

THE STATE OF EVICTIONS: PUBLIC POWER AND RENTAL VALUE

Zachary Hale*

I. INTRODUCTION

“Police! Police!

Come and get this man!

He’s trying to ruin the government

And overturn the land!”

—Langston Hughes, “Ballad of the Landlord” (1940)¹

Each year, evictions force millions of renters out of their homes, traumatizing evicted families and ripping apart the communities in which they live.² The looming threat of this displacement pushes tenants into desperate situations, with many working multiple jobs and skipping essential expenses to make ends meet.³ It also helps landlords hike rent and skip maintenance, increasing their profits via their renters’ precarity. The force behind the landlord’s threats is not a natural or private arrangement, but rather a manifestation of public power that is channeled through property rights. This essay maps that transmission of power, the value it generates, and the costs it imposes on society.

To say that eviction and the rent collection it enables are fundamentally public actions is not merely an observation that private property is a social construction or that rental payments come from the value that emerges from social production. It is rather an assertion that the arrangements that create rental income at scale can only exist through the extensive and explicit coordination of public power. While private coercion can be the source of significant revenue, legibility to broader financial markets requires a dependable promise of enforcement that inherently relies on public

*J.D., Fellow with the Association for Promotion of Political Economy and the Law (APPEAL)

1. LANGSTON HUGHES, *Ballad of the Landlord* (1940), reprinted in *THE COLLECTED POEMS OF LANGSTON HUGHES* 402 (Arnold Rampersad & David Roessel eds., 1995).

2. U.S. GOV’T ACCOUNTABILITY OFF., *EVICTIONS: NATIONAL DATA ARE LIMITED AND CHALLENGING TO COLLECT 1* (Feb. 28, 2024), <https://www.gao.gov/assets/d24106637.pdf>.

3. *Id.*

institutions. Through implicit and explicit violence, these institutions undergird a right of exclusion that is separate from use, turning property ownership into a lucrative investment. The real estate market built on the bedrock of this exclusion is shaped by state activity at virtually every level, from mapping parcels and recording deeds to assessing tax valuation and backstopping mortgage debt. Many of these interventions promote a narrow set of interests, like restrictions on housing supply that boost the price-setting power of property owners and limit alternative forms of tenure. In rental real estate, these government assurances are further supplemented by the state's role in facilitating evictions and maintaining the resulting power imbalance between owners and renters.

These interventions are ultimately determined by political processes, even if particular actors are insulated from democratic accountability. The political foundation of our property systems means that successful movements can rewire the productive circuits for a broader distribution of both power and value. Instead of guaranteeing evictions, the state can guarantee housing security. Instead of requiring tenants to prove they can pay rent before demanding repairs in court, the state can require landlords to prove they have made repairs before starting a case to collect rent. Instead of limiting the provision of housing to that which guarantees real estate income, the state can limit real estate income to that which guarantees housing. These transformations will require concerted effort across multiple terrains of struggle, and this paper aims to map some of the key areas involved in that fight.

II. REALIST PROPERTY, POSSESSION, AND EXCLUSION

“The first man who, having enclosed a piece of ground, bethought himself of saying ‘This is mine,’ and found people simple enough to believe him, was the real founder of civil society.”

—Jean-Jacques Rousseau, “A Discourse Upon the Origin and the Foundation of the Inequality Among Mankind” (1754)⁴

It is not controversial to say that the capitalist economic system relies on private property, especially among its most ardent proponents.⁵ There is more significant debate, however, on what the privacy of property actually entails and what the role of the state is in securing it. In the classical liberal

4. JEAN-JACQUES ROUSSEAU, DISCOURSE ON INEQUALITY: ON THE ORIGIN AND BASIS OF INEQUALITY AMONG MEN 63 (Floating Press 2009) (1754).

5. E.g., Sarwat Jahan & Ahmed Saber Mahmud, *What is Capitalism?*, INT'L MONETARY FUND, <https://www.imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/Capitalism> (last visited Sept. 15, 2024).

narrative, the state emerges to protect pre-political rights that are either ordained by a divine creator or of an otherwise supra-social origin. This limited role for the state is primarily characterized through restraint, and even self-proclaimed “anarcho-capitalists” like Argentinian president Javier Milei promote policies of State reduction rather than State abolition.⁶ The Cato Institute, a U.S.-based libertarian think tank that has expressed support for Milei,⁷ expresses this orthodoxy succinctly in its 2022 Annual Report, stating that, “properly conceived and applied, property rights are self-limiting . . . rights of active use end when they encroach on the property rights of others.”⁸

While natural rights philosophy is still popular in its own right, scholarship by conservative legal thinkers like Professor Richard Epstein has developed it into a more substantial theory of legal property rights that emphasizes the right of exclusion, sometimes described as the “ownership model.”⁹ One of the most developed and consequential iterations of this revived framing is in modern Takings Clause jurisprudence, which relies on a variation of natural rights as a counterargument to progressive taxation and regulation.¹⁰ A prominent application of this approach, and one that is relevant to this essay, is the version espoused by landlord interest groups in their battle against regulation in the rental real estate market.

In the 2019 lawsuit brought by the Community Housing Improvement Program, the group cites the 1829 Supreme Court case *Wilkinson v. Leland* for the proposition, “[t]hat government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint.”¹¹ The original complaint, appellate pleadings, and multiple amici¹² points to natural rights-infused jurisprudence

6. See Michael Chapman, *Argentina's Javier Milei is Slashing Big Government – We Can Do the Same in America*, CATO INST.: CATO AT LIBERTY (Jan. 12, 2024, 4:02 AM), <https://www.cato.org/blog/argentinas-javier-milei-slashing-big-government-we-can-do-same-america>. Milei is typical of this political orientation in that his ideal vision of property and markets involve “limited government,” despite his simultaneous expansion of certain policing powers. See Uki Goñi, ‘*Prison or Bullet*’: *New Argentina Government Promises Harsh Response to Protest*, GUARDIAN (Dec. 17, 2023, 6:00 AM EST), <https://www.theguardian.com/world/2023/dec/17/argentina-president-javier-milei-security-guidelines-protests-currency-devaluation>.

7. See Chapman, *supra* note 6.

8. CATO INST., CATO HANDBOOK FOR POLICYMAKERS 148 (9th ed. 2022), <https://www.cato.org/sites/cato.org/files/2023-03/cato-handbook-9th-edition.pdf>.

9. Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 893 (2013).

10. See generally Eric Kades, *The Natural Property Rights Straitjacket: The Takings Clause, Taxation, and Excessive Rigidity*, 51 U.C. DAVIS L. REV. 1351 (2018).

11. Complaint at 193, Cmty. Hous. Improvement Program v. City of New York, 492 F. Supp. 3d 33 (E.D.N.Y. 2020) (No. 19-cv-4087).

