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Empathy's White Elephant: Responding to the Subprime Mortgage Crisis without Denigrating the Poor

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Empathy's White Elephant: *Responding to the Subprime Mortgage Crisis Without Denigrating the Poor*

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INTRODUCTION

Empathy is the new coverture. Before state legislatures abolished it in the nineteenth century, the plea of coverture nullified any attempts by a married woman to exercise sovereignty over her property. Just as coverture did to married women, the now-well-known call for empathy in our nation's judgments threatens to deny poor borrowers, as a class, the freedom and responsibility to manage their assets. Empathy, as the ideal judge would employ it, would impede the agency of, and thus denigrate, persons within that class. The injustice (and ground for the ultimate abolition) of coverture arose from its failure to respect women in their capacity as responsible agents of legal and moral choosing. Similarly, the class-based adjudication proposals (grounded in empathy) examined below fail to respect poor mortgagors as responsible moral and legal agents.

Judges and scholars are turning general calls for empathy into concrete proposals for granting special rights to some classes of persons, including minorities and the poor.[1] This article demonstrates from two different jurisprudential perspectives that those proposals jeopardize the agency of poor property owners. First, the proposals impede personal responsibility. Any coherent account of property owner sovereignty within the liberal tradition must include recognition of both the freedom and the responsibility entailed in individual choice and action.

Second, the proposals denigrate the dignity of poor borrowers. This article defends the position that property owners exercise sovereignty over their assets by reasoning about ends and purposes and choosing among intelligible reasons

1. *See, e.g.*, Jack B. Weinstein, *The Role of Judges in a Government of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 21 (2008); Mitchell F. Crusto, *Obama's Moral Capitalism: Resuscitating the American Dream*, 63 U. MIAMI L. REV. 1011, 1017–18 (2009).

for action. The empathy-based rights proposals presuppose that these choices are irrational. Legal doctrines that fail to account for and respect the capacity for freedom, responsibility, and practical reasonableness in a class of persons are not merely unwise, but also are inconsistent with human dignity, and are for that reason unjust.

The empathy proposals are nevertheless helpful because they provide an occasion to examine the rationality of subprime borrowing. It is useful to examine the reasons why mortgagors choose to assume risky mortgage obligations. If these reasons are in fact intelligible, then the law ought to respect the choices that follow from them, even while protecting poor and vulnerable borrowers from unscrupulous lenders. This inquiry has obvious, continuing importance as the states and Congress fashion policies to govern the real estate lending market going forward.

Despite all of the problems that empathy poses for moral agents, lawmakers, and judges, empathy's close cousin, forgiveness,[2] has a place in law. This article concludes that forgiveness[3] can be consistent with the practical reasonableness and personal autonomy of those whom the law governs. Where the terms on which forgiveness is extended are established by a legislative body *ex ante*, and the doctrine is available for use by all regardless of socioeconomic class, the law respects the forgiven actor as a responsible agent of legal and moral choosing.

I. POLICY RESPONSES VS. RIGHTS RESPONSES TO PREDATORY LENDING

A. Empathy and the Constitutionalization of Lending Law

1. The President

During his campaign, President Obama notoriously promised to appoint to the federal bench judges who demonstrate empathy for particular classes of litigants.[4] On various occasions, the President has made clear that judicial empathy entails giving special consideration to some classes of persons, especially the poor, minorities, homosexuals, the disabled,[5] and people who express unpopular ideas.[6] The President's decision to single out these particular litigants is curious. No one doubts that a judge ought to empathize with litigants on both sides of each case, to understand their arguments, to understand the implications for those litigants of the decision he will reach, and to understand the facts of

2. Provisions within the law for forgiveness, as explained below, relieve legal agents of responsibility on certain conditions. *See infra* Part IV.

3. Consistent with its focus on real estate lending law, this article focuses on forgiveness within mortgage foreclosure proceedings, otherwise known as redemption. *See infra* Part IV.

4. *See* Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL'Y. 1035, 1042 (2009).

5. *See id.*

6. *See* John W. Whitehead & John M. Beckett, *A Dysfunctional Supreme Court: Remedies and a Comparative Analysis*, 4 CHARLESTON L. REV. 171, 177 (2009).

the case in context. But the idea that some classes of persons are entitled to more empathy than others, or are entitled to empathy not accorded to others, is problematic for the reasons explored below.

Lest any American doubt his resolve, the President reiterated his pledge when Justice Souter announced his retirement from the Supreme Court. In selecting Souter's replacement, the President would seek someone who understood that justice affects "the daily realities of people's lives."[7] He stated, "I view that quality of empathy, of understanding and identifying with people's hopes and struggles[,] as an essential ingredient for arriving as (sic) just decisions and outcomes."[8] In contrast to his earlier comments advocating special consideration for minorities, homosexuals, and the poor, on this occasion the President affirmed the importance of the rule of law, constitutional traditions, "the integrity of the judicial process[,] and the appropriate limits of the judicial role."[9]

Much of the commentary about the President's comments has focused on the qualifications of judicial nominees.[10] But President Obama's comments suggest that federal judges should not merely demonstrate a capacity for empathy, but also adjudicate claims based on empathy for particular classes of persons and create judicially-enforceable rights and entitlements for those who are poor or otherwise disaffected. This would empower courts to advance the interests of certain classes over others. It would bypass the efforts of legislative bodies and other policy-makers to reform those areas of the law that most affect minorities and the poor on equally-applicable grounds that are neutral as to class and affluence.

Though President Obama's elliptical comments on the subject have received the most attention for obvious reasons,[11] he is neither the first nor only noted lawyer to advance the argument that empathy toward particular claimants ought to play a part in judicial decision-making. While almost no area of law remains untouched by this right-to-empathy talk, scholarship about mortgages and lending law has produced some particularly striking claims. And the recent subprime mortgage crisis has made class-based protections for poor borrowers more attractive.

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7. Remarks on the Retirement of Supreme Court Justice David Souter, 2009 DAILY COMP. PRES. DOC. 317 (May 1, 2009).

8. *Id.*

9. *Id.*

10. *See, e.g.*, Hatch, *supra* note 4, at 1042; Whitehead & Beckett, *supra* note 6, at 178.

11. *See, e.g.*, Leading Case, *Criminal Law and Procedure—Fourth Amendment—Search by School Officials:* Safford Unified School District No. 1 v. Redding, 123 HARV. L. REV. 163, 163 (2009); Whitehead & Beckett, *supra* note 6, at 178; Nelson Lund, *Judicial Review and Judicial Duty: The Original Understanding*, 26 CONST. COMMENT. 169, 170–79 (2009); Hatch, *supra* note 4, at 1041–43; Michael R. Dimino, Sr., *We Have Met the Special Interests, and We Are They*, 74 MO. L. REV. 495, 502–03 (2009); Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 499 & n.120 (2010).

2. Weinstein on Law and Empathy

United States District Court Judge and noted scholar Jack Weinstein has asserted that the "three elements of a just decision" are "facts, law, and empathy."[12] Empathy, according to Weinstein, consists in the "feelings we have for our fellow men and women" and is "vital in enforcing the rule of law."[13] Weinstein believes that litigants living "lives of silent desperation" look to judges for understanding.[14] He decries judges who are "out of touch emotionally" with the litigants before them.[15] He suggests that "sharp and growing socioeconomic differences" have a rightful claim upon the attention of judges.[16]

Many of Weinstein's applications of this empathy principle strike the thoughtful reader as entirely unobjectionable. As Judge Weinstein suggests, courts ought to be more responsive to the criminal defendant whose letters to the court go unanswered.[17] Courts ought not unnecessarily delay decisions because justice delayed affects real human lives.[18] These observations are true and laudable.

More problematic is Judge Weinstein's call for "the integration of mercy and justice for the people."[19] This call raises difficult questions of competence and subsidiarity. Why should courts be institutions of mercy, especially when mercy collides with justice? And should courts imitate or intrude upon the sovereignty of the many other institutions that specialize in mercy, such as the church and non-profit organizations?

Leaving these questions aside, Weinstein's claim raises other questions about how the integration of justice and mercy might be instantiated in real cases. For example, how can a judge show mercy to one litigant without disadvantaging other parties? And how can he do so consistent with his duty to uphold the law? Weinstein calls for "flexibility in interpreting the Constitution" and prefers a view of that document that "tends to favor the have-nots."[20] One can infer that his invocation of "flexibility" signals a willingness to read into the text new rights. This proposal to extend special constitutional protections to the poor raises troubling questions.

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12. Weinstein, *supra* note 1, at 21. Weinstein is not the only judge to take seriously the idea of empathy-based decision making. In his dissent from the Ninth Circuit's recent decision upholding the constitutionality of the Pledge of Allegiance, Judge Reinhardt scolded the majority for failing to empathize with atheists. *See* Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1114–15 (9th Cir. 2010). Reinhardt believes that empathy is "most desirable in, even if frequently absent from, today's federal judges at all levels of the judicial system." *Id.* at 1115 n.109.

13. Weinstein, *supra* note 1, at 25.

14. *Id.* at 25–26 (citing United States v. Delgado, 994 F. Supp. 143 (E.D.N.Y. 1998) (quoting HENRY DAVID THOREAU, WALDEN, OR LIFE IN THE WOODS 9 (Vintage Books 1991) (1854))).

15. *Id.* at 26.

16. *Id.*

17. *See id.* at 27.

18. *See* Weinstein, *supra* note 1, at 26.

19. *Id.* at 28.

20. *Id.* at 34–35.

3. Others

Weinstein is not alone in calling for special constitutional privileges for the poor. One law professor has called for rejection of "equal treatment" under the law and adoption of a new equal protection doctrine of "equal concern" based on "empathy for persons."[21] Another has, more radically, called for a "due process of storytelling" to promote empathy for the disadvantaged.[22] These lawyers invoke empathy as a principle on which to constitutionalize socioeconomic differences between litigants. One is left to wonder how this constitutionalization would play out. In light of the recent mortgage crisis, one particularly wonders what implications these proposals have for lending and mortgage law.[23]

4. Crusto on Empathy and Suspect Classifications

While Weinstein and the others leave the implications of their proposals largely unexplored, Professor Mitchell Crusto is considerably more thorough.[24] Crusto ties judicial empathy directly to legal recognition of socioeconomic status as a suspect class for Fourteenth Amendment purposes.[25] This constitutional protection is necessary to combat predatory lending to poor mortgagors, Crusto claims. Predatory lending consists of "lending to marginalized people under . . . terms that they cannot afford,"[26] and includes subprime mortgage lending.[27] In Crusto's view, predatory lending practices constitute a war on the middle class and the under-privileged.[28]

Coming to the defense of these assailed classes, Crusto invokes President Obama's call for empathy in judicial decision-making[29] and advances "moral capitalism," "a constitutionally-based approach to protecting citizens against economic discrimination on the basis of class."[30] Crusto suggests that the law as currently written fails adequately to protect poor and middle-class borrowers from unfair, predatory lending. He concedes that fraudulent lenders can be held accountable, "but proof of fraud places a tremendous litigation burden on the prey against the predatory lenders."[31] He states that "there are not many cases

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21. Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 563 (2004).

22. Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF. L. REV. 61 (1996).

23. Weinstein did comment briefly on property law. Curiously, he asserted that principles of special concern for the disadvantaged support condemnation and redevelopment of private property along the lines approved in *Kelo v. City of New London*, 545 U.S. 469 (2005). *See* Weinstein, *supra* note 1, at 164–66.

24. *See* Crusto, *supra* note 1, at 401.

25. *Id.* at 407–11.

26. *Id.* at 404 n.23.

27. *See id.* at 404.

28. *See id.* at 403–04.

29. *See id.* at 407.

30. *Id.* at 405.

31. *Id.* at 406.

finding lenders liable for predatory lending practices."[32] He believes that some "developing theories of lender liability," such as "reverse redlining" claims, show promise.[33] He notes that reverse redlining allegations are used to support both claims and affirmative defenses against mortgage foreclosure actions.[34] But reverse redlining claims require a demonstration that the borrower fits within a suspect class,[35] and therefore provide no assistance to non-minorities.

