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On Establishing a Housing Right of Contract for Homeless Youth in America

Michael Glassman[1] & Donna Karno[2]

INTRODUCTION

For more than a century, the social policy emphasis has been on family reunification or some socially acceptable facsimile (e.g., foster care). The difficulty is that for many youth, this type of reunification is not an option that can be trusted due to dysfunctional families and failures of social service agencies. These youths are left with no viable alternatives partly because they are denied a right to sign a long-term contract for housing. Thus, the youths are left to live as transients in oftentimes dangerous environments. A lack of available long-term housing becomes a major impediment to the ability of many homeless youth to reintegrate into mainstream society and reestablish a positive life trajectory.

Homelessness has a very different meaning for youth, especially those under eighteen,[3] than it does for adults. It is more difficult for homeless youth under eighteen to obtain shelter on their own because even if they have the means, or are sponsored by somebody who has the means, to obtain a permanent residence, many private shelter providers (e.g., landlords) will not allow them to enter into long-term contracts. Society's denial of youth's right to contract is based primarily on ideological belief systems that revolve around a growing fear of children and youth and the loss of a mythological childhood innocence. However, the age of eighteen is an arbitrary marker and does not reflect the continuum of an individual's cognitive, social, and emotional development. In other words, based solely on age and absent all other reasons, an individual can be and often is deprived of full membership in the larger U.S. social community. The societal and individual repercussions of this deprivation are vast and

sometimes devastating. We assert that while arguments can be made against a universal right to shelter, denying a right to contract for housing based solely on an age barrier cannot be justified from either an economic or a moral perspective.

In U.S. society, the right to contract is very important because housing itself is treated less as a right and more as property that can be exchanged for goods. It is part of the free market, neoclassical ideology[4] that has been dominant in the United States for at least the last four decades since the publication of Milton Friedman's *Capitalism and Freedom*[5] in 1962.[6] The idea of housing being a commodity rather than a right means that the mode and ability of exchange, or more specifically the perception of an individual's mode and ability of exchange, is determinative of shelter. Individuals under eighteen years of age are often perceived as having far less capability to engage in fair exchange over the long term. They are marginalized within the housing market with little chance of finding permanent, safe shelter outside of government-sponsored programs that can be destructive and dangerous (so much so that a large population of youth would rather face the dangers of the streets than enter, or reenter, these government-sponsored programs).

In this paper, we will address four interrelated issues: (1) the concept of a natural right to housing, which is further explored through economic and moral arguments; (2) the right to contract as a socio-moral issue, as well as an economic and legal issue; (3) society's responsibility to define the right to contract; and (4) the ideology behind denying minors a right to contract. Finally, we discuss possibilities for changing to a more generative model of viewing homeless youths and defining their right to contract for housing.

In regards to the concept of a natural right to housing, we explore the economic efficiency of housing as individually determined property that individuals must be capable of obtaining in a competitive market,[7] as opposed to housing as a basic obligation of a society or community to its citizens that creates a universal capability for living a good and productive

life.[8] We approach the right to contract as a socio-moral issue,[9] where individuals should be judged on developmental issues such as social perspective taking and recognition of motivations.[10] Many times these developmental milestones are only minimally correlated with specific ages.[11]

We make the argument that to deny youth who have attained higher levels of developmental social rights, such as the right to contract, leads to alienation of these youth and loss of the youth as potentially productive members of society. We then explore the following question: if society determines that housing is a commodity, does society have a responsibility to define the right to contract, and how and why should it develop those definitions? This is an especially critical issue for minors because they are the population so often marginalized in right to contract laws. Finally, we argue that the denial of the right to housing to individuals who are developmentally capable but have not reached the age of majority is more ideological than rational and is based on a fear of "out-of-control" youth. The social compact would be strengthened by taking a more generative approach to the housing needs of homeless youth under eighteen years of age—a program that recognizes the needs of the whole human being and all developmentally capable human beings as having full membership in our society.

In this particular article, we are distinguishing emancipation from right to contract. Emancipation is an issue where society plays a mediating role in the parent-child relationship (with society almost always bestowing power on the parents before the child has reached the age of majority). On the other hand, the right of a youth to sign a housing contract is related to the direct relationship between society and that youth.

I. THE RIGHT TO HOUSING: FROM ARROW TO SEN TO RAWLS AND KOHLBERG

We propose four ways to look at the right to housing—the first two, economic, and the second two, moral. We first explore an economic argument based on Kenneth Arrow's efficiency model. Second, we discuss Amartya Sen's counter-economic argument based on his decision-making perspective. In response to the economic arguments, we then shift to the moral arguments. Third, we look at John Rawls's moral argument based on the difference principle. Finally, through Lawrence Kohlberg's natural right principle, we further develop Rawls's moral argument and directly argue against Arrow's perspective of housing as a commodity.

A. Arrow and Housing as a Commodity

A competitive atmosphere, where the ability to obtain housing is based on individual accomplishment, leads to conditions of better housing for society as a whole. As an efficient mode of housing development, market competition will lead to better and more available housing and will push individuals to become more productive in society in order to obtain premium housing.

Kenneth Arrow's "Impossibility Theorem," a core tenet of neoclassical economic theory, which informs this position, suggests that it is impossible for all members of the social group to be satisfied at all times, even if they separately vote on every issue in a democratic order.[12] Added to the representative democracy ideal of representation by elected individuals with better information and superior decision making capabilities[13] is the idea that these representatives must be more concerned with the aggregate health of the community than with the distributed consequences. Representatives must do what is best for the society as a whole and accept that not everybody will be satisfied. This combination of representative government and neoclassical economics represents what might be considered the brighter side of the Malthusian coin[14]—it is impossible to satisfy everyone

and still have a successful social system, so it is better to accept the travails of the weaker, rather than put society as a whole at risk by trying to reach some impossible ideal.[15] By applying this theory to housing, some may be left without adequate shelter, but in the aggregate, the society as a whole is better and more efficiently housed.

