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# Housing, Poverty, and the Law

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## Keywords

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## Abstract

Throughout much of the late twentieth century, social scientists and legal scholars focused considerable attention on low-income housing and landlord-tenant law. In recent years, however, interest in housing has waned, leaving many questions fundamental to the poverty debate unanswered. This article calls for a renewed focus on housing, law, and poverty, with particular attention to the housing sector where most low-income families live, unassisted: the private rental market. Surveying social-scientific research, legal analysis, and case history on affordability, access, housing conditions, forced displacement, and homelessness, this article shows how housing plays a central, crucial role in the lives of poor Americans. The poor have been central to the development of housing law, and the law itself has done much to mitigate and aggravate their poverty.

## INTRODUCTION

Housing plays a central role in the lives of poor Americans. For the majority of low-income families, housing is their biggest expense and is fundamental to their psychological, school, and community stability. Housing dynamics—from substandard conditions and crowding to cost burden and eviction—exert a powerful influence on health, job stability, educational success, and other matters essential to well-being.

And yet, research on housing and poverty has waned over the years. Until recently (Pattillo 2013), the last major survey of the sociology of housing appeared in 1980 and tellingly relied more on studies conducted by government staff and consulting firms than by social scientists (Foley 1980). Today, it is not uncommon to find state-of-the-art reviews of urban poverty research that make no mention of housing dynamics. Similarly, legal scholarship by and large has disengaged from the study of housing and poverty. These days, it is rare to see an article on housing in the leading law reviews or legal studies journals. This was not so in the 1960s and 1970s, when top journals regularly published groundbreaking work on landlord-tenant law geared toward the “slum dweller.” Today’s “slum dweller” faces a new set of legal challenges, and new legal innovation focused on housing the poor is urgently needed.

This article calls for a renewed focus on housing, law, and poverty, with particular attention to the housing sector where most low-income families live, unassisted: the private rental market. To do so, it adopts a sociolegal perspective and critically reviews social-scientific research, legal analysis, and case history on five aspects basic to the intersection of housing and poverty: affordability, access, housing conditions, forced displacement, and homelessness. The poor have been central to the development of housing law, and the law itself has done much to mitigate and aggravate their poverty.

## AFFORDABILITY

Housing costs across America have surged. Nationwide, median rent has increased over 70% in the past two decades, and the cost of fuels and utilities has risen by over 50% since 2000 (Carliner 2013, Collinson 2011). Poor renting families, who have watched their incomes stagnate or fall as their housing costs shot up, increasingly have had to devote larger portions of their paychecks to rent and utilities. Today, the majority of poor renting families in America devote over half of their income to housing; almost a quarter dedicate more than 70% (Desmond 2015). The lack of affordable housing is among the most pressing issues facing the urban poor. But it also is among the least understood. A comprehensive explanation of the affordable housing crisis is sorely needed, one that incorporates not only economic dynamics but also the multilayered legal underpinnings of the crisis. In this section, we review the evidence on the relationship between housing costs and rent control, other local regulations, and federal housing policy.

### The Life and Death of Rent Control

At the beginning of the twentieth century, tenant protests in response to steep rent hikes in cities with severe housing shortages sparked efforts in various states to mandate housing affordability (Dodd & Zeiss 1921, Fogelson 2013). During World War II, the federal government imposed a nationwide rent freeze through emergency legislation, along with other wartime price controls. In 1947, Congress enacted federal rent controls in the Housing and Rent Act, only to pave the way for states to phase out such controls two years later, largely in response to sustained mobilization by the real estate lobby (Bloom & Newman 1974). A generation later, the country would witness a

second tenants' rights revolution as renters banded together and pushed for rent regulation, which roughly 170 municipalities would enact by the late 1970s (Cantor 1995, Keating & Kahn 2001).

Landlords vigorously opposed rent control, as did most economists at the time (Arnott 1995). If tenants won rent control by taking to the streets, landlords would seek its end by taking to the courts. Property owners sought to have rent control ruled unconstitutional, based primarily on the Fifth Amendment's Takings Clause. Through numerous cases that followed *Block v. Hirsch* (1921), which found emergency rent controls constitutional, the Supreme Court left open the question of whether rent regulation was permissible in the absence of an emergency housing shortage. An important ruling came in 1992, when the Court issued its most direct judgment on the matter in *Yee et al. v. City of Escondido*, which concluded that a nonemergency rent control ordinance was constitutional. The City of Escondido, California, had adopted an ordinance that prohibited rent increases in mobile home parks unless owners received city council approval. Mobile home park owners, led by John and Irene Yee, argued that rent control amounted to a regulatory taking that denied landowners economically valuable use of their property. But the Court unanimously ruled that Escondido's ordinance did not "take" the owners' property because the government did not require them to rent it. The landlords voluntarily rented their land, and the rent control ordinance regulated that voluntary action.<sup>1</sup>

Although rent stabilization remains constitutionally permissible and is recognized today by many economists to be potentially beneficial if done right (Andersson & Svensson 2014, Arnott 1995), statutes regulating rent have been systematically dismantled over the past several decades. Tenants had their organized movement in the 1970s; landlords have theirs today. Local and national associations have lobbied political representatives to erase rent control from the books. In only four states (California, Maryland, New Jersey, and New York) and the District of Columbia do mandatory rent regulations remain. According to the American Housing Survey, only 1.7% of all renter-occupied units were rent controlled as of 2013. But social scientists are only beginning to write the full story about the rise and fall of rent control. Historians have documented the political groundswell of protest that forced major cities like New York to enact rent regulations (Fogelson 2013); economists have begun exploring new antecedents of rent control, like its role in the expansion of urban homeownership (Fetter 2014); and legal scholars have charted large and consequential shifts in American housing policy (Rosen & Sullivan 2014)—but much work remains undone. Research that analyzed the increasing professionalization of urban landlords alongside the de-escalation of tenant mobilization, intellectual capture regarding the neoclassical economic perspective, and the pressures city politicians face from antagonistic interests would significantly expand our knowledge of one of the most consequential shifts in urban housing policy since the New Deal.

