

PROPORTIONAL POSSESSION

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American eviction proceedings are governed by a fusion of property and contract law. The law's narrow understanding of eviction ignores the importance of a dwelling place to its occupants. Property is not merely land or a structure on that land, it is a home with the power to shape communities, social relationships, and human values. Current eviction law, however, is not designed to consider these facets of property. Rather than balancing the interests of the landowner against those of the tenant, courts render judgment based on superior title and contract obligations without regard for what will happen to the tenant after displacement. The result is a system where the average hearing concludes in under two minutes, and landlords succeed in over eighty percent of cases.

It doesn't have to be this way. The International Covenant on Economic, Social and Cultural Rights, signed and ratified by nearly every nation except the United States, obligates member states to protect tenants against eviction. In Europe, specifically, tenants can invoke a proportionality defense in eviction proceedings. Asserting their rights under Article 8 of the European Convention on Human Rights, tenants may implore courts to weigh the harms of eviction against the rights of the landlord. The result is increased residential stability, improved health, and decreased unemployment. Scholars have thus far ignored the possibility of incorporating such a balancing test into American eviction jurisprudence in large part because there is not a constitutionally protected right to housing in the United States.

This Article argues that the absence of a constitutional right to housing does not bar the introduction of proportionality into American eviction proceedings, a change that has the potential to reshape the lives of individuals and communities. Drawing on sociological literature, this Article documents

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twentieth century policies that led to the privatization of housing for marginalized communities, which in turn catalyzed the commodification of home and created systemic exploitation of the rental housing market. These processes are reinforced by eviction law doctrine that disproportionately centers the interests of property owners while minimizing the possessory interests of tenants. The incorporation of proportionality in eviction hearings, therefore, is a corrective counterbalance that respects private property rights while recognizing the paramount importance of home.

INTRODUCTION.....	1082
I. FOUNDATIONS OF POSSESSION	1087
A. Commodification of Housing	1089
1. <i>Tracing Modern U.S. Housing Policy</i>	1090
2. <i>From Need to Asset</i>	1093
B. Dispossession.....	1097
C. (Re)Aligning Law of Possession and Justice.....	1102
II. PROPORTIONALITY PRINCIPLE	1103
A. Proportionality in European Dispossessory Disputes.....	1106
B. Foundational Protections under Article 8.....	1112
1. <i>Landlords' Due Process Rights</i>	1116
2. <i>Tenants' Due Process Rights</i>	1120
3. <i>Tenants' Right of Non-Discrimination</i>	1123
4. <i>Public v. Private Landlords</i>	1125
III. PROPORTIONAL POSSESSION IN THE UNITED STATES	1131
A. Prioritizing Justice.....	1132
B. Corrective Counterbalancing	1140
CONCLUSION.....	1143

INTRODUCTION

In October 2023, Bob Peniska was jolted awake by heavy rain flooding his tent and soaking his possessions. Mr. Peniska, a fifty-eight-year-old man suffering from Parkinson's disease and an amputated left foot, packed up his few belongings and sought refuge at a local homeless shelter. He was provided a bunk bed in an overcrowded room that lacked accessibility for his wheelchair.¹ It wasn't always like this. In 2012, following his

¹ Jeremy Turley & Yangqi Xu, *Omaha's Public Housing Residents Are Facing Eviction More Often – And Sometimes Over Small Debts*, FLATWATER FREE PRESS (Dec. 7, 2023), <https://flatwaterfreepress.org/omahas-public-housing-residents-are-facing-eviction-more-often-and-sometimes-over-small-debts/#:~:text=OHA%>

Parkinson's diagnosis, Mr. Peniska moved into subsidized public housing provided by the Omaha Housing Authority (OHA). He lived in OHA housing for more than a decade. In 2023, the OHA filed an eviction action against Mr. Peniska and over fifty other public housing tenants for nonpayment of rent. Some tenants owed the OHA as little as \$35 in unpaid rent. One tenant owed the OHA \$60 to replace the key to her front door. Mr. Peniska knew that his monthly disability benefits from the Social Security Administration were insufficient to cover his unpaid rent, but he had nowhere else to go. The eviction court was unsympathetic: Mr. Peniska was given two weeks to leave or be removed by the sheriff; with no other rental housing options, he gathered his things and pitched a tent next to a gas station.²

As in Omaha, Nebraska, public housing authorities and private landlords across the United States routinely leverage the judicial system to forcibly remove tenants from their homes. These practices expose a central tenet of the American property law system: those with superior ownership interests in a property maintain wide discretion to control, exploit, maintain, and utilize the property over junior interests. This is true even when there is no alternative housing and when the junior interest-holder is at risk of homelessness—a dynamic scholar A.J. Van der Walt has termed “ownership-biased outcomes.”³

Across the pond, however, superior ownership rights are not dispositive in determining the prevailing possessory interest in a property. In Ireland, a family of Travellers occupied government-owned property.⁴ After the Clare County Council attempted to evict the family from the land, the Irish Supreme Court found that doing so may violate Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁵ Noting that the family had “nowhere else to go,” the Chief Commissioner of the Irish Human Rights and Equality Commission stated, “this ruling sets out that it is not enough for a local authority to evict Traveller families from

20eviction%20filings%20reached%20a, who%20haven't%20paid%20rent
[<https://perma.cc/PM6Z-TRXR>].

2 *Id.*

3 AJ VAN DER WALT, PROPERTY IN THE MARGINS 27 (2009).

4 Clare Cnty. Council v. McDonagh [2022] 2 IR 122 (SC) (Ir.).

5 *Id.*; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, *opened for signature* Nov. 4, 1950, 213 UNTS 221 [hereinafter ECHR].

public land without any thought of their accommodation needs and requirements.”⁶

Pursuant to the European Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR), the Irish Supreme Court used a proportionality analysis to determine whether expulsion of the Travellers from the land was equitable and just.⁷ Article 8 of the ECHR demands that “everyone has the right to respect for his private and family life, his *home* and his correspondence,”⁸ a right curtailed only in limited circumstances.⁹

Both Mr. Peniska and the Irish Travellers were vulnerable to displacement and homelessness. But the courts came to very different outcomes when considering their possessory interests in the subject properties. The judicial analyses and principles at issue exemplify each country’s distinctive approach to dispossession. While the United States does not take the same positive approach to rights as its European counterparts, scholars observe that proportionality principles are not foreign to U.S. jurisprudence. Understanding proportionality as a means/ends or balancing test, some scholars contend that U.S. courts already engage in proportionality assessments in narrow legal contexts, including when constitutional rights are at stake and in administrative law.¹⁰ Justice Breyer was known

⁶ Press Release, Irish Human Rights and Equality Commission, Supreme Court Rules Against Clare County Council’s Use of Planning Law to Evict a Traveller Family with Nowhere Else to Go (Jan. 31, 2022), <https://www.ihrec.ie/supreme-court-rules-against-clare-county-councils-use-of-planning-law-to-evict-a-traveller-family-with-nowhere-else-to-go/> [https://perma.cc/XPP3-8GKY]; *Clare Cnty. Council*, 2 IR 122; *see also* Law Society Gazette Ireland, *Council v. McDonagh Key Judgment in Law of Trespass*, GAZETTE.IE (July 7, 2022), <https://www.lawsociety.ie/gazette/top-stories/2022/july/clare-co-co-v-mcdonagh-key-judgment-in-law-of-trespass> [https://perma.cc/3L8P-FZ82].

⁷ *Clare Cnty. Council*, 2 IR 122.

⁸ ECHR, *supra* note 5, art. 8(1) (emphasis added).

⁹ *Id.*, art. 8(2).

¹⁰ *See generally* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015); Gregory S. Schneider, Note, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241 (2012); Margaret R. Gibbs, Note, *Eighth Amendment—Narrow Proportionality Requirement Preserves Deference to Legislative Judgment*, 82 J. CRIM. L. & CRIMINOLOGY 955 (1992); Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797 (2011); James C. Francis IV, *Good Intentions Gone Awry: Privacy as Proportionality Under Rule 26(b)(1)*, 59 SAN DIEGO LAW REVIEW 397, 397–99 (2022); *see also* Grant Huscroft, Bradley W. Miller & Gregoire Webber, *Introduction, in Proportionality and the Rule of Law: Rights, Justification, Reasoning* 1 (2014) (suggesting that U.S. jurisprudence incorporates proportionality principles even where it has rejected the proportionality test); Jud Mathews, *Proportionality*

for his penchant for using a proportionality framework,¹¹ and Justice Frankfurter famously advocated for weighing interests in the context of the First Amendment.¹² The concept of judicial balancing in American constitutional jurisprudence has been widely discussed. However, scholars have not yet examined the application of proportionality to U.S. dispossessory proceedings, in large part because there is no constitutional right to housing in the United States. Eviction implicates a fundamental conflict between the ownership rights of a landlord and the possessory interests of a tenant. As the cases of Mr. Peniska and the Irish Travellers illustrate, modern U.S. and European laws governing property ownership and possession greatly differ and produce strikingly different results.

American property law is derived from European notions of property and possession that attempt to assuage the tensions between individual ownership and social good.¹³ Under the ECHR, European private property rights are considered in light of the social, moral, and economic interests of all members in society.¹⁴ As U.S. property law developed, U.S. culture emphasized personal freedom in property ownership at the expense

Review in Administrative Law, in COMPARATIVE ADMINISTRATIVE LAW 405–06 n.2 (Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson eds., 2d ed., 2017) (noting that U.S. administrative law incorporates requirements “similar in spirit” to proportionality analyses).

¹¹ Clay Calvert, *Curing the First Amendment Scrutiny Muddle Through a Breyer-Based Blend Up? Toward a Less Categorical, More Values-Oriented Approach for Selecting Standards of Judicial Review*, 65 WASH. U. J.L. & POL’Y 1, 12–15 (2021); Jackson, *supra* note 10, at 3096–97.

¹² Dennis v. United States, 341 U.S. 494, 524–25 (1951) (“the demands of free speech in a democratic society. . . are better served by candid and informed weighing of competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved.”) (Frankfurter, J., concurring). Years later, Justice Harlan echoed Justice Frankfurter’s sentiment in adjudicating Constitutional rights, insisting that “where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.” Barenblatt v. United States, 360 U.S. 109, 126 (1959).

¹³ David A. Thomas, *Anglo-American Land Law: Diverging Developments from a Shared History: How Anglo-American Land Law Diverged After American Colonization and Independence (pt. II)*, 34 REAL PROP. PROBATE & TR. J. 295, 298–300 (1999); See generally JAN LAITOS, *LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS* (1998); William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335 (1991).

¹⁴ See generally M.N.S. SELLERS, *AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION* (1994).

of social concerns.¹⁵ Under this view, individual freedom and autonomy are prioritized;¹⁶ whoever owns a property is entitled to near-absolute exploitation of that property. By incorporating this view into its legal framework, the United States shifted away from its European roots and towards a property regime that prioritizes superior property ownership over social good.¹⁷

Over the course of the twentieth century, real property in the United States transformed into a commodity for market exchange made possible through the owner-centered values embedded in property law. This property framework profoundly impacts the rental housing market and eviction law. By prioritizing ownership, American eviction law disregards the necessity of housing, the ways in which property facilitates human flourishing,¹⁸ and ignores what will happen to possessory interest holders—tenants—after displacement. This approach to eviction rejects the social aspects of real property, privileges private landownership,¹⁹ and cultivates a system that perpetuates racial and social inequality.²⁰

This Article focuses on displacement from rental housing accommodations and interrogates assumptions baked into American eviction law to raise questions about our relationships to real property. In doing so, it compares American and European legal approaches to tenancy with a focus on the question: how should courts decide who has the right to possess Blackacre? It proceeds in three parts. Part I describes the legal basis of possessory interests in property. After articulating principles in U.S. property and contract law that determine and influence occupancy rights, this section discusses the

¹⁵ Thomas, *supra* note 13, at 354–55; *see generally* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990).

¹⁶ Laitos, *supra* note 13, at 298.

¹⁷ *See generally* Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1 (1977); Morton J. Horowitz, *The Transformation in the Conception of Property in American Law, 1780–1860*, 40 U. CHI. L. REV. 248 (1973).

¹⁸ *See generally* Gregory S. Alexander, *Ownership and Obligations: The Human Flourishing Theory of Property*, in 43 H.K. L. J. 451 (2013).

¹⁹ Nino C. Monea, *Legal Benefits of Homeownership*, 52 N.M. L. REV. 384, 386–88 (2022); *see also* Larissa Katz, *Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power*, 160 U. PA. L. REV. 2029, 2044 (2012).

²⁰ *See* Andrew Scherer, *The Case Against Summary Eviction Proceedings: Process as Racism and Oppression*, 53 SETON HALL L. REV. 1, 9, 47–57 (2022); Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145 *passim* (2020); Nicole Summers, *Eviction Court Displacement Rates*, 117 Nw. U. L. REV. 287, 287–303 (2022).

commodification of housing and how the federal government's shift from a housing provider to a beneficiary of the real estate economy affects eviction proceedings. Part II presents the concept of proportionality, first examining its application in American constitutional jurisprudence. Next, this Part analyzes the application of proportionality in European eviction proceedings and assesses its effectiveness as a tool to balance competing interests among a property's interest holders. Part III makes the case for adoption of proportionality in U.S. eviction jurisprudence, arguing that the absence of a constitutional right to housing does not bar its application. This section begins by evaluating rare instances of judicial balancing in American eviction. It concludes by articulating an affirmative case for greater use of proportionality in dispossessory proceedings.

I FOUNDATIONS OF POSSESSION

The right to exclude is a cornerstone of property law.²¹ This exclusionary principle is rooted in the notion that property owners have absolute power and control over that which they own.²² However, while scholars acknowledge that "the differentiating feature of a system of property [is] the right of the owner to act as the exclusive gatekeep of the owned thing,"²³ "the right to exclude is not absolute."²⁴ Moreover, as Larissa Katz has argued, states exercise their power to "define property rights in

²¹ J.E. Penner, *The Idea of Property in Law*, in PROPERTIES OF PROPERTY 123, 124 (Gregory S. Alexander & Hanoch Dagan eds., 2012) ("The interest in property is an interest in exclusively determining the use of things.") (emphasis added); HANOCHE DAGAN, PROPERTY: VALUES AND INSTITUTIONS 37 (2011) ("The right to exclude is indeed typical of many property institutions, at least in liberal settings."); Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998) ("[T]he right to exclude others is more than just 'one of the most essential constituents of property—it is the *sine qua non*.'") (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).).

²² Joseph William Singer, *How Property Norms Construct the Externalities of Ownership*, in PROPERTY AND COMMUNITY 71 (2010) (citing LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 39–41 (2003)).

²³ Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007).

²⁴ *Palmer v. Atl. Coast Pipeline, LLC*, 801 S.E.2d 414, 418 (Va. 2017) (asserting that the right to exclude is an essential property right, but that "the common law has long recognized that the right to exclude is not absolute"); *El Papel, LLC v. City of Seattle*, 2023 U.S. App. LEXIS 28487, *5 (9th Cir. 2023) (stating that the right to exclude "is not absolute in the landlord/tenant context"); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (holding that a utility company (or government) permanently occupying a landowner's physical property is a taking requiring just compensation under the Fifth Amendment, but

a manner that includes obligations to carry out core state governance functions”²⁵ such as sidewalk and road maintenance.

Limitations on the absolute rights of property owners similarly exist in the landlord-tenant context. Landlord-tenant laws governing leaseholds grew out of liberal notions of property law.²⁶ Leases were historically regarded as a “conveyance,” rather than as a contract.²⁷ The property itself was deemed the most important part of the transfer and “other covenants included in the lease were considered incidental to and independent of the interest in the land.”²⁸ Over time, facets of contract law began to color the leasehold interest. Beginning with the implied warranty of quiet enjoyment, contract law gradually expanded the rights available to tenants as leasehold—that is, possessory—interest holders in a property.²⁹ A “tenants’ rights revolution” in the 1960s and 1970s ushered in the implied warranty of habitability.³⁰ The warranty of habitability “update[ed] landlord-tenant law from the archaic vision of estates in land to the modern world of contracts.”³¹ The infusion of contract principles into landlord-tenant law happened in tandem with a fundamental shift in national housing policy. This shift transformed the relationships between the government, private market, and individuals vis-a-vis housing in ways that upended the core function of housing as a good essential to human flourishing. Instead, housing was reconceptualized as an economic asset whose primary value was derived through financial markets.

The changes to national housing policy, in turn, are reflected in processes governing eviction at the local level. As this

that States have “broad power to impose appropriate restrictions upon an owner’s use of his property”); DAGAN, *supra* note 21, at 37.

²⁵ Katz, *supra* note 19, at 2031 (Katz calls this phenomenon “governing through owners”).

²⁶ Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LIT. ROCK L. REV. 793, 795 (2013) (“English courts (and American courts following the English lead) chose to label the leasehold relationship as one based on property law.”).

²⁷ WILLIAM B. STOECK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 6.10 (3d ed. 2000).

²⁸ Campbell, *supra* note 26 at 796.

²⁹ *Id.* at 797–99.

³⁰ David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 393–94 (2011).

³¹ *Id.* at 394; see generally Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS U. L. REV. 1 (2016).

section discusses, eviction proceedings are inherently designed to stack the deck against tenants in local court systems,³² leading to rapid turnover in the rental housing market.³³ The judicial system's sanction of dispossessory churn benefits the economic interests of property owners at the expense of those in need of housing.

A. Commodification of Housing

Shelter is essential. Everyone needs a place to rest their head. The government's approach to national housing policy has evolved over the course of the twentieth century.³⁴ What was once viewed as a public necessity within the purview of government has since been outsourced to the private sector with the government's blessing. This shift—from direct provision of shelter to underwriting the private sector—upended the human-centric role of housing as a social need. Instead of a social good³⁵ primarily addressed through public programs, over the course of the twentieth century, housing and real estate have been reconceptualized as an asset class that drives the global economy.³⁶ The global commodification of housing is reinforced by regulation at the local level, including the judicial mechanisms that landlords use to dispossess tenants from their homes.³⁷

³² Eviction hearings are designed to favor landlords and are fundamentally unfair to tenants. Scherer, *supra* note 20, at 9.

³³ Allyson E. Gold, *How Eviction Court Stacks the Deck Against Tenants*, THE APPEAL: THE LAB (Apr. 13, 2021), <https://theappeal.org/the-lab/explainers/how-eviction-courts-stack-the-deck-against-tenants> [https://perma.cc/X2U4-P97G].

³⁴ David Birchall, *Challenging the Commodification of Human Rights: The Case of the Right to Housing*, 19 SANTA CLARA J. INT'L L. 1, 6–7 (2021) (“Since the Second World War, housing in many developed states has been defined by three broad eras. First, the era of social housing, predating the binding human right to housing but in which the state took universal housing as a core obligation of decent societies. Second, the era of “housing finance”, starting in the late 1970s, of governments turning away from direct provision and toward assistance to individuals to buy homes from private developers. Third, the contemporary and still accelerating era of “financialization”, in which investment companies enter markets and trade properties at significant scale as securitized assets, and some, like Blackstone, become landlords at a global scale.”).

³⁵ See generally Alexander, *supra* note 18.

³⁶ Birchall, *supra* note 34, at 6–7.

³⁷ See generally Scherer, *supra* note 20.

1. *Tracing Modern U.S. Housing Policy*

The role of government in addressing the population's housing needs has shifted from construction and operation of rental housing accommodations to subsidizing private market landlords to rent units to low-income tenants. In 1937, Congress passed the Wagner-Steagall Act, the first public housing legislation in the United States.³⁸ Building on the National Housing Act of 1934,³⁹ the Wagner-Steagall Act promoted economic stimulation and the "elimination of unsafe and insanitary housing conditions . . . the eradication of slums . . . [and] the provision of decent, safe, and sanitary dwellings for families of low income"⁴⁰ To accomplish these lofty goals, the Wagner-Steagall Act established the U.S. Housing Authority, which funded the construction of public housing for low-income residents.⁴¹ Public housing was established to provide housing for the most vulnerable in society—low-income, elderly, and disabled people.⁴² Yet over time, public housing properties⁴³ "became more and more stigmatized as cent[ers] of extreme poverty, crime, and segregation."⁴⁴ In response to social prejudice

³⁸ United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (1937) ("the Wagner-Steagall Act").