Under Arrow's theory, it becomes less important that individuals within the society feel they have the capabilities for different types of functioning and more important that higher level capabilities exist somewhere in the society. For instance, in American society it is important that people have the ability to keep as much wealth as they can attain and that they have the capability to pass this wealth between generations. This becomes the social choice within the realization that some will have to suffer to maintain this higher-level capability. The idea that material wealth must be based completely on competition is reinforced by the aggregate view of social functioning—when more people get to keep more of their wealth, it increases measurements such as the Gross National Product (GNP), so it must be the best possible course for the society.[16]

In this scenario, homelessness becomes a potential necessary evil to maintain active competition for housing. This is a result of a Malthusian ethos[17] closely aligned with the neoclassical model—if society provides housing for individuals who are unable to obtain housing through their own actions, it allows the weaker parts of the population to not only survive but propagate, thus endangering the health of the society or community by bringing down its aggregate net worth. This framework extends to homeless youths who are the responsibility of their parents. The idea that society benefits from youths competing to get into the best schools based on their parents' resources can be extended down to the idea that youths should also have to compete for housing based on their parents' resources.

Arrow theorem would reject a right to housing based on fairness. If societies overreach on being fair to those members who are disadvantaged, then societies are necessarily going to be unfair to those who are

advantaged. When housing is provided as a right, it is unfair to advantaged individuals who already have housing because it brings down the value of what they have worked and struggled to acquire. Housing is transformed into a redistributed good at the expense of both personal liberty and overall community worth. The neoclassical model suggests that if a choice is to be made it should be in favor of the aggregate wealth of the society as a whole—supporting property rights and the value of property.

However, in the next section of the article, we argue that guaranteeing housing to youths is actually good for society as a whole. By guaranteeing housing to youths, it actually affects the parents' long-term desire and ability to positively impact the aggregate economic wellbeing of the society because choices are made for the good of the children.

B. Sen and Capability Through Housing

There are three arguments—one economic and two moral—that can be made against Arrow and the neoclassical position that housing should be considered a commodity that individuals compete for.[18] The competing economic argument, advanced by Amartya Sen, an economist who focuses on wellbeing as the primary measurement of societal functioning, is more of a process position that claims that when society provides for individuals' basic functions, it enables (but does not guarantee) that individuals have the capability of meeting their potential.[19] The individual, him or herself, works to meet this potential. In other words, there is no sense of top-down engineering in basic functions such as housing; there is also no absolute right, but simply the assertion that the more people in society who are capable of reaching their full potential, the more successful the society. Within this framework, the success of the society is not measured in terms of some aggregate number such as GNP, but on individual comparisons. It is recognition of these individual comparisons that make a society safer and more secure, more capable of overcoming tragedy, and more likely to progress in terms of wealth and stability.[20]

One of Sen's major points, from an economic perspective, is that it is illusory to judge the health of society by an aggregate such as GNP, which itself is a statistic created by those who benefit most from such measures.[21] The primary way to measure the health of a society is by looking at what the society provides for all of its citizens.[22] The provisions are not considered entitlements (that every member of society is entitled to a certain level of basic needs), but investments (that every member of society should be provided with the basic functions that will make them capable actors within society).[23] This includes water, food, shelter, and information. Once individuals have these basic functions, their role and place in society is determined through their own action. Sen believes in the efficacy of human action within the context of these basic functions.[24]

More importantly, he believes that most poor decisions and most great human tragedies are, at least in part, the result of a lack of these basic functions.[25] Communities are destroyed from within by citizens incapable of making the best decisions, rather than by natural Malthusian disasters (e.g., flood, famine, disease, war)[26]—which, according to Arrow, must be survived by some segments of society at the expense of others. Sen's main example is the causes of famines. He makes the argument that famines are never the result of a lack of food, but a lack of the basic function of information.[27] Sen persuasively argues that there is always enough food in famines; however, the difficulty and disaster is that individuals do not know or understand how to access this available food.[28] The same can be said for housing. There is enough housing in the United States—the problem is that those who are homeless do not have the information or wherewithal to access it. The difficulty with housing, as with food, is that shelter is also a basic function. An individual's ability to get a job and an education is limited by his or her lack of housing.

An individual's ability to lead a life that has a positive trajectory within the boundaries of society is critical to a well-functioning, adaptable society. When the quality of life for individuals in society is higher, and there is less

differentiation between members of society, the quality of life for the society as a whole is better and the society is more successful and resilient. Sen argues that capability is a more reliable measure of a society's economic wellbeing than aggregate measures such as GNP.[29]

If society allows all individuals access to basic functions such as housing, society as a whole will be more capable and resilient than if the society leaves youths to compete for housing. While Sen provides the economic argument for providing homeless youths the right to housing, Sen's argument can be bolstered with moral arguments that advance housing as a right.

C. Rawls and the Natural Right to Housing

To pursue housing as a right is to approach the issue from a very different perspective—moral rather than economic. This idea of natural rights is most attributed to the work of John Rawls, discussed in this part, and can possibly be more easily explained through the moral theory of Lawrence Kohlberg, discussed in the following section.[30]

Rawls approaches the idea of rights from a political and moral perspective rather than from an economic perspective.[31] His ideas of liberal justice suggest that societies work best when their decisions are determined through justice based on a universal concept of fairness.[32] While earlier liberal philosophers, such as Locke and Mill, suggest that human rights are metaphysical and absolute,[33] Rawls separates himself by suggesting that rights actually emanate from a natural desire to live in a fair society where individuals treat each other with respect: give individuals in a group the chance to be fair and they will be fair.[34]

Rawls's view addresses one of the major arguments made against a right to housing—that it is an arbitrary right determined through some metaphysical belief system.[35] The degree to which Rawls's ideas on justice would lead to a right to housing is open for debate, but it is a fair starting point. Though Rawls's progression of fairness based in justice does

presume some absolute principles such as the right of free expression, and the right of free association (necessary for the development of political/moral schemes based on fairness), it does not necessarily lead to either property rights or the right to contract (presumably these would be decided through community consensus).[36] Some societies may prefer to promote property rights (which presumably would work against a right to housing), and some may not.