12. *The Lawsuit*, UNLAWFUL RENT REGUL., <https://web.archive.org/web/20240514161634/https://unlawfulrentregs.com/the-lawsuit/#expand> (last visited Feb. 8, 2024).

as support for their argument that rent regulations constitute a taking. The Cato Institute filed an amicus brief arguing that the regulatory deprivation of a landlord's "right to exclude" should be considered a *per se* taking,¹³ a position supported by the Supreme Court's recent assertion in *Cedar Point Nursery v. Hassid* that "[g]overnment action that physically appropriates property is no less a physical taking because it arises from a regulation."¹⁴

While this framework is consistent with the idea that the right to exclude is the ultimate source of rental income, it also oversimplifies the nature of property and the role of the state in securing it. This is in part because the exclusionary ownership model was developed in the effort to supplant a more nuanced "bundle of sticks" model of property rights that had become dominant in 20th century Anglo-American jurisprudence under the influence of legal realists.¹⁵ The bundle model emphasized the multifaceted and relational nature of property rights, with Wesley Hohfeld's influential iteration presenting property as a set of interrelated rights, privileges, powers, and immunities.¹⁶

Hohfeld deepened his analysis with the idea of jural opposites and jural correlatives, whereby any given right would have an opposite "no-right" and a correlative "duty".¹⁷ Opposites and correlatives can provide insight into the landlord-tenant relationship: the landlord's right to exclude opposes the no-right of exclusion held by others; the landlord's right to rental payments is correlated with the tenant's duty to pay, while the tenant's right to a habitable apartment is correlated with a landlord's duty to provide the same. At the failure of either party to fulfill their duty, the wronged party has a right to some enforcement remedy that the State has a correlated duty to carry out. The imbalances between the remedies available to each party and the processes available for their enforcement strengthen the relative power of landlords over tenants even within the deceptively balanced "four corners" of the lease contract.

13. Brief for the Cato Inst. & Manhattan Inst. as Amici Curiae Supporting Petitioners, *Cnty. Hous. Improvement Program v. City of New York*, 144 S. Ct. 264 (2023) (No. 22-1095).

14. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021). The decision also supportively cites Blackstone's proposition that property is "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." *Id.* at 149-50.

15. See di Robilant, *supra* note 9, at 889.

16. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710, 746 (1917).

17. See Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 *WIS. L. REV.* 975, 986-87 (1983).

The Hohfeldian framework of jural relations provides the basis for an important and interesting analysis in its own right,¹⁸ but the most important component of the legal realist bundle view for the purposes of this essay is its implication of state intervention in the act of bundling.¹⁹ As illustrated in the example above, the distribution of rights, duties, privileges, and immunities is accomplished through various legal, administrative, and judicial mechanisms. Further, whether and how a particular right or duty is enforced relies on the discretion of state actors, with their judgment relying on ultimately political considerations.

The ownership model's emphasis on the right to exclude does not entirely supplant the bundle framework, but rather provides a schema for prioritizing particular property rights; the right to exclude can be seen to enable the right of use that can then be rented out to another party. This view is currently dominant at the U.S. Supreme Court, who in *Cedar Point Nursery* cites a long line of cases for the idea that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."²⁰ The National Apartment Association and National Multifamily Housing Council, a landlord interest group, cited the same bundle language in argument that the rent regulation in question was an "evisceration of [landlords'] right to exclude."²¹

While both the ownership and bundle models can be twisted to argue against government intervention, they are both demonstrations of the role that state coercion plays in supporting private property and the power of ownership. As realist Robert Hale put succinctly, government protection of a property right requires "forcing the non-owner to desist from handling it, unless the owner consents."²² Read alongside sociologist Max Weber's oft-cited formulation of power as the probability that one social agent can carry out their will against another despite resistance,²³ the legal realist position

18. See, e.g., Sarah Klammer, *The Legal-Economic Performance Framework as a New Approach to Institutional Impact Analysis and Critical Thinking in Economics*, 3 J.L. & POL. ECON. 304 (2022).

19. See di Robilant, *supra* note 9, at 885 ("Arthur Corbin noted that a right exists when its possessor has the aid of some organized governmental society in controlling the conduct of the person who owes a duty.").

20. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 150 (2021) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179-180 (1979)).

21. Brief for Nat'l Apartment Ass'n & Nat'l Multifamily Hous. Council as Amici Curiae Supporting Plaintiffs-Appellants & Reversal of the District Court, Cmty. Hous. Improvement Program v. City of New York, 59 F.4th 540 (2023) (No. 20-3366-cv).

22. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471 (1923).

23. Mark E. Warren, *Max Weber's Nietzschean conception of power*, 5 HIST. OF THE HUM. SCI. 19 (1992).

can be interpreted as the observation that the state weights that probability through legal design and enforcement. Morris Cohen echoes this analysis, stating that “law confers on me a power, limited but real, to make [my neighbor] do what I want.”²⁴

The institutional economists of the early twentieth century produced similar ideas about property and power, laying bare how exclusive rights allow for the generation of rent values.²⁵ Thorstein Veblen, perhaps the best known of the institutionalists, emphatically asserted that state-backed withholding was a fundamental source of economic value, arguing that “without the right to keep work out of the hands of the workmen and the product out of the market, investment and business enterprise would cease.”²⁶ Institutionalist John R. Commons characterized the modernizing U.S. economy as “premised on a power of creating scarcities by ‘withholding from others,’”²⁷ an extension of the landlord mode of power into burgeoning industrial property relations.

More recent work in heterodox economics has revived this analysis of coercive power and value production, with Jonathan Nitzan and Shimshon Bichler arguing that “[w]hat matters is the right to exclude and the ability to exact terms for not exercising that right.”²⁸ This is consistent with Samuel Bowles and Herbert Gintis’ model of economic power where the empowered party wields a credible threat of sanctions where the disempowered party has no reciprocal threat-credibility.²⁹ As the following section will discuss, the state’s intervention to ensure credible threats to tenants, but not to landlords, creates the type of power imbalance that characterizes exploitative structures throughout the economy.

Before proceeding to the analysis of the public’s role in empowering landlords, it is worth warning against an overcorrection that reduces all aspects of economic behavior to legal design. To emphasize that there are not two separate spheres of “state” and “economy” is not only a refutation of the idea of a pre-political market but also that of an omnipotent state that acts as a pure vector for whatever ends its masters’ design. Even strong administrative states with robust enforcement have regulatory regimes pockmarked not only with legal loopholes but with behavioral

24. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8, 12 (1927).

25. See generally Faisal Chaudhry, *Property as Rent*, 94 ST. JOHN’S L. REV. 363 (2020).

26. THORSTEIN VEBLÉN, ABSENTEE OWNERSHIP AND BUSINESS ENTERPRISE IN RECENT TIMES: THE CASE OF AMERICA 66-67 (1923).

27. Chaudhry, *supra* note 25, at 396.

28. JONATHAN NITZAN & SHIMSHON BICHLER, CAPITAL AS POWER: A STUDY OF ORDER AND CREORDER 228 (2009).

29. Samuel Bowles & Herbert Gintis, *Power* 37 (Univ. of Mass. Amherst, Working Paper No. 2007-03).

inconsistencies at the level of both government and private individuals; legal indeterminacy combined with human irrationality ensures that the shepherd of state always loses some sheep.

Still, any economic autonomy that is channeled through property markets relies on the implicit enforcement of the State's promise to exclude. That promise represents both the deployment of real public resources and the private accumulation of potentially public resources. Perhaps most importantly, that promise creates power that emanates through social behavior regardless of explicit state involvement.

III. THE "STATE" OF EVICTION

The foregoing theoretical perspective grounds the assertion that the state creates the condition for the extraction of rents from private property by supporting the exclusion of some for the benefit of others. Before discussing the costs of that extraction, it is important to identify the ways it is enabled by the use of public power to strengthen landlords and weaken tenants. Such an exploration will be necessarily limited here, but even a brief overview can provide a map of potential sites for struggle over the character of public intervention in property markets.

