

The Value of Home Ownership

*Avital Margalit**

The article offers a new reading of the home ownership-mortgage relationship in Israel. It points at the duality characterizing Israeli law regarding home ownership and its protection. While home ownership is a cherished social value, there is a reluctance to provide it with sufficient protection. The significant implications of repossession in the personal, social, and economic realms call for new thinking concerning the assurance of sustainable housing. Current protection laws focus mostly on ex post solutions, aimed at alleviating the plight of the defaulting mortgagor. The article emphasizes the need for ex ante policies, introducing innovative mechanisms in home purchasing.

INTRODUCTION

Home ownership in Israel is not only a norm but also a highly cherished social value. Approximately seventy percent of the population are legal owners of their homes,¹ while the remainder — free market or public

* Faculty of Law, Bar-Ilan University. I wish to thank Avi Bell, Tsilly Dagan, Hanoch Dagan, Ofer Grosskopf, David Hahn, Asaf Hamdani, Yifat Holzman-Gazit, Dubi Salomon, the participants at the Cegla Center Conference on Bankruptcy in the 21st Century and at the Bar-Ilan faculty seminar for their valuable comments and suggestions. Thanks also to Lilach Levi and Anat Kaminsky for research assistance, and to Yakov Malkiel for his comments.

¹ See Central Bureau of Statistics, Selected Data on Housing in Deciles of Households tbl.14.1, available at http://cbs.gov.il/publications/expenditure_survey03/pdf/t14.pdf (last visited Apr. 1, 2006). About 93% of the land in Israel is publicly owned. Pursuant to the Basic Law: Israel Lands, 1960, 14 L.S.I. 48 (1960), ownership of Israel Lands, defined as land owned by the State, the Development Authority, or the Israel National Fund, cannot be transferred outright through a transaction, save in special circumstances specified in section 2 of the Israel Lands Law, 1960, 14 L.S.I. 49 (1960). The majority of Israeli homeowners thus hold their property as a leasehold right from the Israel Lands Administration. Leasehold

housing tenants — aspire to become homeowners. Psychologically, socially, and economically, the home is perceived as the most valuable possession. Home ownership is regarded as superior to other forms of housing, signalling important social values such as respectability, seriousness of purpose, and a willingness to settle down and become a productive community member. Besides its stabilizing effects, home ownership in Israel has also come to signify attachment and commitment to the country.

Reflecting the values attached to home ownership, the Israeli government has been actively involved in the planning, supply, and regulation of housing. The main method of government intervention has changed since the late 1960s, when the government ceased viewing its primary role as a housing supplier and assumed instead the more modest tasks of assuring the availability of mortgage funds and subsidizing housing purchases in the open market. Although subsidies have diminished in recent years, most of Israel's population could not attain the goal of home ownership without resorting to mortgage loans in general and to state subsidized loans in particular. The government, then, subsidizes the otherwise unaffordable dream of home ownership.

This policy, however, is also a source of heightened risks.² Dominant cultural values and state subsidies, in a process of mutual reinforcement, encourage and even pressure people into purchasing their homes, making other housing options undesirable. For most people, purchasing a home and transacting a mortgage are the most important long-term financial commitments of their lifetimes. The purchase initiates a process of psychological and social attachment to a specific house and its surroundings. Until the mortgage is fully paid off, however, defaulting on payments could lead to the loss of one's home. Although Israeli law offers some protection against the risks of repossession, for many, and especially for low income households, this threat is considerable. Balancing the conflicting interests of homeowners versus those of mortgage-backed creditors, the law ultimately favors the latter and does not provide homeowners with a substantial shield.

periods are generally set at either 49 or 99 years, with an option for extending leases for a second period of the same length. The public and the courts tend to relate to these long-term leaseholds as *de facto* ownership. See Joshua Weisman, *Law of Property: Ownership and Concurrent Ownership* 38-40 (1997) (Hebrew). In the present article, therefore, these long-term residential leases will also be included under the category of "ownership."

2 On the modern perception of risk, including risk generated by government intervention, see Ulrich Beck, *Risk Society* (Mark Ritter trans., 1992) (1986). On the implications of risk for housing issues, see Peter Taylor-Gooby et al., *Risk and the Welfare State*, 50 *Brit. J. Soc.* 177, 182-85 (1999).

The explicit cultural message, as well as the government's involvement and financial incentives to the housing market, are not consistent with the message reflected in the legal system's reluctance to ensure substantial protection to homeowners during times of economic distress.

The suitable way of protecting home ownership is but a small part of the current Israeli debate on housing policy in general. Housing has traditionally been perceived as an integral component of the Israeli welfare state,³ but given the government's recent policy of restricting welfare benefits,⁴ housing policy has become a subject of public debate.⁵ Mortgage foreclosures, therefore, allow us to examine the commitment of Israeli society to the value of home ownership in particular and to housing welfare in general.

The personal and social consequences of mortgage foreclosure are not only theoretical issues. Thousands of families have lost their homes over the last five years due to mortgage repossession, and many others are currently facing this risk.⁶

The aim of this article is to suggest a new reading of the home ownership–mortgage relationship. By pointing to the problems of mortgage repossession, it will highlight the duality characterizing Israeli law regarding home ownership and its protection.⁷ The significant implications of

3 Unlike other welfare issues such as education and health, housing is a commodity and housing needs can be fulfilled in the open market. Government intervention is justified by the need to provide correctives to the market. See Bo Bengtsson, *Housing as a Social Right: Implications for Welfare State Theory*, 24 *Scandinavian Pol. Stud.* 255, 256-59 (2001).

4 On the decline of the Israeli welfare state, see Moria Avnimelech & Yossi Tamir, *A Social Time Bomb: Economics and Politics of Welfare in Israel* (2002) (Hebrew).

5 State intervention in Israel is a mixture of selective policies, such as those aimed at supplying the housing needs of specific segments of society, and of universal legislation, such as consumer protection laws, including the regulation of banking and other financial institutions, aimed at supporting persons who have turned to the market to fulfill their housing needs. On the distinction between selective and universal housing policies, see Bengtsson, *supra* note 3, at 261-71.

6 The current economic recession, involving high rates of unemployment and lay-offs together with a changing job market offering low prospects of full-time secure employment, accounts for low and even mid-income debtors defaulting on their loans. The rate of mortgage arrears increased from 5.05 percent in December 1999 to 6.97 percent in September 2004. About 80,000 households are in default on their mortgage loans. Approximately 11,000 households are facing repossession proceedings, of which 32% are immigrants from the former USSR. See Knesset Research and Information Center, *Report on Increases in Mortgage Arrears and Foreclosure*, available at <http://www.knesset.gov.il/mmm/papers.asp> (Nov. 2004).

7 Although this article focuses on purchase money loans, whether state-subsidized or provided by the free market, the analysis may be relevant, with some required

repossession in the personal, social, and economic realms call for new thinking concerning the assurance of sustainable housing from a new perspective. Current protection laws focus mostly on *ex post* solutions, aimed at alleviating the plight of the defaulting mortgagor. My emphasis in this article is on the need for *ex ante* policies, introducing innovative mechanisms in home purchasing.