While there is no definitive right to housing discussed by Rawls, a neoclassical approach would dismiss such a right. The aforementioned Arrow's impossibility theorem[37] would approach the issue thus: if societies overreach on being fair to those members who are disadvantaged, they are necessarily going to be unfair to those who are advantaged. When housing is provided as a right, it is unfair to advantaged individuals who already have housing because it brings down the value of what they have worked and struggled for. Housing is transformed into a redistributed good at the expense of both personal liberty and overall community worth. The neoclassical model suggests that if a choice is to be made it should be in favor of the aggregate wealth of the society as a whole—supporting property rights and the value of property.

When contrasted to the neoclassical model, one possible road to a right to housing through Rawls's theory is his conception of the difference principle.[38] Rawls's difference principle argues that the only time it is appropriate to be unfair is when unfairness works in favor of the disadvantaged groups in society.[39] For Rawls, in societies where there are homeless individuals, the right to housing should supersede the right to property. This would be especially true in societies with homeless youth because homeless youth can be considered the most disadvantaged group and often lack other protective justice principles. In a just society, the right to housing for all youth should be an inevitable and absolute consequence of open and free rational choice of individuals who are creating a fair society. It is likely that Rawls would consider societies who do not provide

housing for youth as outlaw states or states burdened by unfavorable conditions.[40] The difficulty in this progression of ideas is that Rawls never really explains the rational necessity behind his difference principle. Why would making sure that homeless youth have open access to housing—just because they are severely disadvantaged—make society fairer, beyond a metaphysical belief that it is so? Kohlberg provides a better explanation through his moral theory.

D. Kohlberg, Morality, and the Right to Housing

The issue brought to the forefront by Rawls is that a right to housing is a moral issue. But Rawls concentrates on morality at the level of social contract;[41] to make the argument for a right to housing, levels beyond just the social contract need to be considered. The right to housing is best argued at a higher level of moral consciousness than social contract—as a universal right that needs to be brought down into the practical real world.

Kohlberg's moral scheme is based on progressive levels of perspective taking.[42] There are three general stages (with two levels within each stage).[43] The first stage is preconventional morality—where individuals are incapable of (or refuse to) take the perspective of the other in their determination of rights (e.g., "might makes right").[44] While this moral stage may often be used in action, it is rarely used in justification. The second stage is conventional morality, where individuals take the perspective of the other, but only those who can have a direct or indirect impact on their lives.[45] This level demands recognition of the needs of others in relation to one's self. People realize that in order for society to continue, and for actions to have meaning beyond the immediate, there must be some type of shared or agreed-upon moral structure that guides decision-making processes. Social contract lives at this second level, along with the agreements and assumptions behind Arrow's impossibility theory.[46] But there are no overarching rights at this conventional level, since everything is up for discussion and debate within the community; thus, housing the

homeless may be a rational decision, but it is not a predetermined obligation.

It is at the third, postconventional level of moral thinking where a right to housing has salience. In the postconventional stage, human rights—the right of every individual to have basic levels of respect, care, and freedom—supersede all other considerations, including social contract.[47] As opposed to Rawls's theory that the basic rights of liberty and self expression do not exist so that we might come together as a community and determine societal principles, Kohlberg argues that they exist solely on the basis of each person's humanity and our obligations as humans to fellow members of our species.[48] This means that no society can ever take away these rights, or develop a rationalization on why they should not take priority in our social activity (e.g., we cannot provide housing because it will impact aggregate economic factors such as GNP). Kohlberg was well aware that few reach the postconventional level of moral thinking, and even fewer act from it.[49] Still, it provides a strong, logical argument for a right to housing that few can counter.

The difficulty is that the abstract argument for human rights based on human obligation is an "ought" argument—it is persuasive only in terms of what a society ought to do, not in terms of the way society is. A neoclassical argument promotes the idea that humans do not naturally take care of other humans—rather they compete with them—and that there is a "selfish gene."[50] Any person who promotes a right to housing is likely to be told that it is a noble idea, but it is divorced from reality. This is not the way that things are within our society, within any human society. Economic realism must trump social idealism. But economic realism only has power when analyzing society from a distance, at a specific point in time—a picture of society without relationships. History has suggested it is dangerous to ignore everyday, individual social casualties. For a generative model approach to exist and succeed, instead of neoclassical argument, Kohlberg's moral thinking combined with Sen's informative decision must be used to

reshape the arguments for the basic right to housing. As a result, in the next section, we take the abstract argument for human rights and apply it at the practical level—to homeless youth.

II. THE RIGHT TO CONTRACT OF HOMELESS YOUTH

There is a tension between economics and morality concerning the right to contract—and it is not as easily separated, especially when considering the rights and needs of youth who have no familial means of support. What further complicates this right is that a contract is simultaneously an issue of legal, economic, and moral implications.

The legal aspect of a contract is obvious in that it is a binding agreement in which all parties who enter into it agree to honor their commitments. There are laws that make a contract binding so one party does not have the advantage over the other. The contract is a fail-safe for social agreement—from an economic perspective, it is an addendum to social capital.[51] Social capital basically represents the level of trust between members of a given community, or society, in their day-to-day interactions.[52] Social capital and the rule of law have reciprocal interactions. The higher the level of social capital, the more individuals are willing to defer to the rule of law as a guarantor of their survival, safety, and social progress. The more that individuals defer to the rule of law by choice and without hesitation—especially as it defines legal equality—the easier it becomes for members of a community to trust each other in their interactions and gain greater social capital.

