

# TAKING PERSONAL RESPONSIBILITY: A DIFFERENT VIEW OF MORTGAGE ANTI-DEFICIENCY AND REDEMPTION STATUTES

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While the ultimate foundation of morality may be commitments of individual conscience, it is communities that help introduce and sustain these commitments. Hence the urgent need for communities to articulate the responsibilities they expect their members to discharge, especially in times, such as our own, in which the understanding of these responsibilities has weakened and their reach has grown unclear.<sup>1</sup>

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1. *The Responsive Communitarian Platform: Rights and Responsibilities*, 2 RESPONSIVE COMMUNITY, Winter 1991-1992, at 17. The Responsive Communitarian Movement is often associated with Amitai Etzioni, a sociology professor at George Washington University, William A. Galston, Professor and Director of the University of Maryland's Institute for Philosophy and Public Policy, and Mary Ann Glendon, Learned Hand Professor of Law at

## I. INTRODUCTION

Consumer protection legislation has had a profound and pervasive impact on a wide range of contemporary business transactions. The laws which formally integrate the goals of consumer protection into the fabric of our legal system fall neatly into two general categories. The first category focuses primarily on disclosures, and includes laws which require disclosures to consumers about 1) products or services being purchased; 2) the nature of a contract for the provision of such products or services; or 3) the implications of the contract's terms. For example, federal law requires labels on identified categories of food products, describing not only ingredients, but also caloric and fat content, as well as other information regarding nutritional composition.<sup>2</sup> Cigarette packaging is required to contain warnings with respect to the possible negative long-term consequences of continued use of the product.<sup>3</sup> Alcoholic beverages must be sold in packaging which contains labels warning of the potential danger to the unborn children of mothers who consume alcohol while pregnant.<sup>4</sup> Some states have enacted statutes which require so-called "plain-English" contracts, within certain enumerated contexts.<sup>5</sup> The list is almost endless.

Providing disclosures to consumers can assist them in making informed decisions about the products and services they use, consume, or contract to purchase. Accordingly, there would seem to be few, if any, valid arguments against reasonable disclosure requirements.<sup>6</sup>

The second category, which is equally prevalent, includes statutes, regulations, ordinances, and judicial decisions which expand consumers' rights beyond those contained within the four corners of the contracts into which they enter. As is the case with disclosure laws, this second category of consumer protection laws crosses a broad spectrum of products and services. For example, most states have enacted so-called "lemon" laws which confer upon consumers certain extra-contractual rights when a vehicle is plagued with defects.<sup>7</sup> Several states have provided purchasers of health club memberships

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the Harvard Law School. The "broad thrust" of the Communitarian Platform was endorsed by over 70 prominent American academic, business, and political leaders.

2. 21 U.S.C. § 343 (1994) (food is defined as misbranded unless the label contains, among other things, a description of total fat, saturated fat, cholesterol, sodium, total carbohydrates, complex carbohydrates, sugars, dietary fiber, and total protein contained in each serving size or other unit of measure).

3. 15 U.S.C. § 1333 (1994) (requires all cigarette packages to contain the admonition: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health").

4. 27 U.S.C. § 215(a) (1994) (requires that all alcoholic beverage containers bear the statement: "GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.").

5. See, e.g., CONN. GEN. STAT. § 42-152 (1994); ILL. REV. STAT. ch. 815, para. 655/2 (1996); MINN. STAT. § 325G.29-325G.36 (1995); MONT. CODE ANN. §§ 30-14-1101 to -1113 (1995); N.Y. GEN. OBLIG. LAW § 5-702 (McKinney 1994); OR. REV. STAT. §§ 180.540, 180.545 (1995).

6. This assertion begs the question—what is reasonable? For a suggestion of reasonable disclosures, see *infra* part VII.

7. See, e.g., MASS. GEN. LAWS ch. 90, § 7N 1/2 (1996); MICH. COMP. LAWS §§ 257.1401-1410 (1995); NEV. REV. STAT. ANN. § 597.600-680 (Michie 1995); 73 PA. CONS. STAT. §§ 1952-1963 (1995); TENN. CODE ANN. §§ 55-24-201 to -212 (1995); W. VA. CODE

with rescission rights within statutorily prescribed periods of time after the consumer enters into the contract.<sup>8</sup>

Additionally, a significant body of law has developed to provide consumers with various protections within the context of so-called "contracts of adhesion," or in other circumstances under which there is a great disparity between the bargaining power of the vendor and the consumer.<sup>9</sup> These are but a few examples of what I refer to as "extra-contractual" rights for consumers.

Not surprisingly, consumerism's tentacular reach has expanded to ensnare numerous aspects of a variety of real estate transactions. Specialized consumer protection devices, which directly affect real estate transactions, do not differ significantly from generic consumer protection devices.<sup>10</sup> They, too, fall into the categories of disclosure requirements<sup>11</sup> and laws or rules which provide consumers with extra-contractual rights.<sup>12</sup> It is the latter aspect of consumer protection law, the paternalistic<sup>13</sup> proliferation of cases and rules that

§§ 46A-6A-1 to -9 (1996). See generally Louis J. Siroco, Jr., *Automobile Lemon Laws: An Annotated Bibliography*, 8 LOY. CONSUMER L. REP. 39 (1995-96).

8. See, e.g., CONN. GEN. STAT. § 21a-218 (1994) (purchaser may cancel contract within three business days after signing); D.C. CODE ANN. § 28-3817 (1996) (purchaser may cancel contract within 15 days after purchase, or if, because of illness, injury, or change in residence, purchaser is unable to use membership); GA. CODE ANN. § 10-1-393.2 (1996) (member may cancel contract within seven business days after signing); KY. REV. STAT. ANN. § 367.910 (Banks-Baldwin 1995) (purchaser may cancel contract within three business days after the date of purchase).

Technically, the rights conferred by these statutes are not purely "extra-contractual." The statutes often mandate that health club operators include the rescission provisions in all membership contracts.

9. See generally Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

10. The term "consumer protection devices" is intended to include federal, state, and local statutes, regulations, and ordinances, as well as judicial interpretations.

11. For example, in some states, a seller of a home has a duty to disclose to the purchaser defects of which the seller is aware and which the purchaser would not discover upon reasonable inspection. See, e.g., *Holden v. Frazier*, No. 03A01-9508-CH-00293, 1996 WL 31141 (Tenn. Ct. App. Jan. 29, 1996); *Holcomb v. Zinke*, 365 N.W.2d 507 (N.D. 1985); R.I. GEN. LAWS § 5-20.8-2(a) (1995). A New York court even went so far as to require the seller to disclose to the purchaser the presence of a poltergeist in a home, when the seller created public awareness of the poltergeist and the buyer was unlikely to discover it through a reasonable inspection. See *Stamboy v. Ackley*, 572 N.Y.S.2d 672 (1991). Additionally, some states require brokers, acting as agents for sellers, to disclose to purchasers material adverse facts pertaining to the condition of the property. See, e.g., CAL. CIV. CODE § 2079(a) (West 1996); GA. CODE ANN. § 10-6A-5(b) (1996); *Easton v. Strassburger*, 152 Cal. App. 3d 90 (1984) (broker also has a duty to make a reasonably diligent inspection of the property).

12. Many states now impose an implied warranty of good workmanship or quality on contracts for the sale of new homes. See, e.g., *Frona M. Powell, Builder-Vendor Liability for Environmental Contamination in the Sale of New Residential Property*, 58 TENN. L. REV. 231 (1991) (discussing the decline of caveat emptor and the rise of the doctrine of implied warranty of quality, and suggesting that the warranty should be expanded to include an implied warranty of environmental quality); Chix Miller, *Home Sales: A Crack in the Caveat Emptor Shield*, 29 MERCER L. REV. 323 (1977) (citing cases from 29 states that have adopted an implied warranty of quality). Similarly, in the context of residential leases, beginning in the 1960s and 1970s, courts and legislatures started a growing trend; imposing an implied warranty of habitability on leases. This warranty requires the landlord to keep the property in habitable condition. See ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY*, § 6.38-39 (2d ed. 1993).

13. For a sampling of the literature on paternalism, see generally David L. Shapiro, *Courts, Legislatures and Paternalism*, 74 VA. L. REV. 519 (1988); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986); DONALD VANDEVEER, *PATERNALISTIC INTERVENTION* (1986); Anthony T. Kronman, *Paternalism and the Law of*

afford consumers extra-contractual rights, that the author finds most troubling and susceptible to challenge, especially in the area of real estate finance.

Specifically, this Article focuses on two consumer protection devices that affect real estate mortgages.<sup>14</sup> The offending devices—mandatory statutory rights of redemption and anti-deficiency legislation—can be viewed as symptomatic of our culture's unwillingness to require acceptance of personal responsibility for individual decisions and actions.<sup>15</sup>

Statutory rights of redemption generally provide the consumer with a post-foreclosure right to recover a property which was the subject of a mortgage, as well as the post-foreclosure right of continued possession of the mortgaged property. Anti-deficiency statutes potentially relieve a consumer of the obligation to pay some or all of the portion of his indebtedness that exceeds the amount realized at the foreclosure sale. In each instance, these mortgagor protection devices relieve the mortgagor of the obligation to fulfill certain of its promises to the mortgagee.

Such apparent relief, I would argue, in fact redounds to the moral detriment of individual mortgagors, and that of society at large.<sup>16</sup> What is meant by the use of the term "moral detriment"? It is intended to suggest that when individuals operate within the legal standards required by mandatory statutory rights of redemption and anti-deficiency legislation, they are relieved of an obligation to conduct their business affairs in what might be characterized as the "right way." Simply put, these mortgagor protection devices excuse the individual from honoring his promises and taking responsibility for the consequences of his actions. The consumer obtains the advantages of the financing provided by the lender, but is relieved, at least partially, of the burden of the remedies specifically provided for in the mortgage. This, I would argue, is morally unjustifiable. Even though circumstances might exist which would provide a reasonable explanation for the borrower's default,<sup>17</sup> in the

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*Contracts*, 92 YALE L.J. 763 (1983); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982). See also Bailey Kuklin, *Self-Paternalism in the Marketplace*, 60 U. CIN. L. REV. 649 (1992) (describing "self-paternalism/self control", as opposed to government intervention).

14. The term "mortgage" is used throughout this Article to refer generically to an instrument conveying an interest in real property to secure a debt or other obligation. Notwithstanding the technical differences among such instruments, for purposes of this Article, the term "mortgage" includes mortgages, deeds to secure debt, and deeds of trust.

15. See CHARLES J. SYKES, *A NATION OF VICTIMS—THE DECAY OF THE AMERICAN CHARACTER* (1992). Sykes observes:

Increasingly, Americans act as if they had received a lifelong indemnification from misfortune and a contractual release from personal responsibility. The *British Economist* noted with bemusement that in the United States, "If you lose your job, you can sue for the mental distress of being fired. If your bank goes broke, the government has insured your deposits.... If you drive drunk and crash, you can sue somebody for failing to warn you to stop drinking. *There is always somebody else to blame.*"

*Id.* at 15.

16. See *infra* note 147 and accompanying text.

17. Obviously, circumstances sometimes arise which are heart-wrenching and beyond the control of the consumer/borrower. Economic slowdowns, debilitating accidents, and unexpected illnesses cause the loss of jobs and the depletion of assets available to service debt. Nonetheless, these misfortunes are no more the fault of the lender than the consumer. As unpleasant as the prospect may be, the consumer should step up to the plate, so to speak, and deal with his situation without burdening the lender with a share of the cost. The lender willingly

absence of a willing lender, the private arrangement should not be restructured by statutory, regulatory, or judicial mandate, to mitigate the impact of the consumer's misfortune, malfeasance, or negligence.<sup>18</sup>

This Article proposes that, within the contexts of statutory rights of redemption and anti-deficiency legislation, states have gone too far in providing protection for consumers. By adopting these *mandatory* rules<sup>19</sup> and focusing undue attention on the economic plight of mortgagors, we have lost sight of some basic principles of right and wrong, and the expectation that each of us will assume individual or personal responsibility for our commitments and obligations. Our concern with protecting borrowers and homeowners from undesirable and unfortunate circumstances permits us to tolerate, and in some cases support, laws which encourage individuals to expect additional chances (statutory rights of redemption) to rectify their mortgage defaults, or outright forgiveness of obligations (anti-deficiency legislation).

Part II of this Article provides a brief description of the general understandings and agreements between mortgagors and mortgagees, as well as the basic contractual rights and remedies in a typical mortgage.<sup>20</sup> Parts III and IV describe, respectively, the functioning of anti-deficiency legislation<sup>21</sup> and statutory rights of redemption,<sup>22</sup> and traditional arguments both for and against their retention.<sup>23</sup> Part V challenges a potential moral justification for statutory rights of redemption and anti-deficiency legislation by probing the notion that homes hold such a special place in our society that we are justified in providing extraordinary protection for individuals' rights to, or interests in, their homes.<sup>24</sup>

Part VI argues that we should redirect our attention away from the arguments which debate the effectiveness of the protections offered by these rules or who, as between the mortgagor and the mortgagee, is best able to bear the risks associated with mortgages.<sup>25</sup> This section appeals to our collective

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takes the risk that neither the general assets of the borrower nor the proceeds of a foreclosure sale of the mortgaged property will yield a full recovery of the loan. Correspondingly, the borrower should bear the risk that he cannot retain assets (outside of the context of bankruptcy), including the mortgaged property, unless the indebtedness secured by the mortgage is repaid in full accordance with the loan terms.

