

1-1-1991

Homelessness and the Uses of Theory: An Analysis of Economic and Personality Theories of Property in the Context of Voting Rights and Squatting Rights

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Homelessness and the Uses of Theory: An Analysis of Economic and Personality Theories of Property in the Context of Voting Rights and Squatting Rights

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I. INTRODUCTION

When faced with a problem of the magnitude and seriousness of homelessness,¹ lawyers and policymakers often avoid theoretical speculation in favor of solutions yielding immediate results. Short-term strategies designed to provide for the pressing needs of clients, such as food, shelter, and medical care, are essential and appropriate as *one* means of combatting homelessness.² By not considering the role of

1. Estimates of the number of homeless people are a subject of dispute. Although a 1984 Department of Housing and Urban Development ("HUD") report approximated the number of homeless persons as between 250,000 and 350,000; the Washington, D.C. advocacy group Community for Creative Non-Violence ("CCNV") estimates that there are two million to three million homeless persons in America. H.R. REP. No. 47, 99th Cong., 1st Sess. 7 (1985) [hereinafter H.R. REP. No. 47]. CCNV's legal challenge to the HUD report as inaccurate and consciously designed to curtail support for federal initiatives to alleviate the problems of homelessness failed. *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663 (D.C. Cir. 1987).

2. See Wizner, *Homelessness: Advocacy and Social Policy*, 45 U. MIAMI L. REV. 387 (1990-1991) (discussing three strategies used by faculty and students at Yale Law School to alleviate the immediate shelter needs of clients and to provide for low-income housing).

property theories in advocacy and legislation, however, homeless advocates are disregarding potentially valuable tools in the search for long-term solutions to homelessness.

This Comment evaluates two of the more influential approaches to property rights—the economic utility theory³ and the personality theory⁴—in the context of homelessness. It focuses on the somewhat disparate issues of voting rights⁵ and “squatting”⁶ rights⁷ to illustrate that property theories play a significant, although largely unspoken, role in many homeless issues. Because individual rights are implicitly defined by property ownership principles, the law presents many obstacles for persons trying to overcome homelessness who neither own nor control property. Thus, unless advocates, policymakers, or the judiciary can develop alternative methods of defining rights to necessary resources, the homeless will continue to be excluded from many rights and privileges enjoyed by other members of our society.

In evaluating the implicit role of property theories in voting and squatting rights, this Comment examines the potential for halting the increase in homelessness⁸ by applying property theories in ways to expand voting rights and to recognize greater property entitlements. Further, although this Comment only focuses on two of the myriad problems faced by homeless individuals,⁹ it can serve as a model for further analysis of other homeless issues. Section II defines the economic theory of property rights and discusses its ramifications in the context of homelessness. Section III then presents the personality theory’s alternative approach to defining property rights on the basis of a personhood principle, and suggests arguments for a redefinition

3. For a general discussion of the economic utility theory of property rights, see *infra* Section II.

4. For a general discussion of the personality theory of property, see *infra* Section III.

5. For an analysis of the relation of property theories to voting rights, see *infra* Section V.

6. “To squat is to occupy property without the permission of the owner.” Borgos, *Low-Income Homeownership and the ACORN Squatters Campaign*, in *CRITICAL PERSPECTIVES ON HOUSING* 429 (R. Bratt, C. Hartman & A. Meyerson eds. 1986). For an analysis of squatting rights and property theories, see *infra* Section VI.

7. Voting rights and squatting rights are disparate issues because of the contrasting nature of the “right” involved. Voting is generally thought to be a fundamental right, see *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (recognizing voting as a fundamental right because the right to vote is preservative of all other basic civil and political rights), while squatting is treated by our society essentially as an illegal infringement on the property rights of others. See Hirsch & Wood, *Squatting in New York City: Justification and Strategy*, 16 N.Y.U. REV. L. & SOC. CHANGE 605 (1987-1988) (noting the controversial nature of squatters’ campaigns).

8. See H.R. REP. No. 47, *supra* note 1, at 7 (noting that regardless of disputes over the number of homeless people, “[t]he homeless population is increasing each year and the homeless exist in epidemic proportions”).

9. See, e.g., *Law and the Homeless*, 45 U. MIAMI L. REV. 261 (1990-1991).

of our property system to achieve redistribution by giving limited property rights to homeless persons. Next, Section IV explores the role that the economic and personality theories play in the housing market, the system of property rights most immediately relevant and least responsive to homeless persons. Section V evaluates the relevance of property theories to the enfranchisement of the homeless population. Section VI turns to the issue of squatting rights and applies the economic and personality theories to argue for a property rights entitlement based on resource maximization and self-identification. Finally, Section VII concludes that because economic and personality approaches to property rights play an important role in shaping and resolving homeless issues, advocates should apply these principles to formulate and use new arguments in attempts to find both short- and long-term solutions to homelessness.

II. THE ECONOMIC THEORY OF PROPERTY RIGHTS

A. *History and Development*

The roots of the economic approach to property rights lie in the utilitarian theory of property originally propounded by David Hume.¹⁰ Hume's theory rejected natural or formal rights as justifications for property, suggesting instead that the laws of property were mere conventions that people obeyed out of self-interest: i.e., that property rights develop out of utility alone.¹¹ As elaborated further by Jeremy Bentham, property rights derive from people's expectations of being able to gain enjoyment from what they consider to be their own.¹² Rights and property are thus mutually self-defining terms: "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."¹³ The utilitarian theory's recognition of property rights as artificial constructs that serve as a means to achieve happiness is the dominant contemporary view of property.¹⁴

The "law and economics" perspective on the utilitarian theory arose primarily out of dissatisfaction with the use of such an ephemeral concept as human happiness as the basis for a theory of property; legal economists sought to take more rigorous account of what values

10. L. BECKER, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* 67 (1977) (noting that Hume's philosophy is the basis for conceptions of property that focus on utility rather than formal right).

11. See D. HUME, *A TREATISE OF HUMAN NATURE* 477-516 (2d ed. 1978).

12. See J. BENTHAM, *THEORY OF LEGISLATION* 111-13 (4th ed. 1882).

13. *Id.* at 113.

14. See J. DUKEMINIER & J. KRIER, *PROPERTY* 138 (1988) (noting the prevalence of utilitarian theory among property law scholarship).

property rights serve to protect.¹⁵ Essentially, the economic approach attempts to quantify "value" by measuring it as the maximum a person would be willing to pay for a thing or the minimum they would take to give it up, in terms of a standard medium of exchange, such as money.¹⁶ This quantitative approach forms the basis for the economic analysis of property rights.

The further development of the economic approach is exemplified by one of its preeminent spokesmen, Judge Richard Posner, in his text *Economic Analysis of Law*.¹⁷ Proceeding on the basic assumption that man is a rational maximizer of his own self-interest,¹⁸ Posner derives certain fundamental concepts: (1) that there is an inverse relation between the price charged and the quantity demanded of a good;¹⁹ (2) that the cost of a good is the price that the resources consumed in making and selling it would command in their next-best use;²⁰ and (3) that resources will gravitate toward their most valuable uses if voluntary exchange is permitted.²¹ These basic economic principles lead to the conclusion that the value of a thing is determined by

15. L. BECKER, *supra* note 10, at 67.

16. *Id.* at 67-68.

17. R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1988). As the following analysis will make clear, this Comment's discussion of the "law and economics" approach focuses primarily on Posner's theory as voiced in *Economic Analysis of Law*. Although Posner is certainly not the only scholar to apply economic theory to the study of law, and his mode of analysis is not singularly representative of all forms of economic analysis, the widespread use of Posner's text and the influence his judicial opinions wield, see Comment, *Posnerian Jurisprudence and Economic Analysis of Law: The View from the Bench*, 133 U. PA. L. REV. 1117, 1117 n.1 (1985) (estimating that Posner's opinions had been used as precedent in approximately 1,000 cases), make his theory an appropriate model for evaluating the nature and impact of "law and economics." For a discussion of the influence of Posner's theory and variant approaches to and critiques of economic analysis, see, e.g., Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989) (evaluating the influence of classical law and economics since the publication of *Economic Analysis of Law* and proposing an enrichment of the theory through the fields of sociology and psychology); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 452 (1974) (describing Posner's text as "just a fatly reified symbol of a currently important trend"); and Malloy, *Equating Human Rights and Property Rights—The Need for Moral Judgment in an Economic Analysis of Law and Social Policy*, 47 OHIO ST. L.J. 163, 163 n.6 (1986) (noting that Posner best represents the legal economics scholars and generally evaluating the problems of moral neutrality in economic analysis).

18. R. POSNER, *supra* note 17, at 3.

19. *Id.* at 4. For instance, if the price of steak increases by 10¢ per pound, some rational self-interested consumers will substitute a cheaper alternative food, and demand will decrease. *Id.*

20. *Id.* at 7. The cost of an item to the manufacturer is the price for the materials, labor, and resources that go into making it. That price must equal or exceed the price for which the resources would have sold to the next-highest bidder. *Id.*

21. *Id.* at 8. The party who pays the highest price for a resource does so because he can obtain a more valuable output from it. *Id.*

the exchanges people will engage in to buy or sell it.²² Essentially, what this means is that in a free-market system, all goods will be put to their best uses because those people who derive the most value from them will give the most to obtain them.

Thus, in the realm of property, the ultimate goal in rights development is efficiency.²³ Posner suggests three criteria essential to an efficient system of property rights: (1) *universality*—that all resources be owned (and thus valued) by someone, except for unlimited resources whose value is not diminished by others' use of them;²⁴ (2) *exclusivity*—that a person be able to prevent others from using his property (giving greater incentives to invest the proper amount of resources in the property);²⁵ and (3) *transferability*—that property can be shifted from less to more valuable uses through free exchange.²⁶ The theoretical framework of this economic perspective provides a powerful justification for a free-market approach to property rights and, as this Comment later argues, virtually dominates our entire system of real property ownership.²⁷ The economic approach to property rights thus plays an intrinsic role in how property-related issues are dealt with in our legal system.

