

Brazilian Regularization of Title in Light of *Moradia*, Compared to the United States' Understandings of Homeownership and Homelessness

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“[H]ouses make a town, but citizens make a city.”²

“As orderly and efficient as U.S. property law sometimes is, this very same orderliness mutes and distorts underlying struggles of property use and value.”³

I. Introduction

This Essay is the first fruit of a project arising from observations made during a week-long study trip to Rio de Janeiro in July, 2010.⁴ It considers in a preliminary way some cultural resonances of a program of regularizing title (*regularização*) to dwellings in Rio's *favelas*,⁵ comparing them to recent and ongoing understandings of the cultural significance of homeownership and homelessness in United States property jurisprudence. Given the space limits here, the Essay focuses mostly on an exposition of some generally shared United States approaches to homeownership and homelessness in comparison to a very pared-down version of (somewhat) analogous Brazilian concepts and concerns. A truly detailed exploration of *regularização* in Rio,⁶ the right to housing or *moradia*,⁷ the “right to the city”,⁸ and the “social

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² Edésio Fernandes, *The Social Function of Urban Property in Brazil: Nature, Developments, and Constraints of the New Urban Land Governance Framework in Brazil* 16 (May, 2011) (paper presented at the Fordham Law School Conference on the Social Function of Property) (on file with author).

³ Ngai Pindell, *Finding a Right to the City: Community and Property in Brazil and the United States*, 39 VAND. J. TRANSNAT'L L. 435, 448 (2006).

⁴ This study week, attended by professors and graduate students from several disciplines and several countries, was part of a series of study weeks called “Study Space”, produced by Professor Colin Crawford, until recently of Georgia State University College of Law and now of Tulane University Law School. The Rio de Janeiro 2010 Study Space was co-organized by Professors Romulo Sampaio and Maria Clara Dias. The participants attended lectures and participated in activities concerning the subjects of land use, the environment, and issues of wealth and poverty in Rio.

⁵ *Favela* is Portuguese for shantytown. Colin Crawford, *The Social Function of Property and the Human Capacity to Flourish*, 80 FORDHAM L. REV. 1089, 1105 (2011).

⁶ In making my comparison, I focus on formalization of title. Edésio Fernandes explains that regularization may in fact encompass several types of legal rights. “The definition of the nature of the rights to be attributed to dwellers has varied greatly, ranging from titles (such as freehold and leasehold) to contracts (such as social rent and other rental mechanisms) and precarious administrative permits (such as temporary licenses and certificates of occupancy).” Edésio Fernandes, *The Influence of de Soto's The Mystery of Capital*, LAND LINES (Lincoln Institute of Land Policy), January 2002, at 5; see EDÉSIO FERNANDES, REGULARIZATION OF INFORMAL SETTLEMENTS IN

function of property” as applied in Brazil,⁹ and of *cidadania*¹⁰ generally, will have to await further research. Some of these concepts are explored briefly in Section II.B.¹¹

In a broad sense, what United States property theory and popular culture typically lack is the sociolegal context that Brazilian jurisprudence and custom supply. My initial observation at the end of my study week in Rio¹² was that the desire of the *favela*-dweller to obtain regularized title has a very different inflection than the longstanding focus in the United States on the importance of achieving homeownership. In the United States, homeownership signifies achieving both a certain status and a certain economic security, on an individual and family basis.¹³ Homeownership, long part of “the American Dream,”¹⁴ does not expressly focus on the

LATIN AMERICA 38 – 39 (Lincoln Inst. Land Pol’y 2011) (cataloguing several different types of titles or enforceable rights that can provide security of tenure). Moreover, Fernandes identifies two basic, intertwined goals of regularization programs: “to recognize security of tenure and to promote the sociospatial integration of informal communities within the broader urban structures and society.” Fernandes [2002], *supra*, at 5. Some Latin American countries have focused solely on formalization of title, while Brazil has sought to provide legal security of tenure within a set of integrated social and legal interventions. FERNANDES [2011], *supra*, at 26 - 27.

⁷ This right is typically expressed in English as a “right to housing” or “right to shelter”. It is expressed in Portuguese by a right to *moradia*. The root word *morar* means to dwell someplace. Colin Crawford criticizes the standard English translation of *moradia*. “[T]he translation of ‘moradia’ as ‘housing’ is a highly imperfect one because in Portuguese the word connotes more than mere habitation but also the basket of social services, for example, roads, utilities, access to recreation and other services, that typically accompany planned communities.” Crawford, *supra* note 5, at 1102. Article 11(1) of the International Covenant on Economic, Social, and Political Rights provides for a right to adequate housing. International Covenant on Economic, Social, and Political Rights, Dec. 19, 1966, S. TREATY DOC. No. 95-19 (1978), 993 U.N.T.S. 3 [hereinafter Economic Covenant]. An important interpretation of this right may be found at General Comment 4 of the United Nations Committee on Economic, Social, and Political Rights. United Nations Committee on Economic, Social, and Political Rights, General Comment 4, U.N. Doc. E/1992/23 (12/13/1991) *available at* <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/469f4d91a9378221c12563ed0053547e?Opendocument>.

⁸ The term was coined by French philosopher Henri Lefebvre. HENRI LEFEBVRE, *LE DROIT À LA VILLE* (1968); *see also* HENRI LEFEBVRE, *THE URBAN REVOLUTION* (Robert Bononno trans., Univ. of Minn. Press 2003). It is quite nebulous. As one true adherent to Lefebvre observes, “the density of Lefebvre’s style can at times obscure his message.” Chris Butler, *Critical Legal Studies and the Politics of Space*, 18 SOC. & LEGAL STUD. 313, 327 (2009). Ngai Pindell provides a helpful introduction to the Brazilian law, history, and practice on the right to the city. Pindell, *supra* note 3, at 440 - 59. Whatever the term means, Brazil takes the right to the city seriously. *See* Edésio Fernandes, *Constructing the “Right to the City” in Brazil*, 16 SOC. & LEGAL STUD. 201, 202 (2007).

⁹ The social function of property is also part of Brazilian law and practice, though perhaps more problematically. *See* Alexandre dos Santos Cunha, *The Social Function of Property in Brazilian Law*, 80 FORDHAM L. REV. 1171 (2011). Sometimes a “social function of the city” is identified and discussed separately from the “social function of property”. *See, e.g.*, Pindell, *supra* note 3, at 437. Pindell writes that the social function of the city is “not ... succinctly summarized” and “[i]n part provides a context for the exercise of the social function of property.” *Id.* This sounds accurate to me, and I am not treating the social function of city at length separately from the social function of property here. The concepts overlap at a cultural level.

¹⁰ *Cidadania* is the Portuguese word for citizenship. I find significant the Portuguese focus on citizenship deriving from the city (Portuguese *cidade*) as opposed to the English focus on citizenship applying to the individual citizen (though to be sure *citizen* in English is also derived from “city”).

¹¹ *See infra* Section II.B.

¹² *See* the conversations described *infra* Section II.A.

¹³ *See infra* Section III. Americans from historically oppressed groups, such as African-Americans and Latino-Americans, will likely understand their personal success in achieving homeownership against a backdrop of race relations, and may therefore have a different appreciation of the way in which their individual efforts and achievements are shaped by larger group and class dynamics.

¹⁴ *See, e.g.*, JIM CULLEN, *THE AMERICAN DREAM: A SHORT HISTORY OF AN IDEA THAT SHAPED A NATION* 134 - 57 (2003) (chapter addressing the dream of owning a detached house). I use the term “United States” here, rather than

raft of interconnected services and interpersonal relations that may come with security of tenure. Nor does it typically focus immediately on the way in which dwelling as a homeowner encourages a different relationship to land, community, and local government.¹⁵ Security and community also seem to be behind Rio's titling program.¹⁶ During the Study Space discussions, however, the concerns were expressed more in terms of reliable stability of connection, availability of services, and citizenship. Regularizing title did not seem to me to have a principal significance of an individual's achieving a certain status or gaining access to a wealth-preserving mechanism.¹⁷

Some of the concerns that seem to be expressed in this particular Brazilian cultural understanding of providing regularized formal title to the dwelling appear more clearly in United States discussions of homelessness.¹⁸ These include, for example, achieving overnight shelter, privacy, protection by police, and access to basic social services. However, much of the United States discourse on homelessness is attuned to questions of individual responsibility for homelessness and to compassionate social and legal responses to homelessness on an individual basis. Alternatively, the homelessness discourse questions the responsibility of specific institutions, such as hospitals and prisons, recommending policy changes to redirect institutional behavior. The dimension of interconnection, both in terms of actual services and of psychological citizenship, is not as often expressed or considered.¹⁹

One contribution of this Essay will be to identify Jane Baron's critique of United States discourse around homelessness²⁰ and suggest that it could also apply, in reverse, to homeownership and informal security of tenure. Baron argues that United States homelessness discourse lacks a consideration of the role of property and its connecting, socializing, and citizenship functions.²¹ Baron argues that we need to understand the homeless as having the opposite of property, as having "no property."²² She is correct. Baron could go further, though. To my mind, the issue is not "no property" as such, but having no place to dwell, to take root.

"America" and "American", whenever possible, as there are two continents of "American" countries. However, sometimes an idiomatic phrase or quotation such as "the American Dream" has to be invoked.

¹⁵ There is certainly a cogent argument within United States jurisprudence that homeowners behave differently than renters because of their long-term commitment to dwelling on property in a particular place, and that that commitment shapes their interaction with the community. *See generally* WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND USE POLICIES* (2001). This analysis, inflected through a lens of individual behavior, self-interest, and public choice mechanisms at the level of local government, is not so much about what homeownership means as about what it incentivizes. Fischer provides an economic account of how homeownership affects the construction of community. *But cf.* Stephanie M. Stern, *Reassessing the Citizen Virtues of Homeownership*, 111 COLUM. L. REV. 890 (2011) (critiquing and reassessing the notion of citizenship effects of homeownership).

¹⁶ *See infra* Section II.

¹⁷ The interpretation of regularization that conforms to Hernando de Soto's theory of freeing up informal wealth by formalizing ownership is not discussed in any detail in this essay. *See infra* the brief discussion at the end of Section I.

¹⁸ *See infra* Section IV.

¹⁹ To be sure, claims of constitutional citizenship are mobilized, for example in order to argue that the homeless are constitutionally protected from criminalization. But homelessness is not thereby conceived of as deserving citizenship in the sense of *cidadania*, full participation in community.

²⁰ *See* Jane B. Baron, *Homelessness as a Property Problem*, 36 URB. LAW. 273 (2004).

²¹ *Id.* at 286 – 87.

²² *Id.*

Security of home/housing/shelter facilitates the web of relationships and obligations that Baron correctly identifies as a consequence of “property.”

In the penultimate Section of this essay, I advance five possible explanations for the different resonances of homeownership discourse in the United States and Brazil.²³ One factor is surely the two countries’ different histories around the distribution of public land, and thus, of concentration of land ownership.²⁴ A second is different legal traditions around the basic account of property, with contemporary Brazilian discourse relying heavily on a certain conception of the social function of property.²⁵

Third, the process of regularization of title in Brazil is colored by the incontrovertible presence of immense populations of visible squatter communities.²⁶ Thus, in Brazil regularization of title becomes part of the discourse as to where millions of people have a right to dwell, if anywhere. As things stand, the inhabitants of informal communities are neither homeless nor altogether secure. In contrast, squatter communities in the United States are perhaps less evident.²⁷ Perhaps for this reason too, United States discourse often proceeds on a level that fails to engage the political dimensions of homelessness on the one hand, and of homeownership on the other; and it may also be especially thin on race and class analysis.²⁸

²³ See *infra* Section V.

²⁴ See *infra* Section V.A.

²⁵ See *infra* Section V.B.

²⁶ See *infra* Section V.C.

²⁷ Jane Larson argues that the presence of large irregular populations in *colonias*, principally in Texas, provides the primary example of squatter communities at a large scale in the United States; and further that these communities are understudied. See Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL’Y REV. 137, 140–41 (2002). It is certainly true that *colonias* have not become a central feature of the shared United States understanding of homelessness or homeownership. Tent cities are another type of informal community whose presence and visibility in the United States waxes and wanes with the economy. See, e.g., Zoe Loftus-Farren, Comment, *Tent Cities: An Interim Solution to Homelessness and Affordable Housing Shortages in the United States*, 99 CALIF. L. REV. 1037 (2011). These too are understudied. *Id.* at 1057.

Michelle Wilde Anderson makes a persuasive case that poor communities living unincorporated areas in the urban fringe, typically Black or Latino (and including *colonias* as one type), are similarly misunderstood and understudied. See, e.g., Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931 (2010); Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095 (2008). Many of her recommendations for addressing these hardships of these communities systematically, once they are understood systematically, involve community empowerment through reform of county government – not an argument about formal title, to be sure, but surely one about effectively belonging to a political community. Also, Anderson’s underlying concerns around living conditions in the poor urban fringe and her desire to enhance human flourishing have much in common with concerns about informal communities, and her solutions in a way propose a kind of enhanced localism. See discussion of localism as an underlying issue in understanding informal settlements Sections V.E and VI *infra*.

²⁸ This is an overgeneralization, of course, and some scholars within the legal academy do link issues of right to housing and homeownership to race and class. See, e.g., Carol Necoie Brown, *Intent and Empirics: Race to the Subprime*, 93 MARQ. L. REV. 907 (2010) (describing a theory of the racial discrimination against African Americans present in the dual mortgage market for home financing); Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329 (2009) (analyzing disparities in Black and White homeownership in terms of race and class, and proposing tax code reforms to address the disparity); Rashmi Dyal-Chand, *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*, 39 RUTGERS L.J. 29 (2007) (presenting a case study of predatory lending to low-income households in the United States as a way of testing Hernando de Soto’s hypothesis about the advantages of propertization of informal property); Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855 (comparing generalized

United States property discourse sometimes obscures underlying urgent systemic political dimensions of property in land and the home.

Another potential source of the difference is that United States jurisprudence typically rejects broad aspirational principles such as a right to housing as “law.”²⁹ This may be especially true as to principles generated from foreign and international sources. “Progressive realization” of broad aspirational principles, a common understanding applied to some of the more far-reaching assertions of international human rights law, may also be outside the mainstream of United States concepts of law.³⁰

In the Section V.E, I observe that suspicions about broad aspirations as law combine with a characteristic reluctance in mainstream United States property jurisprudence to see property as processual, rather than fixed by stable principles.³¹ The dominant approach to law is abstract, universal, and monist. Consequently, United States property jurisprudence may obscure or seriously discount the vague, always-in-flux qualities of both broad aspirations for housing for the poor and pragmatic informal property arrangements that sometimes achieve these goals outside a strictly legal framework.

The Essay concludes with a few suggestions for some next steps.³² These include pursuit of further specific investigations of informal communities in both the United States and the developing world; reflections on the role of the local (not so much the specifically informal or private, but the local) in making informal settlements work at all; and problematizing unduly universal, individualistic, liberal property theory. Abstract property discourse, by masking the local, may in itself have a political function and foster injustice. It may treat land as just another commodity, appropriately subject to one set of rules, rather than as involving arrangements about dwelling in local contexts that implicate class and often race.

One important approach to regularizing title is given short shrift in this Essay. Hernando de Soto famously proposed that great wealth resided in informal poor communities in cities around the world, and that it could be unleashed to create more wealth through a formalization of title that would enable that wealth to function as capital.³³ Whether de Soto’s argument is correct is subject to much ongoing discussion; at best it seems to be a sufficient condition for economic improvement of the welfare of the poor only under certain conditions.³⁴ Whatever the

assertions about the benefits of homeownership to the actual experiences of Blacks and Latinos, discerning systematic differences, and asserting the need for a “right to keep”); Elizabeth Warren, *The Economics of Race: When Making It to the Middle is Not Enough*, 61 WASH. & LEE L. REV. 1777, 1787-98 (2004) (describing racial differences in homeownership, bankruptcy of owners as opposed to renters, and disparate effects of predatory lending by race).

²⁹ See Section V.D *infra*.

³⁰ Larson 2002, *supra* note 27, at 144 (“Progressive realization is not an easy idea to incorporate into our legal tradition.”)

³¹ See Section V.E *infra*.

³² See Section VI *infra*.

³³ See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000); HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (1989).