Part I describes the socio-legal construction of home ownership as a significant value, including the government's extensive involvement in the housing market. Part II elaborates on the risks and ramifications of mortgage foreclosure and examines the protections afforded to mortgagors under Israeli law, demonstrating the conflict between the rhetoric surrounding the values of home ownership and the fact that such values are not sufficiently protected. Aiming at solutions that could enhance the probability of avoiding mortgage repossession, Part III makes some preliminary suggestions concerning modifications in mortgage regulation. The thrust of my propositions is that the housing market needs to be restructured through the introduction of new mechanisms for home purchases other than mortgaged-backed loans. Concluding remarks call for further inquiry into ways and means of guaranteeing sustainable housing.

I. THE VALUE OF HOME OWNERSHIP

The meaning of home in Israeli society is the outcome of the mutual interplay of law, culture, and the market. The meaning of home is socially constructed through culture, and it is through it that people relate to their homes and understand the relationships between others and their homes.⁸

A home is a cultural artifact with various attributes.⁹ Lorna Fox points to the interconnected cluster of values traditionally associated with the concept of home in modern societies.¹⁰ As a physical structure, a home offers material

modifications, to other home-related loans and mortgages, such as equity and home improvement mortgages.

8 On the social construction of the relationships between human beings and their possessions, see Helga Ditmar, *The Social Psychology of Material Possessions: To Have is to Be* 75-77, 78-94 (1992).

9 In recent years, the meaning of the concept *home* has attracted the attention of researchers from various disciplines, such as anthropology, architecture, development studies, geography, psychology, sociology, and urban studies. The literature on the subject is extensive.

10 Lorna Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?*, 29 *J.L. & Soc'y* 580, 588-601 (2002).

shelter and security.¹¹ A home, however, not only protects against material dangers but also facilitates individual autonomy and privacy.¹² On a somewhat different level, the home constitutes part of the self.¹³ For most of us, our home is indeed who we are. It reflects our self-identity and our values, as well as those of the social groups we belong to, identify with, or wish to join. At the same time, we use our home symbolically to present these values and social aspirations to others.¹⁴ The home is also a social unit. It is the site for long-term relationships with one's partner, family, friends, and with the wider community.¹⁵ The home symbolizes social status and signals upward or downward mobility, so that the meaning of home is constituted by social stratification and power relations.

Although these characteristics need not be associated with outright ownership of a house and a long-term connection with a dwelling would suffice, home ownership remains a goal for most people, who view it as a guarantee of individual autonomy and well-being. Home ownership is customarily associated with a long list of personal and social benefits, including wealth accumulation and social mobility, self-esteem and personal satisfaction, improved health, a suitable environment for child-rearing, neighborhood and community stability, political involvement and participation in local voluntary organizations, and crime prevention.¹⁶ Personal satisfaction and social stability benefit the economy at large.

11 *Id.* at 591-92. Fox connects the physicality of the home with its territoriality, *see id.* at 592-93. *See also* J. Douglas Porteous, *Home: The Territorial Core*, 66 *Geographical Rev.* 383 (1976).

12 A home may be associated with physical and psychological harm, if its residents, especially women and children, are subject to abuse. *See* Fox, *supra* note 10, at 593-94.

13 *See* Ditmar, *supra* note 8, at 112-13.

14 David M. Hummon, *House, Home, and Identity in Contemporary American Culture*, in *Housing, Culture and Design: A Comparative Perspective* 207, 210-15 (Setha M. Low & Erve Chambers eds., 1989).

15 *See* Fox, *supra* note 10, at 593, 600.

16 Despite the wide perception of home ownership as beneficial there is little, if any, supportive empirical evidence regarding some of its presumed advantages. Some of these features may be personal traits or social conditions that are the cause rather than the effect of home ownership, and some also entail costs. For a critical assessment of the vast research on home ownership, *see* William M. Rohe et al., *The Social Benefits and Costs of Homeownership*, *available at* <http://jchs.harvard.edu/publications/homeownership/liho01-12pdf> (2001); George McCarthy et al., *The Economic Benefits and Costs of Homeownership*, *available*

Reflecting ideological inclinations and cultural schemas of thought, most western societies prefer home ownership to other forms of housing. Constance Perin¹⁷ suggests that different modes of housing are categorized along a symbolic ladder, with home ownership at the top and renting as a lower category in the hierarchy.¹⁸ These rungs symbolize moral cultural meanings. Individuals are expected to climb up the ladder along their life cycle, eventually becoming homeowners.¹⁹ Culturally, home ownership symbolizes that a person has conformed to social expectations, is ready and able to work and save toward the goal of purchasing a home, and is willing to settle down. Ownership, then, represents such personal traits as stability, seriousness of purpose, trustworthiness, thrift, and neighborliness, and is even held to be the cause of these highly esteemed virtues. People thus understand the meaning of a home within the context of an ideology of home ownership as social status, and aspire to become homeowners.²⁰

This perception or ideology of home ownership holds true in Israel as well. Some of the broad ideological commitments influencing how the cultural meaning of home ownership is constructed are specific to Israel, with each social group emphasizing a unique note. For instance, Palestinians are attached to the home and the land as an ideology and as a matter of survival. Zionists embrace the values of resettling their ancient homeland by rebuilding both their private and national homes. For newcomers in an immigrant society, having a home in Israel symbolizes their growing attachment to their new locale and their absorption into the society. The cultural expectation is that young people, usually upon marriage, will purchase a home, and that their parents will assist them by extending whatever financial support they can afford. Prices of housing are high, but Israelis are willing to undertake long-term financial commitments, financing up to 80% of the purchase through loans. Not surprisingly, the rate of home ownership in Israel is approximately 70%, unevenly distributed among the

at <http://www.housingamerica.org/docs/RIHaw/00-02.pdf> (2001); Robert D. Dietz & Donald R. Haurin, *The Social and Private Micro-Level Consequences of Homeownership*, 54 J. Urb. Econ. 401 (2003).

17 Constance Perin, *Everything in Its Place: Social Order and Land Use in America* (1977).

18 See also Stella M. Capek & John I. Gilderbloom, *Community versus Commodity: Tenants and the American City* 16 (1992).

19 Under certain circumstances (and especially in Israel, where outright ownership is denied regarding 93% of the land), similar or even identical significance may attach to ownership and long-term leaseholds. See, e.g., Neal Milner, *Ownership Rights and the Rites of Ownership*, 18 L. & Soc. Inquiry 227 (1993).

20 Neala Schleuning, *To Have and to Hold* 112-14 (1997).

various sub-groups of Israeli society²¹ along lines of socio-economic status, ethnicity, and nationality.²²

The cultural norms regarding a home are reflected, reinforced, and constituted by law. According to the constitutive perspective, law shapes society from within by determining the main cultural categories.²³ The law affects how we understand the world and, in turn, is also shaped and constituted by our behavior and by the meanings we ascribe to it.²⁴ Unlike other real estate assets, a home is accorded distinctive treatment in the legislation as unique and special, even if it lacks substantial legal protection.²⁵

The courts' rhetoric is also important. The sanctity of the home and the unique relationship between individuals and their homes is a recurrent theme in rulings dealing with housing.²⁶ In the context of explaining the constitutional right of privacy,²⁷ for instance, Chief Justice Barak explains the

21 According to the Central Bureau of Statistics, home ownership in the upper ten percent of the population was approximately 83% in 2003, as opposed to approximately 39 percent in the lowest ten percent of the population. See Selected Data on Housing, *supra* note 1. Among those filing for bankruptcy, the rate of home ownership is 42%. See Rafael Efrat, *The Rise and Fall of Entrepreneurs: An Empirical Study of Individual Bankruptcy Petitions in Israel*, 7 Stan. J.L. Bus. & Fin. 163, 181 n.75 (2002). On the discriminative allocation of land and housing among different segments of Israeli society, see generally Oren Yiftachel & Alexander Kedar, *Landed Power: The Making of the Israeli Land Regime*, 16 Theory & Criticism 67 (2000) (Hebrew).