B. *Economic Theory and Homelessness*

Juxtaposing the law and economics approach to property rights with the dilemmas of homelessness raises some problematic theoretical issues. Legal economists speak of efficiency as the primary (and perhaps only) goal of a legal system,²⁸ and define it as the use of economic resources so as to maximize human satisfaction "as measured by aggregate consumer willingness to pay for goods and services."²⁹ But in doing so, the theory implicitly assumes that all people have the ability to achieve and satisfy their desires—that they have control over some valuable resources to exchange. In a critique of Posner's text, Professor Arthur Leff points out this flaw:

In such a system whatever is, is. If you do not "buy" something, you are *unwilling* to do so. There is no place for the word or con-

22. *Id.* at 10.

23. *Id.* at 4. Efficiency is defined in a technical sense as "exploiting resources in such a way that human satisfaction as measured by aggregate willingness to pay for goods and services is maximized." *Id.*

24. *Id.* at 29.

25. *Id.*

26. *Id.* at 30.

27. For a discussion of the role of economic theory in the housing market, see *infra* notes 67-84 and accompanying text.

28. See, e.g., R. POSNER, *supra* note 17, at 6.

29. *Id.* at 4.

cept "unable." Thus, in this system, there is nothing which is coerced. For instance, let us say that a starving man approaches a loaf of bread held by an armed baker. Another potential buyer is there. The baker institutes an auction; he wants cash only (having too great doubts about the starveling's health to be interested in granting credit). The poor man gropes in his pockets and comes up with a dollar. The other bidder immediately takes out \$1.01 and makes off with the bread. Now under Posner's definitional system we must say that the "value" of the bread was no more than a dollar to the poor man because he was "unwilling" to pay more than that. An observer not bound within that particular definitional structure might find it somehow more illuminating to characterize the poor man's failure as being the result of being unable to pay more than a dollar. But one cannot, consistent with Posner's system, say any such thing. One's actual power is irrelevant.³⁰

Leff's parable makes clear that the efficiency criterion of the economic approach to property rights implicitly assumes that everyone already possesses bargaining power (and hence rights) within the system. Essentially, property rights and human rights merge in the economic approach:

It is a mistake to try to contrast human rights and property rights. Property rights are human rights to the use of economic goods. To see a conflict between human rights to use property and civil rights is equally misguided. Civil rights do not conflict with human rights to use goods.³¹

A system that defines and justifies rights exclusively in terms of control over resources indeed may find it impossible to distinguish between human and property rights.

Although the interrelation of human rights and property rights is not a novel concept,³² the absolute equation suggested by economic analysis can have dangerous consequences in the context of homelessness. Defining human rights by one's ownership or control over prop-

30. Leff, *supra* note 17, at 478-79.

31. A. ALCHIAN & W. ALLEN, *EXCHANGE & PRODUCTION* 114 (2d ed. 1977). This view has not gone without criticism from other legal economists: "When human rights and property rights are assigned equivalent values, the danger emerges that the logical conclusions of economic analysis may result in policy directives so contrary to the normative values of the society that both the economic and legal systems are discredited by society." Malloy, *supra* note 17, at 165.

32. "Americans of the founding generation understood property . . . as a basic human right, essential to one's existence, to one's independence, to one's dignity as a person. Without property, real and personal, one could not enjoy life or liberty, and could not be free and independent." Levy, *Property as a Human Right*, 5 *CONST. COMMENTARY* 169, 175 (1988). This notion is very similar to the approach of the personality theory discussed later in this Comment. See *infra* notes 38-53 and accompanying text.

erty—for instance, requiring a property right as a prerequisite to the exercise of other rights—virtually excludes the homeless from the entire system of rights. In a system literally equating human rights and property rights, homeless persons would be nonentities with no rights to be protected.³³

Although this result seems morally repugnant when stated explicitly, the economic approach as a matter of theory ignores such consequences under the guise of moral neutrality. Economic theory proponents explain that it can do nothing to determine whether existing wealth distribution patterns are just or good, but serves only as a means to determine the effect of legal rules on efficiency and value, and on the existing distribution of wealth.³⁴ But this justification is essentially nonresponsive. The critique of the economic approach is not that it fails to call for redistribution,³⁵ but rather that it, by definition, excludes those who do not have resources. The problem is not that some have more than others; it is that those who do not have are considered without rights in the system.³⁶

This qualm with the economic approach does not exist merely in the realm of theory. Indeed, several of the problems that the homeless face arise because certain rights and benefits are made available only to persons with a permanent place of residence.³⁷ When basic

33. This is perhaps an exaggeration, considering that the homeless are not completely without any resources whatsoever. Nonetheless, they are for most purposes economically powerless, particularly where real property rights (i.e., housing) are treated as a prerequisite for other rights, (i.e., voting). See *infra* notes 89-105 and accompanying text.

34. R. POSNER, *supra* note 17, at 10. For a debate between Robin Malloy and Richard Posner on the morality of law and economics, see *Debate: Is Law and Economics Moral?*, 24 VAL. U.L. REV. 147 (1990).

35. Indeed, theoretically the economic approach would not necessarily be adverse to redistribution of resources, provided that once distributed, exclusivity of ownership and free exchange were permitted. See, e.g., R. POSNER, *supra* note 17, at 29-30. If economic analysis is used merely as a descriptive tool, it simply evaluates the value-maximizing effects of the redistribution; if economic analysis is applied positively to examine how resources could be more efficiently used, it in fact does provide a redistributive mandate. For an analysis of the potential positive use of economic theory in the context of squatting rights, see *infra* notes 151-65 and accompanying text.

36. An alternative construction of the economic approach's perspective on the homeless would not base the denial of rights simply on the fact that they have no property, but that somehow the failure to have such resources indicates that they are not "rational maximizers" of their own self-interest. See, e.g., R. POSNER, *supra* note 17, at 3. This analysis may explain the "blame factor" often attached to the homeless—that is, that they are solely responsible for their own plight. Indeed, former President Reagan once commented that many homeless persons "make it their own choice," adding that "[y]ou'll find anywhere from 60 to 75 full pages of help-wanted ads" in the *Washington Post* every Sunday. *Wash. Post*, Dec. 23, 1988, at A8, col. 3.

37. For example, homeless persons have been denied the right to vote, see *infra* notes 89-105, the right to education, see NATIONAL COALITION FOR THE HOMELESS, *BROKEN LIVES: DENIAL OF EDUCATION TO HOMELESS CHILDREN* (1987), and eligibility for certain forms of

personal rights are made contingent upon property rights, the underlying influences of economic analysis and its resulting problems for the homeless become apparent. Nonetheless, homeless advocates can recognize the role of economic theory in arguing for a recognition and expansion of personal rights and potentially use its mode of analysis to their advantage.

III. THE PERSONALITY THEORY OF PROPERTY RIGHTS

A. *History and Development*

The origins of the personality theory of property lie in the philosophy of Hegel, which suggests that property rights play an essential role in the full development and self-realization of individuals.³⁸ In Hegel's philosophy, property occupancy serves as a means by which individuals project their abstract wills into the external world.³⁹ Thus, according to Hegel, the creation and development of property rights is inextricably bound with the personal relationship between individuals and property—a direct contrast to the economic theory's emphasis on the utilitarian nature of property rights.⁴⁰

The personality theory and its relationship to American property law have been analyzed and developed by Professor Margaret Jane Radin in *Property and Personhood*.⁴¹ The basis of Radin's approach is that an individual must have some control over resources in the external environment to achieve proper personal self-development, and that property rights are the assurances of that control.⁴² Radin posits this theory as an intuitive argument: Most people have certain irreplaceable objects that they identify as "almost part of themselves," which are different from other types of replaceable objects.⁴³ Because

governmental assistance, see McKittrick, *The Homeless: Judicial Intervention on Behalf of a Politically Powerless Group*, 16 *FORDHAM URB. L.J.* 389, 398 (1988), because of their lack of permanent residence. Some of these problems have been at least partially addressed by Congress through the Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. § 11301 (1990), and the Homeless Eligibility Clarification Act, Pub. L. No. 99-570, 100 Stat. 3374 (1986) (codified in scattered sections of 7 U.S.C. 38 U.S.C. & 42 U.S.C.).

38. G. HEGEL, *PHILOSOPHY OF RIGHT* (1967). For an in-depth analysis of Hegel's theory of property, see generally Stillman, *Hegel's Analysis of Property in the Philosophy of Right*, 10 *CARDOZO L. REV.* 101 (1989).

39. "A person has as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself and derives its destiny and soul from his will." G. HEGEL, *supra* note 38, para. 44.

40. See generally Stillman, *supra* note 38, for a discussion of the relationship of Hegel's philosophy to the development of property rights.

41. Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

42. *Id.*

43. *Id.* at 959. Radin gives as common examples a wedding ring, a portrait, an heirloom, or a house. *Id.*

of this strong personal connection, the personality theory argues that individuals should be given broad liberty to control these personal objects.⁴⁴ In a more formal Hegelian analysis, the argument is that a person (defined as an abstract autonomous rationality) becomes a fully developed individual through establishing relationships with objects; thus, an individual's will becomes embodied in property.⁴⁵ The basic premise of the personality approach is that the close interrelation between certain forms of property and personhood justify, to some extent, the creation of property rights.

From this analysis, Radin makes a distinction between different types of property as well, which she calls the "personhood dichotomy."⁴⁶ She distinguishes between fungible property that has a certain fiscal value and which will be relinquished for a proper price, and personal property that has an individual meaning which can supersede simple fiscal value.⁴⁷ This distinction also recognizes that the same item may have significant personal value to one person while being merely fungible to another. For example, a wedding ring would be fungible property to a jeweler, and personal property to the wearer.⁴⁸ Because a person is more intimately associated with "personal" property, personality theory suggests that the law should afford more protection to these personal property rights than to mere fungible property interests.⁴⁹ Thus, the personality theory provides not only a justification for property rights, but a means to establish different types or degrees of rights based on the significance of the relationship between property and person.

Radin demonstrates the implicit role that the personality approach has played in areas ranging from takings⁵⁰ to fourth amend-

44. *Id.* at 959-60.

