

Comment on Chester Hartman and David Robinson's "Evictions: The Hidden Housing Problem"—Protection or Protraction?

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Abstract

Since the 1960s, judges and legislatures have made it increasingly difficult for landlords to evict tenants even in those instances where tenants have breached their leases. Sometimes, the growth of tenant protections has actually harmed law-abiding tenants by raising costs to landlords and allowing rule-breakers to remain in their apartments. Most landlords and tenants should want a system of laws that provides for both fair and efficient eviction procedures. Tenants should be entitled to legal representation when they are threatened with eviction, but their attorneys should not use the legal system to obtain free accommodations for their clients.

In the end, efforts to improve the housing of low- and moderate-income households should rely not on setting up impediments to eviction, but rather on increasing tenants' ability to afford housing and reducing the cost of housing development and operation.

Keywords: Evictions; Housing policy; Rental housing

The political ferment of the 1960s sparked many far-reaching changes in American law on a number of fronts from racial equity to civil liberties. Perhaps nowhere was the sea change in legal rules more evident than with respect to the laws governing the relationship between landlords and tenants. At mid-century, American landlord/tenant law was mired in the feudal notion that a tenant had received a conveyance of land and, therefore, had few if any rights vis-à-vis the landlord. By the mid-1980s, however, the pendulum had swung rather dramatically. In a change that several commentators have characterized as "revolutionary" (Rabin 1984; Singer 2001), the relationship between landlords and tenants was transformed into a contract between one party and another for a place to live, with all of the services that such an arrangement entails. A cascade of legal rights for tenants followed from this transformation, including the nonwaivable warranty of habitability, the illegal lease doctrine, and the invalidation of landlord exculpatory clauses.

Among the most important areas of change in landlord/tenant law were the laws governing eviction. Throughout much of the 20th century, a landlord could use self-help to remove a tenant once a lease term had ended, either because of the passage of time or because of a breach

such as nonpayment of rent. The landlord was not required to resort to legal proceedings. By the beginning of the 21st century, the overwhelming majority of states had outlawed self-help, requiring landlords to provide notice and go to court to obtain an order from a judge before eviction could occur (Dukeminier and Krier 2002). The changes in rights with respect to eviction were not solely procedural. In some states, tenants would obtain security of tenure, freedom from eviction as a result of condominium conversions, and protection from increasing rents.

Although some have suggested that the changes in landlord/tenant law were motivated by a desire to rescue low- and moderate-income renters in the cities (Rabin 1984), legal changes were not enough to solve the nation's housing problem. During the 1970s and early 1980s, rent controls, rules against forcible evictions, and the warranty of habitability did not stop the wholesale abandonment of inner-city neighborhoods. Indeed, some commentators have suggested that many of these legal rules may actually have fueled the process of disinvestment (Salins and Mildner 1992). Similarly, the increase in legal rights for tenants did not seem to make housing more affordable for low- and moderate-income families. Instead, the proportion of households paying an excessive proportion of their income for rent grew rather than shrank.

In their article, Chester Hartman and David Robinson, two veterans of the fight to expand tenant rights, argue that evictions¹ are a major problem facing lower-income and minority tenants. They claim that tenants have too few protections, particularly in the face of rising rents, and that they lack the ability to use the protections they do have because they are most often not represented by counsel. Hartman and Robinson are especially concerned with what they view as the erosion of the rights tenants used to enjoy in subsidized housing. Their proposals include organizing communities to oppose evictions, helping tenants prevent eviction, and providing tenants with legal counsel when they face proceedings to end their tenancies, as well as passing laws that regulate rents, guarantee security of tenure, and provide for greater notice. They also call for more information gathering on both the incidence of legal evictions and on other events that cause tenants to leave their homes before they would otherwise choose to do so.

¹ One of the analytical problems in Hartman and Robinson's article is that they do not carefully define the evil they are seeking to address. The title of the article uses the term "eviction," which often implies a legal action to force a tenant to move away from where he or she is currently living. At other points, however, they include within the definition anything that causes a tenant to move out of an apartment when he or she would prefer to remain, including a rent increase. For purposes of this comment, all references to "eviction" refer only to legal actions by the landlord to force a tenant to move.

In this comment, I suggest that Hartman and Robinson give insufficient attention to the important role that evictions play in providing decent, safe, and sanitary housing. Although landlords and tenants often seem locked in a battle to the death, in many ways their interests are not terribly different. Most law-abiding landlords *and* tenants should want a legal system that simultaneously protects the legitimate interests of tenants and permits efficient and expeditious evictions. While Hartman and Robinson offer many useful observations and suggestions to address some of the shortcomings of the current system, they ultimately fail to recognize this simple fact and their analysis therefore remains incomplete.