18. Robert M. Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. CAL. L. REV. 843 (1980). "[T]he mortgagee should not bear the risk of declining value since it did not invest in the property as an owner. The mortgagee, as well as the debtor, is entitled to the court's protection, and can insist upon the complete and immediate enforcement of its contract." *Id.* at 873.

19. The rules could be drafted in a number of different ways: 1) a mandatory rule that prohibits statutory rights of redemption and anti-deficiency rules; 2) a mandatory rule that provides unwaivable statutory rights of redemption and anti-deficiency rules; 3) default rules that ban statutory rights of redemption and anti-deficiency rules, unless the borrower bargains for them; and 4) default rules that provide for statutory rights of redemption and anti-deficiency rules, unless the lender bargains for their waiver. I argue for the elimination of these rules in their current form—mandatory, unwaivable borrower protection, alternative two above. For reasons that are beyond the scope of this Article, I would argue against alternative one, as well.

20. See *infra* notes 28–34 and accompanying text.

21. See *infra* notes 37–49 and accompanying text.

22. See *infra* notes 80–90 and accompanying text.

23. See *infra* notes 53–61 and 71–75 and accompanying text (regarding anti-deficiency legislation), and notes 93–112 and accompanying text (regarding statutory rights of redemption).

24. See *infra* notes 126–42 and accompanying text.

25. See *infra* notes 143–46 and accompanying text.

sense of right and wrong, and suggests that we insist that individuals take personal responsibility for fulfilling their mortgage obligations and for the consequences of their failure to do so. Finally, Part VII proposes that we minimize the possibility that mortgagors will take unanticipated risks by requiring mortgagees to make broad and understandable disclosures to mortgagors.<sup>26</sup> It further suggests that mortgagees test the potential effectiveness of the disclosures by qualifying borrowers based upon financial sophistication, as well as the more traditional financial and credit qualifications.<sup>27</sup>

## II. THE NATURE OF THE DEAL

Statutory rights of redemption and anti-deficiency legislation have continued virtually unabated, perhaps because we have lost sight of the precise nature of the typical arrangement or deal between a mortgagor and a mortgagee. In the most basic transaction, the mortgagee agrees to provide cash to the mortgagor for the use of a mortgagor's choosing.<sup>28</sup> In return, the mortgagor agrees to pledge a piece of its real property as security for the repayment of the loan. The mortgage, which reflects the terms of the secured aspects of the transaction, gives the mortgagee the right to have the property sold at a foreclosure sale, in the event the mortgagor fails to comply with the terms of the loan.<sup>29</sup>

In many instances, by the time the deal has closed, the mortgagor has received the benefit of the full amount of the loan. In addition, the mortgagor has been informed that the loan must be paid in its entirety and of the consequences of her failure to do so. Correspondingly, the mortgagee expects to be repaid in full and in accordance with the terms of the agreement. Both mortgagor and mortgagee agree that the mortgagee cannot, unilaterally and in the absence of a default by the mortgagor, take any remedial measures provided for in the loan documents. The mortgagee's right to foreclose or to seek a judgment against the mortgagor arises *only after* the mortgagor fails to fulfill her obligations under the promissory note evidencing the loan or the mortgage securing the repayment of the note. That is to say, we never have reason to address mortgagee remedies, and the appropriateness or fairness thereof, until the mortgagor has breached a promise to the mortgagee.

If the mortgagor does breach the terms of the loan documents, the lender often seeks to enforce the foreclosure or other remedial provisions of the loan documents to recover the lender's actual, out-of-pocket investment in the defaulting borrower.<sup>30</sup> In addition to the mortgagee's "contractual right" to

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26. See *infra* notes 157-58 and accompanying text.

27. See *infra* notes 159-64 and accompanying text.

28. Frequently, the loan proceeds are used for the purchase of the property which is encumbered by the mortgage securing the repayment of the loan. While these so-called "purchase-money" mortgages do not comprise the universe of mortgage secured loans, they do represent the vast majority of residential mortgage loans. See *infra* note 124. However, on occasion, borrowers are free to use the loan proceeds for purposes totally unrelated to the real estate which secures the loan.

29. The foreclosure sale can take one of two forms. The sale can be conducted by the mortgagee, or by its agent or trustee, pursuant to a power of sale contained in the mortgage. Alternatively, the sale can be a judicial sale which is supervised by a court and conducted by a governmental official (e.g., a sheriff). In either case, the property is sold to the highest bidder at a public auction.

30. Obviously, to the extent that the lender seeks to recover accrued, unpaid interest on

attempt to have the debt satisfied through foreclosure, the mortgagee also has the "contractual right"<sup>31</sup> to ignore the mortgage and pursue collection of the obligation out of the other assets of the mortgagor.<sup>32</sup>

Even in the face of a mortgagor default, the mortgagee's right to recovery is not unlimited. If, at the foreclosure sale, the property sells for more than the outstanding debt, the borrower is entitled to the excess.<sup>33</sup> However, if the property sells for less than the outstanding debt, the lender, in the absence of anti-deficiency legislation or contractual provisions to the contrary, may seek to collect from the borrower the difference between the outstanding debt and the foreclosure sale proceeds, also known as the deficiency.<sup>34</sup>

In some respects, however, the typical agreements between the parties are not worth the paper on which they are written. Statutory rights of redemption and anti-deficiency statutes are legislatively provided real estate finance "mulligans"<sup>35</sup> which permit mortgagors to avoid some of the negative consequences of bad luck, their own faulty decision making, or irresponsibility. These forms of legislation compound the mortgagor's breach. First, she fails to honor a promise to pay, or otherwise perform in accordance with the loan terms, then she is permitted to frustrate the remedial provisions of the documents. Clearly, these rules have the potential to mitigate the consequences of default for a mortgagor. However, there is no readily apparent moral justification for this kind of relief.<sup>36</sup>

As a prelude to examining more fully the moral basis for maintaining

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the outstanding principal balance of the loan, that component of the desired recovery does not represent an out-of-pocket expenditure by the mortgagee. It does, however, represent the lender's opportunity cost. If the lender had loaned the funds to a party other than the defaulting borrower, or otherwise invested the funds, it would have received a return which would have approximated the borrower's accrued, unpaid interest.

31. "Contractual right" is emphasized here because the laws of some states require the mortgagee to pursue satisfaction of its loan through foreclosure before the mortgagee is permitted to pursue a personal judgment against the borrower. *See, e.g.*, IDAHO CODE § 6-101 (1996); N.J. REV. STAT. § 2A:50-2 (1995); UTAH CODE ANN. § 78-37-1 (1995).

32. The mortgagee might choose to pursue assets of the mortgagor that are more liquid than real estate. Such assets might include cash in bank accounts, certificates of deposit, or marketable securities. However, the mortgagee's ability to ignore the security often is limited by so-called "one action" rules which require the mortgagee to pursue foreclosure, and to seek a deficiency judgment within the context of the foreclosure action. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 8.2, at 582-85 (3d ed. 1994).

33. The borrower is entitled to the surplus only after junior lienholders are satisfied from the proceeds. *See id.* § 7.31, at 571 ("[T]he surplus stands in the place of the foreclosed real estate and the liens and interests that previously attached to that real estate now attach to the surplus. They are entitled to be paid out of the surplus in the order of priority they enjoyed prior to foreclosure.").

34. *Id.* § 8.1.

35. MERRIAM WEBSTER'S NEW COLLEGIATE DICTIONARY 764 (10th ed. 1995) defines a mulligan as "[a] free shot sometimes given a golfer in informal play when the previous shot was poorly played." As a non-golfer, I am intrigued by the notion that the recipient of a mulligan could derive any pleasure from purporting to play a game, while suspending the very rules which define the game. As the Russian comic Yakov Smirnoff would say, "America; what a country!"

36. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 17 (1981). Fried explains, "There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it."

these mortgage protection rules, Parts III and IV below describe the forms and functions of anti-deficiency statutes and statutory rights of redemption.

### III. ANTI-DEFICIENCY LEGISLATION

#### A. Forms of Legislation

The general effect of anti-deficiency legislation is to relieve the mortgagor of personal liability for some or all of the difference between 1) the outstanding debt and the foreclosure sale price, or 2) the fair market value of the property and the foreclosure sale price.<sup>37</sup>

The precise language and effect of the various state anti-deficiency statutes are too varied to detail, but some generic categorizations may be helpful. The legislation tends to fall within two broad groups: 1) statutes which prohibit deficiency judgments, based on the nature of the foreclosure, the status of the foreclosure sale purchaser, or the type of property or use of loan proceeds; and 2) statutes which limit or prohibit deficiency judgments, based upon a court supervised appraisal of the property,<sup>38</sup> or based on the fair market value of the property, as determined by a court's<sup>39</sup> or a jury's<sup>40</sup> evaluation of all pertinent testimony or other evidence.

The first category of legislation, "non-recourse" legislation,<sup>41</sup> includes statutes which absolutely prohibit deficiency judgments, without regard to the relationship between the value of the mortgaged property and the foreclosure sale price of that property. In some instances, the prohibition applies to all power of sale foreclosures.<sup>42</sup> Other statutes in this first category prohibit deficiency judgments based on the status of the foreclosure sale purchaser. For example, when the foreclosure sale purchaser is the foreclosing mortgagee, deficiency judgments are prohibited.<sup>43</sup> Finally, this category includes statutes which prohibit deficiency judgments based on the type of property or use of the loan proceeds. The prohibitions under these statutes are effective, for example, only in the case of purchase money mortgages<sup>44</sup> or mortgages encumbering certain residential properties.<sup>45</sup>

In the second category of statutes, "fair-value" legislation,<sup>46</sup> deficiency judgments are available only to the extent that the debt exceeds the appraised<sup>47</sup>

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37. See *infra* notes 59-61 and accompanying text.

38. See, e.g., S.C. CODE ANN. §§ 29-3-700, 29-3-760 (Law. Co-op. 1993).

39. See, e.g., CAL. CIV. PROC. CODE § 726 (West 1996).

40. See, e.g., N.D. CENT. CODE §§ 32-19-06, 32-19-07 (1995).

41. This category is referred to as "non-recourse" legislation because its effect is to relieve the mortgagor from all personal liability, and to limit the lender to *in rem* recovery against the mortgaged property.

42. See, e.g., ALASKA STAT. § 34.20.100 (1995); CAL. CIV. PROC. CODE § 580(d) (West 1996).

43. See, e.g., ME. REV. STAT. ANN. tit. 14, § 6324 (West 1995).

44. See, e.g., ARIZ. REV. STAT. ANN. § 33-729(A) (West 1995); CAL. CIV. PROC. CODE § 580(b) (West 1996).

45. See, e.g., OR. REV. STAT. § 88.070-.075 (1995).

46. The second category is referred to as "fair-value" legislation because the borrower's loan is credited with the fair market value or appraised value of the property, irrespective of its actual foreclosure sale price.

47. See, e.g., ME. REV. STAT. ANN. tit. 14, § 6324.



or fair market<sup>48</sup> value of the mortgaged property. Thus, on the one hand, the mortgagee cannot pursue that portion of the indebtedness which is equal to the difference between the appraised value of the property and the foreclosure sale price. Alternatively, the mortgagee cannot pursue the difference between the fair market value of the property and the foreclosure sale price. Although appraisals may be used to determine fair market value, the trier of fact can use any other relevant evidence to make such a determination.<sup>49</sup> If the appraised value or fair market value, as the case may be, of the mortgaged property exceeds the debt, a deficiency judgment is absolutely barred.

### B. History and Rationale

Anti-deficiency legislation represents yet another tool at the disposal of consumer/mortgagor protectionists. In the absence of anti-deficiency legislation, mortgagees typically are permitted to recover the mortgagor's indebtedness from the foreclosure sale proceeds.<sup>50</sup> However, to the extent the foreclosure sale proceeds are insufficient to retire the debt, the mortgagee has the right to seek a judgment against the mortgagor for the amount by which the debt, plus the expenses of foreclosure, exceed the sales proceeds.<sup>51</sup> The advent of the Great Depression and the introduction of anti-deficiency legislation significantly altered these procedures.<sup>52</sup>

During the economic depression of the 1930s, many borrowers found themselves unable to pay their mortgages.<sup>53</sup> Consequently, their properties—homes in many instances—were exposed to foreclosure.<sup>54</sup> The borrowers' troubles were compounded by the fact that the foreclosure sale of their properties often yielded proceeds which fell far short of the secured indebtedness. The shortfalls were occasioned by at least three significant factors. First, the very nature of a foreclosure sale, as a forced sale which does not benefit from the normal interplay of arms' length negotiation, is not conducive to yielding "fair market value"<sup>55</sup> when the property is sold through foreclosure's auction process.<sup>56</sup>

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48. See, e.g., CAL. CIV. PROC. CODE § 580(a) (West 1996).