³⁹ The National Housing Act created the Federal Housing Administration. National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934).

⁴⁰ United States Housing Act of 1937, pmbl.; *see also* ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES (1957), ("[The Wagner-Steagall Act's] passage owed nearly as much to public housing's potential for employment generation and slum clearance as to its ability to meet the nation's need for low-cost housing.").

⁴¹ United States Housing Act of 1937, § 3. While beyond the scope of this project, it must be noted that New Deal Era housing policy was not limited to creation of public housing. At this time, the federal government also created the Federal Housing Administration ("FHA"). The FHA revolutionized the way homeowners borrowed money to purchase homes. As Gail Radford notes, taken together, these New Deal policies marked the beginning of a two-tiered system of housing policy—a means-tested program that directly produced public housing for poor people to rent and a targeted program that indirectly produced private housing for middle income families to buy, with lasting effects on US housing landscape. *See GAIL RADFORD, MODERN HOUSING FOR AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA* 197-198 (1996).

⁴² See Raquel Rolnik (Special Rapporteur), *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, Raquel Rolnik, on her Mission to the United States of America, U.N. Doc A/HRC/13/20/Add.4, paras. 17-20 (Feb. 12, 2010).

⁴³ Referred to as "the Projects."

⁴⁴ Rolnik, *supra* note 42, ¶ 9 ("Reasons for the perceived decline in the quality of public housing include physical deterioration related to the ageing of the public housing stock and poor maintenance, while little was done to deal with the larger systemic issue of racial and economic segregation in some cities.").

and political stigmatization of public housing properties, the Housing and Community Development Act of 1974 terminated construction of new housing projects.⁴⁵ Instead, the 1974 Act ushered in a new approach to provide housing: the Section 8 Program.⁴⁶

Section 8 is administered by the U.S. Department of Housing and Urban Development, the successor to the U.S. Housing Authority. Section 8 consists of two programs. The first is a tenant-based voucher subsidy that tenants use to rent housing in the private market.⁴⁷ The second is project-based Section 8, which provides subsidies to private property owners to rehabilitate or construct housing for approved tenants.⁴⁸ Both Section 8 programs require tenants to meet income standards, among other criteria.⁴⁹ Once approved for a Section 8 program, tenants' rental payments are federally subsidized.⁵⁰

By subsidizing rents, rather than constructing and operating its own housing stock, Section 8 reallocated federal funds to the private sector, and the federal government took on a more passive role in the provision of housing. Section 8 housing was designed in part to avoid concentrations of low-income tenants that occurred with earlier public housing projects. However, prejudice and opposition to Section 8 housing created the same patterns, and "the Section 8 program came to have an image that was more similar to than different from that of the public housing that preceded it."⁵¹

⁴⁵ *Housing and Community Development Act of 1974*, Pub. L. 93-383, 88 Stat. 633 (1974).

⁴⁶ *Section 8 Program Background Information*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/housing/mfh/rfp/s8bkinf#:~:text=The%20Section%208%20Program%20was,rental%20and%20cooperative%20apartment%20projects [https://perma.cc/DE3B-2NZW]; see also Janet L. Smith, *Public Housing Transformation: Evolving National Policy*, in WHERE ARE POOR PEOPLE TO LIVE? TRANSFORMING PUBLIC HOUSING COMMUNITIES 31 (Larry Bennett, Janet L. Smith & Patricia A. Wright eds., 2006).

⁴⁷ *Tenant Based Vouchers*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/tenant [https://perma.cc/L2E6-BB9V].

⁴⁸ Smith, *supra* note 46, at 30–31; *Project Based Vouchers*, U.S. DEP'T OF HOUS. & URB. DEV. https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/project [https://perma.cc/K7H8-JA2X].

⁴⁹ 24 C.F.R § 982.201(b) (2016).

⁵⁰ U.S. DEP'T OF HOUS. & URB. DEV., 2022 CONGRESSIONAL JUSTIFICATIONS REPORT, at 5–7, 6–9 (2022) (Tenants typically pay no more than a third of their gross income in rent. This comports with the 30% of income definition of housing affordability).

⁵¹ Smith, *supra* note 46, at 30. In Q4 2020, 75% of public housing tenants were a racial minority member, while racial minorities only comprise 41.6% of the total U.S. population. Compare U.S. DEP'T OF HOUS. & URB. DEV., 2022

The government's reliance on the private sector to provide affordable housing continued in the 1980s. Federal housing policy under President Reagan's administration was driven by the assertion that the government "was to be seen primarily as a facilitator of private capital."⁵² To this end, in 1986, Congress created the Low-Income Housing Tax Credit (LIHTC) to encourage real estate developers to construct affordable housing.⁵³

Housing policies of the 1990s and 2000s were marked by a desire to alleviate the problems created by housing programs of the mid-twentieth century. These new housing policies sought to transform public housing through low-density, mixed income spaces⁵⁴ by creating mobility programs for public housing tenants to relocate to higher socioeconomic status neighborhoods.⁵⁵

CONGRESSIONAL JUSTIFICATIONS REPORT, at 5–7 (2022), with 2022 United States Quick-facts, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/RHI125222#RHI125222> [https://perma.cc/F4TF-NBKC].

⁵² Birchall, *supra* note 34, at 7 (Under the Reagan Administration, "the state was to be seen primarily as a facilitator of private capital . . . [t]he principle of politics became to facilitate the economy," leading to financialization of housing).

⁵³ Tax Reform Act of 1986, Pub. Law 99-514, 100 Stat. 2085 (1986); OFF. OF POL'Y DEV. & RSCH., *Low-Income Housing Tax Credit (LIHTC)*, <https://www.huduser.gov/portal/datasets/lihtc.html#:~:text=Created%20by%20the%20Tax%20Reform,targeted%20to%20lower%2Dincome%20households> [https://perma.cc/Q9BW-HQHA] ("The LIHTC program gives State and local LIHTC-allocating agencies [funds] in annual budget authority to issue tax credits for the acquisition, rehabilitation, or new construction of rental housing targeted to lower-income households."); *see also* Smith, *supra* note 46, at 26. (The Tax Reform Act of 1986 "[e]liminated some tax provisions that favored low-income rental housing production and instituted a tax credit system authorizing states to give 'tax credit' to property owners to offset taxes on income. Tax credits are generally sold to outside investors, usually syndicated, to raise initial development funds for a project. Projects must have at least 20 percent of units for households at or below 50 percent of median or 40 percent of units for households at or below 60 percent of area median income. Rents are not to exceed 30 percent of income at these thresholds.").

⁵⁴ *About HOPE VI*, U.S. DEPT' OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/ph/hope6/about [https://perma.cc/QH9V-KNTF]. HUD's Housing Opportunities for People Everywhere ("HOPE") VI program grew directly out of the Commission's report. HOPE VI aimed to transform public housing by (1) "[c]hanging the physical shape of public housing;" (2) "incentive[izing] [] resident self-sufficiency;" (3) eliminating "concentrations of poverty" by locating subsidized housing in middle income neighborhoods and "promoting mixed-income communities;" and (4) collaboration with agencies, local government, nonprofit organizations, and the private sector to support community development. *Id.*

⁵⁵ Several programs created mobility for public housing residents: (1) litigation against HUD and/or local housing authorities in response to discrimination and segregation; (2) Congress' Moving to Opportunity Program; and (3) Regional Opportunity Counseling Program. Ingrid Gould Ellen & Jessica Yager, *Race, Poverty, and Federal Rental Housing Policy*, in *HUD AT 50: CREATING PATHWAYS TO OPPORTUNITY*

Significant budget cuts weakened these efforts. Continued disinvestment resulted in erosion of public housing through failure to maintain existing properties and replace unsalvageable units. “By the early 1990’s, hundreds of thousands of public housing units had become dilapidated . . . [with a] net loss of approximately 170,000 public housing units due to deterioration and decay . . . [yet], annual funding for public housing fell by 25 per cent [sic] between 1999 and 2006.”⁵⁶ Between 1994 and 2009, no new federal funding was allocated for the construction of new public housing.⁵⁷ As federal appropriations for public housing diminished and public housing units fell into disrepair, the federal government increasingly looked to the private market to fill the void.

2. From Need to Asset

As the federal government moved away from providing affordable housing, it encouraged the private market to take its place. Programs like Section 8 and LITHC subsidized private developers and landlords to assume responsibility for the creation, provision, and management of affordable housing. For these private market participants, however, the mantle of providing housing accommodations was not merely driven by the desire to satisfy a social function. The financial incentivization by Congress galvanized the commodification of housing, recasting housing as an asset to be capitalized by private actors rather than a basic human need.

Financialization—“the increasing role of financial motives, financial markets, financial actors, and financial institutions in [an economy]”⁵⁸—is associated with changes in regulation that undermine human rights.⁵⁹ Financialization affects a range

115 (2015), <https://www.huduser.gov/portal//hud50th/HUDat50Book.pdf> [<https://perma.cc/ME8F-CLW6>].

⁵⁶ Rolnik, *supra* note 42, ¶ 21; see also Douglas Rice & Barbara Sard, *Cuts in Federal Housing Assistance are Undermining Community Plans to End Homelessness*, CTR. ON BUDGET & POL’Y PRIORITIES 3 (2007) (“[M]ainstream low-income housing assistance programs have fared poorly in the federal budget in recent years . . . By 2006, funding for HUD programs had declined by \$3.3 billion (or 8 percent).”).

⁵⁷ MAGGIE McCARTY, INTRODUCTION TO PUBLIC HOUSING 8–9, 25 (2014), <https://sgp.fas.org/crs/misc/R41654.pdf> [<https://perma.cc/4XGS-K67R>]; Rolnik, *supra* note 42.

⁵⁸ GERALD EPSTEIN, FINANCIALIZATION AND THE WORLD ECONOMY 3 (2005).

⁵⁹ RADHIKA BALAKRISHNAN, JAMES HEINTZ & DIANE ELSON, RETHINKING ECONOMIC POLICY FOR SOCIAL JUSTICE: THE RADICAL POTENTIAL OF HUMAN RIGHTS, 84 (2016) (“The ascendency of financial markets has enormous implications for the realization of rights.”).

of sectors in society, including infrastructure,⁶⁰ healthcare,⁶¹ education,⁶² and incarceration.⁶³

Within the housing sphere, financialization refers to “structural changes in housing and financial markets and global investment whereby housing is treated as a commodity, a means of accumulating wealth and often as security for financial instruments that are traded and sold on global markets.”⁶⁴ Incorporating financialization, federal housing policies shifted away from the direct provision of affordable housing for vulnerable populations and instead embraced the notion that financial markets are capable of providing housing for all.⁶⁵

In the United States, neoliberal values such as deregulation, decreased taxation, and decreased welfare spending have dominated housing policymaking in the late twentieth century.⁶⁶ Liberalization and internationalization of financial markets took hold in the 1980s,⁶⁷ which precipitated policies that targeted “financ[ing] the cost of housing for individuals and families by providing loans (mortgages or micro-loans) or grants (subsidies or tax exemptions) for the purchase, rental, construction or improvement of housing units.”⁶⁸ As Manuel Aalbers has observed, the financialization of housing is complex,

⁶⁰ See, e.g. Phillip O'Neill, *The Financialisation of Urban Infrastructure: A Framework of Analysis*, 56 URB. STUD. 1304, 1304 (2019).

⁶¹ See, e.g. Erin C. Fuse Brown & Mark A. Hall, *Private Equity and the Corporatization of Health Care*, 76 STAN. L. REV. 527, 527 (2024).

⁶² Dhoha Bareche, *The Financialization of Education*, BERKELEY ECON. REV. (Nov. 1, 2022), <https://econreview.berkeley.edu/the-financialization-of-education> [https://perma.cc/H4WX-67QH].

⁶³ L.B. Wright, *The American Prison System: It's Just Business*, FORDHAM J. CORP. AND FIN. L.: BLOG (Dec. 9, 2018), <https://news.law.fordham.edu/jcfl/2018/12/09/the-american-prison-system-its-just-business> [https://perma.cc/2UX2-S3JU].

⁶⁴ Leilani Farha (Special Rapporteur), *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, U.N. Doc. A/HRC/34/51, ¶ 1 (Jan. 18, 2017) (citing MANUEL B. AALBERS, *THE FINANCIALIZATION OF HOUSING: A POLITICAL ECONOMY APPROACH* (2016)) (citing RADHIKA BALAKRISHNAN, JAMES HEINTZ & DIANE ELSON, *RETHINKING ECONOMIC POLICY FOR SOCIAL JUSTICE: THE RADICAL POTENTIAL OF HUMAN RIGHTS* 85 (2016)).

⁶⁵ Raquel Rolnik & Lidia Rabinovich, *Late-Neoliberalism: The Financialisation of Homeownership and the Housing Rights of the Poor*, in *ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS* 86 (ed. Aoife Nolan, 2014).

⁶⁶ Raquel Rolnik, *Late Neoliberalism: The Financialization of Homeownership and Housing Rights*, 37 INT'L J. URB. & REG'L RSCH. 1058, 1059-62 (2013).

⁶⁷ *Id.* at 1058-66; Manuel B. Aalbers, *The Financialization of Home and the Mortgage Market Crisis*, 12 COMPETITION AND CHANGE 148, *passim* (2008).

⁶⁸ Rolnik & Rabinovich, *supra* note 65, at 60.

multifaceted, and may take many forms, including the securitization of mortgage loans; subprime and predatory lending; rising household mortgage debt; the increasing presence of private equity firms, hedge funds, and publicly traded real estate firms in subsidized rental markets; and the government's reliance on non-profit housing associations, social housing bonds, and financial derivatives.⁶⁹ The utilization of these financial mechanisms has increased the value of the global real estate market to \$613.60 trillion dollars.⁷⁰ Housing is no longer conceived of as predominately a social necessity—it is an asset that drives the global economy.

The World Bank further encouraged this financialized shift in housing with the influential 1993 report, *Housing: Enabling Markets to Work*. The report articulated how the housing market could support the economy and supplied an “enabling strategy” that provided a policy blueprint for governments to enact.⁷¹ The report urged governments to “abandon their earlier role as producers of housing” and instead manage housing as a “major economic sector.”⁷²

Governments heeded this call. Today, housing financing (including residential mortgage markets) comprises approximately 15-20% of the U.S. GDP.⁷³ In the course of one year, from mid-2013 to mid-2014, corporate acquisitions of larger properties in the top 100 recipient global cities rose from USD

⁶⁹ MANUEL AALBERS, THE FINANCIALIZATION OF HOUSING: A POLITICAL ECONOMY APPROACH 3 (2016); Aalbers, *supra* note 67, at 152; *see also* Rolnik & Rabinovich, *supra* note 65, at 86. It must be noted that the process of financialization is not monolithic or uniform. It looks different in different countries and in different markets. See, e.g. Manuel B. Aalbers, Raquel Rolnik & Marieke Krijnen, *The Financialization of Housing in Capitalism's Peripheries*, 30 Hous. POL'Y DEBATE 481, 481 (2020).

⁷⁰ STATISTA, *Real Estate—Worldwide* (July 2024), <https://www.statista.com/outlook/fmo/real-estate/worldwide#value> [https://perma.cc/H7EK-K7YM].

⁷¹ WORLD BANK, *HOUSING: ENABLING MARKETS TO WORK* 9–18 (1993).

⁷² *Id.* at 51.

⁷³ CONG. RSCH. SERV., INTRODUCTION TO U.S. ECONOMY: HOUSING MARKET 1 (2023); Nat'l Ass'n of Home Builders, *Housing's Contribution to Gross Domestic Product*, <https://www.nahb.org/news-and-economics/housing-economics/housings-economic-impact/housings-contribution-to-gross-domestic-product> [https://perma.cc/2G27-M3M7]; STATISTA, *Share of Value Added to the Gross Domestic Product of the United States in 2023, by Industry* (July 5, 2024), <https://www.statista.com/statistics/248004/percentage-added-to-the-us-gdp-by-industry/> [https://perma.cc/4KRC-VBMF]. For a historical overview of mortgage markets, *see also* DEP'T OF HOUS. & URB. DEV. OFFICE OF POL'Y DEV. & RSCH., *EVOLUTION OF THE US HOUSING FINANCE SYSTEM: A HISTORICAL SURVEY AND LESSONS FOR EMERGING MORTGAGE MARKETS* (2006), https://www.huduser.gov/publications/pdf/us_evolution.pdf [https://perma.cc/N4UG-E4D7].

600 billion to USD 1 trillion.⁷⁴ Globally, the value of real estate in 2016 was “about [USD] 217 trillion, nearly 60[%] of the value of all global assets, with residential real estate comprising 75[%] of the total.”⁷⁵ By the end of 2022, the total value of global real estate reached \$379.7 trillion, with the valuation of residential real estate soaring to \$287.6 trillion.⁷⁶ Housing is currently “at the cent[er] of an historic structural transformation in global investment and the economies of the industrialized world with profound consequences for those in need of adequate housing.”⁷⁷

The embrace of housing as a means of wealth accumulation has led to financialization divorcing housing “from its social function of providing a place to live in security and dignity and hence undermin[ing] the realization of housing as a human right.”⁷⁸ The financial transformation of housing as an investment asset for profit maximization negates the core social function of housing as essential for human flourishing. Housing is no longer a place to rest, thrive, and raise a family.⁷⁹ Through policymaking, housing is a commodity to be capitalized, leveraged, and exploited to underwrite global economies. Leilani Farha, the 2014–2020 United Nations Special Rapporteur on the Right to Adequate Housing, described this phenomenon as “*dehumanized housing*”⁸⁰ Instead of prioritizing local community needs,

financialized housing markets respond to the preference of global investors . . . those making decisions about housing—its use, its cost, where it will be built or whether it will be demolished—do so from remote board rooms with

⁷⁴ Farha, *supra* note 64, ¶ 3.

⁷⁵ *Id.*

⁷⁶ Paul Tostevin & Charlotte Rushton, *Total Value of Global Real Estate: Property Remains the World’s Biggest Store of Wealth*, SAVILLS (Sept. 2023), <https://www.savills.com/impacts/market-trends/the-total-value-of-global-real-estate-property-remains-the-worlds-biggest-store-of-wealth.html> [https://perma.cc/53LS-J3P3].

⁷⁷ Farha, *supra* note 64, ¶ 3.

⁷⁸ *Id.*, ¶ 1; Rolnik & Rabinovich, *supra* note 65 at 57 (“The belief that markets could regulate the allocation of housing as the most rational means of resource distribution, combined with experiments in ‘creative’ financial products related to it, have resulted in public policies that have abandoned the conceptual meaning of housing as a social good.”).

⁷⁹ See generally Donald L. Foley, *The Sociology of Housing*, 6 ANN. REV. SOCIO. 457 (1980); Hazel Easthope, *A Place Called Home*, 21 Hous. THEORY & SOC’Y 128 (2004); Ann Dupuis & David C. Thorns, *Home, Home Ownership and the Search for Ontological Security*, 46 Socio. REV. 24 (1998).

⁸⁰ Farha, *supra* note 64, ¶ 31.

no engagement with or accountability to the communities in which their 'assets' are located.⁸¹

Housing as a social good is incompatible with the conceptualization of housing as a financially exploitable asset. Financialization fundamentally alters the relationship between the State and those the government is designed to serve.⁸² As Leilani Farha observed, “[r]ather than being held accountable to residents and their need for housing, States’ housing policies have often become accountable to financial institutions and seem to pander to the confidence of global credit markets and the preferences of wealthy private investors.”⁸³ This entangles domestic policymaking in global financial markets— institutions that are rarely held accountable to social interests like affordable housing.⁸⁴

B. Dispossession

The financialization of housing has fundamentally changed global economies. This shift at the macro level is reinforced by housing policies at the micro level that protect property owners. At the local level, notions of profit maximization are influenced by dispossessory actions that prioritize ownership interests in housing over human needs. In American dispossessory actions, courts prioritize the interests of the landlord and leave little room for judicial inquiries that consider or weigh the context-dependent social factors involved in a tenant’s dispossession from the property.⁸⁵

Finding a rental home is a time-consuming and expensive process. Thanks to persistent affordable renting housing shortages,⁸⁶ it can take months to find a rental home. The dearth of safe, decent, and affordable housing means supply cannot meet demand. Prospective tenants in search of a home often submit several rental applications hoping that one

⁸¹ *Id.* This has also been referred to as “residential alienation.” *Id.* (citing DAVID MADDEN & PETER MARCUSE, IN DEFENSE OF HOUSING: THE POLITICS OF CRISIS 19 (2016)) (“Financialized housing thus precipitates what has been referred to as ‘residential alienation,’ the loss of the critical relationship to housing as a dwelling and the diverse set of social relationships that give it meaning.”).

