

9-1-2023

Rights and Remedies: Rental Housing for Low-Income Households in the United States

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Recommended Citation

David R. Pape & Mary Elise Papke, *Rights and Remedies: Rights and Remedies: Rental Housing for Low-Income Households in the United States*, 25 Marq. Ben. & Soc. Welfare L. Review 1 (2023).

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RIGHTS AND REMEDIES: RENTAL HOUSING FOR LOW-INCOME HOUSEHOLDS IN THE UNITED STATES

By: David Ray Papke* & Mary Elise Papke**

ABSTRACT

The state of rental housing for low-income households in the United States is deplorable. Unaffordable, unsanitary, and insecure, this housing violates the internationally recognized right of housing. While the United States has never formally recognized that right, the right guarantees not only a roof overhead but also affordability, habitability, and security of tenure. Policies and programs seeking to remedy the problems in rental housing might consciously address these aspects of rental housing. Policies and programs of this sort will not be enough to eliminate all problems, but they would alleviate a matter of great embarrassment, namely, the most affluent country in the world does not adequately house low-income households.

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INTRODUCTION

Fully sixty-one percent of all rental housing in the United States classifies as “low-income,”¹ and the problems with this housing are disturbing. A great majority of the units are overpriced and/or unsanitary, and most have serious hazards and deficiencies – mold, rodents, cracked walls, unreliable heating, or defective plumbing.² These problems routinely put low-income renters at greater risk for injury, disease, stress, and even suicide. Stated bluntly, America’s rental housing for low-income households jeopardizes and harms the general well-being of the housing’s occupants.

This terrible rental housing arguably violates the internationally recognized right of housing and the various protections associated with that right. Although the United States has never ratified this right, American rental housing for low-income households clearly violates key aspects of the right as described in international law. Furthermore, when aspects of the rights to housing are violated, the occupants’ other rights are infringed upon as well. The resulting combination of deficiencies and violations is central in such intractable concerns as poverty, inequality, and alienation from civic affairs.

This article has three parts. The first part discusses the internationally recognized right of housing, noting its importance in international law and underscoring that the right involves much more than a roof overhead. The second part scrutinizes three aspects of rental housing for low-income households – affordability, habitability, and security of tenure – which do not meet normal standards vis-à-vis the right of housing. The third part considers how recognizing the right of housing in the United States might awaken concern with housing problems but then emphasizes how particular laws or government programs might more successfully help remedy these problems.

We acknowledge that none of the laws or government programs that already exist or could be added are capable of solving the problems which are prevalent in rental housing for low-income households. All the remedial laws and government programs have

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¹ See JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, AMERICA’S RENTAL HOUSING 2022 13 (2022).

² See U.S. Government Accountability Off., *GAO-20-427, Rental Housing: As More Households Rent, the Poorest Face Affordability and Housing Quality Challenges* (2020), <https://www.gao.gov/products/gao-20-427> [https://perma.cc/VM2G-HFLB].

flaws and need refinement. All will be opposed by landlords and others. However, the laws and government programs we discuss in the third part of this article at least illustrate what might be done regarding a disturbing reality: rental housing for low-income households in the most affluent nation in the world is deplorable.

I. HOUSING RIGHTS ON THE WORLD STAGE

The United Nations and its various committees and affiliated offices have formally recognized the right of housing. Indeed, these international bodies have revisited the right of housing on several occasions, each time reiterating the right's importance and further spelling out what the right entails. Few international rights have the significance and respect accorded to the right of housing, and numerous individual countries have repeatedly recognized the right of housing, in the process confirming their strong commitment to it.

To begin with the United Nations, that body's Assembly offered support for the right of housing when it met in Paris in the winter of 1948. In a sustained burst of humanistic forcefulness, the Assembly published the "Universal Declaration of Human Rights," which set out the essential rights of all human beings.³ Note that the Declaration listing was not merely an expression of hopes or aspirations but rather what the delegates took to be a listing of fundamental human entitlements. According to Jeremy Waldron, "To say that one has a *right* that is being abused or neglected is not to heighten the pathos."⁴

Everyone, the delegates thought, should have their fundamental rights, and nobody should be able to take them away. Claiming your rights is "to face one's oppressors, and bring to bear on the situation the dignity of that power of *being a person*."⁵ So stirring and respected is the Declaration of Human Rights that it has been translated into over 500 languages, making it the most translated document in the world.⁶

Following a Preamble that reads in part "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice,

³ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

⁴ Jeremy Waldron, *Rights and Needs: The Myth of Disjunction*, in LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES (Austin Sarat & Thomas R. Kearns eds., 87 (1996)).

⁵ *Id.*

⁶ UN Office of the High Commissioner for Human Rights, *New Record: Translations of the Universal Declaration of Human Rights Pass 500* (Nov. 2, 2016) <https://yubanet.com/world/new-record-translations-of-universal-declaration-of-human-rights-pass-500/>, [<https://perma.cc/Z8P4-YWUD>].

and peace in the world,"⁷ the Universal Declaration of Human Rights proffers thirty Articles. The 25th Article proclaims that everyone is entitled to adequate well-being for oneself and one's family,⁸ and the Article also says this would include appropriate food, clothing, housing, medical care, and social services.⁹ The delegates clearly understood housing to be different than property in general. The delegates addressed the latter in a fully separate article of the Declaration.¹⁰

In 1966, the United Nations General Assembly once again considered housing rights, this time on the assumption that the ability of human beings to live free from fear and want required not only political rights but also certain economic, social and cultural rights. This recognition that "rights" need not be just political represented an important broadening of the rights concept and an appreciation that freedom exists (or does not exist) in economic, social and cultural contexts. The General Assembly then published a special International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹ It contained thirty-one Articles, and Article 11, Section 1 read: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."¹²

While President Jimmy Carter signed the ICESCR in 1977, the United States Senate has unfortunately never ratified the document.¹³ Furthermore, the United States has over the years reiterated its opposition to the document. At the 2005 meeting of the United Nations on Human Rights in Geneva, Switzerland, for example, the United States stood alone in opposition to many of the resolutions.¹⁴ Regarding the right of housing in particular, United States delegate Goli Ameri summed up the American position: "The United States does not support the 'right to adequate housing' or 'housing rights,' because such a right does not exist."¹⁵

⁷ G.A. Res. 217 (III) A, *supra* note 3, at Preamble.

⁸ *See id.* at Article 25.

⁹ *See id.*

¹⁰ *See id.* at Article 17.

¹¹ G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966).

¹² *Id.* at Article 11, Section 1.

¹³ *See* INTERNATIONAL HUMAN RIGHTS COMMITTEE OF THE NEW YORK CITY BAR, ADVANCING THE RIGHT OF HOUSING IN THE UNITED STATES 1 (2016).

¹⁴ *See* Mayra Gomez & Bret Thiele, *Housing Rights Are Human Rights*, AMERICAN BAR ASSOCIATION (July 1, 2005), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol32_2005/summer2005/hr_summer05_housing/#:~:text=Indeed%2C%20housing%20rights%20are%20not%20a%20new%20development,the%20most%20authoritative%20international%20s [https://perma.cc/3TLA-4QF8].

¹⁵ *Id.*

Despite the cold shoulder from the United States, the Committee on Economic, Social and Cultural Rights in subsequent years developed further the various articles in the Covenant by offering descriptive and normative comments on them. The Comment from December 13, 1991, goes specifically to "The Right to Adequate Housing."¹⁶

According to the Committee, the right of adequate housing is part of the commitment to "the inherent dignity of the human person" from which the rights in the Covenant derive,¹⁷ and the right of adequate housing "is of central importance for the enjoyment of all economic, social and cultural rights."¹⁸ The Comment also insisted that even though housing problems might be "particularly acute" in developing countries, significant problems also exist in economically developed countries.¹⁹

How could we know that housing was in fact adequate? The Committee described what it called the "aspects" of adequate housing. Seven in number, these aspects may be summarized as follows:

- (1) Security of tenure. All persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment, and other threats.
- (2) Availability of services, materials, facilities and infrastructure. All homes must contain facilities essential for health, security, comfort and nutrition.
- (3) Affordability. Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised.
- (4) Habitability. Adequate housing must provide its inhabitants with adequate space and protect them from cold, dampness, heat, rain, wind and other threats to health.
- (5) Accessibility. Adequate housing must be accessible to those entitled to it, especially the elderly, children, the physically disabled, and the terminally ill.

¹⁶ See Office of the High Commissioner for Human Rights, CESCR General Comment No. 4: The Right to Adequate Housing (1991).