³⁴ “Far from being a panacea, regularization and titling programs possess advantages and disadvantages which must be evaluated on a case by case basis.” Carmen G. Gonzalez, *Squatters, Pirates, and Entrepreneurs: Is Informal*

merits of de Soto's arguments and whatever their influence on Brazilian regularization of title programs, they are tangential to the focus of this essay on cultural constructions of formal ownership of the home and their reflection in the differing jurisprudences of Brazil and the United States.

II. The Background of the Inquiry

II.A. One Fine Day in Rio de Janeiro

In one morning study session during our Study Space week, the topic was *regularização*, the regularization of title in Rio's *favelas*. These settlements, many on public land in Rio, have

Housing the Solution to the Urban Housing Crisis?, 40 U. MIAMI INTER-AM. L. REV. 239, 251 (2009). Michael Trebilcock and various co-authors reach similar conclusions about the contingency of the benefits of formalizing property rights in land. See Jamie Baxter & Michael Trebilcock, "Formalizing" Land Tenure in First Nations: Evaluating the Case for Reserve Tenure Reform, 7 INDIGENOUS L.J. 45 (2009); Michael Trebilcock & Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. PA. J. INT'L L. 397 (2008). Alan Gilbert quips that the policy is popular with the right because "Legalized self-help housing permits people to become proper citizens; they can borrow money against their homes Ironically, you are not recognized as a full citizen in modern society until you have been in debt and have a credit rating." Alan Gilbert, *Love in the Time of Enhanced Capital Flows: Reflections on the Links between Liberalization and Informality*, in URBAN INFORMALITY: TRANSNATIONAL PERSPECTIVES FROM THE MIDDLE EAST, LATIN AMERICA, AND SOUTH ASIA 13, 57 (Ananya Roy & Nezar Alsayyad eds. 2004). See also Ray Bromley, *Poverty & Power: Why de Soto's "Mystery of Capital" Cannot Be Solved*, in URBAN INFORMALITY: TRANSNATIONAL PERSPECTIVES FROM THE MIDDLE EAST, LATIN AMERICA, AND SOUTH ASIA 271 (Ananya Roy & Nezar Alsayyad eds. 2004) (critiquing de Soto); Dyal-Chand, *supra* note 28 (evaluating de Soto's hypothesis by reference to homeownership among poor and minority cohorts in the United States; they have access to the property rights de Soto recommends for the Global South, but remain poor); Edésio Fernandes, *An Evaluation of Hernando de Soto's Agenda*, lecture at the Lincoln Institute of Land Policy, March 25, 2009, available at <https://www.lincolninst.edu/pubs/video/ee0da0420c214e44a9ce95de677bd539/An-Evaluation-of-Hernando-de-Soto-s-Agenda> (comprehensive and accessible critique of de Soto's theory) (hereinafter "Fernandes lecture"); Fernandes [2002], note 6, at 8 (de Soto is correct to question the legitimacy of exclusionary legal systems, but misunderstands the economic processes of ownership as well as to some extent the legal processes); Alan Gilbert, *On the Mystery of Capital and the Myths of Hernando de Soto: What Difference Does Legal Title Make?*, 24 INT'L DEV. PLAN. REV. 1 (2002); HERNANDO DE SOTO AND PROPERTY IN A MARKET ECONOMY (D. Benjamin Barros ed. 2010) (offering a variety of authors' assessments of De Soto's arguments); Tayyab Mahmud, "Surplus Humanity" and the Margins of Legality: Slums, Slumdogs, and Accumulation by Dispossession, 14 CHAP. L. REV. 1, 60 - 65 (2010) (critiquing de Soto and other titling responses to the plight of urban slum-dwellers); Timothy Mitchell, *The Work of Economics: How a Discipline Makes Its World*, 46 ARCHIVES EUROPÉENNES DE SOCIOLOGIE 297 (2005) (critiquing de Soto's thesis and the neoliberal intellectual and political matrix in which it emerged and has been tested); Jean-Louis van Gelder, *Legal Tenure Security, Perceived Tenure Security and Housing Improvement in Buenos Aires: An Attempt towards Integration*, 33 INT'L J. URB. & REG. RES. 126, 142 (2009) ("scholars have drawn attention to the face that legalization can diminish rather than increase the tenure security or certain groups of dwellers"); Ann Varley, *Private or Public: Debating the Meaning of Tenure Legalization*, 26 INT'L J. URB. & REG. RES. 449 (2002); Peter M. Ward, Flavio de Souza, Cecilia Giusti, & Jane E. Larson, *El Título en la Mano: The Impact of Titling Programs on Low-Income Housing in Texas Colonias*, 36 LAW & SOC. INQ. 1 (2011) (questioning de Soto's thesis in light of the impact of formal titling on low-income housing in Texas colonias).

Disagreement among scholars and policymakers over whether regularization of title will assist those living in so-called informal housing arrangements or rather destabilize their security of tenure predates de Soto's books by a couple of decades. See, e.g., Varley, *supra*, at 449 ("Although de Soto writes as though he invented the idea of giving the poor access to property in order to combat poverty, international debate about regularization dates back to the 1960s, and in particular to the work of John Turner . . ." (referencing J.F.C. Turner, *Housing Priorities, Settlement Patterns, and Urban Development in Modernizing Countries*, 34 J. AM. INST. PLANNERS 354 (1968))).

been in existence for generations, and house more than a million of Rio's poor and many millions more throughout Brazil.³⁵ *Favela* dwellers do not have formal title to the land they live on nor to their houses. One member of the panel presenting on this topic, a Brazilian law professor, explained a program to supplement the informal ownership of the dwellings in *favelas* with formal legal title to them. He pointed out, however, that registration of title would trigger a title registration fee equal to four months' basic income, as well as a subsequent obligation to pay taxes. Thus, it was very likely that as a result of titling, many of the *favela* residents would lose their dwellings instead of having their tenure made more secure by regularization of title.³⁶

A second panel member, an inhabitant of the Cantagalo *favela*,³⁷ then explained the importance to him of acquiring title: it would bring him and others in his community into fuller and more regular participation within the larger community. In the ensuing question and answer period, the resident was asked whether he was concerned about the potential loss of his property through failure to pay fees and taxes, or other costs such as utility bills.³⁸ He insisted that it was most important to him to acquire the status of owner and to secure a "place on the map." Others in the room joined the conversation. They explained that in fact many *favelas*, those located on government land, did not appear on certain official maps at all, for they had been built on what was still officially public forest land; that the concern of the Cantagalo resident was in part about acquiring an increased ability to negotiate for social services such as utilities, sanitation, transportation, and police protection, based on the newly confirmed ownership status; that these were all part of *moradia*, roughly translated as a right to housing, shelter, or dwelling; and that this in turn was part of a right to the city and of citizenship (*cidadania*).

It is this dialogue that I seek to explore here. I entered that session thinking that regularization of title would be similar in cultural significance to the transition a United States citizen makes from renter to homeowner, a kind of confirmation of access to the middle class and its engine of wealth. Formal ownership might or might not facilitate borrowing and commerce à la Hernando de Soto; but that analysis did not seem to be important for anyone. I did not expect to encounter so much emphasis on connection, community, and a large and

³⁵ "[F]or some time now Brazil's process of informal urban development has not been the exception, but the main socio-economic effect was to produce urban space in the country." Fernandes, *supra* note 8, at 203. All cities with more than 500,000 inhabitants have *favelas*, as do 80 per cent of cities with 100,000 to 500,000 inhabitants, 45 per cent of those with a population of 20,000 to 100,000, and 20 per cent of cities with less than 20,000 inhabitants. *Id.* In 2009, Rio de Janeiro had a population of 6 million, with 1.25 million living in *favelas* and other informal settlements. FERNANDES 2011 REGULARIZATION, *supra* note 6, at 14. There are 1200 *favelas* in Rio. *Id.* at 32. In Latin America generally, in 2000

some 75% of the total population lived in urban areas, making it the most urbanized region in the world. . . . It is estimated that between 40 and 80 percent of the population lives illegally because they can neither afford nor gain legal access to land near employment centers. As a result, illegal tenure arrangements have become the main form of urban land developments.

Fernandes [2002], *supra* note 6, at 6.

³⁶ Similarly, David Harvey predicts that if *regularização* proceeds in Rio, by 2023 "all those hillsides in Rio now covered by *favelas* will be covered by high-rise condominiums with fabulous views over the idyllic bay, while the erstwhile *favela* dwellers will have been filtered off into some remote periphery." David Harvey, *The Right to the City*, 53 NEW LEFT REV. 23, Sept.-Oct 2008.

³⁷ "[T]he Cantagalo project represents the first formal effort to give land titles to slum dwellers in one of the oldest *favelas*" in Rio de Janeiro. Crawford, *supra* note 5, at 1105.

³⁸ Electricity and drinking water are often pirated in *favelas*, and regularization of title might make it easier for the utilities to identify who is using their services, and bill them, and perhaps cut off service.

unfamiliar constellation of attributes associated with the right to *moradia*, nor such an emphasis on citizenship linked to an ability to dwell securely in a place.

My puzzlement was amplified during the field trip we took that afternoon to Cantagalo, which rises on the steep hill behind the Copacabana and Ipanema districts and their beaches. The Cantagalo *favela* was subject to the new “pacification” program in December 2009, pursuant to which the drug lords are driven out of a *favela* and a community police force is installed permanently on-site.³⁹ In our interview with the resident police captain, he explained that there was a three-part process for pacification. First, he said, dominate the land. Then, drive out the drug lords. Finally, establish the community force and work with the residents.

Professor Crawford, serving as our translator, hesitated as he translated the first step, and then did so literally. Afterwards he confirmed that the captain had said “*Primeira dominar a terra.*” This might be translated variously along the lines of controlling the terrain or territory. But to my ear “*terra*” leapt out – an emphasis on brute control of land as the basis for establishing a safer and more functional and more secure community. The two conversations, morning and afternoon, resonated with one another, and suggested to me that the assumptions I as an American brought to the relationship of property, place, community, and citizenship needed to be reexamined in light of what seemed to be a different way of understanding what it means to own property (land) in a troubled and marginal community.

Authorities who have studied the impact of legalization in various informal settlements elsewhere in Latin America sometimes echo the concerns expressed in the Rio study sessions I have described, regarding the attractiveness of regularization of title, even though “in some cases it may *adversely* affect people’s security of tenure.”⁴⁰ Ann Varley, for example, points out that residents’ subjective sense of security is not linked only to legalization of title, but often more importantly to the provision of services, regardless of title,⁴¹ and to the length and stability of the community.⁴² Nevertheless, becoming the real owner of one’s home produces an additional satisfaction.⁴³ Varley also notes that various additional costs may come with legalization, depending on the exact legal classification of the land: legal title may be refused because of the location; legalization may increase tax assessment; and legalization may undermine community’s political solidarity.⁴⁴

³⁹ See generally *Pacification Saves Lives*, RIO REAL (July 29, 2012), <http://riorealblog.com/2012/07/29/pacification-saves-lives-the-first-full-blown-impact-study/> (describing the first study of the effectiveness of the *favela* pacification program); *Pacifying Police Unit*, WIKIPEDIA, http://en.wikipedia.org/wiki/Pacifying_Police_Unit (last visited October 18, 2012); Matias Spektor, *Taking Back the Favelas*, IHT GLOBAL OPINION, Dec. 2, 2011, available at <http://latitude.blogs.nytimes.com/2011/12/02/taking-back-the-favelas/> (describing the policy of *favela* occupations). The Cantagalo *favela* was “pacified” on December 23, 2009, one of the earliest. *Pacifying Police Unit*, *supra*.

⁴⁰ Ann Varley, *The Relationship between Tenure Legalization and Housing Improvements: Evidence from Mexico City*, 18 DEVELOPMENT & CHANGE 463, 477 (1987).; accord, van Gelder, *supra* note 34, at 129 – 30.

⁴¹ Varley, *supra* note 40, at 465 – 67. Ward et al. found a similar sense of belonging through homeownership expressed in focus groups they convened to study the effects of formalizing title in *colonias* in Texas inhabited by Mexicans. Ward et al., *supra* note 34, at 18.

⁴² Varley, *supra* note 40, at 468.

⁴³ *Id.* at 476.

⁴⁴ *Id.* at 477 – 78.

In a recent article, Jean-Louis van Gelder writes:

There appears to be something inherently paradoxical about legalization, as it has been shown capable of producing effects opposite of the ones intended. Legalization may improve the efficiency of land markets and lead to capital gains as a consequence of increases in the value of dwellings, but it can simultaneously make land inaccessible for the low(est) income groups and push them out of settlements as a consequence of market forces. Additionally, the intention of providing tenure security can be strengthened by property rights, but also be undermined when service charges and property taxes turn out to be unaffordable for the beneficiaries.⁴⁵

Speaking generally about Latin American regularization programs, Edésio Fernandes opines that they have been “more successful in upgrading settlements through public investments in urban infrastructure and service provision than in legalization programs.”⁴⁶

Unless titling is undertaken within the context of a broader set of public policies that address urban, politico-institutional and socioeconomic conditions, legalization programs may actually aggravate the processes of exclusion and segregation. As a result, the original beneficiaries of the programs might not be able to remain on the legalized land, although that should be the ultimate objective of regularization programs, especially on public land.⁴⁷

In another recent article, van Gelder reports from a focus group discussion with inhabitants in an informal *barrio* in Buenos Aires that, “[f]or residents, having a property title, realistically or not, implies inclusion in a society that has systematically denied them entry. As one resident put it: ‘Without papers it’s like we don’t exist either.’”⁴⁸ My Cantagalo resident is not alone in expressing this sentiment, then. Legal ownership equals existence, a place on the map. Even if it imperils security of tenure.

II.B. The Brazilian Terms That Circulated That Day

The understanding of *regularização* articulated in my Study Space discussions seems to be linked to *moradia*; to the right to the city; to conception of the social function of property, which is of constitutional dimension in Brazil; and to a certain conception of citizenship (*cidadania*) via full participation in the city. I explore two of these terms more here, the right to the city and the social function of property. Concerning *moradia*, as Pindell points out, both the

⁴⁵ Jean-Louis van Gelder, *What Tenure Security? The Case for a Tripartite View*, 27 LAND USE POLICY 449, 450 (2010) (citations omitted).

⁴⁶ Fernandes [2002], *supra* note 6, at 5.

⁴⁷ *Id.*

⁴⁸ Jean-Louis van Gelder, *Tales of Deviance and Control: On Space, Rules, and Law in Squatter Settlements*, 44 LAW & SOC’Y REV. 239, 262 (2010) (citing focus group discussion related to Jean-Louis van Gelder et al., *Estar “en el aire”: Seguridad en la Tenencia e Inversión en el Hogar en Cinco Barrios Informales de Buenos Aires*, 62 MEDIO AMBIENTE Y URBANIZACION 175 (2005)).

right to the city and the social function of property involve some sort of increased access to housing.⁴⁹

The “right to the city” is derived in various ways from Henri Lefebvre’s *oeuvre*.⁵⁰ Chris Butler, interpreting Henri Lefebvre, describes the right to the city as a “right to urban life”⁵¹ that involves a right to occupy physical space,⁵² a right not to be expelled,⁵³ a right not to suffer segregation,⁵⁴ and a right to participation in all levels of decision-making.⁵⁵ It also involves access to all urban services. So it involves both habitation and participation.⁵⁶ Tayyab Mahmud distills a similar list;⁵⁷ and also stresses that the “right to the city” is to be understood as “more than an individual liberty to access urban resources, and [must] be seen instead as a collective right to reshape the process of urbanization.”⁵⁸ Edésio Fernandes, an important Brazilian urban planner and jurist, agrees. In discussing the “right to the city,” he lists a number of concerns Lefebvre identified as necessary to update eighteenth-century Rousseauian civil rights.⁵⁹ Zeroing in on the right to the city, Fernandes articulates an overall right to habitation—that is, “to fully enjoy urban life with all of its services and advantages;”⁶⁰ and a right to participation—that is, “taking direct part in the management of cities.”⁶¹ Fernandes sees “a vital link between cities and citizenship . . . given the escalating urbanization of society at a global level.”⁶² David Harvey likewise argues that the right to the city must be understood in terms of the contemporary global phenomenon of urbanization and consequent dispossession of the poor in vast numbers.⁶³ Mark Purcell points out that the participation aspect of the right to the city necessarily involves adjusting the scale of politics to include the urban local.⁶⁴

⁴⁹ Pindell, *supra* note 3, at 439, –444 – 45. For what more I have to say on the difference between a right to *moradia* and right to housing, see note 7 *supra*. And I am not treating the social function of the city as a separate matter from the social function of property. See note 9 *supra*.