45. *See id.* at 971-77; *see also* G. HEGEL, *supra* note 38, paras. 44-45.

46. Radin, *supra* note 41, at 986.

47. For Radin's development of the distinction between fungible and personal property, *see id.* at 959-60 & 986-88.

48. *Id.* at 959. This "personhood dichotomy" thus focuses on an element ignored by economic theory—the personal, non-economic relation of individuals to property.

49. *Id.* at 986-88. Radin compares the different degrees of legal protection to be afforded to different degrees of property identification with Calabresi's theory of property rules (suggesting injunctive remedies) and liability rules (suggesting damages). *Id.* (citing Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972)). Although denying that a neat correlation can be drawn (i.e., fungible property should only be protected by liability rules; personal property should be protected by property rules), Radin suggests that *at least* personal property should be protected by property rules. *Id.* at 988.

50. Radin suggests that the paradoxical tendency of courts to require compensation for seizure of small, discrete units of property while allowing large losses in dollar value due to zoning regulations, for instance, to go uncompensated, is explained by recognizing the *personal* right in discrete units of specific property versus total assets. *Id.* at 1002; *see also* Radin, *The*

ment protections,⁵¹ and how its explicit application can assist in the resolution of these disparate property issues.⁵² As this Comment illustrates, the personality theory also may prove to be a useful tool in the analysis of issues directly affecting the homeless.⁵³

B. *Personality Theory and Homelessness*

What is curious about the personality theory is that, in the context of homelessness, it can be interpreted to suggest several different, and perhaps contradictory, ideas. While seemingly diametrically opposed to the economic approach to property rights,⁵⁴ the personality theory arguably dictates the same results: If individuals do not manifest and develop personhood except through the control of resources in the external environment, then those without resources to control are not recognized as individuals. Once again, the homeless would be considered outside of the social and legal system, without rights to be protected. As long as property forms the basis for defining human rights, whether the theory used is based on personhood or economics, the homeless are effectively non-entities in the system of rights.

But such an analysis of the personality theory would be more sophistry than anything else, because the personality theory explicitly disclaims the equation drawn by economic theorists between property ownership and personal rights, maintaining a distinction between property and basic human rights.⁵⁵ Indeed, Radin suggests that "[t]he personhood dichotomy in property, by focusing attention on the importance of certain property to self-constitution, can avoid some distortions that might result from justifications in which all entitlements are considered alike."⁵⁶ By noting the distinction between

Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 COLUM. L. REV. 1667 (1988).

51. Radin utilizes the role of a personhood perspective on property to explain the shifting conception of the fourth amendment from a provision that protects property to one that protects personal privacy, particularly in the context of special rules developed in regard to the "sanctity of the home." Radin, *supra* note 41, at 996-1002.

52. *See id.* at 991-1013.

53. *See infra* notes 110-14 & 166-83 and accompanying text for an evaluation of personality theory in the contexts of voting rights and squatting rights, respectively.

54. Radin bases the justification of property rights on their necessity to self-development, *see supra* notes 38-53 and accompanying text, whereas the economic theory rests on goals of efficiency and resource maximization, *see supra* notes 17-27 and accompanying text.

55. Radin, *supra* note 41, at 989.

56. *Id.* at 988. Radin observes that an economic model based on efficiency criteria would fail to consider different personal and social values; further, a system based on property rights as defining all other rights would allow property interests to outweigh civil liberties. *Id.* at 988 n.109.

property and personhood, the personality theory is not subject to some of the pitfalls of the economic approach to property rights because it does not exclude persons who do not own property from the realm of human rights. While there is an intimate connection between certain types of property and personal development, the person himself is a fundamentally independent source of rights.

Furthermore, unlike the economic approach, the personality theory does not claim or espouse moral neutrality. Radin makes clear that her development of the personhood perspective is a "non-utilitarian, moral theory which would provide an alternative explanation for the observed hierarchy of protection, as well as help us to critique it where it goes wrong."⁵⁷ The theory, in drawing distinctions between different types of property depending on their connection with personhood, explicitly allows individuals to make moral distinctions regarding the kind of protection that should be afforded to a person's right in the property.

Ironically, although the personality theory philosophically makes distinctions based on one's personal connection to property regardless of actual ownership,⁵⁸ and can serve as a method to expand rights for persons without resources, it holds little potential as a tool for reform of a property system in which rights are already defined in economic terms. In other words, in a predominantly free-market structure fundamentally based on economic theories of law,⁵⁹ the personality theory may simply reinforce existing hierarchies of rights that disadvantage the homeless. If the legal economists' equation between human and property rights forms the primary basis for our conception and delineation of rights (that is, only those who own property have rights), and the personality theory operates within that system to justify protecting the rights of persons who already have had the opportunity to "constitute" themselves in property, then the use of personality theory fails to provide support for the rights of the homeless. In fact, it exacerbates the exclusion of the homeless from the system of rights by only protecting persons who already have the means to own property.⁶⁰ For a personality approach to do more than simply reinforce the status quo in the context of homelessness,

57. *Id.* at 985.

58. Adverse possession is one of many ways that one could develop a personal connection to property without actual ownership.

59. See *infra* notes 67-88 and accompanying text.

60. For a discussion of the interrelated roles these theories play in the context of governmental intervention in the housing market, see *infra* notes 67-88 and accompanying text.

its emphasis on the relation between personhood and property must do more than protect those who already have property.

C. *Property as a Human Right*

Taking the basic premise that property rights play an integral role in personal development a step further yields a radical, yet potentially useful, argument in the context of homelessness. If property is essential to personhood, then it follows that a society might bear a responsibility to provide at least a minimal property entitlement necessary for self-development to all its members. Radin addresses, but does not unequivocally endorse, such an argument by noting:

A welfare rights or minimal entitlement theory of just distribution might hold that a government that respects personhood must guarantee citizens all entitlements necessary for personhood. If the personhood dichotomy in property is taken as the source of a distributive mandate as part of such a general theory, it would suggest that government should make it possible for all citizens to have whatever property is necessary for personhood.⁶¹

Furthermore, this minimal entitlement argument suggests that property rights should be rearranged so that fungible property ownership by some persons does not prevent others from constituting themselves in property at all.⁶² Essentially, the theory posits the use of property rights to achieve wealth redistribution. The minimal entitlement analysis has been taken so far as to yield a "New Bill of Property Rights"⁶³ whereby all members of society must be guaranteed access to the store of public resources sufficient for individuals to realize their full human potentials.⁶⁴

Some commentators have characterized the minimal entitlement argument as "turn[ing] the concept of property on its head."⁶⁵ Indeed, it may be fundamentally inimical to a predominantly free-

61. Radin, *supra* note 41, at 990.

62. *Id.* at 990-91.

63. Kent, *Property, Power, and Authority*, 41 BROOKLYN L. REV. 541 (1975) (arguing that property ownership is a fundamental right, and that present property ownership structures should be reorganized to provide all members of society with some minimal property entitlement).

64. *Id.* In fact, the Universal Declaration of Human Rights expressly guarantees a right to a minimal standard of living: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . ." Universal Declaration of Human Rights, art. 25(1), G.A. Res. 217A (III), U.N. Doc. A/810 (1948) (adopted Dec. 10, 1948) (emphasis added). In *Dandridge v. Williams*, 397 U.S. 471, 521 n.14 (1970), Justice Marshall suggested in dissent that Article 25(1) supported the argument for subsistence rights.

65. Ansell, *Property Versus Civil Rights: An Alternative to the Double Standard*, 11 N. KY. L. REV. 51, 125 (1984).

market system of property rights. Although the usefulness of a minimal entitlement theory in a purely legal context might require a radical restructuring of our system and conception of property rights, on a moral level it provides a strong basis for the protection of the homeless. The implication is that a government's responsibility does not end with the mere provision of emergency shelter to the homeless. Because the level of self-identification an individual can have in a temporary shelter would seem insufficient to ensure development of the conception of personhood espoused by the personality approach, a government that respects personhood must also provide the resources necessary to ensure permanent housing for all of its citizens.⁶⁶

IV. THEORIES OF PROPERTY AND THE HOUSING MARKET

The economic approach to property is most immediately relevant to homelessness not merely for its implications as a theory of rights, but because it provides the philosophical underpinnings for a housing market often cited as a major cause of homelessness.⁶⁷ Indeed, this Comment argues that an understanding of the legal economists' position is essential to an understanding of the housing market because the American housing system operates essentially as economic analysis proponents would have it do so.

Housing in the United States is, for the most part, a commodity dominated by the private sector⁶⁸—that is, one in which basic eco-

66. Radin acknowledges the possibility of this argument: "[P]aying attention to the notion of personal property would lead not merely to a right to shelter in general, but a right to a particular house or apartment." Radin, *supra* note 41, at 990 n.115. This analysis impliedly assumes that housing for the homeless is of the personal, rather than fungible, variety of right. *Id.* at 959 (distinguishing fungible property which is freely transferable from personal property to which an individual has intimate attachments). The realities of homelessness would seem to indicate otherwise. The most immediate issue is ensuring basic shelter. Any kind of housing with adequate facilities would suffice, making shelter a fungible item in the personality theory's approach. Characterizing shelter as a fungible property interest, however, serves more to indicate the extent of depersonalization caused by homelessness, rather than to argue against a moral responsibility to provide permanent housing. Shelter, as a basic human necessity, may indeed be fungible—but a society that respects personhood should go further to ensure that all of its members have property entitlements beyond the bare necessities of self-development.

67. The scarcity of low-cost housing is a factor commonly implicated in the increase in the number of homeless Americans. H.R. REP. NO. 47, *supra* note 1, at 8 (calling the scarcity of low-cost housing the "main cause of homelessness"); see also Collins & Barry, *Homelessness: A Post-Industrial Society Faces a Legislative Dilemma*, 20 AKRON L. REV. 409, 412 (1987) (noting the numbers of people involuntarily displaced from homes and loss of low-income housing due to various factors as indicative of a growing need for basic shelter); Comment, *Homeless in America: Looking for a Right to Shelter*, 19 COLUM. J.L. & SOC. PROBS. 305, 311 (1985) (describing the scarcity of low-cost housing as a major factor in the recent increase in homelessness).