¹⁷ *Id.* at para. 7.

¹⁸ *Id.* at para. 1.

¹⁹ *Id.* at para. 4.

- (6) Location. Adequate housing must be at a location which allows access to employment options, health-care services, schools, childcare centers, and other social facilities.
- (7) Cultural adequacy. The way housing is constructed, the building materials used, and the policies supporting these must appropriately enable the expression of cultural identity.²⁰

Beyond spelling out what was needed for adequate housing, the United Nations also created the Office of the Special Rapporteur on the Right of Adequate Housing. Based in Geneva, Switzerland, the Rapporteur is charged with investigating global housing problems; with issuing policy statements and guidelines regarding adequate housing; and with investigating housing problems in selected countries.

In 2009, for example, the Special Rapporteur investigated housing problems in the United States. While acknowledging “the high quality of the majority of housing in the United States,”²¹ the Special Rapporteur expressed “deep concern about the millions of people living in the United States today who face serious challenges in accessing affordable and adequate housing . . .”²² The Special Rapporteur also bemoaned cuts in federal funding for low-income housing and observed, presciently as it turns out, that “a new face of homelessness” was appearing.²³

While the warnings of the Office of the Special Rapporteur apparently attracted no attention in the United States, the creation and work of the Office influenced various countries to recognize the right of housing. France, Mexico, Portugal, Russia, Scotland, and the Republic of South Africa are among the countries that have incorporated the right into their laws.²⁴ The Republic of South Africa has in fact enshrined the right of housing in its Constitution.²⁵ An initial constitutional provision regarding the right to adequate housing is accompanied by another constitutional provision that insists: “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.”²⁶ According to one reliable commentator, “The South African Constitutional Court’s housing rights

²⁰ See *id.* at para. 8.

²¹ Office of the Special Rapporteur on the Right of Adequate Housing, *Mission to the United States of America* 19 (2010).

²² *Id.*

²³ *Id.*

²⁴ See Eric Tars, *Housing as a Human Right*, NATIONAL LOW INCOME HOUSING COALITION, https://nlihc.org/sites/default/files/AG-2021/01-06_Housing-Human-Right.pdf, [<https://perma.cc/6MDQ-XEC7>].

²⁵ See CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Dec. 18, 1996, No. 108, §26(1).

²⁶ CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Dec. 18, 1996, No. 108, § 26(2).

jurisprudence is more developed than that regarding any other social and economic right contained in the South African Constitution,²⁷ and the right of adequate housing in the South African Constitution has prompted a range of government housing programs.²⁸

Despite the recalcitrance of the United States, the right of housing has virtually worldwide acceptance and recognition. International organizations and individual countries may not necessarily provide adequate housing for one and all, but the international community understands that adequate housing is essential for human well-being.

II. HOUSING PROBLEMS IN THE UNITED STATES

The refusal of the United States to recognize the right of housing might perhaps contribute to the nation's inability to acknowledge, much less remedy, its problems involving rental housing for low-income households. Whatever the case, these problems exist in spades.

Selected communities are the home for the most serious of the problems in rental housing for low-income households. These communities include reservations for indigenous peoples, rural counties dominated by semi-monopolistic extraction industries, and especially urban neighborhoods with concentrations of poverty and near-poverty. An analysis from Harvard's Joint Center on Housing Studies found that rental units housed fifty-two percent of the households in urban neighborhoods.²⁹

Critics of rental housing for low-income households in urban neighborhoods can enhance their appreciation of the problems by referring not so much to a unitary right of housing but rather to the "aspects" of adequate housing listed and outlined by the Committee on Economic, Social and Cultural Rights.³⁰ As already suggested, failures involving these aspects overlap and intertwine, but three of the aspects - affordability, habitability, and security of tenure - are especially deficient in American rental housing.

A. Affordability

The United Nations' Committee on Economic, Social and Cultural Rights appreciated how important it was for housing to be

²⁷ Lucy A. Williams, *The Right to Housing in South Africa: An Evolving Jurisprudence*, 45 COLUM. HUM. RTS. L. REV. 816, 816 (2014).

²⁸ See *id.* at 823.

²⁹ See AMERICA'S RENTAL HOUSING 2022, *supra* note 1, at 12.

³⁰ See *General Comment No. 4: The Right to Adequate Housing*, *supra* note 16, at ¶¶ 7-8.

affordable. In its 1991 Comment No.4, the Committee stated that the cost of housing should be commensurate with income levels and insisted as well that the cost not interfere with the attainment and satisfaction of basic needs.³¹ “In accordance with the principle of affordability,” the Committee insisted, “tenants should be protected by appropriate means against unreasonable rent levels or rent increases.”³²

Regrettably, many low-income families cannot afford the rental units in which they live. Housing experts routinely advise that renters spend no more than thirty percent of their household income to pay for housing.³³ A household is characterized as “cost-burdened” if it spends a larger percentage than that, and if a household spends more than fifty percent, it is deemed “severely cost-burdened.”³⁴ Seventy-three percent of rental housing for low-income households is severely cost-burdened, and these households make up seventy-two percent of all severely cost-burdened renter households in the United States.³⁵

Why is the rent for low-income households so high? One theory is that the demand for rental housing exceeds the supply, but rents are high even in metropolitan areas with high vacancy rates.³⁶ Another theory is that expenses associated with rental units keep rising, thereby forcing landlords to charge more and more for their rental units. However, data show that rental revenues have outdistanced landlords’ expenses in recent years.³⁷ “Rising rents are not simply a reflection of rising operating costs.”³⁸

A more convincing explanation is that low-income people – and especially those of color – do not have much choice as to where they might live. They cannot find inexpensive rental housing in the suburbs, and in the aftermath of shameful racial covenants, redlining, and exclusionary zoning, people of color find themselves virtually confined to inner-city neighborhoods. Landlords understand this. They realize they can overcharge their low-income tenants, and they do just that.³⁹

Indeed, landlord profits are higher in poor neighborhoods than in middle-class or wealthy neighborhoods. After accounting for missed rent payments and assorted maintenance costs, the

³¹ See *id.* at ¶ 8(c).

³² *Id.*

³³ See Peggy Bailey, Vice President for Hous. Pol’y, Ctr. on Budget and Pol’y Priorities, *Priced Out: The State of Housing in America, Testimony Before the Senate Committee on Banking, Housing, and Urban Affairs*, (July 21, 2022).

³⁴ *The Gap*, NATIONAL LOW INCOME HOUSING COALITION (2023), <https://nlihc.org/gap/about>, [https://perma.cc/FPR2-2863].

³⁵ See *id.*

³⁶ See MATTHEW DESMOND, *POVERTY, BY AMERICA* 65 (2023).

³⁷ See *id.*

³⁸ *Id.*

³⁹ See *id.*

MacArthur Prize-winning sociologist Matthew Desmond estimated that landlords in low-income neighborhoods can reap profits twice as large as the profits available to landlords operating in affluent neighborhoods.⁴⁰

This is not to say all landlords in low-income neighborhoods are nasty exploiters deserving of the label “slumlord.” Some are supportive of the tenants and sensitive to their needs, but some are not. In general, the more properties the landlord owns, the less likely the landlord is to be mindful of tenants’ rent burdens.

For starters, many landlords in low-income neighborhoods own only one or perhaps a few rental properties; many do their best to make these properties affordable. These “mom and pop” landlords might actually hail from neighborhoods in which their properties are located and may have inherited their properties from their parents or other relatives. Whether these landlords continue to live in urban neighborhoods in which housing is in a downward spiral is of course another matter.

The most powerful landlords, meanwhile, are not “mom and pop” landlords but rather the proprietors of what are in effect rental housing businesses. They may own hundreds or even thousands of properties, usually in a set of inner-city neighborhoods.⁴¹ Unlike some “mom and pop” landlords, these rental housing businesses unabashedly seek to make a profit, and the owners of these businesses often hold considerable sway in local government as well. An alderman tends to listen if somebody owns 100 properties in the alderman’s ward.

Even more noteworthy is what some have dubbed the “financialization of rental housing,”⁴² a variety of the financialization that has occurred in capitalist economies during the past 50-75 years. In this process banks, corporations, and multinationals profit by investing and re-investing rather than by producing goods or selling services. Inevitably, given the process, financial elites, financial institutions, and financial markets exercise greater control of economic policies and economic outcomes.⁴³

Financialization has of course prompted criticism by the political left. Some on that end of the political spectrum argue it has reduced employment, increased income inequality, and caused a transfer of

⁴⁰ See *id.* at 67.