## The Legal Levers of Housing Prices

Law and policy at multiple levels of government play a sizable role in all matters of housing affordability. The tax code, for one, is fundamental to enabling and constraining housing initiatives. Most cities rely heavily, if not exclusively, on revenues from property taxes, but many do not have the power to set property tax rates. That power typically rests with the state. Local politicians seeking to increase revenue streams to fund social services have but one practical means at their

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<sup>1</sup>Recently, the Court was asked to return to these questions in *Harmon v. Markus* (2011), which challenged New York City's rent stabilization statute. After a federal trial court upheld the law, and the Second Circuit appellate court summarily agreed, the Supreme Court declined to hear the case.

disposal: Increase property values to drive up tax revenues (Goldsmith & Blakely 2010, Nelles 2013). As Frug & Barron (2008) have argued convincingly, under these legal constraints gentrification becomes necessary for local politicians of any persuasion. Social scientists often present gentrification as something that happens to this or that transitioning neighborhood and explain it by referencing economic and sociological dynamics. But a more expansive approach would analyze how tax policies incentivize, even force, local politicians to court gentrification on a much larger scale.

Urban economists have identified zoning laws as a hindrance to increasing affordability in cities. After finding evidence that zoning strictness is highly correlated with high housing prices, Glaeser & Gyourko (2003) argue that land use controls drive up housing costs by artificially restricting construction. In recent decades, housing prices have come to reflect a growing burden of obtaining regulatory approval for new construction (Glaeser et al. 2003, 2005; Ihlanfeldt 2007). Relatedly, sociologists have found zoning restrictions to have other collateral consequences as well, as when anti-density measures lead to increases in economic and racial segregation (Massey & Rothwell 2009, Rothwell & Massey 2010).

Besides local regulations, federal housing policy is central to rising rent burden among low-income families. Most basically, housing assistance covers but a fraction of the need: For every family in possession of a voucher or subsidized housing unit, there are three who qualify but receive nothing (Currie 2006, Schwartz 2010). As public sympathy and resources have drained away from public housing, vouchers have become the largest housing subsidy program for low-income families. It is curious and concerning, then, that such a small amount of work has been dedicated to evaluating how this program affects housing prices for voucher holders in particular and urban rental markets more generally. There is some evidence that voucher holders pay above-market rent (Cutts & Olsen 2002). A recent study found that the average Milwaukee renter with a housing voucher pays roughly \$55 more each month, compared with the average unassisted renter, controlling for housing, neighborhood, and school quality (Desmond & Perkins 2015). If voucher holders in other cities pay similar premiums, then the Housing Choice Voucher program may cost taxpayers billions of dollars more than it should and result in the unnecessary denial of assistance to hundreds of thousands of needy families.

Research assessing the impact of housing vouchers on private-market rents is thin and mixed. Susin (2002) found that cities with more housing vouchers experienced steeper rent hikes and estimated that vouchers cost unassisted families more than they have saved assisted ones. This finding aligns with economic theory that would expect rents to increase in response to a program that pushed up demand for rental units (O'Flaherty 1996). But studies also have found no relationship between the concentration of voucher holders and the overall price of rental housing (Eriksen & Ross 2015). Famously, the Experimental Housing Allowance Program found that housing vouchers had a negligible effect on market rents. Apgar (1990) attributed this result to the fact that markets were insufficiently saturated with vouchers and that rents were artificially depressed during the study's time period. That the question of how America's largest housing subsidy affects private rental markets in which most poor families reside remains unsettled is itself deeply unsettling. When it comes to housing policy, there is no question more pressing and urgent than this one.

## ACCESS

Access to decent and affordable housing in a neighborhood of one's choosing is central to the life chances of poor families. The scholarly literature on discrimination in the housing sector is vast and richly deserving of several thorough reviews (e.g., Charles 2003, Galster 1992). Rather

than retrace well-trod paths, we emphasize two emerging areas of study related to housing access that are of particular interest to the sociolegal perspective: the increasing importance of record keeping and the dismantling of the disparate impact standard.

## The Violence of Record Keeping

First Amendment protections have served as the legal foundation for the proliferation of accessible court records, now regularly used to screen tenants. Today, hundreds of data-mining companies specializing in tenant screening reports stand ready to catalog an applicant's previous evictions, court filings, and credit scores (Kleysteuber 2006, Thacher 2008). Federal and state statutes regulating reporting practices, including the Fair Credit Reporting Act, do not adequately protect potential tenants from reports riddled with errors (Dunn & Grabchuk 2010, Stauffer 1987). They do even less to protect them from facts. In every state but California, the government discloses eviction records even when the landlord did not prevail (Kleysteuber 2006, Williams 1994). As landlords often are wary of "troublesome tenants," even dismissed evictions could result in housing applications being rejected (Strahilevitz 2008).