68. Achtenberg & Marcuse, *The Causes of the Housing Problem*, in CRITICAL

conomic principles of supply and demand, economic cost, and free exchange⁶⁹ ostensibly determine the supply, cost, quantity, and location of housing.⁷⁰ The consequences of this approach to the housing market are manifold. The initial costs of constructing housing are increased by rising land and construction loan interest rates.⁷¹ Costs are further increased when successive owners trade for profit.⁷² Production and maintenance is limited in poor or "high-risk" areas because the players in the private housing sector (developers, speculators, producers, and lenders) will only invest in housing where they can make a profit, leading to housing abandonment in poorer areas.⁷³ As maintaining housing in low-income areas becomes less profitable, and constructing new housing more expensive, low-income housing becomes scarce, particularly in inner-city areas.⁷⁴ The ultimate result is an increase in homelessness.⁷⁵ The free-market approach to housing, although theoretically ensuring that all resources are put to their best uses, operates to deny housing to the needy. This is not a surprising result, however, considering that an economic approach values "efficiency" and "human satisfaction" only through aggregate willingness to pay.⁷⁶ In essence, the failure of the market to respond to low-income housing needs is Leff's parable⁷⁷ played out in the real world.

The characterization of the housing market as a predominantly free-market private enterprise system is not meant to imply that the government has not played a role in housing policy. Indeed, the federal government has been involved in the housing sector at least since the New Deal.⁷⁸ Until the 1960's, however, federal housing policy mainly sought to provide financing to the housing sector to increase production; and the middle class were the primary beneficiaries of this

PERSPECTIVES ON HOUSING, *supra* note 6, at 4 (noting that housing is treated not as a social good but as a source of private profit).

69. For a further discussion of the economic principles that affect the housing market, see *supra* notes 17-27 and accompanying text.

70. Achtenberg & Marcuse, *supra* note 68 at 5.

71. *Id.*

72. *Id.*

73. *Id.* at 6.

74. Comment, *supra* note 67, at 311-12.

75. *Id.*

76. R. POSNER, *supra* note 17, at 4 (The goal of a system of rights in the economic approach is to maximize "human satisfaction" as measured by "aggregate willingness to pay" for resources.)

77. For the text of Leff's parable criticizing the efficiency criterion of economic analysis, see *supra* text accompanying note 30.

78. R. STRUYK, M. TURNER & M. UENO, *FUTURE U.S. HOUSING POLICY: MEETING THE DEMOGRAPHIC CHALLENGE* 55 (1988) (discussing the history of federal housing initiatives).

policy.⁷⁹ The 1960's were marked by a greater attention to the housing needs of the poor,⁸⁰ but federal initiatives still relied primarily on the private sector to provide low-income housing through mortgage subsidies, tax incentives, and operating cost subsidies, with public housing regarded as a last resort.⁸¹ Although the recent deregulation of the housing finance system has provided more mortgage money, it has, at the same time, increased the cost of home ownership.⁸²

The nature of governmental activity in the housing market suggests that while there has been some governmental involvement, federal initiatives have relied primarily on the private sector to ensure adequate housing, including housing for low-income households. Where the government does step in, its role is usually to provide an economic impetus to the private housing market (i.e., by providing easily available mortgage money or tax incentives) rather than direct intervention. The government's economic assistance measures are fundamentally in accord with the economic approach's precepts of exclusivity of ownership and free exchange as guarantees of resource maximization because of the reliance on the free market and the encouragement of private ownership.⁸³ But the free market, even with governmental encouragement, has failed to provide sufficient low-income housing, ultimately resulting in a rise in homelessness.⁸⁴ In sum, a housing policy based primarily on the private sector's ability to maximize resources efficiently has proven to be insufficient in combating homelessness.

79. *Id.* at 59, 63. For example, although the Low Rent Public Housing Program of 1937, 42 U.S.C. § 1437a-s (1988), provided housing for the poor by supporting slum clearance and rebuilding decent low-rent housing, the primary purpose of the program was to benefit society by eradicating "dangerous" slum neighborhoods and creating jobs, not to assist the needy. R. STRUYK, M. TURNER & M. UENO, *supra* note 78, at 58.

80. R. STRUYK, M. TURNER & M. ENO, *supra* note 78, at 64. Struyk describes the four basic strategies of housing policy in the 1960's as follows: (1) make homeownership more accessible to low- and moderate-income families; (2) provide tax and financing incentives to encourage private investment in low-income rental housing; (3) supplement rental payments to private rental companies to encourage private participation in the low-income rental market; and (4) ensure that public housing will be affordable even for the poorest households. *Id.* at 65.

81. *Id.* at 67.

82. *Id.* at 71-73. Between 1973 and 1980, federal regulations regarding the thrift industry were gradually relaxed to make more mortgage money available. *Id.* at 72. Over roughly the same period (between 1970 and 1980), the average price of a single-family dwelling rose from \$23,000 to over \$62,000. Wright & Lam, *Homelessness and the Low-Income Housing Supply*, 17 Soc. POL'Y 48, 49 (1987).

83. For a discussion of the economic theory's espousal of these principles, see *supra* notes 17-27 and accompanying text.

84. See H.R. REP. No. 47, *supra* note 1, at 8 (noting the connection between dwindling low-income housing supply and increasing homelessness).

The personality theory plays a role in shaping the government's actions in the housing market, although its influence may not be as readily apparent as the economic approach's impact on governmental decisions. The personality approach, when operating within a predominantly free-market context, may reinforce the rights of those who already own property while disregarding the rights of those who do not.⁸⁵ The governmental emphasis on easing financing for owner-occupied housing, particularly for middle-class households through programs such as mortgage interest subsidies, suggests an implicit recognition of the importance of individual property ownership (rather than rental). This concept is quite amenable to the personality theory's focus on the relationship between personhood and property.⁸⁶ This approach, however, primarily benefits those persons who already have a relatively significant share of resources to acquire housing, while doing little to respond to the importance of property ownership (or, at the least, any form of housing) for the truly needy. Indeed, while federal support for low-income housing programs has been reduced to \$7.5 billion (a seventy-five percent drop since 1981),⁸⁷ the federal government's support for middle-class homeownership through the mortgage interest deduction amounts to a \$34 billion yearly tax expenditure, which is expected to rise to nearly \$40 billion in 1990.⁸⁸ Thus, the personality theory may implicitly justify some governmental action in the housing market on the basis of the importance of property ownership to personhood. Such justification, however, is of questionable value to the homeless absent a call for increased emphasis on the significance of property ownership to those with scant resources.

85. See *supra* notes 54-60 and accompanying text.

86. Although there is a cognizable personal connection with residential rental property, Radin, *supra* note 41, at 993 (noting that the law increasingly recognizes the personal interest in residential leases through tenants' rights), there is an intuitive, qualitative difference between renting and owning one's own home. The intimate personal connection involved in ownership of a residence, in part, explains the governmental preference for homeownership.

87. NATIONAL COALITION FOR THE HOMELESS, HOMELESSNESS IN THE UNITED STATES: BACKGROUND AND FEDERAL RESPONSE—A BRIEFING PAPER FOR CONGRESSIONAL CANDIDATES 74 (1988) (noting that the federal budget for subsidized and public housing programs has been cut from \$32 billion to \$7.5 billion).

88. Wash. Post, Mar. 10, 1990, at E1, col. 6. The article also notes that individuals may deduct up to one million dollars in mortgage interest payments for both primary and secondary homes (often vacation homes), as well as another \$100,000 in home equity loan interest that is used to finance other purchases. *Id.* These policies vividly demonstrate the tilt of federal housing policy toward those who already have the means to obtain permanent housing.

V. HOMELESS VOTING RIGHTS AND PROPERTY THEORIES

A. *Traditional Voter Registration Standards and Recent Responses*

The relationship between property rights and human rights can be illustrated by analyzing the enfranchisement of the homeless population. Voting rights serve as an example of how the homeless' lack of property-holder status can directly affect their non-property rights. Traditionally, the eligibility to vote is determined primarily by a residency requirement.⁸⁹ One must possess a traditional home or be domiciled in the district to register.⁹⁰ The historical rationale for this sort of residency requirement is that it ensures that a voter is a bona fide member of the community and has a common interest in the issues being voted upon.⁹¹ Courts repeatedly have recognized states' compelling interest in preserving their political community, and consistently have upheld states' power to limit the voting community to bona fide residents.⁹² Yet, by definition, residency requirements disenfranchise the homeless population.⁹³

This traditional approach has recently come under challenge, however. In 1984, the Philadelphia and District of Columbia election boards enacted plans enabling the homeless to register to vote.⁹⁴ Soon after, in *Pitts v. Black*,⁹⁵ homeless plaintiffs brought a class action suit against New York city and state election officials, seeking to enjoin

89. Note, *Disenfranchisement of Homeless Persons*, 31 J. URB. & CONTEMP. L. 225, 225-26 (1987).

90. *Id.* at 226.

91. See *Dunn v. Blumstein*, 405 U.S. 330 (1971) (explaining traditional justifications for voter residency requirements).

92. *Id.* at 343 (citing *Evans v. Cornman*, 398 U.S. 419, 422 (1970); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 625 (1969); *Carrington v. Rash*, 380 U.S. 89, 91 (1965); and *Pope v. Williams*, 193 U.S. 621 (1904)).

93. The extent of the exclusion of the homeless from voting is somewhat dependent on how homelessness is defined. A broad definition of homelessness includes people forced to "double up" with family or friends because they lack a place of their own. See, e.g., Hopper & Hamberg, *The Making of America's Homeless: From Skid Row to New Poor, 1945-1984*, in CRITICAL PERSPECTIVES ON HOUSING, *supra* note 6, at 29 (characterizing low-income families forced together into overcrowded living arrangements as a form of borderline homelessness). Individuals who double up do not face the same voter registration problems as those who sleep in shelters or on the street because they can provide a "permanent" address at a traditional residence, albeit not their own.