Crusto concedes that the subprime mortgage crisis has instigated numerous policy reform proposals. But "efforts to end predatory lending have been modest at best."[36] For one thing, consensus is lacking on the question: which lending practices are predatory.[37] And though several states have enacted statutes to combat predatory lending, preemption law limits the reach of those statutes to state-chartered banks.[38]

Crusto proposes a "novel constitutional theory" to redress the unfairness that he perceives in American lending practices.[39] Crusto's theory proceeds from justice-as-fairness. Fairness, he asserts, "is a fundamental principle of American culture."[40] Crusto "challenges the fairness of subjecting certain borrowers to overreaching, economically-oppressive lending practices."[41] The unfairness of subprime mortgage lending consists in requiring the "least financially capable" to "pay a higher interest rate for a mortgage."[42]

Under these circumstances, fairness requires a "principle of moral capitalism,"[43] that is "a constitutionally-based approach to protect citizens against discrimination on the basis of class."[44] Derived from "President Obama's concept of empathy as applied to constitutional jurisprudence,"[45] moral capitalism "is based on the fundamental right that every citizen has to be fairly treated in economic matters and not be a victim or prey of predatory lending practices."[46] This is a mandate of "fundamental fairness."[47]

From this principle of moral capitalism, Crusto derives two doctrinal proposals. First, he recommends recognizing "certain Middle Class and Under-Privileged borrowers"[48] as a suspect class for purposes of the Equal Protection

32. *Id.* at 416.
33. *Id.*
34. *See id.* at 417.
35. *See id.*
36. *Id.* at 407.
37. *See id.* at 412, 414, 416.
38. *See id.* at 419.
39. *Id.* at 401.
40. *Id.* at 401.
41. *Id.*
42. *Id.* at 405.
43. *Id.* at 419–20.
44. *Id.* at 410.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 424.

Clause. Second, he suggests that freedom from predation might be declared a fundamental right for purposes of the Due Process Clause.[49] These alterations of Fourteenth Amendment doctrine would enable borrowers who fall within the protected classes to assert rights-based challenges to foreclosure and other mortgage enforcement actions. Though Crusto does not explore the implications of these challenges, their most obvious use would seem to be as defenses to mortgage default and foreclosure proceedings. These would arise when disparities appear in home loans issued to mortgagors of different classes, or a poor mortgagor lacks the ability to pay at the outset of the loan.

Crusto's proposals are not without their attractions. Lenders who prey upon unsophisticated borrowers are generally much better acquainted with the risk of default than their borrowers are. These lenders willingly assume the known risks—costs of foreclosure, the loss of the time value of money, depreciation in the value of the mortgaged real estate—for which they compensate with high interest rates and other charges.[50] But they seldom account for the consequences that borrowers will endure in the event of default. Foreclosure, destroyed credit, deficiency judgments, and bankruptcy often follow default on an unsound, unwise, or risky loan. The borrower bears these costs alone.

Indeed, it is difficult to muster much sympathy for subprime lenders; empathizing with them is unlikely to make Crusto's proposals any less attractive. Nevertheless, Crusto's proposals leave lingering doubts. Is the recognition of two new constitutional rights a proportionate response to predatory lending practices in the home loan market? Crusto's proposed empathy-based constitutional rights are sure to have extensive consequences, some unintended. In particular, what will be the consequences for borrowers, especially poor borrowers, whom Crusto has set out to protect?

B. Policy Responses to Predatory Lending

Predatory lending appears to have become a problem as subprime residential loans proliferated in the last decade.[51] Many subprime loans were more costly than the borrowers' finances would justify.[52] Others imposed terms that made repayment impracticable or impossible.[53] The most responsible and rational market actors—traditional lenders—aware of the associated risks, largely refrained from issuing subprime loans.[54] Thus "legitimate" lenders did not enter the subprime market in sufficient numbers to eliminate abusive practices.[55]

Meanwhile, specialized, subprime market actors responded to the perverse

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49. *See id.* at 426–27.

50. *See* Baher Azmy, *Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation*, 57 FLA. L. REV. 295, 305 (2005).

51. *See id.* at 312–14, 319–45.

52. *See id.* at 311.

53. *See id.* at 311, 338–45.

54. *See id.* at 346–47.

55. Azmy, *supra* note 50, at 346–47.

incentives created by government sponsored enterprise giants Fannie Mae and Freddie Mac.[56] These government-backed corporations, armed with the competitive advantage attendant to their special relationship with the federal government, created an artificially-inflated secondary mortgage market.[57] Fannie Mae and Freddie Mac were able to convince buyers to purchase securities backed by bundled mortgages, obtain liquidity, and then purchase even more mortgages from primary lenders including subprime lenders.[58] Because Congress charged Fannie and Freddie with expanding credit to borrowers who could not afford traditional mortgages, subprime lenders benefited chiefly from their patronage.[59] Between 2002 and 2007 alone, "Fannie and Freddie purchased $1.9 trillion of mortgages made to borrowers with credit scores below 660, one of the definitions of 'subprime' used by federal banking regulators. This represents over 54% of all such mortgages sold during those years."[60]

Fannie and Freddie increasingly incentivized a high volume of subprime lending, rather than quality and fairness in lending.[61] The subprime lenders in turn marketed themselves directly to vulnerable potential borrowers, and their promises and disclosures were not always truthful.[62] All the while, Fannie, Freddie, and the subprime lenders who supplied them with questionable loans largely escaped regulatory oversight and the normal vicissitudes borne by fully private lenders. Fannie and Freddie are exempt from Securities and Exchange Commission filing requirements,[63] they are not required to hold as much capital

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56. *See* Terry Jones, *'Crony' Capitalism Is Root Cause Of Fannie And Freddie Troubles*, INVESTORS.COM, (Sept. 22, 2008, 7:30 PM), http://www.investors.com/NewsAndAnalysis/Article/487182/200809221930/Crony-Capitalism-Is-Root-Cause-Of-Fannie-And-Freddie-Troubles.aspx (part of an Investor's Business Daily series entitled "What Caused the Loan Crisis?"); Thomas E. Plank, *Regulation and Reform of the Mortgage Market and the Nature of Mortgage Loans: Lessons From Fannie Mae and Freddie Mac*, 60 S.C. L. REV. 779 (2009). Fannie and Freddie, with their implied government backing (which ultimately proved corporeal) effectively prevented the market from correcting the problem. *See* Peter J. Wallison, *Cause and Effect: Government Policies and the Financial Crisis*, AMERICAN ENTERPRISE INSTITUTE (Nov. 2008), http://www.aei.org/docLib/20081203_1123724NovFSOg.pdf. This was just one of many, extensive federal government interventions in the housing market throughout the twentieth and early twenty-first centuries, which contributed to the amassing of subprime loans and the economic collapse of 2008. Thus, the popular narrative among many law professors, which has governments intervening to correct "cascading market failures," Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607, 1641–42 (2010), is misleading, at best. *See, e.g.*, Robert Higgs, *Cumulating Policy Consequences, Frightened Overreactions, and the Current Surge of Government's Size, Scope, and Power*, 33 HARV. J.L. & PUB. POL'Y 531, 538–45 (2010) (chronicling some of the federal government's interventions in the housing and housing finance markets since 1930).

57. *See* Darrell Issa, *Unaffordable Housing and Political Kickbacks Rocked the American Economy*, 33 HARV. J.L. & PUB. POL'Y 407, 408 (2010).

58. *See id.* at 408–09.

59. *See id.* at 409; William Poole, *Causes and Consequences of the Financial Crisis of 2007–2009*, 33 HARV. J.L. & PUB. POL'Y. 421, 425 (2010); Higgs, *supra* note 56, at 541–42.

60. Higgs, *supra* note 56, at 541 (quoting STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 111TH CONG., THE ROLE OF GOVERNMENT AFFORDABLE HOUSING POLICY IN CREATING THE GLOBAL FINANCIAL CRISIS OF 2008, at 24–25 (2009)).

61. *See* Issa, *supra* note 57, at 409–10.

62. *See* Azmy, *supra* note 50, at 348.

63. *See* Issa, *supra* note 57, at 409–19; Higgs, *supra* note 56, at 540.

as their competitors, they pay no state and local income taxes, and their government backing enabled them to socialize their risks, even as they privatized their profits.[64]

During the subprime mortgage bubble partially created by these government-backed actors, sophisticated lenders and brokers sold rather complex, amalgamated lending and investment vehicles to some unsophisticated borrowers. The Securities and Exchange Commission (SEC) has charged a group of securities brokers in California with persuading homeowners to refinance their homes through a related mortgage company and to use the proceeds to purchase instruments called variable universal life policies, which were part life insurance policy and part equity investment.[65] One of these borrowers is a truck driver with four children, who does not speak English well and whose combined family income at the time was $15,000.[66] The premiums for the policy consumed 40% of the borrower's annual income.[67] His new subprime mortgage contained a variable interest rate and a "substantial" prepayment penalty.[68]

The SEC charged the brokers not with selling unsuitable home loans, but rather with inducing the borrowers to use the money to purchase unsuitable securities.[69] As a collaborative of noted scholars recently observed, this produced an "anomaly;" had the mortgagors used the proceeds of the refinancing scheme "to buy food or other necessities, the SEC would never have become involved in the case."[70] These scholars called for an extension of securities laws to enable persons who take on subprime mortgages to "qualify for certain legal protections that are routinely afforded those who transact in securities."[71]

Crusto and the champions of empathy appear skeptical that policy proposals such as this—amending existing securities laws to address risks presented by new lending and investment vehicles—would provide adequate protection for poor borrowers. The solution would certainly be imperfect. Extending securities laws to cover complex and risky real estate loans would not address predatory lending itself. Not all predatory loans involve additional investment risks unrelated to the purchase of the real estate. Sometimes a bad real estate loan is simply a bad real estate loan.

Nevertheless, lawmakers need not treat all subprime loans like securities. Scholars are asking whether Congress should permit mortgage modification in

64. *See id.*

65. *See* Jonathan Macey et al., *Helping Law Catch up to Markets: Applying Broker-Dealer Law to Subprime Mortgages*, 34 J. CORP. L. 789, 790–91 (2009).

66. *Id.* at 791.

67. *Id.*

68. *Id.*

69. *See* Macey et al., *supra* note 65, at 791.

70. *Id.*

71. *Id.* at 792.

bankruptcy.[72] Others wonder whether the uniformity that Fannie Mae and Freddie Mac imposed upon the national mortgage market will persist after the current crisis has passed.[73] Indeed, reforming the role that Fannie Mae and Freddie Mac play in the home lending market is imperative.[74]

Other specific proposals have been presented. Disclosure obligations like those contained in the Truth in Lending Act and the Real Estate Settlement Procedures Act could alleviate the informational asymmetries between lender and borrower and prevent predatory lenders from hiding the ball. A mandatory disclosure at closing might not assist all borrowers. An unsophisticated borrower who is personally invested in the idea of home ownership, unfamiliar with the mechanisms of finance and lacking access to other comparable loan products may incur a debt and mortgage obligation that he almost certainly cannot honor.[75] But requiring disclosure of terms and consequences in advance of closing would level the playing field somewhat.[76]

Other policy-based solutions to predatory lending have been arising out of state legislatures for several years now.[77] Some states have adopted categorical prohibitions against negative amortizations, balloon payments, default interest rates, and other specific lending practices.[78] Now lenders in some states may not issue a loan unless they reasonably believe that the borrower has the ability to pay.[79] States are now collecting data about subprime lending[80] and regulating the content of lending advertisements.[81]

Crusto is skeptical that state legislatures can effectively mitigate the problem. As he points out, state law cannot regulate the conduct of federally-regulated banks. But if Congress must act, it will act with a stronger hand if it nationalizes those policies that have already proven themselves in the states.[82] As Justice Brandeis famously observed, the states are laboratories for policy-making,[83] and real estate lending practices involve just the sort of economic considerations that are most amenable to policy analysis.

This sort of experimentation does take time. But the time is well spent.

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72. *See* Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565, 565 (2009); Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 AM. BANKR. L.J. 663, 722–23 (2009).

73. *See* Gerald Korngold, *Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis*, 60 S.C. L. REV. 727, 737–39 (2009).

74. *See* Thomas E. Plank, *Regulation and Reform of the Mortgage Market and the Nature of Mortgage Loans: Lessons From Fannie Mae and Freddie Mac*, 60 S.C. L. REV. 779 (2009).

75. *See* Azmy, *supra* note 50, at 351–52.

76. *See id.* at 367.

77. *See id.* at 361–81; Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending by Banking Agents: Are Federal Regulators Biting Off More Than They Can Chew?*, 56 AM. U. L. REV. 515, 515 n.3 (2007).

78. *See id.* at 366–67.

79. *See id.* at 368.

80. *See id.* at 372.

81. *See id.*

82. *See id.* at 390–404.

83. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Regulating the residential real estate lending market is a complex and tricky business involving context-specific considerations.[84] One-size solutions are unlikely to fit all of the problems that predatory lending practices generate. By waiting to see which state policies prove effective, which prove ineffective, and which generate unacceptable unintended consequences, Congress can act with greater certitude and effectiveness when and if it does finally act. Indeed, it can better determine whether it needs to act at all.