49. See, e.g., TEX. PROP. CODE ANN. § 51.003 (West 1995).

50. NELSON & WHITMAN, *supra* note 32, § 8.1, at 579.

51. *Id.*

52. *Id.* § 8.3, at 585–86.

53. CHARLES P. KINDLEBERGER, *THE WORLD IN DEPRESSION 1929–1939*, at 112 (rev. ed. 1986).

54. *Id.*

55. This use of the term "fair market value" refers to the price that a property would bring in a negotiated sale, not affected by the time constraints or financing limitations that normally attend the foreclosure sale process. An equally appropriate definition is "the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts." BLACK'S LAW DICTIONARY 597 (6th ed. 1990).

56. In comparing the foreclosure sale price of property to its higher subsequent resale price, Professor Wechsler concluded: "[F]oreclosure by sale frequently operated as a meaningless charade, producing the functional equivalent of strict foreclosure, a process abandoned long ago.... In short, this study indicates that foreclosure by sale is not producing its intended results, and in many cases is yielding unjust and inequitable results." Steven Wechsler, *Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 CORNELL L. REV. 850, 896 (1985). See also Ronald Goldstein, *Reforming the Residential Foreclosure Process*, 21 REAL EST. L.J. 286 (1993); Grant S. Nelson, *The Impact of Mortgagor Bankruptcy on the Real Estate*

The second significant contributor to the anemic foreclosure sale prices during the depression era was the dramatic drop in the price of real estate—even outside of the context of foreclosure.<sup>57</sup> Finally, a factor closely related to the drop in real estate prices was the devastating contraction in the availability of credit to facilitate the purchase of real estate, whether at a foreclosure sale or otherwise.<sup>58</sup>

Obviously, to the extent that a significant difference existed between the outstanding balance of the borrower's indebtedness and the proceeds realized from a foreclosure sale of his property, the borrower sustained two potent financial blows. First, he suffered the financial loss of having her property sold by, or on behalf of, the lender to pay the borrower's defaulted indebtedness. Then, to compound his woes, he was faced with the possibility that the lender would obtain a deficiency judgment, representing the unsatisfied portion of the indebtedness. Thus, after losing title to his property, all of his remaining assets were potentially exposed to sale or levy to satisfy the deficiency judgment.

State legislatures responded to the plight of mortgagors by enacting laws which, among other things, eliminated the availability of deficiency judgments, or placed restrictions on their magnitude.<sup>59</sup> These enactments, which vary in scope or coverage, are referred to as "anti-deficiency legislation."<sup>60</sup> In general, anti-deficiency statutes either limit a mortgagor's loss to the real property securing the loan, or give the mortgagor credit for the full value of his property, regardless of the price paid for the property at foreclosure. The net result of achieving the latter purpose is to limit the exposure of the borrower's general assets to the collection efforts of the mortgagee. This result is achieved: 1) by reducing the mortgage debt by the foreclosure sale price plus the amount by which the fair market value of the real estate security exceeds the sale price, through "fair value" legislation; or 2) by eliminating all debt in excess of the foreclosure sale price of the property, through "non-recourse" legislation.<sup>61</sup>

Although a significant number of anti-deficiency statutes were enacted

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*Mortgagee: Current Problems and Some Suggested Solutions*, 50 MO. L. REV. 217 (1985). Professor Nelson argues:

The foreclosure sale process, whether judicial or under power of sale, is hardly designed to bring a fair price for mortgaged real estate. Frequently, the mortgagee is not only the foreclosure sale purchaser, but the only bidder attending the sale. There are several reasons for this phenomenon. First, because the mortgagee can bid up to the amount of the mortgage debt without putting up new cash, he has a distinct bidding advantage over a third party bidder, who will have out-of-pocket expense from the first dollar bid. Second, while foreclosure statutes require notice by publication to potential third party bidders, the notice, especially in urban areas, is published in newspapers of limited circulation. Moreover, because the publication is technical in nature, a potential third party purchaser has little idea what real estate is being sold. Third, many potential third party purchasers are reluctant to buy land at a foreclosure sale because of the difficulty of ascertaining if a purchaser will receive good and marketable title. Fourth, when a mortgagee forecloses on improved real estate, potential bidders often find it difficult to inspect the premises prior to sale.

*Id.* at 248.

57. KINDLEBERGER, *supra* note 53, at 112.

58. *Id.*

59. GEORGE E. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES § 335, at 702 (2d ed. 1970).

60. See NELSON & WHITMAN, *supra* note 32, § 8.3, at 585-86.

61. See *supra* notes 41-45 and accompanying text.

during the Great Depression, rooted in public and legislative concern about the impact of mortgagee remedies on mortgagors, many of these statutes remain in effect today. The contemporary justifications for the risk shifting required to realize the goals of limiting mortgagor losses are, among other things, to prevent mortgagees from intentionally lending more money than the value of the mortgagor's property would justify,<sup>62</sup> and to shift to the lender the burden of a decline in the security's value during a downturn in the real estate market.<sup>63</sup> Supporters of this view argue that lenders are better able to bear this risk than mortgagors.<sup>64</sup> For example, in support of the Uniform Land Security Interest Act's<sup>65</sup> anti-deficiency provision, section 511(b),<sup>66</sup> Mixon and Shepard reason:

In order for section 511(b) to be justified, it must be established that section 511(b) produces a better utilitarian balance for participants in the home mortgage process than does current law. This fundamental policy issue counterpoises two specific notions. First, consider the region undergoing recession, where deficiency liability poses individual hardships and impedes regional recovery. These losses far outweigh the

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62. See John Mixon & Ira B. Shepard, *Antideficiency Relief for Foreclosed Homeowners: ULSIA Section 511(b)*, 27 WAKE FOREST L. REV. 455, 483 (1992).

63. In justifying California's anti-deficiency legislation, the California Supreme Court acknowledged, "The purposes are to discourage land sales that are unsound because the land is overvalued and, in the event of a depression in land values, to prevent the aggravation of the downturn that would result if defaulting purchasers lost the land and were burdened with personal liability." *Bargioni v. Hill*, 378 P.2d 593, 594 (Cal. 1963). See also David A. Leipziger, *Deficiency Judgments in California: The Supreme Court Tries Again*, 22 UCLA L. REV. 753, 754 (1975).

64. See generally Mixon & Shepard, *supra* note 62.

65. The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Land Security Interest Act (ULSIA) in 1985. To date, this Act has not been adopted by the legislature of any state.

66. ULSIA § 511(b), 7A U.L.A. 295 (1996).

Section 511(b) states:

(b) Unless otherwise agreed and except as provided in this subsection as to protected parties, a person who owes payment of an obligation secured is liable for any deficiency. If that person is a protected party and the obligation secured is a purchase money security interest, there is no liability for a deficiency, notwithstanding any agreement of the protected party. For purposes of calculating the amount of any deficiency a transfer of the real estate to a person who is liable to the creditor under a guaranty, endorsement, repurchase agreement, or the like, is not a sale.

Section 113 states:

(a) "Protected party" means:

(1) an individual who gives a security interest in residential real estate all or part of which the individual occupies or intends to occupy as a residence;

(2) a person obligated primarily or secondarily on an obligation secured by residential real estate if, at the time the obligation is incurred that person is related to an individual who occupies or intends to occupy all or a part of the real estate as a residence; or

(3) an individual who acquires residential real estate and assumes or takes subject to the obligation of a prior protected party under the real estate security agreement.

(b) "Residential real estate" means, in relation to a protected party, real estate improved or to be improved, containing not more than [three] acres, not more than four dwelling units, and no nonresidential uses for which the protected party is a lessor. If a unit in a common interest community is otherwise "residential real estate," it remains so regardless of the size of, or the number of units in, the common interest community.

*Id.* § 113, 7 U.L.A. 266 (1996).

value of monetary collections to lenders.<sup>67</sup>

In *Bargioni v. Hill*,<sup>68</sup> the California Supreme Court suggested that anti-deficiency statutes are useful because they discourage lenders from financing the purchase of properties that are overvalued,<sup>69</sup> and they, at least in part, shift the burden of falling real estate prices from the borrower to the lender.<sup>70</sup> Of course, counterpositions immediately come to mind.

### C. Traditional Rebuttal

It is true that anti-deficiency legislation could provide an incentive for lenders to refrain from lending more than a property's value would justify, but there are other equally or more compelling incentives that could affect similar lender behavior, even in the absence of anti-deficiency legislation. The lender has absolutely no rational basis for financing an amount that exceeds the property's value, without some assurance that it can, at a minimum, recover its capital investment.<sup>71</sup> Intentional (or negligent) "over-lending" would result in the lender having a partially unsecured loan. Clearly, this would not be in the lender's best interests, if we assume that the lender's goal is to have adequate security.<sup>72</sup>

To the contrary, a more obvious incentive for the lender would be to negotiate for and lend at the lowest possible loan-to-value ratio. This would insure the greatest likelihood that a foreclosure sale would produce enough cash to retire the secured debt.<sup>73</sup>

If the mortgagee lends too much on a particular property, it runs the risk that a foreclosure sale would produce a deficiency and the borrower would be judgment-proof. Thus, the right to pursue a deficiency judgment would be worthless. Ultimately, this would result in the lender purchasing a property for more than its market value, assuming that the lender would be permitted to

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67. See *Mixon & Shepard*, *supra* note 62, at 458.

68. 378 P.2d 593 (Cal. 1963).

69. *Id.* at 594.

70. *Id.*

71. Any particular loan officer might have a somewhat irrational and short-term basis for making such a loan. If the loan officer is compensated or promoted solely on the basis of loan production, he might be tempted to make an unsound loan. However, it appears reasonable to assume that other members of the loan underwriting team would have a stabilizing influence on the process, and the loan officer's long-term interests would not be well served by his making under-secured loans.

72. It is significant to note that the Federal Deposit Insurance Corporation; the Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency, Treasury; and the Office of Thrift Supervision, Treasury, jointly agreed to guidelines for loan-to-value ratios for, among other things, permanent mortgages on owner-occupied, one-to-four family, residential property. The guidelines suggest that for any loan with a loan-to-value ratio in excess of 90%, the lender should require mortgage insurance or other marketable collateral. See 57 Fed. Reg. 62,890 (1992). Thus, lenders regulated by these agencies, presumably, would seek to comply with the guidelines.

73. Washburn, *supra* note 18, at 845. Washburn observes:

To confirm the security value of the property, the lender appraises the property and restricts the amount of its loan to an amount less than the appraised value.... First, if the borrower has sufficient cash equity in the property, he has an economic incentive to maintain it and pay off the loan. Second, the lender may not realize the full value upon sale since property values fluctuate in the real estate market.

foreclose.

As the court in *Bargioni* observed, anti-deficiency legislation also serves an economic burden-shifting function.<sup>74</sup> If there is a post-loan recession or depression in the real estate market, the borrower is not burdened with the dual impact of losing his property and having personal liability for the difference between the then outstanding debt and the price at which the property sells at foreclosure. With a stroke of the legislative pen, the borrower's loss can be limited to his investment in the property.<sup>75</sup>

Why is it desirable to limit the borrower's losses? The borrower is the party who makes the miscalculation as to the future value of the property or his ability to repay the loan. It is a simple matter to concede that such miscalculations can lead to unfortunate circumstances if the borrower is unable to ride out the depression and continue to service the debt. Nonetheless, experiencing this type of misfortune does not make the borrower deserving of a free ride at the expense of the lender,<sup>76</sup> or other borrowers.<sup>77</sup> Even though the lender takes a security interest in the property, the lender's investment is in the borrower—not in the property.<sup>78</sup> It is far less obvious that there is any reasonable basis for saddling the lender with the loss simply because the lender is a less sympathetic character than the borrower. If the combination of the loss of the real estate and the continuing burden of the deficiency create an insurmountable burden for the borrower, his recourse should be in the bankruptcy court, not in the lender's pocket.<sup>79</sup>

#### IV. STATUTORY RIGHTS OF REDEMPTION

##### A. The Right to Redeem

Various state statutes<sup>80</sup> provide mortgagors<sup>81</sup> with an extra-contractual

74. See 378 P.2d 593, 594 (citing *Roseleaf Corp. v. Chierighino*, 378 P. 2d. 97, 101 (1963)).

75. This situation always results when "non-recourse" legislation is in effect, and potentially results in the case of "fair value" legislation. See *supra* notes 41 and 46 and accompanying text.