Used as an economic tool, the lower the level of social capital, the more safeguards the community or society needs to put in place to protect the individuals.[53] The most efficient transaction, which occurs in close-knit communities, can involve a minor signal between those involved in the transaction, such as a handshake or a nod of the head. Coleman describes these types of high-level social capital transactions in tight-knit communities; an example is the orthodox/Hassidic Jewish community that

dominates the diamond district in New York where expensive diamonds are borrowed and traded with few, if any, formal safeguards outside the web of community relationships.[54] On the other hand, even the most simple contracts between those who do not share any communal trust require not only multiple levels of safeguards, but also require outside interlocutors preparing and enforcing those contracts, as well as formalized sanctions against reneging on the contracts.[55] As Fukiyama suggests, imposition of these safeguards adds unnecessary cost to any transaction.[56]

Based on morality, a community sets its standards for transactions—in this case, contracts—based on the levels of trust and reciprocity, and each person in that society understands that level of trust and the obligations that it entails. This generalized agreement—what Locke referred to as the social contract—is first defined by the community, but in its implementation, the agreement comes to define community in important ways.[57] This idea goes back to Plato's *Crito*, which suggests that all individuals who wish to stay as part of a society implicitly agree to the social contract—but the opposite is also true, all those who are denied the social contract are implicitly, and sometimes explicitly, shunned as outsiders to the community.[58] For example, a person who was not a member of the Hassidic community would not be trusted with the thousands of dollars in diamonds based on a few gestures and words; the denial of that transaction would immediately signal to the individual that he or she is not a member of the community that has agreed to this social contract. Similarly, homeless youth who are considered outsiders to normal society are denied basic transactions through social gestures and actions.

The three interwoven issues of legal, economic, and moral aspects of the right to contract demonstrate that access to socially agreed-upon contract laws are so important. Denial of a right to contract goes beyond simply denying the chance to attain goods offered in that contract—it is a signal that the person being denied is excluded from that community or society, has no codified place within it, and is expected to leave. The denial of a

right to contract then is both an economic decision and an ethical decision, and the reasons for it must be considered at both levels.

A. Economics, Youth, and Safeguards in the Right to Contract

The economic decision must balance the cost of the contract against the worth of the goods received as a result of entering into the contract. The worth is dependent on the value systems of that community or society. If that community or society is acting within a neoclassical value system, then everything is measured in terms of material gain and loss.[59] When a possible loss is two thousand dollars, but establishing a safeguard (e.g., hiring a lawyer) would cost three thousand dollars, then the application of a safeguard is lowered. However, if the community or society is acting within a human capability value system then the worth in providing capabilities is factored into the transaction, usually by the society as a whole rather than by individuals.[60] For instance, a community or society might impose laws that all dwellings meet minimal standards. The society would regularly inspect buildings and houses to make sure they meet these standards. If the standards are not met, the society would impose heavy fines. Through these economic decisions, societal safeguards and expectations can be set in place to ensure that more homeless youth are able to access housing. However, economic solutions would not address ethical concerns.

B. Ethics, Youth, and Alienation in the Right to Contract

Perhaps more important than the economic issues in the right to contract are the ethical implications: if society denies an individual a contract, it is implicitly stating that it does not consider him or her to be a viable and trusted member of the society. The society is also denying the individual the same access to material and cultural capital that members of the society use to advance themselves,[61] so society is not only saying that these individuals are not members of the community, but that they are being denied the opportunities to become members. This type of exclusion can lead to both

animosity and alienation on the part of the ousted group.[62] Therefore, the reason for the exclusion must be well considered in both economic and moral terms.

Returning to the example of the Hassidic community in the diamond district, the social contract is based, at least in part, on being an everyday member of that community. This includes dressing in a certain manner, behaving in a certain manner, and living and working in close proximity. Individuals that work in the diamond district actually take specific buses into the city. If an individual is excluded, it is not based (or cannot be claimed to be based) on preconventional decision-making processes. That is, the Hassidic diamond dealers are not denying those they deem as "others" because they feel more powerful (level one of preconventional)[63] or because they feel they can get away with it (level two of preconventional).[64] They are not even denying rights because they feel these "others" would not offer them the same type of trust (level three of conventional).[65] The Hassidic diamond sellers are not offering the rights because the "others" are not members, and do not want to be members, of the community that has agreed upon the social contract. Any time an individual is denied a contract, the person who is denying that right must have a similar comprehensive argument based on social contract for that denial to have ethical standing and for it not to be in some way detrimental to the community as a whole.

The question, then, is as follows: is it ethical, and in the best interests of the community, to deny a right to contract to an individual who is under eighteen years of age just because they are under eighteen years of age? What if denial of this common right denies the individual a basic need that diminishes their capabilities and opportunities to participate as a full member of that society? If it is unethical, should there be safeguards against it and how extensive should those safeguards be? The economic argument, even from a neoclassical perspective, does not really make a great deal of sense. Individuals under eighteen have the same access to jobs as a large

portion of those who are over eighteen. If the issue of available income were an issue, then the denial of a housing contract should be based solely on income rather than on age. One could even make the argument that the younger group is more likely to have a steady income, because they are more likely to have fewer familial obligations. In any case, blanket denial of a right to contract seems like far too expensive a safeguard for what it might accomplish from an economic perspective: it narrows the pool of potential renters without any comparable true benefit.

IV. ETHICAL CONSIDERATIONS IN DENYING THE RIGHT TO CONTRACT

To exclude a youth under eighteen is a purely moral/ethical decision. There are actually two arguments that are made when minors are excluded from the right to contract in housing. The first argument is that this exclusion is in the best interests of the society, either because the minors are not full members of the community, or because they cannot function as full members of the community. The second argument is that this exclusion is in the best interests of the minor—that the minor is not capable of making responsible decisions so the society must make responsible decisions in the minor's place.

When society denies a minor a right, the implication is that the minor is not a full member of the society. The question, just as we explore in terms of the exclusionary practices of the Hasidim working in the diamond district, is what type of moral argument can be made to support this position, and can the argument reach the level of social contract? The preconventional arguments are relatively simple to make based on Kohlberg's level one—that youth are denied the right to contract because they are simply less powerful than adults[66]—or perhaps more likely based on Kohlberg's level two, that there are no repercussions for denying youths rights because they cannot vote and have no voice in lawmaking.[67] However, once society reaches the third level, in the (second) conventional

stage of moral judgment, the arguments for the denial of a right to contract based solely on being under eighteen becomes more difficult. The decision making could take one of two main forms. The first and stronger form would state that those over eighteen would not have wanted a right to contract when they were under eighteen, so they should not offer this right. The second and weaker form is that those over eighteen, knowing what they know now, would not have wanted a right to contract when they were under eighteen. A possible third argument is that if the rulemakers were landlords, they would not want minors to have a right to contract. However, once the question of why is raised, this argument is folded into the following discussion of youth and social contract.