A. *Empowering Evictors*

The reliability of exclusion guaranteed by the state allows landlords to rely on it as a source of both power and wealth. This is true even when the law does not explicitly support landlords' particular approach to eviction; in fact, as long as there have been formal processes for enlisting the state to eject tenants, some landlords have circumvented them in favor of the private violence known as self-help or forcible entry.³⁰ While this behavior has been criminalized since the fourteenth century, courts have historically insulated scofflaw landlords from liability.³¹ In the early United States, adoption of the so-called "English rule" limited liability for landlords who used "no more force than is reasonably necessary" in the process of forcible ejection.³² While most states have since adopted additional tenant protections against "forcible entry and detainer," twenty-five states still legally protect self-help

30. When Henry II endorsed a summary eviction process known as the "assize of novel disseisin" in 1166, landlords found it so burdensome that they avoided it in favor of violent "forcible entry," a harm that grew so pervasive it led Richard II to make it a crime in 1381. Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 773-74 (1993).

31. *Id.* at 774-75.

32. *Id.* at 775-77.

evictors from punitive damages and twenty-three allow tenants to remain dispossessed even if the eviction was done illegally.³³

As Robert Hale noted in 1923, “the undoubtedly coercive character of the pressure exerted by the property owner is disguised” by the State’s willingness to make illegal “some of the grosser forms of private coercion.”³⁴ This dynamic can be seen in the laws that sought to protect tenants against self-help eviction, many of which also allowed landlords to recover alleged rent debts and remove tenants from their homes through an expedited court process without the procedural protections available to other civil litigants.³⁵ These “summary evictions,” designed by landowner legislators to facilitate their shared interests in rent extraction,³⁶ have remained an essential vector for state empowerment of landlords.

Tenants in the summary eviction process are rarely represented by counsel, and even when represented are frequently pressured by harried judges into harsh settlements that surrender protections to which they may have otherwise been entitled.³⁷ The resulting stipulations often grant a judgment in the landlord’s favor and impose restrictions on the tenant beyond their initial lease agreement, resulting in a system of “civil probation” that allows landlords to further leverage the already imbalanced summary eviction process.³⁸

Tenants have tried and failed to fight summary eviction through legal arguments that it violates due process,³⁹ suggesting the need for a more explicitly political project to reform or abolish summary process through legislation. Tenant movements have had some success in rebalancing courthouse power, however, and the establishment of a tenant right to counsel in many jurisdictions provides a model for broader fights to subvert the landlord privilege embodied in the summary process.⁴⁰ Though it is naïve to imagine that tenants can be sufficiently empowered through court reform alone, reducing landlord power *within* courts is crucial to reducing the extractive power they wield outside of court through threats to evict.

33. N. Edward Coulson et al., *Tenant Rights, Eviction, and Rent Affordability* (May 11, 2024), <https://economics.ucr.edu/repec/ucr/wpaper/202404.pdf>.

34. Hale, *supra* note 22, at 474.

35. Andrew Scherer, *The Case Against the Summary Eviction Proceedings: Process as Racism and Oppression*, 53 SETON HALL L. REV. 1, 4-5 (2022); Kathryn Ramsey Mason, *Housing Injustice and the Summary Eviction Process: Beyond Lindsey v. Normet*, 74 OKLA. L. REV. 391, 398-99 (2022).

36. Scherer, *supra* note 35, at 55-56.

37. See generally Nicole Summers, *Civil Probation*, 75 STAN. L. REV. 847 (2023).

38. *Id.* at 859, 868.

39. Mason, *supra* note 35, at 393.

40. Scherer, *supra* note 35, at 51; see also *infra* Section V.

B. Backing Landlord Threats

The primary transmission line for the state's augmentation of landlord power is the threat of eviction, which can be used both for debt collection and tenant discipline.⁴¹ Tenants typically enter leases lacking sufficient knowledge or leverage for effective negotiation, a dynamic exacerbated by supply restrictions that limit tenants' alternative housing options and boost landlords' power. Unable to negotiate the terms of the tenancy, tenants often end up signing leases with clauses that they do not understand and that may not even be legal.

Once signed, landlords can use a lease as a tool for threatening tenants with eviction, regardless of the ultimate enforceability of the lease terms. Landlords may ask for increased rent before a lease is over or tack on fines and fees not contemplated in the lease on the assumption that many tenants will either pay the extra money or build up arrears that can be used for further discipline.⁴² This pressure is intensified by short notice requirements for eviction on the basis of alleged rent arrears, with a nationwide average requirement of only five days before a landlord can proceed with eviction.⁴³ The implicit state support of expedited eviction described above empowers landlords by making these threats credible. The threat itself can then be enough to discipline tenants without any need for the courts. As one landlord interviewee in a 2019 study stated in a discussion of Section 8 tenants, "[t]hey all know that if they screw up with me—if I evict them—then they lose the voucher . . . therefore, they, you know, they behave better."⁴⁴ This is consistent with Bichler and Nitzan's observation that the *right* to exclude provides a source of power even when it is not exercised.⁴⁵

While the state may have limited capacity to prevent landlords from threatening otherwise illegal eviction, reforms to the eviction filing process combined with popular education could help defang landlords' threats and blunt their extractive force. Requiring landlords to apply for publicly funded rent assistance before pursuing arrears through a court case, a model that proved effective during COVID-19,⁴⁶ would be another way to interrupt the expedited eviction process and protect tenants from unfounded debt allegations. Further, landlord licensing or registration systems could

41. See generally Philip ME Garboden & Eva Rosen, *Serial Filling: How Landlords Use the Threat of Eviction*, 18 CITY & CMTY. 1 (2019).

42. *Id.*

43. Coulson et al., *supra* note 33.

44. Garboden & Rosen, *supra* note 41, at 17-18.

45. NITZAN & BICHLER, *supra* note 28, at 228.

46. See Sam Gilman, *The Return on Investment of Pandemic Rental Assistance: Modeling a Rare Win-Win-Win*, 18 IND. HEALTH L. REV. 293, 330-333 (2021).

facilitate public accountability for landlords who abuse the court process or use other out-of-court methods for tenant discipline and rental extraction.

C. *Facilitating Constructive Eviction*

One of the few rights that tenants have by default when entering a lease is the warranty of habitability, which requires landlords to ensure a minimum level of safety and maintenance in a rented dwelling. Unfortunately, enforcement of this right typically requires withholding rent and using the warranty as a defense in an eviction case.⁴⁷ This method requires tenants to take on the stigma of an eviction record even when they are justified in their withholding, and the tenants who do brave a court case have a success rate of warranty claims that hardly justifies the associated risks. One study of cases in the New York Housing court found that rent abatements were only awarded in 3.5% of the cases where conditions were raised by tenants as a defense, with courts often ordering tenants to pay full rent without ordering landlords to make needed repairs.⁴⁸

Through this deprioritization of tenants' rights and the broader lack of enforcement of health and safety codes applicable to rental properties, the state enables landlords to create conditions that render a rental unit uninhabitable, known as "constructive eviction." Right to counsel programs can assist tenants in pursuing habitability claims, but increased proactive enforcement requires legislation that expands protections from landlord neglect and harassment and increased funding for the agencies (including legal services providers) that enforce the expanded rights.⁴⁹

D. *Making Implied Force Explicit*

Once an eviction judgment has been rendered, the state steps in directly to ensure that tenants are forcibly removed from their homes by police or deputized private actors. The removal of tenants from their homes is perhaps the state's most visible intervention on behalf of landlords, but its direct impact on rental profitability is muddled. Landlords can incur significant legal fees and turnover costs in the course of an eviction and the following

47. See generally Paula A. Franzese et al., *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS UNIV. L. REV. 1 (2016).

48. Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 UNIV. CHI. L. REV. 145, 191 (2020).

49. Zachary Hale, *The Legal Help NYC Tenants Need Most*, N.Y. DAILY NEWS (Feb. 21, 2022, 10:00 AM), <https://www.nydailynews.com/2022/02/21/the-legal-help-nyc-tenants-need-most/> (showing how New York's Housing Stability and Tenant Protection Act of 2019 and the Anti-Harassment Tenant Protection program may provide potential examples).

vacancy, but the vacancy also provides an opportunity to increase rents either in the vacant unit or across a broader portfolio where units are held vacant to reduce supply. While there are obvious benefits to eviction for landlords, the immediate costs and accompanying uncertainties often lead landlords to take on practices that “minimize the number of evictions executed and maximize the amount of rent paid.”⁵⁰

Whether tenants move on threat of incarceration or under the dripping duress of neglect and harassment, the state is in the background, supporting the landlord’s claim on income over the tenant’s right to safe, healthy housing. Through a Hohfeldian lens, laws for rental housing create rights and duties for both tenants and landlords, but the state prioritizes enforcement of tenant duties over tenant rights. An alternative enforcement landscape could invert this preference and put tenant safety and stability ahead of landlord investment returns. This enforcement would come at the cost of increased public spending and reduced value growth for rental assets, but these tradeoffs are no more radical than the ones made by our current political and economic arrangements.

IV. ACCOUNTING FOR EVICTION’S SOCIAL COSTS

Examining the public costs of eviction requires accounting for both the public expenditure related to tenant removal and for the broader harms incurred by society. This calls for a total accounting of “social costs,” defined by economist K. William Kapp as the “direct and indirect losses suffered by third persons or the general public as a result of private economic activities.”⁵¹ Kapp’s ideas about social cost accounting were informed by Veblen’s conception of “social waste”⁵² and Karl Polanyi’s theory of “substantive economics,”⁵³ all of which emphasized the systemic harms associated with profit-focused systems of production.

Against neoclassical notions of a market mechanisms that rationalizes chaotic activity, Kapp argued that markets that allocate as much loss and damage as possible onto the general public while privatizing the resulting profit are inherently irrational from the perspective of society.⁵⁴ Kapp further distinguished social costs from the neoclassical economic concept of “externalities” by emphasizing the inseparability of social costs from the

50. Garboden & Rosen, *supra* note 41, at 11.

51. K. WILLIAM KAPP, *THE SOCIAL COSTS OF PRIVATE ENTERPRISE* 13 (2d prtg. 1975).

52. *Id.* at 238.

53. *Id.* at 244.

54. Sebastian Berger, *K. William Kapp’s Social Theory of Social Costs*, 47 *HIST. POL. ECON.* 227, 229 (2015).

general production of value, which in turn required analysis of the productive system as a whole.⁵⁵ As Kapp explained, “whether progress and growth are worth their price can be determined only after we have a complete knowledge of the *total* costs involved.”⁵⁶

The total costs involved with eviction, however, are difficult to calculate. This is in part due to the difficulty of measuring the number of evictions that take place at all. Eviction filings and judgments are distributed among state and local court systems that do not share a standardized method of reporting, and even with access to those records, it is virtually impossible to know how many evictions were carried out without recourse to the courts.⁵⁷ Despite these limitations, there have been attempts to estimate the prevalence of evictions in the U.S., with one notable study out of Princeton University estimating 3.6 million eviction filings per year between 2000 and 2018.⁵⁸ That same department maintains an Eviction Tracker project led by Matthew Desmond, which pulls from public data across ten states and thirty-six cities.⁵⁹ As of September 2024, the Eviction Tracker had counted over one million evictions in those jurisdictions over the past calendar year,⁶⁰ each carried out at the expense of the communities whose members are being displaced.

A. *The Costs of Eviction for Public Budgets*

The exact amount of money spent on any given eviction is difficult to measure for reasons similar to those described above, with the additional complication that the associated costs vary widely by region. However daunting a task, the robust accounting of the administrative costs associated with eviction cases and ultimate removal will be an important area for future research. The limited studies that do exist on related expenditures suggest that the cost is extensive: a 2019 study on “The Cost of Eviction and Unpaid Bills of Financially Insecure Families for City Budgets” across ten major American cities estimated that cities took budget hits of tens (or, in the case of New York City and Los Angeles, hundreds) of millions of dollars in

55. KAPP, *supra* note 51, at 15.

56. *Id.*

57. See generally Ashley Gromis et al., *Estimating Eviction Prevalence Across the United States*, 119 PNAS (2022), <https://www.pnas.org/doi/10.1073/pnas.2116169119>.

58. *Id.*

59. *Eviction Tracking*, EVICTION LAB, <https://evictionlab.org/eviction-tracking/> (last visited Sept. 15, 2024).

60. *Id.*

exchange for supporting structures that perpetuate financial precarity.⁶¹ Similarly, cost-benefit analyses of potential eviction diversion programs have estimated that governments spend two to four times more facilitating evictions than they would preventing them, suggesting that the state choices involved in supporting eviction are not just inhumane but also inefficient.⁶²

B. *The Costs of Eviction for Impacted Communities*

While there are significant direct costs to local governments, the bulk of eviction costs are borne by individuals and families who are evicted. In a study published in February 2024, a group of economists at Yale's Tobin Center for Economic Policy estimated that an eviction order led to a 300% relative increase in the likelihood of a family using emergency shelter services, with the disproportionately impacted Black tenants incurring a 467% relative increase.⁶³ The same study found that evictions led to an average drop in income of nearly 15%,⁶⁴ while a 2022 study found that eviction is associated with both increased healthcare spending and disruption of healthcare services.⁶⁵ The extensive adverse health effects of eviction and the homelessness that often follows it have been thoroughly documented,⁶⁶ as have their associated costs for local government.⁶⁷ In a 2021 study primarily focused on the impact of eviction on the spread of COVID-19, a team of public health researchers demonstrated that evictions were correlated with a number of severe outcomes, including a higher mortality rate and

61. *The Cost of Eviction and Unpaid Bills of Financially Insecure Families for City Budgets*, URBAN INST. (2019), <https://www.urban.org/policy-centers/cross-center-initiatives/opportunity-ownership/projects/cost-eviction-and-unpaid-bills-financially-insecure-families-city-budgets>.

62. See Gilman, *supra* note 46, at 352; STOUT RISIUS ROSS, INC., THE FINANCIAL COST AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL IN EVICTION PROCEEDINGS UNDER INTRO 214-A, NAT'L LEGAL AID & DEF. ASS'N (Mar. 16, 2016), <https://legalaidresearch.org/2020/01/31/the-financial-cost-and-benefits-of-establishing-a-right-to-counsel-in-eviction-proceedings-under-intro-214-a/>.

63. Robert Collinson et al., *Eviction and Poverty in American Cities*, 139 Q.J. ECON. 57, 100-03 (2024).

64. *Id.* at 105.

