

Property and Identity: Vulnerability and Insecurity in the Housing Crisis

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INTRODUCTION

The relationship between property and identity is complex. At least since William James, scholars have recognized the intimate connection between people's possessions and their sense of self. In a sentiment later echoed by his close friend Oliver Wendell Holmes,¹ James famously noted that “[w]e feel and act about certain things that are ours very much as we feel and act about ourselves,” and thus “between what a man calls me and what he simply calls mine the line is difficult to draw.”² James recognized that people make meaning of their world in no small part through what they possess, embodying core elements of who they are in objects both mundane and profound. Property in this way can serve not only as a tool to extend individual will into the world, in the Hegelian sense that legal scholars well recognize,³ but also can help people understand themselves and find stability in their identity.⁴

Property, moreover, not only influences people's sense of self but also how others perceive that self.⁵ People use possessions—homes, offices, cars, clothing, furniture, baby strollers—to communicate critical information

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¹ See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897) (“A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”).

² WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 291–92 (1890) (emphasis omitted).

³ See, e.g., Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

⁴ See Lita Furby, *Possessions: Toward a Theory of Their Meaning and Function Throughout the Life Cycle*, 1 LIFESPAN DEV. & BEHAVIOR 297, 318–20 (Paul B. Baltes ed., 1978).

⁵ See generally ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

about their identity, the communities to which they belong, and their social status.⁶ And as people manage that signaling, the internal resonance of property and the external process of communication interact and reinforce each other.⁷

Property's function as an embodiment and symbol of the self can be normatively and practically quite desirable, providing a rootedness and sense of control that can anchor everyday life.⁸ People can also deepen their connection to others through the collective meaning that property provides, allowing them to share common markers of identity over time.⁹ Thus, if property is classically understood as a font of security,¹⁰ the stability property provides can ground people not only literally but also emotionally.¹¹

This extended self, however, also creates vulnerability.¹² The more possessions form and signal core aspects of identity, the greater the risks posed by the emotional valence of property. In particular, when property becomes entwined with associations to place and status, people may find themselves in a race to acquire for property's symbolic value rather than for any intrinsic reason. This process, moreover, tends to be more pronounced in times when conspicuous consumption is at the forefront, when the cultural resonance of the signal connected to certain forms of property—as with homeownership—plays a particularly strong role in the cycle of acquisition and anxiety. Similarly, when identity and status become tied up in possessions, losing property—as with foreclosure—can carry consequences that are as deeply emotional as they are economic.

⁶ See MARY DOUGLAS & BARON ISHERWOOD, *THE WORLD OF GOODS* 3–4 (1979). See generally Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757 (2009).

⁷ See GOFFMAN, *supra* note 5.

⁸ See Jeremy A. Blumenthal, “*To Be Human*”: *A Psychological Perspective on Property Law*, 83 TUL. L. REV. 609, 618 (2009).

⁹ See Eduardo M. Peñalver, *Property's Memories*, 80 FORDHAM L. REV. (forthcoming 2012); see also Rachel A. Van Cleave, *Property Lessons in August Wilson's The Piano Lesson and the Wake of Hurricane Katrina*, 43 CAL. W. L. REV. 97 (2006).

¹⁰ See, e.g., JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 111–12 (C.K. Odgen ed., Richard Hildreth trans., Harcourt, Brace & Co. 1931) (1802).

¹¹ See Furby, *supra* note 4, at 322–23 (discussing the role of affect in control over one's environment as a central component of possessive motivation). It is thus not surprising, as Erving Goffman explored, that total institutions—prisons, monasteries, asylums—strip inhabitants of personally identifiable property and manipulate the link between possessions and identity as a tool of order maintenance. See generally ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* (1961).

¹² Anxiety and property have long been linked. Indeed, as Blackstone—perhaps protesting too much?—was defining property as that “sole and despotic dominion which one man claims and exercises over the external things of the world,” 2 WILLIAM BLACKSTONE, *COMMENTARIES* *2, he noted how unsettling the roots of property can be. See Carol M. Rose, *Canons of Property Talk, or Blackstone's Anxiety*, 108 YALE L.J. 601, 601–02 (1998). Blackstone's reaction was to whistle past the proverbial graveyard. As he put it, “there are very few that will give themselves the trouble to consider the origin[] and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favor, without examining the reason or authority upon which those laws have been built.” BLACKSTONE, *supra*.

The emotional insecurity of this extended self is revealed starkly in times of economic crisis and instability.¹³ Indeed, as the current housing crisis has shown, the link between property and identity can feed the kind of spiraling that creates economic bubbles. A variety of economic and regulatory forces combined to create the recent boom and bust,¹⁴ but all of the easing of credit standards, the misuse of securitization, and lack of regulatory oversight fueled a competitive race around housing that grew out of a culture of homeownership that deeply implicated status signaling. Entire industries developed before the crash dedicated to promoting unsustainable ownership and the abuse of home equity lending to people often ill-equipped to manage the real risks of homeownership.¹⁵ The emotional resonance of property thus exacerbated the vulnerability—part emotional, part economic—on which the market preyed.

Just as the emotional resonance of property's signals can feed bubbles, the aftermath of economic crisis can lead to a strong psychological reaction in the other direction, as people internalize—perhaps overly so—the experience of loss suffered by so many in a downturn. This seems evident at the moment as a general economic recovery has begun, haltingly, but the housing sector remains gripped in a collective paralysis that shows little sign of abating.¹⁶ People may be making economically reasonable decisions not to re-enter the housing market, but an important reason why housing remains stalled is fear and a general sense that homeownership now represents an unduly risky investment.¹⁷

Given these fraught emotional dynamics, the housing crisis could have offered an opportunity to re-examine the dominant role of property as a central arena for pursuing well being in our culture. A growing body of evidence in a number of fields has challenged the ethos of acquisition that prevailed before the crash, and these insights can form the basis for a different understanding of property and identity. It is not clear, however, that this opportunity is taking hold. As the economy stabilizes, early signs of a

¹³ Cf. Rashmi Dyal-Chand, *Home as Ownership, Dispossession as Foreclosure: The Impact of the Current Crisis on the American Model of "Home,"* in *THE IDEA OF HOME IN LAW: DISPLACEMENT AND DISPOSSESSION* (Lorna Fox O'Mahony & James A. Sweeney eds., 2011).

¹⁴ See generally Adam J. Levitin & Susan Wachter, *Explaining the Housing Bubble*, 100 *GEO. L.J.* (forthcoming 2012).

¹⁵ Cf. Katherine M. Lehe, *Cracks in the Foundation of Federal Law: Ameliorating the Ongoing Mortgage Foreclosure Crisis Through Broader Predatory Lending Relief and Deterrence*, 98 *CALIF. L. REV.* 2049, 2053, 2067 (2010).

¹⁶ E.g., Binyamin Appelbaum, *Gloom Grips Consumers, and It May Be Home Prices*, *N.Y. TIMES*, Oct. 19, 2011, at A1 (describing continuing challenges in the housing market); Carla Fried, *States with the Strongest and Weakest Housing Markets*, Comment to *The Daily Money*, *CBS MONEY WATCH* (Mar. 8, 2011), <http://moneywatch.bnet.com/economic-news/blog/daily-money/states-with-the-strongest-and-weakest-housing-markets/2221> ("In the two years since it reached its post-crash bottom, the stock market is now up nearly 100 percent. The housing market? Not so much. The median national home price is still 10 percent lower than in March 2009 and nearly one-third below its early 2007 peak. And fresh data from CoreLogic suggests it's going to be a while before housing gets off the mat.")