⁴¹ Milwaukee inner-city landlord Youssef Berrada, for example, owns buildings with an estimated 9,000 units! See Vanessa Swales, *Tenants In a Decaying Building Learn It Has Changed Hands. Now It’s Part of the Empire of Prolific Evictor Berrada*, MILWAUKEE J. SENTINEL, May 2, 2023, at 3A.

⁴² See Desiree Fields & Sabrina Uffer, *The Financialization of Rental Housing: A Comparative Analysis of New York City and Berlin*, 53 URB. STUD. 1486 (2016).

⁴³ See generally GERALD F. DAVIS, *MANAGED BY THE MARKETS: HOW FINANCE RE-SHAPED AMERICA* (2011).

wealth to managers and owners of capital,⁴⁴ but the champions of financialization probably outnumber the leftist critics. Champions argue that financialization reduces agency costs, facilitates risk sharing, and improves allocative efficiency. The champions of financialization are especially likely to praise new varieties of financialization, and according to two commentators, “[C]onventional wisdom is coalescing around the idea that financial innovation is basically good.”⁴⁵

Is financialization a good thing when it comes to rental housing? While societies have traditionally considered housing to be a social good, sophisticated financial institutions understand housing chiefly as a vehicle for investment and wealth acquisition. The financial institutions then profit from what is already a resource in short supply, and none of the profit makes its way to renters.

Investors’ share of the nation’s rental stock increased dramatically between 2012-22, and projections are that their holdings will reach an extraordinary 7.6 million rental units by the end of the 2020s.⁴⁶ This financialization often leads to price fixing, higher rents, and tear-downs as the quest for profit marches forward. One study of New York City and Berlin found that the financialization of rental housing “heightened existing inequalities in housing affordability and stability.”⁴⁷ Low-income renters can expect to have even greater difficulty finding affordable housing and holding onto it. It is easy to appreciate why the Special Rapporteur on Adequate Housing, among others, has deplored the financialization of rental housing.⁴⁸

B. Habitability

In 1991 the Committee on Economic, Social and Cultural Rights defined habitability in its Comment No. 4 as “providing the inhabitants with adequate space and protecting them from the cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well.”⁴⁹ The Committee also urged nations “to comprehensively apply the Health Principles of Housing prepared by the [World Health Organization] which view housing as the

⁴⁴ See generally Donald Tomaskovic-Dorsey & Ken-Hou Lin, *Financialization: Causes, Inequality Consequences, and Policy Implications*, 18 N.C. BANKING INST. 167 (2013).

⁴⁵ Simon Johnson & James Kwak, *Is Financial Innovation Good for the Economy?* 12 INNOVATION POL’Y & THE ECON. 1, 1 (2012).

⁴⁶ John D. Johnson, *The Rise and Impact of Corporate Landlords*, MARQ. LAW., Summer 2023, 48.

⁴⁷ See Fields & Uffer, *supra* note 42, at 1486.

⁴⁸ See “Financialization of Housing,” OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <https://www.ohchr.org/en/special-procedures/sr-using/financialization>. [<https://perma.cc/3QK9-U4Y4>].

⁴⁹ CÉSCR General Comment No. 4, *supra* note 16, at para. 8(d).

environmental factor most frequently associated with conditions for disease in epidemiological analyses.”⁵⁰ Those Principles, in turn, set out six major concerns in the relationship of housing and health, including but not limited to protection against communicable diseases; protection against injuries, poisonings, and chronic diseases; and reduction of psychological and social stresses.⁵¹ Overall, then, the notion of habitability encompasses a range of physical and social dimensions intended to ensure that individuals and families are safe and healthy in their own space.

Unfortunately, rental housing for low-income households often falls short. It is plagued by leaky plumbing; inadequate heating; poorly functioning duct and ventilation systems; dirty subfloors and carpets; mold; and bug and rodent infestations. According to a 2020 U.S. Government Accountability Office report, about 15% of all rental units in 2017 had major quality problems (rodents, cracked walls) or lacked basic features (heat, running water). Not surprisingly given the rental housing market, low-income households occupied about two-thirds of the rental units with major quality problems and almost 80% of units lacking basic features.⁵²

These problems can “trigger” a range of health problems, one of which is asthma. Asthma is a respiratory condition caused by inflamed airways, which result in breathing problems, even in death. Children living with dust, mite, cockroach, and mold exposures have a 44% risk of asthma diagnosis.⁵³ Children living in neighborhoods where houses had multiple code violations were almost two times as likely to return to the emergency room or hospital within a 12-month period.⁵⁴ And people living in poor quality rental housing were 50% more likely to have emergency room visits for asthma attacks.⁵⁵ In addition to hospitalizations and emergency room visits, the costs of asthma include absences from work and school. In Wisconsin, this translates to one in four adults who missed work and one in three children who missed school in 2022.⁵⁶ Poor quality rental housing is a key factor in explaining the inequitable prevalence of asthma among low-income families and households. Renters cannot afford to make the needed repairs to eliminate the allergens, and landlords

⁵⁰ *Id.*

⁵¹ See generally World Health Organization, *Health Principles of Housing* 1 (1989).

⁵² See U.S. Gov’t Accountability Off., GAO-20-427, *Rental Housing: As More Households Rent, the Poorest Face Affordability and Housing Quality Challenges* (2020).

⁵³ See Evan Lemire, et al., *Unequal Housing Conditions and Code Enforcement Contribute to Asthma Disparities in Boston, Massachusetts*. 41 HEALTH AFF. 563, 563 (2022).

⁵⁴ Talis Shelbourne, *Living and Breathing*, MILWAUKEE J. SENTINEL, Aug. 31, 2022, at 1A, 10A.

⁵⁵ See *id.*

⁵⁶ *Asthma: Wisconsin Asthma Statistics*, Wis. Dep’t of Health Services (Jan. 3, 2023) <https://www.dhs.wisconsin.gov/asthma/facts.htm>. [<https://perma.cc/KS5V-326P>].

are often not inclined to invest in their properties nor think much about the health impacts of housing conditions.⁵⁷

Another major public health problem in rental housing for low-income households is lead poisoning. Children less than six years old are especially vulnerable to lead poisoning, as are pregnant women. A neurotoxin, lead affects developing brains, causing developmental, cognitive, and behavioral problems that last a lifetime.⁵⁸ The Centers for Disease Control and Prevention (CDC) has determined that there is no safe level of blood lead.

Indeed, CDC created the blood lead reference value as a tool for state and local lead screening programs to identify children six years old and younger who had elevated levels of lead compared to other children. Prior to 2012, this value was 10 micrograms per deciliter (10 $\mu\text{g}/\text{dL}$). In 2012, the blood lead reference value was reduced to 5 $\mu\text{g}/\text{dL}$, and in 2021, CDC lowered this value to 3.5 $\mu\text{g}/\text{dL}$.⁵⁹ CDC's current national estimate of children with elevated blood lead levels at or above 3.5 $\mu\text{g}/\text{dL}$ is 500,000.⁶⁰ Although rates of lead poisoning have declined, a challenge in treating children with elevated blood lead levels is that testing declined during the COVID-19 pandemic. As a result, children may have gone untreated, and their homes may have been unabated.

In Wisconsin, the decline in lead poisoning among children under six years old is also evident. The percentage of children with blood lead level above 5 $\mu\text{g}/\text{dL}$ declined from 6.2% in 2012 to 2.8% in 2021 and 2.7% in 2022.⁶¹ Of note, however, is that these rates increase to 5.6% in 2021 and to 5.3% in 2022 when the new reference value of 3.5 $\mu\text{g}/\text{dL}$ is applied.⁶²

In Milwaukee, meanwhile, 2017-2019 data from the City of Milwaukee Health Department show a decline as well. In 2017, 10.2% of children less than six who were tested had elevated blood lead above 5 $\mu\text{g}/\text{dL}$, while in 2019 this rate dropped to 7.5%.⁶³ Data

⁵⁷ Tyra C. Bryant-Stephens, et al., *Housing and Asthma Disparities*, 148 J. ALLERGY CLIN. IMMUNOLOGY 1121, 1122-23 (2021).

⁵⁸ Bruce P. Lanphear, et al., *Low-Level Environmental Lead Exposure and Children's Intellectual Functions: An International Pooled Analysis*, 113 ENVIR. HEALTH PERSP. 894, 899 (2005).

⁵⁹ *Childhood Lead Poisoning Prevention, Blood Lead Reference Value*, Centers for Disease Control and Prevention (Dec. 2, 2022), <https://www.cdc.gov/nceh/lead/data/blood-lead-reference-value.htm>. [<https://perma.cc/R55T-TYBC>].