76. Wechsler, *supra* note 56, at 870. In one of the very few empirical studies of the effect of foreclosures, Professor Wechsler's limited data indicate that while mortgagees profited on the resale of about one-half of the homes they purchased at their own foreclosure sales, the mortgagees lost an average of about \$14,000 per transaction, when profits and losses were combined. *Id.*

77. Even if one assumes that lenders suffer no loss, as the result of mortgagor protection legislation, because they spread the costs among all borrowers by increasing interest rates or fees, the defaulting borrower still benefits at the expense of others. Obviously, this assertion is based on the further assumption that any incremental borrowing costs paid by the defaulting mortgagor is less than the value of the benefit of the anti-deficiency statute, as applied to the defaulting mortgagor.

78. *Provident Bldg. & Loan Ass'n v. Pekarek*, 3 N.E.2d 983, 984 (Ohio 1936) ("The contractual relation of the parties is that of debtor and creditor. The creditor did not invest in the real estate as a purchaser. If the real estate depreciates in value, it should not be required to bear the loss."). But see John Mixon, *Deficiency Judgments Following Home Mortgage Foreclosure: An Anachronism That Increases Personal Tragedy, Impedes Personal Economic Recovery, and Means Little to Lenders*, 22 TEX. TECH L. REV. 1, 47 (1991) ("Mortgage lenders are in fact investors in the region where their mortgage money is placed. They benefit from general value increase because regional prosperity reduces the incidence of defaults and foreclosures, thereby increasing their income from existing mortgages."). *Id.*

79. *Id.* See also *infra* notes 167-72 and accompanying text.

80. In some circumstances, statutory rights of redemption are made available to the

benefit that is commonly referred to as a statutory right of redemption.<sup>82</sup> A mortgagor's statutory right of redemption must be distinguished from the mortgagor's "equitable right of redemption." The equitable right of redemption is a *pre-foreclosure* right which may be exercised at any time between the occurrence of a default and the instant before a foreclosure sale is consummated.<sup>83</sup> In contrast with the equitable right of redemption, which provides every mortgagor with the opportunity to repay the secured indebtedness and reclaim her property from the mortgage, the statutory right of redemption is a *post-foreclosure* right which is not triggered until the mortgagor's equitable right of redemption has been extinguished through a valid foreclosure.<sup>84</sup> When the statutory right of redemption becomes available to the mortgagor, it permits the mortgagor to reclaim her property from the foreclosure sale purchaser by reimbursing the foreclosure sale price to the

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federal government by virtue of federal statutes. See e.g., 28 U.S.C. § 2410(c) (1994) (when a sale is made to satisfy a lien that is superior to that of the United States, the United States has a one-year period of redemption, except with respect to federal tax liens which have a redemption period of the longer of 120 days or the redemption period provided by applicable state law). *Id.*

81. In addition to the mortgagor's statutory right of redemption, several jurisdictions make available to junior lienholders a subordinate statutory right of redemption. See, e.g., ALASKA STAT. § 09.35.220 (1996); ARIZ. REV. STAT. ANN. § 12-1281 (West 1994); KAN. STAT. ANN. § 60-2414(b) (1994); MINN. STAT. § 581.10 (1988 & Supp. 1997); OR. REV. STAT. § 23.540 (1995); UTAH R. CIV. P. 69(f)(1). The junior lienholder's statutory right of redemption is analogous to the mortgagor's right, in that the junior lienholder is given the ability to capture any equity in the property, which could be used to repay some or all of the mortgagor's indebtedness to the junior lienholder. This so-called "equity" represents the difference between the price at which the property could be sold in the open market and the foreclosure sale price, irrespective of the magnitude of the mortgagor's indebtedness to the foreclosing mortgagee.

Although the junior lienholder is at a bidding disadvantage, as compared to the foreclosing mortgagee, if she is a consensual junior lienholder, she extended credit to the mortgagor with the knowledge of this disadvantage, and with the knowledge that she could be forced to bid at the senior lien foreclosure or risk having her security interest wiped out. And, in the case of a non-consensual junior lienholder (e.g., a tort judgment lienholder), she pursues her judgment lien against the mortgagor with full knowledge that the senior mortgagee's lien has priority, and that a foreclosure sale by the senior mortgagee could eliminate her ability to seek satisfaction of her judgment through a sale of the property. In addition, just as is the case with a consensual lienholder, the non-consensual lienholder has the right to protect her interest by bidding at the foreclosure of the senior mortgage.

82. See ALA. CODE §§ 6-5-230, 6-5-231, 6-5-232 (1993); ALASKA STAT. §§ 09.45.190, 09.35.250 (1996); ARIZ. REV. STAT. ANN. § 12-1282 (West 1994); ARK. CODE ANN. § 30-440 (Michie 1987); CAL. CIV. CODE § 729.010-729.090, 726(e) (West 1980 & Supp. 1997); COLO. REV. STAT. ANN. § 188-9-2 (West 1990 & Supp. 1996); 735 ILCS 5/12-122-5/12-133 (West 1990 & Supp. 1996); IOWA CODE ANN. §§ 628.28, 628.3 (West 1950 & Supp. 1996); KAN. STAT. ANN. § 60-2414 (1994); KY. REV. STAT. ANN. § 426.220 (Michie 1992); ME. REV. STAT. ANN. tit. 14, § 6204 (West 1980 & Supp. 1996); MICH. COMP. LAWS ANN. § 600.3140 (West 1987); MINN. STAT. §§ 580.23, 580.24 (1988 & Supp. 1997); MO. REV. STAT. § 443.410 (1986 & Supp. 1997); MONT. CODE ANN. §§ 25-13-710, 71-1-228 (1995); N.M. STAT. ANN. § 24-2-19 (Michie 1978); N.D. CENT. CODE § 32-19-18 (1996); OR. REV. STAT. § 23.560 (1995); S.D. CODIFIED LAWS ANN. § 21-52-1 (1987 & Supp. 1996); TENN. CODE ANN. §§ 66-8-101, 66-8-102 (1993); UTAH R. CIV. P. 69(f)(3); WASH. REV. CODE ANN. § 6.24.140 (1995).

83. To distinguish further, and more pointedly, between the statutory right of redemption and the equitable right of redemption, consistent with American courts' universal acceptance of the equitable right, the author believes that its existence is entirely appropriate. See, e.g., *Russo v. Wolbers*, 323 N.W.2d 385 (Mich. Ct. App. 1982); *Humble Oil & Ref. Co. v. Doerr*, 303 A.2d 898 (N.J. 1973); *Barr v. Granahan*, 38 N.W.2d 705 (Wis. 1949). Through the exercise of the equitable right of redemption, the mortgagor pays her debt in full, the mortgagee is made whole, and the mortgagor recovers her property.

84. NELSON & WHITMAN, *supra* note 32, § 7.1, at 468.

purchaser.

The mortgagor is not required to pay the unpaid balance of the debt originally secured by the foreclosed mortgage, even if that unpaid balance exceeds the foreclosure sale purchase price. Thus, for example, if the remaining debt is \$50,000 and the property is sold at the foreclosure sale for \$30,000, the mortgagor could reclaim the property by paying only \$30,000. In other words, the defaulting borrower gets one last chance to reacquire the previously mortgaged property, but at the foreclosure sale price.<sup>85</sup> The period of time between the consummation of the foreclosure sale and the expiration of the borrower's statutory right of redemption is prescribed by the statute which creates the right of redemption<sup>86</sup>—as short as thirty days,<sup>87</sup> or as long as two years,<sup>88</sup> depending on the state.

Generally, a foreclosing mortgagee has the right to bid at its own foreclosure sale.<sup>89</sup> Moreover, in the overwhelming majority of foreclosures, the foreclosing mortgagee is the high bidder, and thus the purchaser at the foreclosure sale.<sup>90</sup> Accordingly, when the mortgagor exercises her statutory right of redemption, typically she redeems the property from the foreclosing mortgagee.<sup>91</sup>

## B. Rationales

Given the pre-foreclosure protection that is available to mortgagors, one might inquire as to the purposes and justifications for statutory rights of redemption. Supporters of statutory rights of redemption commonly offer two justifications for the enactment of such legislation.<sup>92</sup>

### 1. Increased Foreclosure Sale Price

First, it is argued that the existence of a statutory right of redemption encourages the mortgagee or other foreclosure sale purchaser to make a

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85. See *infra* note 95 and accompanying text.

86. When the federal government is the mortgagee, in some instances, state statutory rights of redemption are not applicable. See *United States v. Stadium Apartments*, 425 F.2d 358, 360 (9th Cir. 1970).

87. ARIZ. REV. STAT. ANN. § 12-1282(A) (West 1995) provides:

The judgment debtor or his successors in interest may redeem at any time within thirty days after the date of the sale if the court determined as part of the judgment under which the sale was made that the property was both abandoned and not used primarily for agricultural or grazing purposes.

88. TENN. CODE ANN. § 66-8-102 (1995) provides: "Real estate sold for debt and made redeemable shall continue redeemable to the debtor and the debtor's creditors for two (2) years after the sale, upon the terms set forth in this chapter, no matter how often it had previously been redeemed." *Id.*

89. Washburn, *supra* note 18, at 887. "As a general rule, the mortgagee has a legal right to bid at its own foreclosure sale, and stands in the same position as every other bidder. The mortgagee can purchase at the lowest price obtainable and owes the debtor no duty to bid the property's market value." *Id.*

90. Wechsler, *supra* note 56, at 880 (In foreclosures in Onondaga County, New York, in 1979, foreclosing mortgagees purchased the foreclosed property in 90 (76%) out of 118 sales.).

91. *Id.*

92. See generally Patrick B. Bauer, *Judicial Foreclosure and Statutory Redemption: The Soundness of Iowa's Traditional Preference for Protection over Credit*, 71 IOWA L. REV. 1 (1985); Homer F. Carey et al., *Studies in Foreclosures in Cook County: II. Foreclosure Methods and Redemption*, 27 ILL. L. REV. 595, 614-15 (1933).

reasonably high bid for the property at a foreclosure sale.<sup>93</sup> If the foreclosure sale price does not approximate the fair market value of the property, arguably unsatisfactory or unfair results will ensue. For example, the mortgagee or a third party purchaser could acquire the mortgagor's property at a bargain price, with a resultant windfall when the property is resold for its full value. Furthermore, in the absence of anti-deficiency legislation, the mortgagor could be forced to surrender cash and other assets, including the mortgaged property, which, in the aggregate, have a value that exceeds the mortgagor's debt.<sup>94</sup>

Presumably, if the mortgagee or a third party acquires the property at the foreclosure with a "low-ball" bid, it runs the risk that the mortgagor will redeem the property during the redemption period, and recapture its equity from the purchaser. The statutory right of redemption would permit the mortgagor to recapture its equity because the redemption price is not tied to the outstanding balance of the indebtedness at the time of the foreclosure. Instead, the redemption price closely approximates the price received for the property at the foreclosure sale. I say the redemption price approximates the foreclosure sale price because some states permit the foreclosure sale purchaser to recover interest on the foreclosure sale price, as well as other expenses incurred in connection with the foreclosure sale.<sup>95</sup>

As suggested above, a fundamental assumption underlying the enactment of a statutory right of redemption is that, without it, prospective purchasers would be less inclined to bid fair value for the property.<sup>96</sup> Thus, the argument goes, the specter of difficulty in retaining the property if the winning bid is too low, created by the borrower's statutory right of redemption, places pressure on the mortgagee or other purchaser to bid up the purchase price, and enhances the likelihood that the mortgagor will realize the maximum benefit from the foreclosure sale.<sup>97</sup>

When a mortgagor exercises her statutory right of redemption, the mortgagee, or other foreclosure sale purchaser, usually receives only the foreclosure sale purchase price, a statutorily prescribed rate of interest on its temporary investment in the property, and reimbursement of certain other necessary expenses incurred in holding the property.<sup>98</sup> To the extent that the

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93. Washburn, *supra* note 18, at 931.

94. For example, if the outstanding debt at the time of foreclosure is \$100,000, and the property has a fair market value of \$150,000 but sells for only \$90,000 at the foreclosure sale, the mortgagor potentially pays \$160,000 for a \$100,000 debt. The payment would include the \$150,000 in value represented by the house, plus the \$10,000 difference between the \$100,000 debt and the \$90,000 credit against the debt which results from the foreclosure sale proceeds. The \$10,000 difference would be the amount of the deficiency judgment to which the mortgagee would be entitled. The foregoing also serves as an illustration of the potential "double-recovery" by a mortgagee who purchases at its own foreclosure sale. See Washburn, *supra* note 18, at 849-50.

95. See, e.g., ARIZ. REV. STAT. ANN. § 12-1285 (West 1995) (redeeming party must pay foreclosure purchase price, plus eight percent, plus taxes and assessments paid by foreclosure sale purchaser); ARK. CODE ANN. § 18-49-106 (Michie 1995) (redeeming party must pay foreclosure purchase price, plus interest, plus the cost of foreclosure and sale); MICH. COMP. LAWS § 600.3140 (1995) (redeeming party must pay foreclosure purchase price, plus interest).