⁸² Farha, *supra* note 64, ¶ 29, 31; *see also generally* Ray Forrest, *Globalization and the Housing Asset Rich: Geographies, Demographies, and Policy Convoys*, 8 GLOB. SOC. POL’Y 167 (2008).

⁸³ Farha, *supra* note 64, ¶ 39.

⁸⁴ *Id.*

⁸⁵ See Scherer, *supra* note 20, at 2.

⁸⁶ *Id.* at 11

will be successful. At anywhere from \$25 to more than \$100 per application,⁸⁷ the costs quickly accumulate.

Losing a home can happen in minutes. One study found that the average eviction hearing takes less than one minute and forty-four seconds.⁸⁸ In less than two minutes, someone can go from housed to homeless. Falling behind on rent often precipitates an eviction. In Chicago, the Law Center for Better Housing found that in 82% of cases, the landlord-plaintiff included an action for back-rent.⁸⁹ In 44% of filed eviction actions, tenants owed landlords less than twenty-five hundred dollars in unpaid rent.⁹⁰

Chicago is not an outlier. Across the United States, eviction generally proceeds against tenants in five stages, with the deck stacked against tenants at every step of the process.⁹¹ In the first stage, commonly referred to as the “quit or cure” period, a landlord must give the tenant notice of the landlord’s intent to terminate the rental agreement and, depending on the grounds for termination, give the tenant time to cure the defect.⁹²

In stage two of an eviction, the landlord pays a fee to file an unlawful detainer action, and the tenant is served with process. The fees for an unlawful detainer action vary by jurisdiction but are relatively inexpensive—often the same as, or

⁸⁷ Tanya Rivera, *NC Has No Cap on Rent Application Fees*, WFMY News 2 (Sept. 12, 2022), <https://www.wfmynews2.com/article/news/local/2-wants-to-know/nc-has-no-cap-on-rent-application-fees-house-condo-apartment-any-amount-no-requirement-to-refund-josie-williams-greensboro-housing-coalition/83-0673c3e1-b2d0-4c68-a462-f0b582b5524b> [https://perma.cc/G44P-94DA].

⁸⁸ *No Time for Justice: A Study of Chicago’s Eviction Court*, L. CTR. FOR BETTER Hous. (Dec. 2013), <https://lcbh.org/resources/no-time-for-justice-a-study-of-chicagos-eviction-court/> [https://perma.cc/3RZD-UF45].

⁸⁹ *Most Families Forced Out for Less than \$2,500 Back Rent*, LAW CTR. FOR BETTER Hous. (May 2019), <https://eviction.lcbh.org/reports/forced-out-for-less-than-2500> [https://perma.cc/2WJL-UHZ9].

⁹⁰ *Id.*

⁹¹ See Gold, *supra* note 33.

⁹² *Id.* The length of time a tenant has to cure varies by jurisdiction. For example, in Washington, D.C., tenants may be assessed a late fee five days after a rent payment is due and have thirty days to tender unpaid back rent and a late fee to the landlord. Rental Housing Late Fee Fairness Amendment Act of 2016, D.C. Law 21-172, 63 D.C. REG. 12959 § 531(b)(2), (d)(2) (Oct. 21, 2016). In Colorado, tenants have ten days to address a lease violation like failure to timely pay rent. COLO. REV. STAT. § 13-40-104(1)(d) (2022). A disturbing trend has emerged in some states to preempt the right to cure as defined by local ordinance. For example, in Texas, House Bill 2127 included a preemption provision that eliminates right to cure ordinances enacted in Austin and Dallas. H.B. 2127, 88th Leg., Reg. Sess. (Tex. 2023).

even less than, filing fees for other civil legal actions,⁹³ which encourages filings.⁹⁴ After the eviction action is filed with the local court system, the tenant is served a summons and notice to appear. It is not uncommon for process servers to fail to provide legally required notice to tenants. In Washington, D.C., two professional process servers successfully provided notice in fewer than one percent of their cases and routinely falsified affidavits stating notice was properly delivered.⁹⁵ In such cases, tenants do not even receive one minute and forty-four seconds to plead their case in front of the judge. Instead, tenants “are at risk of being evicted in legal proceedings they do not even know exist.”⁹⁶

Stage three of the eviction process is the hearing. Eviction is a “summary proceeding” designed to move quickly through the courts.⁹⁷ The paramount legal questions are which party has a superior interest in the property and whether the rental contract has been breached. When the Supreme Court had an opportunity to consider the potential harms of a summary proceeding, it determined that “the simplicity of the issues in the typical [eviction] action will not usually require extended trial preparation and litigation”⁹⁸ Kathryn Sabbath has

⁹³ Henry Gomory, Douglas S. Massey, James R. Hendrickson & Matthew Desmond, *The Racially Disparate Influence of Filing Fees on Eviction Rates*, 33 Hous. Pol'y DEBATE 1463, 1470 (2023); Henry Gomory, Douglas S. Massey, James R. Hendrickson, & Matthew Desmond, *When It's Cheap to File an Eviction Case, Tenants Pay the Price* (June 6, 2023), EVICTION LAB <https://evictionlab.org/tenants-pay-for-cheap-evictions/> [<https://perma.cc/VQ88-HMW3>] (finding that lower eviction filing fees lead to higher eviction filings and judgment rates).

⁹⁴ Sarah Abdelhadi & Ranya Ahmed, *Fast & Cheap: The Speed and Cost of Evicting Tenants for Nonpayment of Rent* 8, LEGAL SERVS. CORP. (Dec. 14, 2021), <https://storymaps.arcgis.com/stories/f644d5b4deb04a158f6929d928035af9> [<https://perma.cc/QF64-4YJ7>] (“As of January 2021, 22 states/territories set minimum eviction filing fees below \$100, 12 of which are below \$50 . . . Because they can be considered operating expenses, landlords may be able to deduct filing fees and other legal costs associated with eviction from their federal income taxes, making eviction an even cheaper option.”).

⁹⁵ Josh Kaplan, *Thousands of D.C. Renters are Evicted Every Year. Do They All Know to Show up to Court?*, DCist (Oct. 5, 2020), <https://dcist.com/story/20/10/05/thousands-of-d-c-renters-are-evicted-every-year-do-they-all-know-to-show-up-to-court> [<https://perma.cc/GC47-NPWA>].

⁹⁶ Gold, *supra* note 33.

⁹⁷ Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137 (2000) (“A summary proceeding for eviction exists in every state. Despite its different labels—summary process, summary dispossession, or forcible entry and detainer—a basic feature of the proceeding is its limited nature.”).

⁹⁸ Lindsey v. Normet, 405 U.S. 56, 65 (1972).

concluded that this lack of thorough judicial analysis creates a “self-fulfilling prophecy” that “sacrifice[s] careful analyses and accurate outcomes . . . Short timeframes that rush cases to judgment make the court less like fora for application of the rule of law and more like asset collection devices or means for forcible removal.”⁹⁹

Tenants are not entirely without legal recourse in eviction actions. But the existing tools are extremely limited in application or require tenants to have sophisticated knowledge of the local court system.¹⁰⁰ Defenses and counterclaims that tenants can raise in an eviction vary by jurisdiction. In Illinois, tenant-defendants may only raise matters “germane” to the purpose of the proceeding.¹⁰¹ A claim is considered germane if it asserts a paramount right of possession, denies the breach of the lease agreement, questions the validity or enforceability of the landlord-plaintiff’s document upon which the right to possession is predicated, or questions the landlord-plaintiff’s motivation for initiating the eviction action.¹⁰² However, many states prohibit the court from considering issues apart from whether the tenant paid the rent.¹⁰³ Moreover, eviction courts typically prohibit tenants from conducting discovery or only permit discovery following judicial permission.¹⁰⁴ Even when it is permitted—either by the court rules or following judicial request—the truncated timeline created by the summary

⁹⁹ Kathryn A. Sabbeth, *Eviction Courts*, 18 U. ST. THOMAS L.J. 359, 378–79 (2022); *see also* Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg, & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243 (2022).

¹⁰⁰ For example, a study of eviction court in New York City by Professor Summers found that “although tenants are more likely to benefit from the warranty of habitability when they have legal representation, the lack of access to counsel does not sufficiently account for the operationalization gap. The significant majority—at least 70 percent—of tenants who were represented by counsel and had meritorious warranty of habitability claims still did not receive a rent abatement.” *The Limits of Good Law: A Study of Housing Court Outcomes*, *supra* note 20, at 151; *see generally* Serge Martinez, *Revitalizing the Implied Warranty of Habitability*, 34 NOTRE DAME J.L. ETHICS & PUB. POL’Y 239 (2020).

¹⁰¹ 735 ILL. COMP. STAT. 5/9-106 (1998) (“no matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise.”).

¹⁰² Spanish Court Two Condo. Assoc. v. Carlson, 979 N.E.2d 891, 896, 901-02 (Ill. App. Ct. 2012), *rev’d on other grounds*, 2014 IL 115342 (Ill. 2014) (The court further clarified that a tenant-defendant *may* seek damages when they are tied to the issue of possession).

¹⁰³ *See Lindsey*, 405 U.S. at 64–65.

¹⁰⁴ Sabbeth, *supra* note 99, at 379; *see also* LSC Eviction Laws Database, LEGAL SERVS. CORP., <https://www.lsc.gov/initiatives/effect-state-local-laws-evictions/lsc-eviction-laws-database#pt-2> [<https://perma.cc/YW3C-FZZX>].

nature of proceedings “make[s] discovery impractical or impossible to complete.”¹⁰⁵

These barriers to justice are exacerbated by an imbalance in legal representation in eviction hearings. Few jurisdictions across the country have a right to counsel in eviction hearings.¹⁰⁶ Others are investing in legal services lawyers to assume this work.¹⁰⁷ The reality for most tenants confronted with an eviction, though, is that they lack the right or ability to access legal representation. On average, only 4% of tenants are represented in eviction hearings, while 83% of landlords have representation.¹⁰⁸

The disproportionate legal representation between landlords and tenants dramatically impacts stage four of the eviction process: entry of judgment. The result is unsurprising: landlords prevail in most eviction proceedings. For example, a 2017 analysis of Hawaiian court records revealed that 85% to 95% of eviction proceedings result in a judgment for the landlord.¹⁰⁹ Often, tenants are provided mere days from the date of the order to vacate their home, regardless of the effect on the tenant and their family. Tenants participating in federal subsidized housing programs—such as public housing, Project-Based Section 8, and the Housing Choice Voucher Program—may have additional rights (e.g. a right to review their file or a right to administrative grievance proceeding),

¹⁰⁵ Sabbeth, *supra* note 99, at 379.

¹⁰⁶ *Status Map*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/map> [<https://perma.cc/XZQ5-GFDT>].

¹⁰⁷ Sarah Holder, Kriston Capps & Mackenzie Hawkins, *In Housing Court, a Scramble for Eviction-Fighting Lawyers*, BLOOMBERG (Apr. 27, 2023), <https://www.bloomberg.com/news/features/2023-04-27/as-renters-struggle-eviction-busting-lawyers-are-in-short-supply> [<https://perma.cc/U6DY-ZNUN>].

¹⁰⁸ NAT'L COAL. FOR A CIV. RT. TO COUNS., EVICTION REPRESENTATION STATISTICS FOR LANDLORDS AND TENANTS ABSENT SPECIAL INTERVENTION REPORT (2024), https://civilrighttocounsel.org/wp-content/uploads/2023/11/Landlord_and_tenant_eviction_rep_stats__NCCRC_.pdf [<https://perma.cc/JC88-2CPP>]; John Pollock, *Using Right to Counsel as an Eviction Diversion Strategy*, NAT'L LEAGUE OF CITIES (Oct. 26, 2021), <https://www.nlc.org/article/2021/10/26/using-right-to-counsel-as-an-eviction-diversion-strategy> [<https://perma.cc/BDH8-U58R>].

¹⁰⁹ VICTOR GEMINIANI, JENNIFER F. CHIN & ISAIAH FELDMAN-SCHWARTZ, EVICTED IN HAWAII: LIVES HANGING IN THE BALANCE 3, 4 (2018) https://www.hiequaljustice.org/s/Evicted-in-Hawaii-Report_DEC6_Update.pdf [<https://perma.cc/C7KK-FMLQ>]. The analysis concluded that 70% of landlords had legal counsel as opposed to 5% of tenants and that 50% of eviction cases resulted in a default judgment in favor of the landlord because the tenant failed to appear in court. *Id.* In O'ahu, the island home to Honolulu, 97% of dispossessory actions resulted in the tenant's eviction. *Id.* at 27.

depending on the type of program subsidizing their housing.¹¹⁰ Yet, eviction scholars Ashley Gromis, James Henderson, and Matthew Desmond found that public housing authorities managed 3.5 out of every 100 renter households, yet were responsible for 5.8 in every 100 evictions filed.¹¹¹ In the final stage of an eviction, a tenant physically vacates the home. The process is traumatic¹¹² and often leads to inferior housing, which precipitates adverse health effects.¹¹³

C. (Re)Aligning Law of Possession and Justice

Macro-level housing commodification is complemented by micro-level eviction law to prioritize the ownership interests of property over the human needs of tenants. However, some prominent property law scholars have challenged the notion that the right to exclude is the heart of property law. Gregory Alexander, Eduardo Peñalver, Joseph Singer, and Laura Underkuffler advanced the theory of progressive property as the normative cornerstone of property law.¹¹⁴ The founders of progressive property theory recognize that while U.S. law focuses on “the right to exclude others and . . . the free use of what one owns,” property should instead “look to the underlying human values that property serves and the social relationships it shapes and reflects.”¹¹⁵ Because “[p]roperty implicates plural and incommensurable values,” a progressive property

¹¹⁰ See generally Fred Fuchs, *Defending Families and Individuals Threatened with Eviction from Federally Subsidized Housing, HOME-Funded Properties, § 515 Rural Rental Housing, § 8 Moderate Rehabilitation, Shelter Plus Care and Supportive Housing, HOPWA, Tax Credit Housing, Section 8 Housing Choice Voucher Program, Public Housing, and Project-Based Voucher Program*, Nat'l Hous. L. Proj. (Nov. 15, 2008) (updated Sept. 2011), <https://www.nhlp.org/wp-content/uploads/Fuchs-Defending-Evictions-from-Fedl-Hsng-Progs-updated-Sept.-12.2011.pdf> [https://perma.cc/M8N5-HVZL]. For additional protections for Section 8 tenants, see 24 CFR § 982.554 (2015).

¹¹¹ Ashley Gromis, James R. Henderson & Matthew Desmond, *Eviction from Public Housing in the United States*, 127 CITIES: INT'L J. OF URB. POL'Y & PLAN. 103749, 1, 11 (2022). Moreover, Desmond's study found that tenants in public housing authorities with higher shares of Black residents are disproportionately exposed to eviction risk and its consequences. *Id.* at 2.

¹¹² Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 6 (2015).

¹¹³ Hugo Vásquez-Vera et al., *The Threat of Home Eviction and Its Effects on Health Through the Equity Lens: A Systematic Review*, 175 SOC. SCI. & MED. 199, 205 (2017).

¹¹⁴ Gregory Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743–44 (2009) (issuing a joint statement on progressive property principles).

¹¹⁵ *Id.* at 743.

approach champions a legal framework that attends to social and communal values in addition to personal preferences.¹¹⁶ As Ezra Rosser described, “progressive scholars have offered new interpretations of existing doctrine and traditions in property law as a way of creating space for property law to better serve human values.”¹¹⁷ Building on this framework, contemporary progressive property scholars “suggest that property law must focus on the nature of the community because its subject matter is uniquely and inseparably tied to the health of both the community and its individual members.”¹¹⁸

Progressive property theorists are aware that the framework’s concern with social obligations and communal values will necessarily limit the rights of property owners.¹¹⁹ Indeed that is the point—individual rights *should* be limited when they conflict with overarching social obligations.¹²⁰ Threads of this progressive framework exist in European dispossessory law. While predating U.S. progressive property theory, European eviction law offers an example of a legal system that is sensitive to context and the needs of all parties to an eviction.

II PROPORTIONALITY PRINCIPLE

Proportionality is a “legal principle, . . . a goal of government, and . . . a particular structured approach to judicial

¹¹⁶ *Id.* at 743–44 (“Property law should establish the framework for a kind of social life appropriate to a free and democratic society.”).

¹¹⁷ Ezra Rosser, *Destabilizing Property*, 48 U. CONN. L. REV. 397, 434 (2015); see also Rashmi Dyal-Chand, *Pragmatism and Postcolonialism: Protecting Non-Owners in Property Law*, 63 AM. U. L. REV. 1683, 1689–91 (2014) (“In this view, which has seen a tremendous groundswell of active scholarship in the last five years, property law’s critical function(s) cannot be reduced to the erection of boundaries that protect the private space required for individuals to act in pursuit of individualized gains.”).

¹¹⁸ Zachary Bray, *The New Progressive Property and the Low-Income Housing Conflict*, 2012 BYU L. REV. 1109, 1119.

¹¹⁹ However, property scholar Gregory Alexander describes “the core image of property rights . . . that the owner has a right to exclude others and owes no further obligation to them” as “highly misleading.” Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 747 (2009).

¹²⁰ *Id.*; but see Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 111–12 (2013) (“But largely left off the table in the progressive property articles is the need to revisit acquisition in light of past wrongs and perhaps to engage in corrective redistribution. As a consequence of ignoring acquisition and distribution, the race-based property advantages enjoyed by whites will remain and will continue to undermine the possibility that society will realize a robust version of progressive property.”)

review”¹²¹ found in both common and civil law systems.¹²² The origins of the proportionality principle trace back to German administrative law, as well as Canadian and Israeli legal doctrines that developed after World War II.¹²³ Early application of proportionality principles were concentrated in police powers and the ability of the state to punish wrongdoing.¹²⁴ In these early expressions, proportionality analyses required that state punishment be proportional to the crime committed.¹²⁵ In the United States, this foundation is most clearly embodied in the Eighth Amendment prohibition against the state inflicting cruel and unusual punishment.¹²⁶

While proportionality is historically rooted in police powers and state punishment, it is not limited to criminal proceedings. The goal of proportionality is to balance competing interests, a concept routinely invoked in judicial decision-making in civil matters. In its application to civil legal matters, the principle assesses whether the state action at issue is proportional to the private rights at stake.¹²⁷ As Vicki Jackson noted, proportionality “has already been recognized in several areas of contemporary constitutional law in the United States.”¹²⁸ In U.S. constitutional law inquiries, this requires a balancing test—rational basis, intermediate scrutiny, or strict scrutiny.¹²⁹

¹²¹ Jackson, *supra* note 10, at 3098.

¹²² See generally Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 73 (2008).

¹²³ Jackson, *supra* note 10, at 3110 (2015) (citing ROBERT J. SHARPE & KENT ROACH, BRIAN DICKSON: A JUDGE'S JOURNEY 334 (2003)). However, “whether German law inspired Canadian law in this instance is uncertain.” *Id.* (citing MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 14–16 (2013)) (citing Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 AM. J. COMPAR. L. 583, 620 n.134 (2010)).

¹²⁴ Eric Engle, *The History of the General Principle of Proportionality: An Overview*, 10 DARTMOUTH L. J. 1, 7 (2012).

¹²⁵ For example, many scholars cite the Magna Carta as an iteration of this principle. See generally *id.*

¹²⁶ U.S. CONST. amend. VIII; see, e.g. *Solem v. Helm*, 463 U.S. 277, 284 (1983) (“The final clause [of the Eighth Amendment] prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.”); see also *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) (specifically identifying the Magna Carta as a historic influence on Eighth Amendment proportionality requirements).