II. COVERTURE AND ITS ABOLITION

The proposals of President Obama, Judge Weinstein, and Professor Crusto remind the property law student of a common law doctrine that granted special protection to a particular class of people—married women—and was thought to protect members of that class from the consequences of their bad decisions. State legislatures abolished this doctrine in the nineteenth century. Its use and its abolition teach helpful lessons to those judges who are tempted to adjudicate cases based upon empathy for members of a particular class.

A. Coverture

At English and early American common law, a woman's property rights and interests were merged into those of her husband at her marriage under the law of coverture.[85] A married woman, a "feme covert" as she was called, could not own property in her individual capacity in any meaningful sense. Though property law technically permitted her to hold title to assets, she could not exercise any of the powers of ownership.[86] For the purposes of property law, the married woman's identity was subsumed within the identity of her husband.[87]

Blackstone gave us the classic statement of the doctrine of coverture. By marriage, he explained, the "legal existence of the woman is suspended."[88] The married woman, or feme covert, came under the protection of her husband who was responsible in law for her conduct and choices.[89] Where the law considered a married woman separately, it treated her as subordinate to her husband "and acting by his compulsion."[90] "And therefore all deeds executed, and acts done, by her, during her coverture, are void," or at least voidable.[91]

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84. *See* Azmy, *supra* note 50, at 298–300.

85. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *442–45 (1769); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 109 (1827).

86. *See* JESSE DUKEMINIER ET AL., PROPERTY 312 (6th ed. 2006).

87. *See id.* Indeed, a woman's legal identity merged into that of her husband in several important respects. *See* Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1260–62 & n.24 (2009). One of the remoter implications of this legal fiction was that husbands could not be held criminally liable for abusing their wives, as long as they did not inflict permanent injury. *See id.* at 1260–61.

88. Blackstone, *supra* note 85, at *442.

89. *Id.*

90. *Id.* at 444.

91. *Id.*

Coverture curtailed the property rights of married women. Married women who held title to real estate had no authority to manage or dispose of their real estate.[92] And title to the wife's personal property passed to her husband as soon as he reduced the items to possession.[93] Though one could create a separate equitable estate for the property of a married woman, the estate carried no presumptive protection for the wife. Instead, the document creating the equitable estate was required to identify specifically any protections that the married woman would enjoy.[94]

B. The Abolition of Coverture

The nineteenth century witnessed the abolition of coverture in the United States. As a consensus arose that the doctrine did not fully respect the dignity of women, states enacted what were known as the Married Women's Property Acts.[95] The Acts first appeared in either 1835 or 1839; this point of historical fact is disputed.[96] The Acts were thought to secure the dignity and autonomy of the married woman in two ways: they shielded her assets from her husband's creditors, and they gave her the authority to govern and dispose of her property as she saw fit.[97]

This latter point deserves some attention. Because the Acts gave married women sovereignty over their own assets, the Acts presupposed the equal reasonableness and personal responsibility of men and women, a fact that coverture denied. The Texas high court observed in 1851 that common law coverture deemed the married woman, as a result of her marriage, "divested of her faculties as a rational being."[98] Coverture extinguished the married woman's separate existence on the ground that "her reason, faculties, and intelligence are entombed."[99] By this process of entombment, the woman's dignity before the law diminished "to her own detriment and the injury of others,"[100] who could not hold her responsible. Meanwhile, her husband enjoyed the

92. *See* Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L. J. 1359, 1361 (1983).

93. *See id.*

94. *See id.*

95. *See generally id.* at 1359.

96. *Compare id.* at 1361 n.3, 1398, *with* DUKEMINIER, *supra* note 86, at 312.

97. *See* Sawada v. Endo, 561 P.2d 1291, 1295 (Haw. 1977); DUKEMINIER, *supra* note 86, at 312.

98. Jones v. Taylor, 7 Tex. 240, 1851 WL 4054, at *5 (1851). Not all or even most courts were amenable to arguments premised upon the equal rationality and responsibility of men and women. Arguing before the Ohio Supreme Court in 1848, an advocate argued that the "false and senseless" doctrine of coverture presupposed "that by marriage a woman is changed from a rational, capable, and responsible being, into a mere appendage" of her husband. Coverture treated her as "a thing without rights, capacities, or responsibilities, except such as have been created by positive law." Purcell v. Goshorn, 17 Ohio 105, 107 (1848), *superseded as recognized in* Dengenhart v. Cracraft, 36 Ohio St. 549 (1881). The court rejected this argument. *Id.* at 124. An earlier Ohio decision denied that coverture denigrated the "rational nature and moral being" of the married woman. Chestnut v. Shane's Lessee, 16 Ohio 599, 633 (1847).

99. *Jones*, 7 Tex. 240, 1851 WL 4054, at *5.

100. *Id.*

corresponding increase in dignity and sovereignty over their joint affairs.[101]

A more recent state court opinion notes that, rather than merging husband and wife, coverture effectively supplanted husband for wife.[102] Coverture placed the married woman under a "complete legal blackout."[103]

> The wife maintained a bare legal existence . . . . While serving to consolidate in the husband the total use of her property, the disabilities of coverture were seen as serving to protect and benefit women. The idea that married women were incapable of managing their business dealings prevailed along with the belief that if a wife were allowed to control her own property, the inevitable outcome would be familial dissension.[104]

When the states abolished coverture, the married woman's "capacities, reason, and moral being were likewise resuscitated."[105] By freeing the married woman to exercise sovereignty over her assets, the law treated her as a fully reasonable and responsible moral agent, capable of exercising the "right of disposition, control, and management."[106] She obtained "distinct and independent rights," which she had the separate responsibility to prosecute and defend in courts of justice.[107] She was free to choose, and she was expected to accept the consequences of her choices, for good or ill; the law now respected her "faculties and powers as a moral agent" in relation to her property.[108]

That coverture was inconsistent with the equal dignity of men and women has important implications.[109] Some might be tempted to believe that the

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101. *See id.*

102. *See* Morgan v. Cincinnati Ins. Co., 307 N.W.2d 53, 58 (Mich. 1981) (Fitzgerald, J. concurring).

103. *Id.*

104. *Id.*

105. *Jones*, 7 Tex. 240, 1851 WL 4054, at *5.

106. *Id.*

107. *Id.*

108. *Id.*

109. Whether changes in cultural assumptions about married women and their responsibility led to the Acts, or instead the Acts changed the culture, is the subject of some doubt. Richard Chused has concluded that early versions of the Acts "made only modest adjustments in coverture law, and that these adjustments generally confirmed rather than confronted prevailing domestic roles of married women." Chused, *supra* note 92, at 1361. Chused suggests that the earliest wave of Married Women's Property Acts can best be understood, not as heralds of feminist liberty, but rather as mechanisms for shielding family assets when the risk-taking of the husband "went sour." *Id.* at 1403. Consistent with this claim is that the Bankruptcy Code as early as 1800 made express provision for women debtors. *See* Karen Gross et al., *Ladies in Red: Learning from America's First Female Bankrupts*, 40 AM. J. LEGAL HIST. 1 (1996). Some of the women who declared bankruptcy under the early Bankruptcy Acts were married. *Id.* at 14. Also, it appears that women did own property in their own names prior to enactment of the Married Women's Property Acts. *Id.* at 11 n.61.

Even if the Acts had some effect on the culture and helped to inform changing views about the capacity of women to manage their own affairs, it seems reasonable to infer from the evidence that the culture returned the favor by shaping the law of women's property ownership. As Chused has documented, women exercised increasing control over property through the early Nineteenth Century, even before the Married Women's Property Acts became law. *See* Chused, *supra* note 92, at 1361–84, 1392–97. By 1840, women had obtained "significantly more authority to dispose of assets at death"

abolition of coverture fundamentally increased the freedom of married women to enjoy the benefits of owner sovereignty. But the freedom of women to succeed as property owners cannot fully explain the phenomenon; the abolition of coverture increased women's success neither uniformly nor universally. Indeed, it did not always accrue to women's benefit at all.

Coverture often shielded women from liability even when they committed fraudulent acts[110] or retained the benefit of their illicit bargains.[111] With the gradual abolition of coverture, as women became increasingly free to succeed they also grew increasingly bound to their failures. The old reports contain cases in which women, far from objecting to the blatant paternalism of coverture, hid behind it from the consequences of their actions.[112] Abolition of coverture denied them this refuge.[113] These cases present a real difficulty for the view that the abolition of coverture accrued unequivocally to the freedom and success of women as property owners. Far from securing financial freedom in all cases, abolition of coverture accrued very often to the material disadvantage of women in the nineteenth century.

C. Coverture, Freedom, and Responsibility of Choice

In other words, as property law left coverture behind, it increasingly recognized not merely the freedom but also the responsibility of women as moral agents and as managers of their own property. The failure of coverture to respect both the freedom of the married woman's choice and her responsibility of choice was made clear in cases where courts resisted the implications of coverture prior to its abolition. Married women who were separated from their husbands and living on separate maintenance he provided often pled coverture as a defense to the claims of their own creditors, even where they had held themselves out as *femes sole*. *Femes sole* was a term for single women with the authority to contract freely.[114] When these women pled coverture as a defense to collection actions, courts often balked at enforcing the doctrine.

Examining one attempt at irresponsible borrowing, Lord Mansfield observed

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than they had earlier enjoyed. *Id.* at 1380. This authority increased within narrow bounds; the increase in women's will writing, for example, merely kept pace with population growth. *Id.* at 1381.

110. *See, e.g.*, Keen v. Hartman, 48 Pa. 497 (1865). *But see* Bryant v. Freeman, 183 S.W. 731, 732 (Tenn. 1916).

111. *See* Foxworth v. Bullock, 44 Miss. 457, 1871 WL 3964 (1870).

112. *See* Strong and Wife v. Waddell, 56 Ala. 471 (1876) (denying the use of coverture as a defense to foreclosure where a married woman executed a promissory note and mortgage jointly with her husband); Heck v. Fisher, 78 Ky. 643 (1880) (stating that while the courts jealously watch over the rights of women, they "would not permit coverture to be used as a cloak for fraud, even when the married woman is not an active participant in its perception."); Parker v. Kane, 86 Mass. (4 Allen) 346 (1862) (referencing a married women's property act); Eckert v. Reuter, 33 N.J.L. 266 (N.J. 1869) (holding that when improvements are done on the premises of a wife for the sole benefit of her estate, and where the wife gave consent for the work, the plaintiff could recover from both husband and wife).

113. *See, e.g.*, Strong and Wife v. Waddell, 56 Ala. 474 (Ala. 1876); Parker v. Kane, 4 Mass. (4 Allen) 346 (1862); Eckert v. Reuter, 33 N.J.L. 266 (N.J. 1869).

114. *See* Chused, *supra* note 92, at 1387.

that the lady ought to pay the debt "[i]n justice."[115] But there intruded "a rule of positive law" by which "a married woman can have no property real or personal."[116] The rule admitted exceptions and the question, as Mansfield saw it, was whether justice required that the case before him must constitute one of those exceptions.[117] Mansfield concluded that where a woman contracted with her husband for a separate maintenance that gave the appearance that she was a *feme sole*, obtained credit as a single woman, and received the benefit of it, she "ought to be liable to the extent of it."[118] Mansfield thought it "just that it should be so."[119] This conclusion was consistent with the general principle "that where a woman has a separate estate, and acts and receives credit as a feme sole, she shall be liable as such."[120]

What could Mansfield have meant by his multiple invocations of "justice" to avoid the clear implications of the positive law of coverture? He might have had in mind a broad conception of fairness. But abstract fairness is an unsteady ground for refusing to employ an applicable and legitimate doctrine of positive law such as coverture. For one thing, it is not obvious that fairness prohibits the enforcement of coverture in cases such as this. The truly-married but apparently-single woman might be heard to argue that the rules were clear and in all fairness, she was entitled to rely upon them. Furthermore, it would hardly be fair to hold her responsible for debts from which she is not under positive law entitled to draw benefit. As long as coverture prohibited her from enjoying the benefits of sovereignty over her assets, she ought to be free to act as though she would not be responsible for obliging herself.

So fairness will not do; while on one hand it is unfair to excuse the lady from the burden of her bargain, on the other hand, it is unfair to hold her to it. One might hope that "justice," when invoked to override long-established positive law, would be a bit more concrete and a bit more manifestly in opposition to the doctrine it is supposed to negate. A more sophisticated account is needed.