¹⁷ See *infra* Part I.

rebalance involving a shift toward an emphasis on personal relationships and experiences rather than possessions seem to be fading.

The housing crisis, in short, holds lessons about the ineluctable distortions that the intimate landscape of property can generate. This Article focuses on three facets of that landscape. Part I examines the role that status anxiety played in the housing boom. Part II turns to emotional aspects of how the pendulum has swung against homeownership after the downturn. Part III reflects on what these dynamics suggest for rethinking homeownership as a touchstone, and for re-examining the centrality of consumption more broadly. The Article concludes in Part IV by arguing that the legal system and housing policy must be more cognizant of these emotional variables, even if the institutional mechanisms available to do so are relatively limited.

I. VULNERABILITY, STATUS ANXIETY, AND THE HOUSING BUBBLE

Scholars have only begun to plumb the causes of the housing crisis, with the bulk of the early literature focused on the relative importance of various structural shifts and regulatory failures.¹⁸ This nascent scholarship, however, tends to underplay the psychological dynamics that contributed to the pre-crash housing frenzy.¹⁹ This Part argues that an aspect of property's extended self—notably, the status associated with homeownership—created a kind of emotional vulnerability, an anxiety of falling behind or being left out of what homeownership represented. This status anxiety exacerbated the economic vulnerability that motivated much of the rise of the subprime industry and was an important factor in the bubble.

To understand how this emotional dynamic unfolded, it is useful to begin with a functional approach to property's role in forming identity. From an inward-looking perspective, one reason that people acquire and hold pos-

¹⁸ For an excellent overview of this emerging literature, and a significant contribution in its own right, see Levitin & Wachter, *supra* note 14 (canvassing leading structural theories of the housing bubble and arguing that the bubble can best be explained as a supply-side phenomenon resulting from information asymmetries in the securitization market).

¹⁹ There are a few notable exceptions. As discussed below, see *infra* text accompanying note 61, Robert Shiller has argued that overconfidence and psychological blindness to economic realities common to most bubbles can explain the housing crisis. ROBERT J. SHILLER, *THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED AND WHAT TO DO ABOUT IT* 48–54 (2008). Attempts to explore psychological and emotional dynamics in aspects of the run-up to the housing crisis can be found in the legal literature as well. See, e.g., Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1079 (2009) (arguing that subprime mortgage contracts were structured rationally to respond to the imperfect rationality of borrowers); Ronnie Cohen & Shannon O'Byrne, *Burning Down the House: Law, Emotion and the Subprime Crisis*, 45 REAL PROP. TR. & EST. L.J. 677 (2011) (arguing that subprime mortgage contracts misallocated risk by not accounting for emotion); see also Hazel Christie et al., *The Emotional Economy of Housing*, 40 ENV'T & PLAN. A 2296, 2299 (2008) (“It is possible that other emotions—fear, desire, love, desperation—feature in driving up prices, or that anxiety or distress might play a part in housing transactions, especially in the light of the multilayered nature of different kinds of emotions anchored in and around the home.”).

sessions, beyond use and investment value, is to embody memories, mark important relationships, and otherwise reinforce a sense of self.²⁰ In this way, as William James recognized,²¹ property takes root in one's personality and can deepen the attachments that objects reflect.²² It may be that "[i]n the world of Robinson Crusoe, property rights play no role,"²³ but connection to material possessions can take hold for entirely internal reasons, regardless of whether there is anyone to exclude.²⁴

That said, property's connection to identity is also an external and interactive social construction. People use their property to communicate with others in ways that shape the collective meaning of possessions in an iterative process.²⁵ These messages can come in many varieties, reflecting almost any aspect of identity, and, given the socially embedded nature of communication through property, they change over time and context.

One particularly resonant set of messages long identified with property involves status. On one level, status simply reflects some basic characteristic or quality. A person's wedding ring signals that she is married, and a white lab coat signals that she is a medical professional. More pointedly, however, people also signal status in the sense of relative place in society's hierarchies. People evaluate themselves by reference to others around them, taking the measure of their worth, how well they are doing by various social standards, their place in a community, and other markers of themselves through a process of collective comparison.²⁶ And people often value relative position more than absolute position.²⁷ Researchers have found, for example, that people will choose an income of \$50,000 per year in a world in which the average income is \$25,000 over receiving an income of \$100,000 per year in a world in which the average income is \$250,000.²⁸

²⁰ See Margaret Jane Radin, *The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood*, 74 OR. L. REV. 423, 426 (1995) [hereinafter Radin, *Reconsidering Personhood*] (noting that "certain categories of property can bridge the gap, or blur the boundary, between the self and the world, between what is inside and what is outside, between what is subject and what is object"); see also Radin, *supra* note 3, at 987–88.

²¹ See *supra* text accompanying note 2.

²² See Furby, *supra* note 4, at 315; see also Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 WAKE FOREST J.L. & POL'Y 93 (2011) (arguing for an object relations approach to property and personhood grounded in material culture theory).

²³ Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967).

²⁴ See Daniel I. A. Cohen, *On Property as Self*, 26 J. PSYCHIATRY & L. 3, 6 (1998); cf. Furby, *supra* note 4, at 313–15, 317.

²⁵ See Davidson, *supra* note 6, at 779–82.

²⁶ The more abstract the quality at issue, moreover, as with "success" or "reputation," the more the cues that others send may be relevant in this evaluation. This is not to say that people who have seemingly objective criteria to compare—as with, say, income—are not equally involved in a process of social comparison, but with more measurable characteristics, it may be easier to understand intrinsic value. Of course, abstract qualities (the "best" office) and concrete measures (square feet) often interact.

²⁷ See RICHARD LAYARD, *HAPPINESS: LESSONS FROM A NEW SCIENCE* 41–42 (2005).

²⁸ *Id.*

As a locus of thick cultural associations, property can be a particularly useful tool to signal and evaluate relative position.²⁹ Consequently, people's choices about material issues can be driven less by any inherent value or utility and more by where their possessions place them in comparison to others.³⁰ Writ large, this can drive people to invest in and make other choices about property to mark—and visibly reinforce—their hierarchical place.³¹

This idea has long roots in property theory,³² but is perhaps most associated with Thorstein Veblen's concept of "conspicuous consumption."³³ Veblen argued that people have always acquired property less to satisfy intrinsic needs and more to compete through what he called the "emulation" of one's peers.³⁴ People are motivated to strive and acquire, Veblen argued, in order to signal their superiority over others through objects of wealth in a race marked by constantly shifting norms.³⁵

In the modern literature, economist Robert Frank has translated the dynamic that Veblen identified into a theory of positional goods.³⁶ As Frank argues, a broad array of goods, in the economics sense, are valued in our society less for their absolute worth, and more because of their ability to mark a position in some localized hierarchy.³⁷ When everyone is competing in the same game, this can generate a "positional treadmill" by which the acquisition of such goods can create new baselines against which future comparison occurs, leading to the need to further advance in relative position.³⁸

Social comparison through property takes place through any number of possessions, but one of the most resonant positional goods in American cul-

²⁹ It should not be seen as contradictory that property can be important to identity both in and of itself and as a relative signifier. Both are true in various ways, and often at the same time.

³⁰ See Floyd Webster Rudmin, *Ownership as Interpersonal Dominance: A History and Three Studies of the Social Psychology of Property* 51 (Mar. 1988) (unpublished Ph.D. dissertation, Queen's University) (on file with author).

³¹ This is not to assert that social comparison in general—and competition through property, specifically—is inherently pernicious. A great deal of positive motivating force comes from wanting to be just a bit better than a rival. And people compete for all sorts of beneficial ends—philanthropy, ecological sensitivity, good parenting, and so on. But, as the housing crisis attests, the message that certain markers of belonging or success are tied predominantly to particular types of property can make people anxious and competitive around those markers.

