Missouri Law Review

Volume 86 | Issue 3 Article 6

Summer 2021

A Common-Law Remedy for the Eviction Epidemic

Brian M. Miller

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

 Part of the Law Commons

Recommended Citation

Brian M. Miller, *A Common-Law Remedy for the Eviction Epidemic*, 86 Mo. L. Rev. (2021)
Available at: https://scholarship.law.missouri.edu/mlr/vol86/iss3/6

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

A Common-Law Remedy for the Eviction Epidemic

Brian M. Miller[*]

ABSTRACT

Eviction burdens tenants and their households with incredible hardship. But it long has been the standard legal remedy when a tenant fails to keep up with rent payments. The combination of these two facts has birthed a crisis. Many commentators have responded to the crisis by suggesting legislative or executive solutions, but courts and the common law have been mostly ignored. This article focuses on courts and the role they can play under the common law to minimize unnecessarily harmful evictions. By considering reasonable expectations and interests of not only landlords, but of tenants and the public as well, this article proposes that courts should opt for a monetary remedy in certain cases in which eviction may otherwise be the norm.

In many cases, eviction lacks theoretical justification. Although some landlords are intimately affected by the day-to-day use of their rental units, others are not. In fact, some landlords hold so many rental units that their interest in the units is more like that of a distributor's interest in commercial goods. They seek to generate income from the units, but rarely, if ever, use the properties themselves. When a rent arrears dispute involves such a landlord on one side, and a tenant likely facing homelessness on the other, eviction may be unjustified and a monetary remedy perhaps should replace it. If courts were to consider this approach, they could find support from common-law remedial principles in both contract and property.

[*]J.D., University of Virginia School of Law; B.A., North Carolina State University. I thank Rich Schragger, Julia Mahoney, Michael Doran, and W. Augustus Todd for helpful comments.

TABLE OF CONTENTS

I. INTRODUCTION

The eviction crisis in this country is well-documented. Hundreds of thousands of people are evicted every year, and low-income individuals, racial minorities, and women are disproportionately affected.[1] An eviction may result from a number of things, such as criminal activity by a tenant or tenant's guest, a failure by a tenant to pay rent, or a simple desire by a landlord to move on to another tenant.[2] Usually a landlord's decision to evict a tenant is entirely lawful. Standard contracts for rental housing expressly allow a landlord to evict a tenant under certain circumstances,[3] and state statutes authorize landlords to file "summary ejectment" actions to quickly remove tenants who violate lease provisions.[4] The thesis of this article is that courts should nonetheless consider a monetary remedy instead of eviction in special cases: when eviction would likely result in homelessness, the landlord owns an abundance of rental units, and the landlord cannot show it will make productive use of the unit in the immediate future.

Legal as eviction may often be, it presents a significant hardship to many tenants—especially tenants who are evicted because of rent arrears.[5] When a person or family is forced to move before the end of the original lease term, they must find alternative housing quickly. That is easier said than done. Vacant rental properties may abound, but they may not be practically available to low-income families searching for housing in a

[1] MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 98 (2016).

[2] David A. Dana, *An Invisible Crisis in Plain Sight: The Emergence of the "Eviction Economy," Its Causes, and the Possibilities for Reform in Legal Regulation and Education*, 115 MICH. L. REV. 935, 946 (2017) (describing the need for reforms to combat eviction crisis and identifying rent arrears as a common reason for eviction).

[3] *See, e.g.*, Interstate Realty Mgmt. Co. v. Price, 86 So. 3d 798, 801 (La. Ct. App. 2012) (describing a lease provision that allowed for the landlord to evict the tenant under certain circumstances); Bentley-Kessinger, Inc. v. Jones, 367 S.E.2d 317, 318 (Ga. Ct. App. 1988) (dealing with a post-eviction dispute brought about by the terms of the lease agreement); Dominski v. Frank Williams and Son, LLC, 46 A.D. 3d 1443 (N.Y. S. Ct. 2007) (dealing with a post-eviction dispute brought about by the terms of the lease agreement); Keller Williams Realty v. Melekos, No. 2015CA0679, 2015 WL 6951406 (La. Ct. App. 2015) (dealing with a post-eviction dispute brought about by the terms of the lease agreement).

[4] *See, e.g.*, N.C. GEN. STAT. § 42-26; N.Y. REAL PROP. ACTS. LAW § 711; 735 IL. COMP. STAT. 5/6-101.

[5] Dana, *supra* note 2, at 937.

pinch. For one, a family who has just been evicted for rent arrears likely does not have much cash on hand for a deposit and first month's rent. Moreover, past evictions typically show up on a permanent record, and many landlords refuse to rent to people with past evictions because of the risk of subsequent default.[6]

Public housing is rarely helpful. If government-funded rental housing ever was abundant and easily accessible, it is no longer.[7] Federal funds have been siphoned off from public housing projects, preventing the construction of new projects to keep up with demand and suppressing the maintenance of existing facilities that are dissolving into disrepair.[8] And, public housing projects that do still operate are often fully occupied with long waiting lists,[9] which may be reserved for people without a history of evictions.[10] The picture is similar for nonprofit-run housing and shelters, which are often packed full and limited to people with "clean" records.[11]

An eviction is therefore often more serious than simply forcing a tenant to move. Such a court decision may practically be a judgment mandating homelessness. And the harsh consequence of abrupt homelessness radiates through all facets of life.[12] Homeless children may miss school, causing them to fall behind and perhaps never graduate.[13] A father or mother who continues to work may be unable to secure a safe

[6] *Id.* ("[T]enants know that a formal eviction on an individual's record makes finding decent new housing much, much more difficult. They understand that an eviction record is like a criminal conviction record--a stain that marks an individual as undesirable for a range of purposes.").

[7] Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 GEO. J. ON POVERTY L. & POL'Y 35, 39 (describing the neglect and diminishment of public housing over recent decades).

[8] *Id.* at 38–40.

[9] Hanrahan v. Housing and Redevelopment Auth. of Duluth, Minn., 912 F. Supp. 428, 435 (D. Minn. 1995) (describing a plaintiff who complained of being placed at the bottom of a public housing waiting list).

[10] *See* Gerald S. Dickinson, *Towards a New Eviction Jurisprudence*, 23 GEO. J. ON POVERTY L. & POL'Y 1, 20 (2015) (describing the harsh consequences of the "one strike rule" in federally-funded housing).

[11] *See* Juan Pablo Garnham, *Texans With Criminal Records Face Increasingly Limited Housing Options. Homeless Advocates Say a New Rule Could Leave Them With Even Fewer Choices.*, THE TEXAS TRIBUNE, Oct. 16, 2020 (explaining that housing in entities receiving housing tax credits may be limited to people without criminal records).

[12] Dana, *supra* note 2, at 937 (explaining that eviction "undermines poor people's efforts to gain and maintain employment, and to provide their children something like a stable education and a sense of agency").

[13] *Id.* at 937 (explaining that eviction "undermines poor people's efforts to gain and maintain employment, and to provide their children something like a stable education and a sense of agency").

place for children during working hours,[14] exposing the children to various dangers like criminal activity or disease.[15] Indeed, a person who has been evicted may be unable to keep a job at all because she lacks the means to get to work or lacks the time to work because she is in search of new housing.[16] On top of it all, psychological research reveals that eviction is a traumatic experience.[17] "Involuntary housing loss," as it has been called,[18] is linked to persistent depressive symptoms.[19] Such symptoms can hamper a person's diligence to pursue change in a variety of areas of life – relational, economic, or otherwise.[20]

All in all, the picture is bleak. Tenants who struggle to stay afloat are cast out into a situation that further inhibits their ability to secure income and stability.[21] It's a vicious cycle. For these reasons and others, the foremost sociologist in the field, Matthew Desmond, explains that "[e]viction isn't just a condition of poverty; it's a cause of poverty."[22]

Commentators have proposed various reforms to combat the eviction crisis. These range from substantive policy solutions like mandating the construction of additional affordable housing or statutory protections against eviction from public housing for the bad acts of guests outside of

---

[14] *Id.* at 940–41 (describing a tenant, who, because of eviction, ultimately had to send her minor children to live with other people just to make sure they had some stability).

[15] *Effects of Poverty, Hunger, and Homelessness on Children and Youth*, AM. PSYCH. ASS'N, https://www.apa.org/pi/families/poverty [https://perma.cc/9UZ6-P6YR] (last visited Nov. 3, 2020) (describing how children experiencing homelessness are more likely to also experience illness, mental health issues, and witness violence).

[16] Eloisa C. Rodriguez-Dod, *"But My Lease Isn't Up Yet!": Finding Fault With "No-Fault" Evictions*, 35 U. ARK. LITTLE ROCK L. REV. 839, 866, n.201 (2013) (describing the difficulty of finding a job for people struggling to pay rent).

[17] *Id.* at 868, n.212.

[18] Harold J. Krent et al., *Eviction Court and a Judicial Duty of Inquiry*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 547, 554 (2016).

[19] *Id.*

[20] Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 878–79 (2015).

[21] Anne Kat Alexander, *Residential Eviction and Public Housing: Covid-19 and Beyond*, 18 IND. HEALTH L. REV. 243, 252–54 (2021).

[22] Terry Gross, *First-Ever Evictions Database Shows: "We're in the Middle of a Housing Crisis"*, NPR (Apr. 12, 2018), https://www.npr.org/2018/04/12/601783346/first-ever-evictions-database-shows-were-in-the-middle-of-a-housing-crisis#:~:text=For%20many%20poor%20families%20in,a%20real%20and%20ongoing%20threat.&text=four%20every%20minute.-,%22Eviction%20isn't%20just%20a%20condition%20of%20poverty%3B%20it's,%5Band%5D%20community%20instability.%22 [https://perma.cc/3G64-QMT7].

the tenant's control,[23] to procedural protections like the right to counsel for tenants in summary ejectment proceedings.[24] Substantial attention has been given to reforming or counteracting the "one strike rule" in Section 8 and public housing,[25] which allows entities receiving federal funds to evict tenants after only one incident of drug related activity on the premises.[26] Most of these proposed reforms would likely be helpful and are worth thorough consideration, but little attention has been given to substantive reform in the common law surrounding evictions. Perhaps that should come as no surprise. Valid rental contracts provide for eviction and state statutes allow it when leases are violated.[27] What is left for a court to do except affirm the property rights identified in the contract and blessed by the legislature?

In fact, courts could act to "reform" the law and combat the eviction crisis. In the past, courts, under their common-law discretion, have taken an active role in developing landlord-tenant law to conform to contemporary knowledge and needs.[28] The most visible example has been the oft-noted trend to evaluate residential landlord-tenant issues through a mix of property and contract law principles.[29] Famously, this revolution has birthed the implied warranty of habitability, which allows tenants to withhold rent if the landlord fails to maintain the residential premises in a

---

[23] *See, e.g.*, Kristen David Adams, *Do We Need a Right to Housing?*, 9 NEV. L.J. 275, 300 (2009) (discussing how recognizing a right to housing might spur the construction of additional affordable housing units); Robert Van Someren Greve, *Protecting Tenants Without Preemption: How State and Local Governments Can Lessen the Impact of HUD's One Strike Rule*, 25 GEO. J. ON POVERTY L. & POL'Y 135, 136–37 (2017) (arguing for various state and local legislative action to counteract the harmful effects of HUD's one-strike rule).

[24] Quite a bit of attention has been given to this particular potential reform. *See generally* Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557 (1988); Ericka Petersen, *Building a House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 63 (2020); Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187 (2009).

[25] *See generally* Caroline Castle, *You Call That a Strike? A Post-Rucker Examination of Eviction from Public Housing Due to Drug-Related Criminal Activity of a Third Party*, Note, 37 GA. L. REV. 1435 (2003); Paul Stinson, *Restoring Justice: How Congress Can Amend the One-Strike Laws in Federally-Subsidized Public Housing to Ensure Due Process, Avoid Inequity, and Combat Crime*, 11 GEO. J. ON POVERTY L. & POL'Y 435 (2004).

[26] 42 U.S.C. § 1437d(l)(6).

[27] *See supra* notes 3 and 4.

[28] Edward Chase & E.H. Taylor, Jr., *Landlord and Tenant: A Study in Property and Contract*, 30 VILL. L. REV. 571, 572–73 (1985).

[29] *Id.*

sufficiently livable condition.[30] Courts recognized the unique challenges posed by housing insecurity in urban centers and responded in accord with renters' reasonable expectations – a hallmark approach of contract law.[31] Because the agrarian characteristics of rural Britain – which originally justified a property-focused approach to leases – had given way to new realities, a common-law "development" was justified.[32]

This article argues that the common-law "revolution" in landlord-tenant law is at least one hurdle short of completion, and that hurdle is the issue of rent arrears. The revolution has enhanced the substantive rights of tenants based on modern realities of rental housing, but it has not substantially swept through the remedies side of the analysis.[33] In other words, tenants today are better positioned to show that their landlord materially breached a lease agreement. But what is the right course of action when a tenant breaches?

The standard remedy is indeed eviction.[34] Landlords reasonably want to avoid housing someone on their property who cannot consistently pay rent, especially when a whole crowd of other potential renters who may be able to pay wait in line. Landlords thus include express provisions in lease contracts allowing them to evict a tenant who falls behind on rent payments.[35] And state legislatures have accommodated landlords by

---

[30] Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 521–23 (1982); Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).

[31] *Javins*, 428 F.2d at 1078.

[32] *Id.* (explaining that "today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the 'jack-of-all-trades' farmer who was the common law's model of the lessee").

[33] The contract revolution has addressed remedies to an extent, though, to the extent that doctrines like the implied warranty of habitability affect both the substantive obligations and the potential remedies for parties to a lease agreement.

[34] Glendon, *supra* note 30, at 512 (describing how eviction or ejectment has long existed as a primary right of landlords).

[35] *See, e.g.*, Interstate Realty Mgmt. Co. v. Price, 86 So. 3d 798, 801 (La. Ct. App. 2012) (describing a lease provision that allowed for the landlord to evict the tenant under certain circumstances); Bentley-Kessinger, Inc. v. Jones, 367 S.E.2d 317, 318 (Ga. Ct. App. 1988) (dealing with a post-eviction dispute brought about by the terms of the lease agreement); Dominski v. Frank Williams and Son, LLC, 46 A.D. 3d 1443 (N.Y. S. Ct. 2007) (dealing with a post-eviction dispute brought about by the terms of the lease agreement); Keller Williams Realty v. Melekos, No. 2015CA0679, 2015 WL 6951406 (La. Ct. App. 2015) (dealing with a post-eviction dispute brought about by the terms of the lease agreement).

passing statutes expressly allowing civil actions in court to quickly remove such breaching tenants under the force of law.[36]

But it is time for the judicial branch to engage. Just as courts took an active role in coaxing landlord-tenant law to reflect changed circumstances and serve the interest of minimally acceptable housing for all paying tenants, so too they should embrace their common-law role of recognizing changed circumstances and serve the interest of housing stability for more low-income people. What would this look like? Primarily, in some special cases, it would look like choosing a remedy other than eviction, like damages, even when the lease terms allow for eviction. Some landlords own dozens or more rental units geographically distant from their own home, and they rent out most of these properties to strangers.[37] Although these properties are undoubtedly "real" property,[38] their value and relationship to the landlord is in some ways more like that of a collection of goods leased out for temporary use. It is thus worth considering how strong of a right to exclude should rest unwaveringly with the landlord. The landlord's primary interest is an expectation, however reasonable or unreasonable, of a continuous stream of rental income. That interest matters, but it should not be the only relevant consideration. A struggling family's interest in stable housing, the likelihood that the landlord could actually find a paying substitute tenant quickly, and the strain on government resources presented by combatting homelessness after the fact all matter too.[39]

Of course, in any given case these various considerations may shake out differently than in other cases. That case-by-case nuance is precisely why courts should have a greater role in exercising their remedial discretion.[40] As in other contract or property cases, courts often must exercise discretion to determine the most appropriate remedy, even when

---

[36] *See, e.g.*, N.C. GEN. STAT. § 42-26; N.Y. REAL PROP. ACTS. LAW § 711; 735 IL. COMP. STAT. 5/6-101. *See also* Glendon, *supra* note 30, at 512.

[37] *Rental Housing Stock*, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., https://www.jchs.harvard.edu/sites/default/files/ahr2011-4-stock.pdf [https://perma.cc/2YLS-HM66] (last visited Nov. 4, 2020). *See also* Michael Kolomatsky, *Mom and Pop Own Fewer Rental Units*, N.Y. TIMES (Aug. 31, 2017), https://www.nytimes.com/2017/08/31/realestate/institutional-investors-landlord.html [https://perma.cc/F3PX-2Z9C].

[38] For a discussion of the classic definitions of real and personal property, *see* George P. Costigan, Jr., *A Plea for a Modern Definition and Classification of Real Property*, 12 YALE L.J. 425, 426 (1903).