III. EMPATHY, AUTONOMY, AND PATERNALISM

The resemblances between coverture and judicial empathy in property law are striking. Both single out a class of persons and attempt to protect the class of persons from the consequences of their own choices. Both doctrines ascribe to the protected class an inability to govern property and financial assets in a responsible manner, and for this reason, they deprive the class of the responsibility of choice. As coverture did for married women, constitutional protections for subprime borrowers would to a significant extent deprive poor borrowers of

115. Corbett v. Poelnitz, (1785) 99 Eng. Rep. 940 (K.B.) 942; 1 Term Rep. 5.
116. *Id.*
117. *Id.*
118. *Id.* at 943.
119. *Id.*
120. *Id.* Mansfield's colleagues on the King's Bench later disagreed, and overruled his decision in Marshall v. Rutton, (1800) 101 Eng. Rep. 1538 (K.B); 8 Term Rep. 545.

both the freedom to choose and responsibility to choose. Thus, the doctrines fail to respect the targeted individuals as responsible agents of moral and legal choosing.

A. Freedom and Responsibility in Liberalism

At this point the reader might reasonably object that these dice are loaded: the presupposition that the law ought to account for personal responsibility and moral agency is contestable. Indeed, liberalism has long asserted that the right precedes the good, that questions of practical reasonableness—i.e. choosing and acting for intelligible reasons, including moral reasons—are irrelevant to questions of legal right. What an individual happens to desire or pursue has no moral or legal significance.[121] The object of liberalism is to provide equal access to morally-neutral laws and institutions so that autonomous individuals can decide for themselves what is good.[122]

This neutrality claim is itself contestable; there are very good reasons to believe that moral neutrality is neither desirable nor possible.[123] Leaving that dispute aside, even a liberal account of property owner sovereignty must at least recognize the central importance of human choice. Socioeconomic rights-based arguments, however, are inconsistent with meaningful human choice. Like coverture and other legal doctrines that unjustly infringe the autonomous sovereignty exercised by human beings,[124] the judicial empathy that President Obama

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121. This is in part because, within the liberal account, "There is nothing about us that is naturally oriented to, or essentially satisfied by," common goods. Mark Blitz, *Liberal Freedom and Responsibility*, *in* PUBLIC MORALITY, CIVIC VIRTUE, AND THE PROBLEM OF MODERN LIBERALISM 116 (T. William Boxx and Gary M. Quinlivan, eds. 2000). "The point of liberalism . . . is that there is no precise unchanging list of common goods, any more than there is of individual goods. There are, however, goods such as representative institutions and markets that reward individual industry that are almost always useful." *Id.*

122. The most influential of these liberal theories in recent decades is of course that of John Rawls. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971); JOHN RAWLS, POLITICAL LIBERALISM (1993).

123. *See, e.g.*, Stephen Macedo, *Against the Old Sexual Morality of the New Natural Law*, *in* NATURAL LAW, LIBERALISM, AND MORALITY 28, 43–45 (Robert P. George, ed. 1996); J. BUDZISZEWSKI, THE LINE THROUGH THE HEART 173–79 (2009); ROBERT GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 129–60 (1993) [hereinafter GEORGE, MAKING MEN MORAL]; JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 5–41 (1996); JOSEPH RAZ, THE MORALITY OF FREEDOM 110–33 (1986). The perfectionist liberal Joseph Raz has observed, "All conceptions involving the cultivation and satisfaction of the so-called expensive tastes are harder to satisfy, and the Rawlsian theory can be said to discriminate against them. Nonindividualistic conceptions are likely to be among the expensive tastes since their realization depends on the cooperation of others." RAZ, *supra* note 123, at 119–20.

124. Raz states, "[A] government aware of its duty to promote the well-being of people is bound, in today's conditions, to be sensitive to the need for people to be free in the sense of being capable of leading successful autonomous lives." Joseph Raz, *Liberty and Trust*, *in* NATURAL LAW, LIBERALISM, AND MORALITY 113 (Robert P. George, ed. 1996). This is not to suggest that all doctrines that infringe autonomy are improper or unjust. We certainly do not believe that persons should have a right grounded in autonomy to murder, maim, torture, or rape. The question always persists which restrictions of autonomy promote well-being and which do not. For this reason, Christopher Wolfe, responding to Raz, has distinguished between valuable autonomy and valueless autonomy, and has observed, "Coercion that inhibits or prevents activities and relationships that are not valuable (because, for example, they are morally bad) does not deprive anyone of valuable autonomy." Christopher Wolfe, *A Response to Joseph*

and others conceive fails to respect the capacity of the person to choose in two respects. First, it denies her the *freedom* to choose by indirectly limiting her total options and directly depriving her of meaningful options. Second, it directly denies her *responsibility* to choose,[125] by depriving her of the opportunity to realize both the costs and the benefits of long-term planning.

Some people easily grasp the first injustice but not the second. It is easy to see, for example, how disenfranchisement of African Americans in the South in the early twentieth century did violence to their freedom of choice. What many often overlook is that the practice also did violence to the responsibility of choice, the right to make a decision to vote for a particular law or candidate and then to accept the consequences of that decision. Similarly, just as coverture deprived women of the freedom to govern their assets, it also denied them the responsibility to govern their assets. It prevented them from realizing the consequences—good, bad, and indifferent—of the choices that they would otherwise have made with respect to their assets and resources.

In significant aspects, the empathy doctrines that President Obama has encouraged, and which some scholars and judges would incorporate in a constitutional right to be free of economic oppression, resemble coverture. These proposals would indirectly limit the *freedom* of home buyers to choose to incur mortgage obligations. And they would directly infringe poor borrowers' *responsibility* of choice by preventing them from realizing some (but not all) of the consequences of their choices. Each of these points requires elaboration.

1. Freedom

It might seem paradoxical that recognition of a new constitutional right (bestowing suspect classification, which for present purposes amounts to the same thing) would inhibit freedom of action. But as the liberal perfectionist Joseph Raz points out coercion is not the only means by which a government interferes with freedom. He notes that all government action "inevitably affects

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Raz, in NATURAL LAW, LIBERALISM, AND MORALITY 135 (Robert P. George, ed. 1996). And Raz himself states,

> An autonomous life is valuable only to the extent that it is engaged in *valuable* activities and relationships. The loss of an opportunity to murder does nothing to reduce one's chances of having the sort of autonomous life which is of value, hence there is nothing lost in not having the opportunity to murder, and one's autonomy, in the sense of a capacity for valuable autonomous life, is not constrained by the absence of that option.

Raz, *supra*, at 120.

What is true of coercive laws that deflect autonomous action is equally true of constitutional rights that effectively limit the sovereignty of poor land owners. If empathy advocates were to demonstrate that the right of a poor mortgagor to incur the mortgage obligation on balance harmed, rather than promoted, the well-being of citizens, they would cast doubt upon the thesis of this article.

125. One scholar asserts that in a functioning liberal society, responsibility takes the place that virtue occupies in an Aristotelian system. Blitz, *supra* note 121, at 117 n.12. Responsibility, in the sense of being accountable for results, "is the analogue in liberalism to traditional duty, religious obligation, customary self-denial, and noble virtue. To a degree, indeed, it replaces them." *Id.* at 118.

the availability of good or bad options. Given the importance of the matter it would be irrational of governments to take action affecting the availability of options without taking that effect of their action into account when deciding what to do."[126]

Though the empathy proposals would not directly deprive poor borrowers of the freedom to purchase a home on whatever terms their finances would allow, they would indirectly do so; lenders who would be prohibited by the Fourteenth Amendment from foreclosing against defaulting, poor mortgagors would decline to issue subprime (or perhaps any) housing loans to poor borrowers.[127] So, the indirect effects of the empathy-based right upon the capacity of poor people to choose are similar to the direct effects of coverture upon married women; both doctrines would limit the options available to the affected class.

But this is not the worst of it. More fundamentally, a constitutional right to be insulated from predatory lending practices would *directly* infringe freedom to choose by rendering the poor mortgagor's choices less meaningful. The rights-based response to subprime mortgage lending would deprive potential subprime borrowers of meaningful choices. In other words, by ameliorating the consequences of bad economic decisions, constitutional socioeconomic classifications would deprive poor borrowers of a significant amount of personal autonomy. To see why this is so, it is helpful to return to Raz.

In his book, *The Morality of Freedom*, Raz locates the value of freedom in securing for individual citizens a meaningful degree of personal autonomy. Personal autonomy consists in the free choice of goals and relations and is "an essential ingredient of individual well-being."[128] Furthermore, "[t]he ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives."[129] If Raz is correct that autonomy is valuable, then states ought to respect and protect personal autonomy in order to promote the well-being of their citizens, all other things being equal.[130]

Personal autonomy, as Raz observes, requires an adequacy of morally-

126. Raz, *supra* note 124, at 114–15.

127. This claim is only partly speculative. It is difficult to see how Weinstein's and Crusto's proposals would avoid negatively affecting the borrowing options available to poor home buyers at least to some extent. And this is an important consideration for a government charged with promoting the well-being of its citizens.

128. RAZ, *supra* note 123, at 369.

129. *Id.*

130. Here a caveat is very much in order. If autonomy is in fact valuable, its value inheres in the control individuals have to choose among pre-moral goods, and to choose morally-upright ends. Neither Raz nor his most thoughtful critics claim that autonomous choices to commit evil acts are valuable. Raz acknowledges, "Autonomy is valuable only if exercised in pursuit of the good. The ideal of autonomy requires only the availability of morally acceptable options." *Id.* at 381. Robert George has concluded, based on this observation, that the value of autonomy is "conditional upon whether or not one uses one's autonomy for good or ill." GEORGE, MAKING MEN MORAL, *supra* note 123, at 177. In other words, the value of autonomy is not absolute, but rather contingent. Autonomy has value in service of reflexive goods, such as practical reasonableness (discussed below), but not when exercised

acceptable, available options. To demonstrate this point, Raz offers two cases.

> *The Man in the Pit.* A person falls down a pit and remains there for the rest of his life, unable to climb out or to summon help. There is just enough ready food to keep him alive without (after he gets used to it) any suffering. He can do nothing much, not even move much. His choices are confined to whether to eat now or a little later, whether to scratch his left ear or not.
> *The Hounded Woman.* A person finds herself on a small desert island. She shares the island with a fierce carnivorous animal which perpetually hunts for her. Her mental stamina, her intellectual ingenuity, her will power and her physical resources are taxed to their limits by her struggle to stay alive. She never has a chance to do, or even to think of anything other than how to escape from the beast.[131]

Raz asserts that the Man in the Pit does not live an autonomous life because he has only trivial options available from which to choose.[132] The Hounded Woman, meanwhile, has available only choices that "are potentially horrendous in their consequences."[133] Neither has an adequate range of options to choose from.[134] He continues, "The criteria of the adequacy of the options available to a person must meet several distinct concerns. They should include options with long-term, pervasive consequences as well as short-term options of little consequences, and a fair spread in between."[135]

Does personal autonomy really require a full range of choices? Few people, if any, would doubt that the Man in the Pit had been deprived of meaningful choices and that his personal autonomy has thus been curtailed. But he has not been deprived of all choices. Furthermore, the choices available to him might be meaningful in different circumstances. A third base coach who scratches his left ear makes a meaningful gesture, which might cost his baseball team a victory. The gesture would be even more momentous if used as a signal to a would-be assassin. So, the deprivation of the Man in the Pit's personal autonomy consists not merely in the limitations placed upon his available choices. It also consists in those circumstances that limit the significance of the choices that remain available to him.

What of the Hounded Woman? It is not as obvious why she has been deprived of personal autonomy. In contrast to the Man in the Pit, she has available to her a much wider variety of choices and all of them are pregnant with significance. Does her lack of trivial choices itself entail a loss of personal autonomy, or is Raz claiming something else?

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to destroy non-reflexive basic goods, such as human life. *See* Adam J. MacLeod, *The (Contingent) Value of Autonomy and the Reflexivity of (Some) Basic Goods*, 5 J. JURIS. 11 (2010).

131. RAZ, *supra* note 123, at 373–74.

132. *See id.* at 374.

133. *Id.*

134. *See id.*

135. *Id.*

It seems unlikely, to say the least, that one enjoys less personal autonomy as one's ratio of momentous-to-trivial choices increases. Does the corporate executive enjoy less personal autonomy than her underlings because she trusts someone else to select for her a dry cleaner and to arrange her lunch? Did President Lincoln enjoy less autonomy than other United States Presidents because he had to devote his energies to preserving the Union and had less time for trivial pursuits and decisions? That would seem inconsistent with our view of Lincoln, who is enshrined on Mount Rushmore and has his own monument at one end of the Washington Mall.