94. In Philadelphia, a federal district court entered a consent decree giving the homeless the right to vote. See *Pitts v. Black*, 608 F. Supp. 696, 701, 708 (S.D.N.Y. 1984) (discussing and citing *Committee for the Dignity and Fairness for the Homeless v. Tartaglione*, No. 84-3447 (E.D. Pa. Sept. 14, 1984) (unreported order)). In the District of Columbia, the Election Board adopted regulations allowing the homeless to register to vote. See *id.* at 707-08 (discussing *In re Jenkins*, slip op. (District of Columbia Bd. of Elections & Ethics, June 7, 1984); and D.C. CODE ANN. § 1-1302(16)(A) (Supp. 1984)).

95. 608 F. Supp. 696 (S.D.N.Y. 1984).

the Election Board from applying residency requirements that would completely disenfranchise the homeless.⁹⁶ The federal district court's analysis of this issue demonstrates the interplay of the different conceptions of personal and property rights as they relate to voting rights issues.

The Election Board claimed that its definition of "residence,"⁹⁷ while excluding the entire homeless population, was necessary to ensure that voters have a verifiable nexus to the community, to prevent fraudulent voting, and to maintain administrative feasibility in the registration and voting process.⁹⁸ The homeless plaintiffs, however, offered a different conception of residence: "the act of being in one geographical locale, where one performs the usual functions of sleeping, eating and living in accordance with one's life style, and a place to which one, 'wherever temporarily located' always intends to return."⁹⁹

The court rejected the Election Board's insistence on the traditional definition of residence, stating that "the key objective is to ascertain 'the place which is the center of an individual's life, . . . the locus of his primary concern,' and the place the individual presently intends to remain,"¹⁰⁰ effectively accepting the homeless plaintiffs' definition. The court enjoined the Election Board from basing homeless persons' right to vote on the traditional residency requirement if it prevented them from registering at all.¹⁰¹ The decision also outlined a residency standard which allows homeless persons to register to vote: "Homeless individuals [may register by] identifying a specific location within a political community which they consider their 'home base,' to which they return regularly, manifest an intent to remain for the present, and a place from which they can receive messages and be contacted."¹⁰² Thus, the decision extended the right to vote to homeless individuals whose "residence" could be a temporary shelter or even a park bench.¹⁰³

Similarly, the plans adopted by Philadelphia and the District of Columbia use non-traditional standards to enfranchise the homeless.

96. *Id.*

97. The Election Law defined residence as "that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return." N.Y. ELEC. LAW § 1-104(22) (McKinney 1990).

98. *Pitts*, 608 F. Supp. at 699.

99. *Id.* at 698.

100. *Id.* at 709 (quoting *Ramsey v. Rockefeller*, 348 F. Supp. 780, 788 (E.D.N.Y. 1972)) (citations omitted).

101. *Id.* at 708.

102. *Id.* at 710.

103. *Id.* at 703.

In Philadelphia, homeless persons may list the address of a shelter where they have an established relationship for registration purposes.¹⁰⁴ In the District of Columbia, regulations allow homeless persons to indicate a specific location where they presently intend to remain for voting purposes.¹⁰⁵ The standards thus focus on the intent of the person to reside at a specified location rather than the legal right of access to a dwelling.

B. *The Role of Property Theories*

The homeless voting rights issue and recent legislative and judicial responses demonstrate, on an implicit level, the interplay between the utilitarian economic conception of rights and the personality approach. As a preliminary matter, it should be noted that voting is not typically regarded as a "property" right. Indeed, although not specifically delineated in the Constitution or its amendments,¹⁰⁶ voting is recognized as a fundamental right essential to the preservation of all other rights.¹⁰⁷ Nonetheless, the effective consequence of the traditional residency requirement is to ensure that the right to vote is held only by persons with the means to possess a traditional home or domicile. Ultimately, a right regarded as fundamental becomes inextricably bound to a property right.

The connection between voting rights and property rights demonstrates the dangers of an economic utility theory of rights in matters involving the homeless. This Comment does not suggest that the original drafters of residency requirements for voter registration consciously underwent a Posnerian economic analysis in determining that registrants must have a traditional home or domicile in the district to be eligible to vote; nor does it mean to imply that proponents of economic theory seek the results that ensue from such standards. Rather, the problem is that a system of rights whose philosophical

104. See *id.* at 701, 708 (discussing and citing Committee for the Dignity and Fairness for the Homeless v. Tartaglione, No. 84-3447 (E.D. Pa. Sept. 14, 1984) (unpublished order)). According to the Philadelphia plan, homeless individuals must designate a shelter with which they have an "established relationship," but they are not required to live there. Note, *supra* note 89, at 235.

105. See *Pitts*, 608 F. Supp. at 707-08 (discussing *In re Jenkins*, slip op. (District of Columbia Bd. of Elections & Ethics, June 7, 1984)). The Election Board, in promulgating regulations that allow a prospective registrant to designate any specific location in the voting district as a "residence," emphasized intent over possessory interest. Note, *supra* note 89, at 235 n.65.

106. By implication, the right to vote is recognized by the fifteenth, nineteenth, and twenty-sixth amendments, which protect the voting rights of Blacks, women, and persons over 18, respectively. U.S. CONST. amends. XV, XIX & XXVI.

107. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (recognizing voting as a fundamental right because the right to vote is preservative of all other basic civil and political rights).

underpinning regards human and property rights as equivalent, or that uses property rights as a prerequisite to exercising other rights, will have the unintentional but unavoidable consequence of excluding the homeless. The response of Thomas Wallace, Executive Director of the New York State Board of Elections, when asked in *Pitts v. Black*¹⁰⁸ why an individual who gives a park bench as his address would not qualify as a resident, vividly illustrates the operation of the traditional residency approach: "The statute requires a fixed, permanent home and whenever temporarily absent, the person intends to return. I see that definition as carrying with it a requirement that the person have a *right* to the physical location, to the property."¹⁰⁹ Thus, the equating of a human right with a property right has as its ultimate result the exclusion of the homeless in a most concrete manner.

The recent judicial and administrative responses to this issue demonstrate a recognition of the problem of basing voting rights on property rights, and incorporate an approach more akin to the personality theory.¹¹⁰ At a most fundamental level, the rejection of standards that require possession of a traditional home or domicile indicates a severing of the link between the fundamental right to vote and a right to some property in the district. The personality theory's recognition of a distinction between human rights and property rights thus becomes an essential tool in enfranchising the homeless population. Only when election boards recognize that the fundamental right to vote can (and must) exist independent of any property right can standards be developed that allow the homeless to register.

Analysis of the standards enunciated by the courts and election boards to ensure enfranchisement of the homeless demonstrates a utilization of some of the basic conceptions of personality theory.¹¹¹ Once judges or election boards determine that the homeless have the right to vote regardless of their possession of a traditional residence, they still must develop registration procedures that will protect the

108. 608 F. Supp. 696 (S.D.N.Y. 1984).

109. Trial Transcript at 192, *Pitts* (No. 84 Civ. 5270 (MJL)), cited in *Pitts*, 608 F. Supp. at 698 (emphasis added).

110. By basing residency requirements on one's personal identification with property as a home or shelter, these non-traditional voting standards disregard the ownership principle in favor of a personhood principle. For a general discussion of the personality theory, see *supra* notes 38-53 and accompanying text.

111. A central conception of the personality theory is that a cognizable interest arises out of a person's identification with a certain property. See Radin, *supra* note 41, at 957. The methods of defining that interest—i.e., focusing on intent rather than formal right—put this conception to practical use. See, e.g., *Pitts*, 608 F. Supp. at 710 (holding that if a person thinks of a certain place as his residence, it should be treated as such for voter registration purposes).

state's legitimate interest in limiting the voting population to only "bona fide" residents with a common interest in the community.¹¹² While the language and methods by which the new standards make this residency determination differ, one of the primary elements is a focus on the individual's intent rather than his actual possession.¹¹³ This approach is easily reconcilable with the personality theory's conception of people's self-identification through property: If a person thinks of a certain place as his residence or "home base," more flexible registration standards recognize this self-identification as sufficient for registration purposes.¹¹⁴ By focusing on the person's identification with the property as a means of defining residence, the personality approach implicitly provides a meaningful standard to ensure the enfranchisement of the homeless.

C. *The Significance of Voting Rights*

Perhaps the most fundamental question one should consider in deciding whether to argue for these non-traditional voting standards is how important voting rights truly are for homeless individuals. There are two usual rationales in favor of focusing on voting rights for homeless persons. First, voting gives homeless persons the opportunity to alleviate their plight through the exercise of power in the political arena.¹¹⁵ This rationale has been questioned by some commentators, who suggest that the empirical results have not yet manifested such political power for the homeless in the jurisdictions where they have been ensured voting rights.¹¹⁶ Nonetheless, the fact that the right to vote has not immediately resulted in political clout for the homeless should not be used as a justification for denying homeless persons of the opportunity to vote.

The second justification for focusing on voting rights rests on the fundamental significance of the right to our conception of individuality.¹¹⁷ The basis for this rationale is that the right to political participation is an essential element of self-identification and freedom in our

112. See *Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972) (noting a state's historic right to restrict its voting community to "bona fide" residents).

113. See Note, *supra* note 89, at 237.

114. See *Pitts*, 608 F. Supp. at 710.

115. See, e.g., Tye, *Voting Rights of Homeless Residents*, 20 CLEARINGHOUSE REV. 227 (1986); Note, *Building a House of Legal Rights: A Plea for the Homeless*, 59 ST. JOHN'S L. REV. 530, 556 (1985).