[39] Alexander, *supra* note 21, at 252–54.

[40] Unlike legislatures, which typically pass general laws targeted to broad categories of occurrences, courts are able to consider the intricacies and oddities of special cases as they arise.

parties to a lawsuit ask for something different.[41] That sensible approach has not generally entered the picture in landlord-tenant disputes over unpaid rent, but it should. Importantly, this new change would find some support from old principles in both contract and property law.[42]

Part II of this article explores why, based on the history of landlord-tenant law, eviction came to be the standard remedy for nonpayment of rent. It then reviews two modern trends in law and public policy putting pressure on that traditional approach: the contract revolution in landlord-tenant law and the modern right to housing movement. Part III channels the questions those trends present and lays out the core theory of this article: in some eviction cases, namely when the landlord does not live on the rental premises and the rental unit is one of many the landlord owns, courts should "balance the equities" and consider alternatives to eviction for a tenant who has come on hard times and fallen behind on rent payments. Part IV explains why courts that pursue such a course would not necessarily be engaging in unconstrained judicial activism but instead would adhere to longstanding principles of the common law of contracts. Part IV also explains why this remedies-based solution to the eviction crisis need not only fall under the banner of the contract law revolution, but that it could additionally be supported by some of the well-established principles of property law.

II. THE HISTORICAL CONVERSATION

This Part explores why eviction is the standard remedy when a tenant fails to keep up with rent payments. One primary reason is that residential leases, though they are generally precipitated by a contract, center on property rights – especially the rights of the landlord in whatever property is the subject of the lease.[43] That being so, the law has provided a property-like remedy to landlords – one that restores to the landlord all the traditional rights in the "bundle of sticks,"[44] including the right to exclude.

This Part also identifies some trends that challenge the traditional conception of leases. These include the contract revolution in landlord-

[41] Marco Jimenez, *Remedial Consilience*, 62 EMORY L.J. 1309, 1310–11 (2013) (explaining that judges have a duty in essentially every case to wrestle with the issue of which remedy is most appropriate).

[42] *Id.*

[43] John A. Humbach, *The Common-Law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants*, 60 WASH. U. L. Q. 1213, 1214–15 (1983) (explaining the centrality of property rights and property law to residential leases).

[44] Glen Anderson, *Towards an Essentialist Legal Definition of Property*, 68 DEPAUL L. REV. 481, 493–96 (2019) (describing the traditional conception of property rights as a bundle of sticks, and the nature of some of those sticks).

tenant law and the modern right to housing movement.[45] The remedy of eviction has thus far withstood any significant scrutiny. But this article is common-law-focused; so it is concerned not only with where we have been, but also where we should go.[46]

A. Why Eviction?

The common law in the United States places a high value on property ownership.[47] When someone owns property, whether "personal" or "real," the law entitles them to a set of rights over that property.[48] That set, traditionally called the "bundle of sticks," includes the rights to possess the property, use the property, alienate the property through gift or sale, and exclude others from the property.[49] These rights are not quite absolute,[50] but they are very strong.[51] So strong that the government formally constrains itself from infringing on them.[52] The federal constitution and state constitutions prohibit the government from depriving a person of property rights without sufficient legal process,[53] and in some cases the government even must pay the property owner for the owner's lost value due to government action.[54] A famous article thus coined the label "property rule" for legal entitlements that cannot be taken

[45] *See, e.g.*, Glendon, *supra* note 30; Adams, *supra* note 23.

[46] Oliver W. Holmes, *The Path of Law*, 10 HARV. L. REV. 457 (1897) (famously, and perhaps controversially, arguing that although the common law inherently references the past for counsel, the point of it, and the role of lawyers and judges, is to take part in guiding law to the right ends, and predict what those ends will be).

[47] *See generally* Anderson, *supra* note 44.

[48] Holmes, *supra* note 46, at 461.

[49] Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 247 (2007).

[50] For example, the common law provides a "necessity" exception to the right to exclude when an exception is necessary to preserve human safety or life. And statutory and constitutional law may limit an owner's right to exclude others from their property in a discriminatory way. Ploof v. Putnam, 71 A. 188, 189 (Vt. 1908).

[51] Although Blackstone's conception of property rights is now thought to be somewhat outdated, it represents the traditional notion that property rights only implicated a unilateral relationship between a person and a thing, and could not be infringed upon by others under most any circumstance. *See* Johnson, *supra* note 49, at 250.

[52] *Id.*

[53] U.S. CONST., amends. V, XIV; N.Y. CONST., art. I, § 6; TEX. CONST., art. I, § 19; COLO. CONST., art. II, § 25.

[54] U.S. CONST., amend. V ("nor shall private property be taken for public use, without just compensation").

without the owner's consent and for an owner-specified price.[55] In short, the ethos when "property" is in play is that the owner owns it, full stop.[56] The owner cannot be forced to do anything with it she does not want to do.[57]

The landlord party to a lease owns the land.[58] Thus, under the traditional conception of property rights, the landlord can hold, use, sell, and exclude others from their land as they wish and on their own terms.[59] A lease represents a landlord's voluntary decision to limit some of her rights to the land for a period of time.[60] But "voluntary" is the key. The temporary limitation of rights over that land only extends as wide and as long as the landlord agrees.[61] If the terms of a lease say that the tenant's rights end after one year of tenancy, then traditionally the fullness of the landlord's rights returns after that one year.[62] And if the lease agreement says that the tenant's rights end if the tenant fails to pay rent at the beginning of every month of the lease term, then, again, all of the landlord's rights may return in full force if the tenant misses a payment.[63]

Importantly, the right to exclude returns to the landlord at the end of the lease term or upon a tenant's breach.[64] Typically, that means that anyone who enters or remains on the landlord's property without her permission may be liable for trespass and could be removed or sued for damages even if they do not harm the property.[65] That is where eviction

---

[55] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) ("An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.").

[56] *Id.*

[57] *See* Johnson, *supra* note 49, at 248.

[58] For a classic definition of a "lease," *see* Franklin v. Jackson, 847 S.W.2d 306, 308 (Tex. Ct. App. 1992) (citing BLACK'S LAW DICTIONARY, 800 (5th ed. 1979) ("[T]he word 'lease' 'means a contract by which one owning such property grants to another the right to possess, use and enjoy it *for a specified period of time in exchange for periodic payment of a stipulated price*, referred to as rent.'").

[59] *Id.*

[60] *Id.*

[61] *See, e.g.*, Calabresi & Melamed, *supra* note 55, at 1106.

[62] *Id.*

[63] *Id.* Again, this reality is predicated not only on the fact that property rights allow landowners to dictate the terms of conveyances, but also because statutes tend to give force to lease provision calling for eviction. *Id.*

[64] *Id.*

[65] For a classic definition of common-law trespass, *see* Medeika v. Watts, 957 A.2d 980, 982 (2008) (describing trespass as an intentional entry onto property possessed by another).

finds its theoretical justification. When, based on the landlord's desire reflected in the lease terms, a tenant's rights end, the tenant may be removed from the property.[66]

The common law traditionally viewed a real property lease as a conveyance of real property, not a pure contract.[67] In other words, a lease agreement gave the specifications under which the landlord turned over property rights to another.[68] As long as those specifications were met, the landlord was thought to have transferred several property rights to the tenant.[69] But, again, all rights to the property reverted back to the landlord if specified conditions, like nonpayment of rent, occurred.[70] The traditional picture gave much power and benefit to the landlord[71]—power to dictate all the terms of the transfer of property, and the benefit of having no duties to the tenant beyond those voluntarily assumed.[72] Indeed, so strong and embedded were (and are) landlord property rights that states passed statutes authorizing landlords to bring actions to remove tenants from their property on a showing that the tenant did not comply perfectly with all the lease terms.[73]

B. Pressure on Pure Property Rights

The common law is a creature of change, though, and landlord-tenant law is certainly no exception.[74] In fact, it is in some ways a poster child of

---

[66] Glendon, *supra* note 30, at 506.

[67] Chase & Taylor, *supra* note 28, at 572–73.

[68] Glendon, *supra* note 30, at 506 (describing the conveyance perspective of real property leases).

[69] *See id. See also* Franklin v. Jackson, 847 S.W.2d 306, 308 (Tex. Ct. App. 1992) (citing BLACK'S LAW DICTIONARY, 800 (5th ed. 1979) ("[T]he word 'lease' 'means a contract by which one owning such property grants to another the right to possess, use and enjoy it *for a specified period of time in exchange for periodic payment of a stipulated price*, referred to as rent.'").

[70] Glendon, *supra* note 30, at 533.

[71] Christopher Wm. Sullivan, *Forgotten Lessons from the Common Law, The Uniform Residential Landlord and Tenant Act, and the Holdover Tenant*, 84 WASH. U. L. REV. 1287, 1293–94 (2006).

[72] *Id.* ("Having executed a lease, a landlord merely gave up possessory rights to the premises for the duration of the lease. At this point, the tenant received the bargained-for benefit and became responsible for the property, and, consequently, although the parties could create express obligations, few implied duties were imposed on the landlord. The landlord had few inherent duties regarding services, repair, or upkeep.").

[73] *See* N.C. Gen. Stat. § 42-26; N.Y. CONSOL. LAW § 711; 735 Il. Comp. Stat. 5/6-101, *et seq.*

[74] Sullivan, *supra* note 71, at 1290.

common-law evolution.[75] The contract revolution reconfigured the lens through which leases were viewed, and thus shifted some rights and entitlements from landlords to tenants.[76] And, although that revolution has now slowed – if not halted completely –[77] people still have big dreams for a tenant-favoring system of rental housing.[78] The modern right to housing movement has many different iterations, and some call for extreme change that largely ignores property rights of homeowners who want to rent.[79] Although I do not necessarily endorse either the past or coming revolution fully, the presumptions behind these movements are worth evaluating before I propose what could be viewed as a compromise approach.

1. The Contract Revolution

The contract revolution in landlord-tenant law has been ongoing for likely more than a century,[80] and it puts pressure on property rights as traditionally expressed. The revolution marks a shift from looking at landlord-tenant legal issues through the lens of pure property law to analyzing them through the lens of contract law.[81] This shift has expanded tenants' entitlements beyond those expressly granted by the landlord who holds the property right.[82] I evaluate this revolution in the landlord-tenant context to note how the common law has not treated property rights as absolute in the traditional sense when competing interests, like those of tenants who need adequate housing, come into play.

Again, a lease for real property was traditionally thought of as a conveyance of that property.[83] That means the landlord who owned the property unilaterally conveyed the property, or at least some rights to the

[75] *Id.* ("Moreover, these developments [in landlord-tenant law] were considered radical because they effectively displaced centuries of common law in the course of a few decades—the wink of an eye in property law. As one commentator described it, 'The residential tenant, long the stepchild of the law, has now become its ward and darling.'").

[76] *Id.* ("starting with a flood of reform in the late 1960s and early 1970s, tenants' legal protections substantially increased").

[77] By this I simply mean that no major new developments have surfaced in the substantive law of landlords and tenants since the implied warranty of habitability took root. *Id*

[78] *See infra* Part II.B.2.

[79] *See infra* Part II.B.2.

[80] *See* Glendon, *supra* note 30, at 503–04. Some commentators assert that landlord-tenant law has always operated substantially under contract principles and thus the revolution is not so revolutionary. *Id.*

[81] *Id.*

[82] Sullivan, *supra* note 71, at 1290.

[83] Humbach, *supra* note 43, at 1214.

property, to a tenant for a period of time.[84] Just like with the conveyance of a freehold estate, the landlord was the master of the transfer:[85] She could dictate all the terms of the transfer and possession of those rights.[86] Importantly, to treat the lease as a conveyance meant that the landlord had no duties regarding the property once it was conveyed (unless the landlord expressly chose to assume certain duties).[87] The landlord transferred the property on her own terms, could get the property back in accordance with the terms she dictated in the conveyance, and did not have to do anything else for the tenant.[88] If the property deteriorated or was damaged while in the tenant's possession, the burden fell on the tenant to do something about it, even if the property was rendered unusable.[89]

That approach developed early in the history of leases, when land to be used for agriculture was usually the subject of the conveyance.[90] Feudal lords in England were granted title to the land, ultimately from the Crown.[91] The lords leased the land to tenants – serfs – who were allowed to farm the land for their own subsistence if they paid the lord (usually in produce).[92] The tenants were often allowed to live on the land, but they did not always do so.[93] The one-sided duties created by a lease in some ways fit the times. Tenants who used the land for agriculture were usually skilled

[84] *Id.* ("The traditional rules governing the landlord-tenant relation generally have been thought to rest on the idea that leases are essentially conveyance transactions, that is, when a lease is made, an 'estate' in land is conveyed by the landlord to the tenant.").

[85] *Id.*

[86] *Id.*

[87] Chase & Taylor, *supra* note 28, at 578 ("The contract doctrine of independency of covenants denies that constructive conditions can be created to relieve a party who fails to incorporate a condition in the contract; it insists that such conditions be express.").

[88] Sullivan, *supra* note 71, at 1292–94.

[89] Chase & Taylor, *supra* note 28, at 577–78.

[90] Sullivan, *supra* note 71, at 1291.

[91] CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, *Introduction to the Law of Real Property* §7, at 9 (3d ed. 2002) (describing the pyramidal system of land ownership in England, under which all land ownership originated from the monarch and was distributed vertically downward several levels).

[92] D Donald Weinstein, *Landlords and Peasants*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/history-of-Europe/Landlords-and-peasants [https://perma.cc/G36U-KC78] (last visited Nov. 6, 2020) (describing how serfs would often pay "rent" by contributing a portion of the harvest to the feudal lord).

[93] *See id.* (describing how tenants often were bound to land on which they were born, but were sometimes free to live and work elsewhere if they could arrange for it).

in manual labor and craft.[94] When defects developed on the land, such as a collapsing shed, the tenants were well-equipped to fix them.[95]

After the industrial revolution in the United States, population began concentrating in cities.[96] More people had to live on less land, and poorer people often worked in factories, not on farms.[97] Because of the land scarcity and evolved economy, tenants sought leases just to have a place to live, not a place from which to subsist directly.[98] And landlords dealt in units of buildings, not in land.[99] Thus, the new "serfs" merely needed adequate housing; they did not seek to develop or profit off of the land like in the past.[100] Likewise, the new "lords" did not seek to have their land maintained, but sought money instead.[101]

Eventually, courts recognized that it made sense to view a residential lease as an agreement rather than as a conveyance alone.[102] After all, the rights conveyed to the tenant were limited and did not include the ability to exercise much dominion over any land.[103] Because the lease was an agreement, principles regarding the law of agreements, or contracts, applied.[104] The law of contracts is largely governed by the objective expectations of the parties to an agreement.[105] And because a tenant's purpose for entering the agreement was obviously to have adequate, safe

---

[94] Sullivan, *supra* note 71, at 1295.

[95] *Id.*

[96] Bashar H. Malkawi, *Labor and Management Relationships in the Twenty-First Century: The Employee/Supervisor Dichotomy*, 12 N.Y. CITY L. REV. 1, 21 (2008).

[97] *Id.* at 20.

[98] *Id.* ("Prior to the creation of large concerns employing hundreds of individuals, the working class in the Western world earned their daily bread by making and selling small crafts or by farming. By the early nineteenth century, as the industrial revolution spread across the United States from its genesis in the eastern seaboard cities, wage work was often seen as little better than slavery.").

[99] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970) ("In [cases of leases for land to be used for agriculture], the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment.").

[100] *Id.*

[101] *Id.*

[102] *Id.* ("In order to reach results more in accord with the legitimate expectations of the parties and the standards of the community, courts have been gradually introducing more modern precepts of contract law in interpreting leases.").

[103] *Id.* at 1075.

[104] *Id.*

[105] *See, e.g.*, Kabil Dev. Corp. v. Mignot, 279 Or. 151, 156–57 (1977) (describing the standard objective theory of assent underlying contract law).

housing,[106] such a benefit could be assumed as part of what the landlord agreed to provide, the written terms of the lease notwithstanding.[107] Moreover, by that time many cities had building safety codes and could penalize landowners who did not meet standards.[108] Tenants, said the courts, could reasonably expect that the landlord would keep the leased premises in lawful condition.[109] Thus, the implied warranty of habitability was born.[110] Today, every residential landlord has a duty to keep the premises in sufficiently livable condition, and a failure to do so amounts to a breach of the lease agreement.[111]

There are other examples of the effects of the contract revolution in landlord-tenant law, but the development of the implied warranty of habitability illustrates the point most relevant to this article: the common law has changed to accommodate modern circumstances and the unique challenges presented thereby, even when the change chips away at the historically unwavering nature of landlord property rights.[112]

2. The Modern Right-to-Housing Movement

There is a new revolution that aims even higher than the contract revolution. The right to housing movement seeks to have housing recognized as a fundamental and enforceable right.[113] This movement, already gaining traction in parts of Europe and in the United Kingdom,[114] could have a variety of expressions and applications. But, some iterations

---

[106] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970) ("When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.").

