimately have less right to *exist* than housed persons do.

Taking a distinctly different approach from Mill and the others whose viewpoints are set forth above, Dworkin argues that the perceived tension

Elsewhere, Solomon states that rights are controversial when resources are scarce. *Id.* at 192.

⁵² Maria Foscarinis, *The Growth of a Movement for a Human Right to Housing in the United States*, 20 HARV. HUM. RTS. J. 35, 35 (2007).

⁵³ *Id.*

⁵⁴ Goodchild, *supra* note 15, at 89 (“The right to housing, as specified in [French] law, is a republican right that arises as a concomitant of an individual’s citizenship of the French republic.”).

⁵⁵ See *infra* Part III.A.2.

⁵⁶ Some states have recognized a right to shelter. See Chester Hartman, *The Case for a Right to Housing*, 9 HOUSING POL’Y DEBATE 223, 236 (1998). Hartman also cites the example of some cities that have opened public buildings to homeless persons when the temperature drops below a certain temperature, noting a “right not to freeze to death.” *Id.* at 237.

⁵⁷ Jane B. Baron, *Homelessness as a Property Problem*, 36 URB. LAW. 273 (2004).

⁵⁸ *Id.* at 273, 285-86. Instead, sometimes it seems that every attempt they might make to do so constitutes a criminal act. One of the best-known studies on the criminalization of homelessness is prepared jointly by the National Coalition for the Homeless and the National Law Center on Homelessness and Poverty. THE NAT’L COAL. FOR THE HOMELESS & THE NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2006), <http://www.nationalhomeless.org/publications/crimreport/report.pdf>.

⁵⁹ Baron, *supra* note 57, at 284-85.

⁶⁰ *Id.* at 284.

between rights and liberties is a false conflict.⁶¹ As a preliminary matter, he denies the existence of any generalized right to liberty.⁶² Instead, he claims that what exists is a series of much narrower, more specific rights.⁶³ The difference matters, Dworkin claims, because of the false conflict society often perceives between liberty for the advantaged groups, on the one hand, and equality for the disadvantaged groups, on the other.⁶⁴ Jules Coleman's jurisprudence is consistent with Dworkin's contention that rights and liberties are not inherently in conflict with one another. According to Coleman, rights have a positive, rather than negative, relationship with liberty: Rights are created to increase liberty or welfare.⁶⁵ Elsewhere, Coleman states, "[R]ights . . . demarcate a realm of liberty or control."⁶⁶ Thus, it is possible that rights actually protect liberty, rather than threaten it, as is commonly thought to be the case.

Taking each of the theories presented above into account, a positive, redistributive right such as a right to housing may be either a threat or an enhancement to liberty, depending on one's own perspective. It is therefore important for any person who is advocating a positive, redistributive right to housing to recognize that such a right may be perceived as an infringement upon the liberty interests of others and to be prepared to respond with countervailing arguments.

The prior discussion about redistribution, resentment, and liberties sets up a related concern—that recognition of a new right, such as a right to housing, may be an unnecessary and inappropriate interruption of the proper function of the private market. This argument is explored in the following section.

4. *Would Creating a New Right Interrupt the Proper Function of the Market?*

In lieu of governmental provision, it may seem more natural and appropriate that the market would be the sole provider of housing, including low-income housing.⁶⁷ Indeed, as Bob Ellickson has argued, were the United States government to go so far as to recognize an unconditional right to housing, its

⁶¹ DWORKIN, *supra* note 27, at 267, 271.

⁶² *Id.* at 266-67, 269. Rather, Dworkin claims, "individual rights to distinct liberties must be recognized only when the fundamental right to treatment as an equal can be shown to require these rights." *Id.* at 273-74. Dworkin describes free speech and the right to free exercise of religion as two areas in which society recognizes a liberty interest. *Id.* at 271.

⁶³ *Id.*

⁶⁴ *Id.* In rejecting the notion of a generalized "right to liberty," Dworkin claims that "the idea creates a false sense of a necessary conflict between liberty and other values when social regulation . . . is proposed." *Id.*

⁶⁵ JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 33-34 (1988).

⁶⁶ *Id.* at 31.

⁶⁷ Pamela Sayne and Bernard Miller note the popular belief that the private-mortgage market has operated efficiently in supporting the construction of low-income housing, such that intervention is neither required nor appropriate. See Pamela Sayne & Bernard Miller, *Right to Housing, Right to Debt: Another Patriarchal Paradigm*, *WOMEN & ENV'TS*, Summer 1996, at 16, 16. As examples, the authors cite housing in London and Japan. *Id.* at 19. In London, housing that has lasted less than twenty years has been financed by sixty-year mortgages. *Id.* In Japan, where four-generation, 100-year mortgages are available, some property has depreciated in value to such an extent that the mortgages are worth less than the balance still owed on the property. *Id.*

decision to do so could seriously disrupt market forces by creating significant, troubling disincentives to work⁶⁸. Moreover, a market-based approach may foster a “customer-service” culture that could improve the quality of the housing provided.⁶⁹ Thus, the argument is that the market may supply better housing to low income persons than a government program would, and may also supply such housing more efficiently than the government.

One criticism of the market-based approach is that it may create an illusion of empowerment for low-income people while actually depriving them of much-needed aid.⁷⁰ Perhaps as a result of the market’s inability to provide a complete solution to the shortage of affordable housing, housing policy has traditionally been bifurcated between governmental and private-market provision of housing, with the government intervening to provide options to those whom the market cannot (or does not) serve.⁷¹ Thus, those persons most in need of affordable housing may not be benefiting from the customer-service culture in the private-housing market that some have lauded.

Another criticism of the market-based approach is that it over-values the commodity of money and the sphere of work.⁷² Richard Sennett has commented on the rise in the importance of work, dating back to the nineteenth century, as a means by which people earn society’s respect and self-respect.⁷³ This trend is not terribly surprising; as John Locke’s jurisprudence suggests, the “ordinary” way of acquiring property is through one’s labor.⁷⁴ Based on Locke’s conception, redistribution is a wholly unnatural means of acquiring

⁶⁸ Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL’Y 17, 17 (1992). Professor Ellickson goes on to note that the United States has traditionally adopted a “conditional-welfare approach” under which “applicants for benefits must prove that they should be excused from the presumptive duty to be self-supporting.” *Id.* at 22-23. He notes that one of the significant practical problems with any unconditional-welfare right is that a state adopting such an approach generally must “resort to heavy-handed coercion to enforce legal duties to work.” *Id.* at 23. *See also* Robert Ellickson, *A Right to Housing?*, RESPONSIVE COMMUNITY, Fall 1994, at 43 (exploring similar themes in an article published by The Institute for Communitarian Policy Studies at The George Washington University). Applying Professor Ellickson’s terminology, I would describe the right to housing I have set forth in this article as a conditional-welfare right, conditioned on the bilateral making and keeping of certain contractual promises. *See infra* Part IV.

⁶⁹ Padraic Kenna, *Housing Rights—The New Benchmarks for Housing Policy in Europe?*, 37 URB. LAW. 87, 92 (2005).

⁷⁰ *Id.* at 90.

⁷¹ *Id.* at 91.

⁷² In addition to Robert Nozick’s *Spheres of Justice*, which is certainly the best-known source for this kind of argument, Josef Pieper expresses somewhat similar themes in portions of his book *Leisure, the Basis of Culture*. JOSEF PIEPER, *LEISURE, THE BASIS OF CULTURE* 2 (Alexander Dru trans., Pantheon Books 1952) (describing the sphere of work as consistently overvalued). Pieper’s interesting book argues that leisure is not merely a break from work, but has value that extends beyond refreshment of the worker for the workplace. *Id.* at 30 (“[L]eisure does not exist for the sake of work . . .”). He goes on to describe leisure as part of self-actualized personhood. *Id.* at 31 (noting that leisure helps a person to “come to full possession of his faculties, face to face with being as a whole”).

⁷³ SENNETT, *supra* note 38, at 32. Along similar lines, Robert Solomon claims that society has reified wealth over community. *See* SOLOMON, *supra* note 4, at 186.

⁷⁴ A. JOHN SIMMONS, *ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY* 111 (1993) (“[O]riginal property rights are based on the purely personal act of

property. Recognizing society's longstanding bias against redistribution is important insofar as it relates to the earlier discussion about the potential resentment associated with redistribution.⁷⁵

Society's reification of money and employment may also prevent policy-makers from providing housing to those who need it most. As Rachel Bratt has suggested, the United States has never focused its federal housing programs primarily on the goal of helping the poor.⁷⁶ Instead, the primary purposes of federal housing programs have been to create jobs and respond to the needs of what Bratt calls the "submerged middle class."⁷⁷

Any argument against allowing the market to be the sole provider of affordable housing must respond to the notion of desert. The concept of the "deserving poor" is perhaps one of the most polarizing concepts in social-justice jurisprudence: Society distinguishes between those who ostensibly are, and those who are not, worthy of societal provision and perhaps even societal concern.⁷⁸ To challenge this common practice, Robert Solomon has made a cogent argument that the market does not predictably reward merit.⁷⁹ Instead, he argues that society tends to reward those persons who are best able to market their skills, even sometimes over those whose skills are most useful to society.⁸⁰ Solomon also notes that those who are privileged are often loathe (perhaps understandably) to acknowledge the ways in which they benefit from society's flawed reward system.⁸¹ Instead, the "haves" generally prefer to believe that they are entitled to what they have, and that those who do not have resources do not deserve them.⁸²

Jules Coleman's jurisprudence takes the market-fallibility thesis one step further by showing how the market's inherent fallibility creates a space in which rights operate. In Coleman's view, rights exist to correct for market

laboring on some unowned object . . . [and thereby] taking the object 'out of the common.'").

⁷⁵ See *supra* notes 40-46 and accompanying text.

⁷⁶ Rachel G. Bratt, *A Right to Housing Redux*, J. HOUSING & COMMUNITY DEV., Nov.-Dec. 2004, at 6, 8. Bratt supports this assertion as follows:

The poor have been with us for a very long time and bad housing was a big problem many years before the federal government got involved with housing. The main reason for federal involvement with housing, which began in the 1930s, was to stimulate the economy—to provide jobs, to safeguard the banking industry, and to stimulate the construction industry. Embedded within these various programs was a commitment to produce housing. But even the earliest housing programs, rather than being aimed at the poor, were targeted to the "submerged middle class."

Id.

⁷⁷ *Id.*

⁷⁸ LAWRENCE J. VALE, FROM THE PURITANS TO THE PROJECTS: PUBLIC HOUSING AND PUBLIC NEIGHBORS 10 (2000) (citing housing reformers' "underlying ambivalence [throughout American history] about whether these people were potentially good citizens who had been brought down by the evil circumstances of their environments, or irredeemable outcasts who deserved no proximate place to good citizens").

⁷⁹ SOLOMON, *supra* note 4, at 183-86.

⁸⁰ *Id.* at 184.

⁸¹ *Id.* at 184-85.

⁸² *Id.* at 185.

failure.⁸³ When the market fails to allocate resources correctly,⁸⁴ entitlements must be allocated directly.⁸⁵

As the previous discussion suggests, the market may not function effectively as the sole provider of housing, despite the seeming attractiveness of a market-based approach. Instead, the market may not be a reliable means of distributing scarce housing resources to those who need (and perhaps even deserve) them most. Thus, insofar as society is concerned with rewarding those who “deserve” housing, it may not be appropriate to assume that the market allocates housing to those who demonstrate the greatest merit.

Familiarity with some of the challenges associated with rights might lead one to question whether seeking to establish any new right—including a right to housing—is a worthwhile use of resources. Accordingly, the following section turns to the question of efficacy: Could a right to housing make a difference in the lives of low-income persons in the United States?

B. What (if Anything) Could a Right to Housing Accomplish in the United States?

1. What Is Meant by the Term “Right”?

To answer the question of whether a right to housing could make a difference in the United States, it is important to begin with a definition of “right.” There is no single, universally accepted definition of the term. Jules Coleman and other scholars emphasize the legitimacy of the claim as an essential part of the definition of “right.”⁸⁶ Other definitions emphasize the power associated with rights.⁸⁷ Ronald Dworkin goes so far as to call individual rights “political trumps held by individuals.”⁸⁸ According to Dworkin, rights cannot be denied solely for “the general interest”⁸⁹ and cannot be abridged for minimal rea-

⁸³ COLEMAN, *supra* note 65, at 28.

⁸⁴ Professor Coleman uses “efficiency” rather than “justice” as a measure of whether allocation is correct. *Id.*

⁸⁵ *Id.*

⁸⁶ Coleman states that calling something a right necessarily denotes “legitimate interests or liberties” to be accorded special protection by the law. *Id.* at 35 (referring to the “privileged status” of rights). Coleman’s “logical form of rights” explores the “necessary features or properties of rights.” *Id.* at 34. Michael P. Zuckert’s treatment of rights is similar, inasmuch that he refers to rights as justified raisable claims. ZUCKERT, *supra* note 13, at 173 (discussing the Hart-Tuck theory of rights). Elsewhere, Zuckert defines a right as “a justified claim to do or to have something, or . . . a moral power.” *Id.* at 313 (discussing the rights jurisprudence of Locke and Rawls).

⁸⁷ Kenna, *supra* note 69, at 110. John Locke makes a similar point, noting that the rightholder may demand enforcement of the right—or not—as he or she wishes. HART, *supra* note 3, at 185 (“[T]his figure becomes intelligible by reference to the special form of control over a correlative duty which a person with such a right is given by the law.”). This characteristic, in turn, gives rise to another definition of “right” propounded by Hart: “[O]ne who has a right has a choice respected by the law.” *Id.* at 188-89.

⁸⁸ DWORKIN, *supra* note 27, at xi.

⁸⁹ *Id.* at 269 (“If someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so.”). Dworkin notes that a failure to provide rights when so requested is unjustified, even when doing so would advance other societal goals. *Id.* at 169. Dworkin describes “goals” in weaker language than “rights,” stating that advancing a goal is merely a vote “in favor of a political act.” *Id.*

sons.⁹⁰ The Dworkin, Hart, and Coleman definitions can be fused together as follows: It is because rights connote legitimacy that they are powerful. This power and legitimacy, in turn, cause rights to be influential; indeed, according to Michael Zuckert, “Natural law and rights function as ultimate normative standards for judgment and action[.]”⁹¹ Thus, Zuckert would contend that rights are a measuring stick by which personal and societal conduct are judged.

In crafting their own definitions, H.L.A. Hart, Jeremy Bentham, and John Austin each focus on the origins of rights rather than the qualities that characterize rights. Hart has described rights as “result[ing] from obligation[s] imposed by law” and as being created by “coercive laws.”⁹² While Hart views rights as creatures of law, Bentham⁹³ and Austin⁹⁴ define rights by emphasizing their relationship to duties.⁹⁵ Indeed, according to Austin, rights presuppose corresponding duties and, to take this analysis further, are conferred by the imposition of a duty and continue to exist only as long as the duty exists.⁹⁶

Roscoe Pound’s definition of rights focuses on the somewhat attenuated relationship he sees between rights and the law. According to Pound, rights are not created by law, but instead precede the law and help us to understand the law.⁹⁷ Thus, Pound argues that rights are created as follows: The law recognizes an interest, confers a right to protect that interest, and then creates a duty to protect that right.⁹⁸ Applying Pound’s theory, the first step toward a right to housing would be to seek recognition of an interest in housing.

Considering each of these theories, it becomes apparent that the most appropriate definition of “right” for any given context may depend on which

⁹⁰ *Id.* at 191-92 (“Someone who claims that citizens have a right against the Government . . . [cannot say] that the Government is justified in overriding a right on the minimal grounds that would be sufficient if no such right existed.”). Thus, balancing group interests versus individual rights in the usual sense is not appropriate, in Dworkin’s conception of rights. *Id.* at 199. Such a conception of rights, Dworkin argues, would make individual rights too vulnerable. *Id.* (describing such balancing as a source of “confusion that threatens to destroy the concept of individual rights”). Dworkin further notes that individuals have the right to disobey laws that would abridge the individuals’ rights against the government. *Id.* at 192. Dworkin additionally submits that inflating rights is not as serious an error as invading them. *Id.* at 199.