Tenant screening on the basis of previous evictions and convictions often is praised for its impartiality. But equal treatment in an unequal society can foster inequality. Low-income African American women disproportionately experience eviction, just as low-income African American men disproportionately experience incarceration (Desmond 2012, Western 2006). Accordingly, uniformly denying housing to all applicants with recent criminal or eviction records will have a disparate impact on low-income African Americans above and beyond the considerable and well-documented racial discrimination they face in the housing market (US Dep. Hous. Urban Dev. 2000). Social scientists should continue the work Pager (2003) started by recording the consequences of record keeping—convictions, evictions, poor credit scores—and analyzing how advances in surveillance and communication technologies, backed by legal arguments for "a free and open society," help facilitate inequality. With respect to legal reasoning, Oyama (2009) creatively has advocated using disparate impact theory to argue that the use of civil or criminal records to deny housing could violate the Fair Housing Act (FHA). But the power of disparate impact has been diluted substantially since 1968.

## The Uncertain Future of Disparate Impact Theory

The FHA forbids policies and practices that have a "disparate impact" on members of protected groups, including racial minorities and women. This theory is unique and ambitious. It is ambitious in that the original drafters believed the FHA was an effective means to racial and economic integration. It is unique in that it does not require intentional discrimination to be established. Despite broad judicial consensus that the FHA contemplates disparate impact claims,<sup>2</sup> textualist

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<sup>2</sup>E.g., *Huntington Branch, NAACP v. Huntington* (1988) (suburban zoning ordinance restricted the location of low-income housing to a predominantly black and poor neighborhood); *Resident Advisory Board v. Rizzo* (1977) (regarding the delay in development of low-income housing in a nearly all-white neighborhood in Philadelphia); *Smith v. Clarkton* (1982) (ordering the construction of public housing units in a predominantly white municipality); *Hanson v. Veterans Administration* (1986); *United States v. City of Black Jack* (1974) (striking down zoning ordinance that would prevent the construction of affordable housing in a nearly all-white, middle class St. Louis suburb); *Metropolitan Housing Development Corp. v. Village of Arlington Heights* (1977) (involving zoning for the construction of low-income housing); *Halet v. Wend Investment Co.* (1982); *Langlois v. Abington Housing Authority* (2000) (low-income minorities and a coalition for the homeless challenged requirements for distribution of Section 8 vouchers); *Mountain Side Mobile Estates Partnership v. Secretary of Housing & Urban Development ex rel. Van Loozenoord* (1995) (involving a Colorado mobile home park).

interpreters have challenged this theory, arguing that the statute's language differs from that of other statutes that permit a disparate impact standard (Allen et al. 2014). Over the years, the concept of disparate impact has been systematically weakened. Its most significant blow came in 1976 with *Washington v. Davis*, when the Supreme Court held that a claimant must prove discriminatory intent to prevail on the claim that discrimination violated the Constitution. Because discriminatory intent is nearly impossible to prove, this ruling essentially immobilized constitutional antidiscrimination claims and confined disparate impact theory to statutory claims.

Although the FHA does not consider "the poor" a protected group, the statute has been used to expand affordable housing access. While the majority of FHA cases fail at the summary judgment stage, and plaintiffs win only 20% of cases that reach the courts of appeals, a substantial number of cases that do prevail involve low-income households (Allen et al. 2014, Seicshnaydre 2013). *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, which the Supreme Court decided in June 2015, originated as a challenge to the Texas Department of Housing and Community Affairs' practices of administering a low-income housing program. Nearly forty groups and individuals filed amicus briefs in *Inclusive Communities*. Contributing to this effort were many social scientists, who marshaled data documenting persistent residential segregation in cities and the role implicit biases play in actuating housing discrimination (e.g., Quillian 2006, Roscigno et al. 2009). The comingling of race and class in urban spaces has allowed the FHA to function as an antipoverty as well as an open housing measure. But disparate impact theory may not be long for this world. *Inclusive Communities* asks whether disparate impact claims are cognizable under the FHA or whether a complainant must prove intentional discrimination. Although the Court upheld the disparate impact standard in *Inclusive Communities*, the ruling was 5–4, with Justice Kennedy breaking the tie between liberal and conservative justices. If the Court one day rejects the disparate impact standard, it will handicap the FHA's latent power, diminished though it has been, to address the housing concerns of the poor.

## CONDITIONS AND CONTROL

Studies have linked poor housing conditions to a wide array of health problems, from asthma, lead poisoning, and respiratory complications to developmental delays, heart disease, and neurological disorders (Evans et al. 2003, Krieger & Higgins 2002, Morgan et al. 2004). In 2002 the *American Journal of Public Health* called inadequate housing "a public health crisis" (Bashir 2002). These facts are not lost on the poor. A survey of families on the list for rent assistance found that almost half believed their children's health had suffered on account of the expense or quality of their apartments (Sharfstein et al. 2001).

A dominant narrative within the literature is that the biggest problem today is not the condition but the cost of housing. Schwartz (2010, p. 26) repeats an idea held by many policymakers and researchers when he writes, "The affordability of housing is today of far greater concern than physical condition or crowding." Although it is indisputable that housing units lacking indoor plumbing or heating systems have virtually disappeared from the American city, we should not lose sight of the fact that recent increases in housing costs have not been accompanied by increases in housing quality. In the 1970s and 1980s, rents increased primarily because housing quality did (Jencks 1994). But in the past decade, as rents have shot up, housing quality has remained virtually unchanged. According to the American Housing Survey, the proportion of rental households with severe physical problems has remained flat over the past two decades (at roughly 3%). The same is true for other measures of housing quality. For example, in 1993, 9% of renters reported being "uncomfortably cold for 24 hours or more" because the heating broke. In 2011, 10% did.