96. NELSON & WHITMAN, *supra* note 32, § 8.8, at 623.

97. *Id.* § 8.4, at 612. See also Edgar Noble Durfee & Delmar W. Doddridge, *Redemption from Foreclosure Sale—The Uniform Mortgage Act*, 23 MICH. L. REV. 825, 840-41 (1925).

98. See *supra* note 95.



foreclosure sale purchaser invests resources in evaluating and acquiring the property,<sup>99</sup> and forgoes the opportunity to invest its funds at a rate of return that exceeds the statutory interest rate, it experiences a loss when the property is redeemed. Accordingly, a putative foreclosure sale purchaser would be forced to strike the appropriate balance between the lowest purchase price that would effectively discourage mortgagor (or junior lienholder) redemption, and the price at which the property would cease to be an economically rational purchase for the bidder. The obvious assumption is that this balancing process would lead to a higher foreclosure sale price than the minimum bid that would be required to purchase the property in the absence of the statutory right of redemption. If this assumption is accurate, with respect to foreclosure sale purchaser behavior, the benefits to the mortgagor are clear. The higher we push the foreclosure sale price, the greater the resulting reduction of the mortgagor's debt. Alternatively, if the sale price exceeds the debt, the higher the price, and the greater the equity returned to the borrower.<sup>100</sup>

Unfortunately, there is very little empirical evidence to support or refute the assumption that the existence of a statutory right of redemption leads to higher foreclosure sale prices. In a limited study examining mortgages foreclosed in two Iowa counties, between 1881 and 1980, Professor Patrick Bauer concludes that Iowa's redemption statute is "neither unnecessary nor entirely ineffective" in rectifying price inadequacy.<sup>101</sup> Professor Bauer describes "price inadequacy" as a foreclosure sale in which "the sale price is less than the value of the land."<sup>102</sup> Bauer's interpretation of his data does not lead him to conclude that statutory rights of redemption should be abolished.<sup>103</sup> Nevertheless, his statement represents exceedingly faint approbation of such statutes.

## 2. Direct Accommodation to Mortgagor

A second justification offered by proponents of the statutory right of redemption is more straightforward, but, in my view, no more persuasive. The argument is simply that the right gives the mortgagor extra time to marshal her resources and regain title to her property.<sup>104</sup> In some instances the redemption right also gives the mortgagor the opportunity to retain possession of her property during the pendency of the statutory redemption period.<sup>105</sup> These two

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99. The resources referred to here include only those costs in excess of the purchase price and other items which are specifically identified, in the relevant statute, as being reimbursable by the redeeming party to the foreclosure sale purchaser.

100. The potential equity available to the borrower is the fair market value of the property minus the debt secured by the mortgage. Because foreclosure sales typically generate sales prices which are less than the price which could be obtained for the property in an arms'-length transaction (the fair market value), the equity available to a borrower in a foreclosure context is reduced, dollar for dollar, by the amount by which the sale price falls short of fair market value. See NELSON & WHITMAN, *supra* note 32, § 8.3, at 586. See also Washburn, *supra* note 18, at 871 n.141; BFP v. Resolution Trust Corp., 114 S. Ct. 1757, 1762 (1994) "[M]arket value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very antithesis of forced-sale value." *Id.*

101. Patrick B. Bauer, *Statutory Redemption Reconsidered: The Operation of Iowa's Redemption Statute in Two Counties Between 1881 and 1980*, 70 IOWA L. REV. 343, 371 (1985). Even the limited empirical evidence appears to be inconclusive at best.

102. *Id.* at 362.

103. *Id.* at 371.

104. NELSON & WHITMAN, *supra* note 32, § 8.4, at 612; Bauer, *supra* note 92, at 8.

105. NELSON & WHITMAN, *supra* note 32, § 8.4, at 610. See also Bauer, *supra* note 101,

additional benefits would appear to be particularly appealing to the adherents of the view that property rights in a homestead enjoy a special status and, therefore, deserve exceptional accommodation.<sup>106</sup>

### C. Traditional Rebuttal

These justifications for the enactment of statutory rights of redemption are not ineluctable or unchallenged. With respect to the assertion that the presence of a statutory right of redemption increases the foreclosure sale price by waving the hammer of redemption over the head of the purchaser, a potent argument has been made that a contrary result is quite possible.<sup>107</sup>

The mere possibility of redemption discourages bidders at the foreclosure sale because there is no finality attached to the purchase.<sup>108</sup> Furthermore, a potential purchaser would face a disincentive to bid for the property because, for a period, she could not maximize the value of the property by making further investment in it or putting it to permanent or long-term use; after all, if the mortgagor redeemed the property, the additional investment would be lost and long-term plans would be scuttled.<sup>109</sup>

While the proposition has not been tested empirically, intuitively one could conclude, all other things being equal, that the vigorousness of the foreclosure sale bidding would rise or fall in a manner that bears some positive correlation with the number of bidders attending the sale. Even with respect to the bidders who would be willing to take the risk that they could lose the property to redemption, logic dictates that they would reduce the amount of their bids to compensate for the enhanced risk.<sup>110</sup>

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at 347.

106. See Curtis J. Berger, *Home Is Where the Heart Is: A Brief Reply to Professor Epstein*, 54 BROOK. L. REV. 1239, 1240-41 (1989); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). See also *infra* notes 126-34 and accompanying text.

107. See Nelson, *supra* note 56. Professor Nelson asserts:

Moreover, the advantages of statutory redemption may be more illusory than real. Because it uses the foreclosure sale price as the redemption amount and affords redemption rights to a wide variety of lien creditors as well as the mortgagor, it arguably encourages those who take part at the sale to bid higher as a means of protecting their prospective purchase from loss by redemption. However, it is equally likely that the defeasible nature of the purchaser's title coupled with the fact that the mortgagor often retains possession during the redemption period serve to depress rather than enhance bidding and, hence, may depress the ultimate foreclosure price.

*Id.* at 248-49. See also NELSON & WHITMAN, *supra* note 32, § 8.4, at 612.

108. See Nelson, *supra* note 56, at 248-49; Washburn, *supra* note 18, at 854. See also NELSON & WHITMAN, *supra* note 32, § 8.4, at 612. Even some strong supporters of statutory rights of redemption concede that such statutes discourage some potential bidders at a foreclosure sale. See Bauer, *supra* note 101, at 403. "[T]hose persons whose needs cannot be met by the conditional title to and delayed possession of the land being sold at the sale are eliminated as potential bidders." *Id.*

109. Most redemption statutes do not permit the foreclosure sale purchaser to recover from the redeeming party the cost of post-foreclosure improvements. The redeeming party is only required to pay amounts specifically prescribed by the statute. See *supra* note 95. But see ALA. CODE §§ 6-5-253 to -254 (1995) (redeeming party must pay foreclosure purchase price, interest, taxes, and the value of permanent improvements made after the foreclosure sale, etc.).

110. See Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489, 533 (1991) (proposing that third-party purchasers are unlikely to bid the fair value of properties when they must bear the risk that their purchase will unravel a year later);

With respect to the argument that the statutory right of redemption affords the mortgagor additional time with which to gather resources to reclaim her property, some evidence suggests that very few mortgagors actually take advantage of these statutory rights by redeeming the property after foreclosure.<sup>111</sup> Nonetheless, a potential foreclosure sale purchaser would have very little basis for speculating as to the probability that any particular mortgagor would or would not redeem. Thus, the theoretically positive impact of statutory rights of redemption—added time to reclaim the property—perhaps is outweighed by the limited use of the right by mortgagors, as well as the negative impact the right has upon the foreclosure sale proceeds available to mortgagees and mortgagors.<sup>112</sup>

#### *D. The Myth of the Innocent Mortgagor*

When borrowers mortgage their properties to secure the repayment of their loans, typically they are aware that if they fail to repay their loans in accordance with the agreed upon terms, they run the risk of losing possession of and title to their property. This is true with respect to mortgages of commercial or non-residential property, as well as residential property. In a commercial setting, it is generally assumed that the borrower has sufficient knowledge and business acumen to fend for herself in the negotiation process, and to apprise herself fully of all risks attendant to mortgaging her property.<sup>113</sup> In the residential context, consumerism has spawned a broad spectrum disclosure regime, which is intended to provide borrowers with detailed information about the functioning and economics of residential mortgages. The Real Estate Settlement Procedures Act<sup>114</sup> requires lenders or closing agents to disclose to borrowers, who secure loans with their residences, a wide array of information in a prescribed closing settlement statement format. The Truth-in-Lending Act<sup>115</sup> requires expansive disclosures, including the amount financed, the annual percentage interest rate, and the sum of the finance charges, payments, and the sales price. Thus, even relatively unsophisticated residential mortgagors should be informed of their potential liability for failure to adhere

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Bauer, *supra* note 101, at 403–04 (“[T]he persons who bid at the sale are forced to set their bids sufficiently below the value of the land as of the date of the sale to compensate for both the discounted value of the possibility of receiving title and possession of the land at the end of the redemption period.”). See also *Mixon & Shepard*, *supra* note 62, at 478. (“[T]he potential of redemption may actually reduce the liquidation value of the property at foreclosure.”) (citing *RODNEY S. DAYAN ET AL., MORTGAGE-BACKED SECURITIES* § 5.05(4)(c) (1985)).

111. See Bauer, *supra* note 101, at 377 (“[R]edemptions occurred after 10.4% of the mortgage foreclosure sales held between 1881 and 1980” in Johnson and Iowa Counties, Iowa); W. L. Shattuck, *Security Transactions*, 36 WASH. L. REV. 303, 311 n.3 (1961) (Washington Mortgage Correspondents Association study revealed that “in a representative group of 276 foreclosures,” only one mortgagor redeemed); David A. Bridewell, *The Effects of Defective Mortgage Laws on Home Financing*, 5 LAW & CONTEMP. PROBS. 545, 558 n.28 (1938) (Home Owners’ Loan Corporation Study showed that less than one percent of 22,000 foreclosed properties were redeemed).

112. Obviously, if the number of bidders at a foreclosure sale is decreased by the existence of a statutory right of redemption, and the foreclosure sale purchase price is correspondingly decreased, the result redounds to the detriment of both mortgagors and mortgagees. A reduction in the purchase price would decrease the amount of funds available to pay off the secured indebtedness, and reduce the availability to the mortgagor of any equity in the foreclosed property.

113. See Wechsler, *supra* note 56, at 888.

114. 12 U.S.C. §§ 2601–2617 (1994).

115. 15 U.S.C. §§ 1601–1693 (1994).

to the terms of their loans. If there is one thing even the most unsophisticated home mortgagor should understand, it is that if she fails to make her mortgage payments, she will lose his home.<sup>116</sup>

Many of us are emotionally attracted to the notion that because most lenders are big and powerful institutions, they should not be permitted to assert their rights at the expense of the average consumer.<sup>117</sup> Our sympathy for the underdog might suggest that if a mortgagor is unfortunate enough to lose her home to foreclosure, she should have the right to reclaim the property, within a reasonable period of time, if through diligence or luck she raises funds which are sufficient to reimburse the lender or other foreclosure sale purchaser. The procedure would be justified because it deprives the lender of a windfall that it would have received at the expense of the borrower.<sup>118</sup>

However, if we unstack the deck and posit the lender as an honest and struggling wage earner who has invested all or a substantial portion of his retirement savings in a loan to a local businessperson, perhaps the emotional argument does not play so well.<sup>119</sup> To the author's knowledge, no state has enacted a statutory right of redemption which distinguishes among mortgages to which the right applies, based on the size, sophistication, or financial wherewithal of the mortgagee. Regardless of the nature of the mortgagee, there is no compelling reason to give the mortgagor more than her contract and the post-default equitable right of redemption entitle her to have.<sup>120</sup> The foregoing assertion invites the following syllogism: *The extra-contractual benefits provided by law are, in fact, a part of the contract. The mortgagee knows, or should know, of the statutory requirements and he willingly enters into the transaction in full contemplation of the law. Therefore, the mortgagor is entitled to any rights expressly provided for by the contract, or implied by law.*<sup>121</sup> Perhaps it is true that the mortgagee enters into secured loan transactions with knowledge of the law; however, such a conclusion avoids

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116. This does not mean to suggest that individual mortgagors, particularly in a residential context, understand all, or most, of the intricacies of mortgage instruments or the financial markets in which they are sold. Obviously, even a highly sophisticated consumer, who is not a financial expert or an economist, would have difficulty in achieving such a level of understanding. Nonetheless, the basic terms of the transaction and the consequences of default are not difficult to comprehend. See *infra* notes 157-60 and accompanying text.

117. See *Mixon & Shepard, supra* note 62, at 461.

118. The obvious assumptions here are 1) the foreclosure sale will bring less than the fair market value of the property, 2) the mortgagee will purchase at the foreclosure sale, and 3) the mortgagee subsequently will resell the property at its fair market value, thereby reaping a windfall.