⁹¹ ZUCKERT, *supra* note 13, at 169.

⁹² HART, *supra* note 3, at 165. Hart calls these “rights correlative to obligations.” *Id.* at 166.

⁹³ ZUCKERT, *supra* note 13, at 171-72 (noting that, in Bentham’s conception of rights, being a holder of rights is nothing more than being the beneficiary of duties placed on some other person). Such rights, according to Hart’s conception of Bentham, are “a species of normative property belonging to the right holder.” HART, *supra* note 3, at 185.

⁹⁴ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 158-59 (2000).

⁹⁵ This is not to suggest that Austin sees rights as being divorced from law. According to Austin, natural law or positive law are the means by which duties—and thus rights—are created. *Id.*

⁹⁶ *Id.* at 158. This is an interesting counterpoint to Owen Fiss’s conception of rights as being related to remedies, but existing even when no remedy exists. See OWEN FISS, *THE LAW AS IT COULD BE* 44 (2003).

⁹⁷ ROSCOE POUND, *THE IDEAL ELEMENT IN LAW* 109-10 (Liberty Fund 2002) (1958). Note that this is in some ways the opposite of Hart’s view, in that Hart sees law as the engine for the creation of rights, whereas Pound sees the interest as the starting point, and the right as the law’s response to that interest. See *supra* note 92 and accompanying text.

⁹⁸ POUND, *supra* note 97, at 110.

characteristic of rights is most relevant to the context in question. At a minimum, we may define rights with respect to their legitimacy, power, or origins. A definition that focuses on the legitimacy and power of rights might be useful in convincing a legislature to recognize some right as a matter of good policy, while a definition that focuses on the origins of rights might be useful to convince that same legislature that it—rather than a court—will be the most effective source of such a right.

In trying to define the term “right,” it is also important to consider whether “right” is a monolithic concept, or rather, whether several different kinds of rights exist. One common way of dividing the larger body of rights is to separate them into “natural” and “civil” rights. Thomas Paine defines natural rights as those that are inherent to a person’s existence⁹⁹ and civil rights as those that exist by virtue of a person’s membership in society.¹⁰⁰ Civil and natural rights are related to one another, according to Paine, in that every civil right is based upon some natural right.¹⁰¹ In addition, he states, some natural rights can be exchanged for civil rights.¹⁰² Given the discussion below, which focuses on how access to housing can affect how a person experiences “personhood” and “citizenship,”¹⁰³ it is possible to describe a right to housing as either a civil or a natural right.

In defining “right,” one must also consider whether the term merits a specialized meaning within the housing context. The United Nations’ International Covenant on Economic, Social and Cultural Rights includes a right to housing with very specific requirements.¹⁰⁴ General Comment 4 to the treaty provides an explanation of what the right to housing means in the context of the treaty.¹⁰⁵ In doing so, the Comment makes particular reference to personhood

⁹⁹ THOMAS PAINE, *RIGHTS OF MAN: BEING AN ANSWER TO MR. BURKE’S ATTACK ON THE FRENCH REVOLUTION* 22 (2d ed. 1791).

¹⁰⁰ *Id.* at 23.

¹⁰¹ *Id.*

¹⁰² *Id.* at 24.

¹⁰³ *See infra* Part II.B.4.b.

¹⁰⁴ The treaty provides as follows:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

International Covenant on Economic, Social, & Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A (XXI), art. 11(1), available at http://www.unhcr.ch/html/menu3/b/a_cescr.htm.

¹⁰⁵ The General Comment states as follows:

In the Committee’s view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. Thus “the inherent dignity of the human person” from which the rights in the Covenant are said to derive requires that the term “housing” be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the

and dignity,¹⁰⁶ privacy,¹⁰⁷ physical security,¹⁰⁸ and security of tenure.¹⁰⁹ The Comment also sets forth a fairly elaborate description of conditions that constitute “adequate housing.”¹¹⁰ Especially because they are so precise, the treaty’s

Global Strategy for Shelter to the Year 2000 have stated: “Adequate shelter means . . . adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities—all at a reasonable cost.”

U.N. Comm. on Econ., Soc., & Cultural Rights [CESCR], *General Comment 4: The Right to Adequate Housing (Art. 11(1))*, ¶ 7, U.N. Doc. E/1992/23 (Dec. 13, 1991), available at [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+4.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument) [hereinafter *General Comment 4*]. See also Kenna, *supra* note 69, at 95 (providing an explanation of what the right to housing means, in the context of the treaty).

¹⁰⁶ See *infra* Part III.A.2.

¹⁰⁷ See *infra* note 221 and accompanying text.

¹⁰⁸ See *infra* notes 211-15 and accompanying text.

¹⁰⁹ See *infra* notes 216-18 and accompanying text.

¹¹⁰ The General Comment provides as follows on this point:

(a) *Legal security of tenure*. Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups;

(b) *Availability of services, materials, facilities and infrastructure*. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

(c) *Affordability*. Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by States parties to ensure the availability of such materials;

(d) *Habitability*. Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States parties to comprehensively apply the *Health Principles of Housing 5/* prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates;

(e) *Accessibility*. Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take

definitions and explanations may provide guidance to the United States if it chooses to adopt a right to housing at some future time.

In addition to searching for a meaningful definition of rights, others have examined the source of rights. Some, like housing theorists Paul and Percival Goodman, suggest that rights are immutable, not to be discovered or amended.¹¹¹ Thus, the Goodmans appear to claim that rights are inherent, rather than creatures of the law. Their position is similar to Dworkin's assertion that the legal system may not have acknowledged every right that persons have, and yet those rights already exist, independent of legal recognition.¹¹² Building upon such a claim, it may be possible to argue that a right to housing already exists in the United States, even though neither the federal government, nor any state, has ever recognized it as such.¹¹³

This section has explored both the definition of rights and the origins of rights. The foregoing definitions are all useful to the current discussion of housing rights insofar as they tend to support the assertion, presented below in Part II.B.4.a, that naming something as a "right," as opposed to a "goal," "policy," "commitment," or anything else that falls short of an entitlement, carries with it a suggestion of power and legitimacy.¹¹⁴ This section's discussion has also suggested that there may be particular attributes, unique to the concept of housing, that might make a right to housing meaningful and effective. Finally, and as this discussion has shown, although the legislature is the most likely source for a right to housing, it may be possible to argue that such a right already exists, even though it has not yet achieved legislative recognition.

The following section builds upon the brief prior discussion of the very specific definition of "right to housing" found in the United Nations' Interna-

fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement;

(f) *Location*. Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants;

(g) *Cultural adequacy*. The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, *inter alia*, modern technological facilities, as appropriate are also ensured.

General Comment 4, supra note 105, at ¶ 8. General Comment 4 elements (a), (b) and (g) are consonant with bilateral promise enforcement, supportive services, and valuing individuality, respectively). These concepts are further explored in the conclusion to this Article. *See infra* Part IV.

¹¹¹ GOODMAN, *supra* note 11, at 189 (speaking derisively of "the discovery of a new human 'right'—as if the rights of man could be so easily amended"). In the same discussion, the authors caution, as noted earlier, against "the trap" of "give-away money." *Id.*

¹¹² *See infra* notes 199-204 and accompanying text.

¹¹³ This argument is presented *infra* in notes 199-204 and accompanying text.

¹¹⁴ *See infra* Part II.B.4.a.

tional Covenant on Economic, Social, and Cultural Rights and its General Comment.¹¹⁵ The purpose of the discussion below is to explore, in greater detail, the necessary attributes of a right to housing.

2. *What Would it Mean to Have a Right to Housing?*

To understand what it would mean to have a right to housing, one must determine what a right to housing might include, if such a right were created. This question can encompass both the number of housing units to be constructed and the specific attributes of such housing—that is, both the “width” and the “depth” of provision.¹¹⁶ The following discussion focuses on the depth, rather than the width, of provision.

a. *Security of Tenure*

First, a right to housing may require security of tenure. The Council of Europe’s Committee on Social Rights defines “adequate housing” as requiring, among other things, “secure tenure supported by the law.”¹¹⁷ The Committee’s definition is consistent with Paul Davidoff’s argument that the United States should recognize “a right to reside in place” as a corollary to the Constitutional right to travel.¹¹⁸ Importantly, however, a resident’s ability to exercise Davidoff’s right “to reside in place” would depend on whether he or she paid an appropriate level of rent and took appropriate care of the premises.¹¹⁹ As I explain in the conclusion of this Article, a conditional formulation of the right to housing is consistent with what I call Promise Enforcement.¹²⁰

Even so, a right to housing does not always require the kind of comprehensive security of tenure one might assume. For example, and despite the fact that it establishes a right to housing, the United Nations’ Covenant on Economic, Social, and Cultural Rights does not necessarily require that signatory states provide housing immediately, provide it to all persons, or provide it free

¹¹⁵ See *supra* notes 104-10 and accompanying text.

¹¹⁶ See Lochner Marais & Johannes Wessels, *Housing Standards and Housing Rights: The Case of Welkom in the Free State Province*, 16 URB. F. 17, 20 (2005) (“In essence, South African housing policy is based on an incremental housing approach and on providing a smaller product to more people (width instead of depth).”).

¹¹⁷ Kenna, *supra* note 69, at 108 (quoting 1 EUROPEAN COMM. OF SOC. RIGHTS, COUNCIL OF EUROPE, EUROPEAN SOCIAL CHARTER (REVISED): CONCLUSIONS 2003, at 221 (2003) (Bulgaria, France, Italy); 2 EUROPEAN COMM. OF SOC. RIGHTS, COUNCIL OF EUROPE, EUROPEAN SOCIAL CHARTER (REVISED): CONCLUSIONS 2003, at 554 (2003) (Romania, Slovenia, Sweden)).

¹¹⁸ Paul Davidoff, *Decent Housing for All: An Agenda, in AMERICA’S HOUSING CRISIS: WHAT IS TO BE DONE?*, *supra* note 1, at 186, 199. This stability, Davidoff contends, would be good for both economic and social mobility. *Id.*

¹¹⁹ *Id.* Davidoff’s position is consistent with HUD policy as it is currently stated. See U.S. Dep’t of Hous. & Urban Dev., Rental Help—HUD’s Public Housing Program, <http://www.hud.gov/renting/phprog.cfm> (last visited Sept. 25, 2008) (responding as follows to the question, “How Long Can I Stay in Public Housing?”: In general, you may stay in public housing as long as you comply with the lease. If, at reexamination your family’s income is sufficient to obtain housing on the private market, the [local housing agency] may determine whether your family should stay in public housing. You will not be required to move unless there is affordable housing available for you on the private market”).

¹²⁰ See *infra* Part IV.

of charge.¹²¹ Along similar lines, Barry Goodchild has interpreted the right to housing in France, in practice, as a “possibility” of housing rather than a “necessity” for governmental provision.¹²²

Yet another, more extreme argument is that a right to housing would require the United States to do nothing more than it has already done. Representatives from the United States made such an argument in 1996 in response to the United Nations’ call for all countries to recognize a right to housing as part of the Second World Conference on Human Settlements (Habitat II).¹²³ Specifically, the United States representatives claimed that the United States’ protection of the free market in housing, coupled with the country’s prohibition against discrimination, should be sufficient to satisfy any right to housing.¹²⁴ That the United States would take this position was somewhat ironic, in that the American Law Institute had been very influential, some fifty years earlier, in proposing a “right to adequate food and housing” that the United Nations incorporated into the Universal Declaration on Human Rights, which is the foundational document for the international right to housing.¹²⁵ Thus, the United States legal community was once instrumental in the creation of a right to housing that the country has subsequently sought to minimize.

Security of tenure is but one aspect of a right to housing. The next section explores how a right to housing may also require comparable consideration of persons who cannot procure housing through the market and those who can.

b. Equal Concern, Rather than Equal Treatment

Applying Dworkin’s rights thesis, any right to housing that the United States might ultimately adopt almost certainly would be a right to “equal concern,” as opposed to a right to “equal treatment.”¹²⁶ In fact, Dworkin argues that “equal concern,” rather than “equal treatment,” is what justice requires.¹²⁷

¹²¹ Phillip Alston, *The United States and the Right to Housing: A Funny Thing Happened on the Way to the Forum*, 1 EUR. HUM. RTS. L. REV. 120, 131-32 (1996). Alston wrote the article in his capacity as chairperson of the United Nations’ Committee on Economic, Social, and Cultural Rights.

¹²² Goodchild, *supra* note 15, at 90 (“The right to housing is about the ‘possibility,’ to use the interpretation of the Constitutional Council, rather than the necessity of public authorities making housing available. The justiciability of the right to housing . . . is therefore limited to those rules that the state itself defines as the terms on which aid is offered.”) (internal citation omitted).

¹²³ Alston, *supra* note 121, at 121. Habitat I was held in 1976. *Id.* at 122.

¹²⁴ *Id.* at 121. This is not the only time such an argument has been made. See Marais & Wessels, *supra* note 116, at 18 (noting that some have construed the right to housing as nothing more than an obligation not to block access to housing). Marais and Wessels also submit that, “[i]n general, it seems as if the right to housing does not mean that governments are supposed to construct houses for the entire population.” *Id.*

¹²⁵ Alston, *supra* note 121, at 125.

¹²⁶ DWORKIN, *supra* note 27, at 272-73.

¹²⁷ Dworkin argues that the governed must be treated with “equal concern,” as persons who are “capable of suffering and frustration.” *Id.* at 272-73. As a related matter, Dworkin also argues that society must treat the governed with respect and as “capable of forming and acting on intelligent conceptions of how their lives should be lived.” *Id.* at 272. Dworkin’s arguments are consistent with the jurisprudence of Robert Solomon, who argues that society must seriously take notice of all persons’ needs and interests even though those needs and interests vary from person to person. SOLOMON, *supra* note 4, at 167. Solomon’s and Dwor-

A right to “equal treatment” would be a right to an equal share of goods and opportunities.¹²⁸ A right to “equal concern,” by contrast, would be a right to “treatment as an equal” and equal respect in the political decisions about how goods and opportunities are to be distributed.¹²⁹ The two conceptions of equality would create very different housing rights, and I find the latter more compelling than the former. I would agree with Robert Solomon that the real injustice in modern society is not the inequality in personal resources, but the deep-seated societal indifference to inequality.¹³⁰ Applying Dworkin’s theory and Solomon’s reasoning, any right to housing that the United States might adopt should be a right to equal concern, respect, and political participation in the decisions to be made about housing policy, rather than a right to equal distribution of housing resources.

The foregoing discussion has suggested that a right to housing should be a right to equal concern, which may or may not involve comprehensive security of tenure. The following section explores whether recognizing such a right could make a practical difference.

3. *Would a Right to Housing Make a Practical Difference?*

International experience has suggested that merely adopting a right to housing may not make an appreciable difference in the lives of low-income persons, and this reality raises the question of whether adopting a right to housing in the United States actually has the potential to make a practical difference. If the answer to this question is “No,” then it probably makes no sense to pursue such a right.

The countries that comprise the European Union have recognized a right to housing through international agreements¹³¹ as well as domestic law.¹³² In fact, it is probably fair to say that the right to housing is widely accepted outside the United States.¹³³ International agreements recognizing such a right

kin’s viewpoints are also consonant with Michael Walzer’s work; Walzer has argued that “[d]emocracy requires equal rights, not equal power.” WALZER, *supra* note 22, at 309.