## From “Buyer Beware” to the Implied Warranty of Habitability

Housing conditions have improved considerably in American cities because of increased regulation and enforcement.<sup>3</sup> Under common law, the buyer or tenant was responsible for assuring a dwelling was livable; this principle was known as *caveat emptor/lessee* (“let the buyer/tenant beware”). With minor exceptions, the doctrine remained intact well into the twentieth century (Josephson 1971, Lesar 1960).

That would change in 1970 after the landmark case *Javins v. First National Realty Corporation*.<sup>4</sup> The plaintiffs in *Javins* were poor African American tenants who had petitioned their landlord for repairs through letters and eventually a rent strike. The landlord responded by suing each tenant for eviction. When the case went to trial in June 1966, six plaintiffs presented considerable evidence of substandard housing conditions, including 1,500 alleged code violations and bags of dead mice. But the trial judge barred the plaintiffs from raising affirmative defenses based on poor housing conditions and summarily ruled in favor of the landlord because the tenants had not paid rent (Chused 2004, Rabin 1983).

On appeal, the plaintiffs’ lawyer drew on a recently published law review article on the implied warranty of habitability (Schoshinski 1966) and argued that landlords have a contractual duty of care based on housing code regulations. The argument attacked *caveat lessee* and claimed that landlords breached their contract with tenants if they failed to maintain safe and decent housing units; if landlords did not meet the minimum standards required under the housing code, they were not entitled to the rent. The US Court of Appeals for the DC Circuit accepted this argument and recognized the interests of “the modern apartment dweller,” with special attention to poor urban tenants (Ackerman 1970).<sup>5</sup>

In 1977, the American Law Institute (1977) approved and issued the *Restatement of the Law Second, Property*, which comprehensively set forth landlord-tenant law, including the implied warranty of habitability. Though the warranty has not been without detractors (Meyers 1975), the *Restatement* represented the legal establishment’s full embrace of this shift in responsibility for an apartment’s livability from tenants to landlords. Today, the District of Columbia and every state except Arkansas have recognized the implied warranty of habitability through legislation or case law (Brower 2010).

## An Argument Without Evidence: Does Code Enforcement Help or Harm the Poor?

A vigorous debate about the relative costs and benefits of code enforcement followed in the wake of *Javins*. In 1971, legal scholar Bruce Ackerman observed policymakers were ambivalent about code enforcement because they were undecided about its consequences for poor tenants. Because of their ambivalence, Ackerman (1970, p. 1095) argued, “code enforcement tended to oscillate wildly

<sup>3</sup>In 1867, New York City adopted what was arguably the first housing code, the Tenement House Act. Yet it was not until the post-World War II era that housing demands and shifting conceptions of the government’s obligations led cities full of blighted slums to begin adopting comprehensive housing codes as part of urban renewal (Ross 1996).

<sup>4</sup>*Javins* is widely recognized to be the seminal implied warranty of habitability case, but it was not the first. Courts in Hawaii [*Lemle v. Breedon* (1969)] and Wisconsin [*Pines v. Perssion* (1961)] had adopted the implied warranty of habitability prior to *Javins*.

<sup>5</sup>Post-*Javins*, courts in several states have recognized an implied warranty of habitability in modern rental agreements. See *Green v. Superior Court of San Francisco* (1974); *Jack Spring, Inc. v. Little* (1972); *Schiro v. W.E. Gould & Co.* (1960); *Steele v. Latimer* (1974); *Boston Housing Authority v. Hemingway* (1973); *Rome v. Walker* (1972); *Kamarath v. Bennett* (1978).

between passive and active phases.” Ackerman called for robust, proactive enforcement throughout the city and against sporadic, reactive enforcement based on complaints from particular addresses. He believed that although selective code enforcement would increase rents, comprehensive enforcement, in which all landlords were held to the same standards, would not. Ackerman’s position was criticized most vocally by Neil Komesar (1973, p. 1193), who argued that many of Ackerman’s economic assumptions were invalid and that his “sweeping pronouncements” about the redistributive possibilities of code enforcement were “incomplete and shallow.” Legal scholars took sides in what became known as the “Ackerman-Komesar Debate,” with some arguing that housing code enforcement was a boon for poor tenants (Craswell 1990, Markovits 1975, Moskovitz 1974) and others urging hesitation or taking the opposite position (Meyers 1975, Posner 1972).

Despite all the ink spilled in this debate, little empirical research has been conducted to inform either position (Rosser 2013). Exceptions include an early study that found no statistically significant relationship between rents and habitability laws but generally supported Komesar’s argument (Hirsch et al. 1975); a Minneapolis-based analysis that supported Ackerman, finding selective enforcement to be beneficial to poor tenants without leading to rent increases (Kinning 1993); and a more recent, nationally representative study that found implied warranty raised rents by modest amounts (Brower 2010).

The absence of empirical evidence establishing statistical patterns about the relationship between code enforcement and housing prices, let alone ethnographic work documenting how enforcement plays out on the ground (Desmond 2012, Garnett 2004, Ross 1996), leaves lawmakers to design in the dark.<sup>6</sup> With basic questions about the effectiveness and potential spillover effects of housing code enforcement largely unanswered, scholarly attention regrettably has shifted away from code enforcement. A cursory look at the evidence indicates that cities made great strides in improving housing conditions in decades past, but recent years have witnessed a general stagnation in housing quality alongside steep rent increases (Super 2011). Understanding why seems fundamental to urban studies—as does evaluating new proactive, citywide rental inspection initiatives recently installed in cities like Seattle and Washington, DC. We also wonder how the spreading of poverty from the central city to suburban neighborhoods with aging property stock will affect the housing quality of low-income families (Kneebone & Berube 2013; Murphy forthcoming).