22 Noah Lewin-Epstein et al., *Home Ownership and Social Inequality in Israel, in Home Ownership and Social Inequality in Comparative Perspective* 338, 344-59 (Karin Kurz & Hans-Peter Blossfeld eds., 2004).

23 See Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *Law in Everyday Life* 21, 22 (Austin Sarat & Thomas R. Kearns eds., 1993). See also Austin Sarat & William L. F. Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* 10-17 (1995).

24 See Patricia Ewick & Susan S. Silbey, *The Common Place of Law* 38-44, 224-333 (1998).

25 For instance, special provisions are incumbent on the appropriation or partition of joint ownership of a family home. See the Planning and Building Law, 1965, § 194, 19 L.S.I. 330 (1964-65); the Land Law, 1969, § 40A, 23 L.S.I. 283 (1968-69), amended by the Land Law (Amendment No. 17), 1995, S.H. 138; the Movable Property Law, 1971, § 10A, 25 L.S.I. 175 (1970-71), amended by the Land Law (Amendment No. 17), 1995, S.H. 138.

26 Questions regarding the home arise in various contexts, from marital property through appropriation and up to the destruction of Palestinian homes. A full analysis of the courts' rhetoric concerning the meaning of the home in different contexts, however, is beyond the scope of this article.

27 H.C. 2481/93, *Dayan v. The Police Commissioner of Jerusalem*, 48(2) P.D. 456,

various meanings of a home: a home is essential to one's personal freedom, to the development and protection of one's autonomy. A home is a meaningful site for social relationships, but also provides refuge from the demands of modern life. Justice Levi emphasizes that a home provides not only physical shelter, but is also of special value to its owner. A home contains personal memories on which the home-dweller relies at times of joy or sorrow. It is within the home that individuals develop their own personality and identity, find freedom and privacy, and feel in control.²⁸ These images of a home emphasize individualistic aspects of home ownership and neglect social ones. Words stressing the importance of the home are also widely found in the case law on mortgage foreclosure.²⁹

The most powerful support for the cultural norm of home ownership may be the system of state subsidies. The Israeli government has played an active role in providing housing since the creation of the state, and has been directly involved in the planning, regulation, allocation, and funding of houses, and even in actual construction.³⁰ Most of these publicly funded housing units have since been privatized through various subsidy programs, while the remainder are still publicly held and used for public housing.³¹

Protecting the unique relationship between people and their homes is not only a matter of concern for individuals but also one of critical social importance, accounting perhaps for the state's activities in facilitating home ownership and subsidizing its purchase.³² In Israel, other ideological motives are also at work. A housing policy that guarantees home ownership promoted Zionist ideology by assuring the absorption of Jewish immigrants, the presence of Jews throughout the land, and the attachment of the population to their home and country.³³

Since the latter half of the 1960s, the emphasis in the government's housing

470-72. Interestingly, Chief Justice Barak's praise of the home was written in connection with the official residence of a high-ranking public servant, in a debate on the value of the official's personal privacy against the right of demonstrators to exercise their freedom of speech across the street.

28 C.A. 2000/01, Ben-Basat v. Ein Dar, 2004(3) Tak-El 491.

29 See, e.g., C.A. 7139/96, Trigov v. Tefachot Mortgages Bank, 51(2) P.D. 661, 666-67; C.A. 7537/04, Tuati v. Discount Mortgages Bank, 2004(3) Tak-El 1943.

30 On the role of government regarding housing during the 1950s and 1960s, see Hubert Law-Yone & Rachel Kalush, *Housing in Israel: Policy and Inequality* 40-43 (1994) (Hebrew).

31 See Lewin-Epstein et al., *supra* note 22, at 342.

32 Mika Oldham, *Mortgages*, in *Land Law: Issues, Debates, Policy* 169, 170-71 (Louise Tee ed., 2002).

33 See Lewin-Epstein et al., *supra* note 22, at 342-43.

policies has shifted towards the demand side instead of merely subsidizing housing supply.³⁴ By subsidizing home purchases and making mortgage funds available to home buyers, the government has been facilitating the mortgage market. By reducing its involvement in the supply of actual dwellings, the government has aimed to reduce its expenditure on housing. The subsidy system may have partly contributed to an increase in housing prices and owners-sellers may have captured some of the benefits.³⁵ The government still supports the housing needs of low-income segments of the population through its public housing system and through subsidies for rent in the free market. Demand for these services, however, significantly exceeds supply.

In the current system of subsidies for home purchases,³⁶ the government extends credit in the form of long-term deposits (usually at below-market interest rates) to mortgage-originator banks, which loan the funds to individuals entitled to state subsidies. These loans are secured by mortgages or pledges on the dwellings. Eligibility for the subsidy and its amount depend upon such factors as the person's socio-economic status and length of service in the IDF (Israel Defense Forces), the dwelling's geographical location, and so forth.³⁷ The state does not examine the debtor's ability to repay the subsidized loan, and the loan's terms do not reflect such ability. The government's commitment to subsidize home purchases has decreased over the years, and subsidized mortgage loans as a portion of total home purchase credit have been diluted to about 25%.³⁸ Purchasing a home thus requires private funding, and most debtors undertake a supplementary loan secured by a mortgage from a banking institution at market interest rates. Yet, for many, the dream of home ownership could not be fulfilled without a state subsidy.

The state's housing policies, together with the cultural norms of home ownership, encourage even low-income households to take upon themselves a risky, long-term financial obligation. With recession and high rates of

34 See Law-Yone & Kalush, *supra* note 30, at 44-50.

35 Gilat Benchetrit & Daniel Czamanski, *Homeownership Extension Policy in Israel During the 90s: Capitalism Sponsored by Government Intervention?*, 6 *Israeli Soc.* 39, 51-56 (2004) (Hebrew).

36 The Residential Purchase Loans Law, 1992, S.H. 246.

37 Internal Regulations of the Ministry of Construction and Housing, *available at* <http://moch.gov.il>. A special subsidy program for new immigrants encourages them to purchase a home soon after arrival in Israel, even if they are not yet on a sound economic footing.

38 Yaron Yehezkel, *The New Mortgage Program of the Ministry of Construction and Housing*, *available at* http://www.adva.org/ivrit/homepage_heb.htm (Nov. 1998) (Hebrew).

unemployment looming, the risk of losing one's home may become a genuine threat.

II. MORTGAGE REPOSSESSION

One result of financing the purchase of a home through the mortgage market is that the physical structure that is one's home becomes the object of the secured creditors' economic interest.³⁹ What for the debtor is a home is for the creditor merely an economic asset. Protecting the proprietary interests of creditors ensures the supply of credit, a social interest in itself. In cases of default, the conflict between the debtor's interest in his home and the creditor's interest in the asset is unavoidable. The balance between them reflects the actual commitment of the legal system to the value of home ownership. In order to assess the protection the law gives to mortgagors, the full significance and implications of mortgage foreclosure must be considered first.