⁶⁰ *Childhood Lead Paint Prevention, Overview of Childhood Lead Poisoning Prevention*, Centers for Disease Control and Prevention (Jan. 19, 2023), <http://www.cdc.gov/nceh/lead/overview.html>. [<https://perma.cc/W4HS-C8SC>].

⁶¹ Wisconsin Department of Health Services, *Lead-Safe Wisconsin: Childhood Lead Poisoning Data and Data Analysis*, Wis. Dep't of Health Services (June 14, 2023) <https://www.dhs.wisconsin.gov/lead/data.htm> [<https://perma.cc/BT8L-CPMJ>].

⁶² *Id.*

⁶³ *City of Milwaukee – Lead Dashboard*, City of Milwaukee Health Department (Oct. 7, 2020),

at the 3.5 $\mu\text{g}/\text{dL}$ reference value are not available, although we would expect these rates to be higher, as they are at the state level.

Sources of lead in inner-city homes are peeling paint, contaminated soil, and contaminated drinking water. The primary cause of elevated blood levels in young children remains paint. Although lead-based house paint was barred in 1978, it is still present on older homes beneath more recent paint jobs on the walls and window sills. When the paint dries out, children often put the resulting paint chips into their mouths or breathe in the dust. Paint chips also drop onto the ground outside homes, and children playing outside are exposed to the lead in the soil. As existing abatement programs illustrate, removing lead-based paint from inner-city homes is possible, but it is costly and time-consuming.

In addition to cost, other factors affect local responses to lead prevention initiatives. For example, in Milwaukee, landlords are not required to certify their properties as lead-safe before renting them, while cities such as Cleveland, Ohio and Rochester, New York do require landlords to certify their units before renting them.⁶⁴ In Milwaukee too, the confluence of historic redlining and older housing stock among other determinants especially in census tracts with “low home ownership, high poverty and majority non-White residents” results in an 1.78% increased risk of elevated blood lead levels compared to high home ownership, low poverty, and majority White census tracts.⁶⁵

Further compounding the lead paint problem found in older homes is the lead in pipes used as service laterals in city water systems. The 2014 municipal water crisis in Flint, Michigan, a majority Black city in which 37% of the residents live in poverty, highlighted the seriousness of this infrastructure issue for cities across the country and particularly the impact on children. To save money the City changed its source of water, which altered the chemical balance in the laterals, and failed to add other protective chemicals.⁶⁶ A study of elevated blood lead levels in children before and after the water source changed showed that children living in socioeconomically disadvantaged neighborhoods experienced the

<https://city.milwaukee.gov/ImageLibrary/Groups/healthAuthors/HEH/PDFs/2019AldermanicDistrictLeadProfiles-FINAL10-31-20.pdf> [<https://perma.cc/6JKR-D776>].

⁶⁴ *Lead-Safe Certification for Rental Units*, Hum. Impact Partners and Cmty. Advocates Pub. Pol’y Inst., (Feb. 2020), https://www.humanimpact.org/wp-content/uploads/2020/02/Lead-safe_HHI_brief_final.pdf.

⁶⁵ Emily E. Lynch & Helen C.S. Meier, *The Intersectional Effect of Poverty, Home Ownership, and Racial/Ethnic Composition on Mean Childhood Blood Levels in Milwaukee County Neighborhoods*, 15 PLOS ONE 1, 7-8 (2020).

⁶⁶ See Karen Czapanskiy, *Lead and Landlords*, 10 BELMONT L. REV. 284, 285 (2023).

greatest increase in elevated blood lead levels between 2013 and 2015.⁶⁷

Cities across the country have been challenged to address this infrastructure problem of lead in municipal water systems. Lead is found in both the water mains bringing the water to streets from the source (the public side) and laterals bringing the water from the streets to homes and businesses (the private side).⁶⁸ Replacing these two parts is very expensive. While the cost to replace the mains is borne by the local government, the question of who bears the burden of paying to replace the laterals is especially challenging where landlords are involved.⁶⁹ Although the 2021 Bipartisan Infrastructure Law designated \$15 billion over five years for replacement of lead pipes, these funds cannot be used to pay for the replacement of the private laterals.⁷⁰

Who should pay for the replacement of the lateral lines in low-income neighborhoods? Owners of rental properties often do not want to spend the money, which would cut into their profits, especially as they do not live in these buildings.⁷¹ Jurisdictions vary in their ability and willingness to pay the full cost to replace the private lateral lines, while some jurisdictions have subsidies for landlords who rent properties in low-income neighborhoods.⁷² Even with a subsidy, a landlord with a large number of rental properties in low-income neighborhoods may still balk at the cost.⁷³

Further complicating the replacement of a lateral service line is the issue of a landlord's obligation as the property owner to replace the line. If the landlord declined, the local public water company would not be able to intervene, and low-income renters' health would suffer.⁷⁴ The assumptions are that landlords as property owners can exclude others from their properties and that they "have no affirmative duties relating to the property."⁷⁵ In fact, jurisdictions could change local or state laws to create a "negative consequence" if a landlord failed to work with the public water entity to replace the lateral service lines, but, at minimum, existing property laws create complications for ensuring that the private lateral service lines in low-income areas with high numbers of renters will be replaced.⁷⁶

⁶⁷ See Mona Hanna-Attish, et al., *Elevated Blood Lead Levels in Children Associated with the Flint Drinking Water Crisis – A Spatial Analysis of Risk and Public Health Response*, 106 AM. J. PUB. HEALTH 283, 285 (2016).

⁶⁸ See Czapanskiy, *supra* note 66, at 286.

⁶⁹ See *id.*

⁷⁰ See *id.* at 287.

⁷¹ See *id.* at 287-88.

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See *id.* at 287-88.

⁷⁵ *Id.*

⁷⁶ See *id.*

As the asthma and lead examples illustrate, renters in low-income neighborhoods, often people of color, have limited control over the conditions in their homes due to the power of landlords. The resulting health impacts are further exacerbated by the households' inability to make any repairs themselves and the attendant stress that accompanies this situation. The aspect of habitability takes on a profound significance given the health risks for low-income households.

C. Security of Tenure

A third major area in which rental housing is unsatisfactory for low-income households involves what the CESCRC calls "security of tenure." In fact, the CESCRC comment regarding adequate housing lists security of tenure first among the aspects of adequate housing.⁷⁷ Security of tenure presumably applies to various types of housing, including rental housing, cooperative housing, owner-occupied housing, and emergency housing. People in these types of housing, the Comment states, "should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."⁷⁸ Furthermore, according to the Comment, states should "take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups."⁷⁹

The most common denial of secure tenure in the contemporary United States involves rental housing for low-income households. Ironically, the tenants actually encounter difficulty finding this housing. According to the National Low Income Housing Coalition, the United States has a shortage of 7.3 million units that are affordable and available to renters with low incomes.⁸⁰ Only 33 affordable and available rental units exist for every 100 low-income renter households, and in 12 of the 50 largest metropolitan areas the shortage of affordable and available homes for low-income renters exceeds 100,000 units.⁸¹ The situation involving rental housing, in the words of one commentator, amounts to "a really brutal housing market."⁸²

⁷⁷ See CESCRC General Comment No. 4, *supra* note 16, at para. 8(a).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See *About the Gap Report*, NATIONAL LOW INCOME HOUSING COALITION <https://nlihc.org/gap/about> (last visited June 14, 2023). [<https://perma.cc/F9Q9-XQ37>].

⁸¹ *Id.*

⁸² Patrick Sisson, *Affordable Housing Woes Paint a 'Bleak Picture'*, N.Y. TIMES, June 14, 2023, at B4.

Add to the problem some landlords' selectiveness. Knowing other potential tenants are standing in line, landlords need not rent to the first applicants they meet. Indeed, landlords can be arbitrary and biased without having to explain themselves.

In addition, larger landlords sometimes check for bad credit ratings, spotty employment records, marred rental histories, and – assuming it is available – evidence of prior evictions. They might even share the resulting lists of supposedly undesirable tenants with other landlords. Then, too, landlords can obtain “tenant-screening reports” from the hundreds of companies in the business of compiling and selling them.⁸³ These reports contain only negative information, usually culled from records available in landlord-tenant courts, criminal courts, and bankruptcy courts. These reports can generate something of a “blacklist,” and, like an actual blacklist, the reports are put together without any due process or explanatory information from those being listed.⁸⁴ Landlords have also been known to use the reports to shield themselves from lawsuits claiming racial or sexual discrimination.⁸⁵

Perhaps needless to add, the arbitrariness and bias of the landlords and the errors and misinformation in the tenant-screening reports are extremely frustrating for low-income renters. The latter, it is worth remembering, frequently move not because they have found a nicer place or in order to “move up in the world” but rather because of necessity or emergency.⁸⁶ They often desperately need places for themselves and their families but find it impossible to get in the door, that is, past a landlord who for one reason or another does not want them.