Kohlberg's level four conventional argument may be the only one that actually suggests exclusionary practices can be part of a social system with ethical standards.[68] The primary issue would be that minors can be excluded from the community or society because they are not yet recognized as full members. But the only way these individuals can not be considered full members when they live in the community and follow the behavioral standards of the community is if they do not understand the concept of social contract as the community has agreed to it.[69] Research regarding moral decision-making processes contradicts this point. While abilities of moral decision making is connected to the development of more complex perspective taking, there is nothing to suggest that eighteen is a critical marker in this development.

Youth could conceivably reach recognition of the social contract when they reach what Piaget called the formal operation period of cognitive development in early adolescence or what Selman referred to as reciprocal perspective taking.[70] The suggestion that youth under fifteen are not capable of understanding the social contract is not supported by developmental research and literature. On the other hand, there are probably large numbers of adults over eighteen who do not understand the moral implications of the social contract.[71] From a developmental perspective, if one has not

developed an understanding of the social contract by eighteen, there is a good possibility he will never develop this understanding, unless there is some change in the trajectory of his or her life (e.g., in the types of activities in which and people with whom he or she engages).[72] This indicates how denying youth the adult right to contract is based on arbitrary standards of cognitive development.

The alienation that the refusal of rights based on an assumption of development can engender in late adolescence and can be highly detrimental to social capital. One thing helping an adolescent achieve higher levels of moral competence is feeling a connection to the larger socio-moral atmosphere, and having positive perceptions of fairness as the norm of the larger community group.[73] This may be one of the reasons why the moral competence of delinquents tends to lag behind nondelinquents.[74] The denial of rights, such as a right to contract, works against the youth's ability to reintegrate into the normalized, mainstream community. This alienation would be especially salient for youth who were already functioning at a higher level or moral competence because they might be more aware of their overt, unfair exclusion from the community. Their alienation would be further heightened through their awareness of the inclusion of adults with lower functioning levels or moral competence. The youth would recognize the arbitrariness of those adults being included into the community, and provided the right to contract despite not having a complete comprehension of a social contract.

The denial of housing contracts based on an individual's juvenile status is detrimental to the social group from both an economic and a moral/ethical perspective. Unlike the denial of a right to housing, there is no counter-argument to why there should not be a denial of the right to contract based on age.

IV. MINORS, RIGHT TO CONTRACT, AND IDEOLOGY OF FEAR

Along with previous economic and moral arguments to allow homeless youth the right to contract, we suggest that the denial of the right to contract for minors is based in an ideology of fear. This terror is founded in an ideological position that is based within an authoritarian world view, in which fear of youth is predominant.

A. The Policy of Ideology

We use the word ideological without any of the negative connotation it has developed over time, instead referring to its original definition as being the study and use of ideas separate from human action and experience, which should be used to guide human actions towards a more ideal society.[75] As Hegel suggested when discussing the ideologues of the French revolution, ideology allows humans to start walking on their heads: to start leading with their ideas.[76] It offers a wider view of individual actions. Individuals make decisions based on the vision of an idealistic society.[77] If what occurs in everyday life does not conform to the types of actions that will lead to the implementation of societal ideals, then it is incumbent on individuals to develop strategies to change everyday actions, rather than reconfigure the ideals.[78] This is why ideology, rather than pragmatic or even obvious considerations, often drives policy decisions.

In the right circumstances, ideology can be used as a tool to drive policy and policy-based decisions. But like any tool, ideology takes on its character through the motivations and goals of the individuals using it. Because ideals that (supposedly) guide action tend to be relatively static (getting actions to meet ideals tends to be a long term project); and because whatever changes do occur are created by those who have special knowledge, and therefore access, to those ideals (the elite), ideology is an especially resonant and purposeful tool for those who are interested in maintenance and protection of the status quo. Ideology tends to have its greatest impact when used by those with an authoritarian mind set.

Minors are denied a right to contract for housing because of an underlying authoritarian ideology that independent youth are dangerous to the community and that the granting of such rights might lead to chaos.[79] The denial of the independence and social recognition that would come with minors' ability to sign a housing contract is an attempt to maintain the community status quo, in which any individual under eighteen is dependent on a parent or guardian. The parent or guardian is held responsible for any damage of or transgression toward the social code by the minor, and any minor who does not have a parent or guardian is marginalized (or deemed nonexistent).

B. Authoritarianism and the Ideology of Childhood: Dangerous Youth

Authoritarianism blocks effective public policy by inserting authoritarian goals into those of the population experiencing the problem, often by exploiting fear and anxiety.[80] When individuals fear they might lose something from their lives, they start to look for things—individuals, symbols, ideas—that will protect them from that loss. Authoritarianism plays a powerful role in the underlying assumptions about a youth's right to contract. The type of control authoritarianism offers allows for the maintenance of predetermined societal ideals. The ideal of childhood as a time of innocence, naiveté, and hope is a relatively new concept, but it has taken a powerful hold on our society.[81] There are two ways that this ideal has been used as a tool to drive policy and policy-based decisions. First, society must do everything it can to make sure that the innocence and naiveté of children is maintained. Second, society must fear children who do not fit into this mold and who do not accept their roles as innocent, pliant children; they are alien and dangerous to the commonwealth—either because they threaten the true innocent children or because they threaten the order of society as a whole. The loss to society is the innocence of children who must be protected from those children who are no longer innocent. Those children or homeless youth who are no longer innocent require

authoritarian prescriptions, such as entry into the juvenile justice system, for the protection of society. Thus, a large number of homeless youth are taken to court and jailed.[82]