[107] *Id.* at 1077, 1080 (describing the implied warranty of habitability and reinforcing the principle based on public housing codes).

[108] *Id.* at 1080.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 1077.

[112] Sullivan, *supra* note 71, at 1296–97.

[113] *See, e.g.*, Adams, *supra* note 23 (evaluating whether we need to recognize a formal right to housing).

[114] Kyra Olds, *The Role of Courts in Making the Right to Housing a Reality Throughout Europe: Lessons from France and The Netherlands*, 28 WIS. INT'L L. J. 170, (2010) 183–94 (describing the nature of the right to housing in The Netherlands and France); Andrea B. Carroll, *The International Trend Toward Requiring Good Cause for Tenant Eviction: Dangerous Portents for the United States?*, 38 SETON HALL L. REV. 427, 451–52 (2008) (describing some features and results of the right to housing in the United Kingdom).

of the right would entail an expansion of "positive" rights of tenants at the expense of some "negative" rights of landlords.[115] This subsection briefly explains the primary features and goals of this modern movement, some theoretical justifications for it, and how it could, if successful, undermine some of the traditional notions of property rights afforded to landlords in the United States.

This movement identifies housing as a basic human right and seeks for governments to recognize it accordingly.[116] It primarily addresses the problems of homelessness, eviction, and housing insecurity through the language of entitlement instead of charity,[117] tackling the housing crisis not by relying on the generous (or even market-driven) actions of those with resources,[118] but by giving enforceable rights to those deprived of adequate housing.[119] Thus, a central goal of the movement is to provide a way for individuals to sue in court when they do not have an opportunity to occupy adequate housing.[120]

One form of the right is enforceable against the government itself.[121] Several European nations have recognized such an iteration, but the substance varies.[122] In France, for example, the right has been thought of as mostly aspirational.[123] Occasionally a person may bring a successful suit, but usually the government may comply with the obligations of the right to housing simply by taking some affirmative steps to increase the availability of affordable housing.[124] Others have viewed the right as stronger, with courts willing to find a violation when a government has not provided housing to a particular claimant who satisfies preconditions.[125]

---

[115] Adams, *supra* note 23, at 282–85.

[116] *See, e.g.*, *id.* at 300–01; Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 248 (2015). *See also* Carroll, *supra* note 114, at 477 ("At least nine countries now recognize the availability of decent housing as a basic human right.").

[117] *See generally* Adams, *supra* note 23.

[118] *Id.* at 277 ("Rights protect needy persons in a way that does not depend on good will.").

[119] Carroll, *supra* note 114, at 428 (describing one recent development in French law providing an enforceable right to adequate housing).

[120] Thomas Byrne & Dennis P. Culhane, *The Right to Housing: An Effective Means for Addressing Homelessness?*, 14 U. PA. J. L. & SOC. CHANGE 379, 379–80 (2011).

[121] Adams, *supra* note 23, at 290–93.

[122] *Id.*

[123] *Id.*

[124] Byrne & Culhane, *supra* note 120, at 386.

[125] *Id.* at 383 (describing that the United Kingdom certain priority groups may have the right to have their application for government-provided housing to be approved).

Courts may order damages to be paid by the government to someone whose right to housing has been violated.[126] But courts might hesitate to issue an injunction requiring the government to provide a claimant with a specific form of housing, perhaps recognizing the complex and expensive realities of providing housing when land and units are limited.[127]

In some countries, though, a commitment to a right to housing is expressed through regulation of the private housing market.[128] Rent control is typical.[129] So is a prohibition on evictions under certain circumstances.[130] France and Poland, for example, generally prohibit evictions during winter months when the consequences are particularly harsh.[131] And courts in some countries will even prevent evictions on a case-by-case basis when homelessness or other severe consequences are likely to result.[132]

Where does this right come from theoretically? One possibility is that the right to housing comes from the right to self-preservation.[133] If evidence shows that homelessness significantly increases the chances of sickness or death (whether because of a heightened risk of infection, exposure to the elements, vulnerability to criminal activity, or in some other way),[134] then perhaps minimally adequate housing is necessary for long-term survival. Another possibility is that the right to housing is derived from a right to liberty or the pursuit of happiness.[135] Studies show that homelessness causes job loss, income reduction, and mental health

[126] Olds, *supra* note 114, at 179 (explaining how a Romanian court ordered the Romanian government to pay damages to a group of people whose right to housing had been violated).

[127] Byrne & Culhane, *supra* note 120, at 383 (explaining that the right to housing in much of Europe tends to generally encourage the production of additional affordable housing but does not tend to create a clear enforceable right in individual cases).

[128] *Id.*

[129] Carroll, *supra* note 114, at 440–41, 451–52 (explaining the nature of rent control measures in Italy and the United Kingdom).

[130] *Id.* at 446–47.

[131] *Id.*

[132] Alexander, *supra* note 116, at 253–54 (describing how the right to housing may call for limitations on evictions with homelessness could result); Carroll, *supra* note 114, at 442 (describing eviction suspensions in Italy).

[133] Adams, *supra* note 23, at 314–15 (explaining that adequate housing is linked to human health and safety).

[134] The evidence does indeed point to this. *See, e.g.*, *Effects of Poverty, Hunger, and Homelessness on Children and Youth*, *supra* note 15.

[135] Adams, *supra* note 23, at 284 (discussing a positive right to liberty in the context of the right to housing).

issues like depression.[136] Thus, to be without a home may mean a limited ability to pursue goals—career, personal, or otherwise.[137] If the freedom to pursue such goals is central to a system of rights, then perhaps housing should be central too.

Whether or not these theoretical foundations are effective to justify a right to housing, recognizing such a right in any meaningful sense may have stark consequences to traditional property rights.[138] As many commentators have noted, to recognize a right generally means to recognize a corresponding duty.[139] If the right is a "positive" right instead of a "negative" right, the corresponding duty is even more demanding.[140] In other words, if people have a positive right to housing, then someone or something has a duty to provide housing to those with that right.[141] But housing does not fall from the sky ready to be used and adequate to satisfy needs. Housing units must be developed first. Existing units must be made available to those in need. If market forces and charity does not give everyone the opportunity to live in a satisfactory home, but the duty to provide housing to all must be satisfied, government intervention of some kind is likely necessary.

Two main methods of government intervention may address the duty to provide housing. Both of them threaten traditional notions of absolute property rights, but in different ways. The first method is the classic tax and spend approach. Government may levy additional tax dollars to fund the public construction of housing units.[142] Or it could use the funds to incentivize private property owners and developers to develop or rent out affordable housing units.[143] This tax and spend method implicates property rights in an indirect way. It forces citizens to hand over their "property" as

---

[136] *See* Krent, *supra* note 18.

[137] *Id.*

[138] *See generally* Adams, *supra* note 23.

[139] Henry T. Terry, *Legal Duties and Rights*, 12 YALE L. J. 185, 188–89 (1903); Henry T. Terry, *The Correspondence of Duties and Rights*, 25 YALE L. J. 171, 174 (1916).

[140] Adams, *supra* note 23, at 282–83 (explaining the nature of positive and negative rights and providing some examples).

[141] Byrne & Culhane, *supra* note 120, at 382 (explaining how a positive right to housing could at least require governments to actively pursue initiatives to increase the availability of adequate affordable housing).

[142] *See, e.g.*, *Public Housing Development*, U.S. DEPT. HOUS. & URB. DEV., https://www.hud.gov/programdescription/phd [https://perma.cc/WUX6-3NMD] (last visited Sept. 6, 2021).

[143] *See, e.g.*, Everett Stamm & Taylor LaJoie, *An Overview of the Low-Income Housing Tax Credit*, TAX FOUND. (Aug. 11, 2020), https://taxfoundation.org/low-income-housing-tax-credit-lihtc/ [https://perma.cc/SUN9-ZETR].

cash and to contribute to a project which the owners of the "property" do not directly benefit from and likely have not consented to. Most commentators have not considered tax and spend approaches to be particularly problematic, even though they may functionally infringe on property rights, because these methods are a necessity: the operation of government requires taxation.[144] So, this familiar method of addressing the right to housing would not mark a dramatic shift in the law. Recognizing a right to housing in this realm would likely just mean that governments have a vaguely defined duty to create more affordable housing.[145]

The second method of fulfilling a duty to provide housing is different. It requires private owners of residential property to make their space available to people in need of housing. The City of Barcelona, for example, sent a message to landlords: fill your spaces with tenants or we will rent out your properties for you at affordable rates.[146] Some cities in the United States have taken a less extreme approach by outlawing or limiting short term rentals like Airbnb and VRBO.[147] Such measures encourage people who own residential units in which they do not live to either sell the units or rent them out long term to locals.[148] The appeal of this category of government action is that it takes advantage of abundant housing stock that already exists and simply encourages (or forces) the owners to put that stock to its best use.[149] The drawback, of course, is that it represents an obvious infringement on traditional property rights, i.e., the right to use and the right to exclude.[150] Forcing landowners to rent out their units when they did not intend to do so, or to people they did not intend to welcome,

---

[144] *See* Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2182, 2184–85 (2004) (explaining the traditional understanding that taxation is a core broad power of government not largely subject to constitutional constraints).

[145] Olds, *supra* note 114, at 174 (explaining that the right to housing often amounts to more of a goal on behalf of the government to increase the stock of affordable housing).

[146] Jack Peat, *Barcelona Tells Landlords: Find Tenants or We Will Rent Your Property as Affordable Housing*, THE LONDON ECON. (July 20, 2020), https://www.thelondoneconomic.com/property/barcelona-tells-landlords-find-tenants-or-we-will-rent-your-property-as-affordable-housing/20/07/ [https://perma.cc/8PFP-4E3H].

[147] Scott Zamost et al., *Unwelcome Guests: Airbnb, Cities Battle Over Illegal Short-Term Rentals*, CNBC (May 24, 2018, 7:00 AM), https://www.cnbc.com/2018/05/23/unwelcome-guests-airbnb-cities-battle-over-illegal-short-term-rentals.html [https://perma.cc/AWS5-WM46].

[148] *Id.* This is because any feasible alternative use for the property is made either illegal or less profitable by government action.

[149] By "best" use, I mean the use most consistent with the public good, not necessarily the most profitable.

[150] *See* Anderson, *supra* note 44, at 487.

limits both of those rights. Eviction moratoriums or prohibitions work in a similar way. Even states and cities in the United States have gone down this road, such as during the COVID-19 pandemic.[151] Limitations on evictions beyond those self-imposed by lease agreement limit the property owner's right to exclude.[152]

At their core, all of these methods of securing a right to housing appear hostile to property rights and at odds with the United States legal system that favors negative rights and resists positive rights.[153] The traditional right to property is a negative right because it states that owners of property have a general right to do (or not do) whatever they want with their property as long as it does not infringe on a negative right promised to others.[154] In that way, a system of various negative rights can exist "peacefully."[155] At least in theory, such a system means that people may do what they want with themselves and their things if they do not bother others.[156] If, however, a positive right is introduced, then a good of some form must be constructed and given to the entitlement holder, and everyone else may be obligated to help.[157]

Positive rights are not unheard of in the United Sates legal system, but they are rare and limited in scope.[158] A nearly unconditional and

---

[151] Dawn Baumgartner Vaughan & Ben Sessoms, *NC Residents Will Be Protected from Pandemic-Related Evictions, Governor Says*, RALEIGH NEWS & OBSERVER (Oct. 28, 2020), https://www.newsobserver.com/news/coronavirus/article246777297.html [] (identifying North Carolina's eviction moratorium); Samantha Chatman, *Landlords Claim Tenants Are Taking Advantage of COVID-19 Eviction Moratorium Order; Renters Rights Advocates Fight Back*, WLS-TV CHICAGO (Oct. 29, 2020), https://abc7chicago.com/illinois-rent-eviction-moratorium-notice-chicago/7434650/ [https://perma.cc/6AXH-M2CR] (identifying Illinois's eviction moratorium).

[152] Abby Vesoulis, *How Eviction Moratoriums Are Hurting Small Landlords – and Why That's Bad for the Future of Affordable Housing*, TIME (June 11, 2020), https://time.com/5846383/coronavirus-small-landlords/ [].

[153] Adams, *supra* note 23, at 283 (explaining that "scholars have traditionally framed rights in the United States in terms of liberties, not positive rights").

[154] *Id.* at 282 (explaining that liberties or negative rights typically involve the right to not be forced to do something, like give your money to someone else).

[155] *Id.*

[156] *Id.*

[157] *See id.* at 282 ("In this conception, as recognized by H.L.A. Hart and others, 'rights' are positive entitlements to something, while 'liberties' are freedom from something, including the freedom from having some of one's money taken to support another person's entitlements.").

[158] Adams, *supra* note 23, at 282–83. Probably the most notable and strongest of these is a child's right to an education, secured by many state constitutions. *See, e.g.*, WASH. CONST., art. IX, § 1 ("It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without

fundamental positive right would certainly shake things up in the landlord-tenant context. And if that positive right is to some form of property, then the property rights of others will necessarily be limited.[159] That is likely why the right to housing has not been recognized in a meaningful sense in the United States.[160] Thus, this article next seeks both to advocate and to mediate. Recognizing both the value of traditional property rights and the interest of secure housing for the less-well-off, it proposes a partial solution rooted in the common law that provides some security to the most at-risk renters and does not eviscerate the expectation interests of landlords.

III. THE REMEDY AND ITS THEORETICAL SUPPORT

The interests pursued by the modern right to housing movement are important. But the expectations of owners of residential property also should be respected so that property rights are not limited without thought and owners are not disincentivized from developing or renting homes to those in need.[161] Most measures that seek to strike a balance between these interests advocate for legislative solutions like vouchers, affordable housing projects, Opportunity Zones, and other programs.[162] This article sets to the side those valuable potential solutions and focuses on courts. The common law is characterized by the principle that the past is important but not iron shackles.[163] That is no less true in the area of evictions.

---

distinction or preference on account of race, color, caste, or sex."); TEX. CONST., art. VII, § 1 ("A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.").

[159] *See* Adams, *supra* note 23, at 282–83.

[160] Byrne & Culhane, *supra* note 120, at 380–81 (noting how the United States has not followed other nations in ratifying the United Nations International Covenant on Economic, Social, and Cultural Rights (ICESCR), which enumerates the right to an adequate standard of living).

[161] Adams, *supra* note 23, at 284–85 (explaining that recognizing a right to housing might discourage market forces that could more effectively provide affordable housing).

[162] *See supra* notes 23–26 and accompanying text (describing some policy reforms advocated by various commentators).

[163] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970) ("Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life—particularly old common law doctrines which the courts themselves created and developed. As we have said before, 'The continued vitality of the common law . . . depends upon its ability to reflect contemporary community values and ethics.'").

Evictions should not be the default remedy in every case in which the lease agreement might call for it. There are some scenarios in which evictions over-privilege a landlord's interests and take no consideration of countervailing interests. These include situations in which the landlord holds a substantial collection of residential properties, the relevant tenant likely faces homelessness, and the landlord is unlikely to make substantial productive use of the rental unit in the immediate future. In these cases, damages may be more appropriate.

The common law of landlords and tenants can adapt to contemporary problems. The contract revolution and the resulting implied warranty of habitability gained traction when courts recognized that landlords were better able to maintain residential premises and that tenants reasonably expected an adequately safe home.[164] The law should likewise address the modern eviction epidemic and conform remedies for tenant breaches to contemporary circumstances.[165]

A. The Landlord's Relationship to the Rental Properties

The first contemporary circumstance to consider is the relationship of landlords to their properties. This relationship differs from landlord to landlord. Some landlords own one property, live on that property, and rent out a portion of it (like a bedroom or suite) to someone outside the household.[166] Some landlords own hundreds or even thousands of rental units and do not live at any or even visit any.[167] Many landlords fall somewhere in between.[168] Moreover, some landlords could not live at or visit one of their properties if they wanted to because they are corporations, not natural persons.[169]

The landlord's relationship to her property should matter to the court when the court must decide how to handle a breach of the lease agreement by the tenant. Why? Because the landlord's relation to a rental property determines the benefits the landlord may reasonably expect to receive from that property.[170] A landlord who lives on site not only reaps income from a renter, but also may interact with renters regularly in the course of

---

[164] Sullivan, *supra* note 71, at 1296–97.