¹²⁷ Engle, *supra* note 124, at 9.

¹²⁸ Jackson, *supra* note 10, at 3104.

¹²⁹ See *id.* at 126–28, 161. However, certain rights may require a modified balancing test. “For example, under the Due Process Clause, courts must now ensure that the measure of punitive damages in civil cases is ‘both reasonable

Which test to apply depends on the rights and/or class of person being infringed upon.¹³⁰ Because it requires a balancing between state interest and private rights, “proportionality insists that adjudication involves the exercise of judgment.”¹³¹

However, as Jamal Greene observes, proportionality assessments are limited in American judicial decision-making precisely because they are rooted in the question of whether the rights at issue are protected by the Constitution. U.S. courts first ask whether a right exists under the Constitution.¹³² After the individual right is identified, the court next applies an appropriate balancing test. This approach differs from other judicial systems applying proportionality, where the foundational inquiry is not the existence of a right, but rather the government’s reason for acting.¹³³ For Professor Greene, American courts’ singular focus on the existence of rights “severs the link between constitutional rights and constitutional justice.”¹³⁴

At a minimum, U.S. courts engage in proportionality analysis in civil cases when constitutionally protected rights are at stake. This is bad news for tenants, though, as the United States does not recognize a constitutionally-protected right to housing.¹³⁵ Nor has the United States joined over 160 countries

and proportionate to the amount of harm to the plaintiff and to the general damages recovered.” *Id.* at 3105 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003)).

¹³⁰ *Id.*

¹³¹ Nelson Tebbe & Micah Schwartzman, *The Politics of Proportionality*, 120 MICH. L. REV. 1307, 1316 (2022). Professors Tebbe and Schwartzman make several contributions to our understanding of rights-based inquiries as balanced against the state’s power to act. They note that given the parameters of balancing tests, “when a right is recognized, it prevails over all countervailing considerations expect perhaps a narrow set of ‘compelling interests’ as courts applying a rational basis review “accept reasons that may be entirely hypothetical and patently divorced from legislatures’ actual motivations.” *Id.* at 1309. For a detailed overview of the history of balancing state power with individual rights, see JAMAL GREENE, *HOW RIGHTS WENT WRONG* (2021).

¹³² GREENE, *supra* note 131, at 93.

¹³³ *Id.* at 56–57, 93. Professor Greene describes this schism in American jurisprudence as anchored in the competing dissents in the 1905 case of *Lochner v. New York*. Justice Holmes’ dissent, which has continued to influence American rights analysis, focused on the fact that Lochner had no constitutional right to contract and therefore the law passed by the New York legislature to limit working hours for bakers was constitutional. In contrast, the dissent authored by Justice Holmes found that “the legislature, in consideration of the labor rights of its citizens, had properly limited Lochner’s constitutional right to contract.” *Id.* at 43.

¹³⁴ *Id.* at 93.

¹³⁵ Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 251–52 (2015); *see generally* Michelle Oren, Rachelle Alterman & Yaffa Zilbershats, *Housing Rights in Constitutional Legislation: A Conceptual*

who have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), which includes a right to housing.¹³⁶ Instead, U.S. courts in dispossessory actions routinely review the merits of an eviction action through the lens of property law and contract rights.

The European judicial approach to eviction differs from the U.S. legal schema. Fundamentally, European courts view possessory rights more dynamically than their U.S. counterparts. European courts still consider title to property to be legally significant. But unlike U.S. judicial inquiries that are foregrounded in questions of title and contract violation, European courts additionally focus on whether an eviction action is proper, and more crucially, how judicial outcomes will ultimately impact the parties to the case.¹³⁷ While U.S. eviction hearings begin and end with an inquiry into who has a superior claim to possess the subject property, our European counterparts go a step beyond and ask what will happen once the judgment has been entered to arrive at a just outcome.

A. Proportionality in European Dispossessory Disputes

Proportionality in European dispossessory disputes is set against a backdrop of economic, legal, social, and territorial cohesion and solidarity in Europe.¹³⁸ As Laura Underkuffler has asserted, “property [law] reflects the ways in which we resolve

Classification, in CONTEMPORARY HOUSING ISSUES IN A GLOBALIZED WORLD (Padraic Kenna ed., 2014); see generally Kristen David Adams, *Do We Need a Right to Housing?* 9 NEV. L.J. 275 (2009).

¹³⁶ The United States has signed but not ratified the International Covenant on Economic, Social and Cultural Rights. International Covenant on Economic, Social and Cultural Rights art. 11, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3, 6 [hereinafter ICESCR]; United Nations Human Rights Office of the High Commissioner, *Status of Ratification Interactive Dashboard*, <https://indicators.ohchr.org/> [https://perma.cc/M42L-8JWD]. For further discussion on the United States and ICESCR, see Thomas Byrne & Dennis P. Culhane, *The Right to Housing: An Effective Means for Addressing Homelessness?*, 14 U. PA. J.L. & Soc. CHANGE 379 (2011) and Maria Massimo, Note, *Housing as a Right in the United States: Mitigating the Affordable Housing Crisis Using an International Human Rights Law Approach*, 62 B.C. L. REV. 273 (2021).

¹³⁷ See generally Emma N. Sweeney, L. Michelle Bruijn & Michel Vols, *Deconstructing the Eviction Protections Under the Revised European Social Charter: A Systematic Content Analysis of the Interplay Between the Right to Housing and the Right to Property*, 23 HUM. RTS. L. REV. 1 (2023); Irinia Domurath & Chantal Mak, *Private Law and Housing Justice in Europe*, 83 MOD. L. REV. 1188 (2020); Michel Vols, *European Law and Private Evictions: Property, Proportionality and Vulnerable People*, 27 EUR. REV. OF PRIV. L. 719 (2019).

¹³⁸ European Union, *Aims and Values*, https://european-union.europa.eu/principles-countries-history/principles-and-values/aims-and-values_

conflicting claims, visions, values, and histories.”¹³⁹ Rather than simply the right to exclude, the contours of a nation’s property law system are contingent on social and historical considerations.¹⁴⁰ AJ van der Walt has described the central tension of property between constitutional guarantees of private property and greater social equity.¹⁴¹ In Europe, in solidarity with the majority of the international community—but for the United States—the resolution of these tensions is the legal recognition of a fundamental right to housing enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights.¹⁴²

The development of modern property law in Europe is a reflection of these social and historical factors and a departure from the traditional bedrock of U.S. property law, which orients rights in relation to the ability to exclude.¹⁴³ Every nation in Europe is a party to the ICESCR.¹⁴⁴ Forty-six European nations are members of the Council of Europe.¹⁴⁵ Twenty-seven of these sovereigns are members of the supranational European Union.¹⁴⁶ Each member of the Council of Europe, regardless

en#:~:text=The%20aims%20of%20the%20European, and%20prevent%20and%20combat%20crime [https://perma.cc/K8DU-9CLG].

¹³⁹ LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 11 (2003).

¹⁴⁰ See generally Michael Trebilcock & Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. PA. J. INT'L L. 397 (2008).

¹⁴¹ RACHAEL WALSH, PROPERTY RIGHTS AND SOCIAL JUSTICE: PROGRESSIVE PROPERTY IN ACTION 5 (2021) (citing AJ van der Walt, *Comparative Notes on the Constitutional Protection of Property Rights*, 19 RECHT EN KRITIEK 39, 40 (1993)). A.M. Honoré described property ownership as “even in the most individualistic ages of Rome and the United States,” having “had a social aspect.” A. M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 144–45 (A. G. Guest ed., 1961).

¹⁴² See generally Fondation Abbé Pierre & Eur. Fed’n of Nat’l Orgs. Working with the Homeless, *Housing-Related Binding Obligations on States: From European and International Case Law* (June 2016), <https://www.feantsa.org/download/2016-06-housing-related-binding-obligations6411857525167192995.pdf> [https://perma.cc/8P9Z-HTVX]; Michael Kolocek, *The Human Right to Housing in the 27 Member States of the European Union*, 7 EUR. J. HOMELESSNESS 135 (2013); ICESCR, *supra* note 136, art. 11; United Nations Human Rights Office of the High Commissioner, *supra* note 136.

¹⁴³ John Sprankling describes the “right to exclude” in property law as being restricted under international law through human rights law, investment law, and the necessity doctrine. JOHN G. SPRANKLING, THE INTERNATIONAL LAW OF PROPERTY 305–22 (2014).

¹⁴⁴ United Nations Human Rights Office of the High Commissioner, *supra* note 136.

¹⁴⁵ Council of Europe, 46 Member States, <https://www.coe.int/en/web/portal/46-members-states> [https://perma.cc/AE4P-V32M].

¹⁴⁶ European Union, EU Countries, https://european-union.europa.eu/principles-countries-history/eu-countries_en [https://perma.cc/4DQR-G6Z9].

of E.U. membership, has agreed to be bound by the European Convention on Human Rights (ECHR), an international convention that protects human rights and enumerated freedoms.¹⁴⁷ The ECHR and ICESCR share many commonalities applicable to tenants, including a right to housing and protections against wrongful eviction. The ECHR exclusively binds forty-six European nations and plays a major role in shaping the contours of European eviction law.

All European nations have country-specific rights and policies to protect people from arbitrary and forced evictions.¹⁴⁸ Chief among these rights is the freedom for an individual to have their family life and home undisturbed except in certain enumerated circumstances, a right protected under Article 8 of the ECHR.¹⁴⁹ Article 8 forbids public authority interference with this right,

except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹⁵⁰

Article 8 is implicated when a person is being evicted or threatened with homelessness. A person's home is "more than a dwelling, it is 'a way of weaving up a life in particular geographic spaces.'"¹⁵¹ Home is the "most important center."¹⁵² Evictions, then, are a severe deprivation of family life and home and disturb an individual's rights protected under Article 8. In Europe, Article 8 is an essential legal shield against the harms of eviction.

¹⁴⁷ European Convention on Human Rights, EUROPEAN COURT OF HUMAN RIGHTS, <https://www.echr.coe.int/european-convention-on-human-rights> [https://perma.cc/A3T4-US47].

¹⁴⁸ *Forced Evictions*, AMNESTY INT'L UK (May 18, 2020), <https://www.amnesty.org.uk/stop-forced-evictions#:~:text=There%20are%20regional%20human%20rights,adequate%20housing%20and%20preventing%20homelessness> [https://perma.cc/K5NM-8YNQ].

¹⁴⁹ ECHR, *supra* note 5, art. 8.

¹⁵⁰ ECHR, *supra* note 5, art. 8(2).

¹⁵¹ Sandy G. Smith, *The Essential Qualities of a Home*, 14 J. ENV'T PSYCH. 31, 31 (1994) (quoting Susan Saegert, *The Role of Housing in the Experience of Dwelling*, in 8 HUMAN BEHAVIOR AND ENVIRONMENT: ADVANCES IN THEORY AND RESEARCH: HOME ENVIRONMENTS 287, 287 (Irwin Altman & Carol M. Werner eds., 1985)).

¹⁵² *Id.* (quoting David Seamon, A GEOGRAPHY OF THE LIFEWORLD; MOVEMENT, REST AND ENCOUNTER 78 (Alan Wilson & Nigel Thrift eds., 1979)).

Article 8 is a floor, but certainly not a ceiling. European nations are free to impose more stringent protections for family life and home than what is provided under Article 8—and many do. Each European country promulgates and enforces its own unique regulatory scheme, including its own constitution and property laws, which regulate and influence eviction proceedings.¹⁵³ In theory, this sovereign-level variation in eviction law runs parallel to overarching European laws and values. However, in dispossessory actions, sovereignty and supranational laws and values can conflict.¹⁵⁴

The most striking variation in eviction laws has emerged between European common law countries and civil law countries.¹⁵⁵ Some common law countries, such as Ireland, have constitutional protections for private ownership and individual property rights that limit those rights in the interest of social justice and the common good.¹⁵⁶ In the United Kingdom, variation exists in the level of protection for tenants based on the distinction between private or public landlords.¹⁵⁷ Civil law countries markedly differ from their common law counterparts. Germany and Switzerland—the civil law countries with the two largest rental markets in Europe—have extensive national legislation that protects marginalized tenants or families against termination of tenancy agreements and eviction.¹⁵⁸ Domestic

¹⁵³ See generally Vols, *supra* note 137; For a comparison of common law and civil law systems, see Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419 (1967); Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VICT. U. WELLINGTON L. REV. 817 (2001).

¹⁵⁴ See generally Plamen Akaliyski, Christian Welzel & Josef Hien, *A Community of Shared Values? Dimensions and Dynamics of Cultural Integration in the European Union*, 44 J. EUR. INTEGRATION 569 (2022).

¹⁵⁵ Vols, *supra* note 137, at 721. For a comparison of common law and civil law systems, see Dainow, *supra* note 153; Pejovic, *supra* note 153.

¹⁵⁶ WALSH, *supra* note 141, at 12–13. However, in the landlord-tenant statutory regime in Ireland, no-fault evictions are permissible in certain circumstances. See Pat Leahy & Kitty Holland, *Eviction Ban Lapses Making Thousands of Notices to Quit Go Live for Tenants*, THE IRISH TIMES (Apr. 1, 2023), <https://www.irishtimes.com/ireland/housing-planning/2023/04/01/notices-to-quit-go-live-as-eviction-ban-lapses> [<https://perma.cc/3BR9-BHDV>]; Shauna Bowers, *Dublin Families Facing Housing Stress Band Together to Call for Action on No-Fault Evictions*, THE IRISH TIMES (Aug. 24, 2023), <https://www.irishtimes.com/ireland/housing-planning/2023/08/24/we-are-trying-not-to-tell-the-kids-about-it-families-facing-eviction-band-together-to-protest-legislation> [<https://perma.cc/Y7TH-RVH6>].

¹⁵⁷ *Guide on Article 8 of the European Convention on Human Rights*, EUR. CT. OF HUM. RTS. REGISTRY, ¶¶ 460–71 (Sept. 4, 2024), https://www.echr.coe.int/documents/d/echr/convention_ENG [<https://perma.cc/VQ4H-4T2P>].

¹⁵⁸ Vols, *supra* note 137, at 731, 748. Over half of Germany's residents are renters. See Carolin Schmidt, *Strong Tenant Protections and Subsidies Support*

German law considers tenant hardship even in private landlord-tenant disputes.¹⁵⁹ The Netherlands has been described as a “paradise” for the rights of tenants for quite some time.¹⁶⁰ Under Dutch law, anyone at risk of eviction, regardless of whether the housing accommodation is private or public, is entitled to a proportionality assessment by an independent court before a tenant may be evicted.¹⁶¹ This legal requirement has led some scholars to refer to the Netherlands as a “proportionality paradise.”¹⁶² The civil legal systems in Spain and France likewise require the judicial application of more stringent proportionality protocols before an eviction can be deemed legally proper.¹⁶³

Despite domestic variation in regulatory schemes between common law and civil law countries, unifying judicial principles exist in all European dispossessory actions. Nearly all European

Germany’s Majority-Renter Housing Market, BROOKINGS INST. (Apr. 20, 2021), <https://www.brookings.edu/articles/germany-rental-housing-markets> [https://perma.cc/RSX6-YLXK]; see also CUSHMAN & WAKEFIELD, *The German Residential Letting Market Remains Attractive*, (Apr. 17, 2023), <https://www.cushmanwakefield.com/en/germany/news/2023/04/wohnmarkt-deutschland-2023> [https://perma.cc/HF2G-KHLQ] (stating that there are 43 million rental units in the country due to so much German property being destroyed in WWII). A whopping 61% of the Swiss population lived in rented or cooperative dwellings in 2021. FED. STAT. OFF., *Rented Dwellings*, <https://www.bfs.admin.ch/bfs/en/home/statistics/construction-housing/dwellings/rented-dwellings.html#:~:text=At%20the%20end%20of%202021,a%20rented%20or%20cooperative%20dwelling> [https://perma.cc/7AFV-UUU2]; see also GOVERNMENT OF THE NETHERLANDS, *Rented Housing*, <https://www.government.nl/topics/housing/rented-housing> [https://perma.cc/GEJ4-U7HX].

¹⁵⁹ Vols, *supra* note 137, at 731–32.

¹⁶⁰ *Id.* at 749.

¹⁶¹ *Id.* at 740.

¹⁶² *Id.* Dutch courts may consider any breach to justify the cancellation of a lease agreement but also have discretion to factor in the specific circumstances around the dispute before determining the necessity of the eviction. From 2007 to 2017, based on available data, Dutch courts ruled in favor of tenants and against eviction in 32% of eviction proceedings that involved a proportionality defense. *Id.* at 741–44. Even if evicted, a Dutch tenant typically has 72 days before a constructive eviction is finally carried out. *See Almost Impossible to Evict Tenants in the Netherlands*, GLOB. PROP. GUIDE (May 22, 2008), <https://www.globalpropertyguide.com/europe/netherlands/landlord-and-tenant> [https://perma.cc/WYA8-KGGP].

¹⁶³ *See generally* Economic and Social Counsel Res. 37/2018, U.N. Doc E/C.12/66/D/37/2 (Oct. 11 2019); Tribunal d’instance [Trib. inst.] [court of first instance] Montreuil, civ., Mar. 13, 2015, (Fr.) https://www.gisti.org/IMG/pdf/jur_titi_montreuil_2015-03-13_no11-14-000211.pdf [https://perma.cc/Y8T3-H7WF]; Cour d’appel [CA] [court of appeal] Versailles, civ., June 11, 2015, no. 15/00166; *see also* Hous. Rts. WATCH, *Respecting International Standards on Home Evictions* (June 30, 2022), <https://www.housingrightswatch.org/content/respecting-international-standards-home-evictions> [https://perma.cc/B2XE-TZ34].

nations, regardless of E.U. membership, must uphold the core values and treaties of the ECHR.¹⁶⁴ In a dispossessory action, if a tenant raises a proportionality defense, European courts generally must engage in a proportionality assessment, which balances traditional notions of property ownership against social considerations. European domestic courts are required in their proportionality assessments to consider the individual rights of the landlord, the tenant, and the interests of society as whole. These individual concerns are evaluated and then weighed and balanced against one another before a European court determines whether to enter an eviction order. This modern transformative shift in European eviction law means that “the right [of a landlord] to possess [property] is no longer absolute . . . [and that the landlord’s interest will not] automatically trump the claims of those with ‘no-rights.’”¹⁶⁵

If domestic European courts fail to properly balance these competing interests, a litigant can typically appeal to the European Court of Human Rights in Strasbourg, France (“European Court”). A litigant must first exhaust domestic remedies and meet domestic procedural requirements before seeking the European Court’s intervention.¹⁶⁶ The litigant can then file a completed application with the European Court, alleging an Article 8 violation in the litigant’s sovereign territory.¹⁶⁷ If these basic procedural requirements are met, the European

¹⁶⁴ Currently, forty-six European nations are a party to the ECHR. The Russian Federation was expelled from the Council of Europe on March 16, 2022, and is no longer a party to the ECHR. COUNCIL OF EUROPE, *The European Convention on Human Rights – How Does It Work?*, <https://www.coe.int/en/web/impact-convention-human-rights/how-it-works#:~:text=The%20Convention%20protects%20the%20rights,human%20rights%20and%20basic%20freedoms> [<https://perma.cc/C2FG-3WG2>]. E.U. nations are subject to additional laws and regulations that are layered on top of the ECHR. For example, see Consolidated Version of the Treaty on European Union arts. 6(2), 7, 49, Oct. 26, 2012, 2012 O.J. (C 326) 15.

¹⁶⁵ Susan Bright, *Manchester City Council v Pinnock (2010) Shifting Ideas of Ownership of Land*, in *LANDMARK CASES IN LAND LAW* (Nigel Gravells ed., 2013) (quoting VAN DER WALT, *supra* note 3, at 27).

¹⁶⁶ *The Admissibility of an Application*, EUR. CT. OF HUM. RTS., 2, https://www.echr.coe.int/documents/d/echr/COURtalks_Inad_Talk_ENG [<https://perma.cc/BU8H-62J8>]. Exhaustion usually requires the litigant to pursue their case to the highest court in their own country. The European Court has its own procedural requirements, including that an application must be submitted to the Court within six months of the final court decision of the originating country.