In the early part of the twentieth century the idea of protecting childhood innocence was predominant.[83] There was a belief in a right to childhood that was protected from the cruelties of society, and it was the community's obligation to institute safeguards that kept children in a protected realm.[84] The child who was somehow separated from home and family was considered a victim.[85] There was nothing inherently wrong or dangerous about the child. Led by progressive activists such as Jane Addams, the right-to-childhood movement established separate juvenile courts, humane orphanages, group homes, and special programs for minors.[86] The myth of the child as innocent persisted; the goals were reunification with the family, or unification with some state sanctioned facsimile of a family, where that innocence could be reclaimed. Even in the Depression, when homelessness for all ages was not uncommon, the persistent existence of this myth was in evidence.[87] As Minehan observed in his Depression-era ethological study of youth homelessness, "we are attempting to force youths to remain at home when there is in the true sense of the word no home in which they can remain."[88]

In the middle of the twentieth century, the view of youth began to change towards a more authoritarian, fear-based model. There was a growing fear of the disruption and chaos that youth were capable of causing, best depicted in movies of the time, such as *The Wild One*[89] and *Blackboard Jungle*.[90] The fear increased, along with the growing independence of youth through cars and the mainstreaming of nighttime hangouts. Youth moved from being under the protective umbrella of the family to being independent and mobile freeagents. Rather than victims of society, independent youth who did not return to their homes were seen as dangerous—engaging in antisocial and sometimes illegal behavior that could, in fact, infect the middle-class lifestyle.[91] This actually became a common theme in movies

and books: how a bad child needed to be quarantined from good children lest they be led astray (e.g., *Rebel Without a Cause*).[92] This growing fear and shift in perception of dangerous youth culminated in the Juvenile Delinquency and Youth Offenses Control Act of 1961.[93] The emphasis, as stated in the title, was on 'control' of youth, and one of the best ways to enforce control was denial of rights.

We argue that the denial of the right to contract for minors who are otherwise capable from an economic and a moral perspective is basically an authoritarian policy based in fear. This fear is promoted through the two-part ideological tool of childhood: innocence and threat. Homeless youth, who live outside the reach and/or control of the family, are therefore dangerous and a threat to the well-being of society in general and to the good children who stay with their family. Therefore, these homeless youth must be denied any rights that would suggest that they are functioning, integrated, and accepted members of the common society.

As discussed in Part III, denying a minor the right to contract symbolizes that this individual has not achieved membership in the society and is alien—a stranger and an outsider. The denial is not based on lack of social capital, cultural capital, or material capital,[94] but is a complete repudiation of the youth based on fear. Society fears the youth, so it denies the youth even minimal membership within it.

The fear of homeless youth is not unique to the right to contract issue; instead we argue that it permeates proactive policy geared towards these youth. The Runaway and Homeless Youth Act (RHYA) misses opportunities for helping these youth because it focuses primarily on family reunification through intervention, suggesting a deficit model for both the youth and their families.[95] Youths who are not with their family, or under direct state supervision (e.g., foster care), are essentially invisible or not worthy of help. Efforts to deal with the homeless from an ecological (the environments where they feel comfortable), social (the peer groups that share their unique ethos and view of the world), economic (street

economies), or emotional perspective are very limited. Youth who do not fit the model of middle-class values are not really recognized as full members of the society.

The ideology of fear of homeless youth does not serve the needs of either the individual youth or the society at large and works against the general rule of law by denying a possibly capable individual access to a basic need. This can make the homeless youth less equal in the society. The level of trust between homeless youth and society in general is diluted, influencing the homeless youth's willingness to make linkages with positive social settings. This world view of fear of homeless youth, as are most authoritarian world views, is ultimately deleterious to the fabric of the society. It drives society apart, alienating marginal populations even further—but societies still must find a way to deal with these populations, which do not disappear simply because they are marginalized. Devising pragmatic methods that allow those under eighteen to have open and fair access to housing would have a positive generative effect on our social systems.

V. CREATING A GENERATIVE MODEL ON THE RIGHT TO CONTRACT

The right to contract for housing may be the most important part of putting youth back on a positive life trajectory, particularly in U.S. society. Property rights have been a critical part of social recognition and social acceptability in the United States since the Declaration of Independence. Throughout our history, property rights have been tied to the right to vote and the rule of law.[96] The dominant neoclassical paradigm put great emphasis on the ownership and protection of property.[97] Youth are not allowed entry into social contracts involving property due to an arbitrary age cut off that has little value in light of current research on human development and capabilities. This necessarily sets a youth on a degenerative trajectory, from an economic perspective, and perhaps even more important for the social community, from a moral perspective.

Individuals who are in a society but who do not feel recognized by or part of a society feel far less compunction to adhere to norms—leading to even greater alienation in a downward spiral. If youth are alienated from fully participating in society from the beginning, it is inevitable that they suffer in this downward spiral.

Society must take a more generative approach in dealing with the issue of homeless youth and housing, one that is based on reintegration of marginalized populations, specifically homeless youth. A generative society seeks to foster human potential for future generations.[98] Humans are not isolates, but rather social beings in which relatedness to the world is of primary importance. Once societies begin to separate groups as "in" or "out," the out group becomes meaningless, or wrong in some manner,[99] thus blocking the ability of the out group to find acceptance in society. This is especially important because, although youth tend to be one of the most vulnerable populations in our society, they are also one of the most malleable from a socio-moral perspective.[100] By putting youth into an ecological context where they find social acceptance, they have a greater possibility of adopting the ethos and the norms of that society or community. In the first part of the twentieth century, developing social policy focused on the idea of reintegration into society—part of what was known as the "whole child" movement.[101] The emphasis was placed on family reunification, or finding some facsimile-type family.[102] The focus of policy was on the future of the society and viewed the developing youth as a functioning, positive member of that society.[103]

Current economic and social circumstances can make family reunification difficult, if not impossible, for a number of youth.[104] In many cases, family reunification does not work towards social reintegration, and in the case of highly dysfunctional families, can even work against it. As a society we must make a choice about how we deal with youth who have no reasonable living alternative. Do we ignore these youths? Do we see them as outsiders, as criminals? Or do we find a way to treat them as full

members of our social community? A generative approach suggests developing strategies for treating disenfranchised youths as full members of society—based on capabilities rather than age. Because one of the most basic needs is housing and because one of the most basic rights in our society is a right to contract for housing (based on the ability to pay), society should go out of its way to guarantee a right to contract.