³² See Davidson, *supra* note 6, at 774–78 (discussing the intellectual history of social comparison through property).

³³ See THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* (Martha Banta ed., Oxford Univ. Press 2007) (1899).

³⁴ *Id.* at 22.

³⁵ See *id.*

³⁶ See generally ROBERT H. FRANK, *CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS* (1985).

³⁷ *Id.* at 7.

³⁸ *Id.* at 136–37.

ture—at least until the crash—has been single-family homeownership.³⁹ In popular culture and in legal imagination, “home” occupies a unique role as property, invoking personal comfort and shelter, privacy, ontological security, and other positive associations.⁴⁰ These associations (and their opposites) could apply to any kind of home, rented or owned, but decades of policymaking and cultural reinforcement have added a distinctive symbolic value to homeownership as a form of tenure, above and beyond the social and psychological benefits of home.⁴¹ Thus, homeownership has been advanced as a secure investment and foundation for economic stability and entrepreneurship; as a marker of commitment to community and foundation for active and participatory citizenship; as a source of autonomy and personal satisfaction; and as a general symbol of the virtues of long-term saving and stewardship.⁴²

These cultural messages stemmed from many sources, but law played a central role in elevating the meaning of homeownership. From federal mortgage interest and property tax exemptions and other support for homeownership that in 2009 added up to \$230 billion,⁴³ to homebuyer tax credits, to the creation (and eventual nationalization) of Fannie Mae and Freddie Mac,⁴⁴ to a host of smaller efforts,⁴⁵ federal housing policy valorized homeownership

³⁹ It is important in this discussion to be cognizant of the multiplicity of cultures of property within the larger culture, and appropriately cautious about asserting any unified memes. Cf. Radin, *Reconsidering Personhood*, *supra* note 20, at 427 (“And who is ‘we’ here? Maybe just ‘our’ dominant culture.”). That said, the cultural power of homeownership runs deep in American society.

⁴⁰ For an example of any number of popular accounts of the emotional valence of homeownership, see Megan McArdle, *A House Is a Home*, *THE NEXT ECONOMY*, Spring 2011, at 8, available at http://www.nationaljournal.com/njonline/no_20100508_1960.php/a-house-is-a-home-20110317#.TryEbYvCrzs.

⁴¹ Homeownership can also be the gateway to amenities—such as quality schools, public safety, and open space—in communities where rental options are few and far between, generating its own anxieties. Cf. LEE ANNE FENNEL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* 214 (2009) (“With so much riding on the choice of a home, people often stretch themselves quite thin to get a foothold in a premier neighborhood, even when it means placing themselves at risk of foreclosure or bankruptcy.”). These anxieties in part reflect the status associated with all of the attendant benefits that homeownership can bring, reinforced by land-use policies that make renting in many communities with such benefits challenging.

⁴² See, e.g., Lawrence J. Vale, *The Ideological Origins of Affordable Homeownership Efforts*, in *CHASING THE AMERICAN DREAM: NEW PERSPECTIVES ON AFFORDABLE HOMEOWNERSHIP* 15, 15–40 (William M. Rohe & Harry L. Watson eds., 2007); Grace W. Bucchianeri, *The American Dream or the American Delusion? The Private and External Benefits of Homeownership* (Apr. 2011) (unpublished manuscript), available at <http://real.wharton.upenn.edu/%7Ewongg/research/American%20Dream%20or%20American%20Delusion%202011-04-22.pdf> (reviewing the literature on the purported benefits of homeownership).

⁴³ CONG. BUDGET OFFICE, *ECONOMIC AND BUDGET ISSUE BRIEF: AN OVERVIEW OF FEDERAL SUPPORT FOR HOUSING* 1 (2009).

⁴⁴ See David Reiss, *Fannie Mae and Freddie Mac: Privatizing Profit and Socializing Loss*, in *LESSONS FROM THE FINANCIAL CRISIS: CAUSES, CONSEQUENCES, AND OUR ECONOMIC FUTURE* 437, 437–42 (Robert W. Kolb ed., 2010).

⁴⁵ See, e.g., Press Release, *The White House, Fact Sheet: America’s Ownership Society: Expanding Opportunities* (Aug. 9, 2004), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2004/08/20040809-9.html> (“The President believes that homeownership is

over the span of decades.⁴⁶ The same can be said for a range of state and local legislation and legal doctrines that provide special protection for homeownership. These include measures that privilege homeowners as borrowers, such as homestead exemptions, forms of the tenancy by the entirety, protections for homeowners in foreclosure, and state provisions that limit property taxes for homes.⁴⁷

The resonance of home ownership and the competitive dynamics surrounding the ability to obtain more homes and to use homes to obtain other consumer goods, moreover, was exploited by an industry of mortgage brokers, subprime lenders, home builders, realtors, retailers, and others who were only too happy to reinforce the message.⁴⁸ That there were abuses in this market is well understood,⁴⁹ and in many ways the most troublesome elements in this industry were able to flourish in no small measure because of the seemingly unassailable association between homeownership and status. Who could argue against buying a home, the biggest possible, and leveraging that home for all it was worth? In this way, policy and industry both contributed to a symbolic meaning for homeownership that reinforced the emotional experience of ownership, which in turn influenced cultural resonance.⁵⁰

The cumulative message of these policies and the industries that relied on them was that homeownership, and the debt required to obtain it—however risk-free that was made to seem before the crash—was not simply an economic choice. Instead, homeownership became a proxy for a larger bundle of messages and a seeming predicate for respect, belonging, and success—in short, for status. To own a home may be the American dream, but that means that the inability to do so is an implicit failure, and this is a very hard message to resist.⁵¹

the cornerstone of America's vibrant communities and benefits individual families by building stability and long-term financial security.”).

⁴⁶ See generally Vale, *supra* note 42.

⁴⁷ See Stephanie M. Stern, *Residential Protectionism and the Legal Myth of Home*, 107 MICH. L. REV. 1094, 1100–01 (2009).

⁴⁸ Even a brief glance shows how these industries even now continue to stake so much on homeownership. See, e.g., Nat'l Ass'n of Realtors, Brochure: The Field Guide to the Benefits of Home Ownership (2011), available at http://www.realtor.org/topics/homeownership/materials_you_can_use; Nat'l Ass'n of Home Builders, Home Buyer Information: 'Opportunity Knocks Brochure' (2010), available at <http://www.nahb.org/generic.aspx?sectionID=123&genericContentID=138420>.

⁴⁹ See, e.g., RICHARD BITNER, CONFESSIONS OF A SUBPRIME LENDER: AN INSIDER'S TALE OF GREED, FRAUD, AND IGNORANCE (2008).

⁵⁰ See Christie et al., *supra* note 19, at 2307 (noting that in research on new homeowners, “[e]xpressions of love for the properties themselves were also bound up with emotional appeals to the status and identity that ownership would bring”); see also Cohen & O’Byrne, *supra* note 19, at 689 (arguing that emotional desire for the “status and prestige of homeownership” is “enormously significant and motivating”). See generally D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006); Blumenthal, *supra* note 8, at 618.

⁵¹ It can be argued that many of the advantages touted for homeownership are less about the legal structure of the relevant property rights and more about the associations that our

The effect of this message manifested in distinct, although related, strands of status anxiety around housing evident in the run-up to the crash: One was the general trend of people that had previously been excluded stretching for homeownership. Much of this growth in homeownership could have been sustainable,⁵² and the goal of reducing disparities in homeownership rates was, and remains, critical. However, the push for an ever-increasing overall homeownership rate regardless of the underlying fundamentals fueled a cycle in which policymakers promoted the tenure form but failed to provide a regulatory environment in which new homeowners had sufficient support in terms of lender oversight and consumer empowerment.