⁵⁰ See, e.g., Butler, *supra* note 8, describing its origins and providing an interpretation referring to the critical legal geography movement in the United States and Canada; Edésio Fernandes, *supra* note 8, at 205 – 08 (providing a derivation of the right to the city from Lefebvre’s *oeuvre*); Pindell, *supra* note 3, at 440 – 41 (discussing Lefebvre); Mark Purcell, *Excavating Lefebvre: The Right to the City and Its Urban Politics of the Inhabitant*, 58 GEOJOURNAL 99, 101 - 03 (2002) (providing an “extrapolation” of Lefebvre to modern conditions, *id.* at 101). A volume of short essays exploring the contours of the right to the city is available from UNESCO. INTERNATIONAL PUBLIC DEBATES: URBAN POLICIES AND THE RIGHT TO THE CITY (2005), <http://unesdoc.unesco.org/images/0014/001461/146179m.pdf>.

⁵¹ Butler, *supra* note 8, at 325.

⁵² *Id.*

⁵³ *Id.* at 326.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Mahmud, *supra* note 34, at 69 (using “right to the city” to describe claims upon adequate urban services, full use of urban space, rights against segregation and expulsion, and active participation in all decision-making leading to the control of social space).

⁵⁸ *Id.* at 70.

⁵⁹ Fernandes, *supra* note 8, at 207 – 08. Some of these updates include “the right to information; the right of expression; the right to culture; the right to identity in difference and in equality; the right to self-management, that is, the democratic control of the economy and politics; the right to public and non-public services; and above all the ‘right to the city’”. *Id.* at 208.

⁶⁰ *Id.* at 208.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Harvey, *supra* note 36, at 29 – 40.

⁶⁴ Purcell, *supra* note 50, at 103 – 07.

Fernandes contends that law plays a crucial role in profound legal reform leading to social inclusiveness and sustainable development, and that Lefebvre's political and theoretical writings on the right to the city did not chart out any of this territory.⁶⁵ But Latin American countries have. Fernandes identifies the incorporation of the "right to the city" into the Brazilian legal system, in particular through Brazil's 2001 federal City Statute⁶⁶ and the draft World Charter on the Right to the City.⁶⁷ These laws have led to important institutional reforms in Brazil, including the creation of Ministry of Cities in 2003;⁶⁸ establishment of the National Council of Cities;⁶⁹ the National Program to Support Sustainable Urban Land Regularization;⁷⁰ and the National Campaign for Participatory Municipal Master Plans.⁷¹ A separate initiative resulted in a constitutional amendment providing a social right to housing in 2000, with an implementing law enacted in 2005.⁷²

Fernandes situates the City Statute within an emerging new urban-legal order characterized by intertwined collective rights;⁷³ an emerging right to participation characterized by increased representative democracy; decentralization of decision-making processes, especially at the municipal level; and clearer legal-administrative frameworks.⁷⁴ The City Statute builds on the chapter on urban policy included in the 1988 Brazilian Federal Constitution.⁷⁵ Prior to 1988, "the lack of attention to urban and territorial jurisdiction in the Constitution led, in the context of Brazil's contradictory federal system, to endless legal controversies and institutional conflicts between federal, state and local administrations as to which had the power to enact urban legislation and implement urban policy."⁷⁶ The 1988 Constitution contained a specific short chapter on Urban Policy.⁷⁷ Fernandes and Rolnik identify some of the strengths of the 1988 Constitution, including the requirement that the city's social functions be developed through a municipal master plan;⁷⁸ a clear balance between the right to private property and limitations imposed by the social function doctrine, including

⁶⁵ Fernandes, *supra* note 8, at 208.

⁶⁶ *Id.* at 202, 211-15 (discussing Federal Law 10.257/2001, the City Statute).

⁶⁷ *Id.* at 202, 215-17 (discussing the World Charter on the Right to the City).

⁶⁸ *Id.* at 215; Fernandes, *supra* note 2, at 9 – 12.

⁶⁹ Fernandes, *supra* note 8, at 215; Fernandes, *supra* note 2, at 12 – 13.

⁷⁰ Fernandes, *supra* note 2, at 9 – 10.

⁷¹ *Id.* at 10.

⁷² *Id.* at 7.

⁷³ These include "the right to urban planning; the social right to housing; the right to environmental preservation; the right to capture surplus value; and the right to regularization of informal settlements. Fernandes, *supra* note 8, at 211.

⁷⁴ *Id.*

⁷⁵ *Id.* at 211, 214. Fernandes points that "until the 1988 Federal Constitution came into force there were no specific constitutional provisions to guide the processes of land development and urban management." Fernandes, *supra* note 2, at 4.

⁷⁶ Edésio Fernandes & Raquel Rolnik, *Law and Urban Change in Brazil*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES* 141, 143 (Edésio Fernandes & Ann Varley eds. 1998); *see also* Leonard Avritzer, *Living Under a Democracy*, *LATIN AM. RESEARCH REV.* 166, 167 (2010) (Although at the end of the 20th century more than seventy percent of Brazil's population were urban dwellers, "Brazilian cities grew in an unfair, disorganized, and illegal way. Unfairness was the result of a process of modernization without any kind of planning—even when cities were planned, no space was reserved for the poor population . . .").

⁷⁷ Constitution of the Federative Republic of Brazil October 5, 1988, tit. VI, ch. II. (consists of arts. 182 and 183).

⁷⁸ *See* Fernandes & Rolnik, *supra* note 76, at 147 – 148 (discussing art. 182 I).

compliance with city planning;⁷⁹ and a type of adverse possession (*usucapião*) tailored to urban squatters.⁸⁰ Fernandes and Rolnik stress the importance of the new *usucapião* right “with regard to programmes for the regularization of *favelas*, since it probably applies, in theory, to more than half the existing *favelas*.”⁸¹

This framework was implemented in the 2001 City Statute. Fernandes identifies four dimensions to the City Statute: conceptual articulation of the constitutional principle of the social function of urban property and of the city; regulation of legal, urbanistic and financial instruments for building a new urban order; democratic processes for management of cities; and comprehensive regularization of informal settlements in private and public urban areas.⁸² With specific regard to land-tenure regularization, the City Statute established new legal forms for transferring ownership of private land (that specific form of *usucapião*, adverse possession) and a legal form for the concession of a real right to use public land (a specialized form of lease).⁸³ Fernandes notes that as to informal settlement regularization, the City Statute and the 1988 constitutional provisions behind it “fundamentally differ[] from the Hernando de Soto-inspired formalization policies that have been given wide support internationally, not least by international banks, ideological think-tanks and development agencies.”⁸⁴

Whatever its legal force, the broadly worded, aspirational World Charter on the Right to the City⁸⁵ is also instructive here as a textual source for the concepts at play in Brazil and elsewhere in Latin America and the Global South.⁸⁶ Fernandes stresses that this draft charter represents an international mobilization led, to a considerable extent, by NGOs and urban movements from Brazil and other Latin American countries.⁸⁷ Among general principles of the right to the city that the World Charter articulates are the social function of the city (Article II.2) and the social function of property (Article II.3). The proposed Charter’s broad guarantees include access to and supply of domestic and urban public services such as drinking water, electric power, light and heating, health, hospitals, schools, garbage disposal, sanitation facilities, and telecommunications (Article XII); a right to transport and public mobility (Article XIII); a right to habitable housing (Article XIV.1); regularization of land ownership and improvement of

⁷⁹ *Id.* (discussing art. 5 XXII, XXII; art. 170 II, III).

⁸⁰ *Id.* (discussing art. 183). This provision allows an individual, male or female, or a couple (married or not), one adverse possession of up to 250 square meters, of private real estate used as a home or dwelling after five years’ occupancy, if the possessor owns no other urban or rural property. The five year time period is much shorter than the otherwise applicable period for *usucapião*. That would be twenty years in most cases. See Pindell, *supra* note 3, at 450. This is called a *usucapião special urbano*. FERNANDES [2011], *supra* note 6, at 40.

⁸¹ Fernandes & Rolnik, *supra* note 76, at 147.

⁸² Fernandes, *supra* note 8, at 212.

⁸³ *Id.* at 214. This lease right can be registered, transferred, and inherited. Fernandes, *supra* note 2, at 41.

⁸⁴ Fernandes, *supra* note 8, at 214.

⁸⁵ A proposed World Charter on the Right to the City (2004) is available at <http://www.dpi.org/files/uploads/publications/WorldCharterontheRighttotheCity-October04.doc>. To be sure, the conversations that sparked this essay were not directly referring to or relying on a document as esoteric and aspirational as the World Charter, and I doubt it has legal force. The concepts do hold some sway in Brazil. See, e.g., Fernandes, *supra* note 8, at 215 – 17; Pindell, *supra* note 3, at 436 n.1, 442 – 25 (discussing the Proposed World Charter).

⁸⁶ Fernandes, *supra* note 8, at 215 – 17; see also Mahmud, *supra* note 34, at 71 – 72 (speaking generally, Mahmud calls the Charter a “promising development” that “[i]f approved by the United Nations ... would confer legitimacy to social movements of the urban poor and slum-dwellers”).

⁸⁷ Fernandes, *supra* note 8, at 215 – 16. .

precarious neighborhoods and informal housing settlements (Article XIV.3); and security of tenure (Article XIV.6).

The contours of the doctrine of the social function of property are nebulous, especially if one tries to generalize across countries and time periods. Colin Crawford discerns a common theme of emphasis on the use of property to promote human flourishing.⁸⁸ Crawford expressly refers to the work of Martha Nussbaum and of Amartya Sen on the development of human capabilities,⁸⁹ in addition to the work of Gregory Alexander and Eduardo Peñalver.⁹⁰ The concepts of human flourishing articulated by these authorities are very open-ended and context-specific, but nonetheless do provide, as they are implemented over time in specific contexts, some kind of guiding principle or direction.⁹¹ In May 2011, Fordham Law School held a symposium on the social function of property, bringing together Latin American and United States property scholars to generate comparative perspective.⁹² This seems to be the most recent overview of “the social function of property” in the United States law review literature. It is remarkably heterogeneous.⁹³

Historically, the propagation of the concept that the state protects property only to assure that property provides a social function is attributed to French jurist Léon Duguit.⁹⁴ Duguit introduced it in one of a series of lectures given in Buenos Aires in 1911.⁹⁵ “In South America, Duguit’s lectures in Buenos Aires served to link his work and ideas to the legal development of

⁸⁸ Crawford, *supra* note 5, at 1089; *id.* at 1094 – 97 (discussing the concept of human flourishing).

⁸⁹ *Id.* at 1094, 1097 (discussing MARTHA NUSSBAUM, *CREATING CAPABILITY: THE HUMAN DEVELOPMENT APPROACH* (Belknap Press, 1st ed. 2011) and AMARTYA SEN, *THE IDEA OF JUSTICE* (Belknap Press, 2009)).

⁹⁰ *Id.* at 1093, 1095 – 98 (discussing Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 *THEORETICAL INQUIRIES IN LAW* 127 (2009)).

⁹¹ On the social function of property, *see generally*, Thomas T. Ankerson & Thomas Ruppert, *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 *TUL. ENVTL. L. J.* 69, 89 (2006) (explaining the relationship of the social function doctrine to land reform in various Latin American countries); Daniel Bonilla, *Liberalism and Property in Colombia: Property as a Right and Property as a Social Function*, 80 *FORDHAM L. REV.* 1135, 1154 – 55 (2011) (explaining Duguit’s conception of the social function of property); Fernandes, *supra* note 8, at 204-06; Sheila R. Foster & A. Daniel Bonilla, *The Social Function of Property: A Comparative Perspective*, 80 *FORDHAM L. REV.* 101, 102 – 05 (discussing the contours the social function of property according to its original exponent, Léon Duguit) (2011); M.C. MIROW, *LATIN AMERICAN LAW; A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA* 205 (2004) (describing the origins of the “social function of property” doctrine in Latin American constitutions in late nineteenth century Catholic concerns to counter a Marxist critique of property; and its deployment as part of land reform efforts); Flávia Santonini Vera, *The Social Function of Property Rights in Brazil* (2006), <http://escholarship.org/uc/item/0tp371xs#page-1>. Santonini Vera’s work explores the introduction of the “social function” into the Brazilian Constitution of 1988 and its subsequent role in managing land invasions organized by the *Movimento Sem Terra* (MST). MST is a landless worker movement that organizes occupations followed by very quick squatter settlement, and is a different squatter issue legally and socially than that presented by *favelas* and the possibility of regularization of ownership of parcels in them. For more on MST, *see, e.g.*, Kevin E. Colby, *Brazil and the MST: Land Reform and Human Rights*, 16 *N.Y. INT’L L. REV.* 1 (2003).

⁹² Most of the papers were published in *Symposium: The Social Function of Property: A Comparative Perspective*, 80 *FORDHAM L. REV.* 1003, 1003-1217 (2011).

⁹³ *See* discussion *infra* Section V.B for whether the social function of property doctrine actually means much of anything.

⁹⁴ Ankerson & Ruppert, *supra* note 91, at 95 (discussing LÉON DUGUIT, *LAW IN THE MODERN STATE* (1919)); Foster & Bonilla, *supra* note 91, at 102 – 06 (discussing Duguit); M.C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 *FLA. J. INT’L L.* 191, 195 (2010) (discussing Duguit and his sources).

⁹⁵ Mirow, *supra* note 94, at 196.

the region. Based on Duguit's work, drafters of Latin American constitutions changed the way property was defined in the first decades of the twentieth century."⁹⁶ Beginning with Mexico in 1917, most Latin American and some European countries incorporated the Duguitian idea of the social function of property in their constitutions.⁹⁷ Its reception in Brazil did not follow the same path as in other Latin American countries, however, and Brazil was not at first influenced by Duguit.⁹⁸ The social function of property was proposed but omitted from the text of Brazil's first Civil Code in 1916 and remained a "mere legal principle" until the Constitution of 1934.⁹⁹ Brazil's 1946 constitution articulated the concept of social function, but it became truly operational only after the end of military government in 1985; the 1988 constitution makes several explicit references to the social function of property.¹⁰⁰ Alexandre dos Santos Cunha considers it especially strong since the adoption of the 2002 Civil Code.¹⁰¹ Nowadays, the social function doctrine is powerful in Brazil.¹⁰²

III. The United States Cultural Take on Homeownership Is Not Like Brazilian *Regularização* and *Moradia*

This Section argues that in United States property rhetoric—both popular rhetoric and to a considerable extent legal academic rhetoric—themes of individual benefit, concern, and economic or personal satisfaction dominate the discussion of homeownership. Themes of community and communal interest such as those expressed in *moradia*, the social function of property, and the right to the city are largely absent or are masked.

⁹⁶ *Id.* at 195; see also M.C. Mirow, *Origins of the Social Function of Property in Chile*, 80 *FORDHAM L. REV.* 1183 (2011) (detailing the politics of the adoption of a social function limitation on property in Chile in 1925).

⁹⁷ Ankerson & Ruppert, *supra* note 91, at 95-96, 108; see also Gregory Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 *CORNELL L. REV.* 733 (2003) (describing the German constitutional application of "social obligation" to property); Rebecca Lubers, *The Social Obligation of Property Ownership: A Comparison of German and U.S. Law*, 24 *ARIZ. ST. J. INT'L & COMP. L.* 389 (2007); Mirow, *supra* note 96 (origin of the social function doctrine in Chile); MIROW, *supra* note 91, at 205-206 (addressing the social function doctrine in Spanish-speaking Latin America).

⁹⁸ Alexandre dos Santos Cunha cautions that Duguit's conception was not the source of the social function of property doctrine in Brazilian law, and in his view Brazilian social function of property doctrine has only and partially begun to assume some of the broad contours of Duguit's conception. dos Santos Cunha, *supra* note 9, at 1171.

⁹⁹ *Id.* at 1175; see also Fernandes & Rolnik, *supra* note 76, at 154.