[165] *See id.*

[166] *See, e.g.*, *supra* note 37.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] Maurie Backman, *Pros and Cons of an Owner-Occupied Property*¸ MILLION ACRES (Feb. 4, 2021), https://www.millionacres.com/real-estate-investing/rental-properties/pros-and-cons-owner-occupied-property/ [https://perma.cc/3SYC-N3J9].

daily life.[171] She may see the renter in the kitchen or out in the yard. She may talk to the renter and build a close relationship. In such circumstances, the landlord may have a particular interest in keeping her home free from people who break agreements with her.[172] For such a landlord, utilizing the remedy of eviction in cases of rent arrears not only opens the possibility of re-acquiring a steady stream of rent, but it also allows the landlord to use her home more freely and to her own comfort—keeping everyone off the premises for some peace and quiet, or bringing in a new renter to fill that close relational space.

The interests of a landlord who owns hundreds of apartments are somewhat different when one renter fails to keep up with rent payments. In that case, a landlord does not expect or intend to occupy the rental unit herself.[173] The landlord never uses the property at all. Nor does she generally expect to replace the breaching tenant with another tenant for the sake of personal relationship. Indeed, she perhaps never even met the breaching tenant. Instead, the landlord's primary interest is rent income.[174] For such "larger" landlords, then, eviction would appear to accomplish too much in some cases (and perhaps too little in some cases as well). The standard method of collecting owed money is to get a court order demanding payment.[175] But eviction nominally declares the tenant is in the wrong, kicks the tenant out without question even though the tenant's location may have little bearing on the landlord's life, and, ironically, often does not help the landlord collect owed rent from the tenant.[176] For a party who is primarily interested in making money off a rental property, then, eviction is sometimes a mismatched remedy.

There is another way to look at the relationship of a landlord to rental units that may be helpful: in some cases the interest looks more like an interest in real property, and in other cases it looks more like an interest in

---

[171] *Id.*

[172] *Id.* Perhaps this is part of the reason why such landlords may be exempt from certain laws like the Fair Housing Act which would otherwise limit the landlord's ability to determine who rents their units. *See* The Fair Housing Act of 1968, 42 U.S.C. ch. 45.

[173] I am speaking in general terms. Of course, a landlord would be within her rights to occupy any vacant unit she owned.

[174] Such landlords may have other secondary interests too, like tenant safety and property values.

[175] *See* Erin Eberlin, *12 Times a Landlord Can Sue a Tenant*, BALANCE SMALL BUS. (Dec. 2, 2020), https://www.thebalancesmb.com/reasons-you-can-sue-your-tenant-4144242 [https://perma.cc/QJY3-6TV6].

[176] *See, e.g.*, Shaker & Assocs., Inc. v. Med. Tech. Grp., Ltd., 315 Ill. App. 3d 126, 199 (2000) (explaining that "[a]s a general rule, eviction (whether actual or constructive) ends a tenant's obligation to pay rent").

a collection of goods or services to be sold. Recall that a property interest traditionally entails a "bundle" of rights, including the right to use.[177] That is because people traditionally put land to productive use, whether through agriculture, development of homes or commercial units, or something else. Contrast that with an interest in a collection of goods. The owner may use some of the goods, but perhaps more likely the goods are acquired to either be put to another use to generate a new product, or to sell. In the case of large collections of residential units, the interest typically is just to generate income. The units are not used by the landlord, and indeed they are often not created by the landlord in the first place. They are acquired by the landlord to be "sold" for periods of time.

Compare it to another valuable set of goods that is often leased: construction equipment like excavators and bulldozers.[178] The owner of the equipment likely does not use the equipment herself and perhaps did not create the equipment. The owner owns all the equipment mainly to receive cash flow when others use it. In a sense, it does not much matter to the owner where the equipment is or how it is being used at a given time. The owner perhaps does not need the construction equipment itself at any given time; she wants the money due to her. For a landlord who owns numerous residential units, the situation is more like that of the owner of construction equipment than it is like the landlord who lives on the same property from which space is leased.

The result of this analysis is the same as that mentioned before. If the primary interest is cash flow and not personal use of owned property, then a monetary remedy may make more sense than eviction.[179]

Another look at history can help explain why a change in perspective is necessary. The leasehold estate came to be in the context of rural England.[180] Tenants were given a right to subsist through farming as long as they gave the lord of that land rent.[181] But rent at that time was often produce from the land itself, not money.[182] The lord obviously needed food to survive. But things were not like they are today, when food can quickly

---

[177] *See* Anderson, *supra* note 44.

[178] *See, e.g.*, Sunstate Equip. Co., LLC v. Hegar, 601 S.W.3d 685, 690 (Tex. 2020) (referencing a company that leased construction equipment to Arizona customers).

[179] Of course, repossession of a tangible good is also a potential remedy for violations of personal property rights. Such remedies, and some of their implications, are discussed below.

[180] *See supra* notes 91–92 and accompanying text.

[181] Weinstein, *supra* note 92 (describing how serfs would often pay "rent" by contributing a portion of the harvest to the feudal lord).

[182] *Id.*

be shipped nationwide and worldwide.[183] A lord's food likely had to come from the lord's land or from somewhere else nearby.[184] In that way, a lord's interest in the land was not simply one of revenue generation.[185] He needed that land specifically because of its nature as land.[186] Lords for the most part, then, did not hold and relate to property as they would a commercial good, in which the nature of the item is somewhat irrelevant as long as it can provide cash flow. Thus, eviction may have made more sense as a remedy for feudal lords because they needed some control over the use of the land itself if they were to survive.[187] When landlords later came to own land in the form of residential units, that changed.[188] Such landlords often do not need to access and use the properties for their own livelihood; they instead need or want the cash flow the properties can provide.[189] That interest does matter, but eviction does not always fit as a remedy to vindicate such interests as well as it perhaps fit for feudal lords.

B. The Landlord's Reasonable Expectations

The second related consideration is the landlord's expectation interests—what a landlord may reasonably expect out of a property at a given time. Perhaps a core idea behind eviction, especially in cases of rent arrears, is that the landlord has the right to replace a tenant who pays less with a tenant who pays more.[190] Considering that a modern landlord's interests are primarily based on revenue, such a right to replace makes some sense. However, a landlord's expectations are not always reasonable. What a landlord hopes to get out of a property may not in every case reflect what the law should treat as a reasonable expectation.[191]

---

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970) ("The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these cases, the value of the lease to the tenant is the land itself.").

[188] *Id.*

[189] *See id.* at 1077 (explaining the interests in urban residential lease properties, in contrast to those of classic agrarian leases).

[190] Although eviction may not be explicitly supported by courts in those terms, it seems that that is the justification, at least when the landlord does not intend to use the property at issue.

[191] The common law often elevates parties' expectations, generally with the constraint that such expectations must be reasonable. *See, e.g.*, Benjamin F. Boyer,

The reason for this distinction is simple. A landlord may hope to always have all of her rental units occupied by a tenant who pays full asking price, but the market may not provide such a continuous benefit.[192] In certain markets with excessively high demand for rental housing at a particular price point, a given landlord may have a waiting list of people to fill a spot immediately once it has been vacated through eviction.[193] But in many cities and neighborhoods, a landlord will have to put forth considerable effort to fill a vacancy for her desired price.[194] And it would require even more effort to fill the vacancy before the evicted tenant's original lease term ends, especially if the eviction occurs late in the term.[195]

Despite this reality, eviction addresses rent arrears as if the landlord will certainly be able to fill the unit with a paying tenant immediately after the unit is vacated.[196] It forces out a tenant who provides less or no income to the landlord even though the unit may thereafter sit vacant, still generating no income to the landlord.[197] If the eviction does not promise meaningful relief to the landlord, why dictate such a harsh outcome?

One response, of course, is that at least eviction would give the landlord a *chance* to generate more income from the rental property.[198] True, but, as this article will later discuss, courts do not default to choosing severe injunction-like remedies based only on a chance that such a remedy is necessary to vindicate a complainant's rights.[199] The party requesting the severe injunctive relief should have a burden of showing the relief is necessary. In other words, landlords who want to evict a tenant who has not kept up with rent payments should be able to make some sort of minimal showing up front that doing so will probably allow them to regain

Promissory Estoppel: Requirements and Limitations of the Doctrine, 98 U. PA. L. REV. 459, 459–60 (1950) (describing the contract doctrine of promissory estoppel).

[192] Dana Anspach, *What to Know Before Buying a Rental Property*, THE BALANCE, (Nov. 30, 2020), https://www.thebalance.com/before-buying-rental-property-2388762 [https://perma.cc/3934-GCRR].

[193] *Id.*

[194] *Id.*

[195] *Id.* If a tenant defaults and is evicted with one month remaining in the lease term, the landlord would have to bring in another renter providing greater cash flow more quickly than one month in order to fully justify the eviction from an economic standpoint. *Id.*

[196] Vesoulis, *supra* note 152.

[197] *Id.*

[198] *Id.*

[199] *See infra* Part IV.

cash flow, and to a greater extent than if the current tenant were allowed to stay.[200]

There are at least two ways this could work from a remedies standpoint. First, perhaps a court could allow a struggling tenant to stay until the landlord *does* prove another tenant could likely fill the spot immediately. Second, a court could allow the tenant to stay until the end of the lease period originally agreed to and hold the tenant liable for a money judgment in the amount of rent they failed to pay. Either approach may have advantages depending on the case. But often the latter would better conform to the landlord's interest in expected cash.

A landlord may reasonably object to a damages approach, even if it in theory could adequately address her rights and expectations. A theoretical match is one thing, a landlord might say, but the real world is different. If a tenant is unable to keep up with rent now, why would we expect him to be able to pay a money judgment later? Won't he simply be judgment proof, causing the landlord to miss out on cash flow entirely for the remainder of the original tenant's lease?

That is a real concern, but there are possible solutions to mitigate this effect. For example, a court could assess a money judgment against the tenant for the appropriate amount, and if the tenant is unable to pay promptly, other legal mechanisms like wage garnishment or security interests on personal property could be put in place.[201] Wage garnishment is a common solution for addressing liabilities of poorer individuals.[202] Although federal law caps the percentage of wages which can be garnished,[203] and thus landlords may receive their due more slowly than they prefer, wage garnishment could help ensure that the landlords do

---

[200] If the standard remedy under the common law is damages, then the party seeking an alternative remedy must demonstrate that remedy is necessary to vindicate her interests.

[201] *Wage Garnishment*, 7 NO. 8 HR COMPLIANCE L. BULL. art. 15 (Quinlan), Aug. 15, 2001 (explaining to employers that "[y]our employee might have lost a court case, be behind in child support, be in default of student loans, or simply owe a business or individual money. If a court has ordered you to garnish his or her wages to pay back the debt, you must obey").

[202] *Garnishment*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/topic/wages/garnishments [https://perma.cc/Z697-38WH]. If a tenant has no job and no real prospect of future employment, other collection measures should probably be explored instead.

[203] *Fact Sheet #30: The Federal Wage Garnishment Law, Consumer Credit Protection Act's Title III (CCPA)*, U.S. DEP'T OF LABOR (Oct. 2020), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs30.pdf [https://perma.cc/5UYA-AMJK] (explaining federal limitations on wage garnishment).

receive much of their due eventually. And that may be better than the alternative of kicking a tenant out (which generally discharges the tenant of the obligation to pay rent) and then struggling to find a new tenant who can pay. Some pay is better than none. Moreover, it may be a better alternative for a tenant who struggles to pay rent. The tenant would at the very least have a home, even if their wages are slightly reduced for a period of time. Reduced wages (or the loss of personal property) will often be preferable to having a permanent stain on the record that prevents the acquisition of future housing (which, again, often leads to a variety of other economic hardships).[204]

If wage garnishment looks to be ineffective in certain cases, another possible solution to help landlords recover owed money is for tenants to take out rent insurance policies that would pay out if a court orders damages and garnishment is not feasible.[205] Of course, such an approach could be a financial burden to the tenants most in need of help.[206] So, governments and nonprofits perhaps could subsidize low-income tenants' premium payments. This safeguard is obviously not court-enacted under common-law authority, the focus of this article, but legislative, policy, or charitable solutions like this (or other initiatives like Section 8 vouchers) are likely a necessary piece of the puzzle to ensure housing affordability on a larger scale.

C. The Tenant's Interests

Of course, an eviction is often far more consequential to the tenant's life and well-being than it is to the landlord's, especially if the landlord owns a massive collection of properties.[207] The tenant's interests should not be cast aside entirely just because they fell behind on rent. As the introductory section discussed, an eviction is a serious and traumatic event

---

[204] Alexander, *supra* note 21, at 252–54. Garnishment may not be advantageous to a tenant if the tenant does have an opportunity to find adequate housing for a lower price after being evicted. A court deciding how to exercise its remedial discretion can evaluate all the "equities" in each case.

[205] *See supra* Part I.

[206] *Id.*

[207] *See supra* Part I. *See also, e.g.*, Kristen E. Broady et al., *An Eviction Moratorium Without Rental Assistance Hurts Smaller Landlords Too*, THE BROOKINGS INST. (Sept. 21, 2020), https://www.brookings.edu/blog/up-front/2020/09/21/an-eviction-moratorium-without-rental-assistance-hurts-smaller-landlords-too/ [https://perma.cc/S4AK-8KPZ] ("larger, corporate landlords likely have relatively more financial resources to absorb a reduction or delay in rental income associated with the moratorium").

for many tenants.[208] It puts tenants in the position of having to find housing quickly.[209] During that time other obligations like employment or school may be neglected.[210] And having an eviction on record substantially impairs a tenant's chances of finding adequate housing in the future.[211] Struck by financial hardship, homelessness, joblessness, danger, children falling behind in school, and even mental health concerns, evicted tenants suffer immensely.[212] Indeed, the suffering may significantly exceed the value added to the landlord from the eviction.[213]

In light of that bleak reality, eviction as a remedy often fails to take adequate account of tenants' interests.[214] It is one thing to say that a tenant is liable to fulfill his contractual duties to a landlord; it is another thing to kick him while he's down—to say that he must get back on his feet somehow while not having secure access to many of life's necessities which serve as preconditions for solvency and upward mobility.[215] Even more, an evicted tenant may have children or other dependents.[216] These other parties are often, understandably, unable to contribute to the resources that might help the tenant meet rent requirements.[217] But they suffer anyway.[218] They may miss school, hampering their chances of

[208] *See supra* Part I.

[209] *Id.*

[210] *Id.*

[211] Dana, *supra* note 2, at 937 ("[T]enants know that a formal eviction on an individual's record makes finding decent new housing much, much more difficult. They understand that an eviction record is like a criminal conviction record--a stain that marks an individual as undesirable for a range of purposes.").

[212] Swan, *supra* note 20, at 878–79.

[213] Dana, *supra* note 2, at 941. This, of course, may not be the case when the eviction does not result in homelessness and the landlord substantially relies on the funds from that rental unit to stay afloat. Broady, *supra* note 207. But, by and large, the comparison will instead be between significant loss on the one hand and minimal change to profit margins on the other.

[214] Swan, *supra* note 20, at 878–79.

[215] *Id.* (explaining that "[e]viction is 'a severely consequential and traumatic event. Researchers have linked eviction to homelessness, material hardship, increased residential mobility, job loss, depression, and even suicide'").

[216] *Id.*

[217] *Id.*

[218] *Id.*

graduating or getting an advanced degree.[219] They may go hungry.[220] They may be exposed to the elements, or to criminal activity.[221]

That is not to say that a monetary remedy in place of eviction would not also present hardships to the tenant, but it would likely be better than the alternative.[222] If a tenant is not forced to search for housing when she was not expecting to have to do so, she can dedicate time and resources to other things like food, school, and work.[223] And in the future if the tenant does move on to a new housing arrangement, she will not have to work around a public record of past eviction, which substantially impairs the opportunity to secure housing moving forward.[224] Even if the alternative remedy results in wage garnishment, the tenant can be assured that only a limited portion of her wages will be extracted,[225] and that she will have a roof over her head in the process.[226]

Not every tenant will suffer the same hardship if evicted. It is therefore important to at least distinguish between tenants who may face homelessness if evicted and those who likely would not. After all, in crafting the appropriate legal rule, all important interests should be considered. And in some cases, the interests of the tenant may not be compelling enough to justify a departure from the remedy preferred by the wronged party – the landlord who has suffered a violation of a lease agreement. For this reason, courts should sometimes opt for eviction when asked to by the landlord to remedy a lease breach. This may be especially true when a tenant violates a lease through some wrongdoing *other than* nonpayment of rent. When a tenant fails to pay rent, it is likely that the tenant is struggling economically (or will be soon) and thus may suffer

[219] Dana, *supra* note 2, at 937 (explaining that eviction "undermines poor people's efforts to gain and maintain employment, and to provide their children something like a stable education and a sense of agency").

[220] *Effects of Poverty, Hunger, and Homelessness on Children and Youth*, *supra* note 15.

[221] *See id.*

[222] *See* Rodriguez-Dod, *supra* note 16.

[223] *Id.*

[224] Swan, *supra* note 20, at 879 ("For low-income tenants, however, the mark of eviction on one's record often prevents tenants from securing affordable housing in a decent neighborhood, and it disqualifies them from many housing programs.") (internal quotation omitted).