119. Some might suggest that my example goes a bit too far and creates a caricature of the downtrodden lender. However, it is intended to represent the polar opposite of the frequently assumed attributes of the lender. It is significant to note that, in 1992, 12.4% of American mortgage debt outstanding, for one-to-four family homes, was held by "individuals and others," exclusive of commercial banks, savings institutions, life insurance companies, federal and related agencies, and mortgage pools or trusts. See AMERICAN BANKERS ASS'N, STATISTICAL INFORMATION ON THE FINANCIAL SERVICES INDUSTRY 507, tbl. 124 (6th ed. 1993).

120. Even in the absence of a statutory right of redemption, the mortgagor has the ability to default on her mortgage obligation, and thereafter recover her property by exercising her equitable right of redemption at any time prior to the consummation of the foreclosure sale. See *supra* note 83 and accompanying text.

121. Cf. *Berger, supra* note 106, at 1246 (suggesting that rent control legislation does not impose an unfair burden on landlords, particularly those who purchase property after the rent control regime is in place); *Edgar O. Olsen, Is Rent Control Good Social Policy?*, 67 CHI.-KENT L. REV. 931, 935 (1991).

grappling with the issue of whether the existence of the law, and the effluent consequences, are appropriate.<sup>122</sup>

Supporters of statutory rights of redemption do not appear to suggest that mortgagors are being hoodwinked into exposing their properties to unreasonable risks of loss.<sup>123</sup> To the contrary, in many instances the mortgagor could not have acquired the property, but for the availability of the mortgage.<sup>124</sup>

Besides, the mortgagor has at her disposal some means of retaining her property, which are unavoidable by the mortgagee. First and foremost, she can comply with the terms of the mortgage. To be even more precise, if the mortgagor makes his payments on time, she virtually eliminates the risk of, and problems associated with, foreclosure. Failing that, in a typical residential context, she can pay off or refinance the loan prior to the institution of foreclosure proceedings, without suffering a prepayment fee.<sup>125</sup> Finally, she can exercise his equitable right of redemption by paying off or refinancing the loan after foreclosure proceedings have commenced but prior to completion of the foreclosure sale.

Thus, the mortgagor is given several opportunities to retain her property, assuming she has the financial wherewithal to do so. If she is unable to do so, it is not the lender's fault. It is unwise and inappropriate to permit mortgagors, after their own repeated failures, to reach back into the process and undo a completed foreclosure sale. Lenders and other foreclosure sale purchasers should not be forced to stand still while the mortgagor is given additional time to clean up a mess over which the lender has no control and to which the lender did not contribute.

## V. THE POLICY OF PROTECTING THE HOMESTEAD

Perhaps there is a reason or justification for statutorily mandated mortgagor relief that transcends naked sympathy for mortgagors. Some

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122. Cf. Richard A. Epstein, *Rent Control Revisited: One Reply to Seven Critics*, 54 BROOK. L. REV. 1281, 1295 (1989).

123. But cf. Mixon & Shepard, *supra* note 62, at 461-62 (In the context of supporting anti-deficiency legislation, the authors assert: "Housing suppliers, lenders, and government induce stable wage earners to buy housing at the outer limit of their financial capability and commit to mortgage debt that exceeds two years of annual gross income.").

124. In a residential context, there is substantial evidence that the overwhelming majority of mortgage secured loans are purchase money loans. See ECONOMICS & STATISTICS ADMIN., BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL BRIEF 94-27, FINANCING OUR RESIDENTIAL PROPERTY (Oct. 1994) (In 1991, 81% of owners of single-family properties had acquired them with purchase money mortgages; 73% with a single new mortgage, 65% with assumed mortgages, and 2% with more than one new mortgage). See also Wechsler, *supra* note 56, at 871 (in foreclosures in Onondaga County, New York, in 1979, 81% of 118 foreclosed mortgages were purchase money mortgages).

Purchase money mortgages include a mortgage taken back by the seller of property to secure financing provided by the seller to assist the purchaser in acquiring the property. Mortgages given to a third party lender (a lender who is not the seller of the property which is the subject of the mortgage) to secure the repayment of a loan made to assist the purchaser in acquiring property are characterized as purchase money loans as well.

125. See Dale A. Whitman, *Mortgage Prepayment Clauses: An Economic and Legal Analysis*, 40 UCLA L. REV. 851, 856-57 (1993). For additional discussion of mortgage prepayments, see generally Frank S. Alexander, *Mortgage Prepayment: The Trial of Common Sense*, 72 CORNELL L. REV. 288 (1987).

commentators argue that property rights in one's home are so inextricably intertwined with the individual's sense of self and well-being that they are deserving of special protection.<sup>126</sup> Is this our public policy, and should it be?<sup>127</sup> One commentator who embraces this view is Professor Margaret Jane Radin.<sup>128</sup> She defines personal property, in part, as property which, if lost, causes its owner "pain that cannot be relieved by the object's replacement."<sup>129</sup> Further, she defines fungible property as "an object that is perfectly replaceable with other goods of equal market value."<sup>130</sup> Finally, she asserts, "[w]here we can ascertain that a given property right is personal, there is a prima facie case that that right should be protected to some extent against invasion by government and against cancellation by conflicting fungible property claims of other people."<sup>131</sup> Pursuant to this logic, she categorizes a person's interest in his or her home as personal property.<sup>132</sup> This argument appears to suggest that because a home, or other item of personal property, is much more highly valued by the owner than money is valued by the lender, and because the home is in fact irreplaceable, the homeowner should not easily lose his home to repay the lender.<sup>133</sup> One can easily concede that this argument has some obvious utilitarian appeal, but it is not a moral justification for frustrating the collection efforts of the mortgagee.<sup>134</sup> To the extent that our legislatures and courts have attempted to announce public policy in the area of the protection of homesteads, their collective pronouncements have been inconsistent, at best.

### The Mortgagor/Renter Distinction

If our public policy assumes that the relationship between a person and his home is worthy of special recognition and consideration by the community, arguably, there should be little, if any, distinction between the psychic value a mortgagor places in his house, cooperative, or condominium, and that placed by a tenant in a rental property that serves as his home. Professor Radin argues:

A tenancy, no less than a single-family house, is the sort of property interest in which a person becomes self-invested; and after the self-investment has taken place, retention of the interest becomes a priority

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126. See generally Berger, *supra* note 106; Radin, *supra* note 106.

127. Although the author believes that decent housing is a basic human right, the debate surrounding that issue is beyond the scope of this Article. Moreover, it is not necessary to engage in that debate to reach the conclusion that no individual has the right to own a piece of property that he cannot afford, or one for which that he is unwilling to pay. Neither is such an engagement necessary to conclude that the definition of "decent housing" should not be limited to an individual's choice of a specific residence.

128. See generally Radin, *supra* note 106.

129. See *id.* at 959.

130. *Id.* at 960.

131. *Id.* at 1014-15.

132. *Id.* at 959.

133. *Id.*

134. See FRIED, *supra* note 36, at 17. In comparing the utilitarian's and moralist's analysis of contract enforcement, Fried asserts:

The utilitarian counting the advantages affirms the general importance of enforcing contracts. The moralist of duty, however, sees *promising* as a device that free, moral individuals have fashioned on the premise of mutual trust, and which gathers its moral force from that premise. The moralist of duty thus posits a general obligation to keep promises, of which the obligation of contract will be only a special case—that special case in which certain promises have attained legal as well as moral force. But since a contract is first of all a promise, the contract must be kept because a promise must be kept.

claim over curtailment of merely fungible interests of others. To pursue the parallel with home ownership, there the owner's interest is personal and the mortgagee's interest is fungible. That is why it seems right to safeguard the owner from losing her home even if it means some curtailment of the mortgagee's interest. Consider how we take for granted special concessions to homeowners (such as homesteading, exemptions in bankruptcy, redemption rights in foreclosure) to avoid loss of their homes.<sup>135</sup>

Yet, we find that our laws treat tenants and mortgagors quite differently.

As discussed above, the statutory right of redemption gives the mortgagor a post-foreclosure right to retake his property from the foreclosure sale purchaser and, in some instances, gives the mortgagor the right to remain in possession of the property so long as the statutory right of redemption has not expired.<sup>136</sup> In contrast, once the landlord has completed the dispossession process, the tenant is out and has no basis for regaining possession of his apartment,<sup>137</sup> even if he is willing to pay all past due rent. In the unlikely event that the tenant offers to pay not only the past due rent, but all of the rent to become due during the balance of the term of the lease, the tenant still could not successfully assert a property right in the real estate for the balance of the term of the pre-default lease.<sup>138</sup>

Similarly, anti-deficiency legislation potentially forgives the mortgagor's repayment of all or a portion of the amount of the debt that 1) exceeds the foreclosure sale price; or 2) is represented by the difference between the fair market value and the foreclosure sale price of the property. The tenant, on the other hand, can be held liable for unpaid rent for the balance of the term.<sup>139</sup> Even in states that require the residential landlord to mitigate the tenant's damages by attempting to relet the property, the dispossessed tenant remains liable to the extent that the rent under the lease exceeds the rent the landlord is able to collect, after reasonable attempts to mitigate.<sup>140</sup>

If the public policy truly seeks to protect the sanctity of the home, we

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135. Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 365-66 (1986).

136. See NELSON & WHITMAN, *supra* note 32, § 8.4, at 610; Bauer, *supra* note 101.

137. CUNNINGHAM ET AL., *supra* note 12, § 6.79, at 400-01 (indicating that every state has a statute allowing a landlord to evict a breaching tenant by summary proceedings, and that, at a minimum, the landlord has the right of possession after prevailing at the proceeding).

138. Immediate payment of the entire amount due for the balance of the lease term, in return for restoration of the right to possess the premises, would represent a hybrid of the exercise of the equitable right of redemption and the exercise of the statutory right of redemption. The tenant would not be free of all lease restrictions in the same way that the mortgagor would be free of all mortgage restrictions after exercising its equitable right of redemption. Additionally, the amount paid by the tenant would more closely approximate the debt of the mortgagor than the foreclosure sale price. However, if such a right were available to a tenant, payment of the entire lease amount in exchange for restored possessory rights would be a post eviction right, similar to the statutory right of redemption's status as a post foreclosure right.

139. See, e.g., *Sommer v. Kridel*, 378 A.2d 767 (N.J. 1977) (residential tenant was liable for rent due after tenant's breach, subject to reduction for landlord's obligation to mitigate damages); *Wilson v. Ruhl*, 356 A.2d 544 (Md. 1976) (tenant was found liable to landlord for rent coming due after tenant's breach, subject to landlord's duty to mitigate damages).

140. See, e.g., *Sommer*, 378 A.2d at 767 (residential tenant was liable for rent due after tenant's breach, subject to reduction for landlord's obligation to mitigate damages); *Wilson*, 356 A.2d at 544 (tenant was found liable to landlord for rent coming due after tenant's breach, subject to landlord's duty to mitigate damages).

must question these inconsistent results,<sup>141</sup> which are based solely on a person's status as a mortgagor or tenant. Why should the mortgagor, simply by virtue of the fortuity of having the financial wherewithal to qualify for a loan to buy a house, be afforded a heightened ability to protect his home, vis-à-vis the renter?<sup>142</sup> Arguably, a renter, who often is more economically disadvantaged than a mortgagor, has a greater need for protection of his ability to remain in his home than does the mortgagor.

In response to the disparate treatment of mortgagors and renters, one could take the position that instead of reducing the protection available to mortgagors, the appropriate reconciliation of the differences would be to enhance the extra-contractual rights now available to renters. This approach would eliminate the imbalance, but it would not address the issue of where we should draw the line in requiring individuals to take personal responsibility for their circumstances.

## VI. A CALL FOR PERSONAL RESPONSIBILITY

### A. *Shifting the Focus*

When we allow ourselves to be distracted by the traditional arguments either favoring or challenging the efficacy and propriety of statutory rights of redemption, we run the risk of losing sight of a more fundamental and compelling reason to question the advisability of their retention or future enactment. Simply put, it is the matter of *personal responsibility*. These are words that we are beginning to hear with increasing frequency in American society. They are a natural reaction to any number of outrageous anecdotes illustrating yet another failure of our citizens to be accountable for the consequences of their voluntary actions.<sup>143</sup> Mary Ann Glendon correctly

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141. The mitigation requirement does have an effect that is somewhat analogous to the anti-deficiency legislation that is "fair value" based. "Fair value" legislation gives the borrower credit against the debt for the fair value of the property. Mitigation requirements, on the other hand, give the tenant credit for the market rental value of the property, but only to the extent that the landlord actually rerents the property or fails to make a reasonable or diligent effort to do so.

142. Obviously, there are circumstances in which a renter has the financial resources to purchase a home, but chooses not to do so and therefore elects to be placed in the less favored status. However, it is very often the case that the tenant does not elect renter status, but is forced there by economic circumstances.