A second variety of status anxiety in the housing boom was the increasing ability of homeowners to leverage the rapidly increasing value in their homes to finance consumption related to housing.⁵³ In the decade before the crash, the national savings rate declined from roughly 5% to essentially zero (and, at times, negative),⁵⁴ and much of this shift was embodied in home-equity borrowing to facilitate the purchase of home-related amenities, more cars, and similar consumption.⁵⁵ Maintaining homeownership in the spiral

culture has built up around homeownership. Indeed, the evidence of the benefits of ownership per se—as distinguished from social capital, long-term community involvement, and other external benefits that might come with other tenure forms—is quite mixed. *See, e.g.*, William H. Rohe et al., *The Social-Psychological Effects of Affordable Homeownership*, in CHASING THE AMERICAN DREAM, *supra* note 42, at 215 (surveying research on self-esteem, life satisfaction, social-network support, and other social-psychological aspects of homeownership and finding that inability to sustain homeownership or stress related to homeownership can undermine these benefits); Stephanie M. Stern, *Reassessing the Citizen Virtues of Homeownership*, 111 COLUM. L. REV. 890, 902–12 (2011) (challenging the assumption that homeownership improves civic engagement); Bucchianeri, *supra* note 42 (presenting research indicating that, controlling for various factors, homeownership does not confer subjective well being benefits, owners can suffer affective harm from owning, and homeowners tend to spend less time on beneficial activities).

Certainly, as a form of investment, housing has a decidedly poor track record in the aggregate. *See* ROBERT J. SHILLER, *IRRATIONAL EXUBERANCE* 20 (2d ed. 2005) (reporting an annual real rate of return for home prices between 1890 and 2004 of 0.4%). And scholars are increasingly challenging both the purported psychological and social benefits of homeownership, and highlighting its economic and individual costs, for example, as a fixed asset that reduces mobility. *See, e.g.*, Stern, *supra* note 47, at 1109–20 (empirically challenging the psychological underpinnings of the centrality of home in identity); *see also* Arlo Chase, *Rethinking the Homeownership Society: Rental Stability Alternative*, 18 BROOK. J.L. & POL'Y 61, 62 (2009); A. Mechele Dickerson, *The Myth of Homeownership and Why Homeownership Is Not Always a Good Thing*, 84 IND. L.J. 189, 207–13 (2009).

Nonetheless, decades of policymaking and powerful industry groups reinforced positive associations to the point that homeownership became (or at least, had become before the crash) both a primary symbol of success and a critical engine for relative position.

⁵² *See* Roberto G. Quercia & Janet Ratcliffe, *The Preventable Foreclosure Crisis*, 19 HOUSING POL'Y DEBATE 775, 780–81 (2008) (comparing subprime lending to regulated lending practices).

⁵³ *See* SHILLER, *supra* note 51, at 12–14 (discussing the “rocket-taking-off” effect in housing prices starting in 1997).

⁵⁴ Massimo Guidolin & Elizabeth A. La Jeunesse, *The Decline in the U.S. Personal Saving Rate: Is It Real and Is It a Puzzle?*, 89 FED. RES. BANK ST. LOUIS REV. 491, 491 (2007).

⁵⁵ *See* Alan Greenspan & James Kennedy, *Sources and Uses of Equity Extracted from Homes 2* (Fed. Reserve Bd. Fin. & Econ. Discussion Series, Working Paper No. 2007-20, 2007), available at <http://www.federalreserve.gov/pubs/feds/2007/200720/200720pap.pdf>

before the crash required more and more spending to keep up with a rising baseline.⁵⁶ Essentially, Americans in the aggregate not only stopped saving but also began to convert homeownership into an engine of consumer spending,⁵⁷ much of it to reinforce materially the distinctive symbolism attached to homeownership.⁵⁸

Much of this status cycle was spurred by intensifying inequality and increasingly concentrated wealth.⁵⁹ The consumption choices of the economically dominant sliver at the top of the income and wealth scale play an important role in the symbolism of property for much of the culture.⁶⁰ In the run-up to the crash, the increasing ability of the highest end of the income scale to own ever-bigger houses (and second homes) and the consumption that went with that contributed to the status-privileging of homeownership. This helped to set a baseline of expectations around what should be consid-

(noting that “a considerable portion of the equity extracted through cash-out refinancings and home equity loans was used to repay non-mortgage debt, largely credit-card loans”). Between 1980 and 2007, moreover, residential investment and consumer spending rose from two-thirds to three-quarters of gross domestic product, and the average family’s personal debt burden as a ratio of disposable income rose from about 65% in the mid-1980s to 133% right before the crash. RICHARD FLORIDA, *THE GREAT RESET: HOW NEW WAYS OF LIVING AND WORKING DRIVE POST-CRASH PROSPERITY* 43 (2010).

⁵⁶ Elizabeth Warren has argued that consumer spending in this era represented the increasing relative cost of basic necessities, including not just mortgage debt but also health care, transportation, child care, and education, rather than a competitive cycle of overconsumption. See Elizabeth Warren, *The Over-Consumption Myth and Other Tales of Economics, Law, and Morality*, 82 WASH. U. L.Q. 1485, 1492–504 (2004). It is difficult, however, to disentangle the consumer choices people make that might be status-related from the effect of those choices on basic necessities. When people, for example, choose to purchase larger homes, that choice can have cascading effects on the kinds of fixed costs on which Warren focuses. Cf. *id.* at 1498. And at least a portion of consumer spending facilitated by the home-equity lending during the bubble was on purchases that were particularly resonant status markers, including home furnishings and similar goods that generally go along with the choice to buy more homes in neighborhoods where all the neighbors are buying into similar amenities.

⁵⁷ Hernando de Soto has argued that entrepreneurship is fueled through leverage, drawing on the ability that owners have to use their property as collateral. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 56–58 (2000). Certainly, some portion of the equity being drawn out of people’s homes in the housing boom supported entrepreneurship, see Greenspan & Kennedy, *supra* note 55, at 10 (noting that roughly \$164 billion per year of equity extraction, out of a total annual average of about \$530 billion, went to financial and non-financial asset acquisition and business investments), but much home equity was used to support non-mortgage debt repayments and direct personal spending. *Id.*

⁵⁸ There was a third strain in the boom represented by a kind of speculative mentality that encouraged people to purchase property beyond their means as investments. This speculation was facilitated by the same combination of credit and culture, with a broad, collective, and ultimately mistaken understanding of the real risks involved. However, in the boom, competition to take advantage of rapidly rising home values and not be left behind as others made seemingly unassailable bets seems to have been a part of the dynamic. This was a step removed, however, from the cultural resonance of homeownership per se, and closer to other instances of general “irrational exuberance.” See SHILLER, *supra* note 51.

⁵⁹ See generally Robert J. Gordon & Ian Dew-Becker, *Controversies About the Rise of American Inequality: A Survey* (Nat’l Bureau of Econ. Research, Working Paper No. 13982, 2008), available at <http://www.nber.org/papers/w13982> (exploring explanations for increasingly skewed economic inequality in the United States).

⁶⁰ See Davidson, *supra* note 6, at 787–89.

ered normal for consumption around housing. What could have been a more sustainable homeownership dynamic was thus warped in no small measure by an unrealistic cascade that flowed from norms set at the highest end of the income scale.