116. McKittrick, *supra* note 37, at 396-97. McKittrick argues that the small number of homeless registrants after Washington, D.C. changed its policy indicates that the homeless will not be a political force because they are more concerned with daily subsistence than with the political process. *Id.*

117. Tye, *supra* note 115, at 227.

society.¹¹⁸ The inherent value of the right to vote is considered as separate from what tangible results might be achieved through the exercise of such right. If we are to recognize the homeless as complete members of society, they must be assured the same basic and fundamental right of participation as property owners.¹¹⁹

VI. SQUATTING RIGHTS AND THE USES OF THEORY

A. *History of Squatting and Squatters' Campaigns*

Squatting rights—the rights to occupy property without the owner's permission¹²⁰—involve issues that are perhaps the antitheses of those raised in the context of voting rights. Although voting is recognized as a fundamental right that should not be denied the homeless for lack of an identifiable property right, squatting involves the infringement by the homeless on the property rights of others. Despite this disparity, the same property theories that implicitly frame the issue of homeless voting rights also play a significant role in the squatting rights question, and can help provide a positive resolution. In the voting rights context, this Comment argues for the use of property theories to recognize a right to vote absent a property right; in the squatting context, property theories provide a means to argue for recognition of limited property interests in abandoned or government-owned buildings based on both economic utility and a squatter's personal identification with the property.

Squatting has been a part of American history at least since the nineteenth century exploration of western America, when gold prospectors illegally settled on land already bought by speculators.¹²¹ Historically, squatting has been the "time-hallowed response of the landless to the contradiction between their own impoverishment and a surfeit of unutilized property."¹²² In contemporary times, squatting

118. *Id.*

119. These two justifications correspond to what Frank Michelman has characterized as the "instrumental" and "constitutive" functions of political participation in his analysis of the relation of voting rights and American democracy. See Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 U. FLA. L. REV. 443 (1989). The instrumental approach to politics values voting rights as a means to advance or defend personal interests formed outside the political arena. *Id.* at 451. The constitutive valuation suggests that the process of political participation itself is essential to the self-constitutive values of identity and freedom. *Id.* While the extent of Michelman's analysis is beyond the scope of this Comment, the important point is that both of these valuations of political participation form an essential part of our conception of democracy, and thus explain why homeless voting rights is a significant issue.

120. Borgos, *supra* note 6, at 429.

121. *Id.*

122. *Id.*

has moved from the unsettled wilderness to the inner city, a result of a tightening of the low-income housing market corresponding with an increase in housing abandonment.¹²³

While squatting often has been met with governmental antagonism,¹²⁴ another response has been the creation of "homesteading" programs¹²⁵ that legitimize squatting to a limited extent.¹²⁶ The Association of Community Organizations for Reform Now ("ACORN") has played an instrumental role in organizing squatters' movements in urban areas.¹²⁷ A discussion of the ACORN squatters' campaign in New York City (the "City") illustrates their methods and tactics.

In 1985, ACORN launched a squatters' campaign after several unsuccessful attempts to persuade city officials to create a homesteading program using properties the City acquired through tax foreclosure. At the time, the buildings were being auctioned to the highest bidder.¹²⁸ ACORN recruited dozens of low-income families in need of housing to occupy City-owned buildings illegally.¹²⁹ Initially, the City responded by obtaining a temporary restraining order,¹³⁰ and it later bulldozed a building that a squatter had spent months repairing.¹³¹ Faced with negative public reaction, the City negotiated a settlement with ACORN that resulted in an agreement to convey fifty-eight buildings to squatters, to provide nearly three million dollars for building rehabilitation, and to cooperate with former squatters in the creation of low-income housing.¹³²

123. The two largest factors contributing to urban squatting have been the abandonment of private housing because of a withdrawal of private investment, and an increase in FHA-insured mortgage foreclosures. *Id.* at 431. See *supra* notes 67-88 and accompanying text for a discussion of the economics of the housing market.

124. Borgos, *supra* note 6, at 430.

125. "Homesteading" programs essentially are a legalized form of squatting: governmental entities will authorize and legitimize, on a limited and regulated basis, the occupation and sometimes legal ownership of unused property. For a discussion of a typical homesteading program, see Hirsch & Wood, *supra* note 7, at 614-16.

126. In 1974, the federal government created section 810 of the Housing and Community Development Act, 42 U.S.C. § 5301 (1988). Implementation of this homesteading act ultimately favored middle-class applicants, however, doing little to alleviate the problems of abandonment and low-income housing need. See Borgos, *supra* note 6, at 431-33.

127. See Borgos, *supra* note 6, at 433-45; see also Hirsch & Wood, *supra* note 7 (discussing ACORN's squatters' campaigns).

128. The auction system was "a dismal failure." Hirsch & Wood, *supra* note 7, at 610. More than half of the auctioned buildings were again repossessed because of tax delinquencies; as a result, several buildings have been torn down. *Id.*

129. *Id.* at 613.

130. *Id.* at 614.

131. *Id.*

132. *Id.* at 614-15.

The program is run by the Mutual Housing Association of New York ("MHANY"), and although it focuses primarily on applicants' housing needs, it also requires applicants to contribute "sweat-equity" by working on the buildings, and to prove financial capability¹³³ to rehabilitate and maintain the buildings.¹³⁴ The program also limits the resale of rehabilitated units to keep them in the low-income housing market. A homesteader has three transfer options: (1) he can transfer to a member of his immediate family; (2) he may sell to another qualifying low-income family for the price that he originally paid; or (3) he may sell to MHANY, which will resell the unit to a qualifying low-income family for the price the homesteader originally paid.¹³⁵

The ACORN squatters' campaigns serve both as political protests against a failure to provide adequate low-income housing, and as an instrumental means of alleviating this problem.¹³⁶ As such, they have been characterized as a way of making "radical" principles amenable to the general public:

The squatters insisted that they had a right to decent housing, and that this right took precedence over the rights of property. In the abstract, such principles do not command the support of a majority of Americans; national housing policy is certainly not founded on them. Yet in the particular form posed by the squatters, these principles were almost unassailable.¹³⁷

Thus, squatting has proven to be an effective tool for the homeless, not only in the direct manner of producing low-income housing, but also as a means of mobilizing public opinion.

Squatting rights issues have also arisen in the courts. One of the more interesting cases presents the "necessity defense" as protection for squatting rights. In *Griffin v. United States*,¹³⁸ several individuals

133. Although applicants are considered only if their total income is less than 80% of the standard metropolitan statistical area median, they have to demonstrate the ability to be responsible for minimal rehabilitation and maintenance costs as well. These financial requirements are alleviated somewhat by the City's three million dollars commitment. *Id.*

134. *Id.* at 615.

135. *Id.*

136. As one commentator explains:

[S]quatting embodied much more than the policy demands of the squatters; it was a blatant challenge to the assumptions and values on which U.S. housing policy is founded. The desperation of the squatters mocked the assumption that Americans are well housed; their eagerness to tear down the boards asserted the primacy of housing needs over property rights; their uncompromising demand for the deeds lent substance to the nascent principle of entitlement.

Borgos, *supra* note 6, at 441-44.

137. *Id.* at 442.

138. 447 A.2d 776 (D.C. 1982), *cert. denied*, 461 U.S. 907 (1983).

entered and opened Washington, D.C. cathedrals to provide overnight shelter for the homeless.¹³⁹ At their trial for illegal entry, the defendants unsuccessfully attempted to introduce evidence in support of the necessity defense, which exonerates the commission of a crime "if the harm resulting from compliance with the law would have significantly exceeded the harm actually resulting from . . . breach of the law."¹⁴⁰ The defendants argued that opening the churches to the homeless was a "calculated but desperate attempt"¹⁴¹ to avoid the evils of homelessness in the middle of winter.

The District of Columbia Court of Appeals affirmed, holding that the defendants had neither shown that their actions would avoid a "specific, immediate, [and] identifiable"¹⁴² harm, nor that all other available measures had been taken—that is, no other shelter was available.¹⁴³ The court found that the necessity defense was improper, believing the illegal entry to be more of a publicity measure than a true last resort to provide shelter.¹⁴⁴ Although the *Griffin* court rejected the necessity defense, it implied that the defense could be raised where squatting was the result of a dire need for shelter rather than merely a publicity measure. The potential use of the necessity defense in other contexts, such as civil disobedience,¹⁴⁵ suggests that if the defense is raised in appropriate circumstances, a court should allow it, even if used *partially* as a means of politicizing governmental failure to address homelessness.

A related squatting rights issue concerns what rights, if any, squatters may have in illegally occupied premises. In *De Villar v. City of New York*,¹⁴⁶ squatters and other illegal occupants of a City-owned building sued the City, challenging their eviction.¹⁴⁷ The City, which had acquired the property through tax foreclosure, posted a vacate

139. *Id.* One of the individual defendants was the late Mitch Snyder of the Community for Creative Non-Violence, although the organization itself is not named in the action. *Id.*

140. *Id.*

141. *Id.* at 778.

142. *Id.*

143. *Id.*

144. "Appellants' motion makes clear that their actions were designed to focus attention on the plight of the homeless; they were not undertaken as a last resort, after all else had been attempted, to avoid an immediate harm." *Id.*

145. See Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79 (1989) (arguing that the defense should be available where crimes have been committed to avert threats to human life which the defendant in good faith actually perceives); see also Comment, "Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless, 45 U. MIAMI L. REV. 417 (1990-1991) (discussing the potential applicability of the necessity doctrine to the arrest of the homeless for essential life activities).

146. 628 F. Supp. 80 (S.D.N.Y. 1986).

147. Plaintiffs charged that their eviction deprived them of their rights to procedural and substantive due process of law under the fourteenth amendment. *Id.*

order in an effort to close the building. The squatters sued in federal court alleging a deprivation of procedural and substantive due process.¹⁴⁸ In dismissing the complaint for failure to allege a constitutionally protected right,¹⁴⁹ the district court concluded that because plaintiffs were "trespassers, squatters and illegal occupants," they had no property interest in the apartments and, hence, no right to protections.¹⁵⁰ Essentially, the court held that in order for the squatters to have any right to continued occupation of the building, or procedural rights prior to eviction, a legal right to possession must first exist.

B. *Economic Analysis and Squatting Rights*

To evaluate the economic perspective on squatting, one must first discuss the larger subject of adverse possession. Initially, the basic principle of exclusivity of property ownership¹⁵¹ seems to be at odds with the concept of adverse possession. The possibility of adverse possession claims arguably works against the efficient investment of resources necessary to achieve maximum use of a property by requiring additional expenditures for security and monitoring costs.¹⁵² Thus, as a means of involuntary property transfer, adverse possession appears inefficient in economic terms.