143. The examples are legion. To cite but a few:

(1) A fired employee of the Coca Cola Company successfully argued at trial that, despite his admitted alcoholism, his employer should not have fired him because he was protected by the Americans with Disabilities Act. Moreover, he was awarded a \$7.1 million judgment. Hank Ezell, *Fired Employee Wins Judgment of \$7.1 Million From Coca-Cola*, ATLANTA J. & CONST., July 1, 1995, at B3;

(2) Railroad tracks, elevated about two feet above the first fairway, traverse the Fort Kent Golf Club's nine hole course. The tracks are noted on the club's scoring cards and on a sign at the first tee. Additionally, the tracks are visible from the first tee. A golfer, playing the course for about the twenty-first time, "shanked" her third shot (from a spot located about 43 feet from the tracks), which "ricocheted off the tracks, hit her in the face, and injured her nose and face." She then sued the club and was awarded \$40,000 in damages. *Pelletier v. Fort Kent Golf Club*, 662 A.2d 220 (Me. 1995);

(3) A trial court denied the petition of a foster parent to terminate the parental rights of a minor's biological father and to adopt the child. The petitions were denied notwithstanding the facts that the biological father 1) had been incarcerated for armed robbery and child molestation; 2) had been hospitalized for serious psychological problems; 3) frequently threatened and harassed Department of Human Services social workers; and 4) was the subject of child neglect



observes: "A near-aphasia concerning responsibilities makes it seem legitimate to accept the benefits of living in a democratic social welfare republic without assuming the corresponding personal and civic obligations."<sup>144</sup>

It appears to be likely that many, if not most, people fail to view statutory rights of redemption and anti-deficiency legislation as appropriately placed among the many examples of devices which excuse irresponsibility.<sup>145</sup> Instead, the focus is on a myopic view of the fairness, or lack thereof, of permitting a mortgagor to lose her property, without the right to reclaim it, and to do so under circumstances which often include an inadequate foreclosure sale price.

The focus should not be on this narrow conception of fairness, or the relative inability of the mortgagor to shoulder the burden of losing her property and possibly failing to receive full credit for its value. The relevant question is whether we have the moral backbone to hold each competent adult responsible for the choices she makes. To allow individuals to walk away from their promises and obligations, even in the wake of law, is purely and simply wrong.<sup>146</sup> We must begin to consider seriously the implications of government intrusions which relieve the individual of bearing full responsibility for the consequences of her decisions, even when those consequences are highly undesirable. If we relieve individuals of the obligation to stand by their commitments, we diminish the individual and we diminish the collective strength of our society by eliminating our ability prudently to rely upon each other for the mutual fulfillment of promises. John Finnis observes:

Indeed, it is a truth of wide application that an individual acts most appropriately for the common good, not by trying to estimate the needs of the common good 'at large', but by performing his contractual undertakings, and fulfilling his other responsibilities, to ascertained individuals, i.e. to those who have particular rights correlative to his duties. Fulfilling one's particular obligations in justice, even within the restricted sphere of private contracts, family responsibilities, etc., is necessary if one is to respect and favour the common good, *not* because 'otherwise everyone suffers', or because non-fulfilment would diminish 'overall net good' in some impossible utilitarian computation, or even because it would 'set a bad example' and thus weaken a useful practice, but simply because the common good *is* the good of individuals, living together and depending upon one another in ways that favour the well-being of each.<sup>147</sup>

Our expectation that one must fulfill the obligations of one's commitments should be based, in part, on the assumption that the commitments were voluntarily undertaken. Nonetheless, it is difficult to imagine many, if any, circumstances under which one is compelled to take a loan and to secure

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proceedings instituted by child welfare authorities. The court supported its finding on the basis that various District of Columbia agencies failed to provide the father with services to which he was entitled and which might have enabled him to realize his "potential to react in a socially acceptable manner." *In re L.L.*, 653 A.2d 873 (D.C. 1995).

144. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE*, at xi (1991).

145. Within this context, "irresponsibility" is intended to include any situation in which the actor fails to honor her obligations to the fullest extent possible, including cases in which the actor's ability to perform is impaired, but not destroyed.

146. See FRIED, *supra* note 36, at 17.

147. JOHN C. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 305 (1980).

that loan with a mortgage.<sup>148</sup> Unfortunately, circumstances sometimes unfold in unpredictable and disadvantageous ways. We know that life is not always fair, and we should choose, as a matter of public policy, to strive for a more just and fair society. However, we must recognize that relieving the mortgagor of personal responsibility does not make it so.<sup>149</sup>

### B. The Whine Factor

At what point do we become so morally enfeebled by community and government sanctioned responsibility-shifting that our individual and collective abilities to function become imperiled? The answer to this question requires an exercise in line drawing. However, anti-deficiency legislation and statutory rights of redemption do not present close or difficult cases. Despite the protestations of those who perceive some essential connection between one's home and one's long-term psychic well-being,<sup>150</sup> these laws provide more of an economic boost to the mortgagor than a prophylactic against psychic trauma. Within relatively short bands of time, a significant percentage of our population changes residences,<sup>151</sup> sometimes voluntarily and sometimes involuntarily, with no apparent long-term or significant negative impact. However, and more to the point, when we employ these unique devices to effectuate a special case for mortgagors, we unnecessarily chip away at the sense of individual responsibility which is a key attribute for each fully functioning citizen.<sup>152</sup> Our laws, including anti-deficiency legislation and statutory rights of redemption, send clear and powerful messages about our society's views of right or wrong, and about the types of behavior we are willing to tolerate.<sup>153</sup>

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148. *But see* *Mixon*, *supra* note 78, at 88.

149. *See* FINNIS, *supra* note 147, at 191. Finnis describes the unfairness or injustice which results from a debtor's expedient use of bankruptcy, when she is able to pay her debts. This is a circumstance which could be analogous to the application of anti-deficiency laws, in lieu of requiring a mortgagor to resort to bankruptcy protection. Finnis asserts:

For it is certainly possible, and in some places not uncommon, that someone who could pay his just debts if he were so minded may choose instead to have them cancelled by bankruptcy, submitting himself to temporary inconvenience for the sake of a future freedom from financial difficulty, a freedom which his own action may deny to his defeated creditors (say, small shopkeepers) or to others (say, fellow students to whom valuable sources of credit may now be closed). No system of law can secure justice if its subjects, let alone its officials, are themselves careless of justice.

*Id.* *See also infra* notes 171 and 172 and accompanying text.

150. *See* Berger, *supra* note 106, at 1240-41, and Radin, *supra* note 106.

151. Twenty-two percent of all households in the 335 American metropolitan areas moved within the 15-month period immediately preceding the 1990 U.S. Census. *See* ECONOMICS & STATISTICS ADMIN., BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL BRIEF 94-20, HOUSING IN METROPOLITAN AREAS—MOVERS AND STAYERS (Sept. 1994).

152. *See* LAWRENCE M. MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP 43 (1986). ("Those who are free of responsibility for themselves cannot be free to make their own way in society.")

153. *See* AMITAI ETZIONI, THE SPIRIT OF COMMUNITY—RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA 48 (1993). In describing how our laws influence or express our collective vision of morality, Etzioni explains:

When we changed the laws that apply to divorce to make it "no fault," far from being viewed as a technical change or as [a] way to make divorce less costly, many considered the new law to be one more indication that the community was less troubled by easy divorce than it had been. For much the same reason, if we were now to enact somewhat stricter divorce requirements, it would signal that we were restoring our respect for the family. It is important, then, to recognize

Therefore, we should eliminate these fail-safe devices to help preserve the individual strength of character that is necessary to insure the continuing vigor of our society.<sup>154</sup> Let us not continue to convey to our citizens the message that it is acceptable to avoid fulfilling our mortgage obligations because government-sanctioned relief is on the way.

Certainly, it is difficult to disagree with the proposition that it is the government's responsibility to protect its citizens from predators who would employ fraudulent or deceptive practices for selfish advantage. However, we go too far when we provide a cushion for those of us who are fully prepared to reap the rewards of a bargain, but equally prepared to "weasel out" of the downside of the same deal. Statutory rights of redemption and anti-deficiency legislation appear to be little more than codified responses to a national whine. Charles Sykes aptly describes the societal neurosis which leads to the support of these legislative escape hatches.<sup>155</sup> He asserts that members of our society feel we have the right to succeed, and the concomitant right to protection from failed expectations.<sup>156</sup>

## VII. A POSSIBLE SOLUTION

Although I am aware of no empirical studies which support the proposition, I suspect that it is rarely the case that a borrower, faced with foreclosure of his property, honestly asserts that at the time he signed the mortgage he was unaware that, if he didn't pay his debt as agreed, his property could be lost through foreclosure. This is precisely the type of assertion that should be eliminated by appropriate lender disclosure.

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the *expressive power* that law holds for the community's moral concerns and for influencing what is deemed appropriate and inappropriate behavior.

*Id.*

154. See Suzanna Sherry, *Without Virtue There Can Be No Liberty*, 78 MINN. L. REV. 61 (1993). In this wonderful essay, Sherry, quoting several prominent and other founding era Americans, asserts:

The quotation..., "without virtue there can be no liberty," is from a 1786 speech by Benjamin Rush, but it is just one formulation of an idea that was common to virtually every American in the founding era. Samuel Adams wrote that men "will be free no longer than while they remain virtuous." His cousin and political opposite, John Adams, said that "public Virtue is the only Foundation of Republics." An anonymous opponent of the Constitution wrote that a "free government, can only exist where the body of the people are virtuous." Another commented that "[a] virtuous people make just laws, and good laws tend to preserve unchanged a virtuous people." All these thinkers, and many others, rested their hopes for America largely on the character of its people: neither written constitutions nor unwritten rights, neither governments nor armies, could save a nation whose people would not save themselves.

*Id.* at 68-69 (citations omitted).

155. See generally CHARLES J. SYKES, *A NATION OF VICTIMS—THE DECAY OF THE AMERICAN CHARACTER* (1992).

156. *Id.* Sykes explains:

For a society that has substituted techniques for values, however, the response to personal setbacks is either to redouble the search for nostrums or to let out the plaintive cry "It's not fair!" That attitude may be preferable to despair, but perhaps it is merely a byway that has the same destination. In place of a recognition that human life is marked by disappointment and limitation, we have enshrined the infinite expectation—for psychological gratification, self-actualization, self-realization, and happiness—not as a goal to be won but as an entitlement.

*Id.* at 20-21.

It should be the mortgagee's responsibility to insure that all required disclosures are made to the mortgagor, but we should be aware that certain putative borrowers may be incapable of comprehending the lender's disclosures. In all cases, the lender should be obligated to make certain specified inquiries of the borrower to determine whether the loan transaction is suitable, in light of the disclosures and the borrower's ability to understand them.

### A. Education/Disclosure vs. Regulation

Clearly, there is disagreement among the commentators with respect to the relative merits of disclosure or education versus more direct government regulation of mortgages.<sup>157</sup> However, so long as we exercise appropriate care in identifying and disqualifying those individuals who are incapable of comprehending or bearing the risk of mortgages and potential deficiencies, arguably we should have less reason for concern with the potential shortcomings of disclosure or education programs and requirements.

One argument that could be raised against the choice of education over legislative preclusion of certain contractual options is that even with very detailed disclosures or efforts to educate, some transactions, or their supporting documentation, are so complex that consumers simply are incapable of comprehending their intricacies.<sup>158</sup> Even if we accept this proposition as a factually correct assertion, it is difficult to imagine that the overwhelming majority of mortgagors could not be informed of and made to understand four basic and relevant facts: 1) if the mortgagor defaults on the mortgage, the lender may foreclose; 2) if the lender forecloses, the mortgagor will irretrievably lose his property; 3) foreclosure sales are not negotiated in arm's-length market transactions, therefore the property will sell for less than its fair market value; and 4) in the likely event that the foreclosure sale results in a depressed sale price, the mortgagor will be required to pay the entire amount by which the outstanding debt exceeds the foreclosure sale proceeds. These are not difficult concepts.

Notwithstanding the ability of most mortgagors to understand the foregoing disclosures,<sup>159</sup> some consumers are simply incapable of comprehending the nature or the magnitude of the risks associated with default under a mortgage. Thus, an additional, and reasonable, prophylactic measure would be to require those regularly engaged in the business of mortgage

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157. See *Mixon & Shepard, supra* note 62, at 485 (describing loan closing documents as "unexplained (and unexplainable)"); William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction*, 70 VA. L. REV. 1083 (1984) (suggesting a combination of disclosure requirements and transaction standardization). Cf. Robert S. Adler & R. David Pittle, *Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation?*, 1 YALE J. ON REG. 159 (suggesting that historical government information and education campaigns have been ineffective, but with appropriate modifications future campaigns could be effective); Murray L. Weidenbaum, *Reforming Government Regulation*, REG., Nov.-Dec. 1980, at 15. (suggesting that providing appropriate information to the public is preferable to direct government regulation).