Perhaps more important, the article reflects the view that by shifting legal entitlements from landlord to tenant, the housing conditions of low-income Americans can be markedly improved. The experience of the past several decades, however, suggests that most housing problems are not caused by the absence of legal rights or responsibilities. Indeed, in some instances, the problems of tenants may have been exacerbated by legal rules that were enacted to help them. At base, the most pressing housing problem facing the poor is their lack of income and the inability of the private market to produce housing they can afford. The only housing policy that has a chance of truly making headway in solving this problem is one that simultaneously seeks to increase the rent-paying ability of tenants and removes rather than creates costly legal barriers to the production and operation of housing.

The importance of efficient eviction procedures

Hartman and Robinson are no doubt correct in suggesting that some landlords care little about the welfare of the people who rent apartments in their buildings. Some landlords undoubtedly abuse and harass their tenants. However, it seems plausible that most landlords are hardworking entrepreneurs who provide their tenants with decent and sanitary housing. Unless charging “market rents” to one’s tenants is a form of exploitation, it would be hard to accuse these landlords of taking advantage of residents.

Just as not all landlords are devils, not all tenants are angels. Tenants can abuse landlords and (indirectly) their fellow tenants by failing to pay the rent and not taking appropriate care of their apartments. While it is undoubtedly true that landlords as a class earn higher incomes and have more wealth than tenants as a class do, many landlords are far from affluent. Instead, the owner of a small building may very well be a modestly educated, self-employed entrepreneur who has scraped

together the money to purchase the building and for whom the rents constitute the only means of feeding his or her family. Thus the loss of rental income from a tenant may come at considerable cost and, in some instances, actually endanger the landlord's ability to maintain ownership.

Furthermore, depending on prevailing market conditions, a loss of rental income on the part of an owner may have a negative impact on other tenants. A landlord who can raise rents to make up for the shortfall will likely do so. In situations where market rents are already being charged or where rent regulations are in place, a landlord may respond to lost rental income by disinvesting in the property. Cutbacks in maintenance will eventually harm all the tenants and could ultimately lead to abandonment of the property and displacement.

Tenants can also abuse other tenants directly by creating nuisances or committing crimes. Because of the close proximity of modern urban life, tenants who make an undue amount of noise or fail to clean their apartments can markedly reduce the quality of life for their neighbors. Similarly, tenants who sell drugs from their apartments or steal from other residents can create enormous problems.

Although there are no empirical data to prove this assertion, it seems likely that the bulk of both landlords and tenants conduct themselves appropriately, with neither seeking to exploit the other. Nevertheless, it is vital for both landlords and tenants to have ways to hold each other accountable for breaking the rules—whether those rules are enshrined in the lease, in common law, or in statute. For tenants, redress is typically through withholding rent, offensively or defensively using legal protections such as the warranty of habitability, or complaining to government authorities about housing code violations. For landlords, redress is through the eviction process.

Unfortunately, neither system of legal redress is particularly satisfactory. All the legal rights in the world will not protect a tenant from an abusive landlord if the tenant does not understand his or her options. And as Hartman and Robinson point out, many tenants are not able to afford an attorney. Because the budgets of legal services organizations are constrained, many tenants with serious problems and meritorious claims cannot be helped (Scherer 1988). In many cases, government agencies are similarly overburdened and unable to effectively resolve tenant complaints in a timely fashion.

For landlords, the eviction process can also be deeply flawed. Self-help is typically unavailable as a remedy. Summary process can be anything

but summary if the tenant has legal representation or a sophisticated knowledge of the process. Delays in excess of six months to a year are not unheard of (U.S. General Accounting Office 1990).² All the while, the tenant is in possession of the premises, typically not paying rent and sometimes destroying the apartment.

Thus, we have an eviction process that fails to serve the needs of a sizable number of landlords and tenants. It seems to me that two types of reforms would make sense. First, I agree with Hartman and Robinson that all tenants facing eviction should have access to legal assistance even though it is not constitutionally required. A place to live, not deemed a fundamental right under the U.S. Constitution (*Lindsey v. Normet*, 405 U.S. 56 [1972]), is critical for a human being to flourish. We are coming to understand more and more how inextricably linked housing is to vitally important human outcomes including our health, our education, our safety, and our ability to find and hold jobs. Before facing the loss of something this important, a tenant should understand the consequences of his or her actions and explore the full panoply of legal defenses available.