To identify these dynamics is not to assert a normative judgment about those who responded to homeownership's ability to convey meaning about status. Many people were susceptible to subprime enticements precisely because the cultural messages around homeownership resonated so powerfully on an emotional level, and they should not be faulted for the efficacy of that message.

It is fair to ask why status and identity in property contributed to this particular bubble when homeownership has had a similar cultural resonance for decades. Indeed, in examining the psychology of housing in the run-up to the crisis, economist Robert Shiller has argued that the factors that drove the bubble reflect recurring market dynamics in which people convince themselves that price appreciation signals a fundamental shift to new economic realities, which then becomes a feedback loop that magnifies the failure of market participants to understand historic cycles of boom and bust.⁶¹ In Shiller's view, individual motivations or emotions that might be particular to housing are no more relevant than, say, the merits of tulips or dot-com stocks. Shiller's theory of contagious market psychology, as compelling as it is at a fairly high level of abstraction, drains the color out of individual crises and does not negate the possibility that deeper emotional dynamics may give texture to any given bubble.

In short, complex structural and regulatory forces created an environment in which long-standing cultural norms about homeownership could metastasize into a housing bubble. In that environment, the urge to compete in ownership and in what ownership could leverage created a distinctive emotional vulnerability that played an important role in fostering frenzy. To be clear, this is not to argue that homeownership is inherently problematic or that the reasons homeownership became a central cultural symbol were entirely unfounded. They manifestly were not. But that very centrality led too many people to buy too much home and build a lifestyle around that choice, all in an effort to purchase the larger symbolic value of property tied up in their extended self.

II. INSECURITY AND FEAR IN HOMEOWNERSHIP AFTER THE CRISIS

If one lesson of the housing crisis is that people can use property to establish and reinforce status and relative position, a second lesson is that when that dynamic leads to overextension, the emotional costs of a downturn can be magnified.⁶² Emotional attachment to what property means for

⁶¹ See SHILLER, *supra* note 19, at 39–46.

⁶² See generally Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437 (2011).

identity, as salutary as it can be, can thus lead to anxiety. In the crisis, the resonance of the cultural power of homeownership made the loss all the more psychologically severe when homeownership started to fail.

One puzzle that has emerged in the wake of the crisis is why the housing market has lagged behind the general, albeit still quite tentative, recovery.⁶³ Indeed, significantly lower housing prices across the country—with an overall drop of roughly one-third since the peak of the boom and even more in some markets⁶⁴—have not generated as much home buying by those newly able to afford to purchase as might be expected.⁶⁵ It is certainly true that with unemployment still high in most markets and credit standards in residential real estate tightened significantly in the wake of the crash,⁶⁶ the housing market remains challenging for many would-be buyers. And there remains a significant stock of foreclosed-against properties in bank portfolios, which, along with other economic realities, continue to depress housing prices.⁶⁷

Even given the sobering nature of these fundamentals, however, it is striking the extent to which the popular literature on the housing market after the crash has reflected tropes of fear and anxiety as much as basic demand and supply dynamics.⁶⁸ Three years after the crash, many people contemplating buying a home now associate the decision less with security, stability, belonging, and responsibility and more with risk, loss, and danger, even if the underlying pull of homeownership remains strong. As *The New York Times* recently reported, “[m]aking an offer for a house, something often done in past generations with little apprehension, is now riddled with worry.”⁶⁹

⁶³ See Fried, *supra* note 16.

⁶⁴ See S&P/CASE-SHILLER HOME PRICE INDEX, <http://www.standardandpoors.com/indices/sp-case-shiller-home-price-indices/en/us/?indexId=spusa-cashpidff—p-us—> (last visited Nov. 10, 2011) (providing national and metropolitan-specific data).

⁶⁵ See, e.g., Jeff Cox, *U.S. Housing Crisis Is Now Worse than Great Depression*, CNBC (June 14, 2011, 12:04 PM), http://www.cnbc.com/id/43395857/US_Housing_Crisis_Is_Now_Worse_Than_Great_Depression (discussing the fact that housing prices have continued to decline despite near-historic high affordability).

⁶⁶ See OFFICE OF THE COMPTROLLER OF THE CURRENCY, DEP’T OF THE TREASURY, SURVEY OF CREDIT UNDERWRITING PRACTICES 2011, at 11 (2011).

⁶⁷ See William Alden, *Housing Market’s Prospects Bleak as Foreclosed Property Backlog Grows*, HUFF POST BUSINESS (May 23, 2011, 9:55 AM), http://www.huffingtonpost.com/2011/05/23/housing-market-foreclosure-backlog_n_865465.html. See generally Alan Mallach, *REO Properties, Housing Markets, and the Shadow Inventory*, in *REO & VACANT PROPERTIES: STRATEGIES FOR NEIGHBORHOOD STABILIZATION 13* (Fed. Reserve Bank of Bos. et al. eds., 2010), available at <http://www.bos.frb.org/commdev/REO-and-vacant-properties/REO-and-vacant-properties.pdf>.

⁶⁸ See, e.g., Paul Starobin, *A Dream Endangered. (Yeah, So?)*, THE NEXT ECONOMY, Spring 2011, at 6, available at http://www.nationaljournal.com/njonline/no_20100508_1960.php/the-enduring-dream-of-homeownership-20110317?mrefid=site_search&page=1 (describing an otherwise optimistic young potential homeowner who “when talking about the subject that occupies her mind these days, the prospect of becoming a homeowner” was “terrified”).

⁶⁹ David Streitfeld & Megan Thee-Brenan, *Despite Fears, Owning Home Retains Allure*, *Poll Shows*, N.Y. TIMES, June 30, 2011, at B1.

Psychologists and behavioralists have provided some useful tools to understand what may be driving this pervasive anxiety in housing markets.⁷⁰ First, people have a marked tendency to pay greater attention to certain experiences, as they sort out (often quite imperfectly) the important—the salient—from the trivial in the bombardment of information that is daily life.⁷¹ People thus place greater weight in their decision-making on information that tends to be more vivid,⁷² and this is reinforced by experiences or images that have emotional resonance.⁷³

Moreover, people tend to be decidedly risk-averse in response to salient negative events. For example, most people require somewhere on the order of a two-for-one premium to risk losing what they currently have over the prospect of gaining something of greater value.⁷⁴ The idea that people value what they have more than what they *might* have reflects a deeper, perhaps instinctual, attachment to objects, even those that have been given to people in artificial settings and for relatively brief periods of time. This has been observed at least since Daniel Kahneman, Jack Knetsch, and Richard Thaler's experiments in which undergraduates given common objects like mugs and pens became immediately less willing to part with them than a reference price would suggest they should be.⁷⁵ One reason why the experience of loss has been found to be so much deeper a negative experience than the psychological upside of an equivalent gain is the importance of property to identity⁷⁶—what we actually possess means something (and says something) very different than what we might possess.

In the context of the housing crisis, the emotional attachment to home-ownership and the larger cultural symbolism that feeds that attachment mean that the experiences of families losing their houses through foreclosure can have tremendous emotional salience for would-be buyers. Indeed, the com-

⁷⁰ Although this discussion focuses primarily on demand-side reactions to the housing crash, a similar story could be told about the psychological dynamics of those considering selling as well. The choice to put property on the market is, as with the choice to buy, certainly influenced by rational market signals about price and demand, but if housing is newly considered risky, then those sellers who will in turn be buyers may opt to remain rather than risk loss.

⁷¹ See Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1141 (2002) (reviewing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000)).

⁷² See *id.* (“[P]eople’s reactions to risks are often based mostly on the harms caused by the potential outcome and the vividness of that outcome.”).

⁷³ See *id.* at 1139 (“[T]here seems to be a close and thus far neglected link between the availability heuristic, studied in purely cognitive terms, and emotions. When the availability heuristic is at work, a salient example is driving judgment, often undermining the mental operation of assessing probability.”).