## Environmental Inequality

Exposure to environmental toxins exacerbates the suffering of the poor, reducing their intellectual capacities and threatening their mental health (Evans & Kantrowitz 2002, Scharber et al. 2013). Studies have shown low-income black and Hispanic neighborhoods to have relatively high rates of pollution (Downey 2006, Mohai & Saha 2007, Pais et al. 2014). Race- and class-based segregation not only correlates with dangerous streets and failing schools but also is accompanied by proximity to trash incinerators or hazardous waste as well as lead poisoning in children (Elliott & Frickel 2013, Grant et al. 2010).

A small but important body of work examines environmental suffering among America’s poor. The investigative pursuits of Markowitz & Rosner (2002, 2013) have exposed the ways chemical companies sought to cover up the public health hazards of their products. Books like Bullard’s (2000) *Dumping on Dixie* document how low-income communities have mobilized to

<sup>6</sup>In the 1987 case *Chicago Board of Realtors, Inc. v. City of Chicago*, concerning a revised housing code that strengthened the relative position of tenants, Judge Richard Posner made ominous predictions about the effects of the new law on poor tenants, forecasting that the law would make “rental housing more costly” and make tenants “worse off.”



fight polluters, whereas Auyero & Swistun's (2009) *Flammable* records how the global poor pay the price for America's appetite for oil. More often than not, however, housing and neighborhood researchers neglect to account for "the simple fact that the poor do not breathe the same air, drink the same water, or play on the same soil as the nonpoor do" (Auyero & Swistun 2009, p. 18).

Environmental inequality is a housing condition, neighborhood effect, and legal problem worthy of serious inquiry. As cities and towns around the globe begin responding to the effects of climate change, we foresee a growing need for research that plumbs the nexus of poverty, housing, and the environment. In the near future, which regions of the country will be most vulnerable to the impending effects of climate change? How can we design policies to shield the poor from being disproportionately affected by rising tides, elongated heat waves, or mounting food prices? New research on socio-environmental disasters addresses such questions and offers insights that will in all likelihood grow in importance in decades to come (Arcaya et al. 2014, Klinenberg 2003).

The structure and practice of the law, for their part, present barriers to combatting environmental inequality. For one, the bodies of law that oversee most environmental concerns (administrative and tort law) are less clearly associated with bodies of law (e.g., family law, landlord-tenant law) that have come to characterize "poor people's courts." Even if they were, Legal Services Corporation restrictions prevent many poverty lawyers from taking on environmental degradation in court because such cases often come in the form of class action suits ("toxic torts"), which are verboten for lawyers who work in organizations that receive Legal Services Corporation funding. If Congress lifted these restrictions, poverty lawyers could play a bigger role in the fight against pollution that disparately affects poor minority communities. Doctrinal aspects of toxic tort cases also present challenges that may be especially daunting for low-income communities. Establishing causation in toxic tort cases is notoriously difficult (Conway-Jones 2002, Kanner 2004), especially for vulnerable populations for whom pollution is but one of many possible adversities correlated with health problems (Austin & Schill 1991). New technology that relies on genetic biomarkers may help firm up the effects of toxic exposure (Marchant 2006), but only if firms representing poor clients can marshal the resources to use it.

## **FORCED DISPLACEMENT FROM HOUSING**

At midcentury, sociologists and demographers regularly collected data on forced mobility—e.g., by eviction, building condemnation, or slum clearance—and found rates of involuntary displacement to be fairly common among city dwellers [e.g., Rossi 1980 (1955)]. Even so, interest in involuntary displacement from housing was eclipsed by research that focused primarily on purposeful mobility owing to life cycle changes, spatial assimilation, or racial turnover. The literature on residential mobility developed a palpable intentionality bias based on the experience of middle-class Americans, and moves generally were understood to be "rational, deliberate, and planned" (Duncan & Newman 2007, p. 175). But in the wake of the foreclosure crisis that began in 2008, along with rising housing costs, researchers and legal analysts have renewed their interest in the prevalence, causes, and consequences of forcibly removing low-income families from their homes by eviction, foreclosure (including that of landlords), and building condemnation.

### **Measuring the Prevalence of Forced Mobility**

The American Housing Survey (AHS) attempts to measure the frequency of involuntary displacement by relying on open-ended questions that ask families to volunteer their reasons for moving. According to the AHS, among renters nationwide who had moved in the past year, between 2.1% and 5.5% were forced from their previous unit on account of private displacement (e.g., owner moved into unit, converted to condominium), government displacement (e.g., unit

was found unfit for occupancy), or eviction (US Dep. Hous. Urban Dev. & US Dep. Commer. 2013).<sup>7</sup> The AHS—as is the case with other national surveys and material hardship studies (Desmond & Kimbro 2015, Mayer & Jencks 1989)—significantly underestimates the prevalence of involuntary removal among renters because tenants often have narrow views of what constitutes an “eviction.” Many who were forced from their homes do not recognize or admit as much in the context of a survey (Hartman & Robinson 2003). Accordingly, studies that rely on court records find considerably higher rates of eviction than those based on self-reports. In Milwaukee (a city of approximately 105,000 renter households), court records revealed that between 2003 and 2007 roughly 16,000 adults and children were evicted each year and that in predominantly black neighborhoods, one renter-occupied household in fourteen was (Desmond 2012). New York City hosted almost 80 nonpayment evictions a day in 2012. That same year, one in nine occupied rental households in Cleveland were summoned to eviction court. The vast majority of evictions are attributed to nonpayment of rent. A recent survey of tenants in Milwaukee’s eviction court found that 92% received an eviction notice for falling behind and one-third devoted at least 80% of their household income to rent (Desmond et al. 2013).