[225] U.S. DEPT. OF LABOR, *supra* note 202.

[226] To avoid incentivizing tenants to simply not pay rent, courts in their equity analysis may consider whether the tenant truly was unable to pay rent, or whether the tenant avoided doing so when capable.

severe consequences if evicted.[227] But if a tenant violates a lease by, for example, conducting illegal activity on the leased property, or repeatedly damaging the property, eviction may be appropriate. In such cases eviction would still present a hardship, but it is less obvious that hardship will ultimately result in homelessness, job loss, or other serious consequences.[228]

D. The Public's Interests

Briefly, the final set of interests hanging in the balance when an eviction could occur are those of the public. Eviction demands much from the public pocketbook.[229] If, as Matthew Desmond persuasively argues, eviction is not just a condition of poverty but a cause of poverty as well,[230] then more evictions means more people seeking public housing, more people requesting unemployment benefits because of job loss, more people with health issues, and potentially more crime.[231] Either government meets the demand caused by rampant eviction with sufficient taxpayer funded benefits, or the unaddressed harms radiate outward and cause problems for more and more of the public as homelessness spreads.[232]

Again, the public interest will not necessarily be the same in every case. The bleak picture just described mainly applies when eviction leads to temporary or long-term homelessness.[233] When it appears that eviction will do so, the public interest, like many of the other interests already described, would call for a monetary remedy rather than eviction. Most preferably for the public, this would mean the tenant must eventually pay what they were required to pay under the lease agreement. That option would absolve the public of putting forth any funds to rectify the situation.

---

[227] Judith L. Fox, *The High Cost of Eviction: Struggling to Contain a Growing Social Problem*, 41 MITCHELL HAMLINE L.J. OF PUB. POL'Y & PRAC. 3 (Symposium Issue) at 4 (2020).

[228] *Id.*

[229] *Id.* ("Eviction is also expensive for the landlords, neighbors, and society generally.").

[230] Gross, *supra* note 22.

[231] *See supra* notes 13–20.

[232] Kate Santich, *Cost of Homelessness in Central Florida? $31K Per Person*, ORLANDO SENTINEL (May 21, 2014), https://www.orlandosentinel.com/news/os-xpm-2014-05-21-os-cost-of-homelessness-orlando-20140521-story.html [https://perma.cc/VW2E-XLZM] (explaining that providing homes for homeless people would save public money in the long run).

[233] Swan, *supra* note 20, at 878–79.

Alternatively, the public could put forth the funds themselves through taxation so that the government covers the remainder of the tenant's financial obligations to the landlord.[234] That option is more expensive for the public than requiring the tenant to pay damages, but in the long run it may be cheaper than the alternative of allowing for eviction.[235]

E. The Balancing Act

A few core facts are clear, then, that provide the theoretical foundations for remedial alternatives to eviction. First, landlords have an interest in benefitting from their rental properties, but the contours of this interest can vary from landlord to landlord.[236] Especially for landlords who own numerous properties and never substantially develop or make use of the properties themselves, their interest can sometimes be adequately addressed through a money judgment.[237] Their relation to the property is more like that of a distributor to his goods than a person to their closely held personal property. Second, notwithstanding a landlord's desire, a new tenant capable of paying the full asking value of rent may not always be readily available to fill an evicted tenant's place.[238] When that is the case, immediate eviction does not serve a substantial purpose for the landlord.[239] Third, tenants may suffer an extreme hardship if evicted, especially if an eviction (typically for rent arrears) would likely result in homelessness.[240] And finally, the public is burdened by homelessness and thus has an interest in alternatives to evictions in cases where homelessness is a substantial risk.[241]

The core thesis of this article is that these principles justify the following overall approach: When a landlord owns many rental units and does not develop or use the rental unit at issue, when the landlord cannot show that they will likely fill the unit with a paying renter promptly after the tenant's eviction, and when eviction would likely constitute an

---

[234] Matthew Yglesias, *The Most Cost-Effective Way to Help the Homeless is to Give Them Homes*, VOX MEDIA (Feb. 20, 2019), https://www.vox.com/2014/5/30/5764096/homeless-shelter-housing-help-solutions []. Whether the care comes through charity or tax dollars, it is a public cost. *Id.*

[235] *Id.* Some evidence shows that securing housing for people who would otherwise be homeless is cheaper than dealing with the costs brought about by homelessness. *Id.*

[236] Broady, *supra* note 207.

[237] *Id.*

[238] Anspach, *supra* note 192.

[239] Swan, *supra* note 20, at 878–79.

[240] *Id.*

[241] Santich, *supra* note 232.

unusually serious hardship like homelessness, then a court should consider avoiding issuing an eviction order and issue a monetary judgment against the tenant instead.

Another theoretical objection worth discussing is that property rights should be consistent; if someone truly has a property right, that right should be as strong for one property owner as the right of another in their property.[242] Thus, it is inappropriate to treat some landlords differently than others, when all landlords should have the same rights over the property they own.

Beyond the reasons I have already explained for treating some landlords differently than others, I will offer a couple areas from outside the common law proper in which the law does indeed treat landowners differently regarding the nature of their rights to their properties. The first is under the Fair Housing Act.[243] Under the FHA, owners of residential rental units (as well as owners of residential properties listed for sale) may not discriminate in leasing to prospective tenants based on protected characteristics like race, sex, or religion.[244] But the FHA allows for some notable exceptions. These include (1) owner-occupied buildings containing four or fewer units (the "Mrs. Murphy exemption"), and (2) single-family homes rented without a broker if the owner does not own more than three houses.[245] The logical explanation for why these properties are exempt from the requirements of the FHA must be that, for these properties, the landlord has a much closer relationship to the rental unit than in other cases.[246] Whether the landlord lives in the building containing the unit or only owns that unit and a couple others, the landlord is more likely both to interact with the tenant on a regular basis and to make personal use of the unit. Simply put, in these situations the landlord is more affected by precisely who occupies the unit, whereas landlords who own more properties and are more distanced from the units should care less about the nature of the occupants.[247]

The second example comes from takings law. The Takings Clause of the Fifth Amendment declares that no property may be taken by the government for public use without paying just compensation.[248] When a

---

[242] And, specifically, that the right should be unwavering or at least very strong.

[243] 42 U.S.C. § 3601 *et seq.*

[244] 42 U.S.C. § 3604.

[245] 42 U.S.C. § 3603(b).

[246] James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R. -C.L. L. REV. 605, 607–08 (1999) (describing the rationale of the Mrs. Murphy FHA exemption according to the Congressional record: to avoid regulating private personal relationships).

[247] *Id.*

[248] U.S. CONST., amend V, cl. 4.

claimant alleges that a regulation which may decrease her property value amounts to a "taking" of her property, the analysis is multi-faceted.[249] One of the considerations a court will weigh when deciding whether the property has been taken is the extent to which the government action interferes with the property owner's reasonable investment-backed expectations.[250] Such expectations vary from property owner to property owner.[251] Imagine a county passing a zoning ordinance that only allows for residential use in a particular geographic area. A landowner may claim that when she purchased her property before the zoning ordinance, she expected to be able to use it to construct and run a hotel. But if that person's land is in the middle of nowhere, away from any major thoroughfares or attractions, it would not be reasonable to expect that a hotel would attract many guests, and so her land's value likely would not be substantially enhanced by the lifting of the new zoning restriction.[252] If, instead, a landowner purchases land right in the middle of a large globally-connected city and becomes subject to the same zoning regulation, perhaps that landowner's expectations for developing and profiting from the land would be substantially greater and a takings claim would have a better chance of success.

These two examples demonstrate that the law regularly treats a property owner's rights in her property differently than it treats those of another property owner. Relevant factors that may cause the law to do so

---

[249] *See* Gregory M. Stein, *Takings In the 21st Century: Reasonable Investment-Backed Expectations After* Palazzolo *and* Tahoe-Sierra, 69 TENN. L. REV. 891, 909 (2002) (describing the various types of takings claims). Takings can take multiple forms. 10 A.L.R. Fed. 2d 231 (Originally published in 2006). One is when the government actually takes title to property. *Id.* Another, discussed in this section, is when a government regulation on the use of property is especially burdensome. *Id.* Finally, a taking can result from the government causing a permanent physical occupation of private property. *Id.*

[250] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (explaining that for regulatory takings claims, "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations").

[251] *See id.* at 136–37 (identifying that the reasonable expectations of the particular property owner matter in the takings analysis).

[252] In *Penn Central*, for example, the Supreme Court held there was no taking from a regulation that prohibited the claimant from building a skyscraper above Grand Central Station because the Court held the owner could still make productive use of the property. *Id.* at 130 (noting that "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable").

are the nature of the landowner's relationship to the property, and the landowner's reasonable interests in the property.[253] Perhaps not coincidentally, those are the same primary considerations identified in this article as justifications for treating some landlords pursuing eviction differently than others.[254]

F. Economic Incentives

Most proposals for intervention into a market system run into a problem: will the intervention stifle the supply? In other words, in this case, will limiting a landlord's options suppress the supply of private affordable housing? Some landlords may be dissuaded from renting to lower-income tenants if they know they might not be able to evict the tenant for nonpayment. Or, the landlord might demand additional compensation on the front end as insurance, which likewise could squeeze out many lower-income tenants.

A few responses. First, I do not claim that the reforms suggested by this article should stand alone against the eviction epidemic. Other initiatives such as those targeted to increase the supply of publicly-funded or publicly-subsidized affordable housing are critical too. Increasing the stock of such housing provides a safety net for struggling families and creates competition for private landlords who are interested in filling their cheaper units.[255] Vouchers and other direct economic incentives to landlords who rent to such tenants are worth considering as well, as they can encourage landlords to rent out their units to people who otherwise may not qualify because of their income level.[256]

Next, I believe unintended responses by landlords would be limited by the fact that the reform attempts to secure money damages. Landlords would not be without a remedy when a tenant fails to pay rent; they simply would be directed towards a monetary remedy. Granted, if the practical effect of a money judgment is that a landlord has to wait on processes like

---

[253] Stein, *supra* note 249, at 893.

[254] In short, the law and my proposed rule reflect the principle that property rights matter, but may be limited circumstantially.

[255] *See, e.g.*, Rachel Pritchett, *Landlords Say Housing Authority Stealing Their Renters*, KITSAP SUN (Nov. 29, 2011), http://archive.kitsapsun.com/news/local/landlords-say-housing-authority-stealing-their-renters-ep-417971482-356988871.html [https://perma.cc/3THA-5QLA].

[256] Michael D. Eriksen & Amanda Ross, *Housing Vouchers and the Price of Rental Housing*, 7 AM. ECON. J. ECON. P. 154, 154 (2015) (concluding that housing vouchers are associated with voucher recipients renting more expensive homes), https://researchrepository.wvu.edu/cgi/viewcontent.cgi?article=1184&context=faculty_publications [https://perma.cc/PX2K-GSHV].

wage garnishment before getting paid, and if those processes do not yield the full debt to the landlord, this result would not be as beneficial to the landlord as evicting the tenant and immediately replacing him with another who can pay more. But it would be better for the landlord than evicting a tenant and not getting paid at all. So, I see the money judgment and processes of collecting it as mitigating factors against undesired responses to economic incentives by landlords.

In addition, any significant economic effects of this proposal on low-income housing stock would be limited by the fact that this proposal itself would only apply in select cases. I argue for courts to consider a monetary remedy not any time a tenant falls behind on rent, but only when it is also the case that the landlord owns numerous rental units (and so it better situated to absorb isolated costs), and the landlord does not show it has another paying tenant lined up to fill the spot (thus the remedy I propose is not as significant of an economic hit as the landlord's alternatives).

Unintended *ex ante* measures by landlords may also be limited by the fact that these reforms would be judge-enacted, not legislative. It would be up to the judge to determine on a case by cases basis whether the conditions exist in which a monetary remedy instead of eviction is appropriate. At the time of the lease agreement, the landlord could only know that it *might* be limited to a monetary remedy, not that it would be for certain. Similarly, it is significant that my proposal targets "larger" landlords, usually corporate entities that are more able to absorb temporary costs, even unexpected ones. The effect of my proposed remedy, in the limited cases it applies, would not be an indefinite tenancy at sufferance.[257] Although it could be implemented in various ways, as I have articulated the remedy it would last at least until a paying tenant is lined up to fill the spot, and at most until the end of the existing tenant's original lease term.

An analogy to rent control (likely a more extreme policy than this one) may be useful. Some evidence shows that jurisdictions implementing rent control have not secured more affordable housing than other jurisdictions.[258] Nevertheless, rent control and other costs to landlords may encourage subdividing, or the conversion of rental housing to owner-occupied housing.[259] Subdivision, as long as regulations allow for it, can

[257] A tenancy at sufferance occurs when a tenant "remains in possession of the premises after termination of the lease [and] occupies 'wrongfully.'" Bockelmann v. Marynick, 788 S.W.2d 569, 571 (Tex. 1990).

[258] *See, e.g.*, John I. Gilderbloom & Lin Ye, *Thirty Years of Rent Control: A Survey of New Jersey Cities*, 29 J. URB. AFFAIRS 207 (2007).

[259] Daniel P. Schwallie, *The Implied Warranty of Habitability as a Mechanism for Redistributing Income: Good Goal, Bad Policy*, 40 CASE WESTERN RESERVE L. REV. 525, 536 (1989).

be a counterweight to rising costs.[260] It may be more expensive for landlords to rent a unit, but when they respond by subdividing it into multiple units, the supply of units increases.[261] And conversion to owner-occupied housing is not always negative either.[262] Landlords who decide to stop renting out units may sell them to families who want to own and occupy. Because these units were rented at affordable rates, they may not sell for high prices and so perhaps allow for lower-income families to own. If so, then the demand of families looking to rent will decrease by one family per sale even as the supply of rental units decreases by one unit per sale. Obviously, many other factors influence the stock of affordable homes for sale and for rent, but the specific effects of rent control may not be as unilaterally harmful for affordable housing as many assume. And again, the remedy proposed in this article, which applies only in select cases and for short periods of time, would probably be even less economically consequential on housing supply than rent control.

Another potential challenge stems from a desire to allow for private bargaining. Landlords are not usually *required* to evict tenants when the lease agreement would allow it. Instead, they presumably choose to do so because they think it is in their interests. If so, is any court intervention necessary to ensure that tenants are only evicted if the landlord has someone else lined up to fill the spot? And, conversely, if the landlord was not so optimistic, couldn't she bargain with the tenant to allow the tenant to stay (such as by forgiving a portion of owed rent if the tenant was able to pay some of it immediately)?

A brief response: first, if the landlord is right about being able to fill the spot vacated by an eviction, she could make that showing to a judge, such as by presenting rental applications for that unit or other indications of interest. Just because landlords will sometimes be right about future business prospects does not mean courts cannot verify. Second, if the landlord is right about *not* being able to fill the vacant spot promptly, she could still bargain with the tenant before resorting to court action. Faced with either eviction or something like wage garnishment as a legal remedy, a landlord may decide it is in her best interests to allow the tenant to stay for, e.g., a portion of owed rent paid right away. Landlords may reasonably

---

[260] Emily Felton, *Subdiving a Property: the Pros and Cons*, BUILDNEW (Dec. 3, 2018), https://www.ibuildnew.com.au/blog/building-new/how-to-build/subdividing-a-property-the-pros-and-cons/ [https://perma.cc/7BYC-8DNY].

[261] *Id.*

[262] Maurie Backman, *Pros and Cons of an Owner-Occupied Property*, MILLION ACRES (Feb. 4, 2021), https://www.millionacres.com/real-estate-investing/rental-properties/pros-and-cons-owner-occupied-property/ [https://perma.cc/G55Y-VNJP].

opt for guaranteed, but less, cash sooner instead of the chance at more cash down the road.

Another concern is that of policies discouraging tenants from paying rent. If a tenant is poor enough to be functionally judgment proof, then perhaps they would take advantage of any sort of protections against eviction and simply not pay. But I believe the proposal as I have articulated it can mostly avoid this problem. Most significantly, the proposal applies when a landlord cannot show that they have a paying tenant lined up to fill the existing tenant's spot. The existing tenant would likely have no reliable way of knowing whether the landlord is in a position to replace them, so the tenant probably could not know whether they might be subject to a monetary remedy instead of eviction until a court decision saying so. Tenants would still have the incentive to pay rent to the extent they are able. But in any event, another safeguard could be put in place to further ensure incentives are proper: courts could limit the alternative remedy I propose to cases in which tenants have made a reasonable effort to pay rent in the past. Courts could assess the tenant's income and expenses during the tenancy and determine whether the tenant has been improperly neglecting rent payments when they could have paid more. Courts make similar inquiries regarding other debts, such as whether someone seeking to discharge loan debt has made a good faith effort to repay it.[263]

To summarize, any policy that makes it more costly for landlords to rent their units at affordable rates could negatively impact the supply of affordable units. But the limits I have articulated for this proposed remedy would significantly mitigate the effect, especially compared to the mixed effect of more severe measures like rent control. And if programs like Section 8 are not neglected, then undesirable landlord responses to economic incentives could be eliminated almost all together. Incentive programs on the front end may do enough on their own if sufficiently robust, and the remedy I propose on the back end can work as a crucial bandage to stop some of the bleeding without substantially upsetting affordable housing stock.