⁷⁴ See DANIEL KAHNEMAN & ANDRES TVERSKY, *CHOICES, VALUES AND FRAMES* 58 (2000). This may seem to stand in tension with the willingness that many people had before the crash to leverage their homes into engines of consumer spending, but this can perhaps be explained by the fact that home-equity lending seemed relatively risk-free in an era of rapidly rising home prices.

⁷⁵ See Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1342 (1990).

⁷⁶ See LAYARD, *supra* note 27, at 168.

bination of emotional vividness and the reinforcing message of the importance of homeownership seem to have almost flipped the role that homeownership played for identity before the crisis. For many who were able to purchase, loss of their homes in the crisis transformed the experience of homeownership from security, attachment, success, and other positive associations, to pain, grief, and failure.⁷⁷ The experience of loss associated with housing, moreover, has gone beyond just those former homeowners who were foreclosed against or who walked away from underwater mortgages. Neighbors have come to witness how devastating foreclosure and loss can be on their own economic situation and on the health of their immediate neighborhood.

In this way, then, people have arguably overreacted to the negative salience of the downturn, in no small measure because loss of housing has had not only significant economic, but also very strong emotional resonance.⁷⁸ And in a process akin to the feedback loop that Robert Shiller has highlighted in the run-up to the crisis,⁷⁹ the cultural message associated with homeownership focused significantly on risk gone bad, building up a self-reinforcing narrative that ownership was newly dangerous.⁸⁰ The more powerful the symbolic message of homeownership and the emotional associations with that symbol, the more powerful is the potential echo of loss when single-family homes started to be repossessed and whole suburban neighborhoods became ghost towns.

Some argue that anxiety about homeownership is not necessarily a bad thing. William Fischel, for example, sees a decided upside to the economic anxiety that attaches to homeownership. Fischel notes that for most homeowners, a house represents a remarkably concentrated economic asset.⁸¹

⁷⁷ See Lorna Fox O'Mahony & James A. Sweeney, *Rethinking Responses to Displacement and Dispossession*, in *THE IDEA OF HOME IN LAW*, *supra* note 13, at 211, 217–18.

⁷⁸ As with job loss and the status shock that can follow, see KATHERINE NEWMAN, *FALLING FROM GRACE: THE EXPERIENCE OF DOWNWARD MOBILITY IN THE AMERICAN MIDDLE CLASS* (1988), the pain of foreclosure and similar loss seems to have been exacerbated for many people by the larger cultural meaning of homeownership. Moreover, the loss of a home can, again like the loss of a job and the shame many feel about that, sever social ties and cause psychic harm from loss of community.

⁷⁹ See SHILLER, *supra* note 19, at 45–46.

⁸⁰ Indeed, loss aversion and the endowment effect may be one reason why some homeowners are not defaulting on their mortgages even when that would appear to be the economically rational thing to do. See Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 *WAKE FOREST L. REV.* 971, 987–89 (2010) (noting behavioralist explanations for the lack of strategic default for underwater mortgagors). It is fair to question whether the supposedly rational calculation involved here is as straightforward as some commentators suggest, given the externalities of default and the potential emotional consequences of the loss of home. *Id.* at 989–96 (arguing that it is less cognitive bias and more shame, guilt, and fear that keep underwater borrowers in their homes). The point here is simply that the greater weight that people give to what they possess, rational or not, helps explain some of the hesitation that people seem to be experiencing around housing in the wake of the crash.

⁸¹ See WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 30 (2005).

This lack of diversification tends to concentrate the mind as well, which, when coupled with the close attention those whom Fischel calls “homevoters” pay to local conditions, creates positive incentives and helps shape responsive local politics.⁸² This kind of anxiety, however, tends to focus on the ability of homeowners to control their economic destiny, which is certainly true in many contexts, but underplays the consequences of a cascade of loss triggered by a larger economic downturn.⁸³

There is no doubt some continuity in the symbolic meaning of home, even if uncertainty has replaced exuberance in the wake of the downturn.⁸⁴ It was the very resonance of the cultural meaning of homeownership that made its role in the crash so emotionally fraught for so many people. What was once an overly valorized type of property has become a source of fear.

III. RE-CENTERING WELL BEING

The third, and perhaps most salient, lesson that the housing crisis holds for the relationship between property and identity involves the enduring centrality of that basic link in American culture. Given the prominence of homeownership as a symbolic good, the housing crisis and its aftermath could have provided an opportunity to re-examine contemporary consumer culture. Homes were never—and will never be—simply ordinary consumer goods, and the strong emotional resonance that homeownership carried could have amplified the lessons the crisis carried about our deepening understanding of the personal, environmental, and social costs of consumption.⁸⁵ However, that opportunity seems to be receding without the shift in attitudes that many commentators predicted at the height of the crisis. This Part will trace these lessons and why they may, unfortunately, go unlearned in the crisis.

To begin with the opportunity that the crisis presented, early after the downturn a number of academics and other commentators saw a chance to rethink the basic ratchet of competitive consumption and the treadmill it fosters that had both become so intertwined with homeownership. For example, Richard Florida argued that the crisis represented a cultural milestone akin to the fundamental realignments seen after both the Long Depression of the late nineteenth century and the Great Depression in the last century.⁸⁶ In

⁸² *Id.* at 260.

⁸³ There are certainly methods to spread the risks associated with homeownership, particularly those over which owners have relatively little direct control (and thus are likely to have the least ability to manage directly). See FENNELL, *supra* note 41. This may moderate some of the psychological weight people give to their investments in their homes. However, the effect may be less than a purely economic approach to the meaning of home might suggest, given the larger cultural symbolism of homeownership (and its attendant downside).

⁸⁴ See Streitfeld & Thee-Brenan, *supra* note 69.

⁸⁵ To draw a connection between property and consumption is not to suggest that all consumption is about acquisition, or that all property is consumption-related. It is rather to highlight one important—and too often ignored—aspect of the culture of ownership.

⁸⁶ See generally FLORIDA, *supra* note 55.

each of these earlier crises, new economic realities ushered in new patterns of consumption that were then solidified in a spatial fix—in the former, the rise and consolidation of the industrial city and in the latter, the suburban nation that emerged after World War II.⁸⁷

Florida sees a similar dawning of a new age in the current crisis that will move American culture away from a focus on housing and automobiles, with all of the attendant spending that goes into those basic markers of identity. In this new, post-suburban, post-industrial economy, Florida envisions a shift in people's consumption away from unsustainable homeownership toward a new landscape of goods and personal services, many of which are only just beginning to emerge.⁸⁸ And, indeed, the early evidence after the crash seemed to be bearing out a decided shift in consumer preferences.⁸⁹

This argument—and the many like it that followed in the immediate aftermath of the housing crash⁹⁰—echoes an extensive and growing literature in fields such as positive psychology, consumer studies, and economics that underscores the tenuous relationship between well being and material possessions, at least once a material foundation is established. It has been argued, for example, that there is little direct correlation, beyond levels necessary for a society to provide for basic necessities, between increasing income (per se) and increasing happiness.⁹¹ This insight reflects the importance of social comparison and hedonic adaptation, as people evaluate their own place and sense of self by a constantly shifting norm.⁹²

The literature on consumption increasingly emphasizes alternative sources of well being, particularly relationships, work, community, and

⁸⁷ *Id.* at 37–40, 107.

⁸⁸ *Id.* at 133 (“We need to radically shrink our expenditures on houses, cars, and energy to free up spending for newly emerging goods and services—everything from new biotechnologies and more powerful computers to new forms of personal development and new experiences.”).