¹²⁸ DWORKIN, *supra* note 27, at 273. Dworkin notes that there are some limited instances—such as voting apportionment—in which the right is one to equal treatment, rather than equal concern. *Id.*

¹²⁹ *Id.*

¹³⁰ SOLOMON, *supra* note 4, at 177. The term Solomon uses is “wanton cruelty.” *Id.* at 185.

¹³¹ Housing Rights Service, *The Housing Rights of A8 Nationals*, HOUSING RTS. REV. (Ir.), Winter 2004, at 5, 5 (noting that a country’s membership in the European Union brings with it an obligation to provide access to low-income housing and assistance to homeless persons in other EU states).

¹³² Kenna, *supra* note 69, at 93-94 (noting the wide scale development of a right to housing in the European Union). Notably, Dr. Kenna is the Chairman of the Housing Rights Expert Group of FEANTSA, the European Federation of National Organizations working with the Homeless.

¹³³ *Id.* at 87 (noting that most states have ratified international instruments affirming a human right to housing). *See also id.* at 99 (quoting Article 34 (3) from the European Union Charter of Fundamental Rights, which refers to a right to “housing assistance”); *id.* at 102 (noting that, under Article 3 of the Council of Europe’s *European Convention on Fundamental Rights and Freedoms* (1950), refusing to provide housing aid has been held to violate the prohibition against inhuman and degrading treatment); *id.* at 105 (noting that Articles 16 and 31 of the Council of Europe’s Revised European Social Charter (1996) provide significantly increased recognition of a right to housing); *id.* at 106 (stating that Article 30 of the same

include the European Union Constitution,¹³⁴ the United Nations' International Covenant on Economic, Social, and Cultural Rights,¹³⁵ and nine other United Nations Instruments.¹³⁶ In addition, many countries have recognized a right to housing through their own domestic law.¹³⁷ However, as the discussion below illustrates, merely having a right to housing does not guarantee sufficient housing.¹³⁸ Thus, a preliminary question exists as to whether these rights, as recognized in other countries and in international instruments, have been meaningful and effective.

document provides protection against poverty and social exclusion, which also contemplates a right to housing aid). *But see* Sue Willman, *Everyone's a Winner?*, NEW L.J. 696, 697 (2003) (noting that, although a refusal to provide support and housing may, under some circumstances, violate the European Convention's Article 3 prohibition against "inhuman and degrading treatment," the threshold for such a claim is very high).

¹³⁴ Kenna, *supra* note 69, at 88 (noting the primacy of the human right to housing in the European Union Constitution).

¹³⁵ *Id.* at 95 (noting that Article 11 of the U.N. International Covenant on Economic, Social and Cultural Rights (1996) includes a right to a standard of living, which includes a right to housing). The Covenant has been ratified by 156 countries. *See* Office of the United Nations High Comm'r for Human Rights, Int'l Covenant on Econ., Soc. and Cultural Rights N.Y., 16 December 1966, <http://www2.ohchr.org/english/bodies/ratification/3.htm> (providing status information for the Covenant).

¹³⁶ Kenna, *supra* note 69, at 94 (noting that Article 25 of the United Nations' Universal Declaration of Human Rights (1948) includes a right to a standard of living, which includes a right to housing); *see also id.* at 97-98 (listing the nine other UN instruments that include a right to housing). In another United Nations initiative that recognizes the historical difficulty women have had in securing mortgages and the fact that women occupy most subsidized and rental housing, the United Nations World Conference on Women supported women's access to housing, as well as credit. *See* Sayne & Miller, *supra* note 67, at 17-18 (citing clause 62(f) of the proposed Global Plan of Action from the fourth such conference in 1995). The clause reads as follows: "Women's human right to equal access to and control of land, property and credit must be upheld, regardless of customary laws, traditions and practices related to inheritance and marriage." *Id.* at 18. *See also* Leilani Farha, *Is There a Woman in the House? Re/conceiving the Human Right to Housing*, 14 CANADIAN J. WOMEN & L. 118, 121-22 (2002) (arguing that, for the United Nations' International Covenant on Economic, Social & Cultural Rights to be effective, it must address the discrimination and inequality that women face in the housing market).

¹³⁷ France, for example, includes a national right to property and security within the French National Assembly's Declaration of the Rights of Men and of Citizens. PAINE, *supra* note 99, at 117 (citing Article 2 of the French National Assembly's Declaration of the Rights of Men and of Citizens). Such a right is not, however, directly found in the French Constitution. *See* Goodchild, *supra* note 15, at 89 ("In the view of legal opinion, most notably the Constitutional Council, the right to housing is a direct extension of the preamble to the 1946 French constitution including a declaration that 'the nation provides the individual and the family the conditions necessary for their development.'"). South Africa and Belgium are two additional countries that recognize a right to housing. *See* Foscarinis, *supra* note 52, at 37. Sweden also has what have been termed "universal ambitions" for housing policy. *See* Bengtsson, *supra* note 41, at 256, 264 ("Instead of providing legal guarantees, a universal housing policy has the aim of supporting the household in its position as market actor."). The Swedish policy brings to mind the discussion in Part II.A.4, *supra*, regarding whether the market should be the sole provider of housing, including low-income housing.

¹³⁸ As Bob Ellickson has noted, "[i]nternational evidence shows that proclaiming a right to shelter does not magically lead to better housing conditions." Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, *supra* note 68, at 25.

In addition, even assuming that the housing rights recognized in other countries have been effective and meaningful, the widespread acceptance of housing rights elsewhere has not caused the idea to gain any particular traction in the United States. Instead, perhaps due to the real or perceived differences in political traditions between the United States and those countries that have recognized a right to housing, American political discourse has generally viewed the fact that other countries have recognized such a right as being of limited practical importance.¹³⁹ Indeed, the United States is arguably a key opponent of the right to housing.¹⁴⁰

As the discussion above suggested, one of the most pervasive concerns about a right to housing, even among housing advocates, involves the potential efficacy (or lack thereof) of such a right. Some countries that recognize a right to housing may have an even greater problem with homelessness than we do here in the United States.¹⁴¹ Instead, other countries' experience has shown that merely creating a right to housing will not end a country's struggle to provide adequate housing for low-income persons.¹⁴² The phenomenon of the unfunded mandate is one significant challenge. The South African right to housing, for example, is not currently being fulfilled because of the tremendous expense involved in providing the volume of housing that is needed.¹⁴³ Even in the United States, current housing entitlements lack adequate funding, and as a result, do not provide housing to all persons who need it.¹⁴⁴

Recognizing a right to housing does not automatically translate into a governmental commitment to provide each citizen with housing as a practical mat-

¹³⁹ Hartman, *supra* note 56, at 228.

¹⁴⁰ Ezra Rosser, *Rural Housing and Code Enforcement: Navigating Between Values and Housing Types*, 13 GEO. J. ON POVERTY L. & POL'Y 33, 58 (2006).

¹⁴¹ The Russian Federation is one jurisdiction that has provided a general right to property in its Constitution that remains unfulfilled at this time. See generally Sheila O'Leary, *The Constitutional Right to Housing in the Russian Federation: Rethinking the Guarantee in Light of Economic and Political Reform*, 9 AM. U. J. INT'L L. & POL'Y 1015 (1994). See also Rosser, *supra* note 140, at 58 (noting that a right to housing is widely recognized in other countries, although not widely enjoyed in actuality).

¹⁴² Tom Mullen et al., *Rights and Security in Housing: The Repossession Process in the Social Rented Sector*, 62 MOD. L. REV. 11, 21, 25 (1999). Mullen, a Scottish law professor, describes two kinds of tenancy arrangements—"secure tenancy" and the less legally protected "assured tenancy," concluding that the relative security of the tenancy depended more on the character of the tenants, the management style of the landlord, and other factors than it did on the differences in legal rights afforded by each arrangement. *Id.* at 21, 25, 28. Thus, for a variety of reasons that Mullen discusses, tenants in "secure tenancies" did not necessarily have more secure housing rights than tenants in "assured tenancies" do, even though the legal regime might suggest otherwise. *Id.*

¹⁴³ Marais & Wessels, *supra* note 116, at 25 ("[T]he last time a poor person . . . received housing in Welkom was in 1995.").

¹⁴⁴ Foscarinis, *supra* note 52, at 36.

ter.¹⁴⁵ Instead, securing such a right also requires community commitment and an effective government.¹⁴⁶

Along similar lines, some countries seem, at first blush, to recognize a right to housing, but actually do not do so. Article 2 of Germany's Basic Law, for example, includes a notion of "free development of . . . personality"¹⁴⁷ that initially could be read as establishing a right to housing. Read as a whole, however, the law provides only a right to respect for the home, rather than a right to housing itself.¹⁴⁸ This is comparable to the kind of preferential treatment afforded to the home under current United States law,¹⁴⁹ and is more a "negative right" or "liberty" than a "positive right," such as an affirmative entitlement to housing.¹⁵⁰ In addition to the fact that countries like Germany have adopted ambiguous language that fails to establish a positive right to housing, some foreign laws and international instruments employ language expressly suggesting a more limited right.¹⁵¹

Concerns about the efficacy of any right to housing that the United States might choose to adopt are particularly important in light of the connection between the concepts of "right" and "remedy," which Owen Fiss has called but two stages of the same process of giving meaning to public values.¹⁵² In Fiss' conception, "right" is the more abstract construct and "remedy" the more practical one—the actualization of the right.¹⁵³ According to Fiss, failing to provide a remedy does not wholly destroy the existence of the right.¹⁵⁴ Nevertheless, a right without a remedy is a right not fully actualized.

¹⁴⁵ Kenna, *supra* note 69, at 103 (quoting *R.(on the application of Bernard) v. Enfield LBC*, UKHRR 148, at 150, 162 (2003), for the proposition that providing rights under Article 8 of the European Convention on Fundamental Rights and Freedoms does not mean that every citizen will have housing, but does require at least some effort on behalf of particularly vulnerable groups).

¹⁴⁶ ZUCKERT, *supra* note 13, at 283.

¹⁴⁷ Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, Bundesanzeiger [BAnz.] 2, as amended, art. 2(1), available at www.gesetze-im-internet.de/bundesrecht/gg/gesamt.pdf. As the Foreword by the Federal President indicates, this document, originally written as the Constitution for the Federal Republic of Germany, became the Constitution of reunified Germany. *Id.* at 1. For an exposition of German law insofar as it relates to a possible housing right, see Raymond Youngs, *Human Rights in the Housing Sphere: German Comparisons*, 15 KING'S C. L.J. 145, 146-47 (2004).

¹⁴⁸ *Id.* at 148 (citing Germany's Basic Law, Article 13, which addresses the "inviolability of the home").

¹⁴⁹ For a thorough exposition of this concept, see D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006), explaining "how homes are treated more favorably than other types of property in a wide range of legal contexts, including criminal law and procedure, torts, privacy, landlord-tenant, debtor-creditor, family law, and income taxation." *Id.* at 255.

¹⁵⁰ See *supra* notes 48-51 and accompanying text.

¹⁵¹ Housing Rights Service, *The Right to a Home*, HOUSING RTS. REV. (Ir.), Summer 2006, at 4, 4. (discussing how Article 8 of the European Convention on Human Rights states that the Convention "does not guarantee the right to have a person's housing problems solved by the authorities").

¹⁵² FISS, *supra* note 96, at 44.

¹⁵³ *Id.* at 44 (stating that "[a] right is a particularized and authoritative declaration of meaning").

¹⁵⁴ *Id.* Notably, Fiss describes the courts as having a special role to play in elaborating upon and giving effect to public values. See *id.* at 43 (noting that judicial independence is a

Not every legal tradition treats rights and remedies the same way. In Europe, rights are often akin to soft policies, rather than entitlements to be enforced with precision.¹⁵⁵ Thus, although many European countries have recognized a right to housing,¹⁵⁶ such rights may not have the practical effect that a United States observer might assume. Such a phenomenon may help to explain why the recognition of a right to housing elsewhere, but especially in European countries, has not been considered particularly significant for United States housing policy.

The foregoing discussion is not meant to imply that only absolute rights are meaningful or that rights are always to be enforced. Even Ronald Dworkin, who has famously argued that rights-based arguments are more compelling than policy-based arguments,¹⁵⁷ acknowledges that an urgent policy can sometimes outweigh a right.¹⁵⁸ Dworkin has also noted that not all rights are equally strong¹⁵⁹ and not all legal rights represent moral rights against the government.¹⁶⁰ Along the same lines, Jules Coleman states that part of defining a right is determining the “conditions of legitimate transfer”—that is, how and when such a right can be lost or given up.¹⁶¹ Understanding these characteristics of rights raises additional questions about whether recognizing a right to housing would make an appreciable difference in the lives of low-income persons in the United States. The following section begins to answer these questions by examining some of the important attributes uniquely associated with rights, as opposed to goals, policies, commitments, and other governmental initiatives that fall short of being called rights.

crucial ingredient in this process). In crafting remedies, as Fiss has noted, courts attempt to provide meaning and impact to the rights they have been asked to apply. *See id.* at 44.

¹⁵⁵ Kenna, *supra* note 69, at 110.

¹⁵⁶ *See supra* note 132 and accompanying text.

¹⁵⁷ DWORKIN, *supra* note 27, at 85 (“[A]n argument of principle does not often rest on assumptions about the nature and intensity of the different demands and concerns distributed throughout the community. On the contrary, an argument of principle fixes on some interest presented by the proponent of the right it describes, an interest alleged to be of such a character as to make irrelevant the fine discriminations of any argument of policy that might oppose it.”). As this discussion shows, Dworkin uses the word “principle” in place of “right.” Given what he sees as the superior nature of principle-based decisions, Dworkin claims that “judicial decisions in civil cases, even in hard cases[,] . . . characteristically are and should be generated by principle[,] not policy.” *Id.* at 84.

¹⁵⁸ *Id.* at 92. Robert Solomon has similarly noted that not all rights—not even those denominated as “human rights”—are absolute. SOLOMON, *supra* note 4, at 168-69 (“[E]ven freedom of speech, we are constantly reminded by the news, is a right embedded in a context which qualifies and occasionally contradicts it.”).

¹⁵⁹ DWORKIN, *supra* note 27, at 170. As examples, Dworkin notes the political right to free speech and the right to some minimal standard of living (the general topic of this Article), arguing that, although both rights exist, the former right is much stronger than the latter. *Id.*

¹⁶⁰ *Id.* at 191. As an example, Dworkin notes the right to drive on a particular street or park in a particular location; these rights, while real, can be abridged by the government at will. *Id.*

¹⁶¹ COLEMAN, *supra* note 65, at 35. These ideas are explored perhaps most famously in an article by Guido Calabresi & A. Douglas Melamed, entitled *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

4. *What Does Society Accomplish By Declaring Something to be a Right?*

a. *Rights Bring Power and Legitimacy, Particularly for Minority Groups*

Rights are more powerful than goals, policies, commitments, and other non-rights. One illustration of this truth is that the United States has recognized a *commitment* to “a decent home and a suitable living environment for every American family” dating back to 1949.¹⁶² This resolution came from President Franklin Delano Roosevelt’s 1944 State of the Union Address, in which he urged the adoption of a “Second Bill of Rights” that would include a right to housing.¹⁶³ Congress officially adopted Roosevelt’s housing goal in 1949.¹⁶⁴ Thus, a commitment to housing for all persons in the United States is not an entirely new concept, but creating an affirmative right to housing would take Congress’ previous commitment to a whole new level and require that it be met.

The 1949 commitment lacked specific goals that would have made it enforceable and meaningful.¹⁶⁵ Currently, the United States falls far short of providing housing to every family in America who needs it; instead, only about one-fourth of those who qualify for housing assistance actually receive it.¹⁶⁶

¹⁶² Davidoff, *supra* note 118, at 187 (noting that this promise is entirely void of content at this time).