IV. COMMON LAW JUSTIFICATION

Perhaps the preceding section would seem all well and good if a jurisdiction were seeking a rule to govern landlord-tenant relationships *a priori*. But, of course, law already exists in this topic area. This law, as

[263] *See, e.g.*, Brunner v. N.Y. State Higher Educ. Serv. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (when deciding whether a party may discharge her student loan debt in bankruptcy proceedings due to undue hardship, considering whether "the debtor has made good faith efforts to repay the loans").

described earlier, finds its roots in both property and contract principles well-established in the common law.[264] And courts, many would say, cannot or should not simply fashion a new principle out of thin air because they think it is logical. That would potentially amount to "judicial activism."[265] This section addresses that concern. It explains that although this article advocates that courts take an "active" role in securing tenants' interests against the hardships of eviction, courts need not necessarily be "activist" to do so.[266] Instead, the common law of both contract and property provides various potential foundations from which to pursue this new approach. There may not be an obvious line from common-law doctrines to my proposed remedy, but there is sufficient support from common-law principles to make the connection without rebuilding law from the ground up.

A. Supporting Principles from Contract Law

This subsection first explains why a court opting for an alternative monetary remedy to eviction in certain circumstances could conform to default principles of contract law. Then, recognizing that eviction is often provided for in a lease's very terms, this subsection explores why various principles of contract law could nonetheless dictate that an eviction clause not be enforced in some circumstances. Overall, the goal of this subsection is to provide justification from the contemporary law of contracts for courts to enforce alternative remedies to eviction.

1. Applying the Traditional Approach to Contract Remedies

The standard approach to remedies in the event of contract breach is to seek damages instead of any other sort of remedy.[267] Section 359 of the Second Restatement of Contracts states that specific performance or an injunction will not be ordered when damages are sufficient to satisfy the

[264] *Supra* Part II.

[265] *See, e.g.*, Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 572 (2007) (describing how judicial activism may be conceived as the deviation from established principles of law such as statutes or precedent).

[266] By this I mean that although implementation of my theory would likely not happen absent judicial intervention, judges would be within the common law tradition to do so.

[267] Jimenez, *supra* note 41, at 1313–14.

interests of the injured party to a contract.[268] So, damages is the default contract remedy.[269] And, the standard approach to measuring contract damages is based on the nonbreaching party's expectations.[270] Expectation damages aim to put the wronged party to a contract in as good a position as they would have been had the breaching party fully performed his obligations.[271]

Thus, to determine how contract law would typically handle a breach of a landlord-tenant agreement from a tenant's failure to pay rent, we must determine what the landlord reasonably expected to get out of the bargain. That, of course, is almost always rent money.[272] Assuming the landlord approaches the lease agreement in the way most landlords who do not live on or use the rental property would approach it, the landlord expects to be paid an agreed-upon amount either monthly or under some other specified timetable.[273]

Under the default principles of contract law, then, a court considering how to resolve a lease dispute resulting from rent arrears should order damages—damages measured by the amount the landlord should have received based on the terms of the contract, minus the amount the tenant already paid to the landlord.[274] According to the standard approach, that is all the court has to do, *unless* it determines that damages would be inadequate to protect the expectation interests of the landlord.[275] As a general rule, the most a landlord would reasonably expect from a lease agreement is to be paid the amount of money contemplated by the lease agreement by the time specified in the lease agreement.[276] That expectation would be largely satisfied not only if a tenant never fell behind on rent, but also if a tenant who did fall behind on rent were ordered by the court to pay what he owes, as long as mechanisms were put in place to

[268] Restatement (Second) of Contracts § 359(1) (Am. Law Inst. 1981) ("Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.").

[269] *Id.*

[270] *Id*. at § 359 cmt. a.

[271] U.S. Naval Inst. v. Charter Commc'ns, Inc., 936 F.2d 692, 696–97 (2d Cir. 1991) (discussing the appropriate expectations damages in that case).

[272] It could be any sort of valid consideration for giving rights over the property to the tenant. 49 AM. JUR. 2d Landlord and Tenant § 91.

[273] Anspach, *supra* note 192.

[274] *See* 49 AM. JUR. 2d Landlord and Tenant § 91. This computation puts the landlord in as good of a position as she would have been had the tenant fulfilled all his obligations.

[275] Restatement (Second) of Contracts § 359(1) (Am. Law Inst. 1981).

[276] 49 AM. JUR. 2d Landlord and Tenant § 91.

ensure that such payments are actually made (perhaps with some interest added on).[277]

Indeed, even if a court determined damages were inadequate to satisfy a landlord's expectation interests,[278] it is hard to see how it could require "specific performance" by the tenant as an alternative to damages. Specific performance is a remedy that requires the breaching party to do what they promised to do in the contract.[279] A tenant promises to pay rent.[280] Thus, a court that ordered specific performance would functionally order the same thing as if it had chosen damages. In either case the tenant is obligated to pay the amount of money the landlord expected to receive as rent.[281]

The only exception to this identical nature of specific performance would be if the eviction clause of a contract were itself interpreted as one of the tenant's obligations.[282] In other words, perhaps the court might read the clause allowing for eviction as an agreement by the tenant to be kicked off the property if he fails to pay rent. But that seems like an implausible construction of that contract provision. An eviction clause appears to simply be a stipulation of an available remedy if the tenant's substantive

[277] Interest may be appropriate to ensure that the landlord capitalizes on the "time value" of money (although it may not be the finder of fact who includes this element). Argonaut Ins. Co. v. May Plumbing Co., 474 So.2d 212, 215 (Fla. 1985) (holding that "it is a purely ministerial duty of the trial judge or clerk of the court to add the appropriate amount of interest to the principal amount of damages awarded in the verdict. We conclude that the finder of fact should not consider the time-value of money in its consideration of damages").

[278] The Second Restatement of Contracts identifies some criteria for determining whether damages are adequate: the difficulty of proving damages with reasonable certainty; the difficulty of procuring substitute performance; and the likelihood of not collecting the damages award. RESTATEMENT (SECOND) OF CONTRACTS § 360 (AM. L. INST. 1981). Under these considerations, damages may appear inappropriate in some cases because the tenant does not have enough money to pay them. *Id.* However, because the performance sought (renting the unit) could be accomplished by others, and because the units in some cases are not particularly unique, I believe damages is still justified much of the time. *See* Campbell Soup Co. v. Wentz, 172 F.2d 80, 82–83 (3d Cir. 1948) (emphasizing that the uniqueness of the good or performance sought matters to the decision of whether to grant specific performance); Klein v. PepsiCo, Inc., 845 F.2d 76, 80 (4th Cir. 1988).

[279] Jimenez, *supra* note 41, at 1321–22 (identifying specific performance as an in-kind restorative remedy).

[280] *Lease*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[281] *See* Bryan Foster, *The Purpose of Criminal Evictions: Applying the Theories of Punishment to Arkansas' Criminal Eviction Statute*, 2018 ARK. L. NOTES 1993 (2018) ("The expectation damages resulting from a tenant's failure to pay rent would be the rent owed to the landlord.").

[282] *See* Wilkie v. Banse, 88 N.W.2d 181, 185 (Neb. 1958).

obligations are not met, not a substantive obligation itself.[283] Nevertheless, even if ordering an eviction could be construed as a form of specific performance, it is not at all clear that such a remedy would always better serve the landlord's expectation interests than damages would.[284] The landlord would have to show that kicking the tenant off the property would enable the landlord to recover much of the expected revenue for the remainder of the tenant's lease period.[285] As discussed above in Part III, market realities will sometimes render that expectation reasonable, but often will not.[286]

Overall, if standard principles from the common law of contract were applied to a tenant breach of a lease agreement resulting from nonpayment of rent, eviction would often not be the preferred remedy.[287] Instead, the law may favor an approach more like the one described in Part III. Damages to satisfy the landlord's expectation interests would sometimes be a better fit.[288]

2. Applying Common-Law Counterweights to Contract Terms

Even if the common law of contracts would favor a remedy like damages over one like eviction, the problem still remains that eviction is typically provided for expressly in the terms of the lease agreement.[289] How, then, could default rules from the common law enter the equation at all when the contract's terms seem to settle the matter? The answer is that, in some special cases, common law principles can control even when a contract's terms would demand a different approach or result.

The most famous of these principles is unconscionability. That principle states that under certain circumstances the terms of a contractual agreement will not be enforced because it would be unconscionable to do so.[290] The principle takes two primary forms: procedural and substantive

---

[283] *See* Polk v. Buckhalter, 258 So. 3d 816, 818–19 (La. Ct. App. 2018) (referring to eviction as a remedy).

[284] *See supra* note 197 and accompanying text.

[285] *See* RESTATEMENT (SECOND) OF CONTRACTS § 359 (AM. L. INST. 1981).

[286] *See supra* Part III, Section B.

[287] *See* RESTATEMENT (SECOND) OF CONTRACTS § 359 (AM. L. INST. 1981).

[288] *See supra* note 197 and accompanying text.

[289] *See, e.g.*, Interstate Realty Mgmt. Co. v. Price, 86 So. 3d 798, 801 (La. Ct. App. 2012); Bentley-Kessinger, Inc. v. Jones, 367 S.E.2d 317, 318 (Ga. Ct. App. 1988); Dominski v. Frank Williams and Son, LLC, 46 A.D. 3d 1443 (N.Y. S. Ct. 2007); Keller Williams Realty v. Melekos, No. 2015CA0679, 2015 WL 6951406 (La. Ct. App. 2015).

[290] RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may

unconscionability.[291] This subsection will apply both of these to the case of lease agreements that call for eviction in the event of rent arrears.

Procedural unconscionability is widely recognized.[292] The doctrine applies when something went wrong in the procedure of the parties' relationship, usually surrounding the forming of the agreement, that makes it unjust to enforce part or all of the agreement later on.[293] Such procedural defects can take many forms and usually arise in cases in which the party against whom the contract is later enforced did not make a meaningful choice at the bargaining stage.[294] One blatant example of this would be if a third party ordered someone to agree to certain terms with someone else, or else the third party would harm them or their family.[295] Contract law at its foundation assumes multiple parties have freely agreed to a set of terms.[296] If it turns out that at the time of the agreement one of the parties was not free but instead agreed to a set of terms out of compulsion, the foundations of contract would be undermined and the law can treat the contract as ineffectual.[297]

But another less obvious case in which procedural unconscionability might apply is when one party is driven to accept a contract term or terms not because a gun is held to their head, but because their life circumstances do not give them any other real options.[298] For example, a person might

---

refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.").

[291] Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L. J. 1, 6 (2012) (identifying the procedural and substantive elements of unconscionability).

[292] Indeed, the Restatement's explanation of unconscionability weighs towards the procedural. RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981).

[293] Lonegrass, *supra* note 291, at 9 (explaining that procedural unconscionability focuses on the bargaining stage).

[294] *Id.* (stating that courts look for evidence "indicating that the transaction lacked meaningful choice on the part of the complaining party").

[295] *See, id.* (explaining that pressure tactics by one party may lead to procedural unconscionability).

[296] Steven W. Feldman, *Pre-Dispute Arbitration Agreements, Freedom of Contract, and the Economic Duress Defense: A Critique of Three Commentaries*, 64 CLEV. ST. L. REV. 37, 62 (2015) ("'Freedom of contract' means parties have the right to bind themselves legally; it is a judicial concept that contracts are based on mutual agreement and free choice.").

[297] *See* Lonegrass, *supra* note 291, at 9; RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981).

[298] I find general support for this broader understanding of procedural unconscionability from the classic opinion of *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 ("Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the

agree to finance a car they want to own at a rate so high that the person could never actually afford the car in the long run.[299] The person might agree to do so because they have no car and absolutely need one to get to work and earn money, and because their credit rating is poor and nowhere else would give them a favorable interest rate. It is a difficult question whether such a person enters a contractual agreement with sufficient freedom to render the contract enforceable.[300] On the one hand, the person does *decide* to enter the agreement when technically she could have refused and tried to continue life without the vehicle she needed. On the other hand, if the car is so necessary that she likely would not have income (and then eventually could lose housing, food, and worse) without it, then the circumstances do share some similarities to those of a person being forced into an agreement at gunpoint.

This conception of procedural unconscionability is likely broader than that which many courts would accept. But it is not an unthinkable way to understand procedural unconscionability,[301] and so it is worth evaluating eviction through this lens. Take for example a person entering a residential lease agreement. She is struggling to get by, working long hours at a grocery store to provide for the immediate needs of herself and her two children.[302] She owns no car, and only one bus line passes near the store where she works. A couple weeks ago she was kicked out of a shelter because one of her children was caught stealing food from another resident for the second time. Since then she and her children have been sleeping in the living room of the home of an acquaintance who is gracious but has made clear they have only three more days before they must move on. The woman has diligently searched rental postings in a local paper but has not found many options. In fact, she has found only one option that is both cheap enough for her to afford the first month's rent and in a location connected to adequate transit for her to get to work.

The desperate tenant contacts the property's landlord, who owns dozens of other rental properties across the city. The landlord is prepared

---

transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power.").

[299] *See generally* De La Torre v. CashCall, Inc., 422 P.3d 1004, 1007 (Cal. 2018) (holding that loan interest rates can amount to unconscionable terms when sufficiently high). Although the California Supreme Court in that case did not focus only on procedural unconscionability, it did explain the circumstances surrounding loan agreements were relevant to its unconscionability decisions. *Id.* at 1009–10.

[300] *Id.* (framing "meaningful choice" under a procedural unconscionability analysis broadly).

[301] *Id.*

[302] This hypothetical is likely not an unusual scenario, unfortunately. *See supra* notes 12–18 and accompanying text.

to lease the property to her for three months. But the landlord makes clear orally and in the written lease terms that if the woman falls behind on rent payments, the landlord can evict her. The woman agrees. "What was the alternative?" she thought. Her boss told her she would be fired if she missed work again because she was searching for housing. Her children have eaten only fast food and the occasional granola bar for the past several weeks because she has no kitchen in which to store and prepare other food. All three of them have gotten sick at least once because of lack of sleep and exposure to the rain and cold. If she did not enter this lease agreement, she and her kids might not make it much longer.

Did this woman meaningfully *choose* to enter the lease agreement with the eviction term included? In one sense, of course she did. She made a decision in the interests her family's health and wellbeing. In another sense, the hard circumstances of life metaphorically held her at gun point—if the alternative is unacceptable is the decision truly free? Needless to say, such philosophical questions are beyond the scope of this article. But what matters for now is that some courts have demonstrated an openness to the broader conception of procedural unconscionability that would support the argument that an eviction term in such circumstances should not be enforced.[303]

The other form of unconscionability in the common law of contract, is substantive unconscionability.[304] Substantive unconscionability, for those courts which recognize it, applies when the enforcement of a contract's terms themselves seems unacceptable and egregiously unfair.[305] For some courts, a defendant in a contract dispute must show both procedural and substantive unconscionability to escape enforcement of a contract term; i.e., the defendant must show both that the circumstances of the agreement itself were strikingly unfair, and that the result of enforcing the agreement would be strikingly unfair as well.[306] Other courts may entertain an assertion of substantive unconscionability alone.[307]

Classic examples of contract terms giving rise to substantive unconscionability include certain damages caps, penalties, and extreme

---

[303] *See Williams*, 350 F.2d at 449.

[304] *Id.* at 449–50 (describing that not only is the fairness of the bargaining positions an element of unconscionability, but so is the overall fairness of the terms).

[305] Lonegrass, *supra* note 291, at 16 (explaining the most common conceptions of substantive unconscionability).

[306] *Id.* at 11 ("The conventional approach to unconscionability has been to invalidate a contract or provision only when strong evidence of both procedural and substantive unconscionability is present.").