Indeed, we do not view one who chooses a life of more (or exclusively) momentous choices as having suffered a deprivation of personal autonomy at all. Quite the opposite is true, in fact. As the options available to one become more momentous, and as the potential consequences of those choices become more pervasive, one's choice-making becomes more meaningful, and one enjoys a higher degree of personal autonomy. If, as Raz supposes, well-being consists in part of controlling one's own destiny, then surely one most acutely promotes one's own well-being by shaping the more significant aspects of one's destiny.[136]

If the Hounded Woman has been deprived of personal autonomy, it cannot be by her lack of trivial choices; it must be because she was placed into these circumstances by coercion, by a lack of acceptable alternative options, or in some other way without her assent. Did the woman choose to enter the desert island? Raz does not say. But if she has been placed there against her will, she has certainly been denied the opportunity to make her own life.

The Man in the Pit teaches us that personal autonomy requires the availability of meaningful choices. If a person is deprived of meaningful choices, or if the choices available to that person are rendered insignificant by external constraints, then that person has suffered a deprivation of personal autonomy. The Hounded Woman perhaps teaches that personal autonomy requires a choice between a life of more momentous choices and a life of more trivial choices. One who chooses to assume responsibility for momentous decisions and relinquish trivial concerns, enjoys more rather than less personal autonomy. But one who is deprived of trivial choices without her assent is deprived of personal autonomy.

What conclusions follow? If the law deflects people from making more meaningful choices by eradicating the consequences of otherwise-momentous choices, it makes meaningful choices trivial, eliminates the possibility of pursuing more meaningful projects, and thus diminishes personal autonomy. Socioeconomic suspect classifications diminish personal autonomy in just this way: they diminish for a class of persons the availability of economic choices with

136. To be fair to him, Raz acknowledges, but prescinds from, the question to what extent one's own choices, which limit the availability of future choices, may curtail one's personal autonomy.

pervasive consequences.[137] Personal autonomy rests on the freedom to fail. Freedom to fail is deflected not merely by eliminating choices that entail a possibility of loss but also by eliminating the risk of loss, while leaving the choice itself available in form only. Meaningful choices entail risk. As one commentator has observed, "The right to evaluate risk for oneself is part of what it means to be a functioning human being."[138]

2. Responsibility

Freedom of choice is only one facet of the problem. Any form of liberalism that aspires to account for autonomous human choice and action must deal with the fact that individual persons do not *merely* pursue particular interests in the short term. Rather, the person who demonstrates healthy self-interest will also concentrate on himself as a candidate for long-range accumulation and satisfaction.[139] This concentration will often lead him to deny himself some short-term satisfactions for the purpose of realizing long-term satisfactions. He will recognize that irresponsible action today will make success tomorrow less likely.[140] In order to ensure his future success, he will develop habits that are at times at odds with his short-term interests. These habits will cumulatively form the disposition that we call responsibility—the practice of investing in oneself by making short-term sacrifices for long-term gain.

As the autonomous self strives for self-perpetuation, he will apply his responsible disposition to new situations as they arise.[141] This can be imagined as a long growth of responsibility. Having achieved success in his prior long-term projects, he might apply the same disciplines of self-denial and delayed gratification to new choices. Once he has learned to be responsible for his career, he might choose to accept responsibility for home ownership.

This is not all. He may also learn to apply his responsible disposition not just to his own affairs but to the affairs of others within his family, community, and circle of influence. He may learn to become responsible for a wife, children, neighbors, and friends, even where that responsibility does not serve short-term satisfaction.[142] We might call this a broad growth of individual responsibility.

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137. On the importance of cultural conditions supporting autonomy, see RAZ, *supra* note 123, at 391–95.

138. Mark Steyn, *Carried Away*, NAT'L REVIEW, Feb. 8, 2010, at 52.

139. Blitz, *supra* note 121, at 118–20.

140. *Id.* at 119.

141. *Id.* at 121.

142. Blitz states,

> The disposition to the long view then colors any particular interest as well: to become responsible for my self-interest as it attaches to any separate interest means that I see this interest too in as wide and common an extent as my concentration and understanding allow. There is a continuum, based on responsibility for oneself, that runs through responsibility experienced as doing one's job well to responsibility as experienced as making one's own the jobs that need to be done but belong to nobody. At the end of this continuum are activities that for most practical purposes serve the common good as well as would a nobler devotion.

As his responsibility grows broadly, the home-owning career man might become the home-owning, career-minded family man (or woman).

In these ways, the individual's exercise of self-interest will often demonstrate a capacity that resembles what used to be known, in the old worldviews, as character.[143] Whatever it is called, this responsible disposition sets the human being apart from animals. It is a central characteristic in which human dignity manifests itself.[144] And the responsible disposition serves autonomous fulfillment; by sacrificing some freedom today, the autonomous self prepares a harvest of greater freedom and satisfaction tomorrow.

For all of these reasons, responsibility is not opposed to the liberal notion of self-interest but is in fact entailed within self-interest.[145] Assuming *arguendo*

Id. at 120–21.

143. *Id.* at 121.

144. Blitz asserts that responsibility is not as much a matter "of guilt as of pride." Blitz, *supra* note 121, at 122.

145. As Blitz points out, the term "responsibility" first appeared in the late eighteenth century, arguably liberalism's most auspicious hour. And the term features prominently in eighteenth century writings such as the Federalist Papers. *Id.* at 119. It should not surprise us to find that our constitutional order presupposes individual and corporate responsibility. But it is worthwhile to reflect on the extent to which this is reflected in the Federalist Papers alone. The authors of the Federalist Papers believed that: a federal government would be impressed with the "responsibility implied in the duty assigned to it," to secure the common safety, THE FEDERALIST No. 23, at 126 (Alexander Hamilton) (J.R. Pole, ed. 2005); a plural executive would "tend[] to conceal faults and destroy responsibility," THE FEDERALIST No. 70, at 377 (Alexander Hamilton); and an idea "all idea of responsibility is lost" when appointments of public officials are made in private by a plural council of appointment. THE FEDERALIST No. 77, at 409 (Alexander Hamilton).

The authors of the Federalist Papers gave significant thought to the nature of responsibility and its operation in the new republic. For example, the author of FEDERALIST No. 63 asserted that a federal Senate was necessary to cure a "want, in some important cases, of a due responsibility in the government to the people." THE FEDERALIST No. 63, at 338 (Alexander Hamilton or James Madison). He explained, "Responsibility, in order to be reasonable, must be limited to objects within the power of the responsible party." *Id.* To be effectual, the government's responsibility must relate to the power entrusted to it, of which its constituents can form "a ready and proper judgment." *Id.* A Senate was necessary, he claimed, to take responsibility for those objects of government that take more than a year or two to develop, and which depend "on a succession of well-chosen and well-connected measures, which have a gradual and perhaps unobserved operation." *Id.* An assembly elected for a short period, and accountable to the people more frequently, could not "provide more than one or two links in a chain of measures, on which the general welfare may essentially depend." *Id.* The Senate should not "be answerable for the final result any more than a steward or tenant, engaged for one year, could be justly made to answer for places or improvements which could not be accomplished in less than half a dozen years." *Id.*

The same author observed how difficult it is to assign individual, personal responsibility to members of a large legislative body. Where the legislature was needed to attain long-term objectives, it would be difficult "to preserve a personal responsibility in the members of a numerous body, for such acts of the body as have an immediate, detached, and palpable operation on its constituents." *Id.* The remedy for both of these defects was to create a Senate, "which, having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects." *Id.*

These writings demonstrate a sophisticated and carefully-considered understanding of the nature and value of responsibility, both corporate and personal. As highly as the Founders valued rights and freedoms, they valued responsibility at least as much.

that obligation is antithetical to liberalism, a point that is far from established, responsibility entails no such presupposition; responsibility is entirely consistent with voluntary, autonomous choice and action.[146] Indeed, responsibility makes possible the autonomous exercise of owner sovereignty over an asset, like real estate, that has a long life span.

B. Autonomy, Practical Reasonableness, and the Common Good

The long and broad growth of personal responsibility, which perfectionist liberals (rightly) acknowledge, points toward a more fundamental problem with the rights-based response to predatory lending. Segregating borrowers on the basis of socioeconomic status entails creating strata of human dignity. By singling out the poor and lower middle class for a special exemption from default and foreclosure, the rights-based proposals deny to those persons the respect and dignity that the law affords to the more affluent.

To see why the doctrine of coverture and empathy-based rights both conflict with human dignity, it is helpful to look more broadly at how the institution of private property ownership serves human values, including autonomy and practical reasonableness. Crusto wonders why a poor borrower should be required to repay an obligation incurred as a result of predatory lending. But one might just as readily ask the opposite question, and instead inquire why the borrower should have the right to incur the obligation in the first instance. More specifically, why should a homeowner-borrower have a right to convey to a lender by mortgage a right to foreclose?[147]

1. Property, Rational Choice, and Free Will

The point of private property is to serve human values. A person who exercises sovereignty over her assets realizes, among other values, autonomy, self-determination, integrity, and authenticity of action. All of these are aspects of a basic human good that many moral philosophers following Aristotle and the Western tradition call practical reasonableness.[148] Indeed, whatever other values it may serve in particular cases, sovereignty over one's property is an

146. Blitz, *supra* note 121, at 122.

147. This question piques more than mere esoteric interest. If, as Crusto proposes, mortgagors have a constitutional defense for foreclosure, then courts will have, in effect, deprived mortgagors of the ability to convey a foreclosure right, because any potential lender/mortgagee will have no way of knowing whether any particular mortgagor will invoke the constitutional defense. Having been deprived of collateral, potential borrowers will find it much more difficult to obtain credit, and they will be required to pay more for any credit that they can secure. (Thanks to Ronald Rotunda for pointing this out.)

148. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHT 165–73, 301–42 (1980). Though not all lawyers and scholars agree with Finnis on the central importance of practical reasonableness, a variety of traditions affirm the significant role that practical reasoning plays in human deliberation and choice. Kant, for example, recognized the "influence of reason on the inner lawgiving will." IMMANUEL KANT, THE METAPHYSICS OF MORALS 173–75 (Mary Gregor ed., 1996); *see also* Raz, *supra* note 124; RAZ, *supra* note 123.

important aspect of free choice, which is an essential precondition to practical reasonableness.[149]

Property owners choose to encumber their property rights for intelligible reasons. They do so in order to realize certain ends, such as a more aesthetically-pleasing kitchen, an extra bedroom to accommodate new additions to the family, or the investment value of home ownership. The value of many of these reasons is often derived from more fundamental reasons, such as beauty, health, and life. Thus, the extra bedroom is instrumentally valuable because it enables a more fundamental end—the addition of a new child to the family, which is an instance of the basic human good known as life. Where the good pursued is intelligible, either as an instrumental good or as a good in itself, the person's choice of it is rational.

People deliberate about the ends they intend to pursue because there are almost always countervailing considerations. Choosing one end often entails foregoing the pursuit of alternatives, so the pre-moral good chosen must be chosen over other, alternative objects. Additionally, countervailing risks might render the choice unattractive as a matter of prudence and the actor must decide how much risk she is willing to bear. In other words, the choice to encumber one's property rights is generally either undetermined or underdetermined and therefore in the fullest sense an autonomous choice. It involves, first, rational deliberation about one's various options, then the choice of one or more options as against incompatible options, and finally the acceptance of an obligation to see the newly-chosen project to completion. Most of the reasons about which the property owner deliberates are pre-moral. Neither moral principles nor legal rules generally govern the questions whether a person should rent or own a home, remodel a kitchen or make do with the old one, or assume a second mortgage in order to send a child to a private college. Rather, the person enjoys a great deal of freedom to choose among intelligible ends.

Moral rules sometimes render some choices unreasonable as a matter of principle. As a matter of moral principle, for example, one ought never lease one's land to an actor that will make a gravely immoral use of the land, such as a known manufacturer of methamphetamine. It can never be reasonable to choose to encumber one's property rights for this end, and the law need not respect this choice, much less preserve the freedom to make it. In a less dramatic case, a landlord ought not enter into a lease with the intention of breaking that lease at the first opportunity.