¹⁶⁷ For procedural filing rules, see EUR. CT. OF HUM. RTS., *Institution of Proceedings*, https://www.echr.coe.int/documents/d/echr/pd_institution_proceedings_eng [<https://perma.cc/QV3E-FZWS>]. For precise requirements of an application, see EUR. CT. OF HUM. RTS., *Rules of Court*, https://www.echr.coe.int/documents/d/echr/rule_47_eng [<https://perma.cc/88MW-9W44>].

Court will then review the application and determine whether to initiate official proceedings.¹⁶⁸ If the European Court accepts the application, it will conduct an official proceeding, perform a proportionality assessment, and ultimately release a written judicial opinion. This opinion then becomes a binding judgment on the European nation from which the litigants originate.¹⁶⁹

Article 8 theoretically underpins all European evictions. Article 8's proportionality principle provides a conceptual framework for judiciaries to strike a balance between the rights of ownership in a property against those with possessory interests in it. Article 8, as refined through case law, has developed into a context-dependent proportionality framework which provides all European courts more equitable and just framework in dispossessory actions.

B. Foundational Protections under Article 8

Article 8 fundamentally protects an individual's right to be left undisturbed within their home. Article 8 proportionality consists of both procedural and substantive rights. Not all European tenants invoke the procedural protection of Article 8—expressly raising proportionality as a legal defense in an eviction action. However, the substantive principles of Article 8 proportionality—but for narrow circumstances, tenants have a right to be undisturbed in their homes—are embedded within all European domestic landlord-tenant law and therefore undergird all eviction proceedings even if the procedural defense is never raised by the tenant.

Article 8 rests on two complementary values. First, it establishes an individual's rights, explicitly acknowledging that everyone has a right to “respect for private and family life, [their] home, and correspondence.”¹⁷⁰ Second, it acknowledges that these rights may only be curtailed “in accordance with the law and [what] is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country . . . for the protection of health or morals, or for the protection of the rights and freedoms of others.”¹⁷¹ Striking an equitable and just balance between the rights of the

¹⁶⁸ See generally *The Admissibility of an Application*, *supra* note 166.

¹⁶⁹ ECHR, *supra* note 5, art. 46.

¹⁷⁰ ECHR, *supra* note 5, art. 8(1).

¹⁷¹ ECHR., *supra* note 5, art. 8(2).

individual and society is at the heart of European proportionality analyses.

The definition of a private and family home under Article 8 is broad and a fact-based inquiry made by the courts. “Home” under Article 8 is not bound by a European sovereign’s legal classification.¹⁷² Instead, it is a fact-based inquiry that refers to any habitation where individuals have “sufficient and continuous links with a specific place.”¹⁷³ For example, European Courts found that when Roma families resided in a caravan on a greenfield site for four years without authority from the local government (and had children enrolled in local schools), there existed a home within the meaning of Article 8.¹⁷⁴

Similarly, the definition of family life under Article 8 is expansive. Contrary to what may seem apparent, Article 8’s version of “family life” is a fact-dependent inquiry. European courts will consider family life to be individuals related through lineality or marriage.¹⁷⁵ However, European courts also consider *de facto* relationships such as individuals living together, duration of relationships, intent to enter into a familial relationship, and the dependency of members within a relationship in order to determine whether an individual’s family life has been disturbed.¹⁷⁶ This is significant for eviction hearings, as a judicial determination of “family life” may give non-leaseholders—such as unmarried couples and even caretakers—recognized rights of possession to the property.

Article 8 extends to tenants in both private and public evictions because all European individuals are entitled to respect for their private and family life and home,¹⁷⁷ regardless of whether the property owner is a public entity or private party. Michel Vols and Sarah Fick have described the distinction between public and private evictions as the former being removal of individuals from their homes against their will by state authorities (such as local housing authorities or the police) and

¹⁷² *Guide on Article 8 of the European Convention on Human Rights*, *supra* note 157, ¶¶ 460–71.

¹⁷³ *Prokopovich v. Russia*, 11 Eur. Ct. H.R. 1, 9 (2004).

¹⁷⁴ *Faulkner v. Ireland*, App. Nos. 30391/18, 30416/18, ¶ 91 (March 8, 2022), <https://hudoc.echr.coe.int/eng?i=001-216764> [<https://perma.cc/Q6MK-YT49>].

¹⁷⁵ *Guide on Article 8 of the European Convention on Human Rights*, *supra* note 157, ¶¶ 335–36.

¹⁷⁶ *Id.*

¹⁷⁷ ECHR, *supra* note 5, art. 8(1).

the latter being the removal of individuals by private parties such as landlords, property owners, or banks.¹⁷⁸

All European eviction actions necessarily involve a collision between private and public laws and invoke Article 8 principles. The application of proportionality under Article 8 assuages this tension. Vols and Fick have theoretically described eviction proceedings as either being vertical or horizontal.¹⁷⁹ Vertical eviction actions are brought by public actors, such as a public housing authority.¹⁸⁰ These are described as vertical because the state (and by extension a state actor) exists on an elevated plane with obligations and duties owed to citizens.¹⁸¹ Horizontal eviction actions, by contrast, involve a private landlord evicting a tenant.¹⁸² Privity between these private actors means their duties and rights are imposed on each other, not the state, which situates them on the same horizontal plane, traditionally governed by private law.¹⁸³

However, Vols and Fick have argued that states have a duty to ensure that an individual's Article 8 rights are not disturbed, even in private horizontal disputes.¹⁸⁴ European courts have an affirmative obligation to intervene on behalf of an evicted tenant whose Article 8 rights have been infringed by a private landlord's dispossession. For a court to do otherwise would violate Article 8, because an arm of the state (the court) would be enforcing or sanctioning the infringement. U.S. legal scholars may recognize this rationale as being similar to the reasoning in *Shelley v. Kraemer*.¹⁸⁵ In *Shelley*, the U.S. Supreme Court famously held that racially restrictive housing covenants between private parties could not be legally enforced by the

¹⁷⁸ Sarah Fick & Michael Vols, *Horizontality and Housing Rights: Protection against Private Evictions from a European and South African Perspective*, 9 EUR. J. COMP. L. & GOVERNANCE 118, 120 (2022).

¹⁷⁹ *Id.* at 124–25.

¹⁸⁰ *Id.* at 123–25.

¹⁸¹ Lottie Lane, *The Horizontal Effect of International Human Rights Law in Practice*, 5 EUR. J. COMP. L. & GOVERNANCE 5, 15 (2018).

¹⁸² See Ficks & Vols, *supra* note 178, at 124; cf. Lane, *supra* note 181, at 16–25 (explaining that international human rights are not enforced horizontally against non-state actors).

¹⁸³ Ficks & Vols, *supra* note 178, at 124; John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 1 (2008). For extensive analyses of the “freedom of contract,” see generally P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180 (2011); David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. L.J. 51 (2013).

¹⁸⁴ Fick & Vols, *supra* note 178, at 126–30.

¹⁸⁵ *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

U.S. courts. The *Shelley* court concluded that U.S. courts that upheld private racialized housing contracts would violate the Equal Protection Clause of the 14th Amendment to the Constitution.¹⁸⁶ Likewise, for Europeans, a judicial sanction of horizontal illegalities, such as a court entering a dispossessory order in favor of the landlord without a proper consideration of Article 8 proportionality principles, would fundamentally implicate the vertical power of the state because European courts must promulgate and legally enforce eviction orders. Article 8 therefore functions as a vehicle to re-align European housing law by applying vertical rights to horizontal private law, a process some scholars refer to as the “constitutionalisation of private law.”¹⁸⁷

Notably, though, Article 8 proportionality has its limits. The First Additional Protocol to the ECHR entitles persons to the peaceful enjoyment of their possessions; an owner’s enjoyment of her possessions cannot be deprived except in the public interest and under domestic and international law.¹⁸⁸ Furthermore, Article 5 of the Treaty on the European Union (TEU) specifies that the application of proportionality cannot exceed what is necessary to achieve the objectives of the E.U. treaties.¹⁸⁹ Both principles apply to European landlords and their real property and function as a judicial backstop to ensure a tenant’s Article 8 rights are appropriately balanced against the rights and interests of the landlord in a European eviction action.

For a European eviction to be proportionally justified, it must be legal, legitimate, and necessary in a democratic society.¹⁹⁰ Jukka Viljan has argued that articulating a precise and fixed meaning of proportionality in the European eviction context may be impossible because European courts perform practical, fact-specific inquiries in eviction proceedings.¹⁹¹ European courts are required to analyze the individual factors that precede an eviction proceeding. These specific factors tend

¹⁸⁶ *Id.*

¹⁸⁷ Fick & Vols, *supra* note 178, at 125.

¹⁸⁸ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262, 262.

¹⁸⁹ Consolidated Version of the Treaty on European Union, *supra* note 164, art. 5(4).

¹⁹⁰ See *Winterstein v. France*, App. No. 27013/07 ¶¶ 75–78 (Oct. 7, 2013) <https://hudoc.echr.coe.int/fre?i=001-127539> [<https://perma.cc/9FXC-VZBZ>] (quoting ECHR, *supra* note 5, art. 8(2)); Hous. Rts. WATCH, *supra* note 163.

¹⁹¹ Vols, *supra* note 137, at 728.

to include “the risk of homelessness, the lack of a specific need for an eviction, and the personal circumstances and individual characteristics of the evictee.”¹⁹² Individual circumstances and characteristics can include a tenant’s health status, vulnerability, age, duration of occupation, and long-term connection to the property.¹⁹³ The vulnerability of historically marginalized groups and the ability to find alternative accommodations are also of special consideration in proportionality assessments but are not dispositive alone.¹⁹⁴ In other words, each eviction proceeding that invokes a proportionality assessment varies depending on the unique facts of the case. As Christoph Schmid and Jason Dinse observe, the European Court’s approach to tenancy law typically is structured around four themes: (1) the landlord’s substantive and procedural due process rights, (2) the tenant’s substantive and procedural due process rights against eviction, (3) the tenant’s right of non-discrimination, and (4) the existence of public and private contracts.¹⁹⁵

1. *Landlords’ Due Process Rights*

European courts performing proportionality assessments in dispossessory actions do not forego a landlord’s rights in a property; proportionality merely provides a more just and equitable framework for litigating dispossessory actions. The First Protocol of the ECHR re-asserts that landlords’ rights to peaceful enjoyment of their property cannot be interfered with without just interference.¹⁹⁶ Proportionality, then, is not the evisceration of a landlord’s rights in a property but instead

¹⁹² *Id.*

¹⁹³ *Id.* at 728–29.

¹⁹⁴ See *Faulkner v. Ireland*, App. Nos. 30391/18, 30416/18, ¶ 91 (March 8, 2022), <https://hudoc.echr.coe.int/eng?i=001-216764> [<https://perma.cc/Q6MK-YT49>]. See also *Hirtu v. France*, App. No. 24720/13, Aug. 14, 2020, <https://hudoc.echr.coe.int/fre?i=001-202442> [<https://perma.cc/LX8A-P4N9>] (concluding that French authorities failed to appropriately consider the evictees’ marginalized ethnic status and failed consider the availability of suitable alternative housing accommodations).

¹⁹⁵ Christoph U. Schmid & Jason R. Dinse, *Towards a Common Core of Residential Tenancy Law in Europe? The Impact of the European Court of Human Rights on Tenancy Law 6–7* (Ctr. of Eur. L. & Pol. Working Paper No. 1/2013, 2013), https://www.uni-bremen.de/fileadmin/user_upload/fachbereiche/fb6/fb6-Forschung/ZERP/PDF/Arbeitspapiere/wp1_2013.pdf [<https://perma.cc/8C6J-3V7Z>] (subsequently published in Portuguese at 89 UNIVERSIDADE DE COIMBRA FACULDADE DE DIREITO BOLETIM 305).

¹⁹⁶ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, *supra* note 188.

requires a context-dependent balancing of all interests in the property.

The European Court has long considered the viability of a landlord's substantive and procedural due process rights when conducting a proportionality assessment in an eviction action. In *Immobiliare Saffi v. Italy*, a corporate owner of an apartment sought to evict holdover tenants. The corporate owner purchased the apartment building and provided formal termination notice to the tenants at the natural expiration of the lease.¹⁹⁷ The Italian Magistrate Court "upheld the validity of the notice to quit and ordered that the premises must be vacated" within one year, but this time period was postponed for several more years by legislation providing for "suspension of the enforcement of orders for possession".¹⁹⁸ The tenants remained on the property for over ten years after the original termination notice despite the landlord attempting to evict them several times.¹⁹⁹ The owner was only able to take possession when the tenant died.²⁰⁰

In ruling against the tenants, the European Court criticized the Italian domestic courts and the Italian government for failing to properly balance the landlord's substantive and procedural rights to the property against the tenants' right to occupy the property under Italian domestic law.²⁰¹ The European Court held that the Italian government legitimately promulgated rent control and tenancy extensions to preserve social and public order due to chronic housing shortages.²⁰² However, the Italian and European Court records were silent on why the Italian government provided these particular tenants such extraordinary protections.²⁰³ While the public interest was served by the Italian statutes, the Italian courts had not proportionally balanced the landlord's interests in the property against these precise tenants. Therefore, the European Court held the Italian courts and government had no legitimate reason to deny the landlord possession of the property for such an extended

¹⁹⁷ *Immobiliare Saffi v. Italy*, 1999-V Eur. Ct. H.R. 73, 81(1999).

¹⁹⁸ *Id.* at 81–83, 94.

¹⁹⁹ *Id.* at 81.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 103.

²⁰² *Id.* at 104.

²⁰³ *Id.*, at 106.

period when the tenants had no extenuating circumstances to merit such extraordinary protection.²⁰⁴

Crucially, European landlords' substantive and procedural rights are not absolute. In *Jansons v. Latvia*, Mr. Jansons was a holdover tenant pursuant to a valid lease agreement with a former private landlord.²⁰⁵ The new private landlord continued to accept Mr. Jansons's rent, and Mr. Jansons believed that his original lease agreement had been *de facto* extended.²⁰⁶ The new landlord demanded Mr. Jansons sign a new short-term tenancy lease with unfavorable terms for Mr. Jansons. He refused. The new landlord then stopped accepting Mr. Jansons' rent and sent him a termination notice, even going so far as to send armed guards to the unit after Mr. Jansons refused to vacate.²⁰⁷ Mr. Jansons went to the courthouse to file a criminal complaint against the new landlord. When he returned, the armed guards refused to let Mr. Jansons re-enter the property.²⁰⁸ Ultimately, the landlord changed the unit's locks and moved all of Mr. Jansons's possessions into a storage unit.²⁰⁹ Mr. Jansons was forced to bring two European Court actions related to his Latvian eviction.

Mr. Jansons's first case in the European Court was met with scathing criticism about the eviction procedure of the Latvian landlord and the local authority's complicity. The Court first made clear that Mr. Jansons's holdover tenancy was an Article 8 home because his three-year duration in the unit amounted to a "sufficient and continuous link" with the unit to give him rights in the property.²¹⁰ The Court admonished the new landlord's usage of armed guards to force Mr. Jansons's eviction and the Latvian's government's failure to meet its obligation under Article 8 to ensure effective protection for Mr. Jansons's

²⁰⁴ *Id.*

²⁰⁵ *Jansons v. Latvia*, App. No. 1434/14, ¶¶ 5–9 (Jan. 20, 2023) <https://hudoc.echr.coe.int/fre?i=001-219070> [https://perma.cc/XR98-7UTY].

²⁰⁶ *Id.*, ¶ 8.

²⁰⁷ *Id.*, ¶¶ 8–10.

²⁰⁸ *Id.*, ¶ 11.

²⁰⁹ *Id.*, ¶¶ 11–18.

²¹⁰ *Id.*, ¶¶ 52–54. The European Court also cited case law that a "home" under Article 8 is a fact-based inquiry and does not depend on domestic law classification. A place is considered an Article 8 home if it is an applicant's actual place of residence (even if a registered address is elsewhere) and does not depend on the home being a permanent living space or the applicant physically residing in the space at the time the right to home is violated. *Id.*

right to respect for his home.²¹¹ Further, the European Court held that a legal dispute existed between Mr. Jansons and the new landlord over the use and enjoyment of the property that should have been resolved by a Latvian court under relevant domestic law. The Court ultimately concluded that Mr. Jansons's Article 8 rights had been violated because the Latvian government failed to uphold its own procedural frameworks that safeguarded a tenant against unjustifiable interference to use and enjoy his own home.²¹²

Mr. Jansons returned to the European Court in a second action because Latvian authorities failed to provide him judicial relief after his first appearance before the Court. Rather than reiterate its previous holding, the European Court performed a proportionality assessment. The Court held that States have positive and negative obligations to their citizens that require "a determination of whether a fair balance has been struck between the competing interests of the individual and of the community as a whole."²¹³ The Court reasoned that the new landlord was entitled to rights of possession and that the Latvian government had a legitimate interest in securing the landlord's substantive and due process rights of possession.²¹⁴ However, the Court held that the new landlord's changing of the locks, forceful entry of the apartment (what U.S. lawyers would call a "self-help eviction"), and the involvement of armed security guards was "the most extreme form of interference with the right to respect for one's home."²¹⁵ Ultimately, the Court concluded that the new landlord's actions were, in the parlance of Article 8, "not [] necessary in a democratic society" due to a failure of the eviction to have a requisite degree of proportionality.²¹⁶

European courts balance the interests of both the specific landlord and the tenant involved in the dispossessory action. Domestic law must provide appropriate substantive and procedural rights to the landlord with respect to possession of their own property. However, as case law makes clear, domestic European laws can—and do—provide increased protections for tenants that are compatible with the doctrine of proportionality.

²¹¹ The Court asserted that Latvian police inactivity "indirectly encouraged further unlawful actions." *Id.*, ¶ 79.

²¹² *Id.*, ¶¶ 89–90.

²¹³ *Id.*, ¶ 74.

²¹⁴ *Id.*, ¶ 70.

²¹⁵ *Id.*, ¶ 68.

²¹⁶ *Id.*, ¶ 70.

Proportionality requires that the specific circumstances of the tenant and the landlord be evaluated and considered. A landlord is not entitled to evict a tenant on a whim, but a tenant is not entitled to limitless eviction protection. Both the landlord and tenant are entitled to substantive and due process rights that must be appropriately weighed in an eviction.

2. *Tenants' Due Process Rights*

Article 8 creates binding legal obligations for all European nations to maintain safeguards and requirements to ensure that a tenant claiming an Article 8 defense is afforded procedural and substantive due process.²¹⁷ All Article 8 litigants that raise a proportionality defense in a European court must be afforded procedural due process.²¹⁸ However, even if a tenant fails to procedurally raise proportionality, thereby waiving it as a defense, there is a presumption that proportionality is substantively embedded in all European domestic landlord-tenant law.²¹⁹ Procedural due process requires that the eviction be lawful and for a legitimate purpose (including the landlord's rights as the property owner) and that courts be involved.²²⁰ Substantive due process under Article 8 is expansive and considers whether the eviction was "necessary in a democratic society."²²¹

All people at risk of eviction have the right to a proportionality assessment even if the tenant's right to occupy has been validly terminated under domestic law.²²² Further, the European Court has held that Article 8 requires courts to consider "the particular circumstances of the case . . . [and] the serious nature of the decisions to be taken" in order to assess if a tenant was justly involved in the judicial process to a "degree sufficient to provide them with the requisite protection of their

²¹⁷ See *Guide on Article 8 of the European Convention on Human Rights*, *supra* note 157, ¶ 13.

²¹⁸ Fick & Vols, *supra* note 178, at 121–22.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*; ECHR, *supra* note 5, art. 8(2).