65. Gabriel L. Schwartz et al., *Eviction Healthcare Utilization, and Disenrollment Among New York City Medicaid Patients*, 62 AM. J. PREVENTIVE MED. 157-59, 162 (2022).

66. See generally REBECCA COHEN & KEITH WARDRIP, CTR. FOR HOUS. POL'Y, SHOULD I STAY OR SHOULD I GO? EXPLORING THE EFFECTS OF HOUSING INSTABILITY AND MOBILITY ON CHILDREN, (Feb. 2011), https://mcstudy.norc.org/publications/files/CohenandWardrip_2009.pdf. See also Colleen M. Heflin & John Iceland, *Poverty, Material Hardship, and Depression*, 90 SOC. SCI. Q. 1052, 1068 (2009).

67. See, e.g., William N. Evans et al., *Reducing and Preventing Homelessness: A Review of the Evidence and Charting a Research Agenda* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26232, 2019).

increased incidence of respiratory conditions and coronary disease.⁶⁸ Additionally, just as the State-backed threat of eviction is enough to provide landlords with coercive power, the prospect of eviction is itself associated with a host of negative mental and physical health outcomes.⁶⁹

C. *The Disproportionate Burdens of Eviction Costs*

The negative impacts of eviction and the threat of eviction are also disparately distributed, with disproportionate harm done to Black tenants even when controlling for income.⁷⁰ Women are also disproportionately impacted by evictions, and those who have experienced eviction are at increased risk of physical and sexual assault and reproductive complications.⁷¹ The level of child suffering correlated with eviction is particularly staggering, with childhood evictions associated with increased incidence of lead poisoning, food insecurity, academic decline, and chronic disease as well as a decrease in life expectancy.⁷² A meaningful social accounting for the costs of eviction should put additional weight on the costs borne by already vulnerable populations to reflect the multiplication of structural and historical imbalances.

V. TRACING THE VALUE OF EVICTION

These costs incurred by the broader social community are directly tied to the value that the state creates through the eviction process, which is registered first as income extracted from rental properties and then amplified throughout the broader financial system via leverage and securitization. When rental real estate firms describe tenant protections as a threat to their financial performance,⁷³ they are explicitly recognizing the role that the state plays in facilitating their business model. The following section identifies components of that model, focusing on the ways that landlords use state power to extract incomes for themselves and their associated investors.

68. Emily A. Benfer et al., *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, 98 J. URB. HEALTH 1, 2, 4 (2021).

69. Hugo Vásquez-Vera et al., *The Threat of Home Eviction and Its Effects on Health Through the Equity Lens: A Systematic Review*, 175 SOC. SCI. & MED. 199, 200, 202-04 (2017).

70. See, e.g., Scherer, *supra* note 35.

71. Benfer et al., *supra* note 68, at 4.

72. *Id.*

73. See generally Benjamin F. Teresa, *Managing Fictitious Capital: The Legal Geography of Investment and Political Struggle in Rental Housing in New York City*, 48 ENV'T. AND PLAN. A 465 (2016); Desiree Fields, *Constructing a New Asset Class: Property-led Financial Accumulation After the Crisis*, 94 ECON. GEOGRAPHY 118 (2018).

A. *Setting and Collecting Rent*

Perhaps the most obvious role that eviction plays in generating real estate value is the conversion of tenant precarity into rents. This is true even where the entire landlord-tenant relationship is conducted without the express threat of legal action. This dynamic becomes especially important when a tenant's rent is increased from one term to the next, with every proposed rent increase carrying a shadow term, "or else, eviction." In the absence of a rent control or just cause eviction law, landlords have no ceiling on the rent increases they can propose,⁷⁴ and budget constrained tenants lack the power to bargain at the individual level. In the common case where a proposed rent increase is beyond the tenant's financial capacity, the increase itself is a form of eviction.

The stability of rent collection and the likelihood of its increase over time creates a stream of revenue that can be projected and abstracted into other forms of value. The volume of this income flow is supposed to act as an incentive for investment in the construction and management of housing, but the interests of those investing in properties are often misaligned with those who live in them. Because investors seek competitive returns, they demand not only that rental revenues stay as high as the market will bear, but that the market be designed to bear ever higher levels of rent extraction over time. Conversely, regulations on eviction or rent increases are portrayed as disincentives that will increase costs for rental property owners and ultimately reduce housing supply.⁷⁵ While there is mixed research on rent regulations' impact on housing production,⁷⁶ the argument that regulation decreases production is consistent with the idea that state facilitation of eviction makes rental properties a more attractive investment.

B. *Cost Savings through Neglect*

When rents cannot be increased any further, landlords can continue to boost their profits by reducing their maintenance costs. This can be done by deferring needed repairs and capital improvements as well as by avoiding more expensive skilled contractors in favor of cheaper—and often unqualified—workers. The state facilitates this method of profit squeezing through the aforementioned deprioritization of habitability claims as well as

74. This is separate from the idea that there is no limit on what landlords can charge in the aggregate or over the medium term; at some point the inability to receive proposed rent will result in a decrease in income either from lowering rent or allowing vacancy to persist.

75. See Coulson et al., *supra* note 33, at 4.

76. See J. W. Mason, *Considerations on Rent Control*, SLACKWIRE: J. W. MASON (Nov. 14, 2019), <https://jwmason.org/slackwire/considerations-on-rent-control/>.

through reactive, complaint-based code enforcement regimes. And, of course, the ease of no-cause eviction and unverified debt collection further suppresses tenant complaints due to fear of retaliation. Beyond cost savings, landlords enjoy an affirmative financial benefit when the likelihood of eviction and unlikelihood of successful habitability claims dissuade tenants from withholding rental payments to compel repairs. Because abatements under the warranty of habitability would lower the collectable rent for the impacted units, landlords who continue to charge the contract rent without making repairs are effectively overcharging tenants living in unsafe conditions. The state's failure to enforce habitability laws allows for a steady flow of expected rental income without the interruptions, reductions, or fines that might be legally justified, ensuring that rental properties will be an attractive investment not only for the direct beneficiaries of rental payments but for those who invest in the associated assets.

C. *Investing in Displacement*

The revenue-generating and cost-saving approaches described above represent a bundle of state-backed benefits that allow rental real estate to serve as a lucrative investment. The real estate industry's reliance on this bundle has led investors and economists to argue that tenant protections represent a threat to the business models of landlords and developers.⁷⁷ The expectation of this bundle's stability moving forward allows real estate firms to project a building's (or often, a larger portfolio's) potential for increased income into the future, which in turn increases potential valuation for commercial mortgage debt under conventional pro-forma underwriting practices.⁷⁸ This increases not only the potential purchase price of the underlying property but also the potential value of its use as collateral to finance portfolio expansion or other business expenditures.

As the associated loans are packaged for resale, typically as Commercial Mortgage-Backed Securities (CMBS), the value produced by state-facilitated eviction is shifted out onto balance sheets beyond the financial institutions immediately involved in rental investments. Simultaneously, improved financial performance on existing properties allows firms to attract more equity investment, with shares of investment vehicles like Real Estate Investment Trusts (REITs) becoming yet another asset inflated by eviction-protected rental income. Trade in these assets, as well as new debts that use these assets as collateral, further amplify the contribution of rental revenues

77. See Coulson et al., *supra* note 33 (citing several studies on impact of rental regulation and building a model of tenant rights as a cost to landlords).