Court record studies can accurately estimate the prevalence and location of formal evictions, but they overlook other types of forced moves low-income families experience, including “informal evictions,” involving landlords forcibly removing tenants (e.g., by demanding they move, changing their locks) beyond the purview of the court. To date, Desmond & Shollenberger (2013) have developed the most comprehensive estimate of the frequency of forced removal in any major city. Applying a new survey technique that captures formal and informal evictions, landlord foreclosures, and building condemnations to a sample of Milwaukee renters, they found that over one in eight renters experienced a forced move in the previous two years. Nearly half of those forced moves were informal evictions, 24% were formal evictions, 23% were landlord foreclosures, and the remaining 5% were building condemnations. Their study demonstrates that measures that do not capture informal evictions likely underestimate drastically the prevalence of involuntary displacement among low-income renters.

This work shows that if low-income families exhibit relatively high rates of residential instability, it is in large part because they regularly are forced to move, particularly on account of nonpayment of rent. A recent study found that poor renting households do not move more than better-off renters once forced moves are accounted for (Desmond et al. 2015). More work that records the prevalence of forced displacement from housing is needed to capture the extent of housing instability among low-income families and to raise awareness of the problem to policymakers. Research that calculated an improved national eviction rate as well as documented significant variation in displacement rates between municipalities would be especially beneficial.

## Who Gets Displaced?

Low-income African American and Latino families are disproportionately subjected to forced displacement. Rugh & Massey (2010) have shown that blacks and Hispanics living in highly segregated neighborhoods were differentially targeted by the subprime lending industry and that cities with higher levels of racial segregation experienced higher levels of foreclosures. The foreclosure crisis contributed to a drastic loss of wealth for black and Hispanic families.

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<sup>7</sup>The 2.1% estimate is based on renters’ reported “main reason for moving,” which is too limiting because those who were involuntarily displaced but listed another factor as their main reason for moving (e.g., poor housing conditions) would be excluded from this figure. The 5.5% estimate is based on all reasons given for moving, which may double count some renters who report multiple kinds of forced moves. The most appropriate figure is somewhere between the two point estimates.

Between 2007 and 2010, the average black family experienced a 31% reduction in wealth, and the average Hispanic family experienced a 44% reduction. By comparison, the average white family experienced an 11% reduction (McKernan et al. 2013).

Studies also have found that low-income black and Hispanic women are evicted at higher rates than men and that single mothers are at especially high risk of eviction (Desmond 2012, Desmond & Shollenberger 2013). In a study of eviction court outcomes, Desmond and colleagues (2013) found that households with children were almost three times more likely to receive an eviction judgment than adult-only households, accounting for arrears, household income, and several other key factors. The FHA forbids disproportionately targeting protected groups—including racial minorities, women, and children—for eviction (Oliveri 2008, Schwemm 2001). But advocates policing housing discrimination typically have focused on getting in, not getting (put) out.

Another line of research analyzes the development of “third-party policing” techniques, which have given rise to “nuisance property” ordinances that hold landlords liable for their tenants’ behavior. Research has shown that these ordinances have a disparate impact on low-income black women and victims of domestic abuse (Desmond & Valdez 2013, Fais 2008), exposing the ordinances to challenges under the Violence Against Women Act, the FHA, and constitutional protections [*Briggs v. Borough of Norristown* (2013)].

### **The Fallout of Forced Mobility**

New research has emerged documenting the fallout of forced displacement from housing: how eviction and foreclosure affect families’ material hardship, health, and neighborhood quality. Studies have linked foreclosures to health complications (Burgard et al. 2012, Currie & Tekin 2015); others have found eviction to have lasting effects on mothers’ mental health (Desmond & Kimbro 2015). This line of work suggests that the moment of losing your home itself, above and beyond the consequences that follow, is a traumatic event that compromises well-being.

Other studies have shown that families forced from their homes often relocate to substandard housing in disadvantaged neighborhoods. One study found that renters forced from their previous home were almost 25% more likely to experience long-term housing problems than matched renters who were not (Desmond et al. 2015). Another study associated forced moves with over a third of a standard deviation increase in neighborhood poverty and crime rates, relative to voluntary moves (Desmond & Shollenberger 2013). One factor that explains these findings is the mark of eviction, which prevents tenants from securing decent housing in a safe neighborhood, as landlords often reject all applicants with recent evictions. Researchers also have observed a substantial relationship between a recent eviction and increased material hardship (excluding housing-related measures of hardship). One study of urban mothers found that those who experienced an eviction in the past year exhibited one standard deviation higher rates of material hardship, compared with matched mothers who did not (Desmond & Kimbro 2015).

Because housing authorities count evictions and unpaid debt as strikes when reviewing applications for public housing and rental vouchers, people who have the greatest need for housing assistance—the rent burdened and evicted—are systematically denied it (Brescia 2009, Desmond 2012). The federal regulation states explicitly that a public housing authority may reject a former tenant’s housing application if anyone in her family was evicted in the previous five years, for any reason [24 C.F.R. § 982.552(c) (2015)]. California is the only state that attempts to limit landlords’ reliance on potentially faulty information about prior evictions by delaying their access to records of pending eviction cases [Calif. Code Civ. Proc. § 1161.2 (2015)].

Research on the consequences of forced displacement is still in its infancy. Even as eviction has become commonplace in poor urban neighborhoods, social scientists know remarkably little about

its ramifications for children, families, and communities. But the budding literature documenting the effects of eviction and foreclosure suggests that involuntary displacement is a cause, not simply a condition, of poverty and social suffering.