¹⁰⁰ See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5(XXIII) (Braz.) (individual and collective rights and duties, providing that "property shall fulfill its social function"); art. 170(III) (general principles of economic activity); art. 182(2) (urban policy); art. 184 (agricultural and land policy and agrarian reform); art. 185 (expropriation for agrarian reform); art. 186 (defining the social function of rural property). Reference to the social function of property also appeared in the original 1988 version of art. 156(I) (authorization for municipal taxes). This provision was amended in 2000, although the sense of authorization to tax for progressive purposes remains. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 156(I) (Braz.). I am working from an English translation of the Brazilian constitution that is available at <http://www.v-brazil.com/government/laws/constitution.html>. See also LEE J. ALISON, GARY D. LIBECAP, & BERNARDO MUELLER, *TITLES, CONFLICT, & LAND USE: THE DEVELOPMENT OF PROPERTY RIGHTS AND LAND REFORM OF THE BRAZILIAN AMAZON FRONTIER* 51 – 52 (1999) (discussing the importance of the "social function" doctrine in plans for land reform at the time of the drafting of Brazil's 1988 constitution).

¹⁰¹ dos Santos Cunha, *supra* note 9, at 1171, –1197 – 80.

¹⁰² Ankerson & Ruppert, *supra* note 91, at 118; dos Santos Cunha, *supra* note 9, at 1181 ("the social function of property is not only well known and acknowledged by both legal professionals and the general public in Brazil, but is also a structural element of that country's legal order").

All agree that “[i]n the United States, home and home ownership are held in high esteem....”¹⁰³ Here are typical reasons why. “Households desire homeownership for many reasons: it delivers a stable stream of housing consumption, a large degree of personal control over the residence, access to superior housing stock and public services, important tax advantages, and unparalleled social and status benefits.”¹⁰⁴ In significant part, “[h]omeownership is said to be a fundamental part of the American Dream because of the economic security it gives homeowners.”¹⁰⁵ Indeed, homeownership is “the only effective form of wealth accumulation for Americans with modest incomes.”¹⁰⁶ In addition to the perceived financial benefits of homeownership, “for people with long-term tenure in their homes, home is a source of feelings of continuity, stability, and permanence.”¹⁰⁷ Home is also the center of individual social networks and provides a physical tie to one’s workplace, school, and so on.¹⁰⁸ In 2006, sixty-eight percent of all American households owned the homes.¹⁰⁹ But there are major class and race disparities in homeownership.¹¹⁰ Indeed, because of their generally more precarious position in society, Blacks and Latinos may be particularly concerned about achieving homeownership.¹¹¹

Recent examinations of the value of American homeownership have been inspired both by the rhetoric over eminent domain when deployed against homeowners in the wake of *Kelo v. City of New London*,¹¹² and by the mortgage foreclosure crisis, in which millions of households have been foreclosed upon or are at risk of foreclosure, and many of them may have been lured into homeownership precisely because of the cultural values attributed to it.¹¹³ Rachel Godsil and David Simunovich, for example, set out to explore “why homeownership is so highly valued”¹¹⁴ as a predicate to asking whether and how loss of homeownership should be protected against or compensated. They point out that the home is an enormous financial asset and a principal source of wealth creation.¹¹⁵ In contrast, renting is viewed as throwing wealth down the drain.¹¹⁶ For these authors, homeownership also has psychological benefits and secures the locus

¹⁰³ D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 255 (2006).

¹⁰⁴ Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047, 1054 (2008).

¹⁰⁵ A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership is Not Always a Good Thing*, 84 IND. L.J. 189, 189 (2009); accord, Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 326 (1988).

¹⁰⁶ Williams, *supra* note 105, at 326.

¹⁰⁷ Barros, *supra* note 103, at 279; accord, Dickerson, *supra* note 105, at 191. Indeed, Akhil Amar sees long roots to this aspect of living in a house, identifying dwelling as typical of an unenumerated right with a long constitutional past, both in terms of privacy and of protection through the Takings Clause. Akhil Reed Amar, *America’s Lived Constitution*, 120 YALE L.J. 1734, 1768 – 77 (2011).

¹⁰⁸ Barros, *supra* note 103, at 279.

¹⁰⁹ Rachel D. Godsil & David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership*, 77 FORDHAM L. REV. 949, 956 (2008).

¹¹⁰ *Id.* at 958.

¹¹¹ *Id.* at 959.

¹¹² 545 U.S. 469 (2005).

¹¹³ For example, Barros, *supra* note 103, is motivated in part by *Kelo*. Dickerson, *supra* note 105, is motivated by the mortgage foreclosure crisis. Godsil & Simunovich, *supra* note 109, are motivated by both, as well as the issue of the value of homeownership raised in the wake of the Katrina flood in New Orleans in 2005.

¹¹⁴ Godsil & Simunovich, *supra* note 109, at 950.

¹¹⁵ *Id.* at 954, 970.

¹¹⁶ *Id.* at 970.

of family and community.¹¹⁷ While the home provides some emotional value, Godsil and Simunovich focus on what they call the status achieved by homeownership.¹¹⁸ Their notion of status is dual – partly about ownership itself, partly about establishing an individual-qua-oneowner’s greater worth in society at large.¹¹⁹ The community ties that they identify as associated with homeownership involve increased civic activity, market transactions linked to home, better living conditions, and economic activity – all coalescing to make a more cohesive community.¹²⁰

Without in any way deprecating Godsil’s and Simunovich’s sophisticated analysis, I contend that it is constructed around an individualistic conception of what it means to own a home or lose a home. Even the aspects that involve participation in community are articulated in terms of individual incentives and disincentives that have aggregate effects. The same is true for other authors in the mainstream of United States scholarship who write about homeownership, for example, Mechelle Dickerson, Lee Anne Fennell, and William Fischel.¹²¹ To be sure, authors such as these ultimately are looking for solutions to various problems on an individual, case-by-case basis: when, if ever, should individual owners receive additional compensation for eminent domain takings of their homes qua homes (Godsil & Simunovich); how to prevent individual losses of homes due to mortgage foreclosure (Godsil & Simunovich; Dickerson); and how to provide alternatives to unnecessarily precarious homeownership (Dickerson; Fennell).¹²² Missing in these analyses and others is communitarian rhetoric around having a place, belonging, and entitlement to participation. Theirs is not at all an incorrect approach, but one very different from the articulation of *moradia* and right to the city that was put forward that fine day in Rio as an explanation of the Cantagallo resident’s understanding of the effects of regularization of title.

To be sure, homeownership as an ideal has come under critical scrutiny in United States academic property discourse, especially in the wake of the recent and ongoing mortgage foreclosure crisis.¹²³ Dickerson writes that “for many, attempting to become a homeowner is a painfully short and ultimately unwise investment.”¹²⁴ She ultimately proposes a number of policy approaches—some dealing with unsound mortgages, others serving to provide housing in forms not influenced by an obsession with homeownership.¹²⁵ Fennell’s innovative effort suggests to a way to split off legally some of the investor’s potential financial risks and rewards

¹¹⁷ *Id.* at 954. Margaret Radin famously articulated this personhood function of property, including the home. Margaret Jane Radin, *Property and Personhood*, 34 STAN L. REV. 957 (1982).

¹¹⁸ Godsil & Simunovich, *supra* note 109, at 951 – 52.

¹¹⁹ *Id.* at 954.

¹²⁰ *Id.* at 952, 969 – 73.

¹²¹ *See, e.g.*, Dickerson, *supra* note 105, at 191 – 92; Fennell, *supra* note 104; FISCHEL, *supra* note 15.

¹²² Godsil and Simunovich, towards the end of their article, also explore Fennell’s suggestion for designing legal instruments of homeownership that would split off the value of the home attributable to off-site local factors such as schools, crime rates, neighborhood amenities, as well as systemic factors. Godsil & Simunovich, *supra* note 109, at 996 – 97.

¹²³ *See generally* Dickerson, *supra* note 105; Rashmi Dyal-Chand, *Home as Ownership, Dispossession as Foreclosure: The Impact of the Current Crisis on the American Model of ‘Home’*, in THE IDEA OF HOME IN LAW: DISPLACEMENT AND DISPOSSESSION 41 (Lorna Fox O’Mahoney & James A Sweeney eds. 2011); Peter W. Salsich, Jr., *Homeownership – Dream or Disaster?*, 21 J. AFFORDABLE HOUSING & CMTY DEV. L. 17 (2012).

¹²⁴ Dickerson, *supra* note 105, at 207.

¹²⁵ *Id.* at 220 – 236.

of homeownership from the consumption benefits.¹²⁶ Critiques of this type, however, sound in the same mode. That is, they ask what is advantageous for the individual as an investor or for the investor's personal security.

Joan Williams' fine and classic article on the rhetoric of property in the United States provides a different sort of critique. She discusses at some length "the romance of the single-family house," but she also calls this rhetoric a "trance" and an "American obsession with homeownership."¹²⁷ Although Williams praises the egalitarian republicanism expressed in the United States myth of homeownership, she argues that it is suspect in a number of ways. She suggests, without exploring her argument fully in this particular article, that the homeownership myth reinforces a gendered sphere of domesticity, and that the prototypical suburban single-family house ideal is exclusionary along lines of race and class.¹²⁸ Elsewhere in the article, she suggests that using an overarching concept of strong protection of property rights puts the widely accepted and generally justifiable notion of homeownership in the service of protecting large capitalist investments in property.¹²⁹

Some United States accounts of homeownership do get a bit closer to *moradia* and a right to the city. I will briefly describe here Tim Iglesias' account of housing ethics, and will also note a discussion of housing in the progressive property theory work of Greg Alexander and Eduardo Peñalver.¹³⁰ The astute reader might note that the works discussed ultimately focus on providing housing for those who don't have it—a prelude to the discussion of homelessness rhetoric assessed in the following section.¹³¹

Tim Iglesias presents a complex picture of housing and homeownership in his description of five "housing ethics" that have historically shaped United States housing law and policy.¹³² They are (1) housing as an economic good, (2) housing as home, (3) housing as a human right,

¹²⁶ Fennell, *supra* note 104, at 1063 – 70.

¹²⁷ Williams, *supra* note 105, at 326.

¹²⁸ *Id.* at 328 – 29.

¹²⁹ As she writes, "it remains to be proven that the need for a high level of protection for the working class homeowner justifies an equally high level of protection for the fondest dreams of [General Motors]." *Id.* at 294. I agree, and have argued elsewhere that there is a persistent dissembling about the nature of property by advocacy groups sponsored by large landholders and industry. Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 189 (2002).

¹³⁰ See GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY (2012) (advocating an Aristotelian approach to property, based on capabilities and human flourishing); Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES IN LAW 127 (2009); see also Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009) (critiquing as incomplete, misleading and problematic the self-interest model of homeowner behavior, and offering a model based on virtue ethics). I also find persuasive Lorna Fox's accounts of the meanings of homeownership. See, e.g., LORNA FOX O'MAHONEY, CONCEPTUALIZING HOME: THEORIES, LAWS AND POLICIES (2007); Lorna Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?*, 29 J. L. & SOC'Y 580 (2002); see also THE IDEA OF HOME IN LAW; DISPLACEMENT AND DISPOSSESSION (Lorna Fox O'Mahoney & James A. Sweeny eds. 2011). But Fox is British, and all but one of the authors in the anthology are other than American; therefore these works are beyond the scope of this essay's inquiry.

¹³¹ See Section IV *infra*.

¹³² Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511 (2007).

(4) housing as providing social order, and (5) housing as one land use in a functional system.¹³³ Iglesias argues that each of these ethics is a stable part of United State housing policy, and that none is dominant.¹³⁴ The first two of his categories, housing as economic good and housing as home, clearly belong to the individualistic, classic liberal core of United States property rhetoric. The last two in contrast display some of the characteristic concern with interconnectedness and function expressed in the Brazilian colloquy over regularization of title, *moradia* and the right to the city. In recognizing a rhetoric of housing as “providing social order,”¹³⁵ Iglesias expressly discusses the creation of community; though he properly notes that by the same token housing also often creates exclusion along race and class lines, and argues that this tendency must be combated.¹³⁶ In discussing an ethic of “housing as one land use in a functional system,”¹³⁷ Iglesias posits the kind of interconnectedness and right to the city that seem to have been expressed in the dialogue with the Cantagalo resident and the seminar participants. There are “functional relationships” between housing and other land uses (e.g., shopping, water, open space, transportation, schools, and medical facilities)¹³⁸ and the goal is to “design[] and promot[e] the development of a workable, livable land use system.”¹³⁹ Notably, Iglesias adverts to planning and environmental modes of analyses.¹⁴⁰ Both disciplines are often in tension here with absolutist visions of private property ownership as they account for positive and negative externalities generated by land use that affects that community.¹⁴¹

Iglesias also presents housing as a basic human right. He begins by quoting a Catholic Church policy statement to the effect that housing is not a commodity but a basic human right.¹⁴² This argument “focuses attention on the fact that decent, safe, and affordable housing is critical to proper human development.”¹⁴³ Here we do find some resonance with the broader implications of *moradia*—not surprisingly, as both are human rights discourses. And it is surely not an accident that a Catholic articulation of a human right to housing would resemble the Brazilian approach to some degree, as both recognize the social function of property, and as one might expect Brazilian legal discourse to be influenced by Catholic teaching.¹⁴⁴ All the same, in his discussion, Iglesias notes the focus of human rights discourse on individual entitlements¹⁴⁵ and not on social policy that conceives of housing as one use in a functional system.¹⁴⁶

¹³³ *Id.* at 511, 514 – 15.

¹³⁴ *Id.* at 516 – 17.

¹³⁵ *Id.* at 553 – 69.

¹³⁶ *Id.* at 589.

¹³⁷ Iglesias, *supra* note 132, at 569 – 83.

¹³⁸ *Id.* at 569 – 70.

¹³⁹ *Id.* at 570.

¹⁴⁰ *Id.* at 570 – 71.

¹⁴¹ For an account of the inevitable tension and negotiation around property, environment, and community, see Marc R. Poirier, *Property, Environment, Community*, 12 J. ENVTL. L. & LITIG. 43 (1997).

¹⁴² Iglesias, *supra* note 132, at 540 (quoting Admin. Bd. U.S. Catholic Conference, *Homelessness and Housing: A Human Tragedy, A Moral Challenge: A Statement* 3 (1988)).

¹⁴³ *Id.* at 540.

¹⁴⁴ See MIROW, *supra* note 91, at 205 (noting the origins of the social function of property doctrine in Latin American law as a nineteenth-century Catholic response to a Marxist critique of property).

¹⁴⁵ Iglesias, *supra* note 132, at 540.

¹⁴⁶ *Id.* at 541 n.143.

The right to housing receives a different inflection, and one fairly close to Brazilian *moradia*, in the course of recent theoretical writing by Gregory Alexander and Eduardo Peñalver.¹⁴⁷ Alexander and Peñalver derive their overarching conception of property neither from utilitarian premises nor from classic liberal premises, but from what they call Aristotelian premises.¹⁴⁸ The core concept is attention to human flourishing.¹⁴⁹ As an example of their theory in practice, they examine the case of *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd.*,¹⁵⁰ which involved a squatter invasion of private property in light of the South African constitution's dual commitments to protect private property and to provide the homeless squatters with housing.¹⁵¹ Alexander's and Peñalver's argument is not mainstream United States property theory at all, but an explication of their progressive, quasi-communitarian critique of other theories of property ownership in light *inter alia* of this specific South African example.

IV. United States homelessness rhetoric: the function of property ownership and of “no property”

At some point in my reflection on the gap between *regularização* and *moradia* on the one hand and United States property jurisprudence's assessment of the meaning of homeownership on the other, it occurred to me that many of the concerns voiced by the Cantagalo resident and the seminar participants were in fact parallel to those addressed in the United States homelessness advocacy literature from the 1980s onward.¹⁵² Perhaps I was looking in the wrong place.

It turns out that the United States homelessness advocacy literature also tends to focus on homeless individuals, not societal patterns of formally landless communities. Thus, it debates whether individuals are responsible for their homelessness (in which case perhaps we ought not to help them); or whether institutions are responsible for individual homelessness (in which case perhaps we ought to reform those institutions).¹⁵³ Writing in 2000, homelessness advocate Maria Foscarinis described two decades of homelessness advocacy as follows:

In broad outline, early legal advocacy focused on addressing immediate basic needs of homeless persons, such as shelter and food, through both litigation and then legislation. Later legal advocacy focused on prevention, such as discharge planning and transitional housing, and on establishing political and civil rights, again through both legislation and litigation. Current legislative efforts are focused on longer-term solutions, such as housing and access to mainstream

¹⁴⁷ Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Alexander & Peñalver [2009], *supra* note 130.

¹⁴⁸ Alexander, *supra* note 147, at 753-73; Alexander & Peñalver [2009], *supra* note 130, at 130 – 45.

¹⁴⁹ Alexander, *supra* note 147, at 745, 748 – 50, 760 – 73; Alexander & Peñalver, *supra* note 130, at 134 – 45.