¹⁶³ Bratt, *supra* note 76, at 6 (quoting Roosevelt as saying that “true individual freedom cannot exist without economic security and independence” and calling for “a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed”). For a discussion of how the second Bill of Rights might be useful today, see generally CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004). Appendix I contains the full text of FDR’s address, including “[t]he right of every family to a decent home.” *Id.* at 235, 243.

¹⁶⁴ Bratt, *supra* note 76, at 6.

¹⁶⁵ Foscarinis, *supra* note 52, at 36. Even if the United States provided housing to each and every American family in accordance with the 1949 commitment, the language of the commitment is arguably still too narrow, in that it seems to exclude all noncitizens and nontraditional families. Davidoff, *supra* note 118, at 188.

¹⁶⁶ Foscarinis, *supra* note 52, at 36. One reason, as Rachel Bratt asserts, is that the current minimum wage is insufficient to pay what HUD has deemed “fair market rent” in all 50 states. Bratt, *supra* note 76, at 6 (“[A]ccording to the National Low Income Housing Coalition, in no state is the minimum wage sufficient for a household to afford (paying no more than 30 percent of income) an apartment at the Department of Housing and Urban Development’s (HUD’s) established fair market rent.”). Bratt goes on to state that, “[i]n addition, the United States continues to lose good-paying manufacturing jobs, the stock of rental housing units affordable to low-income households is declining, and the private for-profit sector does not produce housing affordable to low-income households unless there is substantial public assistance.” *Id.* Indeed, Chester Hartman has asserted that the United States has never in its history had sufficient affordable housing. Hartman, *supra* note 56, at 230-31. Michael E. Stone makes a similar point, noting the “historic pattern of housing problems” throughout United States history. Michael E. Stone, *The Uncertain Future of U.S. Housing Policy, a Reply to Peter Dreier and John Atlas*, 18 J. URB. AFF. 371, 375 (1996) (citing “indigenous peoples driven from their ancestral homes, displacement of tenant farmers from colonial times to the 20th century, tenement conditions and discrimination faced by wave after wave of immigrants from the Irish in the 1840s to Latino and Asian immigrants today, massive foreclosures and dislocations (rural and urban) of the Great Depression of the 1930s, urban

The 1949 commitment can therefore be seen as an example of why affordable-housing goals are not sufficient. Instead, rights are required.¹⁶⁷ Rights, unlike goals, tend to provide the level of specificity needed to motivate follow-through. Unlike goals, rights also create grounds for litigation if no follow-through is forthcoming.¹⁶⁸

In addition to having greater power than non-rights, rights create legitimacy for programs to enforce those rights.¹⁶⁹ Having a right to housing should put the brakes on continual budget cuts for housing programs in the legislative appropriations process.¹⁷⁰ Making housing a right may also motivate increased construction of affordable housing.¹⁷¹

Another way of looking at legitimacy is to consider the question of institutional legitimacy. The extent to which a right to housing is meaningful may depend on which branch of government declares the existence of such a right. As one source has asserted, housing rights may help low-income persons more if they are declared by a legislature rather than a court.¹⁷²

Deeming housing a “human right” may have significant advantages as compared with declaring it to be an “ordinary” right. Some have argued that housing is even more important than education and health care, both of which have already been recognized elsewhere as human rights.¹⁷³ In fact, there has

(disproportionately black) removal of the 1950s and 1960s, abandonment, arson, and displacement in the 1960s and 1970s, and the homelessness, shelter poverty, mortgage foreclosures, and denied housing opportunities of the 1980s and 1990s.”)

¹⁶⁷ Hartman, *supra* note 56, at 231.

¹⁶⁸ *Id.*

¹⁶⁹ Ronald Dworkin attempts to show that rights-based decisions simply have greater legitimacy than those based upon policy considerations. Dworkin differentiates between rights-based decisions, which he terms “principle-based,” and economics-based decisions, which he terms “policy-based,” arguing that the former are more compelling and less susceptible to certain criticisms than the latter. DWORKIN, *supra* note 27, at 84-85. Specifically, he argues that rights-based, or principle-based, decisions are less vulnerable to criticisms that judges should not make the law and to claims that retroactive application is unfair. *Id.* at 85. Elsewhere, Dworkin suggests that whether something is an existing right (as opposed to a new right) is not very important, but goes only to the matter of putting a potential defendant on notice that he or she may infringe upon such a right. *Id.* at 335 (noting the “surprising assumption . . . that the only interest that attaches to saying that a right exists before any decision is actually announced is that if there is a pre-existing legal right, then the defendant may be on notice that he must not infringe it”). According to Dworkin, it is irrelevant whether a new right is controversial because the defendant will necessarily be excused from having prior knowledge of the right. *Id.* Dworkin also argues that rights-based decisions require equal application and consistency of application in a way that policy-based decisions do not. *Id.* at 88.

¹⁷⁰ See Norma Rotunno, Note, *State Constitutional Social Welfare Provisions and the Right to Housing*, 1 HOFSTRA L. & POL’Y SYMP. 111, 111 (1996). Rotunno argues that having a constitutional right to housing would provide the necessary support to courts that would make it possible for them to protect individuals whose housing would otherwise be terminated. *Id.* She particularly advocates for such a right to be recognized at the state level. *Id.*

¹⁷¹ Cushing N. Dolbeare, *The Low-Income Housing Crisis*, in AMERICA’S HOUSING CRISIS: WHAT IS TO BE DONE?, *supra* note 1, at 29, 52 (arguing that the current dearth of low-income housing is an argument for, rather than an argument against, the construction of more low-income housing).

¹⁷² Marais & Wessels, *supra* note 116, at 32.

¹⁷³ Davidoff, *supra* note 118, at 189.

been a movement toward recognizing housing as a human right.¹⁷⁴ Designating housing as a human right would place housing in the same discourse as due process, equality, and enfranchisement.¹⁷⁵ As Maria Foscarinis argues, human rights discourse is particularly powerful because it levels the conversational playing field, given that human rights apply to all persons, regardless of their means or place of origin.¹⁷⁶

Recognizing housing as an *international* human right may supply additional advantages. Even though the international human-rights framework does not include a formal enforcement mechanism for housing rights, declaring housing to be an international human right would create publicity for the right and would open the door for the United States' use of international research and resources on housing.¹⁷⁷ Recognizing an international human right to housing may also increase the political power of housing issues on the domestic level.¹⁷⁸

In addition to the power and legitimacy rights bring to bear as a general proposition, rights also have a special role in protecting minority interests against domination by the majority.¹⁷⁹ As Dworkin notes, rights are most important in protecting minority groups in a divided country.¹⁸⁰ Because a right to housing may be controversial, even divisive, in the United States at this time, protecting this right in the face of division may be particularly important.¹⁸¹

As the previous discussion shows, calling something a "right" rather than a "goal," "commitment," or "policy" is not just a matter of semantics. Rights—and especially human rights—carry power and legitimacy that motivate governments to create and sustain programs to put those rights into action.

b. Rights are Important in Defining Personhood, Citizenship, and Community Values

Identifying something as a right makes an important statement about community values. Stated differently, understanding what a person's rights are—and are not—requires an accounting of what it means to be a person, as well as a member of society.¹⁸² The value that society places on personhood and citizenship is an important aspect of interpersonal respect.¹⁸³ As Robert Nozick's "respect principle" suggests, respect for persons cannot exist without respect

¹⁷⁴ *Id.* (declaring that housing is "essential to survival").

¹⁷⁵ Housing Rights Service, *What our Politicians Have to Say*. . . , HOUSING RTS. REV. (Ir.), Summer 2005, at 3, 3 (discussing the human right to housing).

¹⁷⁶ Foscarinis, *supra* note 52, at 38.

¹⁷⁷ *Id.*

¹⁷⁸ Dolbeare, *supra* note 171, at 52.

¹⁷⁹ Dworkin states that rights represent the majority's promise to the minority to protect the minority's dignity and equality. DWORKIN, *supra* note 27, at 205. Robert Solomon makes a similar point in describing civil rights as society's promise to individuals. SOLOMON, *supra* note 4, at 168.

¹⁸⁰ DWORKIN, *supra* note 27, at 184.

¹⁸¹ As this discussion shows, the fact that rights can be divisive is not only a great challenge, but also sometimes a compelling reason to recognize a right. *See supra* Part II.A.2.

¹⁸² *See* NOZICK, *supra* note 25, at 499-500.

¹⁸³ Along the same lines, some have argued that providing housing to all persons is a matter of justice and fairness. Davidoff, *supra* note 118, at 189.

for rights;¹⁸⁴ rights “establish the lines of interpersonal obligation” and “serv[e] to establish our most fundamental connection with one another.”¹⁸⁵

Rights also make important statements about how a community sees itself.¹⁸⁶ Calling something a right suggests that it reflects the values and basic moral characteristics of the community.¹⁸⁷ Thus, for the United States to recognize a right to housing, the country must declare in a very public way the importance of housing as a part of personhood and citizenship.¹⁸⁸ Making such a declaration certainly has significant financial implications, as well. Insofar as the economic cost, and value, of a right to housing is concerned, Chester Hartman has argued that the United States “unquestionably has the resources to make [the right to housing] available to all its people.”¹⁸⁹ Thus, at least according to Hartman, the question is not whether the country can afford such a right, but rather whether it values housing highly enough to recognize such a right.¹⁹⁰

Exploring the power of rights as a theoretical exercise accomplishes little if the right cannot be implemented as a practical matter. Accordingly, the following section turns to the challenges of political and logistical feasibility.

5. *Is a Right to Housing Feasible in the United States?*

a. *Political Feasibility*

Chester Hartman’s remarks in the previous discussion touched on the question of economic feasibility;¹⁹¹ this section addresses political feasibility. One way of exploring political feasibility is to ask whether a right to housing is consistent with other United States policy. At some level, this seems like an easy question because the United States has recognized a generalized commitment to the universal provision of housing since 1949.¹⁹² In addition, although the United States does not currently recognize a right to housing as a general proposition, some housing entitlements already exist. The most notable, long-

¹⁸⁴ ROBERT NOZICK, *supra* note 51, at 36.

¹⁸⁵ *Id.* at 38-39. Hegel has made a similar point, in exhorting that every individual should “[b]e a person and respect others as persons.” G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 2 (S.W. Dyde trans., Dover Publ’ns 2005) (1896).

¹⁸⁶ See, e.g., Housing Rights Service, *Focus On*, HOUSING RTS. REV. (Ir.), Summer 2006, at 12, 12 (“[A] society is judged by the care it gives to its most vulnerable . . .”).

¹⁸⁷ See, e.g., NOZICK, *supra* note 25, at 499-500.

¹⁸⁸ Bo Bengtsson states that a right to housing is considered a “political marker of concern.” Bengtsson, *supra* note 41, at 261.

¹⁸⁹ Chester Hartman, *Introduction: A Radical Perspective on Housing Reform*, in AMERICA’S HOUSING CRISIS: WHAT IS TO BE DONE?, *supra* note 1, at 1, 9 (noting that all of the authors whose essays are contained in the book share the common belief that “decent, affordable housing is a right”).

¹⁹⁰ Chester Hartman has attempted to estimate the cost of funding a right to housing. Hartman, *supra* note 56, at 239. Hartman also makes it clear that he does not believe the United States should be allowed to escape its obligation to low-income persons, even if it were able to show that it could not provide affordable housing for all persons, as a practical matter. *Id.* at 224 (arguing that any lack of apparent feasibility is not a reason not to pursue a right to housing). Instead, Hartman urges, advocates must remember that the history of the evolution of all rights in the United States has been a matter of political struggle. *Id.*

¹⁹¹ See *supra* notes 189-90 and accompanying text.

¹⁹² See *supra* notes 162-67 and accompanying text.

standing housing entitlement in the United States is the mortgage-interest deduction for homeowners.¹⁹³ Other United States housing entitlements involve military family housing, Federal Emergency Management Administration (“FEMA”) disaster aid, federal aid for foster care, and Medicaid nursing home care.¹⁹⁴ Outside the area of housing, and despite the popular aversion to the general idea of entitlements, many others also exist in the United States at this time, including the earned income tax credit, food stamps, Medicare and Medicaid, school meals, Social Security, supplementary security income (“SSI”), and free public education.¹⁹⁵ The fact that many kinds of entitlements currently exist shows that the United States has already recognized the need for certain kinds of assistance.¹⁹⁶ Notably, several of these entitlements are available to higher-income persons, as well as to low-income persons. Thus, it would be inaccurate to contend that an entitlement program—even a housing entitlement—is politically impossible in the United States.

b. Logistical Feasibility

If the preliminary question, “Do we need a right to housing?”, is answered in the affirmative, an important follow-up question becomes, “Where can such a right be found?” Because state constitutions often address housing, they may be a more promising source for a right to housing than the Federal Constitution would be.¹⁹⁷ In making the argument that a right to housing is already beginning to emerge in the United States, especially at the state level, Florence Roisman shows how to piece together housing rights from existing rights to public assistance, child welfare, and shelter.¹⁹⁸

A more daring approach is to argue that the United States already has a right to housing, even though it has yet to recognize such a right formally and even though some have affirmatively stated that there is no such right.¹⁹⁹ For a

¹⁹³ Dolbeare, *supra* note 171, at 53. According to Rachel Bratt, this deduction accounts for three fourths of the current federal subsidy for housing in the United States. Bratt, *supra* note 76, at 9. Investigative reporter Vicki Kemper offers a similar perspective:

The mortgage interest deduction, adopted as part of the original tax code in 1913 to help family farmers and small-business owners pay down their debts, then expanded after World War II to give more families a foothold in the nation’s booming economy, has become in effect one of the country’s biggest and most expensive—and sacrosanct—entitlements, surpassed only by Social Security, Medicare and Medicaid.

Vicki Kemper, *Home Inequity: One of the Biggest Entitlement Programs is Not for the Poor*, COMMON CAUSE MAG., Summer 1994, at 14, 15.

¹⁹⁴ Hartman, *supra* note 56, at 233.

¹⁹⁵ *Id.* at 232.

¹⁹⁶ *Id.*

¹⁹⁷ Rotunno, *supra* note 170, at 111 (“A state constitutional provision would help to establish an imperative for state legislatures to address homelessness, and would provide an added basis on which courts could enforce and interpret state and local social welfare laws so as to maintain adequate levels of assistance to the homeless.”). Rotunno’s article also includes an appendix citing many extant state law provisions on housing. *Id.* app. at 145-47.

¹⁹⁸ Florence Wagman Roisman, *Establishing a Right to Housing: An Advocate’s Guide*, in THE RIGHTS OF THE HOMELESS 9, 17 (PLI Litig. & Admin. Practice Course Handbook Series 1992), WL 428 PLI/Lit. 9 (explaining how arguments for a right to housing can be based on general assistance statutes in those states where such statutes exist).

¹⁹⁹ One of the best-known, and most common, sources cited for this point is the Supreme Court’s opinion in *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). Even so, as Maria Foscarinis

positivist, it would be ridiculous to propose such an argument. Instead, the positivist would contend that only an authority's recognition of a right makes it real.²⁰⁰ Setting aside the positivist's anticipated objection, one might make the argument that a housing right already exists, by employing Ronald Dworkin's claim that citizens can possess rights beyond those that the law currently recognizes.²⁰¹ Dworkin's thesis opens the door for non-legislative institutions like courts to declare the existence of moral rights that have not previously been recognized.²⁰²

Ronald Dworkin is not the only scholar to insist that citizens may have more rights than the legal system currently acknowledges. Robert Solomon has made a similar argument, claiming that human rights exist independently of any promise that the government will recognize such rights.²⁰³ Solomon's assertions are also consistent with Bruce Ackerman's work; Ackerman has argued that no list of rights can ever be complete.²⁰⁴

Thus, to the extent that the United States should decide to recognize a right to housing, this right may be created by piecing together existing rights to public assistance, welfare, and shelter, where such rights already exist. If no related entitlement programs currently exist upon which to build, the state

has noted, the Supreme Court's holding does not actually go so far as to declare that no right to housing exists. Maria Foscarinis, *Homelessness and Human Rights: Towards an Integrated Strategy*, 19 ST. LOUIS U. PUB. L. REV. 327, 349 (2000). Instead, as Foscarinis states, what the Court held was that there is no right to housing of a certain quality. *Id.*; see also *Lindsey*, 405 U.S. at 74. The Supreme Court held as follows:

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.