A. The Costs of Repossession

The value of home ownership can be assessed not only through its positive effects, but also in light of the consequences of losing one's home. Even if mortgage foreclosure does not result in homelessness, it entails grievous personal and social costs. Beside the loss of many benefits associated with home ownership, other costs emerge.⁴⁰ Eviction from one's home stigmatizes the former owner, causing humiliation and a sense of failure. It leads to a loss of confidence and self-esteem.⁴¹ In many cases, repossession is followed by marital breakdown or otherwise stressful relationships within the family,⁴² as well as greater emotional insecurity for any children involved.⁴³ Existing health problems may be exacerbated and

39 Fox, *supra* note 10, at 583-85.

40 Ford and Burrows suggest a typology of the range of costs associated with mortgage arrears and possession, consisting of social, administrative, financial, socio-psychological, health, political and organizational costs. See Janet Ford & Roger Burrows, *The Costs of Unsustainable Home Ownership in Britain*, 28 J. Soc. Pol'y 305, 316 (1999).

41 Sarah Nettleton & Roger Burrows, *Families Coping with the Experience of Mortgage Repossession in the "New Landscape of Precariousness,"* 4 Community, Work & Family 253, 258-60 (2001).

42 See Ford & Burrows, *supra* note 40, at 317.

43 Sarah Nettleton, *Losing a Home Through Mortgage Repossession: The Views of Children*, 15 Child. & Soc'y 82 (2001).

new ones often materialize.⁴⁴ The family's quality of life deteriorates, not only with regard to its physical accommodations but also in other spheres of life. Failure to repay a mortgage loan is often the outcome of a larger economic or family crisis, and repossession creates further hardships for the family.⁴⁵ Most of these consequences entail social costs as well, and mortgage repossession generates costs such as, for instance, the disruption of social networks and community ties.⁴⁶ Lenders face financial losses, insofar as the debt exceeds the sale price obtained after foreclosure. Processing mortgage arrears and foreclosures entails financial and administrative costs, such as increased interest rates on the unpaid debt, lawyers' fees, court fees, and other costs related to debt collection. These costs burden the defaulting debtor, the lenders, and the legal system.⁴⁷ High levels of repossession also burden state housing and other state welfare agencies, and may even reverberate politically. Thus, the loss of one's home through mortgage foreclosure has significant implications for the individual, the community, the market, and society as a whole.

B. Mortgagor Protection Laws

If home ownership is an important value, and if mortgage foreclosures involve adverse implications for the evicted households and for society in general, one would expect homeowners to be accorded substantial protection against the risk of repossession. Mortgagor protection laws essentially resemble consumer protection mechanisms. The rationale of these mechanisms is, *inter alia*, to balance the contracting parties' asymmetrical negotiating powers, taking into account that the consumer's decision-making ability is far from optimal. The risk of losing one's home due to mortgage repossession is a low-probability, high-loss event. As the behavioral law and economics literature demonstrates,⁴⁸ people in such

⁴⁴ See Fox, *supra* note 10, at 602.

⁴⁵ For a thorough study of the effects of mortgage repossession, see Sarah Nettleton et al., *Losing the Family Home: Understanding the Social Consequences of Mortgage Repossession* (1999).

⁴⁶ Ford & Burrows, *supra* note 40, at 317.

⁴⁷ *Id.* See also Terrence M. Clauretie & Thomas Hertzog, *The Effects of State Foreclosure Laws on Loan Losses: Evidence from the Mortgage Insurance Industry*, 22 J. Money, Credit & Banking 221, 222 (1990). Such additional costs may ultimately fall on mortgage insurers, and may result in increased insurance premiums.

⁴⁸ For the behavioral law and economics perspective, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in *Behavioral Law & Economics* 13 (Cass R. Sunstein ed., 2000).

circumstances tend to discount the risk and underestimate the likelihood of foreclosure. Underrating the probability of losing one's home results from several heuristics and cognitive biases such as the availability heuristic, anchoring, and over-optimism.⁴⁹ Mortgage protection laws may mitigate some of the consequences of underestimating the risk. The argument that claims mortgage protection laws are inefficient⁵⁰ appears to ignore the adverse implications of foreclosures. Moreover, although efficiency is a significant value, it must be offset against others. Attaining this fine balance between social values should be the goal when stipulating the legal protections to be accorded to mortgagors at times of economic distress.

Israeli law affords mortgagors a number of limited protections against foreclosure. Since 1997, the law provides that before taking action against the mortgagor's protected guarantees, the mortgagee must first file suit against the debtor and exhaust all venues of execution proceedings, including mortgage foreclosure.⁵¹ Partly as a result of this provision, but mostly because of the country's economic recession, we have witnessed a surge in mortgage foreclosure rates. The plight of mortgagors who have lost their homes has also created a social problem that politicians have been unable

49 On the operation of heuristics and cognitive biases in the context of home purchase and mortgage transactions, see Michael H. Schill, *An Economic Analysis of Mortgage Protections Laws*, 77 Va. L. Rev. 489, 525-29 (1991); Julia Patterson Forrester, *Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing*, 69 Tul. L. Rev. 373, 383-86 (1994); Lauren E. Willis, Decision-Making and the Limits of Disclosure: The Problem of Predatory Lending (June 2005) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=748286.

50 Opponents of mortgagors' protection laws argue these laws are inefficient and result in increased interest rates, thus burdening borrowers even more without generating corresponding benefits. See Schill, *supra* note 49, at 489, 496-98; Clauretie & Hertzog, *supra* note 47. Schill's answer to these arguments is twofold. First, he claims that the inefficiency of mortgage protection laws is not supported by convincing empirical evidence. See Schill, *supra* note 49, at 490, 496-97. Second, Schill suggests thinking of mortgage protection laws as an *ex ante* insurance mechanism. In such a context, they do promote efficiency. For an elaboration of this alternative view of mortgage protection laws, see *id.* at 515-30.

51 The Guarantee Law, 1967, § 27, 21 L.S.I. 41 (1966-67), amended by the Guarantee Law (Amendment No. 2), 1997, S.H. 2. A protected guarantee with regard to home purchase loans is restricted by the following two requirements. First, the guarantor may not be a corporate body, the debtor's spouse, or the debtor's commercial partner. Second, the guaranteed debt may not exceed a certain sum, as set forth in detail in the law. See the Guarantee Law § 19.

to ignore.⁵² In 2002, new legislation was introduced to increase protection for mortgagors who fall in arrears, applying only to residences. Current Israeli law provides mortgagors with four main modes of protection: disclosure, the right of redemption, deferments and mortgage mitigation, and the right to shelter.⁵³

1. Disclosure

Lenders of home-related loans are required to present explicit loan information in writing to any interested party.⁵⁴ This is a general disclosure requirement without demanding, for instance, disclosure of detailed information that might help prospective borrowers in assessing risks in that specific loan at stake or compare different mortgage products. The assumption underlying this disclosure requirement is that providing complete information enables the mortgagor to make rational decisions about the risk-taking entailed. Prospective borrowers facing a high probability of defaulting on their payments would therefore refrain from taking the loan in the first place, thereby avoiding the risk of repossession. Yet, and although disclosure might indeed be helpful, the probability of the intended rationalization remains questionable due to the operation of the heuristics and cognitive biases that accompany decision-making.⁵⁵