¹⁵⁰ *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd.*, 2004 (8) BCLR 821 (SCA), *aff'd on other grounds*, 2005 (5) SA 3 (CC).

¹⁵¹ Alexander, *supra* note 147, at 786-91; Alexander & Peñalver [2009], *supra* note 130, at 154 – 60.

¹⁵² Iglesias, *supra* note 132, discussed in Section III *infra*, basically makes an affordable housing argument.

¹⁵³ For a variety of perspectives within these general parameters, *see, e.g.*, Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J. L. & PUB. POL'Y 17 (1992); Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y. REV. 1 (1996); Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 FORDHAM URB. L.J. 1215 (2003).

programs; current litigation is focused on access to mainstream programs as well as challenges to efforts to “criminalize” homelessness.¹⁵⁴

The connection between homelessness, housing, place, and integration into the full workings of community—which I might call full citizenship—is rarely articulated. Instead, much of the homelessness literature seems to address piecemeal causes, desert, and stopgap measures to get individuals food and places to sleep and urinate other than the street. The whole matter is approached in terms of individuals and institutional reforms.

That is not always the case, to be sure. Foscarinis argues for using a right to housing to address homelessness, even if such a right was long ago denied recognition by the United States Supreme Court.¹⁵⁵ Relying on a right to housing articulated in a number of United Nations documents, most notably those related to Habitat I¹⁵⁶ and Habitat II,¹⁵⁷ Foscarinis does place homelessness in larger contexts of proximity to work, social services and transportation, economic and community development, housing, and jobs.¹⁵⁸ The human rights approach seems to allow both an individual articulation and a community-regarding one.

Many of the threads I have been following about the possible blind spot in United States homeownership and homelessness discourse are pulled together in an insightful essay by Jane Baron. In *Homelessness as a Property Problem*, Baron argues that because homelessness has been formulated as a problem of poverty, we have asked “a limited, almost formulaic set of questions concerning the depth of the problem ...; the scope of the problem ...; and the cause of the problem (‘Is homelessness a product of individual weakness or of structural forces beyond any individual’s control?’).”¹⁵⁹ Baron argues that:

[t]he literature on homelessness is structured roughly around two competing hypotheses. The first is that homelessness is mostly the result of personal failures such as substance addiction, mental illness, or inability to hold a job. The second competing hypothesis is that homelessness is mostly the result of institutional forces beyond any individual’s control such as a mismatch between the supply and demand for low cost housing or global changes in the job market that have all but eliminated well-paying entry level jobs.¹⁶⁰

¹⁵⁴ Maria Foscarinis, *Homelessness and Human Rights: Towards an Integrated Strategy*, 19 ST. LOUIS U. PUB. L. REV. 327, 329 (2000).

¹⁵⁵ Maria Foscarinis, *The Growth of a Movement for a Human Right to Housing in the United States*, 20 HARV. HUM. RTS. J. 35 (2007); Foscarinis, *supra* note 154, at 342 – 54 (The case she refers to is *Lindsey v. Normet*, 405 U.S. 56 (1972). This case was actually about a tenant’s security of tenure, but is widely understood to negate any argument for a Substantive Due Process right to housing.)

¹⁵⁶ The United Nations Conference on Human Settlements (Habitat I) occurred in Vancouver, Canada from May 31 – June 11. See Report of Habitat: United Nations Conference on Human Settlements, U.N. GAOR, 31st Sess., U.N. Doc. A/CONF. 70/15 (1976). 1976.

¹⁵⁷ The Second United Nations Conference on Human Settlements (Habitat II) took place in Istanbul on June 3 – 14, 1996. See Istanbul Declaration on Human Settlements, U.N. Doc. A/CONF.165/14 (Aug. 7, 1996)

¹⁵⁸ Foscarinis, *supra* note 154, at 345.

¹⁵⁹ Baron, *supra* note 20, at 273.

¹⁶⁰ *Id.* at 279.

Baron also describes a synthesis of these first two approaches, a “vulnerability” argument in which some combination of personal failure and structural forces causes homelessness.¹⁶¹ But this synthesis analysis, just as much as its two component analyses, is grounded in a “rhetoric of individual responsibility” that “may be affirmatively harmful” in understanding homelessness.¹⁶² Baron suggests that an important element is missing from these modes of analyzing homelessness. I agree.

Baron proposes to look at the deprivations of the very poor—no protection from hunger and cold, uncertainty about where they will sleep, no place to bathe—not in terms of poverty as such, but in terms of what they do not own.¹⁶³ This “no property” state of affairs subjects them to “a complex set of disabilities.”¹⁶⁴ Baron here elaborates on the well-known argument made by Jeremy Waldron, in an essay entitled *Homelessness and the Issue of Freedom*,¹⁶⁵ that the homeless are not free because they have no place to perform freedom. Baron essentially argues that the homeless have no place in which to perform a large number of basic human functions. Noting that the United States Supreme Court has held there is no constitutional right to housing,¹⁶⁶ and that wealth is not a suspect class justifying judicial intervention under a strict scrutiny standard,¹⁶⁷ Baron argues that “the ‘no-rights’ add up: no right to be anywhere, no right to have anything, no right to keep what you do have, etc.”¹⁶⁸ The homeless end up in “a complex legal state in which one is literally a shadow, a photographic negative of the complex constellation of qualities and attributes that constitute wealth.”¹⁶⁹

I do take issue with Baron on her last point, as I think she has committed a minor misstatement. It is not only *wealth* that the homeless lack, but *place*. To borrow Virginia Woolf’s phrase, they lack “*A Room of One’s Own*.”¹⁷⁰ And, as a consequence of a lack of place to dwell that they own, they lack stable relationships to neighbors, to various public services, and to the city itself, and therefore they lack a foundation for full citizenship.

Baron does make a gesture in this general direction. Having a secure place for one’s body, personal possessions, and bodily functions (part of owning property in the sense I think Baron intends to direct us towards) is also about securing one’s relationships. In a short, tantalizing paragraph, Baron refers to Wesley Hohfeld’s seminal theoretical work portraying property not as things owned but as sets of correlated relationships between people around things.¹⁷¹ Baron argues that “[a]s non-owners in a world of owners, the homeless have many duties to respect the rights of others, and liabilities to the powers of others, without themselves

¹⁶¹ *Id.* at 280 – 82.

¹⁶² *Id.* at 282.

¹⁶³ *Id.* at 284.

¹⁶⁴ *Id.* at 284 – 85.

¹⁶⁵ Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991).

¹⁶⁶ *Lindsey v. Normet*, 405 U.S. 56 (1972).

¹⁶⁷ *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

¹⁶⁸ Baron, *supra* note 20, at 285.

¹⁶⁹ *Id.*

¹⁷⁰ VIRGINIA WOOLF, *A ROOM OF ONE’S OWN* (Harcourt Brace Jovanovich 1989: 1929).

¹⁷¹ Baron, *supra* note 20, at 287 (discussing Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 15 (1913)).

having property that would give rise to duties and liabilities on the part of others towards them.”¹⁷² This condition renders the homeless distinctly vulnerable.¹⁷³

Baron explores her important argument about “no property” as paucity of secure relationships at somewhat greater length in a later essay, *Property and “No Property.”*¹⁷⁴ She posits that property is social, and involves relationships with others, and therefore necessarily implicates politics. Baron asserts that “[p]ersons owning very few things inhabit a realm of severe social and legal vulnerability, susceptible to the power of many (and, of course, the government) without having (m)any reciprocal power(s) over others.”¹⁷⁵

In her concept of the problem of “no property,” Baron articulates much of what motivated the Cantagalo informant to desire legal title despite its perils, and what seems to inhere in *moradia* as it was discussed that day in Rio and as I understand it. I would like to examine further the idea that having a place to live is an essential element in personal, social, and political relationships. One can get there by understanding human beings as relational in a number of ways—the material basis of society, but also the cultural. The communitarian framing of property comes to mind, with its emphasis on networks, dependence, and interdependence as the basis for both human flourishing and citizenship. Greg Alexander, in his social-obligation account of property, touches on this. Human beings engage in social networks not because we choose to and could walk away, but because our human condition is in fact utterly dependent on them.¹⁷⁶

Andrea Brighenti’s illuminating essay on territory as relationship is also helpful here.¹⁷⁷ Brighenti argues that, “[w]hereas the most widespread view takes territory as the hard fact which provides the visible support or backup of invisible social ties, it may be more interesting to

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Jane B. Baron, *Property and “No Property,”* 42 HOUS. L. REV. 1425 (2006).

¹⁷⁵ *Id.* at 1427.

¹⁷⁶ Alexander, *supra* note 147, at 765. I wish I could also rely here on Eduardo Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889 (2005), as the title is so wonderfully suggestive of an argument that acquiring property (especially in order to dwell on it) can generate entrance into community, something like the right to the city. And indeed, Peñalver contrasts and critiques “property as exit”, the use of a right to exclude and other property rights to withdraw. *Id.* at –1895 – 938. But Peñalver’s examples of “property as entrance” do not line up with the *moradia*/right to the city/citizenship concerns particularly well. He describes “strong entrance” that can be used to construct an alternative “normative community”, *id.* at 1940 – 47; and “weak entrance,” which is about participation in markets and socialization. *Id.* at 1948–55. His assessment of how homeownership functions to generate community will be familiar to United States readers, as it develops the notion that ownership of a home ties one down to the community and generates the need for more participation, both politically and through markets. *Id.* at –1949 -51. None of these arguments seem to me particularly resonant with using property ownership to achieve entrance into the complex of rights articulated by *moradia* and the right to the city. Peñalver is not wrong in what he says; it’s just a missed opportunity.

Baron does better here in her 2006 essay. It demonstrates the connection between ownership and citizenship by analyzing a recent novel whose plot often turns on certain characters’ exclusion from property ownership. Baron, *supra* note 174, at 1431 - 38 (analyzing VALERIE MARTIN, *PROPERTY* (2003)). Neither the married woman character (in an age of coverture) nor the slave character has much room to maneuver, because they cannot be property owners. And owning a house plays a role too, as the wife inherits a house, which of course immediately belongs not to her but to her husband. *Id.* at 1433. But this example is not all that close to the apparent cultural significance of formal title to a home to the Cantagalo resident.

¹⁷⁷ Andrea Brighenti, *On Territory as Relationship and Law as Territory*, 21 No. 2 CAN. J. L. & SOC’Y 65 (2006).

explore how every type of social tie can be imagined and constructed as territorial.”¹⁷⁸ Territory has to do with basic human functions, such as defense, control, reproduction, and access to resources.¹⁷⁹ But territory is not simply about access to land, the ability to be seen to be on land, but about “processes of inclusion and exclusion in the construction of social groups...”¹⁸⁰ It is about identity formation as well as access to resources.¹⁸¹

Zoe Loftus-Farren’s very fine student comment on tent cities provides an excellent catalog of the benefits afforded by tent cities, one type of informal community. It also illustrates why Waldron’s account of homelessness and property is insufficient, and what Baron’s and Brighenti’s theories could be understood as pointing towards.¹⁸² Loftus-Farren notes that “[b]ecause academic literature on tent cities is sparse, many of these benefits have not been extensively documented or studied.”¹⁸³ She is starting her description fresh, a good thing. To begin her catalogue, she notes “community and autonomy,” including stable access to friends and neighbors, the ability of couples without children to live together (an arrangement not typically permitted in homeless shelters, which are usually sex-segregated), autonomy of schedule, and safety of person and possession.¹⁸⁴ Well-functioning tent cities develop self-governance, in terms of security, services, health concerns, and so on,¹⁸⁵ in turn fostering the “self-reliance, determination, and capability” of most of their residents.¹⁸⁶ Tent cities “can also foster increased political mobilization and participation,”¹⁸⁷ “put[ting] a spotlight on the lack of affordable housing and challenges faced by the homeless in the United States.”¹⁸⁸ This inevitable visibility of the underlying political and economic plight of tent city residents can generate media attention, advocacy, volunteerism, and political response.¹⁸⁹

As Loftus-Farren writes in introducing the benefits section of her Comment, “[t]ent cities provide a number of benefits to homeless individuals that are absent in homeless shelters or life on the streets. Specifically, encampments can provide residents with community, potential for self-governance, security, stability, and increased self-reliance and autonomy.”¹⁹⁰ To my mind,

¹⁷⁸ *Id.* at 66 – 67.

¹⁷⁹ *Id.* at 68.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 71.

¹⁸² Loftus-Farren, *supra* note 27, at 1050 – 57. Another very helpful account is Sheila Foster’s analysis of the construction of hundreds of community gardens on vacant lots, and havoc wreaked in the New York neighborhoods when those lots were converted to other purposes. See Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527 (2006). The community gardeners were squatters whose relations over time generated additional important, nurturing, stabilizing relations (Foster describes them as social capital) because of their land use in proximity to one another.

¹⁸³ Loftus-Farren, *supra* note 27, at 1057.

¹⁸⁴ *Id.* at 1050 – 51.

¹⁸⁵ *Id.* at 1052 – 54, 1055 – 57.

¹⁸⁶ *Id.* at 1054.

¹⁸⁷ *Id.* at 1051.

¹⁸⁸ *Id.* at 1054.

¹⁸⁹ *Id.* at 1054 – 55. It can also generate response by socially progressive and politically active churches. See, e.g., *City of Woodinville v. Northshore United Church of Christ*, 211 P.3d 406 (Wash. 2009) (invalidating on freedom of religion grounds city’s permanent ban on church allowing temporary encampment of homeless); Loftus-Farren, *supra* note 27, at 1069 – 70; Kelli Stout, Comment, *Tent Cities and RLUIPA: How a New Religious-Land-Use Issue Aggravates RLUIPA*, 41 SETON HALL L. REV. 465 (2011).

¹⁹⁰ Loftus-Farren, *supra* note 27, at 1050.

all of the important benefits she catalogues derive from a stable community providing individuals a place to live or dwell. It's not just about individual autonomy, increased choice, and self-reliance—one way of reading Waldron. Informal settlements that function well provide community and connection, in just the way indicated theoretically by the Brazilian concepts of *moradia*, the right to the city, and *cidadania*. Loftus-Farren has provided an excellent illustration without using the Brazilian theory. But of course, as she, Larson, and others point out, United States jurisprudence largely fails to account for informal communities at all.

V. Possible explanations for the difference between Brazilian and United States articulations of homeownership and homelessness

There are several possible reasons for the differences explored in the preceding sections between the two cultures' discourses on homeownership, homelessness, and property more generally. Each of these hypotheses is brief and invites further research.

A. Differences in land ownership and the history of land distribution

One factor in explaining the difference in current United States and Brazilian sensibilities around squatter communities and property surely is the different histories of the United States and Brazil concerning land distribution, from colonial times forward. This difference has historical and ideological dimensions. From the outset of Western property practices in Brazil, most people living in Brazil had no land to call their own, and consequently, no place they could call their own. As one account noted, "Brazilian colonial history resulted in large latifundios."¹⁹¹ This concentration of land ownership continues to this day.¹⁹² "At the end of the twentieth century, Brazil [stood] as the prime global example of the largest concentration of land in the fewest hands."¹⁹³

In contrast, the settler society in the many colonies that came to comprise the United States often did distribute land widely one way or another, at least to White settlers.¹⁹⁴ Moreover, early on the United States embraced an explicit policy of distributing land to settlers who used it, through 19th century preferences, and homesteading laws beginning in 1862.¹⁹⁵ It is

¹⁹¹ Ankerson & Ruppert, *supra* note 91, at 102. See dos Santos Cunha, *supra* note 9, at 1172 – 74 (providing a brief history of Brazilian land law).

¹⁹² In contemporary Brazil, one percent of the population of Brazil owns 46% of the land. Ankerson & Ruppert, *supra* note 91, at 102.

¹⁹³ E. Bradford Burns, *Brazil: Frontier & Ideology*, 64 PAC. HISTORICAL REV. 1, 12 (1995).

¹⁹⁴ Not of course to indigenous populations, whose interests were physically and legally subjugated, systematically and mostly in short order. And not by recognizing other systems of private or communal ownership in the Spanish/Mexican Southwest. See, e.g., STEVEN W. BENDER, *TIERRA Y LIBERTAD: LAND, LIBERTY, AND LATINO HOUSING 17-27* (2010) (chapter entitled "Southwest Ranchos: Land Grants and Land Loss"); Placido Gomez, Comment, *The History and Adjudication of the Common Lands of the Spanish and Mexican Land Grants*, 25 NAT. RESOURCES J. 1039 (1985); Guadalupe T. Luna, *Chicano/Chicana Land Tenure in the Agrarian Domain: On the Edge of a "Naked Knife,"* 4 MICH. J. RACE & L. 39 (1998).