Id.

²⁰⁰ See DWORKIN, *supra* note 27, at 17 (providing a list of "key tenets" of positivism). Dworkin describes the first of the three "key tenets" as follows:

The law of a community is a set of special rules used by the community directly or indirectly for the purpose of determining which behavior will be punished or coerced by the public power. These special rules can be identified and distinguished by specific criteria, by tests having to do not with their content but with their *pedigree* or the manner in which they were adopted or developed.

Id.

²⁰¹ *Id.* at 184. He adds that the United States Constitution should not necessarily be considered an exhaustive list of moral rights. *Id.* at 185.

²⁰² *Id.* at 186. In response to the common criticism that Dworkin is inviting judges to engage in unauthorized lawmaking, Dworkin exhorts the judges not to create new rights, but rather, to discover and apply those rights that persons already have. *Id.* at 81. This is the core of Dworkin's "rights thesis," in which he urges judges to "decide hard cases by confirming or denying concrete rights." *Id.* at 101.

²⁰³ SOLOMON, *supra* note 4, at 168.

²⁰⁴ ACKERMAN, *supra* note 17, at 341-42. Instead, for Ackerman, the key is achieving undominated equality as demonstrated by the process he calls Neutral dialogue. *Id.* at 342.

courts and legislatures may be a better situs for establishing such rights than the federal courts and legislatures.

III. WHY HOUSING?

If, as a society, we determine that rights are the most appropriate means of protecting the interests of disadvantaged persons, and if we determine that a right to housing is sensible and consistent with public values, it remains necessary to determine whether housing, as opposed to other important needs such as health care and employment, merits particular priority.

A. *Attributes Associated with Home*

Many have argued that the concept of “home” is special, and it is important to understand why this might be so.²⁰⁵

1. *Belonging, Comfort, and Security*

Scholars and policymakers associate special attributes with housing.²⁰⁶ Having a home²⁰⁷ provides a sense of place.²⁰⁸ Benjamin Barros describes home as a natural source of “rooted” feelings and a sense of belonging.²⁰⁹

²⁰⁵ See, e.g., Barros, *supra* note 149, at 255 (“‘Home’ is a powerful and rich word in the English language.”). It is interesting that scholars and policymakers generally speak of a right to housing, rather than a right to a home. The two concepts have meanings that are recognized as being discrete from one another: one denotes place, the other personal connection. BETH DUNLOP, *A HOUSE FOR MY MOTHER: ARCHITECTS BUILD FOR THEIR FAMILIES* 10 (1999) (“[H]ome is personal, with all the implications of domesticity and intimacy, while house is simply a physical envelope. It is neutral—wood or steel or stone or concrete or glass.”). Nevertheless, and recognizing that some may challenge the appropriateness of doing so, I commonly interchange the terms “home” and “housing.” In addition, I claim that what is required is a right to housing, rather than a “right to a house” or a “right to a home.” See *infra* Part III.D.

²⁰⁶ DAVID PEARSON, *CIRCLE HOUSES: YURTS, TIPIS AND BENDERS* 36 (2001) (“‘[S]helter’ is much more than just a roof overhead.”). The popular television show *Extreme Makeover Home Edition* is another reflection of the societal importance of “home” and the expectation that changing a family’s living environment can change the lives of family members in significant ways. *Extreme Home Makeover: Home Edition*, <http://abc.go.com/primetime/xtremehome/index?pn=about> (last visited Sept. 13, 2008) (“The lives of the lucky families are forever changed when they learn that they’ve been selected to have their home walls moved, their floors replaced and even their facades radically changed. . . . [V]iewers witness not only the unbelievable transformation of the house, but during the final and emotional reveal, they see how the home makeover has impacted the lives of the deserving families.”).

²⁰⁷ Please note that the “home” to which I make reference need not be a single-family dwelling. See *infra* notes 308-18 and accompanying text.

²⁰⁸ DUNLOP, *supra* note 205, at 14 (“It is through the houses we live in that we first derive a sense of place, and continue to do so over the years.”).

²⁰⁹ Barros, *supra* note 149, at 277 (citing “rootedness, continuity, stability, permanence, and connection to larger social networks”). This sense of “rootedness” may be even more powerful when the housing is owned, rather than rented. Eduardo M. Peñalver has argued that property ownership provides the owner with a stake in society, less mobility (in a positive way), and more of a need to engage in market transactions. Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1938-39 (2005) (arguing that the exit role of property in society has commonly been overvalued and the entrance role has commonly been undervalued). He also notes that property ownership has a strong socializing effect and facilitates

Understanding the importance of belonging is crucial: Robert Solomon claims that having a place in the social system is a biological and social necessity.²¹⁰

Having a home also provides a sense of comfort²¹¹ and security. As Stephen Willats has noted, part of controlling one's living space and expressing one's personhood is being able to choose to invite others in, or to keep them at bay.²¹² Along the same lines, Witold Rybczynski describes a home's front door as a symbol of demarcation, control, and belonging—in short, as a signal of “home.”²¹³ Lee Rainwater makes the same point more strenuously, arguing that the first function of housing is to provide shelter from human and nonhuman threats.²¹⁴ Alain de Botton writes of home as providing security in a different sense: “We need a home in the psychological sense as much as we need one in the physical: to compensate for a vulnerability.”²¹⁵

The feeling of security commonly associated with the concept of home may also come from a sense of continuity. Lewis Mumford describes the very notion of domesticity as requiring “permanence and continuity in residence.”²¹⁶ Thus, it may be fair to say that housing without some security of tenure is not really conducive to “domestic life” at all.²¹⁷ Witold Rybczynski's notion of “home” is similar: He describes “home” as something that is constituted out of “the minutiae of everyday life.”²¹⁸ Building upon Rybczynski's statement, perhaps a sense of normalcy is another important aspect of having a home.

Despite the positive attributes commonly associated with housing, proving any connection between housing and other societal goals is very difficult. Chester Hartman acknowledges the difficulty in making this connection, but argues that, even so, the fact that most people believe housing is of central

community life. *Id.* One of the reasons lessened mobility is a positive trait, in Peñalver's conception of property, is that stable communities with low turnover confer the greatest benefits on their members. *Id.* at 1916.

²¹⁰ SOLOMON, *supra* note 4, at 187.

²¹¹ Michael Sorkin, *More or Less*, in *THE HOME HOUSE PROJECT: THE FUTURE OF AFFORDABLE HOUSING* 10, 11 (David J. Brown ed., 2004) (“Housing is at the core of both our comfort and of our political life: We are where we live.”).

²¹² STEPHEN WILLATS, *BEYOND THE PLAN: THE TRANSFORMATION OF PERSONAL SPACE IN HOUSING* 8 (2001). Willats provides some examples of design features that invite passersby in and others that keep them at bay: windows without curtains, and window displays, invite passersby in, while plants on a stoop keep them at bay. *Id.*

²¹³ WITOLD RYBCZYNSKI, *THE MOST BEAUTIFUL HOUSE IN THE WORLD* 165 (1989).

²¹⁴ Lee Rainwater, *Fear and the House-as-Haven in the Lower Class*, in *HOUSING URBAN AMERICA* 181, 181 (John Pynoos, Robert Schafer & Chester W. Hartman eds., 1973). It is only after this need is met, Rainwater argues, that home also becomes a source of personal expression. *Id.* Even for this purpose, Rainwater argues, architecture can make a difference – albeit more so in addressing nonhuman threats than human ones. *Id.* at 189.

²¹⁵ ALAIN DE BOTTON, *THE ARCHITECTURE OF HAPPINESS* 107 (2006).

²¹⁶ LEWIS MUMFORD, *THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS* 12 (1961). Gaston Bachelard makes a similar point when he describes home as a source of continuity and an important part of maintaining the whole person. GASTON BACHELARD, *THE POETICS OF SPACE* 6-7 (Maria Jolas trans., Beacon Press 1969).

²¹⁷ See *supra* Part II.B.2.a.

²¹⁸ RYBCZYNSKI, *supra* note 213, at 143. Along the same lines, Justice Black has identified the concept of home with the “‘daily way of living.’” See Barros, *supra* note 149, at 270 (quoting *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring)). Benjamin Barros, similarly, has noted that home is the physical center of life. *Id.* at 278.

importance to their own lives is reason enough to support a right to housing.²¹⁹ In making his argument, Hartman notes that many people—especially elderly persons, stay-at-home parents, and children—spend more time at home than anywhere else.²²⁰

Another part of the security associated with the concept of home is the notion of privacy. Justice Black has called the home a “sacred retreat,” a major situs of privacy both in United States law and as a matter of societal norms and expectations.²²¹ Taking Justice Black’s words one step further, it may be possible to argue that homeless persons have a lower right to privacy than housed persons do.

Finally, the security of home is also often closely associated with the security of family life. Lewis Mumford writes of the concept of “home” as if “home” were a person—specifically, a mother.²²² Gaston Bachelard evokes related notions of home when he calls it “the human being’s first world,” “a large cradle,” and “maternal.”²²³ Lee Rainwater uses less specific language but conveys a similar thought, noting that home is often seen as “a representation of the family.”²²⁴

The preceding discussion has focused on the relationship between the notion of “home” and the concepts of security, belonging, control, privacy, continuity, and family life. These are “private” benefits of housing that accrue primarily to individuals and families, rather than to society as a whole. The following section explores what might be termed “public” benefits of housing; that is, ways in which housed persons may be more fully actualized, engaged citizens than homeless persons. The ensuing section also looks at the connection between housing and personhood in a more general sense.

2. *Citizenship, Personhood, and Status*

Having a home is part of being a citizen.²²⁵ Stated somewhat differently, housing may be an important component of fully realized personhood²²⁶ or even existence in the fullest sense of that word.²²⁷ Citing Margaret Jane

²¹⁹ CHESTER W. HARTMAN, *HOUSING AND SOCIAL POLICY* 3 (1975) (noting that the concept of “home” includes not only the built environment, but also control over one’s conditions, affordability and value, the surrounding neighborhood, and social life).

²²⁰ *Id.*

²²¹ See Barros, *supra* note 149, at 270 (quoting *Gregory*, 394 U.S. at 125 (Black, J., concurring)).

²²² MUMFORD, *supra* note 216, at 13 (“In Egyptian hieroglyphics, ‘house’ or ‘town’ may stand as symbols for ‘mother . . .’”).

²²³ BACHELARD, *supra* note 216, at 7.

²²⁴ Rainwater, *supra* note 214, at 181.

²²⁵ See, e.g., Sorkin, *supra* note 211, at 11 (discussing the role of housing in citizenship, as well as describing housing as the locus of the gateway into participation in society). In doing so, the author notes the fundamental societal problem in failing to recognize a right to shelter. *Id.*

²²⁶ Kenna, *supra* note 69, at 106.

²²⁷ George Brockway describes the connection between identity and existence: “Existence requires continuity. Continuity requires identity.” GEORGE P. BROCKWAY, *THE END OF ECONOMIC MAN: AN INTRODUCTION TO HUMANISTIC ECONOMICS* 54 (4th ed. 2001). Brockway’s words bring to mind Langston Hughes’ poem *Hope for Harlem*, in which he writes of his desire for a home where he can “live—not just exist.” See Adams, *supra* note 2, at 3-4

Radin's theory of personhood, Benjamin Barros has acknowledged the particular connection between the concept of "home" and personal identity.²²⁸ G.W.F. Hegel's conception of "personality" connects personhood, rights, and property in a way that shows how a right to housing could be important to personhood. As Hegel has stated, "Personality implies, in general, a capacity to possess rights, and constitutes the conception and abstract basis of abstract right."²²⁹ Elsewhere, Hegel states, "[I]t is only personality which gives us a right to things."²³⁰ Connecting Hegel's two statements and taking his argument one step further, if indeed housing is an important component of personhood, it may be possible to argue that homeless persons, whom society perhaps does not currently recognize as fully actualized persons, also are not seen as being capable of holding the same kinds of rights as housed persons. If this statement is correct—that is, if only having a home qualifies a person to be a fully actualized citizen who is capable of having rights, such as a right to a home—it would obviously suggest the existence of a cycle that would be very difficult to break.

At a more superficial level, a person's home can be important to his or her socioeconomic standing.²³¹ In fact, under Roman law, as Hegel noted, "a man [was] not a person until he [had] reached a certain status."²³² Hegel took this argument one step further, noting that, under Roman law, "personality is an attribute of a class and is contrasted with slavery."²³³ Based on Hegel's thesis, it is possible to argue that society relegates homeless persons, not having achieved the requisite socioeconomic status to be deemed "persons," to a position of lesser freedom, even a kind of slavery.²³⁴

Another term that is sometimes used in discussions regarding property ownership, especially in reference to homeowners as contrasted with renters, is "stakeholder."²³⁵ The notion that property ownership is a significant attribute of personhood is consistent with the long-held belief that owning property is an important means of establishing one's membership in society or status as a citizen.²³⁶ In other work, I have argued that residents of low-income housing frequently experience life as if they were merely denizens, not fully citizens of

(citing LANGSTON HUGHES, *Hope for Harlem*, in *THE COLLECTED POEMS OF LANGSTON HUGHES* 436-37 (Arnold Rampersad & David Roessel eds., 1994)).

²²⁸ Barros, *supra* note 149, at 277-82. A desire for home and an intensive interest in one's home are deeply rooted desires that often arise in childhood. RYBCZYNSKI, *supra* note 213, at 25-35 (describing the process of building toy representations of home as a natural form of child's play).

²²⁹ HEGEL, *supra* note 185, at 2.

²³⁰ *Id.* at 4.

²³¹ See HARTMAN, *supra* note 219, at 4.

²³² HEGEL, *supra* note 185, at 4 (noting that this "certain status" includes property ownership).

²³³ *Id.*

²³⁴ *Id.* (suggesting that to be a person is to have property).

²³⁵ Housing Rights Service, Editorial, HOUSING RTS. REV. (Ir.), Summer 2005, at 2, 2 (describing homeowners as "stakeholders").

²³⁶ See, e.g., SIMMONS, *supra* note 74, at 85.

the community in which they live.²³⁷ As one example, persons who are homeless or underhoused tend to be politically disenfranchised.²³⁸

As the preceding discussion has shown, housing provides “public” benefits as well as “private” benefits, in that access to housing affects a person’s status and the degree to which a person functions as a fully enfranchised member of society, as well as his or her domestic life and sense of security. The following section explores the way in which access to housing can affect a person’s identity, sense of relevance, and other goals. This discussion is important for the way in which it sets up a later discussion of whether providing access to housing can help individuals to achieve other goals.²³⁹

3. Identity, Relevance, and Projects

Having possessions (including a home) is a means of establishing personal identity.²⁴⁰ Alain de Botton has made this point perhaps more poetically than any other author, describing the home as a living being²⁴¹ that provides physical and psychological sanctuary, guards identity, and reminds us who we are.²⁴² He argues that “we are . . . different people in different places[.]”²⁴³ Witold Rybczynski notes that the etymology of the word “habitation” suggests a presentation of oneself to the larger world.²⁴⁴ Rybczynski defines “inhabiting” as filling a place with one’s belongings,²⁴⁵ self, and dreams,²⁴⁶ and

²³⁷ Carpenter, *supra* note 36, at 1084 (“Too often, public-housing policy is something done ‘to,’ rather than ‘by,’ or even ‘with’ public-housing tenants, who are thought of more often as ‘denizens’ than as ‘citizens.’”).