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[3] We make the distinction between the developmental concept of youth and the legal age of majority, which have few interrelationships. Whether a person is thought of as a "youth" is based on a continuum of cognitive, social, and emotional development. The age of eighteen is an arbitrary marker of development.

[4] Neoclassical economics is a school of economics suggesting that individuals act to maximize utility (the best possible outcome for each individual) while firms and companies act to maximize their profits. Individuals and firms are able to coexist through their rational choices and, under the best possible circumstances, reinforce each other because the company must produce products that meet the needs of individuals (in order to maximize profits) while individuals need to spend money wisely to buy the best possible products at the lowest possible prices (in order to maximize utility). Neoclassicists believe that this relationship is an almost perfect form of economic symbiosis, and any outside influences (laws, regulations) cannot help but alter and dilute this relationship.

[5] *See generally* MILTON FRIEDMAN & ROSE D. FRIEDMAN, CAPITALISM AND FREEDOM (1962).

[6] This is not to say that property rights have not been central to United States social and economic policy through its history. However we would argue that the quest for property should be the driving force in the determination of rights. This compliments the Malthusian argument that it is in the best interests of society to let those who are unable to attain a level of property that enables survivability (in a free market) to fall by the wayside.

[7] *See* Kenneth Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950).

[8] AMARTYA SEN, DEVELOPMENT AS FREEDOM 5, 87–110 (1999).

[9] *See* LAWRENCE KOHLBERG, 1 ESSAYS ON MORAL DEVELOPMENT xi (1981).

[10] *Id.*; *see also* WILLIAM DAMON, THE SOCIAL WORLD OF THE CHILD 25–70 (1977).

[11] LAWRENCE KOHLBERG, THE PSYCHOLOGY OF MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES 38 (1984).

[12] *See* Arrow, *supra* note 7, at 339–43.
[13] FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD 241–48 (2004).
[14] Malthusianism is based on the seminal population theory of Thomas Malthus. Malthus was an influence on Darwin and his theory of natural selection. Malthus believed that populations could easily grow out of control. The one thing restricting population growth was natural and man-made disaster, as well as catastrophes such as famine, disease, and war. These catastrophes were nature's way of maintaining a stable population. They had the added advantage of promoting those who are strongest in society, (e.g., an individual who survives a war must necessarily be the best soldier) while dispensing with the most marginal, least worthwhile members of a social group. Malthus believed that social intervention was a mistake, distributing resources in an unnatural fashion and putting society at risk by increasing the marginal population.
[15] *See generally* Michael Glassman, *Mutual Aid Theory and Human Development: Sociability as Primary*, 30 J. THEORY SOC. BEHAV. 391 (2000).
[16] This, we believe, is one of the driving ideas in Arrow's 1993 article on social welfare. *See generally* Arrow, *supra* note 7.
[17] *See* Glassman, *supra* note 15, at 392.
[18] Michael Ball, *Housing Analysis: Time for a Theoretical Refocus?* 1 HOUSING STUDIES 147 (1986).
[19] SEN, *supra* note 8, at 17, 35–53.
[20] *See generally* Amartya Sen, *The formulation of Rational Choice*, 84 AM. ECON. REV. 385 (1994).
[21] SEN, *supra* note 8, at 35–53, 285.
[22] *Id.* at 5.
[23] *See id.* at 4.
[24] *Id.* at 282–83.
[25] *See generally* Glassman, *supra* note 15.
[26] SEN, *supra* note 8, at 35–53.
[27] *Id.*
[28] *Id.*
[29] *Id.* at 285.
[30] JOHN RAWLS, A THEORY OF JUSTICE 102–105, 505 (1971); KOHLBERG, *supra* note 9, at 37, 395–426.
[31] *See* RAWLS, *supra* note 30, at 234, 490–96; KOHLBERG, *supra* note 9, at 395–99.
[32] *See* RAWLS, *supra* note 30, at 171–227, 453–62; KOHLBERG, *supra* note 9, at 395–99.
[33] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge University Press 1988) (1690); *see also* JOHN STUART MILL, ON LIBERTY (David Bromwich and George Kateb, eds., 2003).
[34] *See* JOHN RAWLS, THE LAW OF PEOPLES 20, 36–68 (1999).
[35] This idea combines Sen's ideas on basic functions (with housing as a basic function) with Rawls' ideas on distributive justice. *See id.*; SEN, *supra* note 8, at 35–53.
[36] *See* RAWLS, *supra* note 34, at 49–50.
[37] *See* Arrow, *supra* note 7, at 328–346.
[38] RAWLS, *supra* note 30, at 75–83.