78. Teresa, *supra* note 73, at 472-73.

to the overall performance of the so-called FIRE sector of financial, insurance, and real estate firms that dominate the U.S. economy.

The relatively new asset class of single-family rental-backed securities, or “SFRs”, illustrates the relationship between rental income, real estate value, and the broader financial system. In the years following the collapse of housing markets in the Great Financial Crisis, both investors and politicians sought new ways to stabilize real estate prices and revive chains of investment income that had become untenable—or illegal—after the market’s collapse. One popular strategy was to purchase foreclosed single-family properties and convert them to rental housing, which could then be the source of bundled revenue streams subject to securitization and resale.⁷⁹ Eviction of foreclosed-on families facilitated the conversion of owner-occupied homes into a less-secure form of tenure, generating rental income subject to the expedited recovery methods described above rather than the more arduous foreclosure process.

Private equity firms, which had been virtually absent from the single-family rental market prior to the Great Financial Crisis, established the National Rental Home Council to promote their collective involvement in the conversion of thousands of houses (predominantly in the Sun Belt) into rental properties.⁸⁰ The global investment firm Blackstone, whose website boasts that it did not own any single-family homes before “the crisis,”⁸¹ soon became the largest corporate landlord in the country through its subsidiary Invitation Homes.

Despite their recent entry into the rental housing market, private equity landlords are responsible for a disproportionate amount of eviction filings.⁸² Blackstone’s Invitation Homes, which pioneered SFR issuance in 2013, directly recognizes the role that evictions play in their business model, with their 2022 Annual Report stating that “[e]viction, tenant rights, rent control, and rent stabilization laws, and other similar laws and/or regulations that limit our ability to collect rent, enforce remedies for failure to pay rent, or increase rental rates may negatively impact our rental income and

79. Fields, *supra* note 73.

80. *Id.*

81. *Correcting the Record on Blackstone and Invitation Homes*, BLACKSTONE: FIRM NEWS (Nov. 19, 2019), <https://www.blackstone.com/insights/article/correcting-the-record-on-blackstone-and-invitation-homes/>.

82. *See Record Acquisitions and High Evictions by Corporate Landlords in 2021 Draw Scrutiny from Congress*, PRIV. EQUITY STAKEHOLDER PROJECT: NEWS AND BLOG (Jan. 31, 2022), <https://pestakeholder.org/news/record-acquisitions-and-high-evictions-by-corporate-landlords-in-2021-draw-scrutiny-from-congress-2/>.

profitability.”⁸³ Similarly, the 2022 Annual Report for Equity Residential—a REIT specializing in apartment rentals—included a risk disclosure that “adoption of, or changes in, rent control or rent stabilization regulations and eviction restrictions could have an adverse effect on our operations and property values.”⁸⁴

While the performance of SFRs and REIT share prices reflect much more than just the current or projected rental income,⁸⁵ a consistent failure of rental income to meet its projections would weaken asset performance at multiple levels. Most concretely, failure of landlords to make mortgage payments can lead to defaults that impact the debt asset market, while the resulting forced sales of rental properties can lower real estate valuation more broadly.⁸⁶ By enhancing landlords’ ability to maintain consistent and increasing income flows, the promise of state enforcement increases the appeal of rent-backed assets for institutional investors,⁸⁷ which in turn lowers the cost of financing for firms in the business of extracting rent through the threat of eviction.

VI. CHANGING THE VALUES OF RENTAL HOUSING

This essay has begun the project of mapping the state’s role in evictions and accounting for the private gains and public costs that those evictions generate. In doing so, some potential openings for future action responsive

83. INVITATION HOMES, ANNUAL REPORT 2022, https://s28.q4cdn.com/264003623/files/doc_financials/2022/ar/invh_2022_ar_web_bmk.pdf (last visited Sept. 15, 2024).

84. EQUITY RESIDENTIAL, 2022 ANNUAL REPORT, https://s1.q4cdn.com/843629197/files/doc_financials/2022/ar/2022-Annual-Report.pdf (last visited Sept. 15, 2024).

85. The value of assets on any particular balance sheet is impacted by whether they are accounted for as “held to maturity” or “marked to market” (a distinction that has significant ramifications as seen in the recent collapse of Silicon Valley Bank), and the market price of any particular asset is dependent on many demand variables that are not directly related to the underlying income stream. See, e.g., Amanda Blanco, *Signs of SVB’s failure likely hidden by obscure ‘HTM’ accounting designation. Are reforms needed?*, FED. RSRV. BANK OF BOS., (Dec. 14, 2023), <https://www.bostonfed.org/news-and-events/news/2023/12/silicon-valley-bank-failure-accounting-designation-held-to-maturity-obscure.aspx> (describing held to maturity accounting); Robin Wigglesworth, *How bonds ate the entire financial system*, FIN. TIMES, (Aug. 2, 2023), <https://www.ft.com/content/5631cc22-a04d-405c-9154-e307f938f8f3> (describing how demand can develop for assets with bad fundamentals).

86. The Lehman Brothers collapse in 2008 is a paradigmatic example of how distorted valuations can cause cascading losses when the underlying asset does not perform as projected. See generally Joe Hernandez, *How Lehman’s Collapse 15 Years Ago Changed the U.S. Mortgage Industry*, NPR (Sept. 15, 2023, 5:01 AM ET), <https://www.npr.org/2023/09/15/1199321274/lehman-brothers-collapse-2008-mortgages>.

87. See generally Mary Beth Fisher, *The Market in Single-Family Rental Debt*, AMHERST PIERPOINT, <https://apsec.com/site-content/uploads/2021/04/APS-SFR-Primer-April-2021-FINAL.pdf> (last visited Sept. 15, 2024).

to present conditions have emerged. While the following discussion is far from exhaustive, a commitment to social cost accounting requires consideration of alternative economic arrangements. Future research detailing eviction policies across jurisdictions should also develop alternative channels for state power that would reduce and ultimately eliminate the landlord-tenant imbalance.

A. *Empowering Tenants through Advocacy*

Shifting power to tenants can be affected both through the creation of new rights as well as changes in the enforcement of those that already exist.⁸⁸ One approach that is gaining momentum across the U.S. is the provision of legal services for tenants in eviction proceedings, generally framed as a “right to counsel,” which has spread to seventeen cities, two counties, and five states since 2017.⁸⁹ While right to counsel programs differ in scope and scale, expanding tenant representation in eviction cases has generally succeeded in keeping represented renters in their homes.⁹⁰

As the right to legal representation provides this vital harm reduction, right to counsel programs can also shift power in the medium-term by changing expectations of enforcement for both landlords and tenants. For the right to counsel to move beyond harm reduction into the realm of “non-reformist reform,”⁹¹ however, it must be deployed as part of a larger strategy of power-building that goes beyond procedural rights.⁹² At minimum, this requires provision of other services that proactively empower tenants, such as outreach about housing rights, funding to support tenant organizing, and representation for affirmative habitability enforcement. This should also be

88. These are tightly linked strategies as any new enforcement strategies inevitably rearrange rights and any substantive rights-generating legislation inevitably requires enforcement design.

89. *The Right to Counsel for Tenants Facing Eviction: Enacted Legislation*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS., https://civilrighttocounsel.org/wp-content/uploads/2023/11/RTC_Enacted_Legislation_in_Eviction_Proceedings_FINAL.pdf (last updated December 2024).