Several competing economic interests, however, have been advanced in favor of adverse possession: (1) it eliminates the economic costs of proving stale claims in the judicial forum;¹⁵³ (2) it reduces the information and transaction costs involved in discovering and eliminating old claims to property that limit transferability;¹⁵⁴ and (3) it maximizes resource use by rewarding the adverse possessor who makes productive use of a property while punishing the titleholder who "sleeps on his rights."¹⁵⁵ To determine the propriety of adverse possession, economic theorists seek to maximize the property resource by weighing the competing utilities of the right of absolute ownership against the benefits of transferring ownership rights to the

148. *Id.*

149. *Id.* at 83-84.

150. *Id.*

151. *See supra* note 25 and accompanying text.

152. For instance, there would be an over-investment in security measures, and under-investment in cultivation and development of natural resources. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U.L. REV. 1122 (1984-1985).

153. *Id.* at 1128.

154. *Id.* at 1129.

155. *Id.* at 1130. Merrill suggests that the economic explanation of this rationale is that it serves to encourage market transactions by requiring an owner to periodically assert his rights to the property, thereby "flushing out" offers to purchase the property. *Id.*

adverse possessor.¹⁵⁶

In comparing squatting rights to adverse possession generally, some of the economic justifications for recognizing adverse possession would not apply in the squatting rights context. The transaction costs for curing stale claims to property as a result of boundary disputes or defective conveyance instruments simply do not arise in the squatting context, where a homeless person knowingly and purposefully occupies another's building, often that of a governmental entity. Looking purely at resource maximization, however, yields interesting and useful results. Where buildings are lost to the government through tax foreclosure, for example, at least two factors indicate that the resource held very little value to the original owner. First, the owner failed to generate enough revenue or assets to redeem the taxes before sale. Second, because most of these buildings are located in "high-risk" areas, the general disrepair and abandonment illustrates that the owners either explicitly or implicitly decided that the properties were no longer worth the investment of time or resources necessary to make them useful. Local governments have likewise failed to maximize the use of foreclosed property through auction programs, which often result in higher ultimate transaction costs through repeated foreclosures and resales.¹⁵⁷

On the other hand, as ACORN's squatters' campaigns vividly illustrate, vacant tax-foreclosed buildings do hold significant value to the homeless. Finding themselves in dire need of housing, the homeless are willing to invest their labor and what minimal resources they have to make the buildings habitable. Thus, the economic theory's basic principle of resource maximization leads to a persuasive argument for recognition of squatting rights in tax-foreclosed property through the creation of homesteading programs, despite the theory's inherent reluctance to interfere with exclusive property ownership through involuntary exchanges. If property rules are meant to ensure resource maximization, then governmental distribution of tax-foreclosed property should give strong consideration to the comparative value of such property to the homeless, who need it for shelter and are willing to invest human resources in the buildings.

156. This does not necessarily suggest a case-by-case determination of whether adverse possession is proper. Indeed, it is possible that economic analysis can deduce an optimum period for a statute of limitations that will ensure resource maximization. See Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U.L.Q. 723 (1986) (proposing to use economic analysis to determine an appropriate statutory period).

157. For a discussion of the failure of the auction system, see Hirsch & Wood, *supra* note 7, at 610.

Indeed, this economic argument is one of the reasons squatters' campaigns have been so successful. Politicians and community members see homesteading programs as a compelling response to homeless persons' need for shelter because the programs provide shelter without doing violence to the fundamental economic conceptions of a private property system:

At a time when Americans were increasingly hostile to anything perceived as a "giveaway" program, the squatters proclaimed that they were not looking for a handout but an opportunity. They cast their demands in terms of individual initiative, mutual assistance, and the superiority of homeownership, all culturally sanctioned values in the United States. Their position was bolstered by the visible failure of the for-profit "private sector" to maintain housing in their neighborhoods. And homesteading had fiscal appeal as well; even with the provision of generous rehabilitation loans, it appeared to be a relatively inexpensive means of producing low-income housing, and it promised to restore abandoned property to the tax rolls.¹⁵⁸

Thus, in the context of squatters' campaigns as a means of establishing homesteading programs, economic analysis plays a valuable positive role in justifying the legal recognition of squatting rights.

The economic argument for legalized homesteading programs is limited in its applicability, however. Although homesteading may provide the best economic use of government-owned, tax-foreclosed property by maximizing these resources, the same argument may not be as persuasive in the context of privately-owned, vacant but not abandoned property. When dealing with private property, society places great value on exclusivity of ownership and is much more reluctant to enforce involuntary transfers than in the context of government-owned property. Furthermore, where the private property owner has not abandoned the property and continues to pay taxes, there is some indicia that the property continues to hold value to the owner. Thus, while tax-foreclosed, abandoned property may have a higher value to a squatter than to the government (or the original owner), the same conclusion is not as compelling in the non-abandoned private property context. Hence, the persuasiveness of the economic argument for squatting rights may be limited to situations in which the squatters' claims do not conflict with a private owner's rights.¹⁵⁹

158. *Borgos*, *supra* note 6, at 442.

159. In fact, the ACORN squatters' campaigns have been limited to city-owned buildings because of the additional difficulties in fighting private owners for buildings. *Hirsch & Wood*, *supra* note 7, at 613.

Unfortunately, it is doubtful that the economic theory of property rights can serve as a valuable tool in resolving the legal issues that arise from squatting outside of its support of homesteading programs. Because property rights provide the basis for human rights,¹⁶⁰ any legal rights that might arise from squatting would have to emanate from a property right. Although economic analysis supports the premise that squatters would make the best economic use of tax-foreclosed property, their occupation can only be justified by a pre-existing legal right. Because, absent a homesteading program, squatters are illegal occupants of abandoned property, they have no formal property right; thus, they have no cognizable legal rights to protect in an economic analysis. Therefore, legal economists would likely agree with the court's analysis in *De Villar v. City of New York*¹⁶¹ that squatters have no procedural or substantive due process rights before being evicted from illegally occupied premises. As the court stated:

Quite clearly, the plaintiffs had no more of a property interest in those apartments than in any others in the City they might have trespassed into and encamped within, that is, none at all Because the plaintiffs had no property in the apartments they were living in, their evictions did not implicate the Due Process Clause of the Fourteenth Amendment.¹⁶²

The court, following the economic theory's equation between property rights and human rights, only considered whether the squatters had any formal property right, and ignored the possibility that the squatters' continued occupation might create some kind of non-formal right¹⁶³ that would implicate due process concerns.

Economic analysis likewise does not affirmatively answer the question of whether the necessity defense¹⁶⁴ should provide rights for squatters to occupy abandoned buildings. Again, because squatters have no formal property rights to occupy property absent a homesteading program, the economic approach would preclude recognition of the contention that necessity should merit the protection of otherwise homeless squatters.¹⁶⁵ On the other hand, it is entirely possible

160. For a discussion of the relation between property rights and human rights in economic theory, see *supra* notes 28-37 and accompanying text.

161. 628 F. Supp. 80 (S.D.N.Y. 1986).

162. *Id.* at 83.

163. For instance, the court could have recognized a personal interest in the property that at least gave rise to a minimal right to procedural due process protection.

164. For a discussion of the nature of the necessity defense, see *supra* notes 138-45 and accompanying text.

165. The necessity defense can be partially explained in economic terms as a means of weighing the competing social utilities of enforcement of a law versus the desirable result (or harm avoided) by breach of the law. *Cf.* Note, *supra* note 145, at 84 (characterizing the

that the decision to allow the necessity defense to protect squatting rights can be made primarily on a moral, rather than an economic, basis, which will be discussed next in the context of the personality theory.

C. *Personality Theory and Squatting Rights*

The concept of granting rights in property through adverse possession is more easily squared with the personality theory of property rights than with the competing utilities principle of economic theory. The personality theory's essential justification for property rights is the relationship between property and personhood—that is, a self-identification with the property.¹⁶⁶ The personality theory distinguishes between degrees or types of rights in property based on the extent of one's personal identification with the property.¹⁶⁷ The concept of recognizing the right of an active occupant of property, as against an absent titleholder, is a natural consequence of the personality approach. Radin summarizes the personality theory's argument for adverse possession as follows:

The title follows the will, or investment of personhood. If the old title-holder has withdrawn her will, and the new possessor has entered, a new title follows The result of this theory is to attach normative force, and not merely practical significance, to the bond developing between adverse possessor and object over time; and to attach normative force, as well, to the "laches" of the title-holder who allows this to happen.¹⁶⁸

As Radin explains, however, although the personality theory recognizes rights of adverse possessors, it also may impose several limitations on when and how these rights should be recognized. For example, Radin posits that the personality approach might require a good faith standard that would foreclose adverse possessors who knowingly occupy another's property because the essential element of

necessity defense as reflecting a concern for maximizing the greater societal good). But this characterization is somewhat deceptive because the values being weighed are not exclusively economic in nature (i.e., in the squatting scenario, the *personal* need for shelter of the homeless versus the legal, economic interests of the property-owner). To the extent that the necessity defense involves or should involve considerations beyond those of economic utility, economic analysis is an inapt tool for determining its appropriateness. As Posner acknowledges, economic theory is not a tool of moral analysis, at least insofar as a conception of moral justice goes beyond or is distinguishable from value maximization. See R. POSNER, *supra* note 17, at 10.

166. See Radin, *supra* note 41, at 957. For a general discussion of the personality theory of property rights, see *supra* notes 38-53 and accompanying text.

167. Radin, *supra* note 41, at 986.

168. Radin, *Time, Possession, and Alienation*, 64 WASH. U.L.Q. 739, 745 (1986).

self-identification is not as convincing where the possessor knows the property is not his own.¹⁶⁹ Radin notes, however, that an adverse possessor can still use personality theory by arguing that binding one's self to an object knowing it is not your own may, in fact, ultimately make it your own.¹⁷⁰ This argument supplies the necessary self-identification to trigger use of the personality theory.