52 See draft bill Residential Mortgagors Protection (Statute Amendment), 2002 H.H., 364.

53 Mortgagors are also protected by the general provisions of the law protecting consumers' credit transactions, such as the provisions of the Banking (Service to Customers) Law, 1981, 35 L.S.I. 288 (1980-81) and the Regulation of Non-Banking Loans Law, 1993, S.H. 174. Another question that merits attention is how the development of a secondary mortgage market would affect the operation of mortgagor protections, especially those within the discretionary power of the lending institutions, such as mortgage forbearances. An analysis of this important question exceeds the scope of this article. Note, however, that preliminary research using comparative methods suggests that introducing a secondary mortgage market would not improve prospects for the guaranteeing of sustainable housing. See Elia Vartzberger, Will the Secondary Mortgage Market Solve the Housing Problems of Young Couples?, available at <http://adva.org/ivrit/smortgagemarket.htm> (2001) (Hebrew).

54 Among the details to be disclosed are a general description of the loan terms, the mode of calculating the interest, any charges and fees attached to the loan, and payment arrangements. See Regulations of the Supervisor of Banking Regarding Housing Loans, art. 4, available at <http://www.bankisrael.gov.il>. More extensive disclosure requirements apply to non-banking loans. See the Regulation of Non-Banking Loans Law § 3.

55 For the debate on whether disclosure may help overcome heuristics and cognitive biases, see Willis, *supra* note 49. The law also requires that the notice sent to the

The disclosure requirement is often met by resorting to formal legal or economic terminology that remains obscure to most people. To be effective, disclosure about future risks should be communicated in comprehensible terms in all the languages spoken in Israel.

2. *Right of Redemption*

Israeli law provides for a judicial foreclosure sale. A mortgage is foreclosed pursuant to a court order or an order of the Chief Execution Officer⁵⁶ and in the manner specified in the law.⁵⁷ Whereas the mortgagee could at one time use an acceleration clause in the loan agreement and make the entire debt due and payable, the current law stipulates that execution proceedings will first be effected in regard to the sums in arrears,⁵⁸ a provision amounting to significant protection.

Mortgagors in arrears have a right to redeem their homes after fully discharging the payments in arrears and all the charges, fees, interest, and other added costs.⁵⁹ Mortgagors also have a right to pay half of the sums in arrears, including the additions, if they can guarantee full payment of the rest

mortgagor upon the filing of a foreclosure request contain full disclosure of the consequences pursuant to non-payment of any sum in arrears, including the right of the mortgagee to accelerate the loan. *See* the Execution Law, 1967, § 81B1(B)(2), 21 L.S.I. 112 (1966-67), *amended by* the Residential Mortgagor Protection (Statute Amendment) Law, 2002, S.H. 214.

56 The courts are relatively liberal in ordering a stay in execution proceedings until a final judgment is rendered concerning legal defenses that mortgagors bring before the courts. *See* David Bar Offir, Execution Law 549-71 (6th ed. 2005).

57 Mortgages are foreclosed in a manner similar to the realization of attached property or in any mode that seems more efficient and just in the circumstances of the case. *See* the Land Law, 1969, § 90, 23 L.S.I. 283 (1968-69); the Pledges Law, 1967, § 18, 21 L.S.I. 44 (1966-67). Foreclosed assets are usually sold by public auction, by the Execution Office, or by an appointed receiver. *See* the Execution Law, §§ 36-37, 53. The law, however, allows mortgagors to sell their homes if they so wish, provided they can guarantee that sale proceedings will repay the debt fully. The Execution Law § 81B1(B)(3).

58 According to section 81B1(B)(1) of the Execution Law, only if payments fail to meet the timetable specified in the law is the mortgagor entitled to recoup the full debt from the sale's proceeds. Section 81B1(C) specifies circumstances entitling the mortgagee to the entire loan debt: when the mortgagor has left or is about to leave the country for a long period, when the mortgagor has defrauded or is about to defraud his creditors, if other legal debt collection proceedings regarding the assets are in place, or if the sums in arrears amount to more than ten percent of the entire debt.

59 According to section 81B1(B)(4)(a)(1), redemption is possible at any time during the realization period until the 90th day from the appointment of a receiver for the asset.

within six months.⁶⁰ The right of redemption may help mortgagors able to raise the funds needed for payment within the timetable specified by the law. For them, this right ensures a substantial measure of protection against loss of their homes, but implementing it may not be possible for others. Moreover, this protection is afforded once the repossession process has been set in motion and the fear of losing one's home has already materialized.

3. Deferments and Mortgage Mitigation

Israeli law dictates a mandatory six month delay of foreclosure proceedings.⁶¹ During this deferment, the mortgagor can try to raise the needed funds and make amends with the lender, arrange to sell his home himself and thus reduce to some extent the emotional impact of a forced sale, or look for alternative accommodations. This protection might help some mortgagors to negate or mitigate the risks or the adverse consequences of foreclosure.

As for state subsidized loans, the law provides a mechanism of temporary relief for debtors in dire economic circumstances.⁶² The debtor may apply for such relief upon default or even before. A special committee newly established has discretion to authorize relief funds if it finds such a measure is justified.⁶³ The law does not define what constitute dire economic circumstances, nor does it specify any criteria to guide the committee's decisions.

A mortgage mitigation that would rearrange the payment plan according to the mortgagor's economic abilities might be a powerful tool, which could provide mortgagors with significant protection against the risk of losing their homes. Knowledge about this committee is not available to all debtors, and its work should be publicized more widely.⁶⁴ In most cases, relief is granted only after default or even during the repossession process, when the threat of loss is already tangible. Mortgagors should instead be encouraged to appeal to the committee before falling in arrears.

60 Section 81B1 (B)(4)(a)(2).

61 The mortgagee may file a foreclosure request with the Execution Office only six months after the date of the initial default, provided the debt was not fully paid during this time. *See* section 81b1(A) of the Execution Law. Special provisions were made for fees for lawyers and receivers. *See* section 81B1(D) of the Execution Law; Execution (Lawyers' and Receivers' Fees) ordinances, 2002, K.T. 2002, 1158.

62 The Residential Purchase Loans Law, 1992, § 5A, S.H. 246.

63 The Residential Purchase Loans Law also established an appeal committee pursuant to section 5B.

64 Applications to the committee are handled by the lending bank and, as part of the notice concerning delinquent payments, the bank is required to notify mortgagors about their right to appeal through this procedure. *See* Regulations of the Supervisor of Banking, *supra* note 54, art. 13.

4. Right to Shelter

The protection laws described so far are primarily concerned with financial aspects of defaulting on the mortgage loan. Other legal provisions attempt to regulate the consequences of mortgage foreclosure.