²³⁸ See, e.g., Hartman, *supra* note 56, at 226-27.

²³⁹ See *infra* Part III.D.

²⁴⁰ THE HOME HOUSE PROJECT, *supra* note 211, at 61. See also GOODMAN, *supra* note 11, at 183-84 (describing a heavily furnished home as “an asylum for [the owner’s] personality”). Alain de Botton uses somewhat similar language, speaking of a home as a “memoria[l] to identity.” DE BOTTON, *supra* note 215, at 124.

²⁴¹ DE BOTTON, *supra* note 215, at 10-11.

²⁴² This is one of the most important themes in de Botton’s book. *Id.* De Botton notes that we can look to our home environment in seeking to discover, protect, and be reminded of our true selves. *Id.* at 108; see also *id.* at 119 (writing of the “commemoration of our genuine selves”). Likewise, he argues that our homes can remind us of the best of who we are and seek to be. *Id.* at 109. Elsewhere, he states that home allows us “to declare ourselves to the world through a register other than words . . . and, in the process, to remind ourselves.” *Id.* at 126.

²⁴³ *Id.* at 13. Elsewhere, de Botton states, “[W]here we are critically determines what we are able to believe in.” *Id.* at 107. Because of the power of home, he writes of returning home “in a profound sense . . .” *Id.* at 119.

²⁴⁴ RYBCZYNSKI, *supra* note 213, at 169.

²⁴⁵ Stephen Willats describes the way in which objects’ very arrangement within the home can serve an internal, reassuring purpose for the people who live there. WILLATS, *supra* note 212, at 12. Elsewhere, Willats states that objects not only express a person’s existence within his or her living space, but also carry him or her beyond that space. *Id.* at 22. He also provides some examples of residents who carried objects to a new space to imbue the space—and the objects—with new meaning. *Id.* at 28. Even so, Willats cautions against the reification of objects at the expense of people and relationships. *Id.* at 35. Willats notes that a focus on the acquisition of objects can make us see other persons—or even ourselves—as merely objects. *Id.* Doing so naturally turns our focus away from our relationships with other people. *Id.*

²⁴⁶ RYBCZYNSKI, *supra* note 213, at 171.

defines “home” as a place where it is “safe to dream,”²⁴⁷ bringing to mind the Jungian concept of home as an extension of self.²⁴⁸

Citing the connections between possessions (of which housing is but one example) and personal identity, Jeremy Waldron has argued in favor of a general right to private property.²⁴⁹ Hegel’s jurisprudence is consistent with Waldron’s on this point: Hegel suggests that having possessions, and having the ability to exercise free will over those possessions, is a prerequisite to a fully realized existence.²⁵⁰ In Hegel’s conception, to be human is to have property.²⁵¹ Thus, like Waldron, Hegel affirmatively advocates for a right to property.²⁵² To be a person, Hegel argues, “everyone must have property,” albeit not necessarily in the same amount.²⁵³ Stated differently, “[p]ersonality must find an embodiment in property.”²⁵⁴

Rather than focusing on a home as a possession, it is also possible to focus on the home as a personal endeavor or project. Robert Nozick’s jurisprudence suggests that meaningful respect for people requires respect for their personal undertakings and projects.²⁵⁵ In this conception, having personal projects is part of what makes life meaningful²⁵⁶ and is part of personal dignity and independence.²⁵⁷ Robert Solomon asserts that being able to satisfy one’s own basic needs (including shelter) allows a person to be fully human.²⁵⁸ Nozick’s and Solomon’s jurisprudence are related in that they share the theme of self-sufficiency. Both scholars’ work may also suggest that it is important for every person to have some space that he or she controls, even if he or she does not own that space.

One particular way in which a home can be a personal endeavor or project is for the residents to have some opportunity to transform their living space. Friedensreich Hundertwasser’s Viennese low-income housing project Hundertwasserhaus is notable for providing such an opportunity.²⁵⁹ Having an opportunity for individual expression not only affects how the residents per-

²⁴⁷ *Id.* at 190.

²⁴⁸ *Id.* at 191. Rybczynski’s conception of home is similar in some important ways to that of Gaston Bachelard, who calls home “our corner of the world,” a container for our past selves, and a shelter for dreams. BACHELARD, *supra* note 216, at 4-6, 17.

²⁴⁹ ROBERT NOZICK, *supra* note 51, at 35.

²⁵⁰ HEGEL, *supra* note 185, at 5.

²⁵¹ *Id.*

²⁵² *Id.* at 10.

²⁵³ *Id.* (“[J]ustice demands merely that every one should have property.”).

²⁵⁴ *Id.* Chester Hartman also recognizes the connection between housing and personal dignity. *See* Hartman, *supra* note 56, at 226-29.

²⁵⁵ ROBERT NOZICK, *supra* note 51, at 41.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 45.

²⁵⁸ SOLOMON, *supra* note 4, at 187.

²⁵⁹ I have examined Hundertwasser’s work, and the social-justice consequences of many of its features, in an earlier work. *See* Carpenter, *supra* note 36, at 1101-02. Stephen Willats has also noted the importance of residents having an opportunity to express their personhood by transforming the space in which they live. WILLATS, *supra* note 212, at 8. Willats describes self-expression as taking place within what he calls “a permissible bandwidth.” *Id.* He notes, by way of example, that children sometimes create spontaneous drawings as an exercise in self-expression. *Id.* at 24. This kind of creative behavior, Willats notes, requires “self-organisation coupled with the ability to transform.” *Id.* at 5.

ceive their home and the experience of living there, but also the perceptions of passersby.²⁶⁰

This section has explored the connections between housing and various important personal and interpersonal dynamics. On an internal level, housing may be an important part of belonging, comfort, and security. On an interpersonal level, housing may be part of how society defines personhood and citizenship. On both a personal and an interpersonal level, housing may serve as a means for defining and expressing personal identity. Understanding how access to housing affects individuals is an important first step to exploring whether it makes sense to focus on housing, as opposed to some other important need such as a higher minimum wage or universal health care, as a key factor in dealing with the problem of poverty in America.

B. *Is All Housing Alike?*

In considering whether housing deserves special emphasis due to its connection with various personal, interpersonal, and societal dynamics, it is important to consider whether all housing shares these attributes or whether these qualities are limited to certain kinds of housing. Some types of housing are associated with particularly positive attributes due to their perceived connection with some important value. Three examples are yurts, tipis, and farmhouses. Yurts, which are typically inhabited by nomadic people, especially in Central Asia, are imbued with spiritual associations reflected in the yurt's design.²⁶¹ Tipis, which are primarily associated with Native Americans, particularly in the plains, also hold cultural and spiritual significance.²⁶² Insofar as farmhouses are concerned, Frank Lloyd Wright was probably their most famous advocate; he argued that farm living was a superior means of inculcating public values.²⁶³ Since all persons clearly cannot live in yurts, tipis, or farmhouses, the question remains whether other housing can be connected with important values as well. For this reason, it makes sense to discern why these three specialized forms of housing are valued and to see whether other, more readily available kinds of housing can supply similar positive qualities.

One feature that yurts and tipis have in common is that both are normally hand-built and highly personalized to fit the needs of those who will live there. For this reason, designing one's yurt or tipi is also a means of designing one's way of life and expressing one's individuality.²⁶⁴ More conventional housing can also provide opportunities for self-expression if the prospective residents

²⁶⁰ WILLATS, *supra* note 212, at 10. Willats contrasts the exterior of many modern buildings, which tend to obscure the individual identity of those who live there. *Id.* at 6-7.

²⁶¹ PEARSON, *supra* note 206, at 10 (noting that the word "yurt" means "dwelling"). *See also id.* at 42 (describing life in a yurt as a spiritual experience); *id.* at 46 (discussing the spiritual connotations of yurt design).

²⁶² *Id.* at 13.

²⁶³ GOODMAN, *supra* note 11, at 88 (describing Wright's Broadacres design, which was based on the notion of farm values as a special source of virtue).

²⁶⁴ PEARSON, *supra* note 206, at 18. As Pearson states, a wife's work in designing the felt cover for the family yurt is part of establishing herself as "a good wife." *Id.* at 22.

are included in the design process.²⁶⁵ Residents need not make large changes to feel as though their home has been personalized to fit their needs; instead, as Stephen Willats notes, even allowing prospective residents to make small changes in the plan for their homes can be a meaningful exercise.²⁶⁶ As Richard Sennett notes, the opportunity to be involved in community planning is particularly important for residents of public housing, who normally do not have any role in selecting their neighbors.²⁶⁷ Input from residents also makes it possible for planners and architects to understand how the residents will utilize the built environment. As one example of how planners and architects might better understand how low-income families live, Blair Kamin cites the phenomenon of the live-in grandmother who provides child care for a low-income working mother.²⁶⁸ As Kamin notes, an architect or planner who knows that an additional adult is likely to reside in the unit may look for ways to incorporate additional privacy into the apartment's design to promote family harmony.²⁶⁹ Just as involving residents in the design process can yield significant benefits, leaving residents out of the process may practically ensure failure.²⁷⁰

What makes farm housing attractive is its association with "living on the land" and the concomitant connection between one's labor and living space.²⁷¹ Farm living gives residents significant control over their living space, but also requires a high level of responsibility, because farm residents may be charged with growing their own food as well as maintaining the home and grounds. The additional control and responsibility associated with farm life may enhance the inhabitants' connection to their home.²⁷² As the following discussion shows, control and responsibility are also very important in the context of low-income housing.

Consciously or unconsciously, architects and planners may dictate a preferred lifestyle that does not fit the residents' needs.²⁷³ The risk is that the space will be wholly programmed by persons who will never live there and who therefore definitionally have no long-term personal investment in the

²⁶⁵ THE HOME HOUSE PROJECT, *supra* note 211, at 76 (providing a contemporary example—the residents' construction of an illuminated quilt wall in their home—that seems similar in some important ways to the traditional felt yurt cover described in Pearson's work).

²⁶⁶ WILLATS, *supra* note 212, at 21-22.

²⁶⁷ SENNETT, *supra* note 38, at 10.

²⁶⁸ BLAIR KAMIN, WHY ARCHITECTURE MATTERS: LESSONS FROM CHICAGO 247 (2001).

²⁶⁹ *Id.*

²⁷⁰ See *infra* notes 278-89 and accompanying text.

²⁷¹ AMERICAN HOUSE: DOMESTIC ARCHITECTURE IN THE USA 96 (Jeffery W. Howe ed., 2002) ("Farmhouses embody the vernacular tradition of American architecture at its simplest and most self-sufficient.").

²⁷² Margaret Jane Radin makes a distinction between what she calls "fungible" property and "personal" property imbued with particular connection, arguing that the latter should sometimes receive greater protection due to its enhanced meaning. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 960 (1982). Radin places particular emphasis on the home as an example of "personal" property, noting that "[o]ur reverence for the sanctity of the home is rooted in the understanding that the home is inextricably part of the individual, the family, and the fabric of society." *Id.* at 1013. See also Barros, *supra* note 149, at 278-82 (critiquing Radin's thesis).

²⁷³ WILLATS, *supra* note 212, at 33-34. Willats describes how an official plan can seek to preserve the status quo and impose the norms of the authorities who controlled the building process. *Id.*

building.²⁷⁴ Chester Hartman refers to the residents' lack of opportunity for input as a form of subservience.²⁷⁵ Using such a strong word as "subservience" calls to mind this Article's earlier discussion of the fact that homeless persons in the United States may currently enjoy less freedom than housed persons do.²⁷⁶ Taking the argument one step further, it is possible to argue that a dwelling over which the residents have no control does not meet the definition of "home" at all.²⁷⁷

Potentially disastrous results may occur when an architect chooses a design that is meaningless or, worse, insulting from the standpoint of the residents.²⁷⁸ Stephen Willats claims that residents of low-income housing are constantly and vividly aware that they do not, and cannot, control their living space, and may become angry and frustrated when they feel that they have been locked into a plan for their living space that they had no role in creating.²⁷⁹ Residents may express their anger at their physical surroundings by denying the architect's vision for the space and replacing it with their own vision, sometimes quite destructively.²⁸⁰ The dearth of opportunities for individuation and resident involvement may have played a significant role in the failure of the Cabrini Green²⁸¹ and Robert Taylor Homes²⁸² housing projects in Chicago.

Related problems arise with housing that is either simply inappropriate for its chosen purpose²⁸³ or is of a design that the residents cannot reasonably maintain in livable fashion. The initial optimism over,²⁸⁴ and rapid decline

²⁷⁴ *Id.* at 33.

²⁷⁵ HARTMAN, *supra* note 219, at 5.

²⁷⁶ See *supra* note 234 and accompanying text.

²⁷⁷ Lee Rainwater calls "home" the "place of maximum exercise of individual autonomy, minimum conformity to the formal and complex rules of public demeanor." Rainwater, *supra* note 214, at 181.

²⁷⁸ Sam Davis provides an example that I have always found particularly compelling. See SAM DAVIS, *THE ARCHITECTURE OF AFFORDABLE HOUSING* 48 (1995) (citing the example of the use of brewery vats as playground equipment by developers of affordable housing in San Francisco; the architects thought that the form was interesting, unique, and played appropriate homage to the area's history, but the residents found the experiment to be demeaning).

²⁷⁹ WILLATS, *supra* note 212, at 37. Willats notes that designers and builders sometimes convey to residents the unwelcome signal that only they—not the residents—are competent to express visions for the building's use. *Id.* at 40-41. Trapped, powerless, and angry, the residents may lash out at the physical environment, destroying a space that—for them—holds no hope, just anguish. *Id.* at 40-45.

²⁸⁰ *Id.* at 32. In the example Willats provides, the residents became angry and disillusioned, seeing no reason why they should try to conform their behavior to the authorities' expectations for them. *Id.* at 30.

²⁸¹ SENNETT, *supra* note 38, at 10 ("Everyone in Cabrini had a passive relationship to the project because of its architecture. None of the residents had a hand in designing where we lived. The plan itself was a rigid grid of low-rise houses; the lawns and open spaces admitted no gardening by the residents.").

²⁸² The Robert Taylor Homes, he notes, were "even more directive" than Cabrini Green, in the sense that certain furniture could fit only in certain spots in an apartment, due to the manner in which the units were designed. *Id.* (noting that the "floor layout dictat[ed] where beds, tables, and sofas could be placed").

²⁸³ RYBCZYNSKI, *supra* note 213, at 4 (noting that the purpose of any building is to fulfill some societal need, not to gratify the architect).

²⁸⁴ WILLATS, *supra* note 212, at 18 (writing of the early and mid-1970s as a period of optimism regarding high-rise housing). Richard Sennett, likewise, wrote of the initial opti-

of,²⁸⁵ high-rise public housing is a well-documented phenomenon that may be at least partially explained by the fact that high-rise low-income housing is not particularly well suited to the persons most likely to live there.²⁸⁶ As Stephen Willats has noted, enormous high-rise, low-income housing developments are a high-maintenance environment that the residents have no resources to maintain.²⁸⁷ As a result, the buildings often begin to deteriorate as soon as the authorities fail to supply necessary maintenance.²⁸⁸ A second negative consequence is more subtle: residents become dependents who are neither capable of maintaining their own living space, nor expected to do so.²⁸⁹

As the discussion in this section has suggested, resident input, control, and responsibility are crucial components of successful housing. Housing that meets these criteria will be a better fit for the community and will be more likely to be received and maintained in a way that is consistent with long-term success. Thus, to the extent that the United States decides to create a right to housing, this right should include resident involvement and responsibility.