[307] *Id.* at 19 (describing the "substantive unconscionability alone" approach taken by some courts).

prices.[308] In such situations, courts sometimes reason that the term is "such as no man in his senses and not under delusion would make [the agreement] on the one hand, and as no honest and fair man would accept [it] on the other."[309] That is the traditional approach to substantive unconscionability.[310] In the courts' view, the shocking terms of the contract themselves are evidence that something went wrong at the bargaining stage.[311]

But the threshold for substantive unconscionability is lower in some jurisdictions.[312] In these jurisdictions, enforcing a contract may be deemed substantively unconscionable if doing so seems strikingly unfair.[313] New Mexico, for example, has rejected the typical high threshold for substantive unconscionability and opted for a standard more like one of "unreasonable one-sidedness" or "commercial unreasonableness."[314] In *Cordova v. World Finance Corporation of New Mexico*, the New Mexico Supreme Court stated that substantive unconscionability "focuses on such issues as whether the contract terms are commercially reasonable and fair, the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns."[315] Under that standard, the court declared unenforceable an arbitration clause that allowed a wide range of options for one party asserting a breach, but only allowed arbitration for the other party.[316] In the court's view, that arbitration clause was so imbalanced in favor of one party that the court could declare it unenforceable without even considering procedural unconscionability.[317]

Under this broader conception of substantive unconscionability followed by some courts,[318] eviction may seem especially problematic. If a court is, like those in New Mexico and other places like Illinois, willing to consider "the purpose and effect of the terms, the one-sidedness of the

[308] *Id.* at 53 (explaining that liquidated damages provisions are common culprits leading to substantive unconscionability).

[309] *Id.* at 16.

[310] *Id.*

[311] *Id.* at 19.

[312] *Id.* at 16.

[313] *Id.* ("Where courts once routinely required "conscience-shocking" or "outrageous" unfairness to support a finding of substantive unconscionability, courts employing a sliding scale increasingly look to whether the terms are "unreasonably one-sided" or "commercially unreasonable.").

[314] *Id.*

[315] Cordova v. World Fin. Corp. of N.M., 208 P.3d 901, 907 (N.M. 2009).

[316] *Id.* at 904.

[317] *Id.* at 910.

[318] Illinois, for example, follows a similar approach to New Mexico. Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 268–69 (Ill. 2006).

terms, and other similar public policy concerns,"[319] then it could presumably consider whether the eviction would bring substantial hardship on a tenant, whether eviction would be more substantial of a remedy than necessary to make the landlord whole, and other related considerations. In practice, courts have not generally explored a conscionability limitation on evictions.[320] But this subsection demonstrates that such an approach would not be far out of the mainstream, especially under a substantive unconscionability analysis.[321]

Other common-law principles limit the enforcement of contract remedy provisions specifically. The first of these principles worth noting is the requirement of certainty of damages.[322] This principle states that for a plaintiff to be entitled to a damage award for breach of contract, the plaintiff must be able to prove with reasonable certainty that it actually suffered such damages.[323] This idea is fundamental to the law of contract.[324] The court's role in the event of a breach is to ensure that the nonbreaching party is compensated for what it lost, and generally for no more.[325] The principle of certainty thus ensures that a harmed plaintiff is not overcompensated.[326] The classic example in which an injured party may have trouble ensuring the certainty of damages is a case in which the injured party claims the defendant's breach caused her to lose profits.[327]

---

[319] *Cordova,* 208 P.3d at 907.

[320] The North Carolina Court of Appeals did, only to be overruled by the state's supreme court. E. Carolina Reg'l Hous. Auth. v. Lofton, 789 S.E.2d 449, 452 (N.C. 2016) ("Contrary to the Court of Appeals' decision, the equitable defense of unconscionability is not a consideration in summary ejectment proceedings. To prevail in a summary ejectment proceeding under North Carolina law, a landlord must establish by a preponderance of the evidence that a tenant breached the lease.).

[321] A contract may also be unenforceable on the ground that its enforcement would be contrary to public policy. RESTATEMENT (SECOND) OF CONTRACTS § 365 (AM. L. INST. 1981). However, for as long as state statutes allow for summary ejectment actions, it will be hard to prove an eviction under such a statute would violate the public policy of the state.

[322] RESTATEMENT (SECOND) OF CONTRACTS § 352 (AM. L. INST. 1981) ("Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.").

[323] *Id.*

[324] Matthew Miliknowsky, *A Not Intractable Problem: Reasonable Certainty, Tractebel,and the Problem of Damages for Anticipatory Breach of a Long-Term Contract in a Thin Market*, 108 COLUM. L. REV. 452, 464 (2008).

[325] GRANT GILMORE, THE DEATH OF CONTRACT 16 (Ronald K.L. Collins ed., 2d ed. 1995) ("Money damages for breach of contract were to be 'compensatory,' never punitive . . . .").

[326] *See* Milikowsky, *supra* note 324, at 464.

[327] Isbell v. Anderson Carriage Co., 136 N.W. 457, 462 (Mich. 1912) (explaining that it is difficult to prove damages from lost profits with sufficient certainty).

Lost profits are hard to prove because they are speculative; it is often hard to know for sure how much money a nonbreaching party would have made had the breach not occurred.[328]

The principle of certainty applies primarily to damages.[329] Thus, it does not map onto eviction neatly. But the underlying idea may still apply and counsel courts to avoid enforcing an eviction provision in some cases. As previously discussed, if a contract remedy is designed to make a nonbreaching party whole, then the justification for an eviction must be that a landlord would make productive use of the property almost immediately after evicting the tenant.[330] But if the landlord would not actually use the property right away, or were not able to find a replacement tenant immediately, then a remedy that kicks out an existing tenant before the original lease term specified fails to give the landlord what they are really missing, rent money. Conversely, a remedy like damages in the amount of unpaid rent would satisfy the principle of certainty because that number *is* a sure thing.[331] The court can know exactly how much money the landlord should have been paid by the tenant.[332]

Relatedly, eviction may in some cases contravene the principle underlying common-law limits on stipulated or liquidated damages.[333] Stipulated damages provisions specify what the breaching party must pay if it breaches.[334] They are often used when the actual value of damages would be difficult to prove, like if the expected harm to a nonbreaching party would be loss of profit.[335] One significant limitation is that for a liquidated damages clause to be enforced, an actual loss must have been suffered or reasonably anticipated.[336] Also, a court may refuse to enforce a liquidated damages provision if it finds the provision requires a much greater payment than is necessary to make the injured party whole.[337]

Because eviction is a separate remedy from damages, it would not obviously be subject to the traditional common-law limits on liquidated

---

[328] Michael D. Weisman & Ben T. Clements, *Protecting Reasonable Expectations: Proof of Lost Profits for New Businesses*, 76 MASS. L. REV. 186, 186–88 (1991).

[329] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 352 (AM. L. INST. 1981).

[330] *Id.*

[331] *Id.*

[332] *Id.*

[333] RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM. L. INST. 1981).

[334] *Id.*

[335] *See id.*

[336] *Id.* ("Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.").

[337] *Id.*

damages.[338] But eviction is a stipulated remedy that in theory has a certain value.[339] Of course, a landlord has suffered actual loss if a tenant has fallen behind on rent; the landlord has lost the value of rent for a period of time.[340] But, as noted multiple times in the article, eviction often costs the tenant far more than the rent arrears costs the landlord.[341] If a court determines that under the circumstances of a particular case that is true—for example, if $1,000 for one month of rent backpay would make the landlord whole, but eviction frees up the rental property for *five* months (worth $5,000) moving forward—the common law limitations on stipulated damages give a reason to go with another remedy that better reflects the realities of the situation.[342]

The rule against penalties is very similar.[343] Like with the principle of certainty and the limitation on stipulated or liquidated damages, the rule against penalties rests on the conviction that contract law is about making a nonbreaching party to an agreement whole.[344] A penalty, which indeed often arises as a non-enforceable stipulated damages clause, is a remedy that costs the breaching party more than the loss suffered by the nonbreaching party.[345] And a penalty need not be strictly financial,[346] especially if it serves as a deterrent to breaching.

A simple way to evaluate whether eviction is an improper penalty in a given case is to ask two questions.[347] First, is eviction or damages (likely in the value of unpaid rent plus interest) more costly to the tenant? If damages are more costly, eviction is likely not an improper penalty

---

[338] *Evict*, BLACK'S LAW DICTIONARY (11th ed. 2019)

[339] *See* Kamel v. Wambua, 984 N.Y.S.2d 337, 338–39 (N.Y. App. Div. 2014) (referring to the "deterrent value" of eviction).

[340] *See In re Kocher*, 78 B.R. 844, 851 (Bankr. S.D. Ohio 1987) (referring to rent as "the quintessential measure of the time value of real property.").

[341] *See, e.g.*, *supra* note 176 and accompanying text.

[342] *See* RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM. L. INST. 1981).

[343] *See id.* (describing the rule that penalties under contracts are generally against public policy).

[344] *Id.* § 356 cmt. a.

[345] *See* Wasserman's, Inc. v. Twp. of Middletown, 645 A.2d 100, 105–06 (N.J. 1994) (describing penalties as sums that extend beyond the realm of actual compensation into the realm of punishment or deterrence).

[346] *In re* Graham Square, Inc., 126 F.3d 823, 828 (6th Cir. 1997) (stating that principal features of penalties are their lack of proportional relation to actual damages and their design to coerce performance). Although penalties almost always are financial, the central requirement is that they have some economic value beyond what is necessary to compensate the harmed party. *Id.*

[347] I am not aware of courts or other commentators using this formulation to determine a penalty, but it seems to me to be an effective means of determining whether a remedy extends beyond compensation and into the realm of deterrence.

because it does not overshoot the value of what the landlord lost. Second, if eviction is more costly, does damages satisfy the landlord's expectation interests? Assuming the landlord only "uses" the property for generating rental income, the answer will often be yes. And if it is indeed the case that damages would compensate a landlord adequately, then to choose a remedy that is more costly to a tenant could amount to an unreasonable penalty.

Granted, it may seem unusual to evaluate the propriety of a remedy based on the breaching party's views towards that remedy instead of the nonbreaching party's views. But I assume under this approach that the court would determine first that the alternate remedy, damages, could indeed satisfy the landlord's expectation interests to a sufficient degree. So, the landlord's interest in the remedy would be adequately addressed. Once that is settled, nothing inherent to contract law would prevent a court from addressing which remedy, out of all remedies that could adequately compensate a plaintiff, would cause the least unnecessary additional hardship to the defendant.[348]

3. The Contract Approach Summarized

All in all, eviction poses some problems to contract doctrine. It deviates from the standard default approach to contract remedies, which favors damages over other remedial measures.[349] Thus, a contract purist could hold that damages and not eviction should be the preferred remedy for rent arrears.[350] But what about freedom of contract? Lease agreements typically allow for eviction in the event of rent nonpayment.[351] The common law of contract has a response to that too.[352] As a general matter, courts have substantial discretion over choosing the appropriate remedy, especially when a party seeks a remedy that is more injunctive in nature.[353] More specifically, eviction may be unconscionable in some cases, either because the tenant had little to no choice but to enter the lease agreement,

---

[348] *See* David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 636–37 (1988).

[349] RESTATEMENT (SECOND) OF CONTRACTS § 359 (AM. L. INST. 1981).

[350] *Id.*

[351] *See, e.g.*, Interstate Realty Mgmt. Co. v. Price, 86 So. 3d 798, 801 (La. Ct. App. 2012); Bentley-Kessinger, Inc. v. Jones, 367 S.E.2d 317, 318 (Ga. Ct. App. 1988); Dominski v. Frank Williams and Son, LLC, 46 A.D. 3d 1443 (N.Y. S. Ct. 2007); Keller Williams Realty v. Melekos, No. 2015CA0679, 2015 WL 6951406 (La. Ct. App. 2015).

[352] *See* Schoenbrod, *supra* note 348, at 636–37.

[353] See *id.*

or because the tenant would suffer an unreasonable hardship from the eviction compared to the benefit the landlord would receive from the eviction (or some combination of both).[354] And, relatedly, the common law welcomes scrutiny from the court into particular stipulated remedies when those remedies appear unnecessarily harsh or disproportionate to the harm suffered by the landlord.[355]

B. Supporting Principles from Property Law

The last subsection considered how the alternative to eviction advocated in this article may conform to the existing structures of contract law. This subsection approaches the issue through the lens of property law. Although the most natural understanding of property rights would support eviction in many cases of rent arrears, some common-law principles push towards damages instead.[356] This is especially true if a landlord's interest in a rental unit is more like that of an interest in an item of personal property or chattel than traditional real property, which I argue is often the case.[357]

The common law of property provides for a variety of remedies to vindicate property rights. The proper remedy depends on the type of property at issue and the owner's interest in that property.[358] The common law remedy most obviously relevant to this article is called ejectment.[359] Ejectment is a court order to vacate or relinquish occupancy of a premises.[360] Under the common law, a person can bring an action for ejectment against a trespasser on her property if damages would be inadequate to vindicate the property owner's interests.[361] Traditionally this

[354] *See supra* notes 12–18 and accompanying text.

[355] RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM. L. INST. 1981).

[356] *See, e.g.,* RESTATEMENT (SECOND) OF CONTRACTS §§ 359, 362–67 (AM. L. INST. 1981).

[357] *See* Lezell v. Forde, 891 N.Y.S.2d 606, 614 (Sup. Ct. 2009) (questioning whether an apartment lease should be treated as real property or personal property and the consequences of the decision).

[358] *Id.* at 613.

[359] Davis v. Westphal, 405 P.3d 73, 82 (Mont. 2017) ("In modern form, common law ejectment is an action at law brought against a trespasser in possession of all or a portion of real property for immediate possession of the property based on proof of superior title and the right to immediate possession.").

[360] *See id.* (describing ejectment of a means of claiming immediate possession to property).

[361] *See, e.g.*, ROBIN C. LARNER, EQUITABLE RELIEF; EJECTMENT, 14 GA. JUR. § 24:16 (2020) ("The general rule is that equity will interfere to restrain a trespass when the injury is irreparable in damages, or the trespasser is insolvent, or other circumstances exist which, in the court's discretion, render the interposition of the writ

remedy is favored to rectify not one-time trespasses, but repeated or ongoing trespasses when a damages award would not deter future trespass by the defendant.[362]

Eviction functions similarly to ejectment in the context of the landlord-tenant relationship.[363] In the eyes of the common law, then, eviction secures a landlord's interests in ways that damages perhaps cannot.[364] Or, at least, eviction would be appropriate when damages would not sufficiently satisfy a landlord's interests but removing the tenant from the property would.[365] Thus, eviction for rent arrears sometimes, but not always, would be supported by the default principles of the common law of property. It would be so supported when the landlord intends to use many of the sticks in the bundle of property rights in the rental property—if the landlord would use or sell the property if the tenant were not there.[366] But when damages may satisfy a landlord's interests, ejectment might not have common law support.[367] As with contract law, property law often favors making a plaintiff whole through money damages as opposed to injunctions.[368] So if a landlord has no interest in the property besides an intention to find a replacement renter to bring back the flow of rent payments, ejectment in the form of eviction may not be preferable.[369]

The most common alternative to ejectment in property law is a trespass action.[370] Like an ejectment action, a trespass suit seeks to address the harm caused by a person present on real property without permission or after permission expired.[371] It differs from ejectment in that it generally seeks damages from the trespasser, not removal (usually when a trespass action for damages is brought, the trespasser no longer remains on the property, but that is not a necessary feature of such actions).[372] As a unique

necessary and proper, among which will be the avoidance of circuity and multiplicity of actions.").

[362] *Id.* ("Equity may enjoin a continuing trespass to land.").

[363] TAMMY E. HINSHAW & RACHEL M. KANE, EVICTION DISTINGUISHED FROM EJECTMENT, 22 STAND. PA. PRAC. § 120:3 (2d ed. 2020).

[364] *See supra* note 361 and accompanying text.

[365] *See supra* note 361 and accompanying text.

[366] *Id.* This is because only when the landlord so intends will it be necessary to entirely turn over the property to the landlord.

[367] *Id.*

[368] *Id.*

[369] *Id.*

[370] *Id.*

[371] *Id.*

[372] St. Louis Cty. v. Moore, 818 S.W.2d 309, 310 (Mo. Ct. App. 1991) (referencing "the common law right to sue for trespass and collect actual and punitive damages").

feature of property law, a plaintiff who successfully proves trespass is generally entitled to damages even if she cannot prove that the trespass harmed her or the property.[373] Trespass guarantees at least nominal damages.[374] If the plaintiff can prove harm, even economic harm, then she will generally be entitled to damages for the value of the harm.[375] Trespass liability therefore serves both a symbolic and compensatory function. A court will declare a plaintiff's right has been violated in any case in which they suffer a trespass, but it will not do anything of much practical significance unless the plaintiff shows they have actually been harmed.[376]

Such an action is probably the closest existing property law corollary to the approach I suggest in this article.[377] In the landlord-tenant context, a trespass action would work as follows: once the tenant violates the lease agreement (such as by failing to keep up with rent) the tenant's interest in the property nominally reverts back to the landlord, because the lease agreement says so.[378] Thus, the tenant loses the rights to use and exclude and the landlord regains the full bundle of sticks, including the right to exclude.[379] At that point, the tenant is a trespasser unless the landlord gives him permission to remain.[380] If a landlord brought a trespass action for damages against the tenant, the landlord would certainly be entitled to nominal damages.[381] But the landlord would be entitled to additional damages in the amount which she can prove was caused by the tenant's overstay.[382]

The amount of harm would depend on what benefits the landlord could not obtain because the tenant remained on the property.[383] This would, of course, vary from case to case. If the landlord lived on site or used the site for her own personal endeavors, then the tenant's overstay may limit the exercise of such rights and factor into a damages award. But if the landlord, for example, owned many rental units and never personally used them, then presumably the primary damages the landlord could prove would be those resulting from being unable to rent out the property to

[373] Grygiel v. Monches Fish & Game Club, Inc., 787 N.W.2d 6, 19 (Wis. 2010) (explaining that trespass entitles a claimant to nominal damages).