For homeowners the largest threat to the tenure might be banks' mortgage foreclosures or perhaps local government's use of such processes as eminent domain. For low-income renters eviction is the biggest menace. Eviction is of course the removal of a tenant from a rental property by the landlord. The most common reason for an eviction is the tenant's failure to pay the rent in a timely fashion, but landlords might also evict because the tenants have supposedly violated the terms of the lease, a lease being the agreement which gives the tenant a temporary possessory interest in the property. Violations include but are not limited to criminal or disruptive activity; damage to the premises; and housing unauthorized individuals. Desmond's study of evictions in the City of Milwaukee showed that landlords' decisions to evict were not simply the automatic consequence of tenants' failure to pay the rent or of

⁸³ See Rudy Kleysteuber, *Tenant Security Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1345-48 (2007).

⁸⁴ *Id.* at 1361.

⁸⁵ See *id.* at 1348.

⁸⁶ See DESMOND, *supra* note 36, at 37.

violations of lease terms.⁸⁷ “Landlords showed considerable discretion over whether to move forward with an eviction, extending leniency to some tenants and withdrawing it for others.”⁸⁸ The unpredictable nature of landlords’ conduct can with good reason leave tenants wondering “how to play things” when they get on the bad side of a landlord.

Evictions themselves can be informal or formal. If a landlord truly wants to get rid of a particular tenant, the informal approach is likely the easiest and certainly the least expensive. Informal evictions might be accomplished by having the water or electricity turned off; changing the locks; threatening to report illegal activity to the police; or even – in rare cases – offering to pay the tenant’s moving expenses. Scholars often overlook informal evictions because they do not for the most part appear on any official record, but Desmond’s study of evictions in Milwaukee found that roughly half of all evictions were informal.⁸⁹

Formal evictions, by contrast, *do* leave records and include legal officials. The landlord begins the process by giving the tenant notice to pay or vacate. The length of the period varies from state to state and sometimes from county to county within a given state, but the tenant usually has five to ten days to meet the landlord’s demands. If the tenant fails to do so, the landlord can initiate an eviction lawsuit, usually in a small claims or municipal court. In some jurisdictions the tenant may submit a written response to the landlord’s petition, but in other jurisdictions the courts simply set a date for trial. Since a pronounced time-sensitivity exists in eviction proceedings, the date for trial is frequently expedited. If a tenant does appear at the expedited proceeding, judges will often ask them to step into the busy hallway outside the courtroom and quickly work out some type of compromise. In the end, the majority of tenants facing eviction do not show up, leading to default judgments for the landlord.⁹⁰

Sometimes in a postscript of sorts to a formal eviction proceeding, the tenant still refuses to leave the premises. A sheriff or other eviction official might then remove the tenant, other people, and personal belongings from the property. One sad but familiar sight in many inner-city neighborhoods is a curbside stack of furniture, clothing, and other personal belongings that have been abandoned by an evicted tenant. Scavengers might comb through

⁸⁷ *Id.* at 128.

⁸⁸ *Id.*

⁸⁹ MATTHEW DESMOND, *EVICTED 4* (2016).

⁹⁰ Two journalists have produced a ranking of cities by rate of eviction judgments. North Charleston, South Carolina and Richmond, Virginia rank first and second, a surprise for those who anticipated decaying inner-cities in large metropolitan areas would rank highest. See Emily Badger & Quoctrung Bui, *Eviction Comes Fast and Often, Sweeping U.S.*, N.Y. TIMES, APRIL 8, 2018, 1.

and/or rudely vandalize the abandoned personal property until, before long, sanitation workers take whatever is left to the dump.

The sight of a tenant on the run or the vandalizing of the tenant's possessions is not what necessarily motivates landlords. In a study of landlords in Baltimore, Cleveland, and Dallas, researchers found the landlords' chief goal in formally petitioning to evict was to collect some rent, even if it was a small percentage of the tenant's arrearage.⁹¹ A landlord often uses a petition for eviction to apply more pressure to the tenant and to let the tenant know that the landlord is dead serious.⁹²

Keeping both informal and informal evictions in mind, we emphasize how great a threat eviction is to low-income people's security of tenure. Desmond found that in a two-year period one in eight Milwaukee renters experienced a forced move, and the great majority resulted from evictions.⁹³ He also maintains that the numbers are similar in Chicago, Cleveland, and Kansas City.⁹⁴ As he bluntly puts it: "Millions of Americans are evicted every year because they cannot pay the rent."⁹⁵

Whether the landlord is changing the locks to get rid of an unwanted tenant or negotiating with the tenant in the hall outside the small claims court, a fundamental power differential exists within the landlord/tenant relationship. The landlord, after all, owns the property, and the tenant has only a temporary possessory interest, one which is ultimately dependent on the tolerance and/or good will of the landlord. In the eviction or potential eviction situation the tenant is justifiably on edge. The tenant might find that the household, already strapped to pay the rent on a rundown, unhealthy place, suddenly has no place to live.

The personal losses that an evicted tenant experiences should not be underestimated. Vacating an apartment abruptly can lead the tenant to lose possessions and perhaps a job. Furthermore, eviction harms the tenant emotionally and psychologically. Anxiety, depression, family violence, and possibly suicide can result.⁹⁶ More generally, eviction often affects the tenant's confidence and enthusiasm, both of which might already be low. According to Desmond, "[T]here is the toll eviction takes on a person's spirit."⁹⁷

Eviction can also be hard on the family and friends of the evicted person. In poor and working-poor neighborhoods, marriage has

⁹¹ See Rebecca Gale, *Why Landlords File for Eviction (Hint: It's Usually Not to Evict)*, CITYLAB (June 18, 2019), <https://www.citylab.com/equity/2019/06/eviction-notice-process-rental-landlords-collect>.

⁹² See Kleysteuber, *supra* note 83, at 1355.

⁹³ See DESMOND, EVICTED, *supra* note 89, at 5.

⁹⁴ *Id.*

⁹⁵ *Id.* at 4.

⁹⁶ See Elizabeth Gudrais, *Disrupted Lives*, HARVARD MAGAZINE, Jan.-Feb., 2014, 38.

⁹⁷ DESMOND, EVICTED, *supra* note 89, at 298.

ceased to be the norm, but birth rates have not declined. Parents routinely and lovingly raise their children outside of marriage. In most cases, the unmarried mother has custody of the children, and this means evicted families will disproportionately consist of single mothers and dependent minors. Given an eviction, the single mother will have to find new day care arrangements and schools. Changing from one school to another, meanwhile, always has the potential to throw a child off track.

When an evicted household leaves a block or pulls out of a neighborhood, that move can remove important social capital, which can be in limited supply in the first place. The move might also prove disruptive on the new block or in the new neighborhood. Given the previously discussed shortage of affordable housing, the move will often be to an even more rundown and fragmented area,⁹⁸ and this will only add to the stress the household is experiencing. In one particularly nightmarish possibility, an evicted household will have no choice but move in with a friend or relative, but the latter's landlord may evict the friend or relative because the occupancy limit in the lease has been violated!⁹⁹

Given the negative ramifications of evictions or threats of eviction, it is hardly surprising that the CESCR discussed at some length the damage evictions and the threats of eviction do to security of tenure and to the right of housing in general. The Committee also pointed out that evictions infringe other internationally recognized human rights such as health, privacy, and the enjoyment of one's possessions.¹⁰⁰ Indeed, in its Comment on evictions the Committee on Economic Social and Cultural Rights characterized forced evictions as "prima facie incompatible with the requirements of the Covenant."¹⁰¹

III. LEGAL SOLUTIONS FOR THE HOUSING PROBLEM

What might be done to address the severe problems associated with rental housing for low-income households? Some argue that the United States must first establish a right of housing, but, as a subsequent discussion will indicate, we think prospects for reaching that goal are bleak. More promising, in our opinion, are policies and programs consciously designed to address the problematic aspects of rental housing for low-income households – affordability, habitability, and security of tenure – which we

⁹⁸ See AMERICA'S RENTAL HOUSING, *supra* note 1, at 30.