### Poor and Pro Se: Civil *Gideon* in Housing Court

Advocates and researchers have argued that providing poor tenants in housing court with lawyers would lower the number of evictions and stem their fallout. Unlike in many other countries, rich and poor alike, in America low-income families in civil court have no right to counsel (Davis 2012, Lidman 2006). In the landmark 1963 case *Gideon v. Wainwright*, the Supreme Court unanimously established the right to counsel for indigent defendants in criminal cases on the grounds that a fair trial was impossible without a lawyer. Eighteen years later, the Court heard the case of Abby Gail Lassiter, a poor black woman who appeared without counsel at a civil trial that resulted in her parental rights being erased. But in *Lassiter v. Dep. of Social Services of Durham County* (1981), a divided Court ruled that the right to appointed counsel was reserved only when the loss of physical liberty was at stake. After *Lassiter* (but not necessarily because of it), federal lawmakers began scaling back legal aid to the poor (Johnson 2014).

Today, when indigent civil litigants come to court pro se, the court has no duty to provide them with counsel and usually no money to either. As a result, most tenants in housing court do not have representation, but most landlords do (Engler 2010). Without legal counsel, tenants facing eviction, many of whom have low levels of education, often go head-to-head with an attorney. As a result of this considerable imbalance of power, many tenants do not assert their rights, agree to unfair stipulations, or lose. Perhaps knowing precisely this, in many cities the majority of tenants summoned to housing court default (Gerchick 1994, Larson 2006).

In response to drastic reductions in legal aid to the poor, states have permitted lawyers to provide more limited assistance to clients—“unbundled” representation that usually entails representation at a single stage of a case (Jennings & Greiner 2012, Mosten 1994). Studies that have compared unbundled and full representation have found marked differences. Greiner and colleagues (2012) conducted a randomized controlled experiment in Boston to observe whether tenants in eviction cases fare better with full representation than with more limited assistance. Two-thirds of fully represented clients retained possession of their homes, compared with just one-third of clients who received limited service. Unbundled representation is no substitute for full-service counsel. Other randomized experiments have found that tenants represented by lawyers are much more likely to avoid eviction, irrespective of the merits of their case (Seron et al. 2001).

The “Civil *Gideon*” movement has garnered widespread support among activists, local politicians, and court officers.<sup>8</sup> In 2006, the American Bar Association passed a resolution urging the state to provide counsel “as a matter of right at public expense” in civil cases “where basic human needs are at stake,” including shelter. Social scientists and legal analysts, for their part, have scrutinized the importance of counsel in housing court and have argued that a right to counsel in civil cases emanates from the Constitution and other federal law (Gee 2010, Kleinman 2003,

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<sup>8</sup>In *Turner v. Rogers* (2011), the US Supreme Court considered whether a South Carolina man who was jailed for failure to pay child support was entitled to legal representation in the civil proceedings that led to his incarceration. Because there is no equivalent constitutional provision to the Sixth Amendment that would guarantee the right to counsel in a civil case, *Turner* relied primarily on the due process clause of the Fourteenth Amendment. The Court ruled 5 to 4 that the due process clause does not “automatically” require the state to provide counsel to an indigent person in a civil case, even if that person is at risk of incarceration. But it did vacate the South Carolina Supreme Court’s judgment on the grounds that South Carolina’s failure to provide “alternative procedural safeguards” violated the due process clause (Gross 2013). Prior to *Turner*, the Civil *Gideon* movement enjoyed renewed energy despite the apparent implications of *Lassiter*.

Scherer 2006). Some have argued for de-emphasizing the right to counsel for a new focus on “demand-side reform” that would involve overhauling poor people’s court procedures to better serve unrepresented litigants (Steinberg 2015). Others have advocated for relocating advocacy for the right to counsel from the federal to the state and local levels (Landsman 2012).

## REGULATING HOMELESSNESS

The law not only regulates the housed, it also regulates the homeless. Counting the homeless is notoriously difficult. The US Department of Housing and Urban Development has adopted a conservative definition focused on people staying in shelters or safe havens and those with a primary nighttime residence not designed for sleeping (e.g., a car, public park). By this definition, 610,042 people, or roughly 1 in 500 Americans, were homeless on any given night in January 2013. The majority of them were children. Curiously, homelessness has declined nationwide, even as the affordable housing crisis has intensified. Between 2007 and 2013, for example, unsheltered homelessness declined by 23%. However, in cities where the crisis is felt most acutely (New York City, for example), homelessness has increased. More research is needed that directly articulates the underlying causes of national and local rates of homelessness. The homeless have played a leading role in housing law. They have been at the center of the debate around the right to shelter, and their public presence has led municipalities to draft wide-reaching legislation regulating public space.

### Homelessness and the Right to Housing

In the 1970s, a growing number of people began panhandling, sleeping in public parks, and searching for food in garbage cans. Advocates gave these people a name—“the homeless”—and began petitioning policymakers on their behalf, including by developing a robust legal strategy that recognized housing as a right and placed an affirmative duty on the government to provide shelter. Legal scholars sensed an emerging “right to housing” emanating primarily from Warren Court jurisprudence on the Reconstruction Amendments and argued that housing was a “fundamental interest” protected under the US Constitution (Michelman 1970).<sup>9</sup> The Court saw things differently. In *Lindsey v. Normet* (1972), the Court ruled, “We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality.” Most commentators believe *Lindsey* foreclosed any federal constitutional positive right to housing (Blau 1993, McNamara 2008).