¹⁹⁵ A series of 19th century preemption laws allowed squatters to purchase federal land first if it were ever to be privatized. See, e.g., EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* 62 – 63 (2010). For one classic history of federal land laws, see JOHN OPIE, *THE LAW OF THE LAND: TWO HUNDRED YEARS OF AMERICAN FARMLAND POLICY* 31 – 84

immaterial for our limited purposes here exactly how this United States policy developed or whether it always functioned—for example, how much of it can be attributed specifically to Thomas Jefferson’s vision of a nation of yeoman farmers. It was an ideology of shared land ownership. Also, certainly the liberal, anti-royalist ideology of individual rights linked with individual property ownership articulated by James Harrington, John Locke, and William Blackstone informed United States public lands policy in a way that would later result in wide distribution of land.¹⁹⁶ Such distribution would in turn reinforce an individualistic cultural understanding of property in land and an assumption that ownership of one’s place and dwelling was a norm of citizenship to be aspired to. Depression-era federal policies to encourage homeownership (at least among some populations—minorities were, notoriously, rigorously excluded) were a natural successor to these policies.¹⁹⁷ And the current United States rhetoric would follow.

I must underscore that this account of United States land policy and its ideological traces applies to Whites. Aziz Rana’s *The Two Faces of American Freedom* analyzes United States land policy and ideology in the frameworks of white settler theory and persuasively argues that the ideology of ownership and freedom maintained and transformed throughout much of United States history suppressed both ownership and citizenship for non-Whites.¹⁹⁸ Anthony O’Rourke’s astute review essay on *The Two Faces of American Freedom* suggests that Rana’s analysis can be carried forward to explain the current role of homeownership in American politics, with its race and class disparities.¹⁹⁹ O’Rourke’s suggestion is worth exploring.

B. The social function doctrine and the right to the city

The difference between the dominant United States discourses on homeownership and homelessness and the Brazilian approach to homeownership in the context of *regularização* is likely also related to the prevalence of the doctrine of the social function of property in Brazilian law and social theory and its absence in United States property discourse, as well as the cognate concept of the right to the city.

One could legitimately ask how much content the social function of property can be relied on to have. In this regard, an interesting debate broke out toward the conclusion of

(1987); *see generally* ANDRO LINKLATER, *MEASURING AMERICA: HOW THE UNITED STATES WAS SHAPED BY THE GREATEST LAND SALE IN HISTORY* (2002) [probably needs a parenthetical description]; Pindell, *supra* note 3, at 468–72 (briefly describing squatter and land claims in United States history). Opie also provides a useful overview of land law in the colonial period and the period of the Articles of Confederation. OPIE, *supra*, at xvii–xxi, 1–30.

¹⁹⁶ *See* OPIE, *supra* note 195, at 29–31 (discussing the influence of the natural rights philosophies of Harrington and Locke on the United States approach to private property).

¹⁹⁷ *See, e.g.*, Adam Gordon, Note, *The Creation of Homeownership: How New Deal Changes in Banking Regulations Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 *YALE L.J.* 186, 193–94 (2005); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 203–15 (1985).

¹⁹⁸ *See generally* AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010).

¹⁹⁹ *See generally* Anthony O’Rourke, *Theorizing American Freedom*, Review Essay, 110 *MICH. L. REV.* 1101 (2012) (reviewing AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010)).

Fordham Law School's 2011 symposium on the social function of property. As I recall it,²⁰⁰ two United States authorities took the position that the doctrine was important, at the very least in order to broaden the concerns understood to be encompassed within the concept of property, and therefore to legitimate the participation of various stakeholders in articulating their claims about resources and human flourishing. Two Brazilian authorities disagreed. Alexandre dos Santos Cunha took the position that the meaning of the doctrine was variable, country and case specific. Edésio Fernandes maintained that it had no meaning at all.

Each of the participants in this little colloquy has a point, in my view. There is little predictable content *ex ante* and in the abstract in the notion of the social function of property. Perhaps the best one can do is, like Colin Crawford, to assess a number of examples and discern a common theme of emphasis on the use of property to promote human flourishing.²⁰¹ This would not be the only example of a broad and differentially interpreted principle modifying classical liberal property rights.²⁰²

So Brazil and other Latin American jurisdictions share a social function doctrine, though it takes different forms. In contrast, the United States, in practice and in jurisprudence, continues to operate with a classical liberal-era constitution drafted in 1789 and an individualistic conception of property, and has never expressly reformed its key articulation of property protection in light of subsequently-emerging conceptions of social and economic rights.²⁰³ Ankerson & Ruppert note this lack of evolution, and find it “remarkable that a doctrine so fundamental to private and public law in many countries in the world has received so little

²⁰⁰ This discussion is not reflected in the published papers, with the possible exception of some doubts expressed by dos Santos Cunha at the conclusion of his published symposium piece. dos Santos Cunha, *supra* note 9, at 1181. The reader will have to trust the author's recollection of what happened.

²⁰¹ Crawford, *supra* note 5, at 1089; *see also id.* at 1094 – 97 (discussing the concept of human flourishing).

²⁰² I have in mind the public trust doctrine, which as applied in various jurisdictions has taken on a variety of forms with at best a family resemblance to one another. *See, e.g.,* Michael C. Blumm, *Public Property and Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573 (1989); Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrine: Public Values, Private Rights, and the Evolution Towards an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010); Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVT'L L. REV. 1 (2007); Marc R. Poirier, *Modified Private Property: New Jersey's Public Trust Doctrine, Private Development and Exclusion, and Shared Public Uses of Natural Resources*, 15 SOUTHEASTERN ENVTL. L.J. 71 (2006). One article that explores this connection is Hanno Kube, *Private Property in Natural Resources and the Public Weal in German Law – Latent Similarities to the Public Trust Doctrine?*, 37 NAT. RESOURCES J. 857 (1997).

²⁰³ Ankerson & Ruppert, *supra* note 91, at –96 – 98. Ankerson & Ruppert note that the United States constitution provides for eminent domain power for “public use” if “just compensation” is paid, U.S. constn. amd. V. They argue that expropriation in Latin America is different in scope under the “social function” doctrine than in the United States under “public use.” *Id.* at 97 – 98. I would argue that the concept of private property in general may be understood somewhat differently in light of the broader claim of supervening need made by the social function doctrine. Indeed, the differences between different national conceptions of the relationship between private property rights on the one hand and socially-motivated regulation and expropriation on the other have been put in play by bilateral and multilateral trade agreements, and are the subject of significant scholarship about the nature of property rights across nations and legal cultures. *See, e.g.,* Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist*, 33 ENVTL. L. 851 (2003); David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. INQUIRY 57 (2000); David Schneiderman, *NAFTA's Takings Rule: American Constitutionalism Comes to Canada*, 46 U. TORONTO L.J. 499 (1996).

attention in comparative legal literature in the United States.”²⁰⁴ Foster and Bonilla write that “the conventional account in U.S. law and theory situates the individual owner as insulated from the demand by others in society and owing no further obligation to them, except for the duty not to cause harm to others and their property.”²⁰⁵ The classical liberal approach identifies “the ‘core’ of property rights with individual autonomy and ... relegate[s] the limitations on autonomy to the ‘periphery’ of property rights.”²⁰⁶ It is against this still dominant classical liberal background that social-obligation theorists of property—Gregory Alexander, Eduardo Peñalver, Joseph Singer, and Laura Underkuffler among them—have sought to shift the discourse.²⁰⁷

C. Invisibility of squatter communities in the United States

Jane Larson, in the second of her articles describing Mexican *colonias* in Texas, asserts that large informal communities are basically understudied in the United States.²⁰⁸ In the process of commenting, often critically, on an earlier article by Larson about *colonias*, Richard Delgado observes that informal settlements most certainly are ubiquitous, but they are also ignored.²⁰⁹ And indeed surely they will be visible to the subordinated communities themselves and to an academic such as Delgado, whose identity and career are intimately linked with tracking and explicating the plight of such groups. Several types of informal squatter communities, past and present, have appeared in United States history – in addition to *colonias*, tent cities in times of economic trouble, for example.²¹⁰ And one might argue that large cohorts of undocumented workers living six, eight, ten, or twenty to an apartment, illegally (that is, in violation of housing codes), collectively comprise an informal settlement. Nevertheless, Larson and the others have a point. Our public and legal discourse on land ownership, homeownership, and property has been insufficiently attentive to informality and hence to informal community.²¹¹

²⁰⁴ Ankerson & Ruppert, *supra* note 91, at 119. *Accord*, Gonzalez, *supra* note 34, at 256 (“the English-language literature on the social function doctrine is quite sparse notwithstanding the significant interest in this doctrine in Europe and Latin America”).

²⁰⁵ Foster & Bonilla, *supra* note 91, at 1008 - 09 (citing Alexander, *supra* note 147).

²⁰⁶ *Id.* at 1011.

²⁰⁷ *See, e.g.*, Alexander, *supra* note 147; Gregory Alexander, *Property & Propriety*, 77 NEB. L. REV. 667 (1998); Alexander & Peñalver [2009-, *supra* note 130; Gregory S. Alexander, Eduardo Peñalver, Joseph William Singer, & Laura Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009); Peñalver, *supra* note 130; JOSEPH WILLIAM SINGER, *THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP* (2000); JOSEPH WILLIAM SINGER, *ENTITLEMENTS* (2000); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

²⁰⁸ Larson, *supra* note 27, at 158 – 59; *accord*, Ward et al., *supra* note 34, at 5 (few people are aware of the extensive informal self-help communities in Texas and elsewhere in the United States). *See also* PETER M. WARD, *COLONIAS AND PUBLIC POLICY IN TEXAS AND MEXICO: URBANIZATION BY STEALTH* 98, –242 – 43 (1999) (arguing that in the 1960s and 1970s Texas cities ignored peripheral *colonias* because they were relatively distant); *id.* at 108 (arguing that more recently Texas cities have addressed *colonias* in terms of disaster relief, water, and wastewater services, but have not viewed them as a structural problem of modes of housing production and of poverty) Indeed, Ward points out that Texas only responded to the conditions in *colonias* as a result of visibility in the form of international criticism for cholera and other Third World conditions in a First World country. *Id.* at 119 – 20, 131, 242.

²⁰⁹ Richard Delgado, *Rodrigo’s Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667, 678 (1997) (commenting on Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179 (1995)).

²¹⁰ *See, e.g.*, Loftus-Farren, *supra* note 27; *see also* NATIONAL COALITION FOR THE HOMELESS, *TENT CITIES IN AMERICA: A PACIFIC COAST REPORT* (2010).

²¹¹ Larson, *supra* note 27, at 158.

To some extent this may be an effect of race and class segregation in the United States, which geographically produces invisibility. *Colonias* and tent cities, especially in peripheral and rural areas, may stand outside the literal view of the powerful, just as they appear to do in United States property theory. In contrast, during my week in Rio the *favelas* of the South Zone were visible everywhere on the slopes that surround the more prosperous asphalt streets²¹² and the beaches.²¹³ A country that has always had massive populations with no secure place to live, no place on the map, may experience pressure to develop property law in practice and theory that addresses the needs of those populations.

One could take Gregory Alexander once again as an example of a minority thread.²¹⁴ Alexander does write in an impassioned way about the plight of squatter communities and the need to bend protection of private property with a right to housing to address the needs of these communities. He links landless communities and tenure, in a way reminiscent of the Cantagalo informant that fine day in Rio. As he and Peñalver point out, the squatter communities described are ubiquitous, visible everywhere in South Africa.²¹⁵ Whether Alexander's social-obligation conception of property was influenced by such vast homelessness, or simply confirmed by it, is unimportant. In a planet with a billion squatters,²¹⁶ our property conceptions could well take note of the right to dwelling as a claim to inclusion in community. In United States property jurisprudence, for the most part, they do not.

There may also be a politically (to me) unacceptable elision in United States property discourse, in the way it favors thinking about home, homeownership, and place in terms of the individuals who either own homes, rent, or are homeless. In the United States, as abroad, there are vast disadvantaged populations who collectively have "no property" as Baron articulated it. As Carmen Gonzalez has pointed out in her critique of de Sotoist assumptions that formalized property ownership is better because it will create wealth, perhaps United States jurisprudence needs to deal with squatter settlements on their own terms. Gonzalez writes:

Far from representing a failure of formal law, informality constitutes a parallel and intersecting system of law developed by the urban poor in the face of daunting economic hardship. Formal and informal property systems coexist and influence one another. ...

²¹² Cariocas sort themselves and their territory into those who live *no asfalto* – on the level, asphalt-paved, wealthier areas near the beaches – and those who live *no morro* – on the hill, that is, in the *favelas*.

²¹³ To be sure, the large *favelas* of the North Zone weren't discussed much, and I got the sense they were off limits, beyond the reach of *favela* tourism. Not so picturesque, perhaps, or riskier.

²¹⁴ M.C. Mirow has written an amusing short book review in the form of a letter to Justice Antonin Scalia, contrasting Scalia's view of property with that of Professor Alexander, who teaches at Cornell Law School. Mirow argues that the social-obligation norm, despite a trend in academic interest exemplified, if not led, by Professor Alexander, is not very much part of United States property jurisprudence. He concludes with a suggestion for a slogan: "Ithaca, ten square miles of social-obligation norm surrounded by reality." M.C. Mirow, *Book Review*, 58 J. LEGAL EDUC. 147, 155 (2008) (reviewing GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* (2006)).

²¹⁵ Alexander & Peñalver, *supra* note 130, at 175 – 76.

²¹⁶ See, e.g., MIKE DAVIS, *PLANET OF SLUMS* (2006); Mahmud, *supra* note 34, at 11 – 40 (describing the social processes that generate slums from a Marxist perspective); ROBERT NEUWIRTH, *SHADOW CITIES: A BILLION SQUATTERS, A NEW URBAN WORLD* (2006).

What matters in the end is guaranteeing that every member of society has adequate shelter, decent jobs, a good education, and access to health care.²¹⁷

Gonzalez suggests that some of the condemnation of informal systems is mistakenly attributed to the notion that the Global South has a generically failed legal system, when the cause is actually a failed economic system brought about by neoliberal reforms and massive rural-to-urban migration.²¹⁸ Larson similarly suggests that the informality of squatter communities itself is in tension with United States legal theory—there appears to be no law there to analyze—and that this is part of the explanation for inattention to informal communities.²¹⁹ In fact, as Peter Ward points out,

colonia-type housing production in the United States – as elsewhere in the world – is invariably highly rational given prevailing socioeconomic constraints that prevent people from homesteading normally. In short, there is little about *colonias* that is “strange”, or even surprising. The only strange thing, perhaps, is that the phenomenon has not been more widely recognized.²²⁰

D. United States jurisprudence treats as suspect vague principles of human rights (especially those of foreign origin) and disdains “progressive realization” of them

Some of the United States property jurisprudence’s reluctance to engage with the law of informal communities stems from the fact that high-level human-rights principles are vague and also of foreign origin, and that the on-the-ground solutions in informal communities are *ad hoc* and often non-transferable. Both of these circumstances run up against a preference in United States property theory to see property rules as fixed and stable and universal, even when they may in fact be situation specific and re-negotiated regularly. For the first observation, discussed in Section V.D, I rely on Jane Larson; for the second and third, discussed in Section V.E, I rely on Carmen Gonzalez, Daniel Bonilla Maldonado, and an assortment of property theorists, including Joan Williams, Laura Underkuffler, and my own writings.

In looking to describe a mechanism to improve over the long term the lot of those living in informal *colonias*, Jane Larson looks beyond an immediate complete resolution, turning instead to the notion of “progressive realization” that is used to structure the working of some human rights principles, especially positive social and economic rights.²²¹ Larson relies specifically on the Covenant on Economic, Social, and Political Rights,²²² which articulates a

²¹⁷ Gonzalez, *supra* note 34, at 258 – 59.

²¹⁸ *Id.* at 254 – 56; see also Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75 (2008) (presenting and critiquing the notion of generally failed law in Latin America).

²¹⁹ Larson, *supra* note 27, at 158 – 59.