⁸⁹ See RICH MORIN & PAUL TAYLOR, PEW RESEARCH CTR., LUXURY OR NECESSITY? THE PUBLIC MAKES A U-TURN 5 (2009), available at <http://www.pewsocialtrends.org/files/2010/10/luxury-of-necessity-2009.pdf> (reporting steep drop in the percentage of consumers rating various household appliances as a necessity rather than a “luxury you could do without”).

⁹⁰ See, e.g., Amitai Etzioni, *Spent: America After Consumerism*, THE NEW REPUBLIC, June 17, 2009, at 20 (arguing that the housing crisis should give impetus to replacing the centrality of consumption in American culture with communitarian pursuits).

⁹¹ See Richard Easterlin et al., *The Happiness-Income Paradox Revisited*, 107 PROC. NAT'L ACAD. SCI. 22,463 (2010) (surveying thirty-seven countries over an average period of twenty-two years and showing that happiness does not correlate over the long run with a country's income). The so-called “Easterlin Paradox” has been the subject of sustained critique, see, e.g., Betsey Stevenson & Justin Wolfers, *Economic Growth and Subjective Well-Being: Reassessing the Easterlin Paradox*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY, Spring 2008, at 1–84, but seems reaffirmed by the broadest available data, Easterlin et al., *supra* note 91, at 22,466.

The link between income and happiness is distinct from what income might be used to facilitate, in terms of personal experiences and relationships. Those contributors to subjective well being, however, do not necessarily require more resources to sustain or promote, so researchers have tried to isolate income as an independent variable.

⁹² Easterlin et al., *supra* note 91.

health.⁹³ What unites these factors are the sense of purpose and the centrality of social connection to subjective well being.⁹⁴ The evidence shows that loss of income is relatively less central to positive feelings than, for example, are divorce, unemployment, trust, beliefs, and good governance.⁹⁵

This literature suggests that property can be less of an end unto itself, as was evident in status races before the crash where symbolic value became as important in many ways as what housing could facilitate. Instead, property can be understood more clearly as a means to other instrumental goals that contribute to well being. Homes—rented or owned—are indeed a platform for supporting families and friendship, but that simple truth can get lost when acquisition becomes a self-reinforcing cycle. Much of this is a question of emphasis, rather than categorical distinction,⁹⁶ but the housing crisis provides a stark reminder of the consequences of an imbalance that places greater emphasis on ownership than what property can foster.

Moreover, the hedonic-treadmill critique of the centrality of property to identity has all the more force given our increasing understanding of the costs of consumption. The United States, the second-highest emitter of carbon, with one of the highest per capita rates, accounts for nearly one-fourth of the world's greenhouse gases with only five percent of the world's population.⁹⁷ Beyond its contribution to climate change, consumption in the United States has an impact on a variety of basic ecosystems, contributing to what Christine Klein recently called the “environmental deficit,” a growing debt in terms of natural capital such as biodiversity, clean air, and water.⁹⁸ The social costs of consumption have long been understood, of course, in terms of harm done to personal relationships and other pursuits, but that understanding has been deepened in recent years by psychological research about materialism.⁹⁹

This shift in emphasis would comport, at a conceptual level, with recent scholarship exploring human flourishing as a normative framework for property. Gregory Alexander, for example, has argued that fostering the capabil-

⁹³ See LAYARD, *supra* note 27, at 62; see also Leaf Van Boven, *Experientialism, Materialism, and the Pursuit of Happiness*, 9 REV. GEN. PSYCHOL. 132 (2005) (reviewing the literature on subjective well being and documenting the differential benefits of experiential expenditures over material expenditures).

⁹⁴ See LAYARD, *supra* note 27, at 63.

⁹⁵ *Id.* at 71.

⁹⁶ As discussed above, see *supra* text accompanying notes 20–25, property's link to identity can reinforce the meaning in relationships and reflect memories of experiences that are not centered on consumption for its own sake. The point here is where the emphasis lies—on property as a means or property as an end.

⁹⁷ See Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 673 & n.11 (2010).

⁹⁸ See Christine A. Klein, *The Environmental Deficit: Applying Lessons from the Economic Recession*, 51 ARIZ. L. REV. 651, 651 (2009).

⁹⁹ See, e.g., Leaf Van Boven et al., *Stigmatizing Materialism: On Stereotypes and Impressions of Materialistic and Experiential Pursuits*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 551, 551 (2010) (discussing research that shows that materialism undermines social relationships).

ities essential to flourishing obligates owners to share property and make sacrifices to support the capabilities of the members of their communities.¹⁰⁰ Although Alexander is focused on ensuring sufficient resources more than the risks of misusing property to devalue relationships, his argument is broadly consistent with the possibility of re-centering possessions toward other sources of well being. Alexander's framework, by highlighting the reality of inequities in the current structure of property rights and the promise of a justificatory framework that seeks to ensure a broad distribution of property, points to a normatively attractive way to approach what property should be doing.

Despite the promise that the crisis presented to foster a sustained discourse on questions about the meaning of consumption and the potential of property to serve more clearly as a platform for relationships and experiences, that discourse does not seem to be coming to fruition. Although it is still relatively early, the fundamental transformation of the American economy ushered in by the crisis is occurring without serious and sustained reflection in the broader culture and political discourse about what underlying direction the transformation should take. The early wave of commentary seeking to spark that dialogue seems to have been replaced by an increasing focus on the role of consumer spending for the American economy to return to something resembling pre-recession normality.¹⁰¹

Perhaps the Federal Government's response to the crisis forestalled a deeper and more wrenching spiral, which in turn may have limited the cultural impact of the crisis. But the focus of that response has largely sought to re-create the structure of pre-crash housing-related consumption,¹⁰² with a policy landscape at the national level that is still heavily skewed toward a model of homeownership that facilitates more home and less sustainable ownership.¹⁰³ More broadly, the centrifugal pull of a culture in which possessions are central to identity means that in the aftermath of this crisis people seem to be seeking the comfort of the familiar, rather than really reexamining what that choice means.

¹⁰⁰ See Radin, *Reconsidering Personhood*, *supra* note 20, at 432–37 (grounding an approach to property and personhood in terms of Nussbaum's capabilities framework). See generally Gregory S. Alexander, *The Social Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009).

¹⁰¹ See, e.g., *Room for Debate: Why Aren't You Saving?*, N.Y. TIMES (Feb. 8, 2011), <http://www.nytimes.com/roomfordebate/2011/02/08/why-americans-cant-save-money/no-more-unions-no-more-pensions-whys-its-hard-to-save> ("In the depths of the recession, we were supposed to be in a new era of thrift. So why are Americans spending again?"); *No Pent Up Demand Around Here*, *Free Exchange Blog*, ECONOMIST (Mar. 29, 2011, 10:21 PM), http://www.economist.com/blogs/freeexchange/2011/03/consumer_spending (noting that after a brief dip during the recession, consumer spending has resumed a steady trend line up).

¹⁰² See Dyal-Chand, *supra* note 13, at 49 (analyzing the policy response to the housing crisis as grounded in traditional conceptions of home and homeownership).

¹⁰³ For example, in 2009, federal subsidies for homeownership, including home mortgage interest and local property tax deductions, were roughly four times greater than for rental housing. See CONG. BUDGET OFFICE, *supra* note 43, at 1.

IV. HOUSING LAW AND POLICY IN THE BALANCE

If the housing crisis underscores risks associated with the link between property and identity, is there anything that law can—or should—do in response to the intense emotions that the link can generate? The short answer is that legal actors have little choice but to respond to these psychological dynamics, but a more complete answer has to be that legal institutions are not always well-suited to do so.