²²² Schmid & Dinse, *supra* note 195, at 10; *see also* McCann v. United Kingdom, App. No. 18984/91 (Sept. 20, 1995), <https://hudoc.echr.coe.int/eng?i=001-57943> [<https://perma.cc/37VN-C69C>]; Kay v. United Kingdom, App. No. 37341/06 (Dec. 21, 2010) <https://hudoc.echr.coe.int/eng?i=001-100508> [<https://perma.cc/P66C-TRZF>].

interests.²²³ Additionally, the European Court has demanded that Article 8 procedural due process deprivations must be judged in “the light of” other tenets of international law.²²⁴

A tenant’s substantive rights under Article 8 are broad because they are weighed against what is necessary in a democratic society. Article 8 rights are context-dependent, but relative factors to the proportionality analysis include the tenant’s health status, vulnerability, age, whether they are a member of a historically marginalized group, and long-term connection to the property.²²⁵ A significant portion of these substantive due process rights under Article 8 have been developed through non-housing proceedings, such as deportation, domestic abuse, and police searches and seizures.²²⁶

The case of *Brežec v. Croatia* illustrates the importance of long-term connection to the property under a proportionality assessment. In *Brežec*, a woman moved into a public flat in Mlini, Dubrovnik in 1970.²²⁷ In 1997, the Republic of Croatia sold the unit to a private landlord. In 2005, the private landlord sought to evict Ms. Brežec because no legal contract existed evidencing Ms. Brežec’s right to occupy the flat.²²⁸ Ms. Brežec argued that the paperwork had been lost in the war in Croatia and that with her forty-year residency, several witnesses could attest to her legal entitlement to the flat.²²⁹ She was denied judicial relief and evicted.²³⁰ On appeal, the European Court

²²³ Case of W v. United Kingdom, App. No. 9749/82, ¶ 64 (July 8, 1987) <https://hudoc.echr.coe.int/eng?i=001-57600> [https://perma.cc/Z2S6-2AXB].

²²⁴ *Ignaccolo-Zenide v. Romania* 2000-I Eur. Ct. H.R. 241, 244; *D’Alconzo v. Italy*, App. No. 64297/12, (May 23, 2017) <https://hudoc.echr.coe.int/eng?i=001-171499> [https://perma.cc/CN63-LDWD]; *Barnea and Caldara v. Italy*, App. No. 37931/15 (Sept. 22, 2017) <https://hudoc.echr.coe.int/eng?i=001-174445> [https://perma.cc/S8XB-TTUH].

²²⁵ *Vols*, *supra* note 137, at 728–29; *Faulkner v. Ireland*, App. Nos. 30391/18, 30416/18, ¶ 91 (March 8, 2022), <https://hudoc.echr.coe.int/eng?i=001-216764> [https://perma.cc/Q6MK-YT49].

²²⁶ *Guide on Article 8 of the European Convention on Human Rights*, *supra* note 157, ¶¶ 126–35, 260–61, 444–50. For example, under Article 8, the European Court has found that laws governing police search and seizures must be “particularly precise,” reasonable and proportional to the aim pursued. *See Sallinen v. Finland*, App. No. 50882/99, ¶ 90 (Dec. 27, 2005) <https://hudoc.echr.coe.int/eng?i=001-70283> [https://perma.cc/PZL4-E5Q2]; *McLeod v. United Kingdom*, App. No. 24755/94, ¶¶ 38–45, 51 (Sept. 23, 1994) <https://hudoc.echr.coe.int/eng?i=001-58241> [https://perma.cc/MU8C-U4SU].

²²⁷ *Brežec v. Croatia*, App. No. 7177/10, ¶ 6 (Oct. 18, 2013) <https://hudoc.echr.coe.int/eng?i=001-122432> [https://perma.cc/DF9Y-8TTK].

²²⁸ *Id.*, ¶ 9.

²²⁹ *Id.*, ¶ 47.

²³⁰ *Id.*, ¶ 11.

stressed that Ms. Brežec had remained in the unit for an extensive length of time, during a tumultuous time for the region.²³¹ Moreover, the Court observed the eviction was something of existential concern for Ms. Brežec and that the private landlord had expressly promised to provide accommodation for all tenants during the transition to privatization.²³² As a result, the Court held that Ms. Brežec's eviction was not necessary in a democratic society because Ms. Brežec was not "afforded adequate procedural safeguards" by the Croatian courts and the eviction order was "not fair" in light of her circumstances.²³³

Several Article 8 substantive due process cases have involved persons belonging to historically marginalized ethnic and minority groups such as the Irish Travellers and Roma. The European Court has held that special consideration and weight must be given in proportionality analyses that involve vulnerable peoples with different lifestyles.²³⁴ The European Court often chastises European eviction courts for failing to consider the health and wellness of marginalized peoples, eviction's effect on the family unit and young children, and the inability of evicted tenants to find alternative housing.²³⁵ In a recent Irish case, *Clare County Council v. McDonagh*, the European Court asserted that the underprivileged and marginalized status of Irish Travellers should be taken into account in a proportionality assessment.²³⁶ Rachael Walsh described *McDonagh* as signaling that Article 8 proportionality is "focused 'much more on the social position, economic status and personal circumstance of the parties involved in property relations or disputes and less on their legal status or established property rights.'"²³⁷

²³¹ *Id.*, ¶ 47.

²³² *Id.*

²³³ *Id.*, ¶¶ 44–51.

²³⁴ *Connors v. United Kingdom*, App. No. 66746/01, ¶ 84 (Aug. 27, 2004) <https://hudoc.echr.coe.int/eng?i=001-61795> [https://perma.cc/2MYK-PHF2].

²³⁵ See, e.g., *id.*, ¶ 85.

²³⁶ *Clare Cnty. Council v. McDonagh*, [2022] 2 IR 122 (SC) (Ir.).

²³⁷ Rachael Walsh, *Property, Proportionality, and Marginality*, VERFASSUNGSBLOG (Feb. 4, 2022), <https://verfassungsblog.de/property-proportionality-and-marginality> [https://perma.cc/55HW-PVLD] (quoting VAN DER WALT, *supra* note 3, at 245).

3. *Tenants' Right of Non-Discrimination*

All European nations have an obligation to protect human rights within their own borders.²³⁸ Article 14 of the ECHR, which prohibits discrimination,²³⁹ is often read in conjunction with Article 8 and triggers a proportionality assessment in eviction proceedings. European courts must engage in a delicate balancing between two competing interests: respecting the sovereignty of domestic European laws and upholding the requisite demands of supranational human rights.

Questions concerning sexuality and gender discrimination are prevalent in European dispossessory disputes due to the failure of some European nations to modernize statutory and constitutional regimes to accommodate evolving social norms. In *Karner v. Austria*, a gay tenant entered into a lease agreement with a private landlord for a Vienna flat.²⁴⁰ The man's partner subsequently moved into the unit. Both men began to pay rent for the flat, but the partner was never listed as a tenant on the lease agreement. Several years later, the original tenant died and his partner exercised rights under an Austrian rental law that allowed surviving family members to take over a tenancy.²⁴¹ The purpose of the law was to protect married people from being homeless due to a sudden loss of a partner.²⁴² The private landlord took steps to evict the surviving partner.²⁴³ In subsequent legal proceedings, the man pled that the landlord violated his rights under the Austrian rental law.²⁴⁴ However, the Austrian Supreme Court held the private eviction was proper because the man's gender and sexual identity prevented him from being considered a "life companion" under the rental law.²⁴⁵

²³⁸ See "Relating to Certain Aspects of the L. on the Use of Languages in Educ. in Belgium" v. Belgium, App. Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, ¶ 10 (July 23, 1968) <https://hudoc.echr.coe.int/eng?i=001-57525> [<https://perma.cc/7BBC-BQX5>] see also ALICE DONALD, JANE GORDON, & PHILIP LEACH, THE UK AND THE EUROPEAN COURT OF HUMAN RIGHTS 154 (2012), https://www.equalityhumanrights.com/sites/default/files/83._european_court_of_human_rights.pdf [<https://perma.cc/E2FK-X698>].

²³⁹ ECHR, *supra* note 5, art. 14.

²⁴⁰ *Karner v. Austria*, 2003-IX Eur. Ct. H.R. 199, 206.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

Before the European Court, the surviving partner challenged the proportionality of the eviction order under Articles 8 and 14. The Austrian government did not deny that the surviving partner was treated differently.²⁴⁶ The Austrian government claimed it had a duty to protect the traditional family unit and that its denial to recognize the partner as a “life companion” was an objective and reasonable justification.²⁴⁷ While the European Court contemplated that protection of the traditional family unit could have merit, it ultimately ruled that “protecting the family in the traditional sense is rather abstract.”²⁴⁸ Further, the Court reasoned that proportionality requires a proper means-end fit.²⁴⁹ To satisfy proportionality, the surviving partner’s eviction under Austrian landlord-tenant law had to be necessary to achieve the Austrian government’s aim of “protecting the family in the traditional sense.”²⁵⁰ The European Court concluded that it could not see the Austrian government “advanc[ing] any arguments that would allow such a conclusion” and ruled in favor of the surviving partner.²⁵¹

Other European nations have grappled with proportionality in dispossessory actions that involve the collision between modern progressive values and so-called traditional norms and values embedded in landlord and tenant law. Notably, in *Kozak v. Poland*, the European Court chastised Poland’s national constitution for defining marriage as a “union of a man and a woman,”²⁵² which prevented Piotr Kozak, a gay man, from having tenancy rights.²⁵³ The European Court held in *Kozak* that proportionality demanded judicial balancing of Poland’s constitutional protection of family rights against human rights treaties and the recognition that *de facto* marital cohabitation, including unmarried LGBTQ relationships. These relationships, the Court stated, are afforded Article 8 protection.²⁵⁴ The Court reasoned that intrusions which infiltrate the “intimate and vulnerable sphere of an individual’s private life” require “particularly

²⁴⁶ *Id.* at 211.

²⁴⁷ *Id.* at 206, 211.

²⁴⁸ *Id.* at 212–213.

²⁴⁹ *Id.* at 213.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Kozak v. Poland*, App. No. 13102/02, ¶ 98 (June 2, 2002) <https://hudoc.echr.coe.int/eng?i=001-97597> [https://perma.cc/8QDD-V9UR] (quoting KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION], July 16, 1997, art. 18 (Pol.)).

²⁵³ *Id.*, ¶ 2.

²⁵⁴ *Id.*, ¶¶ 96–99.

“weighty reasons” to justify an eviction based on those intrusions.²⁵⁵ The European Court then concluded that Mr. Kozak’s eviction based on his gender was an unjustifiable and intrusive violation of his Article 8 and Article 14 rights.²⁵⁶

As the European Court’s *Karner* and *Kozak* judgments make plain, courts conducting proportionality assessments in eviction actions must “take into account developments in society and changes in the perception of social, civil-status and relational issues.”²⁵⁷ These factors include conducting proportionality assessments to recognize that there is “not just one way or one choice in the sphere of leading and living one’s family or private life.”²⁵⁸

4. *Public v. Private Landlords*

Whether the landlord is a public or private entity is significant for proportionality analysis. Article 8 expressly states that a public authority cannot interfere with an individual’s home unless the interference is necessary in a democratic society.²⁵⁹ Yet, Article 8’s protections are not limited to actions taken by a public authority; they extend to private parties as well. While European Courts hold public landlords and public contracts under a higher level of judicial scrutiny in proportionality assessments than private landlords and private contracts,²⁶⁰ European nations must ensure that Article 8 rights are affirmatively respected between private parties.²⁶¹

The distinction between private and public contracts under Article 8 is rarely a concern in civil law countries because most civil countries, like the Netherlands and Germany, have crafted strong tenant protections in their domestic codes. In common law states, such as the United Kingdom, however,

²⁵⁵ *Id.*, ¶ 92.

²⁵⁶ *Id.*, ¶ 99.

²⁵⁷ *Id.*, ¶ 98.

²⁵⁸ *Id.*

²⁵⁹ ECHR, *supra* note 5, art. 8(2).

²⁶⁰ See *Vrzić v. Croatia*, App. No. 43777/13, ¶ 63–73 (Oct. 12, 2016) <https://hudoc.echr.coe.int/eng?i=001-164681> [<https://perma.cc/E9SZ-NFQM>] (applying a “somewhat different” proportionality test); but see *F.J.M. v. United Kingdom*, App. No. 76202/16, ¶¶ 37–45 (Nov. 6, 2018) <https://hudoc.echr.coe.int/fre?i=001-188124> [<https://perma.cc/8RPG-9DLY>] (holding that a proportionality test was not necessary because “the legislature has prescribed how [the private parties’] respective Convention rights are to be respected.”).

²⁶¹ *Guide on Article 8 of the European Convention on Human Rights*, *supra* note 157, ¶ 172 (citing *McCann v. United Kingdom*, App. No. 18984/91 (Sept. 20, 1995), <https://hudoc.echr.coe.int/eng?i=001-57943> [<https://perma.cc/37VN-C69C>]).

there is typically a greater distinction between private and public property laws. Common law nations typically preserve a landlord's right to exclude their private property. Unsurprisingly, then, the United Kingdom has generated several dispossessory cases invoking Article 8 that have involved private and public contracts.

The plain language of Article 8 indicates that a *public authority* may not interfere with an individual's right to respect for private and family life but-for certain enumerated exceptions.²⁶² The European Court's foundational *McCann v. United Kingdom* made clear that public landlords in the United Kingdom are bound by Article 8.²⁶³ In *McCann*, a British family lived in a house owned by the local public authority.²⁶⁴ The British couple's marriage broke down, and Mrs. McCann and her two children left the home.²⁶⁵ Mrs. McCann was then rehoused by the local public authority due to domestic violence.²⁶⁶ Due to severe substandard conditions, the local public housing authority deemed the unit uninhabitable.²⁶⁷ However, Mr. McCann made amends with his wife and began making repairs to the second home so Mrs. McCann and her children could remain in the unit.²⁶⁸ A local housing officer discovered that the unit was still occupied and induced Mrs. McCann to sign a termination agreement.²⁶⁹ The local housing authority eventually brought eviction proceedings. The European Court held that anyone at risk of an Article 8 interference of the magnitude of eviction is entitled to a proportionality defense, even if their right of possession of the property is terminated under domestic law.²⁷⁰ The European Court concluded that the public housing authority violated Article 8 because it bypassed the British statutory scheme with the termination agreement and did not give

²⁶² ECHR, *supra* note 5, art. 8(2).

²⁶³ *McCann v. United Kingdom*, App. No. 18984/91, ¶¶ 50–55 (Sept. 20, 1995), <https://hudoc.echr.coe.int/eng?i=001-57943> [<https://perma.cc/37VN-C69C>].

²⁶⁴ *Id.*, ¶ 7.

²⁶⁵ *Id.*, ¶ 8.

²⁶⁶ *Id.*, ¶ 9.

²⁶⁷ *Id.* The local housing authority's inspection deemed the unit would require an investment of 15,000-pound sterling to make the unit meet habitability standards.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*, ¶ 50. The Court opined that "the loss of one's home is a most extreme form of interference with the right to respect for the home."

any consideration to Mrs. McCann's right to respect for her home.²⁷¹

After the conclusion of *McCann*, British courts were hesitant to adhere to its principles. In *Manchester City Council v. Pinnock*, a public housing case involving a shorthold tenancy,²⁷² the Supreme Court of the United Kingdom opined that Article 8 proportionality would only merit suspension or revocation of a termination order, and continued possession by a U.K. tenant, in exceptional cases.²⁷³ The British Court, in part, assessed that the European Court's jurisprudence was "unambiguous and consistent" but that British courts were not "bound to follow every decision" of the European Court.²⁷⁴ Rather, British courts were required to "take into account" European Court decisions. The Court in *Pinnock* determined that "in virtually every case where a residential [tenant] has no contractual or statutory protection, and the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession in favor of the landlord would be proportionate."²⁷⁵ In many cases, eviction analysis "is best left to the good sense and experience of judges sitting in the County Court."²⁷⁶ If an Article 8 claim is raised in the domestic courts, that court should "initially consider it summarily, and if, as will no doubt often be the case, the court is satisfied that, even if the facts relied on are made out, the point would not succeed, it should be dismissed."²⁷⁷

271 *Id.*, ¶¶ 51–55.

272 See Mark Jordan, *The British Assured Shorthold Tenancy in a European Context: Extremity of Tenancy Law on the Fringes of Europe*, in *TENANCY LAW AND HOUSING POLICY IN EUROPE: TOWARDS REGULATORY EQUILIBRIUM*, 239-50. (Christoph U. Shmid, ed., 2018) (explaining that shorthold tenancies are a form of rental control that affords tenants six months of rental protection which is then followed by no tenant protection; shorthold tenancies became the default tenancy arrangement in the United Kingdom by private landlords under Thatcher reforms in the 1980's, which attempted to make the United Kingdom more private market friendly.); see generally EMILY WALSH, *A GUIDE TO LANDLORD AND TENANT LAW* (2018).

273 *Manchester City Council v. Pinnock* [2010] UKSC 45, [51]–[54], [2011] 2 AC 104 (appeal taken from Eng. & Wales) <https://www.bailii.org/uk/cases/UKSC/2011/6.html> [<https://perma.cc/E97B-P5PJ>].

274 *Id.* at [46].

275 *Id.* at [54].

276 *Id.* at [57].

277 *Id.* at [61].

The *Pinnock* decision²⁷⁸ created considerable confusion about the application of Article 8 proportionality in the United Kingdom, particularly in cases involving private landlords. Most recently, *F.J.M. v. United Kingdom* appeared to confront the applicability of Article 8 to evictions initiated by private parties. In *F.J.M.*, a tenant with severe psychiatric and behavioral health problems was evicted due to a failure to satisfy mortgage payments on a private residence.²⁷⁹ The tenant argued that domestic British courts should have permitted her to assert a proportionality defense because her eviction was not necessary in a democratic society. *F.J.M.* failed to raise any arguments that applicable British laws lacked substantive proportionality. The European Court articulated the *McCann* principle that tenants were entitled to a proportionality defense primarily applied in cases where they had been living in “State-owned or socially-owned accommodation[s].”²⁸⁰ As a result, the European Court held that the tenant was not entitled to an Article 8 defense because (1) U.K. law sufficiently protected her rights; and (2) the requirement of a proportionality assessment before entering a possession order would be “wholly unpredictable and potentially very damaging” on the private rental sector in the United Kingdom.²⁸¹

At first glance, the *F.J.M.* decision appeared to close the door on the judicial application of a proportionality analysis in cases involving private landlords when the court determines that underlying domestic law sufficiently balances the rights of landlords and tenants. However, not all European eviction scholars agree with such a reading of *F.J.M.* Michel Vols and Sarah Fick argue that commentators have fundamentally misread *F.J.M.*²⁸² Vols and Fick have conceded that Article 8 proportionality is a vertical legal principle between public and private actors. But the obligations imposed by Article 8 are still enforced by state organs (courts) against private parties through domestic laws.²⁸³ Essentially, as the U.S. Supreme Court determined in *Shelley v. Kraemer*, contracts (like lease agreements or home sales) between private parties still rely on public entities—court systems—for

²⁷⁸ For further discussion on *Pinnock*, see generally Dave Cowan & Caroline Hunter, *Yeah But, No But – Pinnock and Powell in the Supreme Court*, 75 MOD. L. REV. 78 (2012).

²⁷⁹ *F.J.M. v. United Kingdom*, App. No. 76202/16, ¶¶ 3–5 (Nov. 6, 2018) <https://hudoc.echr.coe.int/fre?i=001-188124> [<https://perma.cc/8RPG-9DLY>].

²⁸⁰ *Id.*, ¶ 37.

²⁸¹ *Id.*, ¶ 43.

²⁸² Fick & Vols, *supra* note 178, at 138.

²⁸³ *Id.* at 151.

enforcement. Because private contracts still fundamentally involve public entities, European nations have a positive obligation to protect all people from interference with their Article 8 rights, including tenants renting from private landlords.²⁸⁴ Therefore, by not applying a proportionality assessment in an eviction action initiated by a private landlord, a state may fail to adhere to its vertical Article 8 obligations.²⁸⁵

Analyzing *F.J.M.*, Vols and Fick have stressed that (1) underlying British law did not provide the tenant a proportionality defense in her private law eviction; and (2) the British courts denied the tenant a procedural proportionality defense.²⁸⁶ Moreover, because the *F.J.M.* tenant did not challenge British law itself as violating her substantive Article 8 rights on appeal—known under British law as a declaration of incompatibility²⁸⁷—the European Court’s analysis was limited to merely assessing the procedural actions of the British court.²⁸⁸ The *F.J.M.* tenant may have been successful if she had challenged the substantive proportionality of the British law, much like the tenant in *Karner v. Austria* challenged the application of the Austrian rental law’s interpretation of “life companion.”