The Tenant Protection Law provides substantive protection of the relationship between people and their homes.⁶⁵ The law dictates that, upon foreclosure of a mortgage, the owner-occupier or long-term lessee-occupier becomes a protected tenant of the new owner or long-term lessor.⁶⁶ The mortgagor is entitled to remain in the dwelling he had previously owned and many attributes of the home are thereby retained. Implementing this protection means that the property can only be sold as occupied by a protected tenant, substantially reducing its sale price. The reach of this protection is very broad and covers all real estate assets (not just dwellings), as well as all occupied assets no matter how many or how high their value. Court rulings have therefore curtailed its scope,⁶⁷ limiting it to rights recorded in the Land Registry.⁶⁸

When no protected tenant status is established, the relationship between owners and their homes is not protected. Instead, the law provides that creditors cannot complete foreclosure proceedings unless they can prove the mortgagor and his family have reasonable living quarters, or that alternative accommodation has been placed at their disposal.⁶⁹ Thus, the law protects the right to shelter.

⁶⁵ The Tenant Protection Law (Consolidated Version), 1972, § 33(a), 26 L.S.I. 204 (1971-72). This section also applies to other circumstances in which the right to the property has terminated, such as the execution of a judgment or bankruptcy proceedings. The law has met with sharp criticism, as has its implementation by the courts. See Uriel Reichman, *A Landowner who Becomes a Protected Tenant: The Need to Amend the Law*, 9 Tel-Aviv U. L. Rev. 121 (1983) (Hebrew).

⁶⁶ The Tenant Protection Law provides, *inter alia*, rent control regulation and strict regulations on tenants' eviction.

⁶⁷ Regarding co-owners, for instance, it was ruled that only exclusive possession to which the other co-owners have unequivocally consented is required for this protection to apply. See C.A. 753/82, *Plonit v. Ploni*, 37(4) P.D. 626.

⁶⁸ C.A. 3295/94, *Freminger v. Moor*, 50(5) P.D. 111, 122-23. One objection to this ruling is that rights are often not registered in the Land Registry due to circumstances beyond the rights-holder's control such as, for instance, when subdivision proceedings have not been finalized.

⁶⁹ The Execution Law, 1967, § 38(a), (c), 21 L.S.I. 112 (1966-67). A similar provision is section 86A of the Bankruptcy ordinances, 1985, K.T. 1986, 672. According to section 38(b) of the Execution Law, alternative accommodation shall be provided in the form of another dwelling, by the payment of compensation, or in some other

The dwelling provided as alternative accommodation may eventually become home to the debtor and her family, but not all the effects associated with the loss of home ownership can be mitigated in this manner, and traumatic events have lingering repercussions.

Whether it is protecting the mortgagor's specific home or merely ensuring alternative shelter, the law further provides that these rights may be waived by the debtor *ex ante* as part of the mortgage agreement.⁷⁰ Indeed, standard forms of mortgage agreements include waivers of these protective provisions.⁷¹

The mortgagor's plight is further exacerbated because Israeli law does not include an anti-deficiency rule, and the lender is entitled to collect the difference between the debt and the monies obtained from foreclosure proceedings, either from the debtor or from his guarantors.⁷² The risks of further proceedings of debt-collection, or even of bankruptcy, are thus added to the adverse effects of repossession. Under current rules, and even in the absence of alternative housing, dispossessed debtors are not entitled, under limited conditions, to public housing but only to a subsidy for a new purchase or for rent in the free market.

manner. The law does not state who must arrange for the finding of alternative accommodation, and the court ruled that this is the duty of the realizing creditor, since he is the one interested in the asset and its sale. *See* C.A. 7700/95, *Negola v. Chazzan*, 50(1) P.D. 338. In *Negola*, the criteria regarding finding an alternative dwelling were defined as the ability to defray costs without selling the house, the family's ability to find alternative accommodation, the family's income and assets, the family's ability to receive aid from external sources, the size and expenditures of the family, the debtor's personal circumstances, and the ratio between the size of the debt and the cost of the arrangements the debtor must make. The new dwelling is not required to be of the same size and standard as the previous one.

70 The Tenant Protection Law § 33(c)(2); the Execution Law § 38(c).

71 The courts review cases regarding such waivers according to the rationale of consumer protection. In *P.F.I. Establishment*, the court held it is not sufficient to maintain that the debtor has relinquished the right; the deed must state the exact section of the law that waives this protection. *See* C.A. 1132/94, *P.F.I. Establishment v. Rosner*, 49(5) P.D. 215; but see C.A. 1679/01, *Mishkan Bank Hapoalim for Mortgages v. Speizman*, 57(2) P.D. 145, where Justice Dorner opined that mentioning the exact section of the law is not required. In another case, the court ruled that a proper explanation of the affected rights and the implications of the waiver should be communicated to the borrower. The obligation of acting in good faith during negotiations compels the lender to do this. The court stated that not only must the section of the law be specifically mentioned, but the language of the waiver itself must be clear and explicit. Non-compliance with such disclosure requirements results in the application of the mortgagor protection laws. However, see C.A. 9136/02, *Mister Money Inc. v. Reiz*, 58(3) P.D. 934.

72 The Pledges Law, 1967, § 23, 21 L.S.I. 44 (1966-67).

The rate of home repossessions has been growing, and might have been higher were it not for these legal protection mechanisms. Current law does not have the power to prevent repossession, highlighting the gap between the rhetoric on the value of home ownership and the reality.

In determining the legal regime on debt collection mechanisms, the law aims to balance the interests of the creditor (the right to property and the right to an expedient and efficient process) and the rights of the debtor (the right to human dignity and freedom, and the right to a secure, though minimal, economic base).⁷³ When applying these principles to mortgage foreclosures, the law does not grant immunity to the home but does attempt to reduce the incidence of repossessions.

The costs of mortgagor protection laws are often imposed on the creditors. Indeed, creditors profit from the mortgage market and are responsible to the society within which they operate. The social responsibility for supplying sustainable housing, however, is not incumbent on the banks and on other financial institutions that, moreover, can pass along the costs of mortgagor protection laws either to the debtor or to future borrowers. Both from a normative and from a practical perspective, then, the law's ability to impose measures for mortgagor protection is limited. The incomplete protection afforded to mortgagors thus reflects a trade-off between encouraging home ownership *ex ante* and preserving it *ex post*. Although it offers solutions to some defaulting mortgagors and helps to secure their relationship with their homes, others will find that the protections afforded by law do not suffice. These mortgagors, driven by personal preferences and cultural norms to purchase a home they cannot afford, bear the costs of such incomplete protection. A search for solutions to the problem of assuring sustainable housing necessitates looking beyond the mortgagor-mortgagee relationship.

III. THE ROAD TO SUSTAINABLE HOUSING

Israeli law regulates the relationship between mortgagor and mortgagee. Concerning home-related loans in general and subsidized home purchase loans in particular, certain legal measures protect mortgagors against the risk of mortgage foreclosure. Despite the protection afforded by law, however, loans must be repaid, and the relatively high rate of repossession in recent years attests to a social problem that cannot be ignored.

Losing ownership of a home may be more grievous than not having had

73 C.A. 4905/98, Gamzu v. Yesha'aya, 55(3) P.D. 360.

one in the first place. Cultural and legal encouragement to purchase a home, together with the cognitive biases that operate when taking such high-risk decisions, may prove costlier to the individual than not owning a home. Even if short-term ownership were to prove valuable (meaning it is better to have a home and lose it than to never have one at all), subsidizing home purchases when repossession is likely could be an erroneous policy. Purchase subsidies are not free, and investing sizeable amounts of government money for the negligible potential returns accruing from a revolving door policy of purchase and repossession makes no sense. As for people who cannot afford to purchase a home through current market mechanisms and are likely to default on their loans, can we maintain the benefits associated with owning a home without necessarily causing them to suffer the psychological, social, and economic effects of foreclosure?