Nevertheless, in the early 1990s, a debate emerged as to whether the Constitution guarantees an affirmative right to shelter. Some legal scholars argued that constitutional protections extend to housing (e.g., via Section 2 of the Thirteenth Amendment) (Amar 1990); others pushed for statutory establishment of housing as an entitlement (Berger 1990); still others presumed that a positive guarantee of minimum housing would disincentivize work (Ellickson 1992). More recently, scholars have suggested that *Lindsey* does not preclude an affirmative right to housing, arguing that shelter undergirds a fundamental liberty interest and is thus analogous to the right to

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<sup>9</sup>This argument found support in, e.g., *Jones v. Alfred H. Mayer, Co.* (1968, concluding that housing discrimination is one of “the badges and incidents of slavery”); *Reitman v. Mulkey* (1967, holding that California was obligated to reject a facially race-neutral law that permitted private housing discrimination); and *Thorpe v. Housing Authority of Durham* (1969, ruling that a local public housing authority was required to follow federally issued notice procedures before evicting a tenant).

privacy, the right to travel, and other rights that the Supreme Court has found in the penumbras of more explicitly protected constitutional rights (Green 2012).

After *Lindsey*, advocates for a right to housing refocused their energies on state and local law. State courts and legislatures, as well as city governments, proved more accepting of the idea that the government has an affirmative duty to shelter the poor. In the late 1970s and 1980s, right-to-shelter advocates won court victories or brokered consent judgments in several jurisdictions (Hartman 1998, Hirsch 1990). *Callaban v. Carey* (1979), for example, established an affirmative right to shelter for homeless men in New York City, a right expanded to women and families in 1983. Despite several challenges, the right remains relatively robust in America's most populous city, largely because judicial oversight has stalled executive-branch efforts to limit it. Elsewhere, however, protracted legal battles seriously curtailed the right to housing, reducing it from an entitlement to a description of services that may be provided at will. The right of every citizen to decent, safe, and stable housing became a mandate to provide temporary emergency shelter to the indigent in severe weather conditions.

Social scientists have engaged in debates about the right to housing. Historians have documented how land was transformed into a commodity (Mumford 1961, Polanyi 1944), and sociologists have used the right to shelter to call for new research agendas and analytical perspectives (Bratt et al. 2006, Pattillo 2013). There is a rich ethnographic literature on homelessness within sociology and urban anthropology (Bourgois & Schonberg 2009, Snow & Anderson 1993). These accounts tend to focus on street men, but the face of "the new homeless" belongs to women and children (Lee et al. 2010). More research is needed on the new homeless, especially homeless children and teens. Questions about the geography of new homelessness, how families fall in and out of homelessness, and the effects of homelessness on children are essential for our understanding of severe deprivation in America as well as for designing effective policy. More work that studies not "the homeless" as a bounded group but the political economy of homelessness (e.g., Marr 2015) would shed light on the structural conditions that give rise to this social problem.

### The Return of Vagrancy-Type Laws

For much of their history, American cities had vagrancy laws that targeted the visibly destitute—street alcoholics, vagabonds, the jobless—who found refuge and community in public spaces (Chambliss 1964, Douglas 1960, Foote 1956). However, in *Papachristou v. City of Jacksonville* (1972), the Supreme Court struck down Florida's vagrancy law on the grounds that it was unconstitutionally vague and bestowed the police with too much power to interfere with innocent behavior (Goluboff 2009).

Municipalities reacted to this ruling by drafting new ordinances and refashioning vagrancy statutes. Many cities adopted "civility codes," prohibiting not "vagrants" themselves, as did the old laws, but certain behavior in public places associated with street homelessness (e.g., sidewalk sleeping, panhandling). At the same time, states altered trespass laws effectively to push homeless people from what were previously considered public spaces (Beckett & Herbert 2010). A survey of 187 cities conducted by the National Law Center on Homelessness and Poverty (2014) found that a third have citywide bans on loitering and a fifth forbid sleeping in public. Additionally, selective enforcement of facially neutral city ordinances (e.g., feeding pigeons, soliciting cars) can be used to clear the homeless from public spaces (Saelinger 2006). As a result of these new modes of urban enclosure, the unsheltered homeless have become spatially and socially isolated in our cities (Herring 2014, Stuart 2014). Although new vagrancy-type statutes are technically civil, they are enforced by police, who may arrest people for noncompliance. Accordingly, the experiences of the street homeless bear a close resemblance to those in the pre-*Papachristou* era.

## CONCLUSION

American poverty researchers typically have looked past housing because they were more interested in the character of urban neighborhoods—that, or they have studied public housing or other housing policies. The first approach treats housing as a second-order phenomenon, peripheral to social problems understood to be more fundamental, e.g., segregation, immigration, gentrification. The second perspective narrows the field and neglects the housing sector in which the vast majority of low-income families live: the private rental market. Although most poor families receive no housing assistance (Schwartz 2010), most research on housing focuses on the lucky minority of assisted households. We know much more about public housing (which serves less than 2% of the population) than about inner-city landlords and their properties (which constitute the bulk of housing for the ghetto poor).

This imbalance—an overabundance of research on certain housing policies and a paucity of studies on more elemental aspects of housing markets—means that many questions absolutely central to the lives of poor families remain largely unanswered.<sup>10</sup> But important new work from social scientists and legal scholars is reviving the study of housing and poverty, broadening its focus beyond housing policy and analyzing housing qua housing. This work is helping to pull housing back to the center of the poverty debate, where it belongs.

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<sup>10</sup>Two decades ago, Richard Arnott (1995, p. 117) observed that fellow economists’ “focus on rent control has diverted attention from more important housing policy issues . . . . Not a single paper has been published in a leading journal during the past decade dealing with low-income housing problems.”

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