A recent British case in *F.J.M.*’s wake, *Dean v. Mitchell*, concluded with a finding of incompatibility of British law with Article 8. *Dean v. Mitchell* involved two private parties and a dispute over a mobile home owned by Mr. Mitchell that sat on a campsite owned by Ms. Dean and others. Mr. Mitchell had a license to rent the site, but Ms. Dean ultimately moved for possession of the land. British law did not entitle Mr. Mitchell with tenant-like protections because his living situation fell outside statutory protections even for certain mobile homes. Mr. Mitchell successfully argued that his mobile home *should* be protected based on his specific circumstances and that, furthermore, the British law in question, the Mobile Homes Act 1983, was not compatible with Article 8 of the ECHR. The judge agreed, and an order of incompatibility with Article 8

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ A declaration of incompatibility is enshrined in British law pursuant to section 4 of the Human Rights Act of 1998. The law gives the authority for higher British courts to evaluate the compatibility of domestic law with the ECH and then issue a declaration if the domestic law is incompatible. For commentary on declarations of incompatibility, see Jeff King, *Parliament’s Role Following Declarations of Incompatibility Under the Human Rights Act*, in *PARLIAMENTS AND HUMAN RIGHTS: REDRESSING THE DEMOCRATIC DEFICIT* (2015).

²⁸⁸ Fick & Vols, *supra* note 178, at 151.

was entered.²⁸⁹ Scholars Jennifer Russell and Lewis Graham have asserted that *Dean v. Mitchell* demonstrates “the influence of human rights law” in dispossessory actions, “notwithstanding the horizontal nature of the dispute and Ms. Dean *et al.*’s strong property rights.”²⁹⁰ Therefore, there remains hope for the application of Article 8 and the *McCann* principle to private landlords in the aftermath of *F.J.M.*

European proportionality analyses are context-dependent. European courts look at the way in which *both* parties are situated before eviction proceedings commence. These individual, context-dependent factors, often include a tenant’s risk of homelessness, health status, vulnerability, age, duration of occupation of the rental unit, and a long-term connection to Blackacre. Even with these commonalities, civil and common law countries conduct proportionality assessments differently.²⁹¹ Schmid and Dinse’s four-part structure of European proportionality demonstrates the ways in which specific context affects the judicial determination of whether an order of possession should be entered for a property owner. Nowhere is this more evident than in proportionality analyses involving private versus public leaseholds in common law countries like the United Kingdom. However, as Vols and Fick have argued, this does not mean cases involving private landlords are immune to proportionality under Article 8. The *F.J.M.* decision was limited to the European Court reviewing whether the British courts properly followed their own domestic procedure rather than a

²⁸⁹ *Dean v. Mitchell* [2023] EWHC 1479 (KB). <https://www.bailii.org/ew/cases/EWHC/KB/2023/1479.html> [<https://perma.cc/4WEY-TWRH>].

²⁹⁰ Jennifer Russell & Lewis Graham, *Dean v. Mitchell: The Resurrection of Article 8 in Private Possession Proceedings?* 2023 CONVEYANCER AND PROPERTY LAWYER 388, 396–97.

²⁹¹ Vols, *supra* note 137, at 748 (“The results presented above show that Member States balance residents’ and landlords’ rights in various ways. In countries such as Germany, Belgium and the Netherlands, the shift towards more protection of tenants did not cause a (legal) uproar at all, due to the already strong tenant protection in those jurisdictions. Under Spanish law, tenants are not entitled to advance a proportionality defence in court to have a court look at the context of their specific eviction case. Yet, Spanish Parliament discusses a Bill that will give tenants that right. In the United Kingdom, tenants in the public and social rental sectors are entitled to put forward a proportionality defence in court and ask the judge to check the proportionality of the eviction in their specific cases. Still, in the private rentals sector tenants do not have the right to this type of individualized proportionality testing, because the Supreme Court held that Parliament already took the proportionality of making an order for possession into account through the Housing Act 1988. In countries such as Sweden and France, courts accept that residents are entitled to ask court to review the proportionality of the eviction in their specific case but take a slightly conservative stance that fits in the traditional rights paradigm”).

conclusion that proportionality assessments are unavailable to tenants renting from private market landlords. Even with the availability of a proportionality defense for tenants in an eviction hearing, European proportionality assessments do not guarantee a particular outcome. Rather, European proportionality shifts the rights framework from one rooted in property and contract law principles to a progressive property schema infused with social concerns that justly and equitably consider the rights of both the owners and occupants of property.

III

PROPORTIONAL POSSESSION IN THE UNITED STATES

Europe provides an optimistic example of how to balance competing interests and concerns in dispossessory hearings. Of course, the United States is not a party state to the ECHR or its sister treaties, nor is the United States bound by European laws or the European Court. The United States has not ratified the ICESCR. Modern U.S. eviction law, instead, should reflect the way the United States “resolve[s] conflicting claims, visions, values, and histories.”²⁹²

The current state of U.S. eviction processes and their downstream effects paints an unflattering portrait of one of the wealthiest countries in the world. The United States has the highest eviction rate of OECD countries.²⁹³ U.S. landlords file over 3.6 million evictions each year.²⁹⁴ Eviction filings have increased by over 50% in some U.S. cities since the COVID-19 pandemic.²⁹⁵ The Eviction Lab, which tracks evictions in thirty-four cities in ten U.S. states, has reported over one million evictions from September 2022 to August 2023.²⁹⁶ State-level housing policies have a strong association with county-level eviction filing risk.²⁹⁷ The alarming number of U.S. evictions

²⁹² UNDERKUFFLER, *supra* note 139, at 11.

²⁹³ ORGANISATION FOR ECON. CO-OPERATION & DEV., *HC3.3. Evictions*, 3, (Apr. 29, 2024) <https://www.oecd.org/els/family/HC3-3-Evictions.pdf> [https://perma.cc/7NCC-FKET].

²⁹⁴ Michael Casey & R.J. Rico, *Eviction Filings Soar Over 50% Above Pre-Pandemic Levels in Some Cities as Rents Increase*, PBS News (June 17, 2023, 2:42 PM), <https://www.pbs.org/newshour/nation/eviction-filings-soar-over-50-above-pre-pandemic-levels-in-some-cities-as-rents-increase#:~:text=Eviction%20filings%20are%20more%20than,million%20eviction%20cases%20every%20year> [https://perma.cc/3A8B-W6NV]; see also EVICTION LAB, <https://evictionlab.org/eviction-tracking/> [https://perma.cc/U9ZP-7NBL].

²⁹⁵ Casey & Rico, *supra* note 294.

²⁹⁶ EVICTION LAB, *supra* note 294, at 6.

²⁹⁷ Gromis, Henderson & Desmond, *supra* note 111.

has led to an increase in persons experiencing homelessness²⁹⁸ and severe, negative health outcomes for evicted tenants.²⁹⁹ Evictions increase healthcare spending while disrupting health care access and result in poor health outcomes for tenants.³⁰⁰ U.S. eviction law must be re-aligned to prioritize justice over a landlord's absolute right to exclude. The infusion of proportionality principles into U.S. eviction hearings also functions as a corrective counterbalance to systems of exploitation that have been promulgated by twentieth century housing policies.

A. Prioritizing Justice

U.S. eviction law must evolve to prioritize justice over certainty. The current legal framework for eviction in the United States is an expedited process that prioritizes perceived efficiency and predictability. Under the current doctrine, the dominant legal inquiries concern title to the property, how the parties have contracted to use the property, and whether there exist violations of the lease agreement. In certain jurisdictions, the analysis is further restricted: only issues "germane" to the proceeding may be adjudicated in an eviction hearing.³⁰¹

²⁹⁸ *Eviction Filings Associated with Increases in Homelessness*, NAT'L LOW INCOME HOUS. COAL. (Apr. 10, 2023), <https://nlihc.org/resource/eviction-filings-associated-increases-homelessness>. [<https://perma.cc/X8WF-N87H>]; *COVID-19 Homeless System Response: Strategies for Eviction Prevention*, U.S. DEP'T OF HOUS. & URB. DEV., <https://files.hudexchange.info/resources/documents/COVID-19-Homeless-System-Response-Strategies-for-Eviction-Prevention.pdf> [<https://perma.cc/SQ49-834T>]; see also generally Robert Collinson & Davin Reed, *The Effects of Evictions on Low-Income Households* (Dec. 2018), https://www.law.nyu.edu/sites/default/files/upload_documents/evictions_collinson_reed.pdf [<https://perma.cc/SJ44-E7MR>].

²⁹⁹ See generally Wyatt P. Bensken et al., *Health Status and Chronic Disease Burden of the Homeless Population: An Analysis of Two Decades of Multi-Institutional Electronic Medical Records*, 32 J. HEALTH CARE POOR & UNDERSERVED 1619 (2021); Nick Graetz et al., *The Impacts of Rent Burden and Eviction on Mortality in the United States, 2000-2019*, 340 SOC. SCI. & MED. 1 (2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10828546/pdf/main.pdf> [<https://perma.cc/LC54-U52C>]; Morgan K. Hoke & Courtney E. Boen, *The Health Impacts of Eviction: Evidence from the National Longitudinal Study of Adolescent to Adult Health*, 273 SOC. SCI. MED. 1 (2021), <https://www.sciencedirect.com/science/article/pii/S0277953621000745?via%3Dihub> [<https://perma.cc/Y8RC-REV3>]; Corey Hazekamp, Sana Yousuf, Kelli Day, Mary Kate Daly & Karen Sheehan, *Eviction and Pediatric Health Outcomes in Chicago*, 45 J. CMTY. HEALTH 891 (2020) (finding that evictions and eviction filing rates were significant predictors for very low birth weight and infant mortality).

³⁰⁰ Gabriel L. Schwartz, Justin M. Feldman, Scarlett S. Wang, & Sherry A. Glied, *Eviction, Healthcare Utilization, and Disenrollment among New York City Medicaid Patients*, 62 AM. J. OF PREVENTATIVE MED. 157, 160 (2022).

³⁰¹ 735 ILL. COMP. STAT. 5/9-106 ("[N]o matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise.").

This narrow inquiry leaves no room for questions concerning the necessity of an eviction or the role of housing as a social good distinct from its function as a financial asset. The result is a system that churns through dispossessory cases in an average of less than two minutes.³⁰² This expedited judicial process strips vital context from the proceedings. What circumstances led the tenant to allegedly violate the lease? Are there factors such as historical, ethnic, and minority marginalization, homelessness risk, probability of severe health consequences, the scope and duration of the tenancy, the potential for displacement of children living in precarious family situations, or the overall public interest in preventing a specific eviction that the court cannot consider? What will happen to the parties after a judgment is entered? Who else will be affected by the court's decision? Will children experience homelessness because their parents' unemployment led to a missed rental payment? These questions challenge the fundamental assumption of eviction adjudication: title and contract determine superiority of interests. Nothing else matters.

As Europe's implementation of the proportionality principle demonstrates, however, eviction proceedings can incorporate these progressive property values and social factors to achieve justice without abandoning the rights of property owners.³⁰³ In U.S. eviction law, a proportionality infusion is not only feasible, but necessary. The commodification of housing only considers property as a capital asset. But housing is so much more: it is a fundamental human necessity.³⁰⁴ The past century of U.S. housing policy reflects a trend of government abdicating its responsibility to ensure safe and adequate housing accommodations for the most vulnerable. While the government previously constructed and operated housing accommodations, in the latter half of the twentieth century, it shifted to outsourcing housing to the private market.³⁰⁵ This outsourcing ossified the essence of housing, fundamentally transforming human need into a capital asset that undergirds the entire economy.

Rather than framing evictions as a battle of rights in a property—the landlord's ownership interest against the tenant's

³⁰² *No Time for Justice: A Study of Chicago's Eviction Court*, *supra* note 88.

³⁰³ Even in the "proportionality paradise" of the Netherlands, Dutch landlords are successful in 68% of eviction proceedings. See Vols, *supra* note 137, at 744.

³⁰⁴ MADDEN & MARCUSE, *supra* note 81, at 12; JOHN GILDERBLOOM & RICHARD P. APPELBAUM, *RETHINKING RENTAL HOUSING* 5, 68 (1987); Byrne & Culhane, *supra* note 136, at 381.

³⁰⁵ See *supra* section I.A.

right to occupy—our adjudication process can ask what rights-holding means to the interests of justice.³⁰⁶ Instead of the current narrow scope of inquiry centered on superior title and contract rights, the process can examine multiple factors and balance interests to arrive at a just outcome.³⁰⁷ Our system of justice can embrace a nuanced consideration of “which rights to care about and which ones to discard,”³⁰⁸ and we can aspire to look at context and circumstances in an eviction hearing.

Critics of proportionality will point out that this balancing of interests invites greater uncertainty to the eviction process than the current legal framework. They’re not wrong. But we should question why we are beholden to a legal system that is comfortable prioritizing certainty over justice. The U.S. legal system values certainty, efficiency, and expediency. To be sure, respect for judicial economy is worthwhile and pragmatic. Judicial systems need structure and boundaries to render decisions, and parties to a case deserve a timely resolution. However, in the context of eviction, what certainty does the legal system prioritize? Given that 85% to 95% of cases result in a favorable outcome for the landlord,³⁰⁹ the status quo disproportionately favors one party in an eviction: the party with ownership of a capital asset that ultimately fuels the global market.

Europe’s proportionality approach evidences an ability to balance the rights of the landlord and the tenant. As Irish scholar Rachael Walsh notes, “a middle-ground position: respect for private property rights, appropriately delimited by social justice considerations” “is achievable. . .without fundamental destabilising effects.”³¹⁰ A system that allows for more

³⁰⁶ JAMAL GREENE, *supra* note 131, at 89 (“The American approach [to rights] is dangerous because it divides us into those who have rights and those who don’t . . .”; “[T]his is how we end up with a right to nunchucks but not to food.”).

³⁰⁷ *Id.* at 110.

³⁰⁸ *Id.* at 90.

³⁰⁹ GEMINIANI, CHIN & FELDMAN-SCHWARTZ, *supra* note 109, at 3, 4.

³¹⁰ WALSH, *supra* note 141, at 11–12. (quoting Rachael Walsh & Lorna Fox O’Mahoney, *Land law, Property Ideologies and the British-Irish Relationship*, 47 COMMON L. WORLD REV., 7, 26 (2018)). The full text is as follows:

The Irish case-study reveals through its doctrine and outcomes, ‘. . .an ongoing process of legal and political negotiation towards a middle-ground position: respect for private property rights, appropriately delimited by social justice considerations.’ It demonstrates that socially responsive constitutional protection of property rights is achievable, but that a degree of unpredictability concerning the scope of constitutionally protected property rights is inevitable. However, the outcomes in Irish constitutional property law have been such

comprehensive, justice-oriented considerations need not sacrifice judicial stability. U.S. eviction adjudication can take a more holistic view of possessory interests in property wherein private property rights are neither eliminated nor subjugated entirely to social interests, but nor are social interests entirely irrelevant to the proceedings.

Glimmers of a European proportional approach already exist in modern U.S. law. The COVID-19 CARES Act and Centers for Disease Prevention and Control eviction moratorium are the most striking examples of grafting proportionality principles into American landlord tenant law at the federal level. On March 27, 2020, as the COVID-19 pandemic ravaged the U.S., the CARES Act was passed.³¹¹ The CARES Act created a temporary moratorium on eviction filings for individuals in federally backed housing properties, including individuals participating in VAWA, the rural housing voucher program, or in a rental unit with a federally backed mortgage loan or multifamily mortgage loan.³¹² The CARES Act eviction moratorium expired July 24, 2020. On September 4, 2020, as the COVID-19 pandemic surged on, CDC Director Dr. Rochelle Walensky executed her authority under Section 361 of the Public Health Service Act³¹³ and ordered a nationwide eviction moratorium for non-payment of rent in the interest of public health.³¹⁴ The CDC moratorium was wildly successful. It prevented an estimated million and a half eviction filings³¹⁵ and ran concurrently with

that unpredictability is largely confined to its margins, showing that a predominantly contextual approach can be adopted in constitutional property rights adjudication without fundamental destabilising effects.

Id.

³¹¹ Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. No. 116-136, 134 Stat. 281 (2020).

³¹² CARES Act § 4024.

³¹³ 42 U.S.C. § 264(a).

³¹⁴ Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292 (Sept. 4, 2020); *Federal Eviction Moratoriums in Response to the COVID-19 Pandemic*, CONG. RSCH. SERV. (Mar. 30, 2021), <https://crsreports.congress.gov/product/pdf/IN/IN11516> [https://perma.cc/WHW9-63TK].

³¹⁵ A. Martinez, *Evictions Are Increasing Dramatically Since the Lifting of Pandemic-Era Protections*, NAT’L PUB. RADIO, (June 21, 2023, 5:13 AM), <https://www.npr.org/2023/06/21/1183408490/evictions-are-increasing-dramatically-since-the-lifting-of-pandemic-era-protecti#:~:text=Like%20I%20said%2C%20we%20saw,2021%20by%20the%20federal%20moratorium> [https://perma.cc/24SQ-BVQP].

state and local eviction moratoria.³¹⁶ The CDC eviction moratorium was applicable to most landlords and halted evictions of non-paying tenants absent certain enumerated exceptions.³¹⁷ It covered 6.5 million rental households that were behind on rent.³¹⁸ In issuing the order for an eviction moratorium, the CDC stressed the need to protect the health of the most vulnerable, including individuals with underlying medical conditions and people at risk of experiencing homelessness.³¹⁹

The CDC moratorium was extended multiple times and Initially withstood Supreme Court scrutiny.³²⁰ The victory was short-lived. On August 26, 2021, the Supreme Court held that the CDC Director's invocation of the Public Health Services Act § 361 to implement a nationwide eviction moratorium was a "wafer-thin reed on which to rest such sweeping power."³²¹ The majority held that Congress, not the CDC, should promulgate an eviction moratorium. The majority even admitted that "it is indisputable that the public has a strong interest in combating

³¹⁶ Peter Hepburn & Renee Louis, *Preliminary Analysis: Shifts in Eviction Filings from the CARES Act to the CDC Order*, EVICTION LAB, (Sept. 22, 2020), <https://evictionlab.org/shifts-in-eviction-filings-from-cares-act-to-cdc-order/> [https://perma.cc/QE69-FA9W] (discussing the additional impact of state and local eviction moratoria for renters while the CDC's moratorium was in effect); *see also* Emily A. Benfer et al., *COVID-19 Housing Policy: State and Federal Eviction Moratoria and Supportive Measures in the United States During the Pandemic*, 33 Hous. POL'Y DEBATE 1390 (2022).

³¹⁷ *Alabama Ass'n. of Realtors v. Dept.t of Health & Hum. Servs.*, 141 S.Ct. 2485, 2489 (2021).

³¹⁸ *Federal Moratorium on Evictions for Nonpayment of Rent*, NATIONAL HOUSING LAW PROJECT, 1, <https://nlihc.org/sites/default/files/Overview-of-National-Eviction-Moratorium.pdf>. [https://perma.cc/43H9-LJLF]. To exercise their rights under the moratorium, renters submitted a declaration attesting that they (1) used "best efforts" to obtain governmental assistance for rent or housing; (2) meet income requirements, (3) are unable to pay rent due to "substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses"; (4) continue to use best efforts to make timely rental payments as close to full rental payments as permitted, and (5) no alternative housing options are available. *See id.* at 6.

³¹⁹ *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 85 Fed. Reg. 55292 (Sept. 4, 2020).

³²⁰ Nina Totenberg & Chris Arnold, *The Supreme Court Leaves the CDC's Moratorium on Evictions in Place*, NAT'L PUB. RADIO (June 29, 2021, 7:53 PM), <https://www.npr.org/2021/06/29/1003268497/the-supreme-court-leaves-the-cdcs-moratorium-on-evictions-in-place> [https://perma.cc/GTD8-7EDG].