⁹⁹ See Shaila Dewan, *Evictions Soar in Hot Market; Renters Suffer*, N.Y. TIMES, Aug. 28, 2014, A1.

¹⁰⁰ See Office of the High Commissioner for Human Rights, CESCR Comment No. 7 on Forced Evictions, para. 4 (1997).

¹⁰¹ *Id.* at para. 1.

discussed in Part II of this article. Indeed, programs exist that attempt to do just that. All are flawed, and the power of landlords and the more general commodification of housing limit what might be accomplished. But at least we have examples of what might be done, of steps that could be taken.

A. A Right of Housing for the United States

As noted earlier, the international treaties and agreements which create a right of housing need to be ratified. Since the United States has never ratified these treaties and agreements,¹⁰² international law in and of itself “does not establish a binding legal obligation” in the United States.¹⁰³

Furthermore, the Constitution of the United States does not recognize a right of housing. Yes, the Constitution recognizes property rights in several ways,¹⁰⁴ but property rights do not include the right of housing. Justice White’s peevish Opinion of the Court in *Lindsey et al. v. Normet et al.* cast such a conflation of rights as misguided.¹⁰⁵ While White acknowledged the importance of decent, safe, and sanitary housing, he also insisted that the Constitution of the United States did not include any guarantees of “access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the relevant agreement.”¹⁰⁶ Apparently irritated by what he took to be activists’ excessive demands, Justice White also urged us to remember that “the Constitution does not provide judicial remedies for every social and economic ill.”¹⁰⁷

A few state constitutions reference housing rights, but they also do not establish an enforceable right of housing. New York’s Constitution, to cite one example, guarantees inexpensive housing and nursing home accommodations for persons of low income, but New York’s Constitution does not speak of housing rights in general.¹⁰⁸ For its part, Massachusetts’s Constitution includes a right of shelter, though it does not promise everyone will have a roof overhead.¹⁰⁹ Such feints at a constitutional right of housing are

¹⁰² See Ying Chen & Paul McDonough, *Bringing Americans Home: Establishing a Rights-Based Framework at the State Level*, 21 SEATTLE J. FOR SOCIAL JUSTICE 3, 37 (2022).

¹⁰³ *Id.* at 36-37.

¹⁰⁴ The Fifth Amendment says both that property cannot be taken without due process and also that if property is taken for public use, the property owner must receive just compensation. See U.S. CONST. amend. V.

¹⁰⁵ *Lindsey v. Normet*, 405 U.S. 56 (1972).

¹⁰⁶ *Id.* at 72.

¹⁰⁷ *Id.*

¹⁰⁸ See N.Y. CONST. art. XVIII.

¹⁰⁹ See Mass. CONST. art. XLVII.

encouraging, but in New York, Massachusetts, and other state constitutions the right of housing receives almost as little recognition as it does in the Constitution of the United States.

Regardless of the right of housing's failure to find a home in constitutional law, some continue to argue that the recognition of the right of housing in the United States remains possible and is needed to boost certain social justice campaigns. For example, the modern-day campaign against homelessness deplores the tendency of lawmakers and law enforcement officials to criminalize homelessness,¹¹⁰ and some argue recognition of the right of housing could put an end to this offensive practice.¹¹¹ More generally, if the thousands of people sleeping on pallets or in pup tents had an operational right of housing, we would have to believe they could improve their situation.

One activist and scholar who has argued forcefully for the right of housing in the United States is Maria Foscarinis, the founder of the National Homelessness Center. In articles published in the 2000s, she thoughtfully discussed how recognition of the right could aid low-income families.¹¹² As Foscarinis acknowledged, recognition of the right of housing would not immediately, or perhaps ever, solve the housing problems in the United States,¹¹³ but in her opinion recognition could "help conceptualize and articulate in legal terms the assaults on human rights, dignity, and social inclusion that constituents who are affected experience"¹¹⁴ Furthermore, she notes, recognition of the right of housing could "bring about a paradigm shift" that would give a boost to beneficial programs and policies.¹¹⁵

Of late, champions of a right of housing for the United States have argued that state and local law offers the most promising possibility for recognizing the right of housing. Ying Chen and Paul McDonough, for example, argue that since federal and constitutional law do not really support a right of housing, state and local law might be the best way to establish a rights-based approach to housing.¹¹⁶ "This need not amount to a universal right to free,

¹¹⁰ See generally Joy H. Kim, *Homelessness: Functional Barriers to Shelters and Homeless Individuals' Lack of Choice*, 95 NYU L. REV. 1150 (2020) and Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CAL. L. REV. 559 (2021).

¹¹¹ See Eric Tars, et al., *Challenging Domestic Injustice Through International Human Rights Advocacy; Addressing Homelessness in the United States*, 42 CARDOZO L. REV. 913 (2021).

¹¹² See Maria Foscarinis, *Advocating for the Human Right to Housing: Notes from the United States*, 30 NYU REV. L. & SOC. CHANGE 447 (2006) and Maria Foscarinis, et al., *The Human Right to Housing: Making the Case in U.S. Advocacy*, CLEARINGHOUSE REV. J. POVERTY L. & POL'Y, July-August, 2004.

¹¹³ *Id.* at 97.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Chen & McDonough, *supra* note 102, at 39.

government-supplied housing, but it would require state authorities to establish an effective legal and institutional framework that ensures people's access to housing adequate for their health, wellbeing, safety, and security."¹¹⁷

State and local legislators have occasionally taken Chen and McDonough's suggestions to heart. California cities such as Berkeley, Oakland, and San Francisco have passed resolutions supporting both the Universal Declaration of Human Rights and the CESCR and also endorsing the right of housing in general.¹¹⁸ Cook County, Illinois, in which Chicago is located, passed a resolution stating that housing was a human right.¹¹⁹ More recently, the State of California has flirted with the idea of recognizing the right of housing. Progressive state legislators have even proposed amending the state constitution to include the right.¹²⁰

Efforts on the state level in California and elsewhere to establish a right of housing merit support, but at the same time, we find it difficult to imagine a right of housing catching on. Such a right collides with the dominant ideology, which has traditionally valorized individual achievement and accomplishment. With this premise as a backdrop, an individual's inadequate housing might be seen as a matter of personal failure. If your housing is dangerous and lousy, some might say with more than a trace of racism thrown in, you are yourself the reason.

In addition to the limitations imposed by this particular attitude, the traditional understanding of "rights" in the United States is potentially restrictive. In the Bill of Rights and in most state constitutions, negative rights that protect individuals from government interference overshadow positive rights that require government action for the benefit of individuals.¹²¹ In fact, some would say that when Americans argue for their "rights," they often have in mind what might be better characterized as their "liberties." The latter protect us against having something fundamental taken away.¹²² Whatever the language, the right of housing is not what the legal system and public customarily take to be a "right." Purported rights to education, health care, or general well-being also fail to fit the mold.

¹¹⁷ *Id.* at 47-48.

¹¹⁸ See Foscarinis, *The Human Right to Housing: Making the Case in U.S. Advocacy*, *supra* note 112, at 111.

¹¹⁹ See *id.* at 112.

¹²⁰ See Ashley Zavala, *California Voters Could Decide If Housing Is a Human Right under New Proposal*, KCRA (Mar. 9, 2003), <https://www.kcra.com/article/California-voters-could-decide-if-housing-is-a-human-right-under-new-proposal> [<https://perma.cc/72NC-QD3F>].

¹²¹ See Foscarinis, *Advocating for the Human Right to Housing*, *supra* note 112, at 447.

¹²² See Kristen David Adams, *Do We Need a Right of Housing?*, 9 NEV. L.J. 275, 282 (2009).

Last but certainly not least, the United States has outdistanced almost all countries of the world in its understanding of housing as a market commodity. As suggested by many turns in this article, Americans routinely assume housing is something that can be sold and leased. Many Americans take housing to be an investment opportunity, and a good one at that. The financialization of housing is both ongoing and ominous. In short, we agree with Desmond that there “probably should be a right to housing,”¹²³ but we see little likelihood that it could be achieved.

B. Addressing the Aspects of Adequate Housing

Although various commentators call forcefully for recognizing the right of housing in the United States, a smaller number of voices have suggested it would be mistaken to place too much emphasis on establishing the right in and of itself. Some suggest that insisting on such a right, especially for housing for low-income households, could distract policymakers from a more pressing concern such as poverty.¹²⁴ Others have argued that an emphasis on the right of housing might prompt resentment,¹²⁵ especially among market-oriented elites who might take recognition of the right to carry with it an unwanted redistribution of wealth.