A fully reasonable person will take all countervailing opportunities, risks, and principles, including moral rules, into consideration before encumbering his property. But not all countervailing considerations are equal in weight or significance. In the exercise of practical reasoning, pre-moral and prudential considerations count differently than moral principles and rules. In the absence of moral constraints, people have great freedom to choose. The law does not

149. *See* GEORGE, MAKING MEN MORAL, *supra* note 123, at 168, 177–78.

prohibit a lessor from leasing to a lessee with marginal finances. This choice does no violence to human goods. It is neither immoral nor unjust. The lessor has deliberately chosen no immoral end. The risk of the lessee's default is, to be sure, a countervailing consideration that a prudent lessor will weigh against the potential gain. But the potential gain is an intelligible end, and the risk of loss is an intelligible cost. The lessor might choose unwisely, but his choice will not be irrational. For this reason the law does well to defer to the lessor's judgment, no matter which choice he makes.

In cases when the choice between incompatible options is not settled by physical, psychological, or economic limitations or legal or moral prohibitions, it is the act of choosing itself, the exercise of free will, that settles the question.[150] The person making the choice is in an important sense the maker or creator of the state of affairs that follows the choice: the education of the child or the new, more hospitable kitchen. Freedom to choose for intelligible reasons, and thus to bring a new reality into being, is an essential component of human dignity; it is a central capacity that sets human beings apart from other beings. The act of choosing rationally "is creative of personal character, and thus of a most significant aspect of the reality of each person who is capable of meaningful relations with other persons."[151] It demonstrates the capacity to establish "some meaningful relationship between his or her feelings, understanding, judgments, and actions."[152]

2. The Choice of Obligation as a New Reason

Once the actor has chosen, his choice gives him new reasons for action. If the lessor agrees to the lease, the law does well to hold him to the bargain. Property owners, like all persons, create moral reasons when they choose to oblige themselves. A binding obligation is itself a reason for action, in part because people choose to accept obligations for intelligible reasons. The lessor promises to honor and to protect the lessee's quiet use and enjoyment in order to gain something that he could not have obtained otherwise.

Consider the decision to incur a mortgage obligation in order to purchase a home. When one chooses to own rather than rent one's home, one accepts the obligations associated with the loan as the end product of deliberative choice about one's personal priorities and commitments in light of certain fixed facts.[153] As an initial act of rational perception, the potential home buyer perceives the value of home ownership. As an act of pre-moral choosing, an

150. *See* JOHN FINNIS, MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH 58 (1991).

151. *Id.*

152. *Id.*

153. The individual's assumption of a particular obligation is the product of a chain of reasoning about the individual's projects and priorities in light of certain, fixed facts. Obligation generally is the conclusion at the end of a chain of inferences derived from the common good. *See* Finnis, *supra* note 148, at 302. Obligation is a means of cooperation, which enhances both collective productivity and individual autonomy. *Id.* at 303.

exercise of free will, he chooses the object of home ownership over other valuable objects that he might have chosen with equal rationality, such as a more fulfilling career or more time to vacation. As an exercise of prudence he weighs the benefits against the risks entailed in incurring a mortgage obligation. There being no relevant, identifiable moral principles that might rule the choice out of bounds, he then chooses to bind himself to the obligation in order to realize his object: owning a home.

Once bound, the mortgagor has new, moral reasons for acting consistently with his promise. The acceptance of the obligation brings the mortgagor into cooperation with the mortgagee for mutual benefit[154] and at reciprocal risk. The obligation gives rise to new priorities and commitments, for the borrower is now obliged to honor his new promises; the common good of mortgagor and mortgagee can be realized only if the mortgagor performs his promise.[155] Breaking his promise would harm the mortgagor's integrity. And unless the promise was fraudulently induced or some other moral excuse inheres, breaking the promise will violate moral principles, such as the principle of fair dealing.

Furthermore, breaking one's promise to one's mortgagee harms other people who were not parties to the original transaction. It harms the mortgagor's neighbors; strategic default often depresses home prices in the neighborhood. And when the law forgives hard-pressed debtors, it taxes creditors; someone must bear the loss. Contrary to stereotype, not all creditors are wealthy bankers. As the subprime mortgage meltdown demonstrated, many creditors are truck drivers, nurses, and small business owners, who invested in mutual funds that

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> Like the law, [the institution of obligation] enables past, present, and predictable future to be related in a stable though developing order; enables this order to be effected in complex interpersonal patterns; and brings all this within reach of individual initiative and arrangement, thus enhancing individual autonomy in the very process of increasing individuals' obligations.

Id. Indeed, the point of the institution of binding obligation is to enable individuals to exercise control over their relationships within community. *Id.* at 308.

154. It would be a mistake to assume, as Judge Weinstein seems to do, that a poor mortgagor and an affluent mortgagee possess competing goods, because one happens at the moment to be poor and the other affluent. The good of an individual party to a promise is not distinct from, but rather is part of, the common good. As Finnis explains,

> [A]n 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-fulfillment 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.

Finnis, *supra* note 148, at 305.

155. *See id.* at 307; ROBERT GEORGE, IN DEFENSE OF NATURAL LAW 71 (1999).

included investment instruments backed by mortgages. These investors lose money when mortgagors default, and unlike many of the banks, they do not receive federal bailout money to cover their losses.

Defaulting on one's mortgage indirectly harms the public at large. In sufficient numbers, defaults drive the cost of credit up and the supply of credit down. As the supply of credit dries up, prices deflate. Deflation and the unavailability of credit increase unemployment. So, strategic defaults contribute indirectly to economic harms endured by hundreds of thousands of Americans.

Leaving aside harm to others, the mortgagor remains an agent of practical reason, bound to his previously-accepted obligations. This is true even when things do not turn out as he expected because his decision to accept responsibility is a reason for him to honor his obligation. A strong argument can be made that practical reasonableness and its close cousin, integrity, are reasons for action, intelligible in and of themselves. That is, choosing to honor one's obligations in an upright, just, good, and fair manner is an intelligible choice, even when one has no other reasons to honor one's obligations.[156] It remains a reasonable choice—perhaps the only fully reasonable and morally upright choice—even when honoring the mortgage obligation is financially detrimental for the mortgagor and will prevent him from realizing other external ends.[157]

The decision to incur a mortgage obligation, like all autonomous decisions, is the product of both reason and will.[158] The mortgagor exercises will in choosing to accept an obligation that would not otherwise burden him but for his deliberate choice. Yet he chooses for intelligible reasons. To excuse a homeowner-borrower from the obligation he has deliberately chosen to incur is therefore to treat him as not fully reasonable or not worthy of being treated as fully reasonable.[159] This fails to respect him as a fully-functioning agent of practical

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156. *See* GEORGE, MAKING MEN MORAL, *supra* note 123, at 179.

157. Note here that we are dealing with cases in which the deliberate choice to undertake a mortgage obligation was informed. Cases involving fraud or fault of the lender-mortgagee present a very different problem. Such cases might, for example, entail excusable ignorance on the part of the borrower, relieving him of moral responsibility. *See* DANIEL R. COQUILLETTE, LAWYERS AND FUNDAMENTAL MORAL RESPONSIBILITY 37 (1995). That is to say, one generally will not have a morally-binding obligation, and thus will lack a moral reason, to honor an obligation that one was unfairly induced to incur, or that one incurred as a result of ignorance fostered by the promisee.

The law recognizes this distinction, as well. As Weinstein, Crusto, and other rights-based advocates for judicial empathy recognize, the law already prohibits such lending practices as fraud and misrepresentation. And, as mentioned above, new legislated policies can extend current law to cover new abuses as lenders conceive of them and can target those abuses that lead to obligations incurred without knowing assents.

158. *See* Finnis, *supra* note 148, at 337–42; Kant, *supra* note 148, at 173 ("[T]he law by virtue of which I regard myself as being under obligation proceeds in every case from my own practical reason; and in being constrained by my own reason, I am also the one constraining myself.")

159. Compare the following passage from Kant:

> [A] human being's duty to himself as a moral being *only* (without taking his animality into consideration) consists in what is *formal* in the consistency of the maxims of his will with the *dignity* of humanity in his person. It consists, therefore, in a prohibition against depriving himself of the *prerogative* of a moral being, that of acting in accordance with principles, that

reasonableness, who has considered the facts, has analyzed the alternative courses of action, and has chosen one course over all the others in an exercise of both reason and will.

3. Evidence of Practical Reasonableness in the United States

Without affirming that practical reasonableness and integrity are reasons in and of themselves, one is hard pressed to explain the paucity of strategic defaults in the last several months in the United States.[160] A mortgagor who owes more on his house than his house is worth obviously has little incentive to honor his mortgage obligation. If that mortgagor lives in a non-recourse jurisdiction and cannot be subjected to a deficiency judgment, he has little or no economic reason to honor his obligation. A negative equity mortgagor acting in an economically rational manner would simply walk away. Yet few of the approximately 5.3 million[161] negative equity mortgagors in the United States have defaulted on their mortgage loans. In fact, only about 10% of them have done so.[162] In the third quarter of 2009 the strategic default rate was between 2.5% and 3.5%.[163]

Economists attempting to explain this seemingly irrational behavior are divided. Some point to the attendant costs of default, such as a poor credit rating and lost opportunity to realize equity when the market rebounds.[164] A poor credit rating makes credit more expensive to obtain. Additionally, walking away from one's home often entails renting a new place to live, which means the loss of a mortgage interest tax deduction and a lost opportunity to build new equity.[165]

But these costs will not always, or perhaps even often, exceed the economic gain that a mortgagor with negative equity can realize by defaulting. Many homes in the United States are underwater by large margins. In the second quarter of 2009, more than 16% of homeowners had negative equity exceeding 20% of their homes' values.[166] In California, a non-recourse jurisdiction, 35% of all homeowners have negative equity,[167] and 25% have negative equity

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is, inner freedom, and so making himself a plaything of the mere inclinations and hence a thing.

Kant, *supra* note 148, at 175.

160. *See* Brent T. White, *Underwater and Not Walking Away: Shame, Fear and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 71–72 (2010). There is some evidence that the number of strategic defaults is now increasing. *See* David Streitfeld, *Owners Stop Paying Mortgages, and Stop Fretting*, N.Y. TIMES, May 31, 2010, at A1, *available at* http://www.nytimes.com/2010/06/01/business/01nopay.html?pagewanted=1&partner=rss&emc=rss.

161. Kevin A. Hassett, *Mortgage Morality*, NAT'L REV., Mar. 8, 2010, at 20.

162. *Id.* Only between 17% and 25% of all defaults are strategic. *See* White, *supra* note 160, at 976 n.18.

163. White, *supra* note 160, at 977.

164. *See* Hassett, *supra* note 161.

165. *See id.*

166. White, *supra* note 160, at 975.

167. *Id.* at 974.

exceeding 25% of their homes' value.[168] Given the high home prices in California, it is reasonable to infer that a substantial percentage of homeowners have negative equity of hundreds of thousands of dollars.[169] When, as in these cases, the value of the home is much less than the amount owed on it, the costs of carrying a damaged credit rating for some period of time[170] and of renting will not by themselves deter default.

Furthermore, the prospect of renting is not always a deterrent. Renting is not always the alternative to ownership. If the mortgagor owns more than one home or can downsize and obtain a new loan for a smaller first home, then the mortgagor is not forced to choose between honoring his mortgage obligation and renting. Renting has other advantages. With or without an implied warranty of habitability, a lessee generally bears fewer responsibilities for maintenance of a home than a mortgagor who owns title in fee simple. Furthermore, relief from the costs of real estate taxes and insurance for the premises has quantifiable, economic value.

There is a psychological cost entailed in selling one's home at a loss, a phenomenon that behavioral economists call "loss aversion."[171] Homeowners who neither sell nor default probably value their homes more than prospective purchasers do. Behavioral economists might dismiss the choices of non-defaulting mortgagors as suboptimal behavior caused by these and other biases.[172] But as one scholar has noted, the behavioral economic model cannot account for "homeowners who are fully aware that it would be in their financial best interest to default, but still don't do so."[173] Given the incentive that poor and middle-class homeowners have to track the value of their homes, which often constitute their most significant investments, the category of mortgagors who know that they have negative equity is probably quite numerous.

Other economists have uncovered a more striking explanation for the small number of strategic defaults. After reviewing extensive survey data about strategic defaults, a trio of economists concluded that "the most important variables in predicting the likelihood of a strategic default are moral and social considerations."[174] In addition to "pure economic reasons, individuals may have moral considerations that affect their willingness to default."[175] Even "amoral people" may choose not to default strategically if they believe that the decision

168. *Id.* at 975.

169. *Id.*

170. A credit rating can recover from a mortgage default in as little as two years. *See id.* at 973–74.

171. *See* Ray Fisman, *You've Just Been Offered a Great New Job in Charlotte: Too Bad You Can't Sell Your House in Tampa*, SLATE (Sept. 29, 2008, 11:28 AM), http://www.slate.com/id/2200916/.