³²¹ *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489; *see also* Carl Romer & Kristen Broady, *In Overturning the Eviction Moratorium, the Supreme Court Continues Its History of Harming Black Households*, BROOKINGS INST. (Sept. 14, 2021), <https://www.brookings.edu/articles/in-overturning-the-eviction-moratorium-the-supreme-court-continues-its-history-of-harming-black-households> [https://perma.cc/7ZTM-XSTW].

the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends.”³²² In his dissent, Justice Breyer articulated that a “balance of the equities strongly favor[ed]” protecting tenants and public health, and that “the health of millions” was at stake with the CDC’s eviction moratorium. Nevertheless, the CDC’s moratorium ended, and eviction proceedings skyrocketed.³²³

While the COVID-19 eviction moratoria provide limited examples of the federal government leveraging proportionality principles in U.S. law, examples of a proportional approach to possession exist in a handful of state and local jurisdictions. As progressive property scholars point out, “local rent-control and eviction-protection ordinances [are] examples of the norms and values for which they advocate. More specifically, some recent progressive-property accounts have pointed out that local rent-control and eviction-protection ordinances attempt to protect crucially important dignitary interests through property law. . . .”³²⁴

At the state level, California leads the way in providing robust eviction law protections for tenants. California eviction law provides a justice-centered balancing between the interests of a landlord and tenant. For example, the State’s Ellis Act grants rental-property landlords the right to exit the rental housing market and sell or demolish their rental units.³²⁵ Local municipalities, however, can place conditions and restrictions on landlords who evict tenants in the process of exercising their Ellis Act rights. Landlords must follow stringent procedural requirements.³²⁶ San Jose requires that tenants be given a 120-day notice of an Ellis eviction; special populations, including seniors, terminally or catastrophically ill persons, and residents with school-aged children are entitled to up to a one-year notice.³²⁷ San Francisco, San Jose, and Los Angeles ordinances require tenants to be compensated for relocation

³²² *Ala. Ass’n of Realtors*, 141 S. Ct. at 2490 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 585–586 (1952)).

³²³ *Ala. Ass’n of Realtors*, 141 S. Ct. at 2492, 2494 (Breyer, J., dissenting).

³²⁴ Zachary Bray, *The New Progressive Property and the Low-Income Housing Conflict*, 2012 B.Y.U. L. REV. 1109, 1139–40.

³²⁵ CAL. GOV. CODE § 7060–7060.7 (Deering 1985).

³²⁶ See, e.g. S.F., CAL. ADMIN. CODE § 37.9A.

³²⁷ See City of San Jose, *Ellis Act Ordinance*, <https://www.sanjoseca.gov/your-government/departments-offices/housing/tenants/learn-about-notices-to-evacate/ellis-act-ordinance> [<https://perma.cc/LSQ8-3YGR>].

expenses in an Ellis eviction.³²⁸ Moreover, a landlord's intent for the future of the property is paramount to what legal actions follow an Ellis eviction. It is a fact-dependent inquiry to determine whether the removal of the unit from the long-term rental housing market is appropriate. In 2020, the Ellis Act was amended to require any unit returned to the rental market during the 10-year constraint period to effectuate a return of the entire rental property to the market, "with exceptions for certain owner-occupied units."³²⁹

Other jurisdictions prohibit landlords from evicting tenants at-will, a process referred to as "just cause" eviction. Five states currently have just cause eviction laws.³³⁰ Generally, just cause legislation consists of "three core components: (1) the definition of the legal grounds for eviction, (2) the placing of limits on rental increases, and (3) the enhancement of written notice requirements."³³¹ In a just cause eviction, a landlord's right to dispossess a tenant from the property does not arise unless the tenant, for example, violates the lease agreement, fails to pay rent, or commits property damage, disturbance, or disorderly conduct.³³²

Several cities have followed suit.³³³ Notably, Los Angeles's just cause eviction law infuses proportionality into the question

³²⁸ Brian J. Asquith, *The Effects of an Ellis Act Eviction on Neighborhood Socioeconomic Status*, (W. E. Upjohn Institute, Working Paper No. 22-374, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4283770 [https://perma.cc/BMS5-A6HE]; *see* S.F. CAL. ADMIN. CODE § 37.9A, 37.9A(e) (requiring compensation to be adjusted based on the Consumer Price Index ("CPI")); Jack Rogers, *Los Angeles to Force Landlords to Pay Tenants' Relocation Costs*, GLOBEST.COM (Jan. 24, 2023, 6:45 AM), <https://www.globest.com/2023/01/24/los-angeles-to-force-landlords-to-pay-tenants-relocation-costs/#:~:text=Under%20the%20new%20law%2C%20landlords,plus%20%241%2C411%20in%20moving%20costs> [https://perma.cc/PA9T-QTYN]; City of San Jose, *supra* note 327. San Francisco and San Jose require the compensation to be adjusted based on the Consumer Price Index ("CPI"). *Id.*; S.F. CAL. ADMIN. CODE § 37.9A, 37.9A(e).

³²⁹ *See New Legislation Regarding Ellis Act Evictions*, SF.GOV (July 19, 2022), <https://sf.gov/news/new-legislation-regarding-ellis-act-evictions> [https://perma.cc/EH7Y-6UNZ]. Currently, San Francisco landlords in an Ellis eviction must compensate eligible tenants \$10,000 per individual, capped at \$30,000 per household, plus an additional \$6,700 for tenants who are elderly or disabled. These new amounts will increase every March 1.

³³⁰ New Jersey, California, New Hampshire, Oregon, and Washington. Jade Vasquez & Sarah Gallagher, *Promoting Housing Stability through Just Cause Eviction Legislation*, NAT'L LOW INCOME HOUS. COAL. (May 17, 2022), <https://nlihc.org/sites/default/files/Promoting-Housing-Stability-Through-Just-Cause-Eviction-Legislation.pdf> [https://perma.cc/ZM4V-B9Q5].

³³¹ *Id.* at 2-3.

³³² *Id.*

³³³ See, for example, Los Angeles and New York City. *Infra* notes 334-38 and accompanying text.

of ripeness in eviction proceedings.³³⁴ Pursuant to Los Angeles eviction law, there is a threshold amount of unpaid rent that a landlord must be owed before an eviction action can ever be initiated. A landlord does not have a valid claim to dispossess a tenant from the property for non-payment of rent unless and until the tenant's outstanding rent exceeds one month of a "fair market rent" valuation.³³⁵ Typically, a tenant's failure to tender to the landlord anything less than a full month's rent is considered a material breach of the lease agreement. Los Angeles' law, though, softens this traditional rule. An L.A. tenant who provides the landlord with half of their rental obligation cannot be evicted. The fair market rental valuation is a creative infusion of proportionality that weakens the absolutism in property law and embraces the foundational contract law principle of materiality of breach to protect tenants from unjust eviction. However, the Los Angeles law is not pro-tenant at the expense of the landlord. Just cause eviction rights do not protect tenants until (1) the expiration of an initial lease or (2) after six months of tenancy, whichever commences first.³³⁶ Likewise New York City courts can consider a tenant's extenuating circumstances to determine whether an eviction is proper and just. A "temporary financial embarrassment," such as a tenant's isolated instance of a late rental payment, is not considered an appropriate ground for an eviction when the tenant could have satisfied his rental obligations with a prospective payment schedule.³³⁷ New York eviction court judges may also find for the landlord but stay the order of possession if a tenant will be harmed or experience homelessness following eviction.³³⁸

³³⁴ Julia Wick, *What to Know About L.A.'s New Tenant Protection Laws*, L.A. TIMES (Feb. 7, 2023, 8:06 PM), <https://www.latimes.com/california/story/2023-02-07/what-to-know-about-l-a-s-new-tenant-protection-laws> [<https://perma.cc/GV2H-8KMM>].

³³⁵ *Id.* This amount is set by HUD rather than a private party.

³³⁶ *The City of Los Angeles Creates Just Cause Tenant Eviction Protections that Apply to Most Rentals*, LAW OFFICE OF DAVID PIOTROWSKI: BLOG, (Mar. 10, 2023), <https://www.attorneydavid.com/blog/city-of-los-angeles-creates-just-cause-tenant-eviction-protections-on-most-rentals/> [<https://perma.cc/SMQ3-T9KW>].

³³⁷ 326-330 E. 35th St. Assoc. v. Sofizade, 741 N.Y.S.2d 380, 382 (N.Y. 2002). The court further opined that the appropriateness of such a discretionary stay required a balancing of factors, including "the length of the tenancy, the tenant's payment history prior to the rent defaults complained of, the circumstances and severity of the rent defaults, and the tenant's present financial status or other relevant indicia of creditworthiness." *Id.*

³³⁸ See N.Y. R.P.A.P.L. 749(3) (stating that New York courts have the power to stay or vacate a possession order for good cause); Parkchester Apts. Co. v. Heim,

The inclusion of proportionality principles in American landlord-tenant law shifts eviction law away from Draconian exclusionary rights of landlords and emphasizes context and balancing to achieve justice. The COVID-19 era eviction moratoria illustrate the ability of policymakers to take social and health consequences into account in dispossessory actions and push back against the notion that superior ownership interests should always prevail. State and local protections, likewise, illustrate that incorporating proportionality principles is not overly cumbersome on the judiciary, nor does it shift the balance of evictions entirely in favor of tenants. Infusing proportionality principles into U.S. eviction hearings is socially, morally, ethically, and economically viable. Ultimately, it is possible to adopt a more comprehensive legal framework to arrive at a more just outcome.

B. Corrective Counterbalancing

While the previous section discusses the merits of prioritizing justice over efficiency, this section addresses why such a shift is necessary and applicable to dispossessory cases involving both federally-assisted housing and private market tenancies. Federally-assisted housing refers to housing that is subsidized with public funding. The extent of governmental assistance for a housing accommodation can be thought of in terms of a spectrum. On one end, rental housing is owned and operated directly by a governmental agency like a public housing authority. On the other end, rental housing is privately owned and operated. In the middle of the spectrum, private landlords operate rental housing and receive federal subsidies such as housing choice vouchers or low-income housing tax credits.³³⁹

If you accept that a proportionality assessment has a place in dispossessory hearings, it is easier to envision that application to public housing authorities and governmental housing providers. These are agencies acting on behalf of the government that have not only taken steps to fulfil the goal of providing a basic human need to residents but have also identified vulnerable tenants in need of housing assistance. Evicting tenants the government has deemed eligible for housing assistance

607 N.Y.S.2d 212 (N.Y. App. Div. 1993) (holding that good cause for staying a possession order involves a judge reviewing the circumstances involved in an eviction); *see also* Guidance Ctr. of Westchester v. Artist, 2023 N.Y. Misc. LEXIS 19071, *12-13 (holding that a possession order be issued for the landlord, but stayed for 30 days).

³³⁹ These subsidies are offered as examples, rather than an exhaustive list.

all but guarantees these tenants will experience unstable housing or homelessness following displacement. In Europe, given that Article 8 protects matters of “central importance” for a person’s “identity, self-determination, physical and moral integrity, maintenance of relationships . . . [and security],”³⁴⁰ the European Court has opined that a tenant’s eviction from public housing without a government providing “permanent, or even temporary, accommodation” constitutes a failure of the government to contribute to the “solution of [a] housing need.”³⁴¹ This reasoning is reflected in current U.S. Section 8 policy, which prohibits landlords from evicting tenants without just cause.³⁴²

Applying proportionality analyses to private landlords is more complicated because American law privileges private landownership.³⁴³ Even in Europe, with Article 8 of the ECHR, there remains variability in how proportionality is applied to private market landlords bringing eviction actions.³⁴⁴ However, the complexity does not merit the elimination of proportionality principles in these cases. *Shelley* sets a precedent that American courts can intervene in private housing contracts to prevent gross social and racial injustice.

The privileging of private landownership in eviction law has perpetuated social and racial inequality.³⁴⁵ Decades of disinvestment in housing for vulnerable populations coupled with commodification of the long-term rental housing market and a regulatory schema that incentivizes landlords to repeatedly churn through tenants creates two levels of exploitation in rental housing.³⁴⁶

³⁴⁰ Connors v. United Kingdom, App. No. 66746/01, ¶ 82 (Aug. 27, 2004) <https://hudoc.echr.coe.int/eng?i=001-61795> [<https://perma.cc/2MYK-PHF2>]).

³⁴¹ Case of Gladysheva v. Russia, App. No. 7097/10, ¶ (Mar. 6, 2012), <https://hudoc.echr.coe.int/eng?i=001-107713> [<https://perma.cc/4SGS-35M2>]).

³⁴² 24 C.F.R. § 982.310 (a)–(d) (2016). Just cause evictions under Section 8 include serious violations (e.g., nonpayment of rent, repeated lease violations, or violation of federal, State, or local laws), criminal activity occurring in, on, or near the rental property (including by any tenant, household member or guest), and other good cause (e.g. a tenant’s failure to accept a new lease or revision, nuisance, using the unit for an unintended purpose, or business/economic reasons such as a sale of the property, property renovations, or increasing rent).

³⁴³ Monea, *supra* note 19, at 386–88; Katz, *supra* note 19, at 2044.

³⁴⁴ See discussion, *supra* subpart II.B.4.

³⁴⁵ See Scherer, *supra* note 20, at 9, 47–57; see generally *The Limits of Good Law: A Study of Housing Court Outcomes*, *supra* note 20; *Eviction Court Displacement Rates*, *supra* note 20.

³⁴⁶ For a more detailed discussion of exploitation in the rental housing market see Philip M. E. Garboden, *Moving Beyond Good Landlord, Bad Landlord*:

The first is between the individual landlord and tenant. The dearth of affordable housing leaves low-income tenants vulnerable to housing instability and homelessness. Demand for affordable long-term rental accommodations so far outstrips supply that tenants, who occupy the inferior bargaining position with respect to landlords, are pressured into accepting housing that is overpriced or under-maintained—usually both.³⁴⁷ Overpaying more for housing that commonly fails to meet habitability standards exacerbates housing instability for low-income tenants, creating a precarious situation. Tenants are paying too much for poor housing and often paying out of pocket to attempt to address unhealthy conditions like infestation, mold, and malfunctioning appliances. Stretched past a financial breaking point, tenants may fall behind on rent while trying to get ahead of threats to habitability. It is an untenable situation that frequently precipitates an eviction filing.

Second, exploitation exists on a systemic level. Systemic market failures produce limited options. Within the rental housing market, decades of disinvestment and commodification have resulted in a system that fails to produce an adequate supply of affordable housing for vulnerable populations. As the government has backed away from directly serving as a housing provider, it has increasingly relied on the private sector to fill that role. Financialization and commodification of the rental housing market exacerbate exploitation of low-income tenants and are complemented by eviction doctrine that stacks the deck in favor of landlords.

Laws governing eviction reflect the symbiotic relationship between private property owners who provide long-term rental

A Theoretical Investigation of Exploitation in Housing, in THE SOCIOLOGY OF HOUSING: HOW HOMES SHAPE OUR SOCIAL LIVES 225 (Brian McCabe & Eva Rosen eds., 2023).

347 NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES, 24 (2024), https://nlihc.org/sites/default/files/gap/2024/Gap-Report_2024.pdf [<https://perma.cc/DFN5-GYS6>] (arguing that the private market has failed to address the 7.3-million-unit shortage of rental housing for low-income tenants because of costs); ELIJAH DE LA CAMPA, VINCENT J. REINA & CHRISTOPHER HERBERT, HOW ARE LANDLORDS FARING DURING THE COVID-19 PANDEMIC?: EVIDENCE FROM A NATIONAL CROSS-SITE SURVEY 2 (2021), https://www.jchs.harvard.edu/sites/default/files/research/files/harvard_jchs_covid_impact_landlords_survey_de_la_campa_2021.pdf [<https://perma.cc/L3UA-AZJD>] (noting the surge in deferred maintenance on rental property); *see generally* Matthew Desmond & Nathan Wilmers, *Do the Poor Pay More for Housing? Exploitation, Profit, and Risk in Rental Markets*, 124 AM. J. OF SOC. 1090 (2019) (finding that landlords have heightened profits in distressed communities). In contrast, “the landlord-tenant relationship works quite well in a situation where both landlords and tenants have power”; “managers in high-end properties never even consider evictions and are highly focused on customer service and tenant recruitment.” Philip M. E. Garboden, *supra* note 346.

housing and state power. U.S. law excessively privileges private landownership. The very fact that eviction is an expedited process where landlords are successful in 85% to 95% of hearings³⁴⁸—which only last a few minutes³⁴⁹—helps incentivize tenant churn. Together, the dearth of affordable housing and eviction laws that favor landlords “creates opportunities for exploitation that individuals are bound to take advantage of.”³⁵⁰ The use of proportionality in eviction hearings, therefore, is a corrective counterbalance to housing and eviction systems that are inherently exploitative of tenants on individual and systemic levels. Housing policies—from outsourcing to the private market, to commodification of housing as a lucrative asset class, to eviction laws—have been a central mechanism to perpetuate inequality; proportionality in *all* cases is a modest remedy.

CONCLUSION

Ms. Rodriguez³⁵¹ lived for years in an apartment with her school-aged daughter. She worked daily shifts in a local textile factory. However, when her hours were drastically reduced, she could no longer afford her rent and utilities. She decided to prioritize the utility bill, reasoning that her young daughter’s health would be in imminent danger without reliable access to water. She paid just enough to keep the city from terminating services and worked with advocates to enroll in a utility assistance program that would make her rates more affordable. But not since the pandemic-era Emergency Rental Assistance Program³⁵² had there been a program in her jurisdiction to help tenants with housing payments. She reached out to charity groups and churches, hoping for help while she tried to get more hours at the factory. After she fell two months behind on rent, she finally had a spot of good news: the factory could

³⁴⁸ GEMINIANI, CHIN & FELDMAN-SCHWARTZ, *supra* note 109, at 3, 4.

³⁴⁹ *No Time for Justice: A Study of Chicago’s Eviction Court*, *supra* note 88.

³⁵⁰ Garboden, *supra* note 346 at 227–28 (“[S]ystemic vulnerabilities facilitate economic inequalities.”).

³⁵¹ Ms. Rodriguez is an amalgamation of several clients represented by the authors.

³⁵² See generally Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 501, 134 Stat. 1182, H.R. 133 (2020); see also Emergency Rental Assistance Program, U.S. DEP’T TREAS., <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program> [<https://perma.cc/YS9Q-S95G>]. ERAP funding under the Consolidated Appropriations Act was known as ERA1. See also American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3201, 135 Stat. 4, H.R. 1319 (2021). ERAP funding under ARPA was known as ERA2.

afford to increase her hours again, and she was back to her pre-reduction income. She immediately resumed rental payments to her landlord. By cutting all discretionary spending, she tried to make additional payments toward the back rent. Fifty dollars here; seventy dollars there.

Despite the fact that she had resumed monthly rental payments and was making progress toward the outstanding rent, her landlord filed an eviction action. At the hearing, the court inquired into who owned the property (the landlord) and whether Ms. Rodriguez had violated her lease agreement (yes, she breached when she couldn't pay rent as a result of her employer reducing her work hours). That was it. An inquiry into title and into the contract. The court never asked why Ms. Rodriguez stopped paying rent or what would happen to her and her young daughter if they were evicted. These questions weren't germane. A judgment of possession was entered in favor of the landlord. Ms. Rodriguez left before the sheriff came to board up the door. She didn't want to put her daughter through the trauma of seeing her stuff on the curb. A ten-year-old, Ms. Rodriguez thought, doesn't need to see that.

Had the court instead used a proportionality analysis, the judge may have considered how the move would affect the health of Ms. Rodriguez's daughter, who lives with a chronic disability. Or perhaps the court may have contemplated whether the interests of justice were served by rendering a family homeless when they were actively taking steps to repay outstanding rent. Maybe if the court could've taken into consideration the fact that Ms. Rodriguez was gainfully employed again and had the means to make future rental payments, it would've entered an order of possession for the tenant. We'll never know.

In U.S. courtrooms, judicial inquiry during an eviction hearing is constrained. Courts do not have the ability to balance the parties' interests to arrive at a judgment. While European eviction law is instructive, U.S. law need not adopt a positive right to housing to incorporate a balanced framework for eviction. Indeed, kernels of proportionality exist in modern U.S. law. Widespread incorporation of proportionality principles can re-align American eviction law to respect the rights of property owners while at the same time ensuring justice is prioritized and greater social equity and health equity are promoted.