90. *Id.*

91. Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2527 (2023) (“The basic formulation of the non-reformist reform is twofold. First, a non-reformist reform aims to undermine the political, economic, and social system or set of relations as it gestures at a fundamentally distinct system or set of relations in relation or toward a particular ideological and material project of world-building. Second, a non-reformist reform draws from and builds the popular strength, consciousness, and organization of revolutionary or agential classes or coalitions . . .”).

92. See John Whitlow, *Gentrification and Countermovement: The Right to Counsel and New York City's Affordable Housing Crisis*, 46 FORDHAM URB. L.J. 1081, 1086 (2019); see also Akbar, *supra* note 92, at 2535-36.

coupled with pushes to expand the bundle of rights available to tenants, such as regulations on rent increases or even limitations on no-cause evictions.⁹³

B. *Restricting Latitude for Evictors*

As described in Sections III and V, the state's perpetuation of housing precarity helps to weaken the bargaining position of both current and prospective tenants and increases landlord leverage for rent extraction. As a result of pressure from tenant movements, governments are increasingly considering regulations that would restrict potential justifications for eviction. As of this writing, 43 jurisdictions across the U.S. have enacted some form of "good cause" or "just cause" eviction protections, including 10 states and the District of Columbia.⁹⁴ These laws effectively require that landlords renew or extend tenancies in the absence of certain "good causes," such as breach of lease or nonpayment of rent.⁹⁵ In acknowledgement of the eviction implicit in rent increases, these laws often put restrictions on the amount that a landlord can increase the rent from term to term. While these protections would provide a vital level of security and stability for renters, and accordingly weaken landlords' power to use the threat of eviction for certain extraction strategies, the prospect of eviction for the enumerated causes coupled with the continued use of summary eviction process for nonpayment cases would still retain key aspects of the landlord power structure.

C. *Deprioritizing Evictions in Court*

Accordingly, an important vector for weakening the power that the state provides to landlords is to remove the privileges afforded by the summary eviction process.⁹⁶ With summary eviction cases used overwhelmingly for the collection of debts rather than to seek possession in its own right,⁹⁷ two clear-eyed changes would be to raise the bar for possessory claims and to divert debt claims into separate processes for mediation or rent assistance.⁹⁸

93. See Jade Vasquez & Sarah Gallagher, *Promoting Housing Stability Through Just Cause Eviction Legislation*, NAT'L LOW INCOME HOUS. COAL. (2022), <https://nlihc.org/sites/default/files/Promoting-Housing-Stability-Through-Just-Cause-Eviction-Legislation.pdf>.

94. National Low Income Housing Coalition, *State and Local Tenant Protections Database*, <https://nlihc.org/tenant-protections> (accessed December 10, 2024).

95. Caitlin Dewey, *States Adopt "Good Cause" Policies to Block Wrongful Evictions*, GOVERNING (July 6, 2023), <https://www.governing.com/housing/states-adopt-good-cause-policies-to-block-wrongful-eviction>.

96. Scherer, *supra* note 35, at 35-36; Mason, *supra* note 35, at 395.

97. Scherer, *supra* note 35, at 50; Mason, *supra* note 35, at 425.

98. Mason, *supra* note 35, at 428-429.

Rental assistance programs can also act as a hook for the enforcement of other tenant rights, as seen in the deployment of COVID-19 emergency funding that required landlords to accept restrictions on evictions and rent increases.⁹⁹ In evaluating applications for rent assistance, agencies can also consider housing conditions and landlord accounting practices, mitigating the power imbalance caused by courts' deference to landlords' claims and indifference towards tenants' habitability concerns.¹⁰⁰ Shifting cases out of expedited process, or out of civil litigation altogether, can form part of a strategy of what Lauren Sudeall calls the "delegalization" of disputes that are disproportionately used to punish people suffering from other forms of economic, social, and structural inequity.¹⁰¹

D. Enforcing Housing Codes

Removing the threat of eviction from cases based solely on rental arrears not only avoids the direct harm of evictions but also strengthens the tenant's position with regard to enforcement of other rights. The right to safe and healthy housing, so often weakened by the threat of eviction, can also be proactively reinforced through equitable code enforcement strategies.¹⁰² Requiring landlords to either obtain licenses or register their properties provides a basis for conditioning the privilege of rental income on compliance with certain affirmative regulations. Paired with proactive inspections for code violations, rental licensing can improve housing conditions in the short term and facilitate tenant empowerment in the long term by providing current tenants with a basis for rent abatement and potential tenants with a basis to evaluate housing options.

E. Guaranteeing Housing for All

The strongest legal intervention for tenant empowerment is a universal right to housing, which is recognized in some form in multiple human rights treaties as well as some national and state constitutions.¹⁰³ While the right to

99. Sam Gilman, *Ending Evictions: The Lived Case for Replacing the Violence of Eviction with the Humanity of a Safety Net*, 32 J. AFFORDABLE HOUS. & CMTY. DEV. L. 49, 53, 67 (2023).

100. Summers, *supra* note 48, at 162-164.

101. Lauren Sudeall, *Delegalization*, 75 STAN. L. REV. ONLINE 116, 122-23 (2023).

102. See *A Guide to Proactive Rental Inspections*, CHANGLAB SOLS., https://www.changelabsolutions.org/sites/default/files/2022-11/A-Guide-to-Proactive-Rental-Inspections_FINAL_20221031A.pdf (last visited Sept. 15, 2024); see also Katie Hannon Michel, *Stopping the Vicious Cycle: Equitable Enforcement Strategies to Achieve Safe, Stable, and Accessible Housing for People with Disabilities*, 102 MILBANK Q. 43, 49-50 (2024).

103. Sarah Klammer & Eric Scorsone, *Housing as a Human Right: A Proposed Alternative Institutional Structure in Sacramento*, 56 J. ECON. ISSUES 523, 524 (2022).

housing often lacks the political or material support necessary for its full realization, even in jurisdictions where it is legally enshrined, there are multiple ways that governments can pursue its implementation, including guaranteed public support for rental payments and guaranteed housing outside of the private rental system.¹⁰⁴

Any approach to securing a right to housing will require the deployment of public resources that are not equally available to different national governments or even to different levels of government within the U.S. This crucial fact has led some advocates to call for the U.S. federal government to take responsibility for funding a domestic housing guarantee,¹⁰⁵ which is both a promising proposal and a daunting political challenge. Where political will is available, even governments with relatively harder financial constraints have options for the production of housing outside of the currently constituted market for rentals.

State and local governments often have “balanced-budget” requirements that prohibit deficit spending, leading to reliance on tax revenue or bonded debt that severely restricts potential expenditure. Taxation allows governments to redistribute socially created value,¹⁰⁶ but for this reason it can also incentivize governments to adopt policies that maximize the value of their targeted tax base. This works at cross purposes with the ultimate goal of reducing the extractive power of property ownership. Taxes that target rental real estate extraction are therefore better thought of as a component of overall market design, such as to disincentivize certain extractive models, than as a sustainable source of revenue for funding nonmarket housing.

An alternative model that has been gaining traction in recent years uses debt instruments to fund production of “below market” housing in a process often referred to as “social housing development.”¹⁰⁷ The leading example of this new wave of public housing construction is an initiative in

104. For a discussion of how different countries approach right to housing in the context of evictions, see Susanne Gerull, *Evictions Due to Rent Arrears: A Comparative Analysis of Evictions in Fourteen Countries*, 8 EUR. J. HOMELESSNESS 137, 148-150 (2014).