Recent studies indicate how important an attorney can be to a tenant facing eviction. The best, by Seron et al. (2001), randomly assigned tenants in Manhattan housing court to groups that received legal assistance and those that did not. Although some selection biases may have crept into the study,³ the authors find that tenants without legal representation had a 50.6 percent probability of receiving a judgment against them, compared with a 21.5 percent probability for tenants with legal representation. Unrepresented tenants were also much more likely to default and much less likely to enter into a stipulation that required the landlord to repair their buildings.

While expanding tenant access to lawyers would solve one type of systemic failure related to the eviction process, it might exacerbate another. It is likely that the number of contested eviction cases would greatly rise as a result of expanded legal representation. This could choke the courts with litigation, making the term “summary process” even more of a misnomer than it is today. Lending credence to this concern is the finding by Seron et al. (2001) that legal representation

² According to a study conducted in Washington, DC, the average number of days that elapsed between the filing of a complaint by a landlord and eviction of the tenant was 114. The shortest period was 37 days and the longest, 945 days.

³ For example, only those litigants who were judged by community law office personnel to benefit from legal representation were given full assistance (Seron, et al. 2001).

increased the time between the filing of an answer and the final judgment by over 60 percent.⁴

It is difficult to know how to deal with this problem. More resources could be devoted to the judiciary, or an expansion of alternative dispute resolution could be attempted. But to be effective, reforms would have to be more far-reaching. Steps would need to be taken to ensure that the court system would not be used by lawyers as a way to obtain free accommodations for their clients. Requirements that tenants deposit the rent into court during the pendency of their lawsuits are one way to safeguard the legal system from manipulation. Assessing costs on the losing parties is another possible safeguard. Nevertheless, the only way to truly guard against abuse is for attorneys themselves to realize the harm they do to other low- and moderate-income tenants when they prolong cases with non-meritorious legal maneuvers. Attorneys have an ethical obligation to represent their clients zealously. Zeal, however, should not extend to asserting a defense to eviction based on the warranty of habitability when the apartment is, in fact, in decent condition.

The special case of subsidized housing

Hartman and Robinson single out the recent reduction in tenant protections in subsidized housing for particular criticism. However, perhaps nowhere is the problem of tenant-on-tenant abuse and the need for efficient and expeditious eviction procedures more apparent than in public housing. This was particularly true in the late 1980s and early 1990s when, for a variety of reasons, social order broke down in public housing in many of the nation's largest cities.⁵ Vandalism became widespread, leading to the defacement of buildings and the destruction of elevators and front-door locks. Perhaps more important, crime rates in some public housing developments reached alarming levels. Apartments were taken over by violent gangs and used as drug bazaars. For children, just walking to school entailed a risk to life and limb.

⁴ However, the authors also find that legal representation was associated with a substantial decrease in postjudgment motions, which they interpret as potentially creating fewer burdens on the court system.

⁵ The breakdown of order in public housing developments was attributable to a number of factors such as managerial laxity, admission rules that promoted enormous concentrations of poverty, underfunding of capital and operating expenses, design, and architectural flaws. For a complete discussion of the genesis of distress in public housing, see Schill 1993.

One reason why the crime problem got out of control in many public housing developments is that managers typically were constrained in their admission and eviction decisions by the types of rules that Hartman and Robinson presumably would defend (Fuerst and Petty 1985; Schill 1993). In the early years of the public housing program, public housing authorities (PHAs) had enormous latitude in selecting applicants and evicting tenants. Managers used this discretion to screen out potentially troublesome tenants. In the context of eviction, PHAs were treated as private landlords by the courts and thus were not required to provide tenants with a hearing before ending their leases or even to provide a detailed explanation of why they were being evicted.⁶ This flexibility with respect to admissions and evictions gave PHAs enormous control over the tenants' lives.

Beginning in the late 1960s, however, public housing tenants won substantial freedom from seemingly arbitrary PHA actions as a result of the expansion of due process rights by the Warren Court. For example, in *Holmes v. New York City Housing Authority* (398 F.2d 262 [2d Cir. 1968]), a federal appellate court held that PHAs must adopt "ascertainable standards" in their tenant selection procedures. With respect to evictions, the Supreme Court ruled a year later that PHAs must follow a U.S. Department of Housing and Urban Development (HUD) directive requiring a hearing before terminating a lease (*Thorpe v. Housing Authority of the City of Durham* (398 U.S. 268 [1969])). Shortly thereafter, the Court of Appeals for the Second Circuit ruled in *Escalera v. New York City Housing Authority* (425 F.2d 853 [2d Cir. 1970]) that the U.S. Constitution required PHAs to offer tenants a hearing, permit them to inspect PHA records, and enable them to cross-examine witnesses before terminating a lease. Judicial decisions limiting PHA discretion did not address procedural matters alone. Admission and eviction standards that excluded unwed mothers or people with criminal records were struck down by courts as arbitrary (*Thomas v. Housing Authority of Little Rock* (282 F. Supp. 575 [E.D. Ark. 1967])); *Tucker v. Norwalk Housing Authority* (Civ. No. B-251 [E.D. Conn. 1971]).