C. *Is Housing the Best Point of Emphasis?*

If providing housing for low-income persons is an effective means of supporting other important goals as well, then it may make sense to give primacy to housing rather than the other supported goals.²⁹⁰ As one example, affordable housing plays an important role in the provision of supportive services.²⁹¹ In addition, high-quality housing may tend to promote health and safety.²⁹² Chester Hartman has claimed that society pays for the lack of affordable housing by incurring higher costs for health care, fire, police, human resources, education, and lost productivity in the workplace, all exacerbated by the dearth of housing.²⁹³ Housing quality and location may also affect the availability of employment, education, and other opportunities.²⁹⁴ Stated another way, failing

mism over the high-rise public housing structures in Chicago, which the city saw as “new and clean,” at least at first. SENNETT, *supra* note 38, at 10.

²⁸⁵ WILLATS, *supra* note 212, at 26.

²⁸⁶ As one example, Alain de Botton notes that Le Corbusier’s values were disconnected from the priorities of the residents who occupied the high-rise housing he designed. Although he admired industry because he spent much of his life amid luxury, the residents preferred luxury because they spent much of their lives amid industry. DE BOTTON, *supra* note 215, at 164. Children are a more obvious example of persons who might struggle with high-rise living.

²⁸⁷ WILLATS, *supra* note 212, at 39.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 39-40.

²⁹⁰ Housing Rights Service, *What our Politicians Have to Say. . .*, *supra* note 175, at 3; Housing Rights Service, Editorial, *supra* note 235, at 2.

²⁹¹ Housing Rights Service, *What our Politicians Have to Say. . .*, *supra* note 175, at 3.

²⁹² Hartman, *supra* note 56, at 224. See generally Marcus Powlowski, *Making Public Health Motivated Evictions Consistent with the Right to Housing*, 9 QUINNIPIAC HEALTH L.J. 271 (2006) (arguing that homelessness is an independent risk factor for poor health).

²⁹³ Hartman, *supra* note 56, at 225. Hartman’s argument, if provable, may be an important tool in responding to claims that increased governmental provision of affordable housing is simply too expensive.

²⁹⁴ *Id.* at 229-30.

to provide affordable housing can have far-reaching negative effects²⁹⁵ at the individual level,²⁹⁶ as well as the community level.

At the same time, establishing a causal relationship between housing quality and the quality of family life with any certainty can be difficult.²⁹⁷ Chester Hartman notes that, even though prevention of disease was one early justification for subsidized housing, studies have not necessarily proven a connection between housing quality and health.²⁹⁸ Hartman admits that what he calls the “social pathology case”—that is, the argument that bad housing leads to delinquency, poor performance at school and in the workplace, and a decline in family life, is even more difficult to prove.²⁹⁹ Thus, there is no consensus that improving the supply and quality of low-income housing will improve residents’ lives in other ways as well.

Even if providing low-income housing will also help society to address other important goals, improving the supply and quality of affordable housing obviously cannot solve all of the poverty-related problems currently facing society.³⁰⁰ As but one example, there is no reason to expect that a housing entitlement would solve the nation’s problems with unemployment and low minimum wages.³⁰¹ Furthermore, simply improving the supply and quality of low-income housing will not ensure that the housing will be a success. Instead, as architecture critic Blair Kamin notes, thoughtfully designed housing can be most effective in improving the lives of low-income persons when coupled with social services, job training, and other programs.³⁰² In other words, success demands an emphasis on people, not just buildings,³⁰³ and the poverty problem is too complex to be solved by merely addressing any single area, such as housing.

²⁹⁵ Kenna, *supra* note 69, at 101 (citing a European Union Commission Report for the proposition that failing to provide sufficient affordable housing can have a negative effect on an entire country or region, not just the low-income population of a discrete area).

²⁹⁶ GOODMAN, *supra* note 11, at 14-15 (making the point that society cannot expect persons who lack basic security to engage in meaningful life planning).

²⁹⁷ Nathan Glazer, *The Effects of Poor Housing*, in HOUSING URBAN AMERICA, *supra* note 214, at 158, 161.

²⁹⁸ HARTMAN, *supra* note 219, at 1.

²⁹⁹ *Id.* at 2.

³⁰⁰ See generally ABA Forum on Affordable Housing and Community Development Law, *Strengthening the Foundations of Our Communities* (May 23-25, 2007) (notes from the Forum available upon request from the author). Ron Wilson, who spoke as a representative of Enterprise Homes, made the point that many persons who evacuated from the Gulf Coast in the wake of Hurricane Katrina want very much to return to the area, but merely supplying sufficient housing is not enough to make this happen. Ron Wilson, Representative for Enterprise Homes, Address at the ABA 16th Annual Conference on Affordable Housing and Community Development Law: The Future of Public and Assisted Housing After Katrina (May 24, 2007) [hereinafter Remarks of Ron Wilson]. Instead, jobs, schools, grocery stores, and banks, among other institutions, must be rebuilt for persons to return in large numbers. *Id.*

³⁰¹ Stone, *supra* note 166, at 374 (“Housing policy alone cannot be expected to overcome the full burden of economic problems affecting housing, but neither can more equitable and secure incomes overcome the flaws in the housing system.”).

³⁰² KAMIN, *supra* note 268, at 239, 242, 258.

³⁰³ *Id.* at 241. I have explored this theme in an earlier article. See Carpenter, *supra* note 36, at 1101-10.

Even so, housing may be the most effective single point of emphasis in attacking the larger problem of poverty. First, even though housing obviously cannot solve every problem that contributes to poverty, it can help to address at least some of those problems in significant ways. As Alain de Botton notes, although housing alone cannot solve society's most pervasive problems, addressing the housing problem would make a significant difference in the lives of low-income persons.³⁰⁴ In addition, housing does have some unique attributes, most notably its positive effect on certain important personal, interpersonal, and societal dynamics.³⁰⁵ As Blair Kamin has noted, the built environment has the potential to either lift or crush the spirit.³⁰⁶ Others, too, have noted the powerful role of a very bad—or very good—built environment in affecting the lives of those who reside there.³⁰⁷

³⁰⁴ DE BOTTON, *supra* note 215, at 11 (noting the contribution of home to personal happiness).

³⁰⁵ See *supra* Part III.A.

³⁰⁶ KAMIN, *supra* note 268, at 240. Many people share the misconception that great architecture is a luxury to be enjoyed only by wealthy persons. See generally Ben Nicholson, *Private Life in the Public Realm*, in THE HOME HOUSE PROJECT, *supra* note 211, at 82, 89 (noting the pervasive question of how much or how little society is willing to spend to provide housing for low-income persons, and especially noting the problems of resentment and perceived free-riding). As Witold Rybczynski notes, “cheap” and “architectural” are commonly considered to be mutually exclusive. RYBCZYNSKI, *supra* note 213, at 3. The assumption is often that only “architecture,” rather than common buildings, can lift the spirit. *Id.* at 4-5. Alain de Botton writes of the way in which architecture is often trivialized. See DE BOTTON, *supra* note 215, at 12. At the same time, however, he cautions against a simple conflation of beauty with meaning. *Id.* at 121-23. De Botton states,

[t]here is no necessary connection between the concepts of home and of prettiness; what we call a home is merely any place that succeeds in making more consistently available to us the important truths which the wider world ignores, or which our distracted and irresolute selves have trouble holding on to.

Id. A countervailing position is that aesthetically pleasing architecture is both necessary and cost-efficient. Nicholson, *supra*, at 89 (arguing that architecture—and, for that matter, art—is a necessary component of housing for all persons, not just wealthy persons). Nicholson goes on to describe life without art and architecture as “prison” and to challenge the reader that merely practical solutions are not sufficient. *Id.* I have argued previously in favor of the notion that beauty is never gratuitous. See Kristen David Adams, *Can Promise Enforcement Save Affordable Housing in the United States?*, 41 SAN DIEGO L. REV. 643, 713-20 (2004) (arguing in favor of “beauty as part of human dignity, even part of humanity itself”). See also GOODMAN, *supra* note 11, at 166 (supporting the idea of the societal necessity of gratuitous beauty).

³⁰⁷ For example, Richard Sennett writes of how the architecture of the infamous Cabrini Green development in Chicago generated passivity on the part of its residents. SENNETT, *supra* note 38, at 10. See also Nathan Glazer, *What Happened to the Social Agenda?*, 76 AM. SCHOLAR 108, 109 (2007) (noting architects' decreased interest in exploring the social transformative power of architecture); Nicholson, *supra* note 306, at 90 (noting the power of architecture to effectuate societal change). Glazer further explores this theme in his 2007 book, *From a Cause to a Style*. NATHAN GLAZER, FROM A CAUSE TO A STYLE: MODERNIST ARCHITECTURE'S ENCOUNTER WITH THE AMERICAN CITY 12 (2007) (noting that the “canons of modernism were . . . powerful because they reflected, more than just a commitment to a simpler aesthetic, a commitment to social reform, moderate or radical”). Glazer continues as follows:

Simplicity and directness, the rejection of ornament, the most rational accommodation of needs, would better serve the poor and the working classes. Simpler design would mean easily reproducible forms, suited to the needs for which they were designed, perhaps eventually to be manu-

Thus, although improving low-income housing cannot provide a comprehensive solution to the problem of poverty in the United States, increasing the supply and quality of the nation's affordable housing remains a meaningful goal. The following section addresses what kind of housing would be most effective, if the United States were to create a right to housing.

D. *Home, House, or Housing?*

If the United States were to recognize a right to housing, should it more properly be termed a right to “a home” or even “a house?” Starting first with the second possibility—a “right to a house”—single-family housing for low-income persons presents a complex set of issues. On the one hand, the expense associated with single-family housing makes multi-family housing much more attractive financially.³⁰⁸ On the other hand, homeownership remains the ideal in American life,³⁰⁹ a preference that can perhaps be traced back to the country's history of homesteading.³¹⁰ Even when renting, tenants often prefer single-family housing to apartments.³¹¹ Like residents, policymakers often prefer single-family housing to apartments.³¹² One reason both policymakers and residents sometimes prefer homeownership to tenancy is that owning a home is an empowering experience.³¹³ Ownership may also be associated with a greater sense of belonging on the property and control over the property than tenancy provides.³¹⁴ These benefits—empowerment, belonging, and control—are all personal in nature; homeownership has been credited with benefits to the larger society, as well. For example, homeownership has been described as a source of civic virtue and social esteem.³¹⁵

factured in factories rather than shaped by skilled craftsmen, and so reducing the cost of housing and making more available for less.

Id. Glazer's thesis is that architects have lost this sense of social purpose in more recent times.

³⁰⁸ See generally Sorkin, *supra* note 211, at 10 (noting that the declining primacy of the nuclear family in American life should make it possible to turn the focus away from single-family housing).

³⁰⁹ *Id.* at 13 (“The grail of home ownership distinguishes us still in both the fact and the breach.”).

³¹⁰ SENNETT, *supra* note 38, at 112.

³¹¹ Remarks of Ron Wilson, *supra* note 300. Mr. Wilson described how his firm allowed displaced Gulf Coast residents to help decide what their built environment would look like. *Id.* He noted, “everyone wanted single-family homes with lawns” and disdained apartment living. *Id.* See also GOODMAN, *supra* note 11, at 145 (recognizing the classic problem of how to keep apartment living from being perceived as second-best).

³¹² Michael Stone is one of many policy analysts who have argued for an increased focus on homeownership, as opposed to rental programs. Stone, *supra* note 166, at 373 (arguing that many current proposals “fail . . . to recognize the need and opportunity for moving substantial amounts of private rental housing into resident and community ownership through financial and legal incentives”).

³¹³ See generally THE HOME HOUSE PROJECT, *supra* note 211, at 52 (noting that empowerment through homeownership is an important goal of Habitat for Humanity).

³¹⁴ HEGEL, *supra* note 185, at 16 (“The total use of a thing cannot be mine, while the abstract property is somebody else's.”).

³¹⁵ See Lynne Dearborn, *Homeownership: The Problematics of Ideals and Realities*, 16 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 40, 40 (2006).

The federal government, perhaps in response to the widespread preference for homeownership over renting, has increasingly shifted its focus from the provision of subsidized rental housing to the promotion of homeownership.³¹⁶ Not every person, however, is a good fit for homeownership, and thus the emphasis on homeownership can have very negative consequences for certain persons who are most vulnerable—and thus most in need of housing rental assistance.³¹⁷ One negative consequence that has received considerable attention in recent times is the rise in default rates for subprime mortgages.³¹⁸ Fairly widespread default rates have suggested that homeownership, although very attractive for persons who can afford it, cannot on its own provide a comprehensive solution to the need for affordable housing. Thus, if the United States should decide to create a right to housing, this right should not be equated with “a right to own a house” or even “a right to rent a house.” Instead, multi-family housing and rental housing should be considered important components of any such right.

If a right to housing will not ensure that every person owns or rents a single-family house, should it at least ensure that every person has a home, as opposed to merely having “housing”? It seems relatively clear that the concept of “home” is not limited to the dwelling itself, but instead also includes a sense of meaningful attachment and connection with the dwelling that makes it more than just a place to live.³¹⁹ As Alain de Botton states, “those places whose outlook matches and legitimates our own, we tend to honour with the term ‘home.’”³²⁰ De Botton’s words serve to remind the reader that “home” need not be a detached single-family dwelling. In fact, he takes this concept one step further, arguing that “[o]ur homes do not have to offer us permanent occupancy or store our clothes to merit the name.”³²¹ Instead, he continues, “[h]ome can be an airport or a library, a garden or a motorway diner.”³²² In addition, the notion of “home” is not necessarily limited to the dwelling itself, but may include the surrounding environment.³²³

³¹⁶ See, e.g., *id.* at 43 (noting a ten-percent increase in homeownership since 1990).

³¹⁷ See, e.g., *id.* at 41 (cautioning against any approach that would recommend homeownership as an easy solution to the housing problems for low-income persons in the United States).

³¹⁸ See, e.g., *id.* at 43, 46-47 (noting the much higher default rates associated with subprime mortgages and the common practice, called “reverse redlining,” of steering minority purchasers toward subprime loans even when they qualify for conventional lending).

³¹⁹ David Pearson’s book *Freewheeling Homes*, which includes descriptions of homes that are gypsy vardos, schoolbus conversions, and shepherds’ huts, is a powerful illustration of the concept that “home” is not merely a shape, but rather a more complex idea. See generally DAVID PEARSON, *THE HOUSE THAT JACK BUILT: FREEWHEELING HOMES* (2002).

³²⁰ DE BOTTON, *supra* note 215, at 107.

³²¹ *Id.*

³²² *Id.*

³²³ The Rural Studio, which Samuel Mockbee founded in Hale County, Alabama to provide “modest, innovative houses for poor people,” is particularly well known for paying attention to a house’s surrounding spaces, including porches and outbuildings. ANDREA OPPENHEIMER DEAN & TIMOTHY HURSLEY, *RURAL STUDIO: SAMUEL MOCKBEE AND AN ARCHITECTURE OF DECENCY I* (2002). There are many examples of this emphasis in Dean and Hursley’s book; two of my favorites are the “Butterfly” house that is “nearly half porch,” reflecting the fact that the owners-to-be “lived on their porch,” and the Bryant house, which included a separate smokehouse for cooking. *Id.* at 10, 33.

Whereas de Botton proposes a fairly expansive definition of “home,” Witold Rybczynski presents a more conventional definition, suggesting that people expect “home” to have a certain look and to exhibit certain “familiar signs of habitation.”³²⁴ Two “familiar signs of habitation” are occupying and maintaining a home. The concept of “home” also at least arguably suggests that the residents had, or continue to have, some involvement in choosing and maintaining their dwelling.³²⁵ Fusing these definitions, it seems apparent that the concept of home involves both concrete and symbolic considerations that together make the dwelling place something more than just a physical location; instead, the concept of “home” is imbued with practical and personal significance.