Radin also notes that it is unlikely that the personality theory would favor "tacking"—that is, combining successive adverse possessors' time of uninterrupted possession—to meet the possession requirement of the statute of limitations.¹⁷¹ The personality theory's justification for a statute of limitations is that the statutory period represents the time required for an adverse possessor to sufficiently self-identify with the property so that it is appropriate to recognize his rights in it.¹⁷² Therefore, subsequent occupants of adversely possessed property should have to start the statutory period anew.

When urban squatting in abandoned buildings is evaluated under the personality theory, it is perhaps easier to justify the rights of squatters to knowingly occupying another's property. A governmental entity would appear to have minimal self-identification with a tax-foreclosed building as compared to the personhood invested by a squatter seeking to make the building his own dwelling. Just as economic analysis suggests that the competing economic values of the property to the government and to the squatter weigh in favor of granting rights to the otherwise homeless squatter,¹⁷³ the personhood dichotomy similarly attributes more significance to a squatter's claim of right in seeking permanent shelter than to a disinterested and absent governmental titleholder.

This personhood argument, which in some senses parallels the economic resource maximization argument,¹⁷⁴ provides a moral counterpart to the economic justifications for recognizing squatting rights that have been a large factor in the appeal of homesteading programs.¹⁷⁵ The message of squatters' campaigns, that the right to

169. *Id.* at 749.

170. *Id.*

171. *Id.*

172. *Id.* It is unclear how personality theory would determine the appropriate time frame in which to recognize self-identification with property, which may partially explain legal economists' dissatisfaction with an approach based on personal rather than quantitative, economic values.

173. For an economic analysis of squatting rights, see *supra* notes 151-65 and accompanying text.

174. See *supra* notes 151-65 and accompanying text.

175. See Borgos, *supra* note 6, at 443-44.

decent housing takes precedence over formal property rights,¹⁷⁶ is compelling not merely because it makes economic sense, but because politicians and community members recognize the personal, moral basis of the squatters' claim of right to the occupied properties.

The "minimal entitlement" argument¹⁷⁷ hinted at by the personality theory provides further support for recognizing squatting rights. If society accepts that the government bears some responsibility to ensure that all of its citizens have sufficient "property for personhood" (at the least, permanent housing), then homesteading programs provide an ideal vehicle for the implementation of the necessary redistribution of property. The means of providing such property are already in the government's hands because it holds title to the abandoned buildings, and the distribution can be achieved without adversely affecting the property rights of other citizens. Homeless advocates' use of this personality-based analysis may further bolster the argument for legal recognition of squatting rights through homesteading programs.

The use of personality theory to support squatting rights, however, is subject to some limitations as well. As with the economic arguments for recognizing squatting rights, the personality theory's justifications for squatting become less persuasive in the context of privately-owned property.¹⁷⁸ Where a squatter's claim of right is considered against that of a private property owner, the weighing of personhood invested does not so decidedly favor the squatter, particularly where the private titleholder also has significant connections to the property. Thus, the moral significance of the personality approach likewise may be limited to the context of government-owned property where there is only minimal personhood attached to the titleholder's claim of right.

The personality theory's disfavor for tacking also may limit recognized squatting rights. Because occupancy by one person is essential to the personality approach's justification for adverse possession, on a theoretical level, squatting should lead only to a limited property right vested in the individual squatter and not an absolute property right. Interestingly enough, just such a limitation is included in the New York City homesteading program: The program restricts transfer of housing units rehabilitated by squatters to members of the

176. *Id.*

177. Radin, *supra* note 41, at 990. For a discussion of the concept of property as a human right, see *supra* notes 61-66 and accompanying text.

178. For a discussion of the limitations of economic justification of squatting, see *supra* notes 159-65 and accompanying text.

squatter's immediate family, to other needy individuals at the original price, or back to the housing program itself, creating a significantly limited right of ownership for the squatter.¹⁷⁹ Although there are practical reasons for such a limitation (primarily to keep the units in the low-income housing market by preventing resale for profit), the means by which this goal is accomplished demonstrate an implicit use of the personality theory by focusing on an individual relationship with the property, and fundamentally are in accord with the type of right a personality approach justifies. This analysis illustrates the usefulness of a personality theory of property rights in the squatting context, both as a moral justification for legalized homesteading programs, and as an instrumental means for designing and implementing such programs. Arguably, the success of squatters' campaigns in leading to homesteading programs is attributable to their appeal to both the economic and personality theories of property rights.

While the economic approach does not prove to be very useful outside of the context of legalized homesteading programs,¹⁸⁰ the personality theory may be a valuable tool in the other issues raised by squatting. The question raised in *De Villar v. City of New York*¹⁸¹ of whether squatters have any rights in illegally occupied property would not be so simply dismissed under a personality approach. In personality theory, the question of right is rooted in the extent of self-identification with property rather than simply the formal property right itself.¹⁸² Accordingly, personality theory allows an argument that the squatters' continued occupation, albeit illegal, gives rise to some form of right to be protected. While the extent of this right may not be great enough to justify relinquishing title to squatters without a formal homesteading program, self-identification through continued occupation may raise due process concerns. The personality theory's recognition of a distinction between human and property rights, and its emphasis on the constitutive nature of property occupation, thus provide potential arguments for sustaining the *De Villar* complaint.

The personality approach also may provide a basis for recogniz-

179. Hirsch & Wood, *supra* note 7, at 615. For a discussion of the New York homesteading program, see *supra* notes 128-35 and accompanying text.

180. For a discussion of the limits of economic theory in the context of squatting, see *supra* notes 159-65 and accompanying text.

181. 628 F. Supp. 80 (S.D.N.Y. 1986).

182. See Radin, *supra* note 41, at 988-89. For a discussion of the personality theory's distinction between rights created through self-identification versus merely formal property rights, see *supra* notes 55-57 and accompanying text.

ing the necessity defense¹⁸³ as a means of protecting squatters. The lack of clear economic grounds for allowing the necessity defense illustrates that the question of whether the harm caused by not illegally squatting on property (that is, the harm of remaining homeless) significantly exceeds the harm that actually results from the breach of the law is, at heart, a moral judgment a court must make. As such, this question of comparative harm would be evaluated best in light of the personality theory's personhood dichotomy. In that context, the issue becomes whether the interest of the property owner, essentially a fungible interest (at least in the case of government-owned abandoned property), should outweigh the interest of a squatter seeking shelter, a fundamentally personal interest.¹⁸⁴ The weighing of comparative harm, when viewed in this manner, favors the "illegal" squatter and puts the primacy of housing needs over merely formal property rights. The personality-based analysis suggests that the necessity defense can appropriately be raised as protection for squatters who occupy buildings as a means of obtaining the fundamental human need of shelter, at least where the investment of personality by others is minimal. Here again, personality theory can provide a persuasive moral argument and potential legal framework for protecting squatters who otherwise would be homeless.¹⁸⁵

D. *The Role of Squatting in Combating Homelessness*

Ultimately, the effectiveness of squatters' campaigns as an instrumental means of providing housing for the homeless is somewhat limited. Although squatters' campaigns have led to homesteading programs which generate low-income housing,¹⁸⁶ and have drawn increased attention to the crisis of homelessness,¹⁸⁷ they are not a complete solution. The limited supply of buildings suitable for rehabilitation by squatters,¹⁸⁸ the inability of many of the homeless to contribute labor or even the "minimal" fiscal costs of rehabilitation and

183. For a discussion of the necessity defense in the context of squatting, see *supra* notes 138-45 and accompanying text.

184. See *id.* at 959-60 & 986-88 (defining fungible and personal property interests).

185. For a discussion of other potential uses of the necessity defense as protection for the rights of homeless persons, see Comment, *supra* note 145.

186. The New York program created 180 units of permanent housing because of the squatters' efforts. Hirsch & Wood, *supra* note 7, at 617.

187. See *id.* at 614, 616-17 (noting the usefulness of squatters' campaigns in attracting public attention).

188. See Schuman, *The Agony and the Equity: A Critique of Self-Help Housing*, in CRITICAL PERSPECTIVES ON HOUSING, *supra* note 6, at 466 (noting that the amount of "self-help" housing available for homesteading programs is negligible compared to the increase in higher-income housing due to gentrification).

maintenance,¹⁸⁹ and the ever-present difficulties of low-income home-ownership¹⁹⁰ make homesteading programs only partially responsive to the housing needs of the homeless. Nonetheless, homesteading programs do provide permanent housing to at least some segments of the homeless population, and serve to mobilize public opinion in favor of further initiatives. By delineating the implicit role of property theories in homesteading efforts, and by exploring the potential for explicit application of property theory principles, this Comment may help to make squatters' campaigns even more effective.

VII. CONCLUSION

To the homeless and their advocates, the realm of legal theory may seem far removed from the problems of homelessness. The theory of rights to which a society subscribes, however, has a profound impact on how the law affects the homeless. The dominant role played by the economic utility theory in the American system of property ownership explains the workings of a housing market that has failed, in large part, to respond to the needs of the homeless. Furthermore, the adoption of an economic approach that equates property rights with human rights can result in the exclusion of the homeless from rights not typically considered as "property" rights, such as voting. The role of personality theory, which focuses on the importance of property ownership to self-development, may merely reinforce the problems inherent in the economic approach because our society is unwilling, for the most part, to think seriously about redistribution.

Advocates, however, can use theory in a positive way in the context of homelessness. Alternative approaches to property rights, such as the personality theory, provide the principles by which enfranchisement of the homeless population can be ensured. The personality theory and economic analysis can both be valuable tools in the context of squatting rights, where property theories provide both economic and moral justification for the creation of legalized homesteading programs to provide low-income housing. This analysis of the implicit, yet fundamental, role of theory, and this demonstration of the potential uses of theory in specific homeless issues can serve as a model for

189. *Id.* at 465 (noting that homesteading is only a viable alternative for the younger and more energetic of the poor, and does not respond to the needs of the elderly, the disabled, women with child-care responsibilities, and employed people unable to support themselves and their families if they were to participate in a homesteading program).

190. *Id.* (noting the growing gap between housing costs and income, and that the reduced costs of home-ownership through "self-help" programs such as homesteading only partially respond to this problem).

homeless advocates to implement in these and other contexts, and can help to ensure that the crisis of homelessness is not allowed to continue.

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