Two courses are available for dealing with the problems of mortgage foreclosure. The first may be characterized as "more of the same," namely, introducing additional mortgagor protection laws to modify current practices. An alternative or, more precisely, a supplementary road, is to reconsider whether mortgaged-backed loans should continue to be the main mechanism for attaining sustainable housing or whether the range of alternatives should be expanded.⁷⁴

74 Commenting on an earlier draft, Ofer Grosskopf pointed to the wide availability of mortgage loans as the original cause for the high rate of repossessions. In order to force lenders to invest in assessing the risks of default, the law should establish an owner's mandatory right not to be evicted from her home. The number of loans approved would decrease, but would force the government to intervene and supply sustainable housing options. I agree with the objectives of Grosskopf's proposal, but am skeptical as to its application. If accepted, the suggested protection law would dramatically diminish the value of a mortgage as a security. The result would be a corresponding increase in costs, particularly interest rates, given the difficulties and the costs of accurately assessing the likelihood of a borrower defaulting on her home purchase loans. See Kerry D. Vandell, *Handing Over the Keys: A Perspective on Mortgage Default Research*, 21 *J. Real Estate Econ.* 211 (1993), available at <http://www.blackwell-synergy.com/links/doi/10.1111/1540-6229.00609/enhancedabs/>. Moreover, because lenders would probably take over-inclusive measures of risk avoidance, they would deny loans to credible borrowers. This proposal thus seems to be too stringent. If the problem merits government intervention to correct the market and assure more sustainable housing options, it should do so as a matter of good public policy. Worsening the borrowers' plight so as to force the government to act is not, in my opinion, an appropriate measure.

A. Modifying Mortgage Regulations

In an attempt to reduce the incidence of mortgage repossessions, Israel has enacted several protection laws that can prove helpful in some cases, as noted. Preliminary suggestions for expanding the enforced mortgagor protection laws were formulated above, but further steps could be added. Two new mechanisms are briefly outlined below, and the need for additional measures is pointed to as well.

1. *Mandatory Loss Mitigation and Forbearance*

Mortgage loss mitigation or forbearance are powerful tools to assist borrowers who, despite their good will and efforts, cannot meet the payment schedule determined when undertaking the loan. These are ad-hoc measures, which can be tailored to meet each mortgagor's specific circumstances. For some, lengthening the loan term might suffice, others could be helped by "freezing" the arrears for a defined period, while other debtors may need a more comprehensive form of forbearance.

Under the current law, a six months delay is mandatory between the first default and the filing of a foreclosure request.⁷⁵ Increased default interest and various other charges are added to the total debt in arrears during this period. The law does not dictate what should be done during these six months, and any agreement between the mortgagor and the mortgagee for coping with the arrears is largely a matter of the mortgagee's discretion. The special committee's authority to dictate a mortgage mitigation agreement extends only to state subsidized loans.⁷⁶ The committee members include two government representatives (one from the ministry of finance and one from the ministry of construction and housing), and a representative of the mortgagee, without representatives from the public in general or from the mortgagors in particular.

Since implementing repossessions is costly to mortgagees, they often have an incentive to engage in mitigation.⁷⁷ The internal policy of various mortgagees is indeed to adopt a lenient mode, but the matter is ultimately at their discretion. In order to encourage further reliance on such a policy, the legislature should consider making mitigation mandatory and stipulate that,

⁷⁵ See text accompanying *supra* note 61.

⁷⁶ See text accompanying *supra* notes 62-63.

⁷⁷ Bart M. Lambrecht et al., *Mortgage Default and Possession Under Recourse: A Competing Hazards Approach*, 35 J. Money Credit & Banking 425 (2003).

subject to well-defined exceptions, recourse to repossession would become available only after mitigation arrangements have failed.⁷⁸

Mandatory loss mitigation is consistent with the nature of the mortgagor-mortgagee relationship, which is usually long-term. Indeed, the risks are unequally distributed between the parties, but they create a mutual dependency that might seem to justify a requirement of mutual agreement on mitigating measures. The obvious asymmetry between the parties, however, together with the mortgagee's bureaucratic institutional power, justify the proposition of mandatory loss mitigation.

Third parties, such as legal aid organizations or even special state agency workers, should be involved in reaching forbearance agreements in order to play down the differences in the parties' negotiating powers.⁷⁹ Making loss mitigation mandatory and third party advice available may also encourage mortgagors to bring forward their financial difficulties at an early stage and before default occurs.

2. Mortgage Payment Protection Insurance

An alternative or supplementary measure to loss mitigation may be a mortgage payment protection insurance (MPPI) that is not commonly used in Israel. Current banking practice is to demand mortgagors (save for the elderly) to acquire life insurance so that, upon the mortgagor's death, the loan is repaid.⁸⁰ Where the loan-to-value ratio is high, mortgagees sometimes require mortgage insurance to cover the difference between the sale price and the outstanding debt. MMPI is a different kind of insurance measure. It insures mortgagors against loss of earnings due to unemployment, illness, or incapacity, and pays the mortgage loan in their stead for the period detailed in the policy. Thus, it insures against the loss of home and is in operation during the mortgagor's lifetime.

The use of MPPI is prevalent in Great Britain,⁸¹ and its take-up rates are

78 Mortgage lenders in Britain are required, as part of fair dealings standards, to adopt the policy of turning to repossession only as a last resort. See Oldham, *supra* note 34, at 199-200.

79 This arrangement is in force in various places. See, e.g., British Council of Mortgage Lenders' Consumer Information, Internet Brochure, available at <http://caml.otg.uk> (last visited Mar. 1, 2006); Canada Mortgage and Housing Corporation, Internet Brochure, available at <http://www.cmhc-schl.gc.ca> (last visited Mar. 1, 2006); US Department of Housing and Urban Development, Internet Brochure, available at <http://www.hud.gov/foreclosure/index> (last visited Mar. 1, 2006).

80 Regulations of the Supervisor of Banking, *supra* note 54, art. 11.

81 On the history of MPPI in Britain as a replacement for direct state assistance, see

growing.⁸² Some mortgage institutions require mortgagors to take up MPPI and others supply it themselves.⁸³ The British experience shows no evidence of adverse selection — insurance is not taken up only, or mainly, by mortgagors more likely to default.⁸⁴

MMPI is a good measure for temporary protection. It benefits the mortgagee, since it saves the cost of resorting to expensive debt collection proceedings. It benefits the mortgagor, since it ensures continuous payments according to schedule without default interest and other charges added to the debt. But bringing insurance companies into the picture involves various transaction costs, and the measure is efficient only insofar as it is less costly than default and subsequent repossession.⁸⁵ Given the grave implications of repossession, this may indeed be true.

The use of MMPI as a mortgagor protection measure, however, has some limits. First, as the British experience shows, to avoid prohibitively expensive premiums the insurance covers only brief periods of payments, usually one year. Second, research points to several variables that significantly increase the risk of mortgage defaults,⁸⁶ among them youth, employment other than full-time and self-employment, separation or divorce, and care of dependent children. These variables translate into numerous contingencies likely to cause default, yet, for deeply ingrained reasons, the insurance industry tends to provide insurance only for such eventualities as unemployment or incapacity. But even within this limited scope, MPPI could serve as an efficient measure in Israel if used more frequently, and thought should be given to making it mandatory.