Who decides whether housing is sufficient? In addition to policymakers and code enforcement agencies, resident involvement is exceedingly important.³²⁶ Sometimes, the interaction between third parties and residents is controversial. For example, a resident may feel as though his or her housing is entirely sufficient, even though it may not be up to housing-code standards.³²⁷ Noting the potential for conflict between resident preferences and external standards, Ezra Rosser would take the concept of resident empowerment as discussed earlier in this Article one step further, giving residents the right to trump code-enforcement agencies. He argues that housing codes, rather than improving housing conditions for low-income persons, are actually destructive when they impose standards that individuals whom society intends to protect cannot afford.³²⁸ Nathan Glazer has made a similar point, acknowledging the danger inherent in purporting to declare with certainty what good or bad housing is.³²⁹ Thus, if the United States were to create a right to housing, it would be important to allow the residents to have a significant voice—perhaps even the deciding vote—in determining what kind of housing is sufficient to meet their needs.

As the foregoing discussion suggests, it probably remains appropriate to continue referring to the right as a right to housing, rather than a right to a

³²⁴ RYBCZYNSKI, *supra* note 213, at 164.

³²⁵ See *supra* text accompanying notes 264-68 and 278-82. See also THE HOME HOUSE PROJECT, *supra* note 211, at 42 (describing a housing system capable of construction by unskilled laborers, who might ultimately be residents of such homes). Along similar lines, Dr. Saad Yahya has urged policymakers to allow end users of low-income housing to be involved in designing the standards by which their homes will be built. SAAD YAYHA ET AL., DOUBLE STANDARDS, SINGLE PURPOSE: REFORMING HOUSING REGULATIONS TO REDUCE POVERTY 37-38 (2001) (“The involvement of end users might seem a logical approach in this day of market-driven, [sic] customer-centred economies, but the principle that users are the best people to judge what they want has not penetrated the thinking of housing sector officials, bureaucrats, politicians, civil servants, professionals or technocrats, who tend to claim superior knowledge of what is ‘right’ for people.”).

³²⁶ See *supra* text accompanying notes 264-70 and 278-82. As Richard Sennett notes, the problem with Chicago’s Cabrini Green housing project was not just its “rigid grid,” but also the fact that residents had no opportunity to participate in the selection of the design for their future homes. SENNETT, *supra* note 38, at 10.

³²⁷ GOODMAN, *supra* note 11, at 209 (noting that city life, even under slum conditions, has some attributes of luxury). The authors go on to describe how this truth makes it impossible to provide affordable public housing in some cities. *Id.* at 209-10.

³²⁸ Rosser, *supra* note 140, at 59.

³²⁹ Glazer, *supra* note 297, at 165.

home or even a house. Homeownership is not a comprehensive solution to the low-income-housing crisis in this country, and single-family housing is not the only kind of housing that can qualify as “home.” In addition, whether housing meets the rather subjective standard of being “home” is not something that is fully within the control of builders and architects, but requires resident input. Thus, an architect or planner cannot ensure that a built environment qualifies as “home,” but can take steps to ensure that it at least has the potential to do so.

IV. CONCLUSION

At this point, if the reader is convinced, as I am, (1) that rights are a powerful and useful means of protecting the interests of low-income persons, (2) that a right to housing is a cogent notion, (3) that housing deserves particular emphasis, and (4) that it is housing, rather than a home or a house, that should be the goal, it then remains necessary to sketch at least a preliminary drawing of what a right to housing might look like.

In earlier work, I have introduced the notion of Promise Enforcement,³³⁰ and I will now explain why Promise Enforcement provides the model for the kind of right to housing that I believe will work best for the United States. Promise Enforcement requires a true bilateral contract between landlords and their tenants that would protect the interests and expectations of both parties. Under such a contract, the tenants would be informed of the promises being made to them, and the covenants required of them.³³¹ In a Promise Enforcement model as I envision it, all persons would have a right to housing, so long as they keep their contractual promises. The notion of a contract-based right to housing is not unique. Instead, other countries³³² and the international community³³³ have recognized the need for a bilateral exchange of promises in low-

³³⁰ Carpenter, *supra* note 36, at 1084. Promise Enforcement is briefly described as follows:

Promise Enforcement is intended to invoke Rousseauian social-contract theory. Too often, public-housing policy is something done “to” rather than “by,” or even “with” public-housing tenants, who are thought of more often as “denizens” than as “citizens.” Each of the three elements of Promise Enforcement is grounded in the language of Rousseau’s social contract. The first element of Promise Enforcement, contextual thinking, is related to a necessary threshold condition for the social contract to exist: before a social contract can be formed, it is necessary that the people to be within the contract have agreed to be unified and understand themselves to be a single people. The second and third elements, valuing individuality and comprehensive responsibility, go to the status of the contract, assuming that the threshold requirement of contextual thinking already has been met. In addition, the third element, comprehensive responsibility, is related to the Rousseauian idea that each person alienates all of his natural rights and receives, in return, civil rights from the sovereign (of which he is a member).

Id. (footnotes omitted).

³³¹ One example of this phenomenon is the Rent Book Regulations in Ireland, which govern the information that must, as a matter of law, be made available to tenants regarding their tenancy. See Housing Rights Service, *New Rent Book Regulations Now in Force*, HOUSING RTS. REV. (Ir.), Summer 2004, at 11, 11. Unfortunately, the required Rent Books are not always provided. See Housing Rights Service, *New Future for the Private Rented Sector*, HOUSING RTS. REV. (Ir.), Spring/Summer 2003, at 2, 2-3.

³³² See Housing Rights Service, *New Future for the Private Rented Sector*, *supra* note 331, at 3.

³³³ Kenna, *supra* note 69, at 101 (noting the European Union Unfair Contract Terms directive, which is consonant with the notion of bilateral promise enforcement).

income housing. Notably, Irish law uses the term “contract holder” to describe a low-income tenant.³³⁴ This terminology is significant because it recognizes the bilateral nature of the relationship.

To sum up, I believe that a right to housing should require both parties to make and keep a contract supported by valuable consideration. That is, a tenant who makes and keeps all promises required of him or her should be confident that his or her tenancy *cannot* be terminated unilaterally.³³⁵ Some of the strongest arguments against a right to housing are made by public-housing authorities and other providers of low-income housing, who stress that the very fact that housing is not a right in the United States makes it possible for them to protect low-income residents—for example, by excluding or evicting those who engage in criminal behavior.³³⁶ I do not believe this stance is inconsistent

³³⁴ See Housing Rights Service, *Report Calls for Radical Tenancy Overhaul*, HOUSING RTS. REV. (Ir.), Summer 2006, at 8, 9 (quoting from LAW COMMISSION, RENTING HOMES: THE FINAL REPORT (LAW COM NO. 297) (2006) (available through the Law Commission website) at http://www.lawcom.gov.uk/docs/lc297_vol1.pdf).

³³⁵ In describing the hopelessness of the current low-income-housing cycle, Peter Edelman identifies rental terminations without cause as one of the most significant sources of despair and discouragement. See PETER EDELMAN, *SEARCHING FOR AMERICA'S HEART: RFK AND THE RENEWAL OF HOPE* 155-67 (2001). Edelman describes how low-income residents, required to work, but not provided with means for child care, lose their jobs and thus their governmental benefits. *Id.* at 159. In addition, many who would wish to go to college to increase their prospects of employment are not permitted to use government benefits to do so. *Id.* at 155, 162. Edelman also mentions a fifteen-year waiting list for housing vouchers in the city of Chicago. *Id.* at 160. Edelman's description serves to paint a picture of why, as he argues, it is really very easy to become homeless in the United States at this time. *Id.* at 155-67.

³³⁶ I heard a useful discussion of many of these concerns at a conference sponsored by the American Bar Association's Affordable Housing Forum. ABA 16th Annual Conference on Affordable Housing and Community Development Law, *Making Affordable Housing Safe—Evictions for Criminal Activity* (May 24, 2007) (notes from the Forum available upon request from the author). Margaret McFarland made the important point that not only is public housing not a matter of right, but that society should stop considering public housing as emergency housing, or housing of last resort. Margaret McFarland, University of Maryland, Address at the ABA 16th Annual Conference on Affordable Housing and Community Development Law: Making Affordable Housing Safe—Evictions for Criminal Activity (May 24, 2007) [hereinafter Remarks of Margaret McFarland]. She acknowledged the existence of some very hard cases in which, for example, some innocent children might be evicted to protect other innocent children, where the first group of children was part of a household in which some family members were engaging in illegal activities. *Id.* Gloria Green of the Atlanta Housing Authority echoed Ms. McFarland's points, and also added that the housing authorities are generally forced to rely on the accounts provided by police, assuming those reports to be honest and thorough, due to the lack of viable resources for making their own, separate investigations of alleged criminal activities. Gloria J. Green, Atlanta Housing Authority, Moderator, Address at the ABA 16th Annual Conference on Affordable Housing and Community Development Law: Making Affordable Housing Safe—Evictions for Criminal Activity (May 24, 2007). Ms. Green also noted, in a follow-up to Ms. McFarland's point about the eviction of children, that, although barring only the offending family member may seem like the more humane approach, it is very hard to make such a policy work because sympathetic family members often allow a barred person to return. *Id.* One of Ms. McFarland's most compelling points, in my opinion, was her statement that many of the problems in public housing are greatly exacerbated because housing is being required to carry the ball for many other problems that housing cannot solve alone, such as lack of work, healthcare, and childcare. Remarks of Margaret McFarland, *supra*.

with the Promise Enforcement model I have proposed; instead, it is fair to expect tenants to uphold their part of the lease contract, which may reasonably include covenants regarding behavior.³³⁷

In the previous paragraph, I mentioned my expectation that low-income-housing contracts—like any other contracts—should be supported by valuable consideration. My assertion may have surprised some readers. There is a common misperception that affordable housing contributes nothing to society. This erroneous belief is so strong that it could very well make it impossible to create a right to housing in the United States at the present time. To combat this misperception, voters and policymakers must become aware of how low-income housing, and those who reside there, contribute to society.³³⁸ Blair Kamin writes of public housing as a community resource,³³⁹ rather than the community drain or even menace that it is sometimes purported to be.³⁴⁰

One way of improving public perception of affordable housing's role in society is by increasing public awareness of the market power of low-income persons.³⁴¹ In earlier work, I have argued that no society can have a functioning social contract if it does not see itself as a single, unified people.³⁴² Seeing low-income persons as consumers—not just as dependants—would be an important step toward the goal of seeing ourselves as a single people. John Rawls' jurisprudence provides one of the best-known examples of how society might change the way it views its low-income members. Rawls invites each person to envision himself or herself as a potential member of what Rawls calls "the least advantaged [class]."³⁴³ In this "original position" in which each per-

³³⁷ ABA 16th Annual Conference on Affordable Housing and Community Development Law, *Making Affordable Housing Safe—Evictions for Criminal Activity* (May 24, 2007) (notes from the Forum available upon request from the author). One audience member did make the intriguing suggestion, however, that petty theft by a needy person should not bar that person from public housing.

³³⁸ *Id.* Milton Pratt of Michaels Development Company argued passionately that the United States needs New Orleans for many reasons, including but not limited to the city's "massive port," which imports most of the petrochemicals for the rest of the United States. Just as it is crucial that the rest of the country understand that rebuilding New Orleans is not merely a charitable venture, it is also crucial that voters and policymakers understand the myriad of contributions that residents of subsidized housing make to the economy, including but not limited to the work that many such residents do in service-industry jobs. A report prepared by the National Coalition for the Homeless states that the Coalition's own research suggests that approximately thirteen to twenty five percent of homeless persons are employed, but also notes that other sources' numbers are significantly higher. NAT'L COAL. FOR THE HOMELESS, WHO IS HOMELESS? (2007), <http://www.nationalhomeless.org/publications/facts/Whois.pdf>.

³³⁹ KAMIN, *supra* note 268, at 243.

³⁴⁰ In earlier work, I have also described some ways in which public housing might establish itself as a community resource. Carpenter, *supra* note 36, at 1094-96 (describing several ways in which low-income housing might "contribute as a valuable citizen to the larger community" through what I call "contextual thinking").

³⁴¹ GOODMAN, *supra* note 11, at 148 (noting that even the poorest persons can influence society and its ideas by their spending choices).

³⁴² Carpenter, *supra* note 36, at 1084 ("[B]efore a social contract can be formed, it is necessary that the people to be within the contract have agreed to be unified and understand themselves to be a single people.").

³⁴³ JOHN RAWLS, A THEORY OF JUSTICE 12, 14-15, 98 (1971). *See also* DWORKIN, *supra* note 27, at 150. Dworkin notes that some scholars have criticized Rawls for assuming that

son does not know anything about how many (or how few) personal resources he or she might have,³⁴⁴ each person would be asked to participate in negotiating a contract that will form the foundation of society.³⁴⁵ Rawls claims that this exercise would force each member of society to identify with low-income persons in a new way and would probably affect the kinds of policies society would enact.³⁴⁶ In reading Rawls' work and musing on the notion of each of us imagining oneself as a potential member of the "least advantaged" class, I wonder whether one of the policies society might enact as a result of Rawls' exercise would be a right to housing.

As this Article has attempted to show, rights are challenging and controversial, but also powerful. Housing is but one of many great needs, and focusing on housing is not a panacea. Even so, improving the supply and quality of affordable housing is a worthy effort that may improve the lives of low-income persons in other ways as well. Creating a right to housing would be a significant step beyond recognizing a housing goal, commitment, or policy, and would increase the legitimacy of housing programs in important ways. A right to housing that is built upon traditional notions of bilateral agreement—a construct that I call Promise Enforcement—recognizes the dignity of both contracting parties and protects the expectations of each. As a closing thought, one potential benefit of the kind of rights-based discourse this Article has presented is that it may make us more likely to treat people as both ends and means, rather than as means alone.³⁴⁷ When we focus on the inherent value in other

people are inherently conservative and thus, having envisioned themselves in the "original position" as potential members of the worst-off class, will want to protect their own self-interest by protecting the interests of the members of that class. *Id.* As Dworkin notes, this may not be a reasonable assumption, given the fact that some members of society are natural gamblers who may be much more comfortable with a considerably higher level of risk than others. *Id.*

³⁴⁴ RAWLS, *supra* note 343, at 12.

³⁴⁵ *Id.*; DWORKIN, *supra* note 27, at 169. Dworkin notes that part of the power of such a contract is that it looks at the principles each of us would ostensibly be willing to agree to if we were invited to do so. *Id.* This kind of social contract, Dworkin argues, is consistent only with a rights-based jurisprudence, not one that is founded on economic arguments. *Id.* at 172-73.

³⁴⁶ Rawls refers to the resultant policies as being characterized by what he calls "maximin;" that is, by "adop[ting] the alternative the worst outcome of which is superior to the worst outcomes of the others." RAWLS, *supra* note 343, at 152-53.

³⁴⁷ See, e.g., GOODMAN, *supra* note 11, at 155 (providing some examples in the employment context of how workers can be seen as both the means and the end of their work). This example brings to mind the workers in Hundertwasserhaus, who were encouraged to create spontaneous mosaics and to bring their family members on-site after hours to see their work. HARRY RAND, HUNDERTWASSER 185 (1993) ("The workers who work on the building like working there. . . . They do not have the feeling that they are just machines who assemble pre-fabricated items."). See also DWORKIN, *supra* note 27, at 90, 172-73 (noting that rights-based theories focus on individuals as both means and ends, rather than merely as a means to some other end, as a goal-based theory would do); RAWLS, *supra* note 343, at 180 ("To regard persons as ends in themselves in the basic design of society is to agree to forego those gains which do not contribute to their representative expectations. By contrast, to regard persons as means is to be prepared to impose upon them lower prospects of life for the sake of the higher expectations of others.").

persons, we might view humanity as a finite resource to be protected and treasured, just like oil and gemstones.³⁴⁸

³⁴⁸ GOODMAN, *supra* note 11, at 230-31 (comparing the human race with other kinds of “[p]lanetary resources [that] are finite and must be conserved”).