The enormous discretion that PHAs had over tenant admissions and evictions before the extension of due process requirements in the 1960s no doubt gave rise to abuses (Friedman 1966; Reich 1965). Nevertheless, the cure in this case may have been much worse than the disease. The proliferation of procedural and substantive safeguards contributed to the social disorder that enveloped PHAs in the 1980s and 1990s.

⁶ Nevertheless, public housing tenants were still entitled to all of the legal safeguards enjoyed by private sector tenants.

PHAs were no longer able to deny admission to suspected “problem” tenants unless they could provide objective evidence of past misdeeds and persuasive arguments that the applicants would interfere with the health, safety, or welfare of other tenants. In addition, tenants could be evicted only for “good cause,” which has generally been interpreted to require evidence of serious or repeated misconduct. Even where such evidence existed, PHAs were required to accord tenants a hearing before bringing a court action for eviction. During the often lengthy period when these two sets of administrative and court proceedings took place, tenants remained in their apartments and wreaked havoc on their neighbors.

In the 1990s, the public housing program reached a watershed. The well-publicized rise in crime in public housing, together with a growing antipathy toward housing and other social welfare programs, spawned a series of reform measures that had the effect of cutting back some of the due process protections that had accumulated since the 1960s. Beginning in the late 1980s with the Federal Anti-Drug Abuse Act of 1988, federal law has required PHAs to use lease provisions that provided for the eviction of tenants for criminal and drug-related activities. Current law embodies a “one strike and you’re out” policy making the tenant responsible not just for his or her own illegal activities, but also for the drug-related criminal activities of any member of the household or a guest, whether such activities take place on the premises or not. In addition, the Housing Act of 1937 has been amended to permit PHAs to dispense with grievance hearings for terminations of tenancies involving activities that threaten the “health, safety, or right to peaceful enjoyment...of other tenants” or any violent or drug-related criminal activity so long as the jurisdiction in which the PHA is located provides the tenant with the right to a hearing in court before eviction (42 U.S.C. §1437d(1)(6)).⁷

The erosion of tenant rights has not been limited to the public housing program. In addition, the rules governing Section 8 housing vouchers were changed. Under previous law, once a landlord signed a lease with a Section 8 tenant, he or she was required to renew the lease indefinitely. The only way a landlord could terminate the lease was for cause such as when a tenant failed to pay rent or violated some other material provision. In 1998, Congress permanently repealed the “endless lease” requirement, enabling landlords to refuse to renew leases with

⁷ The hearing in court must include the “basic elements of due process,” but it shall not necessarily include the right to examine relevant documents within the possession of the PHA.

tenants at the end of their stated terms (Quality Housing and Work Responsibility Act of 1998, §549).⁸

Was the reduction of protections for subsidized tenants that took place in the late 1990s a mistake, as Hartman and Robinson suggest? In my view, it was not. Despite what many of us might prefer, housing assistance in the United States is not a right, but a privilege.⁹ Only one out of every three qualified households receives a subsidy, while the remaining two are left to fend for themselves. If housing assistance must be rationed, it does not seem unreasonable to me to choose to provide it first to people who follow the rules. Furthermore, our experience in the 1980s and 1990s suggests that enhanced due process rights for tenants of public housing might be nice in theory, but in practice are a luxury that neither they nor the rest of us can afford.

Of course, we must guard against overreacting. In its zeal to rid public housing of law-breakers, Congress's "one strike and you're out" rule has caught in its web residents who did not know that their relatives were performing illegal acts. For example, in the recent case of *Department of Housing and Urban Development v. Rucker* (535 U.S. 125 [2002]), the U.S. Supreme Court overturned a federal appellate court decision and upheld the eviction of Pearlie Rucker, a 63-year-old resident of public housing. Ms. Rucker shared her apartment with her mentally disabled daughter, two grandchildren, and one great-grandchild. After her daughter was apprehended for possession of cocaine near her apartment, Ms. Rucker was evicted despite her claims that she had searched her daughter's room for drugs and warned her daughter not to use them. While there is no doubt some virtue in creating an incentive for residents of public housing not to turn a blind eye to the activities of their relatives and guests, turning out truly innocent tenants may be an unwise overreaction.

Is eviction the problem?