172. *See* White, *supra* note 160, at 972.

173. *Id.*

174. Luigi Guiso et al., *Moral and Social Constraints to Strategic Defaults on Mortgages* 19 (Nat'l Bureau of Econ. Research, Working Paper No. 15145, 2009), *available at* http://www.nber.org/papers/w15145.pdf.

175. *Id.* at 3.

will subject them to social stigma.[176]

Though the economists found the results "surprising,"[177] the data support their conclusion. When surveyed, 81% of respondents stated that it would be "morally wrong" to default on their mortgages strategically if they had the means to pay.[178] Those who hold this view are 77% less likely to default on their mortgages.[179] That an overwhelming majority of Americans are governed by these moral principles[180] is perhaps the only thing preventing a massive and irremediable collapse of the housing market. After reviewing these numbers, one commentator suggested, "Perhaps our best hope is to be found in the observation that most Americans still find something morally repugnant in strategic defaults . . . ."[181]

These findings demonstrate that many American mortgagors believe that morality—acting and choosing consistently with practical reasonableness—and integrity—remaining true to one's projects and commitments—give them reasons to honor their mortgage obligations. These mortgagors appear to choose to honor their obligations for these reasons even when it would make better financial sense to walk away from their obligations. Are all of these people mistaken? Are they allowing their emotions to overcome their rationality? One

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176. *Id.* at 3.

177. *Id.* at 5.

178. *Id.* at 5, 19.

179. *Id.* at 21–22. Hassett notes an important caveat: "People were 82 percent more likely to state an intention to default if they knew someone who had already defaulted. It seems, then, that Americans think it's wrong to default, but this conviction is dependent, in part, on their friends' circumstances." Hassett, *supra* note 161, at 22. Hassett continues,

> When faced with the question of strategic default, Americans . . . feel, as Adam Smith suggested, a strong compulsion to be viewed as honorable by their fellow citizens. But like Hume's opportunistic knave, they can turn their morality on and off. If borrowers see their friends walk out on their mortgages with little or no consequence, they may conclude that the gains to be had from defaulting are worth the cost.

Id. Hassett concludes that "stigma matters." *Id.*

It could be the stigma, and not any actual moral reason, that matters. If a mortgagor believes that his neighbors believe that he has a moral reason not to default, he might honor his obligation to avoid incurring their disapprobation. Alternatively, stigma might matter because it reinforces moral norms that mortgagors already know to be true. In short, the mortgagor's neighbors might be right.

In either event, it is clear that the contents of the law matter. If the law were to condone strategic default, as it surely would if it enshrined constitutional defenses for poor subprime borrowers, then at least some of the stigma attached to strategic default would disappear. For more on the effects of external motivations for morally upright conduct, including social approbation reinforced by law, see Brian Broughman & Robert Cooter, *Charity and Information: Correcting the Failure of a Disjunctive Social Norm*, 43 U. MICH. J.L. REFORM 871, 883–97 (2010), and the studies cited therein. For more on the role that positive law plays in reinforcing social and moral norms, see generally Adam J. MacLeod, *The Law as Bard: Extolling a Culture's Virtues, Exposing Its Vices, and Telling Its Story*, 1 J. JURIS. 11 (2008).

180. Guiso et al. found "that no household is willing to default if the equity shortfall is less than 10% of the value of the house. The percentage of households willing to default strategically increases to 5% if the shortfall is between 10 and 20% of the value of the house and reaches 17% when the shortfall reaches 50%." Guiso et al., *supra* note 174, at 5.

181. Hassett, *supra* note 161, at 22.

should at least hesitate before dismissing such large numbers of Americans as irrational.

Similarly, it would be a mistake, not to say extraordinarily sanctimonious, to judge that these moral convictions must reflect nothing more than emotion and fear or are ephemeral products of mass socialization.[182] That some social scientists and law professors will not accept and cannot account for the real value of practical reasonableness and integrity could signify either of two realities. On one hand, it could be that millions of America homeowners who believe that they have real, objective moral reasons not to default on their mortgages when they can afford to honor their obligations are wrong. On the other hand, it could be that intellectuals are puzzled by practical reasonableness because they have little first-hand experience with it, or because they fail to recognize that they exercise it on a daily basis.[183]

C. Empathy vs. Human Dignity

Lawmakers and judicial officers should be cognizant of personal responsibility and human dignity, and must carefully consider how their decisions will affect both. The empathy-based constitutional right proposals considered above fail to respect basic human dignity, and for this reason, they should be rejected. This is true whether respect for human dignity is grounded in practical reasonableness, or as liberals would have it, in personal autonomy.

1. The Effects of Positive Law Upon Meaningful Choices

Positive law has a powerful effect on both practical reasonableness and personal autonomy. The rights and obligations created by positive law can, among other things, render choices less meaningful. To illustrate this, we add a third autonomy case with apologies to Joseph Raz:

> *The Untimely Marriage Proposal.* M.A. and M.B. make marriage proposals to W1 and W2, respectively. Neither W1 nor W2 is thrilled with her prospect. Both are madly in love with M.C., who is interested in neither of them. Both W1 and W2 agree to marry their respective suitors. M.A. and W1 live in a state with no-fault divorce. M.B. and W2 live in a state that only recognizes so-called covenant marriages, from which a spouse cannot unilaterally be released. Some time later, M.C. expresses his desire to marry whichever of

182. *But see* White, *supra* note 160.

183. Max Weber famously asserted that the Protestant Christian religious ethic, which regulates the whole of one's personal conduct, makes possible the educational and economic successes of predominantly Protestant societies. Weber called this the "spirit of capitalism." *See* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1958). I am here suggesting something different, that moral constraints and other principles of practical reasonableness are, in fact, *reasons*. People act rationally when they honor their obligations, even when they have no financial or economic reasons to do so. In fact, sometimes the only fully reasonable course is to honor one's obligations, even when it runs contrary to economic self-interest. This is not a religious or sociological argument but rather a philosophical claim.

W1 or W2 is interested. W1, glad to be rid of M.A., divorces him and marries M.C.

Was not W1's decision to marry M.A. less meaningful than W2's decision to marry M.B.? Certainly M.A., M.B., and W2 would think so. The different levels of significance (and the corresponding degrees of personal autonomy) were determined, at least in part, by positive law. W1 agreed to marry M.A. only temporarily until a better offer came along. The law required her to take no risk and make little sacrifice. W2, by contrast, agreed to marry M.B. despite the possibility of a better offer at a later time. The law of her home state required her to make a more momentous decision to account for her long-term interests and to choose for keeps.

The law in many cases demonstrates the capacity to make choices more or less meaningful by treating citizens as more or less tied to the consequences of their decisions. This is not merely or necessarily a matter of freedom. A state that by law makes a choice less meaningful might or might not deprive its citizens of freedom to make the choice in the first instance. Indeed, a state can diminish the responsibility of its subjects even as it increases their freedom. It might, for example, permit its citizens to choose between a no-fault scheme of marriage and a covenant marriage by making both regimes available in law. Nevertheless, positive law that makes choices less momentous, and thus less meaningful, fails fully to respect the responsibility of citizens. It also fails to consider citizens as fully-functioning agents of practical reasonableness, who choose for intelligible reasons, despite the risk of foreclosing other, countervailing options.

2. Human Dignity: Demonstrated in Practical Reasonableness (Or, At the Very Least, Responsibility)

Exercising sovereignty over one's property, including one's home, is in many respects much like exercising sovereignty over one's relationships, affiliations, career, and moral choices. All of these exercises entail deliberation and choices. The choice to accept an obligation gives the mortgagor a new, independent reason to honor that obligation: it is good to act with integrity and consistently with practical reasonableness. The equal and intrinsic dignity of each human being inheres at least in part in this fundamental capacity to deliberate, to choose rationally, and to accept the consequences of one's choices.[184] As one scholar has succinctly put it, "Human dignity requires recognition of human

184. This is not to suggest that human beings who lack the capacity to reason are not entitled to the full respect and protection accorded to those who demonstrate the capacity to reason. That some very young humans have not yet developed the capacity, or that some disabled or old human beings have lost the capacity, does not make them any less human.

free will."[185]

The rights-based response to lending abuses deflects the considered results of one's deliberate, rational choice. In short, it treats the choice as if it were irrational. It denies the intelligibility of the reasons for the mortgagor's choice. In the rights-based approach, the right of the poor borrower trumps the borrower's reason, and the freedom to avoid one's obligation trumps the freedom to assume the obligation. While rich mortgagors are deemed to have conveyed a mortgage to a lender for valid reasons, poor borrowers are presumed to have conveyed a mortgage unreasonably, or perhaps even irrationally. Likewise, rich borrowers have the freedom to oblige themselves, and poor borrowers do not. The equal dignity of poor mortgagors is thus demeaned because their equal rationality is denied.

Similarly, creating socioeconomic suspect classifications would deprive poor, would-be home buyers of a degree of personal autonomy. Unfettered, autonomous choice entails both the freedom to choose and the responsibility to choose. Freedom from the obligation would run directly contrary to the prior freedom to enter into the obligation and to enjoy the benefits that attended the obligation. If one has a constitutional right to void prior obligations, grounded in one's financial condition, then one did not really have the freedom to enter into the obligation in the first place.

While *directly* eliminating the risk of the mortgagor's choice, the rights-based approach that Crusto, Weinstein, and others propose would *indirectly* deprive potential borrowers of meaningful choices in other ways. As constitutional law increasingly insulated subprime borrowers from the consequences of their choices, the supply of subprime loans would evaporate. The rights-based approach would preserve or increase the choices available to potential borrowers only if lenders would continue to loan money to borrowers who enjoyed the right.[186] That contingency is so highly unlikely as to defy credulity. What lender would issue a home loan secured by a mortgage that is enforceable only with the assent of the mortgagor?

Indeed, Crusto does not suppose that the supply of subprime loans would, or should, remain constant if his theories were adopted. Instead, he embraces the limitations that his theories would place upon choice. In his view, mortgage borrowers "should not be sold mortgage products that they ultimately cannot afford."[187] Responsibility rests with the lender, not the prospective home pur-

185. COQUILLETTE, *supra* note 157, at 37. Kant called practical reason, which he conceived as the capacity to subject the mere inclinations to the lawgiving will, "inner freedom, the innate dignity of a human being." Kant, *supra* note 148, at 175.

186. This highlights a fact that Crusto, Weinstein, and even Raz can be faulted for neglecting: the choices available to persons are interdependent. Both of Raz's cases posit, presumably for the sake of simplicity, individuals living in isolation. Autonomy is almost never realized in those conditions in the real world. Further, Crusto and Weinstein assume that the behavior of lenders would remain constant as between a rights-based regulatory regime and a policy-based regime. This assumption is highly questionable.

187. Crusto, *supra* note 1, at 1038.

chaser, to "consider the suitability of the mortgage" in light of the potential borrower's finances.[188]

None of this ought to suggest that policy-based responses to predatory lending do not also raise troubling questions about the freedom and autonomy of poor borrowers. For example, does a statutory prohibition against balloon loans fully respect the poor borrower as a moral agent of rational, autonomous choice? Though one naturally sympathizes with the exploited poor borrower, this is surely not an easy question. On one hand, the case is persuasive for tying the hands of wealthy lenders who take advantage of poor borrowers and capitalize on their poverty and lack of appetizing options. On the other hand, many poor borrowers choose to enter into bad loans, fully aware of the risks and consequences because they perceive some potential advantage. A bad loan is still *an* option. Should all poor borrowers be deprived of the freedom to enter into contractual arrangements in which they perceive some advantage for themselves?

Furthermore, not all policies are equal. Usury laws might be more or less effective than outright prohibitions against particular kinds of loans. Disclosure obligations might preserve the greatest freedom for poor borrowers. A borrower who knows several days or weeks ahead of closing what risks he would assume should he consummate the deal is well equipped to choose responsibly from the choices available to him. Indeed, disclosure obligation laws respect the subprime borrower as a rational agent of free and responsible choice. These provisions enable the borrower to exercise both reason and will and to make choices for intelligible reasons that are grounded in fact. Disclosure laws presuppose that if equipped with an understanding of the risks, he will choose the course that is most consistent with his long-term interests.

IV. A PROPOSAL FOR THE PROPER INTEGRATION OF FORGIVENESS IN PROPERTY LAW

Judges and lawyers should resist the call to constitutionalize socioeconomic differences in lending and mortgage law, regardless of their various philosophical commitments. Reflecting on the role of practical reasonableness and personal responsibility in lending law uncovers strong reasons to oppose the empathy movement in constitutional law. One should oppose the movement not merely for the good of lenders and taxpayers, but for the good, well-being, and autonomous sovereignty of the mortgagor-landowner.