Tania Burchardt & John Hills, *From Public to Private: The Case of Mortgage Payment Insurance in Great Britain*, 13 *Housing Stud.* 311 (1998).

82 Janet Ford et al., *Homeowners Risk and Safety Nets* 33-34, available at http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/downloadable/aopm_house_028_317.pdf (2004).

83 *Id.* at 11.

84 *Id.* at 46-59; Gwilym Pryce & Margaret Keoghan, *Determinants of MMPI Take-up*, 16 *Housing Stud.* 179 (2001).

85 The cost of the insurance was given as a major reason for not taking it up. Ford et al., *supra* note 82, at 62. However, it is not clear that the respondent took into consideration the costs of repossession in assessing whether the premium was too expensive.

86 Roger Burrows, *Mortgage Indebtedness in England: An "Epidemiology,"* 13 *Housing Stud.* 5 (1998); Ford et al., *supra* note 82, at 11-15.

B. Rethinking the Supply Side

Mortgagor protection laws have their merits but, as analyzed in this article, their scope and power are limited. They cannot secure the continuity of the relationship between individuals and their homes, and do not ensure the permanency of home ownership. The personal, social, and economic implications of repossession demand a reexamination of the supply side of the housing market.

The main road to home ownership, other than personal or family funds, goes through the mortgage market. Non-ownership housing is available in Israel through the legal instrument of a lease, either in the free market (and then usually only for a short-term) or through public housing. The supply side, then, is rigid. The repertoire of ways and means for achieving the goal of affordable and sustainable housing needs to be expanded. Unlike most mortgagor protection laws, meant to be enforced *ex post* (after the mortgagor has defaulted), new sources and methods of housing supply are designed to meet the problem *ex ante*.

A new discourse on housing policy in Israel starts from the assumption that subsidizing more stable housing options could be more profitable for the government. Solutions require alternative mechanisms of state intervention in the housing market, which could be offered to those deemed most likely to default on mortgage loans.

One option is to restructure and revitalize the system of public housing. Public housing used to be the prevalent mode of housing in Israel's early years, used by the government as a means of achieving Zionist objectives.⁸⁷ Gradually, as a result of privatization and of the state's reluctance to continue its involvement in the direct supply of housing, public housing lost its priority and was largely replaced by the free market mechanism of purchasing a home and attaining home ownership.⁸⁸ Currently, public housing dwellers are either the original residents (mostly immigrants who arrived from North Africa in the 1950s), people on welfare who are entitled to it as part of their right to public accommodation, and new immigrants from Ethiopia and the former USSR. The government is unwilling to supply new public housing units, while the old ones are managed inefficiently and are deteriorating. Thousands of families are on a waiting list for public housing. Using public housing to contend with the problems posed by repossessions seems unlikely under the

⁸⁷ Rachel Kallus & Heubert Law-Yone, *National Home/Personal Home: The Role of Public Housing in the Shaping of Space*, 16 *Theory & Criticism* 153 (2000)(Hebrew).

⁸⁸ See text accompanying *supra* notes 36-37.

circumstances, but is also undesirable. Its bureaucratic nature and the tenants' permanent dependency on the government's largesse lead to unequal power relationships and deepen social stratification gaps.

Viewing the open market as a housing source while also retaining state support and subsidies may generate several innovative strategies for increasing home ownership or long-term relationships with a home. Some of these strategies are implemented in other countries, allowing Israel to learn from the experience of others.

One instance of an alternative mechanism for achieving the goal of sustainable housing is for the state to opt out of the current mortgage market altogether. Instead, the state would subsidize the regulation of free market long-term leaseholds, an institution just about non-existent in Israel's current housing market. A beneficial tax regime, for instance, could encourage investment in housing schemes to be offered to people who cannot afford purchases through the mortgage market.⁸⁹ The outcome would be the creation of public-private partnerships involving, as a by-product, increased corporate awareness of social responsibility.

The state should regulate leasehold agreements to conform with the objective of affordable, sustainable, and secured housing, possibly granting tenants a right to purchase full ownership of their dwellings. Under such a lease-purchase scheme, the tenants lease their apartment and pay rent, but part of the rent accumulates towards the purchase of the home after a predetermined period or even beforehand. The American experience with such programs shows they are not without problems, touching both on funding and management and also on the tenants' expectations and participation.⁹⁰ Nevertheless, these programs have afforded decent housing to

⁸⁹ See sections 53A-53D of the Encouragement of Capital Investment Law, 1959, 13 L.S.I. 258 (1958-59). Recently, an amendment to the Tax Ordinance introduced tax benefits for real-estate investment trusts (REIT). See Law Amending the Tax Ordinance (No. 147), 2005, S.H. 2023. These trusts manage capital funds that invest in income-producing real estate, usually shopping centers, offices, industrial buildings, and old-age homes. It is not clear whether such benefits would suffice to attract investments in residential buildings. On the American tax credit plan for investment in low-income housing, see <http://nefinc.org>; <http://lisc.org> (last visited Mar. 1, 2006).

⁹⁰ See Danny L. Balfour & Janet L. Smith, *Transforming Lease-Purchase Housing Programs for Low Income Families: Towards Empowerment and Engagement*, 18 J. Urb. Aff. 173 (1996). See also Megan J. Ballard, *Profiting from Poverty: The Competition Between For-Profit and Nonprofit Developers for Low-Income Housing Tax Credits*, 55 Hastings L.J. 211 (2003).

thousands of families, together with the benefits embedded in the value of a home.

IV. ONE VALUE, MANY ROADS

Mortgage repossession is a serious problem in Israel, and mortgagor protection laws are limited in their ability to prevent this traumatic event and its long lasting impacts. If we are to live up to our highly esteemed value of home ownership or, at least, of a long-term relationship with a home, more needs to be done toward attaining the goal of affordable and sustainable housing. Many roads might be available for achieving this social goal, with different ones for different people. When designing new mechanisms for affordable housing, we need to consider how to avoid the risks of stigmatized categorization. A housing reform should serve to constitute the value of home as the core cultural concept, and the means to attain this end are a marginal issue. The aim, then, is to design many roads but to constitute one value.

The underlying assumption of the arguments proposed in this article is that home ownership is a part of welfare policy. We are currently witnessing the decline of the Israeli welfare state. For various reasons, some of which were noted, the government is still involved in the housing market and still acknowledges ownership of one's home as a value. At the same time, this article has also traced the state's gradual retreat from the full responsibility it had once assumed in this regard. Everyone, and particularly people we would tend to categorize as needy, would be better equipped to face any further erosion of the welfare state if each person held a property right to his home, secure in his ability to preserve and enhance his relationship with it. Implementing mechanisms potentially capable of providing sustainable housing is a step towards the realization of what Frank Michelman calls the distributive concept of the constitutional right to property.⁹¹ The housing reform contributes to the material independence of citizens and to the creation of a more just society by ensuring a more equitable distribution through the promise of an affordable long-term relationship with one's home.

⁹¹ Frank Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 Iowa L. Rev. 1319 (1987).