²²⁰ Peter M. Ward, *Informality of Housing Production at the Urban-Rural Interface: The “Not So Strange Case” of the Texas Colonias*, in URBAN INFORMALITY: TRANSNATIONAL PERSPECTIVES FROM THE MIDDLE EAST, LATIN AMERICA, AND SOUTH ASIA 243, 243 (Ananya Roy & Nezar Alsayyad eds. 2004).

²²¹ Larson, *supra* note 27, at 178 – 81. Larson writes that “[p]rogressive realization” provides a regulatory conception for imposing aspirational standards while calibrating compliance obligations to available economic resources.” *Id.* at 179.

²²² Larson, *supra* note 27, at 177 – 78 (discussing the Economic Covenant, *supra* note 7).

currently un-implementable right to adequate housing.²²³ She points out that United States jurisprudence typically does not regard any of this as law, but rather as economic and social policy.²²⁴ “In general, negative rights provide the norm of legal rules in our tradition rather than positive rights.”²²⁵ Yet the gravamen of the cultural understanding of regularization of title we have been exploring sounds precisely in a broad, vague, not yet fully implementable right. No wonder United States discourse, with its different and narrower tradition as to what counts as human rights law, might assess things differently.

So the problem is not simply a question of a gap between human rights law and enforcement, a charge sometimes made about Latin American legal systems generally.²²⁶ It is whether aspirational human rights law counts as law.

E Is an extralegal legal system legitimate law? The problem of legal monism

In her assessment of formal and informal property approach to the global housing crisis, Carmen Gonzalez makes a different but convergent point to Larson’s. For Gonzalez, holding a debate between formality versus informality is a “red herring.”²²⁷ “[I]nformality constitutes a parallel and intersecting system of law developed by the urban poor in the face of daunting economic hardship.”²²⁸ Gonzalez’s own study and other studies responding to de Soto’s claims show that informal property solutions are pragmatic, *ad hoc*, and likely each one to be *sui generis*.²²⁹ Yet many of them function adequately to provide security of tenure and markets in property. As Gonzalez writes, “[t]he advantages and disadvantages of formal and informal title must be evaluated on a case by case basis.”²³⁰ But this *ad hoc*, improvisatory quality may make the whole issue of managing communities informally seem not a proper topic for a law professor or advocate. Our old, familiar, individualistic, liberal discourse of law and property may seem a better-fashioned tool. Even if it doesn’t particularly fit.

As van Gelder, among others, points out, a simplistic legal/illegal dichotomy masks inquiry into “*de facto* and/or perceived tenure security, which are both empirical issues.”²³¹

²²³ *Id.* at 177 – 79.

²²⁴ *Id.* at 178 - 79. “Since 1981, the United States has maintained that economic, social and cultural rights ‘belong in a qualitatively different category from other rights, that they should not be seen as rights but as goals of economic and social policy.’” *Id.* (quoting U.N. GAOR 3d Comm., 36th mtg. at 6, U.N. Doc. A/40/C.3/SR.36 (1985), quoted in Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties’ Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 158 (1987)).

²²⁵ *Id.* at 177 – 78.

²²⁶ See, e.g., MIROW, *supra* note 91, at 235; van Gelder, *supra* note 45, at 454 (“In Latin American countries, ... which historically have poor human rights records and strong liberal traditions of their Constitutions and Civil Codes, human rights approaches are particularly vulnerable from an enforcement point of view.”).

²²⁷ Gonzalez, *supra* note 34, at 258.

²²⁸ *Id.*

²²⁹ See *supra* note 34 and accompanying text; see also NEUWIRTH, *supra* note 216, at 25 – 173 (discussing squatter communities in Rio de Janeiro, Nairobi, Mumbai, and Istanbul, some of which are successful without formal title).

²³⁰ Gonzalez, *supra* note 34, at 258.

²³¹ Van Gelder, *supra* note 45, at 454; see also van Gelder, *supra* note 34, at 132 – 40 (presenting an example of one kind of empirical study).

Characterizing the question of security of tenure in informal communities as one of legal pluralism, as some authorities do, may be helpful;²³² but to me it also threatens to re-inscribe a desire to discern a clear one-size-fits-all *alternative* legal system, another set of rules, rather than particularized inquiry into what are, as Gonzalez insists, always local conditions.²³³

Daniel Bonilla Maldonado provides a magnificent theoretical framework for this underlying concern in his important article *Extralegal Property, Legal Monism, and Pluralism*.²³⁴ His theoretical argument about the shortcomings of a one-size-fits-all approach to property and land law was developed in the course of a six-month study of how informal property transactions functioned on the ground in the community of Jerusalén, in Ciudad Bolívar, Colombia.²³⁵ In this article, theory meets practice.

Bonilla Maldonado defines legal monism as “the idea that there must be one and only one centralized hierarchical legal system in each state.”²³⁶ Indeed, he argues, “[p]roperty in the West has conceptually depended on legal monism.”²³⁷ The supposed virtues of legal monism in property include principles of equality, legal security, legality, political unity, and maintaining social and political order.²³⁸ Supposedly, legal monism in property offers unity, clarity and simplicity, facilitating individuals’ decision making processes.²³⁹ A unified system also contributes to overall legitimacy.²⁴⁰ And—notably from my point of view—Bonilla Maldonado writes that “legal monism is necessary for the consolidation of a modern market economy,” as it promotes “[t]he circulation of capital.”²⁴¹

²³² Van Gelder, *supra* note 45, at 454 (citing, *inter alia*, two classic studies, Boaventura de Sousa Santos, *The Law of the Oppressed: The Construction and Reproduction of Legality in Pasagarda*, 12 L. & SOC’Y REV. 5 (1977); Kenneth L. Karst, *Rights in Land and Housing in an Informal Legal System: The Barrios of Caracas*, 19 AM. J. COMP. L. 550 (1971)).

²³³ See van Gelder [2010 *Tales*], *supra* note 46, at 242 (agreeing, at least in part, by stating: “Applying legal pluralism to informal settlements requires envisioning them as having proper normative systems with a ‘law’ that is different from and somehow resident outside that of the state legal system.”). *But cf. id.* at 242 – 43, where van Gelder posits another set of dichotomous norms— a legal/illegal within the informal settlement. Van Gelder among others also suggests an additional way of approaching informal property arrangements in various communities, conceding of a continuum with chaos at one end and full formal legal order at the other. *Id.* at 240 – 41. I find this proposal more problematic, for it still privileges the formal, legal approach when many informal approaches function as effective property law within their communities.

²³⁴ See generally Daniel Bonilla Maldonado, *Extralegal Property, Legal Monism, and Pluralism*, 40 U. MIAMI INTER-AM. L. REV. 213 (2009).

²³⁵ *Id.* at 213 n. 1. The case study itself appears in the second half of the article. *Id.* at 226 – 38. Bonilla Maldonado writes that the case study “illustrate[s] the descriptive and normative shortcomings of legal monism, as well as the usefulness of certain tools provided by legal pluralism for comprehending the reality of property as it actually exists in the Global South.” *Id.* at 215.

²³⁶ *Id.* at 213; see *id.* at 216 (expanding on this argument).

²³⁷ *Id.* at 213.

²³⁸ *Id.*; see *id.* at 217 - 18 (expanding on this argument).

²³⁹ Daniel Bonilla Maldonado, *Extralegal Property, Legal Monism, and Pluralism*, 40 U. MIAMI INTER-AM. L. REV. 213, 220 (2009).

²⁴⁰ *Id.*

²⁴¹ See *id.* (citing DE SOTO 2000, *supra* note 33, at 7, 10). The question about whether facilitating sales of land is good for an informal community proved the occasion of a spirited discussion in the Q & A session at Edésio Fernandes’s 2009 lecture at the Lincoln Institute of Land Policy. A questioner pointed out that a hotel owner anxious to buy hillside *favela* property would require formal title, not just informal property arrangements that might suffice within the *favela* community. Fernandes countered that the questioner was relying on an absolute sole

Carol Rose provides one kind of account of what is going on here.

[T]he clarification of formal title is useful precisely because it makes the status of property knowable to outsiders, that is, to strangers to the community. . . . Formal title gives assurances to any stranger at all who may want to purchase the property. Thus, formal title potentially introduces strangers into the community, through a form of property assurance that is not at all “natural” to a close-knit community.²⁴²

Exposure of the community’s land (and thus the community) to a market consisting of a world of strangers raises concerns of the kind associated with anti-globalization.²⁴³ There is a loss of a sense of local or national control²⁴⁴ because “formal title puts a *barrio* house into play in an economy that is much larger than the local community.”²⁴⁵

To Rose’s view one might juxtapose Ann Varley’s. She emphasizes that the local nature of extralegal property systems makes them resistant to the full force of the market.²⁴⁶ But these local systems do reflect the investment and social capital involved in self-help housing. She notes “incredulity” when she asked informal residents whether they would be likely to sell their homes.²⁴⁷ For them, the effort in building from scratch, the sacrifice, was great. “In these circumstances, housing means more to people than shelter or an economic asset. It has become part of their life story—and not only their own story, but the story of their family.”²⁴⁸ So they were less likely to want to sell.

Ngai Pindell makes a related point here. “Because *favela* residents obtain legal title to their property as a result of [titling] programs, these residents are able to make economic choices that may negatively impact neighbors.”²⁴⁹ Part of the issue is unrestrained fee simple ownership. One could address these issues to some extent by imposing accumulation and exit restraints.²⁵⁰ Also, as Fernandes and others point out, title need not be established in fee simple form.²⁵¹

ownership model of property, when in fact collective ownership, and thus collective sale, were also possible. Fernandes alluded to Islamic models of collective land ownership in Egypt, which he claimed functioned well in those local contexts. The host contributed the recollection that a particular congressman from Rio de Janeiro who advocated *regularização* also had said publicly that once formal titling was accomplished, he stood ready to buy hundreds of parcels. There followed further discussion about whether collective ownership really would facilitate free market transfers of property and whether, to the extent that it impeded it, that might well be a good thing. It was pointed out that cooperative and condominium models of ownership actually account for a significant portion of United States property ownership. Fernandes lecture 2009, *supra* note 34, at 71:30 – 76:00.

²⁴² Carol M. Rose, *Privatization – The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691, 703 (2006).

²⁴³ *Id.* at 704.

²⁴⁴ *Id.* at 704 – 05.

²⁴⁵ *Id.* at 705.

²⁴⁶ Varley, *supra* note 34, at 455 (questioning whether this local aspect is a defect, as de Soto maintains); see also DE SOTO 2000, *supra* note 33, at 5.

²⁴⁷ Varley], *supra* note 34, at 457.

²⁴⁸ *Id.*

²⁴⁹ Pindell, *supra* note 3, at 457.

²⁵⁰ *Id.* at 458.

²⁵¹ See note 241 *supra* (discussing a colloquy, at a 2009 lecture by Professor Fernandes, note 34 *supra*, concerning the commodification of land when informal use receives formal title).

But Bonilla Maldonado is actually more concerned about something else. One of his principal disputes with legal monism is that it is simply inadequate to describe the way property works in the Global South.²⁵² Vast populations in these regions live in informal settlements.²⁵³ “[I]f we want to understand the way in which property is interpreted and exchanged in a large part of the Global South, we must question the supposed unity, homogeneity, and exclusivity of state property law.”²⁵⁴ Official state law and parallel extralegal systems are paired, dynamic, and interactive.²⁵⁵ Any account that omits extralegal systems is woefully inadequate as a descriptive matter, he asserts.²⁵⁶ Two fundamental theses of legal pluralism are that “it is an error to identify rights with state law because the center of gravity in law is not the State, but the society,”²⁵⁷ and that in fact a plurality of legal systems co-exist and need to be studied as such.²⁵⁸

For extralegal systems, which are “created from the bottom up,”²⁵⁹ “may adequately reflect and protect the interests of those directly affected by the informal system—a question which cannot always be predicated on the state property regime.”²⁶⁰ In addition, extralegal systems are “flexible, adaptable, and sensitive to context.”²⁶¹ They may also be more accessible to local residences than the formal property scheme, conceptually and practically, and thus have an egalitarian function.²⁶²

Edésio Fernandes’s critique of de Soto strongly parallels Bonilla Maldonado’s argument about the flaws of legal monism in accounting for law in informal settlements. Fernandes critiques de Soto’s work because it “has failed to qualify the discussion on property rights; . . . he seems to assume that there is a universal, ahistorical, ‘natural’ legal definition of such rights.”²⁶³ Throughout Latin America and the developing world, Fernandes writes, “the state has treated differently the different forms of property rights . . . and the social relations around them, allowing for varying degrees of state intervention in the domain of economic property relations.”²⁶⁴ Land and real estate however are often treated differently, under a “dominant individualistic approach” applied universally, rather than under the notion of the social function of property.²⁶⁵ Fernandes argues that any analysis that sees formal property rights as a *sine qua non* for security of tenure is flawed. In many developing countries under certain conditions,

²⁵² Maldonado, *supra* note 234, at 221.

²⁵³ *Id.* at 221 – 22. Among prevalent coexisting property regimes are those involving indigenous populations, and those governing dealings in the peripheral districts of major cities. *Id.* at 219 – 20. Of which there will be more than fifty in excess of five million inhabitants by 2015. *Id.* at 221 (citing DE SOTO 2000, *supra* note 33, at 85).

²⁵⁴ *Id.* at 223.

²⁵⁵ *See id.*

²⁵⁶ *See id.*

²⁵⁷ *Id.* at 228.

²⁵⁸ *See id.* at 229 (stating: “Legal pluralism seems to be part of the reality in most contemporary States and not all legal pluralism in colonies or ex-colonies can be explained starting with the relationship of these places with the metropolis, extralegal property being one example.”).

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 225 – 26.

²⁶¹ *Id.* In a related argument, Bonilla Maldonado writes that extralegal systems can serve to address cultural diversity. *Id.* at 226.

²⁶² *Id.* at 225 – 26.

²⁶³ Fernandes [2002], *supra* note 6, at 7.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

“residents in informal settlements can share an effective perception of security of tenure, have access to . . . credit and public services, and invest in housing improvements, even without having legal titles.”²⁶⁶

One source of this misleading focus on the formal and universal is the legal academy. A short paragraph in Bonilla Maldonado’s article castigates Latin American academics for “teach[ing] and writ[ing] their books as if legal monism was the rule and not the exception.”²⁶⁷ Extralegal property’s existence is typically not even mentioned in courses and books on property rights, a situation he deplors.²⁶⁸ Bonilla Maldonado’s point here overlaps quite directly with my project in this Essay, inasmuch as I have identified a rather a significant gap in mainstream United States property jurisprudence where certain accounts of the function of property in informal communities ought to be. His criticism about excessive focus on a monistic concept and the consequent lack of attention to description of on the ground practice is telling.²⁶⁹

There is something about United States property discourse in general that is especially averse to informality, situation specificity, and fluidity. This partly is about nothing more than a generic compulsion of our legal authorities to try to pronounce broad rules.²⁷⁰ Property law may be especially susceptible to this tendency to oversimplify and rigidify, as we think and hope that property is prototypically about owning things (solid, unchangeable, to achieve stability, but also fungible so that they can be bought and sold) rather than managing community relationships, however that may occur. A rigid concept of property as object of ownership generates a rigid property rhetoric.²⁷¹ Savvy property theorists can take account of the need to change rules by acknowledging that property is fixed, changes, and then is fixed again.²⁷²

One strand of United States property theory recognizes that two approaches to property coexist, one formal, rigid, and natural, the other repeatedly negotiated. Joan Williams calls the former the “intuitive” model and seeks to expose it, encouraging instead a conversation about the welfare of the community.²⁷³ Similarly, Laura Underkuffler identifies an absolute view of

²⁶⁶ *Id.* (internal citation omitted).

²⁶⁷ *Id.* at 222.

²⁶⁸ *Id.* at 223.

²⁶⁹ Ann Varley makes a similar point in her interesting article critiquing analyses of formal title versus informal housing arrangements for excessive reliance on dualisms, because dualisms abstract from context. Varley, *supra* note 34. She invokes a feminist critique of abstract dualisms. For Varley, understanding why residents of informal housing behave the way they do, why they attempt to sell or do not attempt to sell, what their house means to them, is always inflected by their personal experience and by the local conditions. For Varley, “[t]he logic that leads to dichotomy ‘flees from the sensuous particularity of experience, with its ambiguities, and seeks to generate stable categories.’” *Id.* at 459 (quoting IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 98 (1990)).