Is there then no room in law for excusing moral agents from the legal consequences of their actions? To the contrary, American law is quite familiar with a concept that is somewhat related to, but different in significant respects from, the Obama-Weinstein-Crusto concept of empathy: forgiveness. The law contains numerous provisions for forgiveness, including debt discharge in

188. *Id.* at 1037.

bankruptcy;[189] presidential pardons, commutations, and reprieves;[190] and reduction of criminal sentences for acceptance of responsibility.[191]

These provisions share at least two characteristics that rights-based judicial empathy and coverture both lack. First, each of these provisions contains specific predicates that are established in law *ex ante*. Second, each is made equally available to all, regardless of sex, race, and socioeconomic status.[192] Both of these traits are significant for the preservation of practical reasonableness and personal responsibility. The first trait serves the second: because the predicates are established *ex ante*, they cannot be fashioned around particular cases to excuse on the basis of sex, race, or socioeconomic status.

Mortgage law has an established history of relieving mortgagors from the hardship of foreclosure by employing remedies the predicates for which have been established *ex ante* and which have been available to all, regardless of class. In English equity courts in the seventeenth century the equity of redemption[193] enabled any defaulting mortgagor to escape the consequences of his default by tendering outstanding principle and interest within a reasonable time after the loan came due.[194] The equity of redemption was the primary protection for mortgagors against overreaching by unscrupulous mortgagees, and it was effective. For more than a century, the maturity of English mortgages was fixed as a matter of course at six months from the date of execution.[195] Of course, the corresponding loans were seldom repaid within six months. Thus, most English mortgages were in default most of the time.[196] As one scholar observed, "If the English mortgagor were not reasonably protected against overreaching, it is unthinkable that he should have acquiesced for more than a century in the practice of fixing maturity at six months."[197]

The English equity of redemption often saved delinquent mortgagors "upon a slight showing"[198] and "even when the excuse was lame."[199] Mortgagors were afforded successive redemption periods to satisfy junior mortgagees, even after a decree of foreclosure *nisi* issued.[200] Only by foreclosing the equity of redemp-

189. *See, e.g.*, 11 U.S.C. § 727 (2006).

190. *See, e.g.*, 28 C.F.R. § 1 (2010).

191. *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2010).

192. They share other traits that socioeconomic suspect classifications do not. For example, provisions for forgiveness in the criminal law require some acceptance of responsibility by the person receiving forgiveness. A similar principle underlies the so-called apology movement in medical malpractice reform. Under this proposal, doctors would face diminished liability where they personally apologize for their negligent acts.

193. For brief histories of the equity of redemption and foreclosure, see DUKEMINIER ET AL., *supra* note 86, at 543–45; see also Campbell v. Holyland, (1877) 7 Ch. D. 166, at 171–72 (Eng.).

194. *See* Michael S. Knoll, *The Ancient Roots of Modern Financial Innovation: The Early History of Regulatory Arbitrage*, 87 OR. L. REV. 93, 109 (2008).

195. *See* Sheldon Tefft, *The Myth of Strict Foreclosure*, 4 U. CHI. L. REV. 575, 576 (1937).

196. *See id.*

197. *Id.*

198. *Id.* at 578.

199. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 584 (1988).

200. *See* Tefft, *supra* note 195, at 577–78.

tion could the mortgagee remove any cloud from the title.[201] This required entry of a decree of foreclosure *nisi*, a subsequent decree of foreclosure absolute after the expiration of all successive periods of redemption, and unless the mortgagee vacated voluntarily, successful prosecution of an eviction action.[202] The mortgagor sometimes succeeded in reopening the proceedings for another redemption period after entry of a decree of foreclosure absolute, and even after sale by the mortgagee to a third party.[203]

The American equity of redemption, by contrast, was summary, and a decree of foreclosure absolute was final.[204] But mortgagors have obtained relief from foreclosure in response to various crises and hardships in American history. During depressions legislatures have temporarily extended redemption periods.[205] Statutory rights of redemption permitted mortgagors to redeem from the purchaser at or after a foreclosure sale, despite the predictable discouraging effect that this right had on potential bidders.[206]

The equity of redemption accounted for non-economic, human values that the original deed of mortgage was ill equipped to protect. It is this feature that most forcefully strikes the careful student of the doctrine. The equity of redemption enabled courts of equity to look beyond form to substance to undue a judgment mandated by positive law in order to ensure that fairness was served.

From the purely financial perspective, mortgagor and mortgagee might be on equal footing.[207] As many commentators have noted, an English mortgagor in the seventeenth century might have failed to settle his debt on the appointed day for any number of reasons that had nothing to do with financial distress. He might have been robbed en route to the meeting with the mortgagee[208] or unable to find the mortgagee.[209] Equity courts permitted the mortgagor to redeem if he established in his petition specific equitable grounds for relief, such as fraud,[210] and that he was prepared to satisfy the debt in full.[211]

When non-financial considerations entered the analysis, mortgagor and mortgagee often had entirely incommensurable interests in the title. The mortgagee

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201. *See* Knoll, *supra* note 194, at 109–10.

202. *See* Tefft, *supra* note 195, at 576–78.

203. *See id.* at 578–79.

204. *See id.* at 588.

205. *See id.* at 589.

206. *See id.* at 590; *see generally* DUKEMINIER ET AL., *supra* note 86, at 544. The statutory right of redemption often did not come into play until the mortgagor's equity of redemption was extinguished by foreclosure. *See* DUKEMINIER ET AL., *supra* note 86, at 545.

207. Of course, even if this was sometimes true, the mortgagee might have stood to realize a substantial windfall from termination of the mortgagor's interest. In one frequently-cited case, the Chancellor extended the equity of redemption four times, even after the mortgagor had promised on the third occasion not to seek any further extensions, because the estate was of greater value than the encumbrance. *See* Anonymus Case, (1740) 27 Eng. Rep. 621 (Ch.); [1740] Barn. Ch. 221.

208. *See* JOHN E. CRIBBET ET AL., PROPERTY 980 (9th ed. 2008).

209. *See* Knoll, *supra* note 194, at 109. The mortgagee took title even where he made himself unavailable to accept repayment. *Id.*

210. *See id.*

211. *See* CRIBBET, *supra* note 208, at 980.

viewed title to the mortgaged land as a security for his investment, nothing more.[212] The mortgagor who had conveyed title to the mortgagee as security for the loan,[213] often had a prior relationship with the land itself. Carol Rose has observed that early mortgages "had the look of pawnshop transactions."[214] In cases involving "an old family estate" or "picture" or some other item that had a "special value for the mortgagor," equity courts were most sympathetic to motions for redemption.[215]

Thus it is not surprising to find decisions extending periods of redemption when the value of the estate far exceeded the outstanding debt;[216] when the mortgagor demonstrated that he had made earnest efforts to repay the debt and had been frustrated by circumstances beyond his control;[217] and when the property had special value to one or both parties that was not captured within its fair market economic value.[218] On the other hand (and tellingly), the mortgagor could not redeem after permitting the mortgagee to treat the land as his own.[219] Where the forfeited estate was one for possession, entitling the mortgagee after foreclosure to take occupancy and make alterations, the "reasonable time" for redemption was shortened.[220] Here again, preference was given to the non-financial interests in land over purely financial interests; the period of redemption was more likely to be extended in equity where the estate was a reversion, "as to which the mortgagee can do nothing except sell it."[221]

Today, the cases of predatory lending that arouse the most natural sympathy—and for which perhaps we ought to exercise the greatest empathy—involve just these sorts of considerations. The poorly-educated truck driver who is tricked into jeopardizing title to the home in which he raised his family is considerably more sympathetic than the couple that took advantage of easy, subprime credit to purchase a second home that they could not afford, or to purchase rather than rent in order to obtain the resultant tax break.

Perhaps the equity of redemption has something still to teach us. It is not self-evident that mortgagors who are foreclosed upon should have some equitable recourse after foreclosure; upsetting settled expectations produces significant adverse consequences.[222] But if relief is appropriate, state legislatures might once again pull statutory rights of redemption out of mothballs to address the current economic crisis in the United States. This legislative response to the

212. *See* Knoll, *supra* note 194, at 108–09.
213. *See* Rose, *supra* note 199, at 583.
214. *Id.*
215. Campbell v. Holyland, (1887) 7 Ch. D. 166, at 173 (Eng.).
216. *See* Holford v. Yate, (1855) 69 Eng. Rep. 631 (Ch.) 633; 1 Kay & J. 677; Anonymus Case, (1740) 27 Eng. Rep. 621(Ch.); [1740] Barn. Ch. 221.
217. *See* Edwards v. Cunliffe, (1816) 56 Eng. Rep. 106 (Ch.); 1 Madd. 287.
218. *See* Campbell v. Holyland, (1887) 7 Ch. D. 166, at 173 (Eng.).
219. *See id.* at 172.
220. *See id.* at 172–73.
221. *Id.*
222. *See* Rose, *supra* note 199.

crisis should respect, rather than diminish, the dignity of sovereign homeowners. In order to target those most deserving of protection without singling persons out on the basis of class, statutory redemption rights should contain two predicates.

First, post-foreclosure redemption should be available only where the fair market value of the real property foreclosed upon exceeds the amount outstanding on the loan or, in the alternative, where the mortgagee engaged in fraud in procuring the note or mortgage. The borrower who has been tricked into obtaining credit on fraudulent terms and the borrower who has not the means to protect the equity in his home both deserve protection from unscrupulous mortgagees. These borrowers should be given an extended opportunity to satisfy their debts, either by refinancing on more favorable terms with a third-party lender or by successfully prosecuting a claim for fraud against the original lender and its agents.

This is not to suggest that underwater mortgagors who are not the victims of fraud are categorically undeserving of protection. Other forms of protection might be appropriate for them. But the fact is that many borrowers of all socioeconomic strata simply borrowed more than they could afford. Rather than renting, they purchased. Or rather than purchasing a comfortable home, they purchased their dream home. Or rather than renting during their vacations, they purchased a second home (or a third). An important corollary of respect for mortgagors as responsible moral agents is that people should be left to fail when they make irresponsible choices.

Second, the mortgagor should be required to make good faith efforts to cure a default prior to foreclosure. The mortgagor who demonstrates little interest in protecting his property rights until the eleventh or twelfth hour is not acting like a responsible property sovereign. And the mortgagor who jeopardizes her equity stake by her own actions or omissions, though a proper object of both empathy and sympathy, is rightly left free to experience the consequences.[223] Redemption should be available to those who honor their obligations. Where the mortgagee procured the obligation through nefarious means, the mortgagor should be permitted to satisfy the good faith efforts requirement by attempting to negotiate reasonable terms with the mortgagee. These efforts would demonstrate a connection to the land and a desire to act responsibly.

CONCLUSION

Though one naturally sympathizes with, and ought to demonstrate empathy for, the victims of predatory home lending, the law should respect the responsibility and capacity of poor homeowners to act as sovereigns over their property and as agents of economic (prudential) and moral reasoning. When property

223. *See* McNeill Family Trust v. Centura Bank, 60 P.3d 1277, 1282–84 (Wyo. 2003) (discussing Delfelder v. Teton Land & Investment Co., 24 P.2d 792, 703–11 (Wyo. 1933).

owners choose to encumber their estates and to obligate themselves to mortgagees, they do so for intelligible reasons. They choose as an act of will. And they choose for reasons that correspond to values and goods that all can recognize. In short, they act as agents of practical reasonableness. The law should honor them as agents of practical reasonableness and absent fraud, should respect the choice to encumber their property rights.

The judicial empathy standard that President Obama, Judge Weinstein, Professor Crusto, and others envision is inconsistent with respect for poor moral agents. In short, it treats their decisions as irrational. To create socioeconomic suspect classifications is to treat poor people as if they are incapable of making rational choices for intelligible reasons. It fails to honor their considered obligations as reasons. And it fails to respect them as responsible, morally-upright, agents of practical reasonableness.

Though not comprehensive solutions, statutory rights of redemption could provide relief for deserving borrowers. If coupled with more comprehensive reforms, they might pave a way forward without denigrating the dignity of poor homeowners. Any such statutory rights must be made available on criteria that are established in law *ex ante*, and must be made equally available to all, regardless of sex, race, and socioeconomic status. If statutory redemption rights do accord special treatment to one class, that class should be those persons who acted responsibly in incurring the obligation.