At a micro level, taking the emotional dimensions of homeownership seriously should sensitize courts and policymakers to the insecurity that such an emotional connection can create. Consumer advocates have long recognized the vulnerability that credit card companies and other purveyors of consumer debt prey on,¹⁰⁴ and the housing crash vividly illustrated that the same kind of dynamic can infect home mortgage markets. This does not mean that people should be discouraged from owning their homes, but that, in creating a conducive regulatory environment for what is often the single most important transaction that most consumers undertake, policymakers must understand how easy it is to exploit people's deep desire for belonging and symbols of place.

This recognition, moreover, offers support for those commentators that have advocated focusing not only on macroeconomic risk in the aftermath of the crisis but also on the individual owners and borrowers who were the victims of the boom.¹⁰⁵ An emphasis on systemic risk alone will tend to obscure the fine-grained reasons why people respond to certain risks—and why some market forces exacerbate that—and any regulatory regime that ignores these psychological dynamics will be fundamentally distorted. But even individual-oriented strategies, such as Shiller's, predicated on giving people more information to understand the genuine risks (and benefits) of ownership over renting have to be rethought to account more fundamentally for the emotional context in which that decision often takes place.

More broadly, in terms of housing, policymakers could decouple homeownership per se from the various goals that have been tied up in the tenure form, shifting toward a more balanced approach to the central questions implicated by homeownership. The reality is that many of the purported benefits of homeownership require sufficient assets (or public support, which has not been significant) to sustain them in the long run. Owning may make eminent sense for those who can afford it, but a more balanced housing policy would also recognize that the instrumental and normative goals of homeownership policy, such as stability, security, and investment, are not inherent in ownership itself, and focus instead on the tradeoffs necessary to

¹⁰⁴ See, e.g., Jayne W. Barnard, *Deception, Decisions, and Investor Education*, 17 ELDER L.J. 201, 201 (2009).

¹⁰⁵ See generally SHILLER, *supra* note 19, at 21–22, 122–48 (advocating for a new information infrastructure to forestall future bubbles, centered around not only stronger risk management institutions but also various tools for consumer empowerment).

consider in achieving each of those goals. This rebalancing would consider, for example, the need—especially during times of economic crises—for mobility; the relative merits of alternative approaches to building long-term economic security; and how best to foster engaged citizenship at the community level regardless of property status.

Thus, for example, if the concern is the independence that property can foster, that can be achieved through homeownership or renting and has more to do with how either are structured than any inherent aspect of the legal form. Long-standing debates about how much latitude landlords should have over tenants now seem eerily similar to the economic power that lenders have over underwater borrowers. The question in each case requires balancing concerns over competing claimants and risk of loss, as well as the practical consequences of more or less discretion granted to various market participants. None of these questions should be resolved by invocation of some formal definition of a tenure type, and the same can be said for so many other concerns that have played out through the proxy of homeownership.

This process will not yield easy answers, and homeownership will continue to have a role to play, but not as a default solution to complex problems. Indeed, national housing policy is beginning to shift toward a more balanced recognition of the value of rental housing.¹⁰⁶ The pendulum should not swing too far in the other direction, somehow elevating rental housing over homeownership, as that would risk the same mistaken emphasis on the form of property rather than the reality of the lived experience it represents. Rather, this should foster an understanding that there is value in being more realistic about the tradeoffs inherent in any approach to housing as distinct from what we hope the given form of property will ultimately foster.

This shift toward a more balanced approach to homeownership in light of the link between property and identity can more broadly validate a regulatory strategy that takes into account the fear and insecurity that follows the experience of loss. The crisis has certainly reaffirmed the vital centrality of an active regulatory system to a well-functioning system of property,¹⁰⁷ even as the policies that have emerged have generated a significant pushback. That divide underscores a similar psychological division, with some people more comfortable with the visibility that the crisis has brought to the state role in ordering property, finding comfort in a responsive regulatory system,

¹⁰⁶ See, e.g., Donna Kimura, *Donovan: HUD's 2011 Budget Reasserts Commitment to Rental Housing*, AFFORDABLE HOUSING FINANCE, <http://www.housingfinance.com/news/ahf/021610-ahf-Donovan-HUDs-2011-Budget-Reasserts-Commitment-to-Rental-Housing.htm> (last visited Nov. 10, 2011) (discussing the U.S. Secretary of Housing and Urban Development's commitment to a balanced housing policy that focuses not only on homeownership but also on rental housing in the wake of the housing crisis).

¹⁰⁷ See Joseph William Singer, *Subprime: Why a Free and Democratic Society Needs Law*, 47 HARV. C.R.-C.L. L. REV. 141 (2012).

while others just as clearly seem to recoil in response to a more prominent governmental role.¹⁰⁸ Whether this crisis yields any deeper recalibration of the public/private divide in property remains to be seen, but the strongly felt need for a swift response to the crisis—whatever one may think of the resulting policies—underscores the psychological dimensions of that regulatory system.

It should be recognized that there are important institutional limits to the legal system's ability to mitigate the vulnerability that arises from the link between property and identity. Property law has a tendency not to interrogate the intentions of owners in the use of their property in contexts where there is no direct relationship to third parties. Absent harmful use, induced reliance, or similar embedded consequences, most property doctrines simply do not account for the larger social context in which an individual makes decisions about how to use their property. And this is for good reason, given the contested nature of most internal norms and our legal system's general respect for autonomy.

Perhaps the best that can be done is to bring greater balance to the assumptions that law makes about the link between property and identity. Margaret Radin's personhood theory remains a powerful argument for orienting property around protecting the constitutive value of possessions.¹⁰⁹ However, from an emotional, rather than philosophical, perspective, the underappreciated obverse of that connection represented by the vulnerability that can attach even to the most personal of property, and the anxiety that linkage can create, suggests that in weighing the extent and strength of legal protection, attention should be paid to both sides of the psychological equation.¹¹⁰ This may sound modest in light of the larger social ferment the housing crisis has unleashed, but it would be a start nonetheless.

Ultimately, then, the question remains whether law can support nascent attempts to de-emphasize the negative aspects of acquisition and emphasize what property can do to facilitate well being. Certainly, there are lessons from efforts in the housing sector that recognize the value of renting, or at least the reality of the tradeoffs between renting and owning. This could be a model for paying similar attention to the costs that attach to consumer spending as the engine of the economy, acknowledging the need for alternatives that are more personally, socially, and environmentally sustainable.

CONCLUSION

The current crisis, like others before it, may augur a fundamental economic and cultural shift in directions that are as hard to perceive now as

¹⁰⁸ Davidson, *supra* note 62, at Part II.D (discussing psychological divides in reactions to state ordering of property).

¹⁰⁹ See Radin, *supra* note 3.

¹¹⁰ See Stern, *supra* note 47.

post-War suburbia would have been at the dawn of the New Deal.¹¹¹ It is certainly in no way too late for a re-examination of the forces that created the crisis, and an important part of that re-examination must be an acknowledgment of the fundamental links that our culture creates between property and identity.

These ties deepen the emotional resonance of property in ways that can be quite salutary, but that also pose risks. The need to acquire and display property in order to feel a sense of belonging and equal citizenship can create real emotional vulnerability, as was clear in the housing bubble. The investment that people place in their property can also reverberate strongly when the legal system inadequately buffers that property from loss, as in the aftermath of the crisis.

All of this suggests that the housing crisis creates an opening for our culture and the legal system to mediate the anxiety and insecurity that attachment to property might bring, recognizing the visceral and understandable power of that attachment.

¹¹¹ FLORIDA, *supra* note 55, at 106.