105. See Ashley Burke, *MMT and the Homes Guarantee*, LPE PROJECT: BLOG (Sep. 10, 2020), <https://lpeproject.org/blog/mmt-and-the-homes-guarantee>. But see Matías Vernengo & Esteban Pérez Caldentey, *Modern Money Theory (MMT) in the Tropics: Functional Finance in Developing Countries* (Pol. Econ. Rsch. Inst., Working Paper No. 495, 2019) (discussing why MMT prescriptions don’t work for many countries).

106. It is important to realize that tax policy is part of the overall state intervention in the initial production and distribution of value, and not only in its after-the-fact redistribution. For more on this point, see Martha T. McCluskey, *Rethinking Economics for Tax Law and Political Economy*, 83 OHIO STATE L.J. ONLINE 94, 104-105 (2022).

107. Mihir Zaveri, *A New Bill Could Bring ‘Social Housing’ to New York*, N.Y. TIMES (Feb. 6, 2024), <https://www.nytimes.com/2024/02/06/nyregion/new-york-state-housing-developer-bill.html>.

Montgomery County, Maryland that uses municipal bond issuance to seed a revolving fund that can finance lower cost development.¹⁰⁸ Major metropolitan areas like Seattle and Atlanta began exploration of a similar model in 2023,¹⁰⁹ and in 2024, the organized housing justice movement in New York announced a legislative priority to create a Social Housing Development Agency.¹¹⁰

Housing authority bonds can be made more reliable than other municipal securities through the use of back door federal guarantees, like the use of voucher money for the servicing income or an explicit guarantee from a federal agency like Freddie Mac.¹¹¹ A more ambitious goal would be the creation of a Federal Reserve facility for public housing securities similar to the one that propped up municipal bonds during COVID-19.¹¹² The resulting demand could increase liquidity for the asset holders and ultimately reduce the cost of borrowing for public housing developers, allowing for lower cost housing production.¹¹³ The federal government could further facilitate these secondary markets by developing public underwriting capacity to make potentially inscrutable bonds more appealing and accessible.¹¹⁴ Implementing the eviction reforms described above would reduce the

108. Paul E. Williams, *The Basic Logistics of Public Development*, CTR. FOR PUB. ENTER. (May 31, 2023), <https://publicenterprise.org/the-basic-logistics-of-public-development/>.

109. Anna Patrick, *Seattle Social Housing Developer Sees First Round of Funding*, SEATTLE TIMES: PROJECT HOMELESS (Aug. 14, 2023, 6:00 AM), <https://www.seattletimes.com/seattle-news/homeless/seattle-social-housing-developer-sees-first-round-of-funding/>; Sean Keenan, *Atlanta plans to embrace “European-style social housing,”* ATLANTA CIVIC CIRCLE (July 3, 2023), <https://atlantaciviccircle.org/2023/07/03/atlanta-launching-urban-development-corporation/#:~:text=The%20city%20of%20Atlanta%20is,housing%20never%20seen%20here%20before..> For more information on this model of public housing development, see Center for Public Enterprise, *Housing Production: Mixed Income Development*, <https://publicenterprise.org/housing/> (last accessed December 10, 2024).

110. Zaveri, *supra* note 108; New York has had other models of public finance for housing development at the state and local level for decades, see N.Y. State Department of Homes and Community Renewal, *Housing Development Fund Corporation*, <https://hcr.ny.gov/housing-development-fund-corporation-hdfc> (last accessed December 10, 2024) (describing the state-level housing finance agency created in 1966); see also N.Y.C. Housing Development Corporation, <https://www.nychdc.com/> (last accessed December 10, 2024) (describing city level housing finance agency created in 1971).

111. *Social Bonds Framework*, FREDDIE MAC MULTIFAMILY, <https://mf.freddiemac.com/docs/social-bonds-framework.pdf> (last visited Sept. 15, 2024).

112. Michael D. Bordo & John V. Duca, *How the New Fed Municipal Bond Facility Capped Muni-Treasury Yield Spreads in the COVID-19 Recession* 1-3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 28437, 2021).

113. For a discussion of this dynamic in asset markets, see Mike Beggs, Senior Lecturer, Univ. of Sydney, Paper Presented at the 38th E. Econ. Ass’n Ann. Meeting: Liquidity as a Social Relation (Feb. 28, 2012), https://www.academia.edu/10274302/Liquidity_as_a_social_relation.

114. Advait Arun, *Overreading into underwriting*, CTR. FOR PUB. ENTER., <https://publicenterprise.org/overreading-into-underwriting/> (March 14, 2024).

potential returns on private market rental investments, further closing the gap in appeal between the resulting securities and smoothing speculative frenzies in real estate. While there are inherent limits and latent dangers to reliance on private asset markets for funding long term public projects, such approaches provide an example of how the value generation fueled by eviction can be replaced with less socially destructive production.

Ultimately, overcoming the political construction of the landlord-tenant relationship requires redistribution of the power that characterizes it; a task made more difficult by the feedback mechanisms that convert state-empowered wealth to political influence. By building and managing housing as a public good, governments can weaken the extractive leverage of rental asset owners over the long term, which can in turn facilitate the ultimate transformation of our housing system into something more just.

VII. CONCLUSION

In her short story "The Ones Who Walk Away from Omelas," Ursula K. Le Guin imagines a town whose residents enjoy the greatest possible pleasures under the bargain that their bliss is only made possible by the horrific suffering of one unfortunate child.¹¹⁵ The diffuse suffering of the real world is not so neatly encapsulated, but there are many forms of concentrated harm that both result from and contribute to more broadly embraced benefits. Eviction is only one of these harms, but, through its examination, we can better understand the mechanisms of power and extraction that characterize a wider range of economic production. In Le Guin's story, some residents of Omelas choose to walk away into the unknown rather than stay in a place that agrees to thrive off of such immense pain, but in our world, we have no allegorical option of escape.¹¹⁶ Once we are exposed to the harms that allow our system to persist, we have to choose between passive condonement or active reconfiguration. It may not be possible to eliminate suffering, but that does not make its current allotment inevitable.

The recognition that rental markets are the result of political and legal design opens up the possibility of reconfiguring public interventions for a more socially valuable outcome. Determining what is socially valuable, in turn, requires a form of accounting that measures a broader range of outputs and weights them based on socially agreed upon metrics. For Kapp, one of the key benefits of quantifying the harms of profit-seeking private behavior

115. URSULA K. LE GUIN, *THE ONES WHO WALK AWAY FROM OMELAS* (1973), *reprinted in THE WIND'S TWELVE QUARTERS* 97 (4th prtg. 1979).

116. *Id.*

was that it enables the development of “social minima,” or acceptable outcomes toward which the public can coordinate production.¹¹⁷

This essay has traced some initial contours of such an accounting, but a full embrace of this approach will require intensive, multidisciplinary research leveraging both quantitative and qualitative methods of measurement and evaluation. To counter the inevitably technocratic dimensions of such an endeavor, there must be mechanisms for democratic and reflexive re-evaluation that improve on the faulty signal transmission of current property markets. Ultimately, the production of housing and its associated value is a political project that both contributes to and benefits from the strength of broader movements for economic justice. This depends on the distribution not only of socially created value, but of the power that shapes it.

117. KAPP, *supra* note 51, at xx-xxi, xxv.