One way to overcome these concerns would be to devise programs which, short of touting the overall right of housing, correspond to the aspects of adequate housing that we discussed in Part II of this article. Illustrations of this approach exist with regard to affordability, habitability, and security of tenure, but all could be improved and expanded.

Turning first to affordability, dozens of programs exist on the local, state and federal levels designed to increase the number of affordable rental units. The most important and most discussed is the federal Low-Income Housing Tax Credit Program (LIHTC). It is the financial engine for approximately 90 percent of all the newly built affordable rental housing in the United States, and it has led to literally millions of rental units for low-income families since its inception in 1986.¹²⁶

LIHTC is a supply side program rather than a subsidy program such as Section 8 vouchers. LIHTC provides an incentive for developing housing rather than financial support for tenants. Created through tax reform rather than housing legislation, LIHTC provides federal tax credits for developers to build or renovate rental

¹²³ See DESMOND, *EVICTED*, *supra* note 89, at 312.

¹²⁴ See Adams, *supra* note 122, at 277.

¹²⁵ See *id.*

¹²⁶ See *Editorial: A Tax Credit Worth Preserving*, N.Y. TIMES, Dec. 21, 2012, at A30.

housing for low-income families, customarily in mixed-income housing complexes. At least 20 percent of a complex's units must be made available at below-market rates for at least fifteen years, and renters must have below average household income in order to be eligible to rent the units. Depending on when developers obtained their tax credits, developers can drop the affordability requirements and charge market rates for the units 15-30 years later in time.¹²⁷

Although acknowledging LIHTC cannot by itself eliminate the affordable housing shortage in the United States, commentators generally praise the program.¹²⁸ Developers actively compete with one another for the tax credits in state-run competitions, and would-be renters invariably outnumber the affordable units. But LIHTC is not without its critics. According to some, the low-income tenants in mixed-income complexes do not always feel welcome or have all of the same benefits as the middle and upper-class residents. In one particularly awkward episode, the residents of the "affordable" units in a 33-story development on Manhattan's western edge realized that they and their guests were expected to use a special entrance. The media dubbed the entrance the "poor door."¹²⁹ While local politicians were outraged and promised it would never happen again, the residents who were polled said they were happy to come and go through the special entrance as long as they had relatively inexpensive apartments in Manhattan.¹³⁰

We wonder if the tenants stopped to reflect on whom the LIHTC best served. According to one study done in Florida, the great majority of the federal funds available through LIHTC actually go to developers and to the banks to whom developers can sell their tax credits.¹³¹ Low-income tenants are at best secondary beneficiaries.¹³²

As for the habitability of rental housing and particularly the lead poisoning problem, laws and legal institutions already exist which at first glance seem capable of improving the actual living quarters of low-income people. However, legal constructs such as the implied warranty of habitability and legal institutions such as housing code enforcement offices are not consciously shaped with reference to

¹²⁷ For a more extended description of the LIHTC, see Corianne Payton Scally, *The Low-Income Housing Tax Credit: How It Works and Who It Serves*, URBAN INSTITUTE (July 12, 2018), <https://www.urban.org/research/publication/low-income-housing-tax-credit-how-it-works-and-who-it-serves/> [https://perma.cc/2C4M-W6Y7].

¹²⁸ See, e.g., Mark Lipschultz, *Merging the Public and the Private: The LIHTC Program and a Formula for More Affordable Housing*, 36 REV. BANKING & FIN. L. 379, 396 (2016).

¹²⁹ See Janet Babin, *New York Skyscraper's Separate "Poor Door" Sparks Outrage*, NPR (July 7, 2014), <https://www.npr.org/2014/07/30/336322608/new-york-skyscrapers-separate-poor-door-sparks-outrage>. [https://perma.cc/6GHG-PPQC].

¹³⁰ See *id.*

¹³¹ Greg Burge, *Do Tenants Capture the Benefits from the Low-Income Housing Tax Credit?* 39 REAL EST. ECON. 71, 73 (2011).

¹³² See *id.* at 72.

habitability and in the end have done little to improve the living conditions of low-income people.

The implied warranty of habitability, for example, has been available to renters since the 1960s when Judge J. Skelly Wright and others first conceptualized and applied it. Invoking consumer protection principles rather than traditional landlord-tenant law, Wright maintained that landlords had to keep their rental properties “habitable,” that is, free of structural defects and other hazards and generally fit for habitation.¹³³ If the landlord breached the implied warranty of habitability, the tenant could, depending on state law, withhold rent payments; move without owing unpaid past rent; remove dangerous materials from the premises; and/or deduct the cost of necessary repairs from the rent.

If landlords took the implied warranty of habitability seriously, the living conditions of tenants would obviously be better, but the implied warranty of habitability is as much a legalistic conceptualization as it is a useful tool. Many occupants of rental housing are unaware of the warranty or lack the resources necessary to invoke it. Then, too, and as discussed earlier in this article, an extreme shortage of affordable housing exists. As a result, many low-income tenants are leery of reporting breaches out of fear that their landlords will retaliate or of not being able to find other housing that they can afford.¹³⁴ Of about 40,000 eviction proceedings in Essex County, New Jersey, in 2014, only 80 renters cited a failure to meet the implied warranty of habitability as a defense.¹³⁵

Local housing code enforcement also seems promising for low-income tenants living in rental housing. The federal Housing Act of 1964 and the Housing and Urban Development Act of 1965 required local governments seeking public funding for public housing or urban renewal to have in place (1) a housing code addressing the deterioration of the housing stock in the inner city and (2) a system for enforcing the code.¹³⁶ Unwilling to forego the funding, almost all American cities had housing codes on their books by the late 1960s.¹³⁷ The codes still exist in the present and require running hot and cold water, safe light sockets, working toilets, reliable smoke detectors, and dozens of other things of importance to the safety and health of renters. If somehow landlords met all the requirements set out in the housing codes, low-income renters would have safe and sanitary housing.

¹³³ See *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

¹³⁴ See generally David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389 (2011).

¹³⁵ See Paula Franzese, et al., *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reforms*, 16 RUTGERS UNIV. L. REV. 1, 22 (2016).

¹³⁶ See DAVID RAY PAPKE, CONTAINMENT AND CONDEMNATION: LAW AND THE OPPRESSION OF THE URBAN POOR 63 (2019).

¹³⁷ See *id.*

Unfortunately, though, code enforcement is lax, and many landlords, to use the standard language, do not bring their properties “up to code.” An older, but still insightful study of code enforcement in Baltimore, Boston, and Buffalo revealed how and why code inspection officials often ignore tenants’ complaints and go easy on landlords.¹³⁸ What’s more, strict enforcement of the codes might lead some landlords to abandon their properties, thereby contributing to the shortage of affordable rental housing. According to the historian Lawrence M. Friedman, “No housing code ever created a single unit of decent, affordable housing. Actual enforcement, arguably, would have the opposite effect: it would reduce the supply of places where the poor could find a roof over their heads.”¹³⁹

If the implied warranty of habitability and housing code enforcement will not contribute significantly to improving the habitability of rental housing for low-income families, do any newer laws or legal institutions show promise? Thinking primarily of the lead poisoning problem, we perceive the federal Lead-Based Paint Hazard Reduction Act to have potential, especially in its attempt to place obligations on landlords.¹⁴⁰ Enacted in 1992, the Act requires sellers and lessors of residential properties to inform buyers and renters of any lead-based hazards on properties built before 1978, the year in which the federal government banned the use of lead-based paint. According to the Act, landlords are also supposed to have at their disposal a lead hazard pamphlet prepared by the Environmental Protection Agency (EPA). If a landlord does not inform the tenant as required, the tenant can sue for up to three times the damages incurred finding a new apartment and moving to that apartment.

The Act could conceivably be advantageous for low-income renters. Their rental housing is concentrated in a small number of urban neighborhoods and for the most part absent in others.¹⁴¹ Furthermore, rental housing for low-income households tends to be available in older single-family homes; in duplexes and triplexes; and in small apartment buildings, all of which are older. If built before 1978, virtually all of these structures have lead-based paint chipping and peeling on their exteriors, interiors, or both.

The weakness in the Act, meanwhile, involves the nature of the obligations placed on landlords. Commentators characterize these obligations as “mandatory information disclosure,” and an existing literature questions the effectiveness of the approach in eliminating

¹³⁸ See generally H. Laurence Ross, *Housing Code Enforcement and Urban Decline*, 6 J. AFF. HOUSING & COM. DEV. L. 29 (1996).