²⁷⁰ See, e.g., Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 *LAW & SOC. INQUIRY* 779, 783 (1992) (compulsion of legal discourse to provide solutions or visions); Pierre Schlag, *Clerks in the Maze*, 91 *MICH. L. REV.* 2053, 2056 (1993) (describing typical legal academic desire to emulate judges by pronouncing rules).

²⁷¹ See, e.g., Poirier 1997, *supra* note 141, at 43 – 44 (deploring the use of the “property rights encomium” to laud unchangeable property rights when in fact some adjustment becomes grievously necessary in light of changed environmental conditions).

²⁷² The classic treatment is Carol M. Rose, *Crystals and Mud in Property Law*, 40 *STAN. L. REV.* 47 (1988); see also Carol M. Rose, *Property and Expropriation: Theme and Variations in American Law*, 2000 *UTAH L. REV.* 1. I have argued that the promise of fixed value during regulatory transition, if believed and acted on in good faith, invites folks to participate in an ongoing negotiation about property and community. Poirier, *supra* note 129, at 172 – 73.

²⁷³ Williams, *supra* note 105, at 278 – 879.

property and an overall more wide-ranging, comprehensive view.²⁷⁴ As she points out, the first version of property is ultimately individualistic and self-regarding, while the second is both self- and other-regarding.²⁷⁵ Both Williams and Underkuffler argue for getting past the absolute or rigid approach, in order better to accomplish the broader social goals served by property.²⁷⁶ As Underkuffler points out, the concept of property is “of central, almost emotional importance.”²⁷⁷ The stakes in renegotiating the concept of property are deep and at once personal and political; they implicate who we are as individuals and what it is that society promises us. So while the second, pragmatic account is undoubtedly a more accurate description of property practice, there may be advantages to dissembling.²⁷⁸ Maintaining a façade of stable property is socially useful.²⁷⁹

Property theorists in the United States may have in the backs of their minds a suspicion of straying too far from a rhetoric of property as generally applicable rules about individuals and what they do and do not own. In Brazil, we are looking at a different rhetoric, of vague rights to dwell, of property ownership as a gateway to community, unenforceable as a whole, implementable only piecemeal and ad hoc. This rhetoric may seem inadequate, perhaps even incomprehensible, as law. In short, it may be in part a clinging to a particular formal, universalizing, and ultimately narrow version of what property law is about—an allegiance to legal monism—that accounts for the difference in United States property rhetoric on regularizing title and homeownership.

VI. Conclusion

My investigations in this Essay have turned out to be an affirmation of localism, specificity, and complexity in property law theory and practice. They suggest that we should approach with considerable wariness the kind of generalized claims for property, and in particular for homeownership, that are a stock in trade for many property rights advocates, among them many legal academics.

To properly understand the impact of *regularização* in Rio (or a similar formalization of title in any other megacity of the Global South) requires a sophisticated and case-specific analysis of law, social and cultural context, and what Bonilla Maldonado calls extralegal practice.²⁸⁰ In the case of the Rio *favela* dweller, homeownership is informed by the broader concepts I encountered—a right to housing/*moradia*/dwelling, a right to the city, a social function

²⁷⁴ See generally Laura Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127 (1990).

²⁷⁵ Laura Underkuffler-Freund, *Takings and the Nature of Property*, 9 CAN. J. L. & JURIS. 161, 167–68 (1996); see Poirier, *supra* note 129, at 112 n.76 (collecting sources on this point).

²⁷⁶ Indeed Underkuffler writes “[t]he Supreme Court’s ostensible use of an absolute approach to property results in a kind of patent dishonesty. . . .” Underkuffler, *supra* note 274, at 129.

²⁷⁷ *Id.*

²⁷⁸ In a concluding section of an article on vagueness in takings doctrine, I raised the question, “Can We Talk About Property As Process? Should We?” Poirier, *supra* note 129, at 186 – 91.

²⁷⁹ *Id.* at 187 – 89.

²⁸⁰ See FERNANDES [2011], *supra* note 6, at 9 (“[T]he evidence indicates that successful regularization initiatives have to be designed to fit the facts and history of the particular informal settlement and country context”); *id.* at 46 (recommending a customized approach to regularization policies). One aspect of this variability may also be to consider different types of legal rights aimed at producing security of tenure and preserving communities for their current inhabitants. *Id.* at 41 – 42 (discussing possibilities).

of property, and a kind of participatory notion of citizenship/*cidadania*. As we have seen, these concepts themselves are variously articulated in various settings. And, one should note, they are not always extralegal--implementation will often involve municipal law by design, as Edésio Fernandes so strongly points out is the case in Brazil.²⁸¹ Municipal law is of course local, varied, and potentially can be more democratic and participatory than a distant and in some cases autocratic national government.²⁸²

Meanwhile, back at the ranch in the United States, I do sense an increasing interest in legal academia in exploring what it means to own a home in analyses that are more nuanced, for example by taking into account race, class, and also gender. This strand of property scholarship has always existed, but the recent mortgage foreclosure crisis, the differential impacts of homeownership in the aftermath of Hurricane Katrina and other storms, the general hard times, and a substantial increase in class differentiation seem to have prompted more and more varied studies.²⁸³ In addition, historical and demographic studies of how ownership works and doesn't work for cohorts considered separately and specifically as to race, class, and gender are also extraordinarily important.²⁸⁴ Effectively this scholarship critiques legal monism as to the identity characteristics of the homeowner.²⁸⁵ It is not an abstract "A" who owns Blackacre. In Audrey

²⁸¹ Fernandes, *supra* note 8 at 202; *see also* Mahmud, *supra* note 32, at 34 – 40.

²⁸² In the case of Brazil, advances in regularization and general devolution of authority over urban areas to municipalities have occurred in the context of an overall process of democratization.

²⁸³ *See, e.g.*, Carole Necole Brown, *supra* note 28 (describing her theory of the racial discrimination against African Americans present in the dual mortgage market for home financing); Dorothy Brown, *supra* note 28 (analyzing disparities in Black and White homeownership in terms of race and class, and proposing tax code reforms to address the disparity); Dickerson, *supra* note 105 (arguing for an overhaul of U.S. government homeownership subsidy policy so as to minimize predatory lending practices, and establish a system of consumers who make housing choices based on economics instead of emotions); Dyal-Chand, *supra* note 123, at 44, 54 (arguing that "the American equation of 'home' as 'owned home' can be measured along racial lines", and then exploring changes in policy in the Obama administration that move from a conception of home as investment to one of home as shelter); Dyal-Chand, *supra* note 28 (presenting a case study of predatory lending to low-income households in the United States as a way of testing Hernando de Soto's hypothesis about the advantages of propertization of informal property); McFarlane, *supra* note 28, at 855 (comparing generalized assertions about the benefits of homeownership to the actual experiences of Blacks and Latinos, discerning systematic differences, and asserting the need for a "right to keep"); Salsich, *supra* note 123 (arguing for the automatic inclusion of financial counseling and mediation in residential lending practices, as well as urging more attention be paid to the value of renting as a means to increasing the stability of the residential housing market); Warren, *supra* note 28 (analyzing the interplay between racial classification, access to homeownership, predatory lending practices and bankruptcy risk in the United States); Heather Way, *Informal Homeownership in the United States and the Law*, 29 ST. L. U. PUB. L. REV. 113, 118 (2009) (referring to the effect of Katrina and other storms on informal homeowners in the South).

²⁸⁴ *See, e.g.*, BENDER, *supra* note 194; Gomez, *supra* note 194 (describing and challenging the U.S. court system's treatment of land grant disputes in the American Southwest, effectively converting what were once communal lands into the public domain of the U.S. sovereignty); Luna, *supra* note 194 (analyzing and challenging the internal logic of the land grant doctrine in the context of Chicano/Chicana land dispossession in the American Southwest, and calling for international law remedies to this dispossession pursuant to the Treaty of Guadalupe Hidalgo); McFarlane, *supra* note 28, at 890-907 (presenting a history of instability in Black and Latino homeownership). *See generally* ALFRED BROPHY, ALBERTO LOPEZ & KALI MURRAY, *INTEGRATING SPACES: PROPERTY, LAW & RACE* (2010).

²⁸⁵ Another aspect of the emerging scholarship prompted by the mortgage foreclosure crisis and the Great Recession is to take seriously alternatives to fee simple home ownership as a long-term approach to security of tenure, whether this be renting, community ownership, or more novel models. This project is not altogether new – especially perhaps in the context of how to manage the equity in low-income housing. But we can see better how important a piece of the puzzle it is. *See generally* Arlo Chase, *Rethinking the Homeownership Society: Rental Stability*

McFarlane's words, these studies reveal, in contrast to the general assertion that homeowner confers stability, "an alternate reality of property ownership: a reality of recurring instability."²⁸⁶

It would also behoove United States property scholars to consider regularly and systematically various instances of more-or-less stable informal communities and their uses of legal and extralegal property. This might well take the form of Ostrom-like case studies.²⁸⁷ Some such scholarship exists. In addition to *colonias*,²⁸⁸ tent cities are emerging (again) in these hard times, and perhaps in response a study of tent cities has emerged as well.²⁸⁹ Stable community gardens are also possibly relevant to the matter at hand;²⁹⁰ Michele Anderson's project on unincorporated urban edges is also useful.²⁹¹ Typically undisciplined by a general law, or at least less so, these informal dwelling arrangements in some sense share the characteristics of *favelas* and other types of informal communities in Latin America and the Global South.²⁹² More study of various informal dwelling arrangements in the United States and their uses of property language might also better inform the ongoing theoretical debate about where property comes from and how it lives, breathes, and functions.

Often, United States jurisprudence fails to pay any attention to informal communities at all. Moreover, it may well dismiss a general, aspirational rights framework that might validate why we should care how such informal communities function—including *moradia*, right to the city, social function of property, and so on.²⁹³ One of the purposes of the social-obligation theorists is and should be to remedy that gap in our account of property. They should tell us about dwelling, not just formal ownership. Sheila Foster's accounts of the functions and perils of urban commons might be one place to start.²⁹⁴ The resources managed by informal arrangements could well be thought of in property terms.

Alternative, 18 J. L. & POL. 261 (2009); James J. Kelly, Jr., *Maryland's Affordable Housing Land Trust Act*, 19 J. AFFORDABLE HOUSING & COMM. DEVELOPMENT L. 345, Spring/Summer 2010; Pindell, *supra* note 3, at 473 – 78 (considering land banks as a United States analog to Brazilian right to the city measures).

²⁸⁶ McFarlane, *supra* note 28, at 860.

²⁸⁷ Annette Kim notes the similarity between Ostrom's case study work in the area of natural resources and case studies of informal housing. Annette M. Kim, *A Market Without the "Right" Property Rights: Ho Chi Minh City, Vietnam's Newly-Emerged Private Real Estate Market*, 12(2) ECONOMICS OF TRANSITION 275, 279 (2004).

²⁸⁸ See, e.g., Larson, *supra* note 27; Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179 (1995); Ward et al., *supra* note 34; Ward, *supra* note 220; WARD, *supra* note 208..

²⁸⁹ See, e.g., Loftus-Farren, *supra* note 27.

²⁹⁰ See, e.g., Foster], *supra* note 182.

²⁹¹ Anderson [2010], *supra* note 27; Anderson [2008], *supra* note 27. For example, one might productively compare Peter Ward's observations a decade or so earlier of the way in which poor living conditions in Texas *colonias* were maintained and ignored because they were not incorporated into cities but remained part of peripheral country jurisdictions. Ward, *supra* note 220, at 255 (observing that the weakness, lack of effective process, and failure to provide services of county governments contribute to the development of informality in Texas *colonias*) WARD, *supra* note 208, at 118 (same).

²⁹² See, e.g., Dyal-Chand, *supra* note 34 (using United States poor and informal housing to test de Soto's hypothesis as to the effect of formal title on informal communities in the global South); Ward et al., *supra* note 34 (comparing inhabitants of *colonias* along the Texas/Mexico border to those living in informal communities in Mexico and Latin America).

²⁹³ Cf. Iglesias, *supra* note 132 (discerning several strands in homeownership jurisprudence, some of which incorporate connectedness and others of which reflect classic liberal views).

²⁹⁴ Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57 (2011); Sheila R. Foster, *Urban Informality as a Commons Dilemma*, 40 U. MIAMI INTER-AM. L. REV. 261 (2009); Foster, *supra* note 182.

A fundamental theoretical question is whether property law and jurisprudence are to be local and concrete or universal and abstract. If anything is to be gleaned generally from this Essay, it is that accounts of housing, homes, homelessness, and dwelling require attention at the local level, not beginning with some abstract account of property ratified by a legal monist approach.²⁹⁵ Property jurisprudence around homeownership requires study *in situ*, and being aware of what has been called the “interlegality” of formal and informal property systems.²⁹⁶ What is required strikes me as not unlike the work that Elinor Ostrom and those working with her produced when they studied varied ways of managing common pool natural resources by a local community, from the bottom up, as it were.²⁹⁷ And indeed Sheila Foster has argued that informal property housing systems often are, precisely, bottom-up solutions to managing urban commons of the sort addressed by concepts like *moradia* and the right to the city.²⁹⁸ Accurate descriptions of informal property systems will help us better to understand the solutions devised by communities who rely on informal property in their attempts to achieve the many aspects of human flourishing that a secure dwelling situated within a similarly secure community can provide.²⁹⁹ Occasionally we may then be able to improve on them. These are the benefits Bonilla Maldonado argues for in criticizing legal monism in favor of description and careful, focused prescription.³⁰⁰ In contrast, a one-size-fits-all account, such as that provided by de Soto,³⁰¹ is hardly sufficient, and may often be counterproductive.³⁰²

The stakes here are large. For “[p]roperty theory determines how lawyers and policymakers think about urban issues and imagine solutions.”³⁰³ A regular failure to critically examine the dominant individualistic approach to homeownership and homelessness will “foreclose serious consideration of alternative property arrangements.”³⁰⁴ As vague as they are, *moradia*, the right to the city, the social function of property, and a certain notion of *cidadania* help us to understand the concept of property in the home. To be sure, the Brazilian matrix within which *regularização* occurs has its own abstractions, exotic to an American ear not trained in them. But these abstractions do not function standing alone.³⁰⁵ As Ngai Pindell writes, “With its sometimes chaotic, sometimes ethereal overlay of formal, legal property rules atop the lived experiences of urban dwellers using, possessing, building, and speculating on land, Brazil’s property system presents the chance to see more clearly the underlying, universal

²⁹⁵ See generally Bonilla Maldonado 2007, *supra* note 234.

²⁹⁶ Boaventura de Sousa Santos, *Law; A Map of Misreading: Toward a Postmodern Conception of Law*, 14 J. LAW & SOC. 279, 297- 298 (discussing legal pluralism and the concept of interlegality).

²⁹⁷ See, e.g., ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990).

²⁹⁸ Foster 2009, *supra* note 294; see also Foster 2011, *supra* note 294 (articulating an account of local community responses to managing shared urban resources, using Ostrom’s general approach). Foster’s argument goes a good ways towards establishing that inquiry into the management of urban resources has to account for what Bonilla calls the extra-legal in addition to he formally legal, and that this must be a local inquiry.

²⁹⁹ See Baron, *supra* note 20; Crawford, *supra* note 5; Iglesias, *supra* note 132; Waldron, *supra* note 165.

³⁰⁰ Bonilla Maldonado, *supra* note 234.

³⁰¹ See DE SOTO 2000, *supra* note 32.

³⁰² See sources cited in note 34 .

³⁰³ Pindell, *supra* note 3, at 460.

³⁰⁴ *Id.*

³⁰⁵ See the discussion of the Fordham symposium dialogue about whether there is content to the social function of property, text at note 205 *supra*.

tensions in property law.”³⁰⁶ Similarly, in the United States, an abstract account of the virtues and meaning of homeownership should not ignore concreteness and context, or it will mislead, with potentially serious consequences. A unitary theory is likely to miss the complexities of property ownership, especially homeownership. The unexamined discourse, by its very abstractness, masks political and social truths that would better be uncovered and discussed. Ignoring these truths may, for example, deliver informal communities unawares to the realities of a market in land, which, for all its benefits, is also perilous.³⁰⁷ Ownership may not be the same thing as a right to *moradia*.

³⁰⁶ Pindell, *supra* note 3, at 449.

³⁰⁷ Compare Rose, *supra* note 242, at 703 – 05 (not viewing these perils as overly grave), with McFarlane, *supra* note 28 (detailing the perils to people of color, resulting in a systematic instability of homeownership).