158. See *Mixon supra* note 78, at 89 n.300.

159. But see Eskridge, *supra* note 157, at 1133. In criticizing the disclosures required by the Truth-in-Lending Act, Professor Eskridge asserts: "Consumers have a limited ability to absorb and process information during any given period. If they receive too much, they either will be unable to make accurate comparisons or will be discouraged from even trying to evaluate the data." *Id.*

lending<sup>160</sup> to take appropriate steps to identify the relatively small percentage of loan applicants who are presumptively ineducable, with respect to mortgage risks, or demonstrably incapable of understanding the disclosed risk attendant to mortgage transactions. It follows that mortgage lenders then should be required to refrain from entering into mortgage transactions with borrowers who fail to demonstrate the requisite ability to comprehend the lender's disclosures.<sup>161</sup>

### B. The Securities Analogy

The type of inquiry suggested above would be analogous to the inquiries offerors or sellers of securities are required to make with respect to the suitability<sup>162</sup> of certain types of investments for the individual purchaser.<sup>163</sup> The seller of the security must take certain steps to insure that the investor has either the individual wherewithal to make a prudent investment decision or that he has competent advisors to aid in the decision making process. If the seller, after due inquiry, legitimately determines that the investor, either individually or together with his advisor, is qualified to make the investment decision, the

160. This requirement should be applicable only to lenders, who regularly engage in the business of making mortgage loans, because it is possible that many individual lenders (such as those providing seller financing) may be no more sophisticated as to financial matters than the mortgagors to whom they lend.

161. Perhaps the simple answer is to require the lender to obtain from the borrower an independent appraisal of the property, and to prohibit loans of more than a selected percentage of the appraised value of the property. We would assume that if the loan represents less than a predetermined percentage of the appraised value of the property, the deficiency risk is low enough to permit virtually any borrower to be deemed to have accepted the risks knowingly. Notwithstanding this precaution, the borrower would, in fact, be subject to the risk of an inaccurate appraisal or a substantial decline in the market value of the real estate.

162. See Eskridge, *supra* note 157, at 1200-03. Professor Eskridge proposes a suitability rule which would be applicable to real estate intermediaries (e.g. real estate brokers) who advise home buyers with respect to various housing and financing alternatives. However, the suitability standard suggested here would be applied by lending institutions to potential mortgagees, and would not contemplate a comparison of the mortgage offered with any other financing alternatives. The only test would be whether the mortgagor has the ability to understand and bear the risk of the mortgage. The relative merits of other financing vehicles or competitive mortgages would be irrelevant. *Id.*

163. 17 C.F.R. §§ 230.501-230.508 (1996). For sales of unregistered securities, not exceeding an aggregate sales price of \$5,000,000, an issuer may sell to an unlimited number of "accredited investors." *Id.* § 230.505. With respect to sales of unregistered securities, without regard to the dollar amount of the offering, an issuer may sell to no more than 35 purchasers, each of whom must be a "sophisticated purchaser." Rule 506 describes the nature of these so-called "sophisticated investors" as follows:

Each person who is not an accredited investor either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description.

*Id.* § 230.506(a)(2)(ii). An "accredited investor" is defined in part, as follows:

"Any person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds \$1,000,000"; *id.* § 230.501(a)(5), or "[a]ny natural person who had individual income in excess of \$200,000 in each of the two most recent years or joint income with that person's spouse in excess of \$300,000 in each of those years and a reasonable expectation of reaching the same income level in the current year." *Id.* § 230.501(a)(6).

"Purchaser representative" is defined, in part, as a person who "[h]as such knowledge and experience in financial and business matters that he is capable of evaluating, alone, or together with other purchaser representatives of the purchaser, or together with the purchaser, the merits and risks of the prospective investment." *Id.* § 230.501(h)(2).

investor is thereafter at risk of partial or total loss of the investment. Moreover, in the absence of fraud or some other violation of the securities laws, the investor has no recourse against the seller of the security if the investment is lost.<sup>164</sup>

The securities laws referred to above seek to provide investors with a sufficient informational basis upon which to make prudent investment decisions, or to preempt the marriage of unsophisticated or financially frail investors with inappropriate investments. Both of these goals would be equally useful in connection with regulating mortgages. However, currently existing mortgagor protection devices push the envelope to an unreasonable extreme. Statutory rights of redemption and anti-deficiency legislation go several steps further and effectively pronounce to the borrower:

1. If you make an imprudent financial decision and cannot repay the lender, *as you promised*, we will provide you with some additional time to recover. Moreover, if, at such time as the mortgage is foreclosed, the remaining balance of your debt exceeds the amount received at the foreclosure sale, we might force the lender to forgive a portion of the debt. We might force this forgiveness irrespective of whether, at the time the loan closed (a) you and the lender knew the property was worth less than the loan amount; (b) an independent appraiser made an inaccurate but good faith valuation of the property which indicated that its value exceeded the loan amount; or (c) the value of the property far exceeded the loan amount, but declined after the loan was made.

2. If you make what appeared at the time to be a prudent financial decision to enter into a mortgage, and later, through no fault of yours or the mortgagee, you lose your job, suffer a catastrophic illness, or some other financial misfortune renders you unable to repay your mortgage, *as you promised*, we will punish the lender by providing you with the relief set forth above.

3. Even if you can easily afford to pay your mortgage, *as you promised*, but choose not to, or even if you otherwise negligently, willfully, or maliciously fail to pay your mortgage, *as you promised*, in either event we will punish the lender by providing you with the relief set forth above.

If the borrower, through no fault of the mortgagee, is unable or unwilling to repay his debt, the lender should have the unfettered ability to pursue its fully disclosed, understood, and agreed upon remedies.<sup>165</sup> This result is neither inappropriate, in a legal sense, nor unjust in a moral sense. To the

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164. It should be noted that, with respect to most offerings and sales of securities registered under the Securities Act of 1933, the issuer of the securities is not required to apply suitability or sophistication standards to potential investors. All relevant disclosures are made in the registration statement and offering prospectus, and the purchaser of the securities essentially is left to his or her own devices to comprehend the nature and import of the disclosures. Again, in the absence of fraud or other violation of the securities laws, the purchaser is at risk for the entire investment.

165. This Article does not mean to suggest that actual mortgagee fraud or misconduct should be ignored, or that a mortgagee in such circumstances should be free to pursue all remedies contained in the mortgage. To the contrary, if the lender defrauds the mortgagor or fails to make reasonable disclosure to the borrower, in terms that are understood by a reasonably prudent borrower, appropriate remedial measures should be made available to the borrower. Furthermore, punitive actions should be levied against the mortgagee, if they are warranted by the circumstances.

contrary, permitting the mortgagor to delay or defeat, in whole or in part, the mortgagee's claim unjustifiably alters the contractual rights for which the mortgagee should be permitted to bargain, and imparts a benefit to the mortgagor, at the expense of the mortgagee or others.<sup>166</sup> More importantly, when we fail to require the mortgagor to honor his obligations, he avoids taking personal responsibility for the consequences of his own decisions.

### C. The Bankruptcy Alternative

The suggested result could appear to be harsh, if it is not viewed within the larger context of protections currently available to debtors, including mortgagors. To the extent that the public policy is best served by providing special protection for the interests of owners of real property, we have at our disposal an intricate and comprehensive array of tools which, at least in part, provide such protection. The United States Bankruptcy Code<sup>167</sup> contains provisions which exempt certain assets<sup>168</sup> from inclusion in Chapter 7<sup>169</sup> individual liquidation procedures, and various states have their own homestead or other exemptions which provide significant protection for overextended borrowers.<sup>170</sup> It seems far more appropriate to employ the Bankruptcy Code's comprehensive scheme of balancing the interests of creditors against the desirability of providing borrowers with a so-called "fresh start," than to

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166. See *supra* note 77 and accompanying text.

167. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (11 U.S.C. §§ 101-1330 (1994 & Supp. I 1995)), amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C. (1994 & Supp. I 1995)); Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C. (1994 & Supp. I 1995)); Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (codified as amended in scattered sections of 11 U.S.C. (1994)); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified as amended in scattered sections of 11 U.S.C. (1994)); Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2865 (codified as amended in scattered sections of 11 U.S.C. (1994)); Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C. (1994 & Supp. I 1995)); Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C. (1994 & Supp. I 1995)); Treasury, Postal Service and General Government Appropriations Act of 1991, Pub. L. No. 101-509, 104 Stat. 1389 (codified as amended in scattered sections of 28 U.S.C. (1994 & Supp. I 1995)); Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-121, 107 Stat. 1153 (codified as amended in scattered sections of 28 U.S.C. (1994 & Supp. I 1995)); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320934, 108 Stat. 1976, 2135 (codified at 11 U.S.C. § 523 (1994)); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended in scattered sections of 11 U.S.C., 18 U.S.C., and 28 U.S.C. (1994 & Supp. I 1995)) [hereinafter Bankruptcy Code or Code].

168. The Bankruptcy Code provides a listing of assets that may be excluded from consideration in making the determination as to the value of a debtor's assets which are available to repay creditors. 11 U.S.C. § 522(d) (1994). However, the Code defers to each individual state's election to provide exemptions which differ from those provided by the Code. 11 U.S.C. § 522(b) (1994).

169. 11 U.S.C. §§ 701-766 (1994).

170. See, e.g., FLA. CONST. art. X, § 4(a)(1) (exempting the debtor's home plus 160 acres, if located outside of a municipality, or home plus one-half acre, if located within a municipality); FLA. STAT. ch. 222.14 (1995) (exempting cash surrender value of life insurance and annuity contracts); FLA. STAT. ch. 222.18 (1995) (exempting disability income benefits); TEX. CONST. art. XVI, § 50 (exempting debtor's home); TEX. PROP. CODE ANN. § 42.0021 (West 1996) (exempting retirement plans).

provide piecemeal and potentially disproportionate and morally inappropriate protection for mortgagors.<sup>171</sup>

Before we rush to relieve the mortgagor from obligations incurred in exchange for substantial personal benefit, at a minimum we should use the bankruptcy process to examine the mortgagor's ability to fulfill the obligation. This examination includes a thorough evaluation of each and every non-exempt<sup>172</sup> asset owned by the mortgagor, with a view toward paying various categories of creditors. Bear in mind that, under some circumstances (e.g., a non-purchase money mortgage), anti-deficiency legislation potentially shields the actual cash proceeds of the loan from the reach of the mortgagee. Thus, the mortgagor could mortgage his real estate, retain the cash proceeds of the loan, and force the mortgagee to recover the loan, if at all, through a foreclosure sale of the mortgaged real estate. As a practical matter, this would result in a forced purchase of the security by the lender.

### VIII. CONCLUSION

The desirability and usefulness of mandatory statutory rights of redemption and anti-deficiency legislation can be, and have been, debated on the basis of the effectiveness with which they accomplish the goal of providing consumer protection. Additionally, arguments have been made with respect to who, as between the mortgagor and the mortgagee (or the lending industry), is best able to avoid or bear the risk of loss associated with defaulted mortgage obligations. While these arguments are interesting and have an appropriate place in other contexts, I believe they divert our attention from a point upon which focus is most urgently needed. Irrespective of the effectiveness, or lack thereof, of anti-deficiency legislation and statutory rights of redemption in providing financial and other relief for mortgagors, and without regard to who is best able to avoid or bear the risks of mortgage defaults, mandatory rules that provide these forms of borrower relief signal societal approval of mortgagors' failure to honor their promises and to take responsibility for the burdens of their mortgage obligations. This signaling contributes to the moral impoverishment of individual mortgagors and, ultimately, to the moral impoverishment of our society at large.

A preferable and morally justifiable means of addressing our collective concern for the plight of mortgagors is 1) to require comprehensive and comprehensible disclosures to prospective borrowers, regarding the potential consequences of default, and 2) to require mortgagees to perform a borrower sophistication analysis as part of the loan qualification process. Mortgagees should not be permitted to make loans to borrowers who have not demonstrated the ability to understand the risks of the mortgage transaction, as described in

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171. See *Mixon*, *supra* note 78, at 45. *Mixon* suggests that the absence of anti-deficiency legislation would force mortgagors with overwhelming liability for deficiency judgments to file for bankruptcy protection, thereby engaging in what he believes mortgagors view to be "immoral and degrading" behavior—debt avoidance. *Id.* However, I would argue that anti-deficiency legislation is simply a government sanctioned form of debt avoidance, which in some respects cannot be meaningfully distinguished from bankruptcy in a positive way. In fact, unlike bankruptcy, anti-deficiency legislation potentially permits some financially able mortgagors to preserve non-exempt assets, while being relieved of legitimate obligations.

172. Non-exempt assets are all assets not exempted by 11 U.S.C. § 522(d) (1994). See *supra* note 168.



the required disclosures. However, once a mortgagor has been appropriately qualified, and notified of the potential risks of a mortgage default, the mortgagee should be permitted to pursue foreclosure and, in applicable cases, a deficiency judgment, unimpeded by statutory rights of redemption and anti-deficiency legislation.