Hartman and Robinson lump within the category of "eviction" a variety of processes that could lead a tenant to leave an apartment despite the desire to remain. Many of these situations would not normally be

⁸ Unlike the changes in the public housing program, the reduction in tenant rights in the Section 8 program was not enacted in response to disorder or crime. Instead, the repeal of the "endless lease" requirement was designed to promote landlord participation by making the rules similar to those governing private market rentals.

⁹ For an interesting debate over whether housing assistance should be an entitlement, compare Hartman 1998 with Salins and Mildner 1992.

thought of as resulting in an eviction or as something that would be addressed by the legal system. For example, increases in rent attributable to changes in the market value of housing would be part of the problem their article seeks to address. They endorse efforts to use the legal system to forestall such a move by enacting rent control and organizing communities to block evictions, thereby creating “eviction-free zones.”

I do not believe that this nation’s most pressing housing problems can be solved by changing the substantive or procedural law of landlord and tenant. Most housing policy analysts would identify the two most important housing-related problems facing Americans as poor quality and affordability.¹⁰ In many instances, using legal reforms to address one problem tends to exacerbate the other. For example, rent control is clearly an effective tool to promote affordability, at least for those lucky enough to obtain housing. However, rent controls, particularly those that strictly limit increases, have been shown to reduce maintenance and promote housing disinvestment (Downs 1996; HUD 1991b). Conversely, the warranty of habitability and code enforcement may well be effective in increasing the quality of housing. At the same time, they are likely to increase the cost of housing, thereby increasing affordability problems (Hirsch 1999; Posner 1998).¹¹

Indeed, this dynamic seems to have occurred over the past 30 to 40 years. Whether in response to legal reforms or changing tastes, the quality of American housing has improved tremendously. Indeed, it is virtually impossible to track this improvement over the years, because previous indicators of poor quality are no longer relevant. In 1940, close to 50 percent of all housing units lacked complete plumbing. By 2000, this number had declined to 0.46 percent (Colton 2003). According to the 2001 American Housing Survey (U.S. Bureau of the Census 2002), only 2 percent of all occupied housing units currently have severe physical problems. As housing quality problems decreased, affordability problems increased. From 1978 to 2001, the proportion of renters paying more than half their income for housing increased from 16.3 percent to 21.5 percent (U.S. Bureau of the Census 1978, 2002). Although studies have not demonstrated a cause-and-effect relationship between increased quality and affordability problems, such a connection is certainly plausible.

¹⁰ Other housing-related problems include location and housing discrimination.

¹¹ For arguments that warranties of habitability do not necessarily increase the price of housing or reduce its quantity, see Ackerman 1971 and Kennedy 1987.

Using the legal system governing evictions to promote housing affordability would have predictably negative effects on affordability. There is no such thing as a free lunch in housing: Unless one is lucky enough to have a landlord with charitable impulses and extremely deep pockets, efforts to impede the eviction of tenants who cannot pay their rent are likely to lead to either increased rents for the remaining tenants or a decline in housing quality.

To their credit, Hartman and Robinson recognize that the legal “reforms” they favor are, at best, second-best solutions. I wholeheartedly agree with them that “[t]he most effective way to avoid forced evictions (at least those linked to rent- and utility-paying problems, which almost certainly are responsible for the vast majority of such actions) would be to increase the supply of decent, modestly priced units and/or to increase tenants’ incomes” (493). Like it or not—and I believe that there is much to like—we live in a society in which housing is, for the most part, provided according to the laws of supply and demand. Therefore, the most direct and, in my view, the only route toward solving our chronic housing problem is for government to work with the market rather than against it. This implies that we must increase the rent-paying ability of low-income families and bring down the cost of housing. In most housing markets, an increased commitment to housing vouchers and programs to enhance the human capital of low- and moderate-income individuals would be the best way to achieve the first objective.

With respect to the second approach—reducing the cost of housing—there is much that can be done. Perhaps most important, we must take steps to remove the impediments erected by government itself. The federal government, as well as states and municipalities throughout the nation, have passed a broad array of laws that either directly impede the construction of housing or add to its cost (HUD, Advisory Commission on Regulatory Barriers to Affordable Housing 1991a; Schill 2002). Although some of these regulations such as exclusionary zoning ordinances are designed primarily to interfere with the housing market, many others have benign purposes like protecting the environment, but are no less pernicious in their effects.

Other laws and regulations drive up the operating costs of housing. Indeed, Hartman and Robinson have identified one set of laws—those that govern evictions—that may very well be problematic in this regard. Let me add to their excellent proposal for data gathering and research one additional question for analysis. Have the benefits of the revolution in landlord/tenant law exceeded its costs?

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