[39] *See* RAWLS, *supra* note 34, at 113.
[40] *See* RAWLS, *supra* note 34, at 80 (describing outlaw states).
[41] RAWLS, *supra* note 30, at 10–11.
[42] Lawrence Kohlberg suggested a three-stage progression to moral development with two sublevels in each stage. The first stage of moral development is the preconventional, in which individuals obey rules either because the rulemakers are more powerful than they are, or because they feel that obeying the rule is in their own best interest. The second stage is the conventional stage, in which individuals are able to take into account the perspectives of others in their social group when making moral decisions. At the first level of the conventional stage, individuals often follow a variation of the "golden rule": "Do unto others as you want them to do unto you." At the second level, individuals recognize the importance of social contract. The third stage is the postconventional stage—very few individuals actually reach this stage. In the postconventional stage, individuals are able to comprehend needs beyond the immediate needs of their society, and recognize that some universal principles such as life and liberty can actually supersede the law that is part of the social contract. This last stage is where a person replaces individual moral decision making with global moral decision making. *See* KOHLBERG, *supra* note 11, at 44.
[43] *Id.*
[44] KOHLBERG, *supra* note 11, at 314–19.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *See* RICHARD DAWKINS, THE SELFISH GENE 11 (1976).
[51] *See* FRANK FUKUYAMA, THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTRUCTION OF SOCIAL ORDER 19–20 (1999) (discussing the use of the term "social capital").
[52] Pierre Bourdieu, *The Forms of Capital*, *in* HANDBOOK OF THEORY AND RESEARCH IN THE SOCIOLOGY OF EDUCATION 248 (John Richardson ed. 1986).
[53] *See* FUKUYAMA, *supra* note 51, at 194–211; *see generally* JAMES COLEMAN, THE FOUNDATIONS OF SOCIAL THEORY *(*1990).
[54] Lisa Bernstein, *Opting Out of the Legal System*: *Extralegal Contractual Relations in the Diamond Industry*, 21 J. OF LEGAL STUD. 120, 140–41 (1992).
[55] *Id.* at 120.
[56] *See generally* FUKUYAMA, *supra* note 51, at 194–211.
[57] *See* LOCKE, *supra* note 33; MILL, *supra* note 33.
[58] PLATO, THE APOLOGY AND CRITO OF PLATO AND SYMPOSIUM OF XENOPHON 62–67 (Raymond Larson ed., Coronado Press 1980).
[59] *See generally* Arrow, *supra* note 7.
[60] SEN, *supra* note 8, at 282.
[61] *See* Bourdieu, *supra* note 52, at 243.
[62] KOHLBERG, *supra* note 11, at 263–70.
[63] *Id.*

[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *See* LOCKE, *supra* note 33, at 107–115; PLATO, *supra* note 58, at 348–367.
[70] *See* JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD (1965); ROBERT L. SELMAN, THE GROWTH OF INTERPERSONAL UNDERSTANDING: DEVELOPMENTAL AND CLINICAL ANALYSES 137–42 (1980).
[71] *See* MICHAEL CHAPMAN, CONSTRUCTIVE EVOLUTION: ORIGINS AND DEVELOPMENT OF PIAGET'S THOUGHT 192–258 (1988); SELMAN, *supra* note 70, at 137–38.
[72] *Id.*
[73] *See* Daniel Brugman et al., *Perceptions of Moral Atmosphere in School and Norm Transgressive Behavior in Adolescents: An Intervention Study*, 27 INT'L J. OF BEHAV. DEV. 289 (2003).
[74] Mary P. Gavaghan et al., *Moral Judgment in Delinquents and Non-Delinquents: Recognition Versus Production Measures*, 114 J. OF PSYCHOL. 267 (1983).
[75] ANTOINE LOUIS CLAUDE DESTUTT DE TRACY, A TREATISE ON POLITICAL ECONOMY 1–31 (Thomas Jefferson trans., A.M. Kelley ed. 1970) (1817).
[76] JOACHIM RITTER, HEGEL AND THE FRENCH REVOLUTION: ESSAYS ON THE PHILOSOPHY OF RIGHT 43–52 (Richard Winfield ed. 1984).
[77] *Id.*
[78] *Id.*
[79] *See* Donna Karno, A Theoretical Exploration of Authoritarianism, Ideology, and Generativity: No Child Left Behind and the Runaway and Homeless Youth Act 113 (2008) (unpublished doctoral dissertation, The Ohio State University, Columbus).
[80] *Id.* at 108.
[81] *See generally* KRISTIE LINDENMEYER, A RIGHT TO CHILDHOOD: THE U.S. CHILDREN'S BUREAU AND CHILD WELFARE 1912–46 (1997).
[82] *See* Lori Nessel & Kevin Ryan, *Migrant Farmworkers, Homeless and Runaway Youth: Challenging the Barriers to Inclusion*,13 LAW & INEQ. 99, 122–25, 136–37 (1994).
[83] LINDENMEYER, *supra* note 81, at 1912–46.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] THOMAS MINEHAN, BOY AND GIRL TRAMPS OF AMERICA 237 (1934).
[88] *Id.*
[89] THE WILD ONE (Stanley Kramer Productions 1953).
[90] BLACKBOARD JUNGLE (Metro Goldwyn Mayer 1955).
[91] *See* ARCHIE K. LOSS, POP DREAMS 15–16 (1999).
[92] REBEL WITHOUT A CAUSE (Warner Bros. Pictures 1955).
[93] Juvenile Delinquency and Youth Offenses Control Act of 1961, Pub. L. No. 87–274, 75 Stat. 572 (1961).
[94] *See generally* Bourdieu, *supra* note 52.

[95] *See* 42 U.S.C. §§ 5701–5751 (2003).
[96] Karno, *supra* note 79, at 101.
[97] *Id.* at 104.
[98] Ed de St. Aubin et al., *The Generative Society: An Epilogue*, *in* THE GENERATIVE SOCIETY: CARING FOR FUTURE GENERATIONS 4–8 (Ed de St. Aubin et al. eds., 2004).
[99] *See* E.H. Erikson, *The Ontogeny of Ritualization in Man*, 251 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y OF LONDON 337 (1966).
[100] Brugman et al., *supra* note 73, at 289–90.
[101] LINDENMEYER, *supra* note 81, at 1–2.
[102] *See id.* at 2.
[103] *Id.* at 10 ("'The noblest duty of the Republic is that of self-preservation by so cherishing all its children that they, in turn, may become enlightened self-governing citizens . . .'").
[104] *See Living on the Street: Finding Solutions to Protect Runaway and Homeless Youth: Hearing Before S. Comm. on the Judiciary,* 110th Cong. 2 (2008) (statement of Hon. Patrick Leahy, Chairman, S. Comm. on the Judiciary); *The Problem of Homeless Youth: Hearing before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 100th Cong. (1988).