[374] *Id.*

[375] *Id.* (explaining that a claimant may collect any compensatory damages they can prove from a trespass).

[376] *Id.*

[377] *See supra* Part III.

[378] *See supra* Part II.A.

[379] *See supra* Part II.A.

[380] *See supra* Part II.A.

[381] *See supra* note 372 and accompanying text.

[382] *See supra* notes 372–73 and accompanying text.

[383] *See generally supra* Part III.A.

someone who could pay more than the existing tenant. Importantly, this calculation may be different than the calculation of damages if the same situation were evaluated under a contract approach. Under the contract approach, the landlord could certainly be entitled to a damages award in the value of the rent payments for the remainder of the breaching tenant's lease, because that is what the landlord would have received had the tenant's obligation been performed.[384] But under property law, and under a trespass approach specifically, the lease agreement is out the window once the tenant breaches.[385] From that point on, the landlord simply has the standard set of property rights over the rental unit. Damages would be calculated not based on how much income the landlord could have earned if the tenant had satisfied the rental obligation, but based on how much the tenant's overstay harms the landlord from the moment the lease agreement vanishes onward.[386] Thus, under this approach, a landlord should recover the full value of the remainder of the rent payments only if she can show that the tenant's overstay prevented the landlord from filling that unit with another full paying renter for the entirety of that period. The landlord could demonstrate this with, for example, evidence of interest in the property by prospective tenants such as rental applications.

A few other significant remedies from the common law of property generally apply to personal property instead of real property. They are worth mentioning, though, because, as discussed in Part III, theoretical justifications exist to treat certain landlords' interests in certain rental properties more like an interest in chattel than an interest in closely held land.[387] Two of these remedies for violations of personal property rights are replevin and trover. Replevin (or, its close sibling, "detinue"), analytically the personal property corollary to ejectment, requires the wrongful holder of the chattel to return it to the owner.[388] Trover, the personal property corollary to trespass, requires the wrongful holder of the property to pay the owner for what she has taken.[389] Trover was thought

[384] *See supra* Part IV, Section A.

[385] This is because, under the conveyance view of leases, when the terms of the conveyance call for reversion to the landlord, reversion occurs and the terms have served their purpose. *See supra* notes 68–71 and accompanying text.

[386] *See supra* notes 68–71 and accompanying text.

[387] *See* Part III *supra*.

[388] *Laprease and Fuentes: Replevin Reconsidered*, 71 COLUM. L. REV. 886, 886 (1971) (explaining that replevin is "[m]ost frequently used today to effect summary repossession of a chattel purchased under a conditional sale contract").

[389] Taylor v. Morgan, 3 Watts 333, 333 (Pa. 1834) (explaining a way to calculate damages in a trover action). Trover seeks damages because the action is generally used when the defendant no longer has the property. *History of the Distinctions Between Trespass, Detinue, and Trover*, 18 HARV. L. REV. 402, 402 (1905) ("The action

to be the standard remedy when the wrongful holder of the property had already converted it to his own use.[390]

In cases in which a landlord's interest in the rental unit is more like an interest in chattel,[391] and when the tenant instead of the landlord is more likely to make productive use of the property for the immediate future, an action more like trover might make sense over one like replevin. Of course, trover does not map onto such a situation in a perfectly clean way. With trover, damages may make sense because the defendant has already converted the property to another use.[392] For example, a defendant may wrongfully hold some of the plaintiff's lumber, but by the time the plaintiff sues, the defendant has already made a boat out of that lumber. It would be impossible for the defendant to return that precise lumber to the plaintiff in its original form, and it would be impractical or inefficient to require the defendant to go out and find substantially similar lumber and give it to the plaintiff. So, damages to the plaintiff makes the most sense.

When a tenant breaches a lease agreement because of rent arrears, the tenant has not converted the property; the rental property still exists. Thus, it would not be impossible for the tenant to return the precise property to the landlord. However, it may be impractical or inefficient. If a landlord only "uses" the property by renting it out and generating income, then money is primarily what the landlord is due. The question, then, is whether the remedy of eviction is a practical or efficient way to make sure the landlord gets paid for the remainder of the lease period. If the landlord already has a tenant ready to move in and pay full price, that may be the case. If the landlord does not, then damages would more likely fit the logic of the distinction between trover and replevin.[393]

The overall point is this: under the traditional approach to property law remedies – whether dealing with personal property or real property – damages instead of eviction makes more sense as long as the landlord is not likely to make immediate use of the property or immediately rent it out to a paying replacement tenant.

But that is not the end of the discussion. A particular remedy may make sense, but that remedy may not be the one the plaintiff seeks. If a

---

of trover is founded upon a conversion, which, according to our modern ideas, may occur through an unpermitted taking of chattels, by a wrongful detention of them, or by an unlawful disposition so that neither the owner nor the wrong-doer has any further control over them.").

[390] *Id.*

[391] *See* Part III *supra.*

[392] *See supra* note 389.

[393] Of course, eviction may be inefficient on a broader scale as well, if society has an interest in keeping people housed and homelessness costs more in the long run than securing housing up front.

plaintiff seeks one particular remedy, shows her legal right has been violated, and thus under the law may be entitled to the requested remedy, the court must grant it, right? Not necessarily. Especially in actions in which common-law principles apply, courts are endowed with considerable remedial discretion.[394] They can consider a wide set of policy considerations that implicate the interests of the parties to the case, as well as others who have an interest in the remedy.[395] And one common-law rule that guides this discretion, which we have already seen in the contract context, is that damages are the preferred remedy over injunctions whenever damages are adequate to satisfy a plaintiff's interests.[396] For the reasons that have been discussed, damages are sufficient in some cases in which the landlord seeks an eviction.

Indeed, one notable feature of property law is that it sometimes makes an exception to the absolute right to exclude when such an exception is necessary to serve another important end or when enforcing the right to exclude would violate public policy.[397] In the famous case of *Ploof v. Putnam*,[398] a family was sailing on a lake when a strong storm blew in.[399] The family tied their boat to a dock on another person's property to try to avoid shipwreck.[400] The property owner's servant promptly untied the boat and the boat crashed into the shore, injuring the family on board.[401] The Vermont Supreme Court held that the property owner wrongly had the boat untied because the necessity exception to the right to exclude applied.[402] "[The] doctrine of necessity," the court said, "applies with special force to the preservation of human life."[403]

Similarly, in *State v. Shack*,[404] the Supreme Court of New Jersey held that a property owner could not exclude from his property two nonprofit workers who sought to provide legal and medical services to migrant workers housed there.[405] The court explained that:

---

[394] In particular, judges have significant discretion when asked to grant a form of injunctive relief. *See* Schoenbrod, *supra* note 348, at 635–380.

[395] *Id.* at 636–37.

[396] Davidson Bros., Inc. v. D. Katz & Sons, Inc., 579 A.2d 288, 307 (N.J. 1990).

[397] Ploof v. Putnam, 71 A. 188 (Vt. 1908).

[398] *Id.*

[399] *Id.*

[400] *Id.*

[401] *Id.* at 188–89.

[402] *Id.* at 189.

[403] *Id.*

[404] 277 A.2d 369 (N.J. 1971).

[405] *Id.* at 374–75.

> Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.[406]

Thus, some courts have been willing to recognize exceptions or limitations on the right of landowners to exclude others from their property when such exclusion would potentially threaten human health and safety.[407] Because eviction may similarly lead to considerable hardship and health and safety concerns, even if less immediately than in these cases, it would not be farfetched to think a court may limit a landlord's right to evict a tenant in some special cases, especially when it could order a damages award instead.

As a final note for this subsection, it is worth mentioning that the remedial approach for which I advocate may appear to generally contradict the theoretical framework made famous by Calabresi and Melamed.[408] Under that theory, and those which have expounded on it, "property rules" are to be favored over "liability rules" when transactions costs are low.[409] In the case of a landlord tenant dispute over rent arrears, transactions costs would likely be low. Usually only two parties would need to negotiate, and, because they would probably have a preexisting relationship of some form, it would not be particularly difficult for them to do so.

Nevertheless, even under an approach that prioritizes economic efficiency, such a simple analysis may be worth questioning.[410] As Calabresi and Melamed themselves explain,

> It should be clear that most entitlements to most goods are mixed. Taney's house may be protected by a property rule in situations where Marshall wishes to purchase it, by a liability rule where the

[406] *Id.* at 372.

[407] *See, e.g.*, *Ploof*, 71 A. at 188; *Shack*, 277 A.2d at 369.

[408] Calabresi & Melamed, *supra* note 55.

[409] Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 718 (1996) (identifying, though questioning, the standard perspective that property rules should be used when transactions costs are high and liability rules when costs are low).

[410] Kaplow and Shavell question the standard transactions costs analysis. *Id.*

> government decides to take it by eminent domain, and by a rule of inalienability in situations where Taney is drunk or incompetent.[411]

But why is "Taney's house" protected by a liability rule when the government wants to take it by eminent domain? Presumably, the answer is not because bargaining costs between the owner and the taker (the government) would be high; only two parties are officially involved. Instead, in my view, the answer must be one of two things. One, the parties who have a relevant interest in the transaction are actually more numerous than only the two officially involved. Specifically, because a taking by the government is done for the public interest,[412] the interested parties are all those who may benefit from the property being removed from the exclusive control of the private owner. And conceived in that way, transactions costs *would* be high, because such costs may have to account for bargaining with all these additional persons. Second, perhaps the house would be protected by a liability rule in the case of a taking because, practically, the government must have the power of eminent domain for the sake of the public interest, and a property rule would entirely undermine eminent domain (because a property rule would allow the owner to hold his property unless he *freely* gives it up).[413] Under either justification, a property rule may be displaced by a liability rule because the public interest in some way requires it.

The damages remedy for which I advocate in this article is not a taking as traditionally conceived. But the same principle may apply. Although only two parties, the landlord and the tenant, are primarily involved in the transaction which could allow for a tenant to stay on the landlord's property, the interests of other parties matter too. This is especially true when a tenant's dependents are in the picture. It also may be true when an eviction would likely cause homelessness. Homelessness is a concern of all who live in a jurisdiction in which it occurs. Homelessness is associated with higher crime rates and thus draws on government resources funded by the public's tax dollars.[414] For this reason, it may indeed be impractical to facilitate actual negotiation between a landlord who wants to evict someone and all parties affected by

---

[411] Calabresi & Melamed, *supra* note 55, at 1093.

[412] Kelo v. City of New London, 545 U.S. 469, 477–78 (2005) (explaining the public purpose requirement for the exercise of eminent domain power under the Takings Clause).

[413] *See supra* note 55 and accompanying text.

[414] M. Price, *New Insights on Homelessness and Violence*, AM. PSYCH. ASS'N (Dec. 2009), https://www.apa.org/monitor/2009/12/violence [https://perma.cc/8LND-9N83].

the eviction epidemic. Thus, a liability rule may be justified in place of a property rule.

Additionally, the remedy I recommend does resemble a taking in a certain way. The government, this time through the court instead of the legislature or executive,[415] declares that a landlord must continue to rent out the property to the existing tenant for at least part of the remainder of the lease term. But, instead of the government compensating the landlord through tax dollars, the government may order the tenant to retain liability for that monetary value.

Overall, principles underlying common law property remedies may support a deviation from the eviction default in some cases when a tenant fails to keep up with rent payments.[416] As across the common law, damages are the preferred remedy over injunctions whenever damages adequately compensate the plaintiff for what it has lost.[417] And when a party seeks some form of injunctive relief, courts have considerable discretion to evaluate whether such relief is appropriate.[418] When the landlord does not use all the property rights it has in the rental property, but instead only seeks to generate income from it, a money judgment may be sufficient to secure its interests.[419] And although the landlord's interest in its land might traditionally be protected by a property rule, requiring its consent to deprive it of any rights to the property, the broader harm to the public caused by evictions may justify a liability rule instead.

V. CONCLUSION

Eviction in the United States presents an intimidating problem. How can we secure adequate housing for people who may suffer homelessness and other grave consequences, while also respecting the expectation interests and property rights of private landlords who provide the large part of low-income housing stock? Although commentators have focused extensively on questions of homelessness and housing affordability, most

---

[415] *See* Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 DUKE J. CONST. L. & PUB. POL'Y 91 (2011) (discussing the relatively new concept of judicial takings).

[416] *See supra* Part IV, Section B.

[417] *See supra* notes 268 and 361 and accompanying text.

[418] *See supra* notes 268 and 361 and accompanying text.

[419] *See supra* notes 268 and 361 and accompanying text. And if a tenant cannot pay the judgment, the landlord may still see much of its interests secured through other mechanisms like wage garnishment and security interests on personal property. Of course, landlords may not prefer such mechanisms. Landlords' preferences for remedies matter and should often be accommodated, but they are not the end all be all when the preferred remedy is injunctive in nature.

proposed solutions focus on legislative or other policy action.[420] Rent control, eviction moratoriums, the eradication of single-family zoning, voucher programs, public housing, and other policy initiatives are important pieces of the puzzle. But courts can play a role too. Just as courts operating under the common law saw the new challenges presented by urbanization and thus developed landlord-tenant law to secure greater rights for tenants, so too they can develop landlord-tenant law on the remedies side of the equation to meet this modern crisis.[421]

From a theoretical perspective, a landlord's property rights, though important, are neither unwavering nor the only relevant consideration. When a tenant fails to keep up with rent payments, the remedy blessed by the court also implicates (1) the landlord's relationship to the property, (2) the landlord's reasonable expectations regarding benefits from the property, (3) the potentially excessive hardship a tenant could suffer if evicted, and (4) the burden on the public when a person is pushed into homelessness.[422] Specifically, landlords may relate to their rental properties in a way that is more like that of an owner of chattel who never uses the chattel but simply generates income from others using it. This is especially true of landlords who own numerous rental units and neither live on nor use any of them.[423] When such a rental unit is at the center of a rent arrears dispute, the primary concern of the landlord is restoring lost cash flow.[424] Eviction may be inappropriate, then, because it always makes the assumption, which sometimes is not warranted, that the landlord will be able to find a paying replacement tenant immediately. It thereby both fails to secure the money due to the landlord and kicks out a tenant in dire circumstances without asking whether doing so truly helps make the landlord whole. Damages, on the other hand, could address some of the reasonable interests and expectations of the landlord without rendering the tenant homeless. Because eviction often does burden the tenant more than it benefits the landlord, and because the public has an interest in widespread housing security, a monetary remedy could help remedy the eviction epidemic.

Not only does such an approach make sense as a matter of theory, but it also finds some support in historical common-law approaches to remedies. Contract law favors damages when they adequately satisfy an

[420] *See supra* Part II, Section B.
[421] *See supra* Part I.
[422] *See supra* Part II, Sections A–D.
[423] *See supra* Part II, Section A.
[424] *See supra* Part II, Section A.

injured party's expectation interests.[425] And even when a lease agreement specifically calls for eviction, contract law provides various mechanisms under which such a provision sometimes should not be enforced, like unconscionability and limitations on penalties and stipulated remedies.[426] Likewise, under the common law of property, damages and similar legal remedies are favored over injunctive relief when they sufficiently restore to property owners the value of the rights they have lost.[427] And, even under the substantive law of property, the right to exclude must sometimes give way when human health and safety hang in the balance.[428] Under the common law as a whole, courts have considerable remedial discretion, which they may leverage in the interests of the parties and the public.[429]

Today, eviction is the standard legal remedy for rent arrears, but it need not be in all cases. Courts have often allowed evictions to proceed simply because the lease agreement says so. But that approach, perhaps followed in the name of judicial restraint, abrogates the common-law power courts have traditionally exercised when circumstances required it. Today, the circumstances do require it. Eviction has been transplanted from long-passed circumstances in which it made more sense and pressed onto disputes for which it is sometimes an ill-fitted solution. Courts are well-positioned to notice when eviction is indeed an ill-fitted solution, and it is time they do so.

[425] Restatement (Second) of Contracts § 359(1) (Am. Law Inst. 1981) ("Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.").

[426] *See supra* Part IV, Section A.1.

[427] *See supra* Part IV, Section A.1.

[428] *See supra* Part IV, Section A.1.

[429] *See supra* Part IV, Section A.1.