¹³⁹ LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 409 (2002).

¹⁴⁰ See 42 U.S.C. 63A, §§4851-56 (2012).

¹⁴¹ Rental units make up more than 80 percent of the housing stock in just 5 percent of census tracts. See AMERICA’S RENTAL HOUSING, *supra* note 1, at 18.

a hazard.¹⁴² Sometimes the disclosure of the information does little to address the underlying hazard for selected subpopulations. With regard to the lead-based paint hazard, for example, landlords might do more testing for lead-based paint, but no guarantee exists that they will remove the paint, an expensive undertaking that most landlords would like to avoid.¹⁴³

In general, we think the Lead-Based Hazard Reduction Act requires too little of landlords. Landlords are aware of the shortage of inexpensive rental housing and know tenants might not want to risk backing out of an apartment even if its habitability is in question due to the lead-based paint hazard. Indeed, landlords on occasion are known to leave notification forms and informational pamphlets in their briefcases and shoulder bags. Many landlords, we suspect, resent their mandatory disclosure obligations in the first place.

A related but potentially more effective way to approach landlords' obligations would involve not merely information disclosure but rather actual abatement. A step in this direction appears in regulations recently proposed by the Biden Administration. Currently before the Environmental Protection Agency (EPA) and open to public comment, the proposed regulations would not require all landlords to proactively test for lead-based paint chips or dust. However, if a child demonstrated confirmed symptoms related to lead exposure, the landlord would then be required to undertake and *pay for* a clean-up of the property in which the child lives. The proposed regulations could not be implemented until 2024 at the earliest, but the EPA estimates that the regulations would reduce exposure to lead for as many as 500,000 children per year.¹⁴⁴

Turning to security of tenure, the state and federal eviction moratoria issued in conjunction with the COVID-19 pandemic are models of sorts for addressing the crisis involving rental housing for low-rent households. Forty-three states and Washington, D.C. implemented moratoria early in the pandemic.¹⁴⁵ The state moratoria of course varied, with some targeting the whole eviction process and others emphasizing only the later stages of the process. One study found that the state moratoria not only enabled renters to remain in their apartments but also contributed to their improved mental health, as shown by fewer days with mental health problems and a

¹⁴² See generally ARCHON FUNG, MARY GRAHAM & DAVID WEIL, *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* (2007).

¹⁴³ See Hyunhoe Bae, *Reducing Environmental Risks by Information Disclosure*, 31 J. POL'Y ANALYSIS & MGMT. 40 (2012).

¹⁴⁴ See Coral Davenport, *EPA Proposes Stricter Rules on the Removal of Lead-Based Paint*, N.Y. TIMES, July 13, 2023, at A13.

¹⁴⁵ See Abdinasir K. Ali & George L. Wehby, *State Eviction Moratoriums During the COVID-19 Pandemic Were Associated with Improved Mental Health Among People Who Rent*, 41 HEALTH AFFAIRS 1583, 1583 (2022).

lower likelihood of frequent mental distress.¹⁴⁶ Another study found that the moratoria enabled renters to redirect household financial resources to “immediate consumption needs, notably including food and grocery spending.”¹⁴⁷ The availability of extra funds also reduced renters’ stress and food insecurity.¹⁴⁸

The federal moratoria, meanwhile, have a more tortured legal history but similar effects. In March, 2020, at the start of the pandemic, Congress passed the Coronavirus Aid, Relief and Economic Security Act (CARES) to provide relief from problems caused by COVID-19.¹⁴⁹ One of the programs in CARES was a 120-day eviction moratorium. When Congress did not continue the eviction ban after it expired, the Centers for Disease Control (CDC) on several occasions issued orders temporarily halting residential evictions.¹⁵⁰ Landlords sued to stop the moratoria, and after several appeals the United States Supreme Court finally ended renters’ protection from eviction, stating that the CDC had exceeded its authority.¹⁵¹

The federal moratoria, both from Congress and from the CDC, were controversial from the start, and the moratoria had unintended consequences that irked some. While some renters did in fact use their rent money to buy food, others used it for flat screens, cars, and vacations. This sometimes soured relationships with landlords. Since the moratoria did not cancel rent, renters fell behind on their rent, and growing numbers worried about how they would be able to pay in the future. Then, when the moratoria ended, landlords rushed to evict tenants, and the courts faced a torrent of eviction proceedings.¹⁵² Despite these consequences, though, the moratoria prevented an estimated 1.55 million evictions and significantly reduced the concomitant negative ramifications of eviction.¹⁵³

Policymakers who promoted the eviction moratoria argued that the moratoria would slow the spread of the coronavirus, a noble goal

¹⁴⁶ *Id.* at 1586.

¹⁴⁷ Xudong An, et al., *More Than Shelter: The Effect of Rental Eviction Moratoria on Household Well-Being*, 112 REA PROC. AND PRAC. 308, 308 (2022).

¹⁴⁸ *See id.*

¹⁴⁹ *See* Sanford P. Shatz & Shaun Kevin Ramey, *Supreme Court Strikes Down the CDC’s Second Eviction Moratorium*, BUSINESS LAW TODAY (Sept. 14, 2021), https://www.americanbar.org/groups/business_law/resources/business-law-today/supreme-court-strikes-down-CDC’s-second-eviction-moratorium. [<https://perma.cc/W6EY-X8HF>].

¹⁵⁰ *See id.*

¹⁵¹ *See id.*

¹⁵² *See* Jack Tsai, *Expected and Possible Unexpected Consequences of Ending the Eviction Moratorium*, LANCET REGIONAL HEALTH – AMERICAS (Oct. 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9904063/> [<https://perma.cc/D8K7-UL44>].

¹⁵³ *See* Samantha Batko & Amy Rogin, *The End of the National Eviction Moratorium Will Be Costly for Everyone*, URBAN INSTITUTE (June 24, 2021), <https://www.urban.org/urban-wire/end-national-eviction-moratorium-will-be-costly-everyone> [<https://perma.cc/9Z8P-HDWH>].

to be sure. But could eviction moratoria be understood instead as ways to provide greater security of tenure regardless of the virus? Might the moratoria be re-envisioned as a rent cancellation program for people in need? In order to be eligible, renters would have to demonstrate their household income was below a certain level.¹⁵⁴ Alternatively, renters would have to show they were unable to pay their rent due to unemployment, loss of overtime, uninsured medical expenses, or perhaps the likelihood of homelessness. In addition, some sort of fund could be established to compensate landlords for loss of rent payments.

Some of the measures we have discussed – the development of affordable housing, lead-based paint abatement obligations, and eviction moratoria/rent cancellation – might be politically difficult or even impossible to achieve, and all of them would require substantial fine-tuning. The similarity among these measures, meanwhile, is they consciously address particular features of inadequate rental housing. The measures focus on aspects of the nation’s problematic rental housing for low-income households.

CONCLUSION

Rental housing for low-income households in the United States is deplorable. Much of this housing is unaffordable, unsanitary, and insecure. The well-being of the residents undeniably suffers because of where the residents have to live.

While the internationally recognized right of housing is unenforceable in the United States, this right nevertheless illuminates the problems with rental housing for low-income households. At issue is not so much the proverbial “roof over one’s head” but rather the aspects of adequate housing that international treaties and agreements spell out. Most poor and working-poor people cannot afford the housing in which they live. The housing itself is often inhabitable, with lead poisoning from paint and pipes being an especially dangerous part of the problem. The high prevalence of evictions, both formal and informal, leaves the residents stressed and insecure.

But just as the established aspects of adequate housing illuminate the inadequacies of rental housing for low-income people, those aspects could be the focus of specific law reforms and government programs. A revised federal tax credit program could produce additional affordable units and make them available for longer

¹⁵⁴ In order to be eligible for the federal eviction moratorium, for example, household income had to be below \$99,000 in 2021. See *Federal Moratorium on Evictions for Nonpayment of Rent*, NATIONAL HOUSING LAW PROJECT (Aug. 2021), <https://www.nlhc.org/sites/default/files>.

periods of time. New laws could place greater responsibility on landlords for actually abating the lead-paint menace. And eviction moratoria and rent assistance could spare tenants the disaster of eviction even after the pandemic once and for all concludes.

None of these remedial laws and programs, even despite their focus on specific aspects of inadequate rental housing, will end the housing crisis for low-income households. Landlords have too much power, and the American public in general takes housing to be privately-owned and profit-generating. Yet the steps we propose could be taken. They could be a start at ending the crisis involving rental housing for low-income households in the United States that is an ongoing embarrassment on the world stage.