AN UNQUALIFIED PROHIBITION OF SELF-HELP EVICTION: PROVIDING A RIGHT TO COURT PROCESS FOR ALL RESIDENTIAL OCCUPANTS

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Stability in one's home is essential to safety, security, and human dignity. The right to court process prior to eviction should be unassailable. Yet, for some of the most marginalized residential occupants, that right does not exist. Nearly every state has codified laws that prohibit landlords from taking the law into their own hands to evict a tenant without a court order. In most states, however, the prohibition of so-called "self-help evictions" hinges on whether an occupant is considered a "tenant" or a "licensee." The law shelters residential occupants who establish a formal landlord-tenant relationship in the premises where they reside. It guarantees a right to court process and legal recourse if that right is violated. The same is not true for countless others who rely on temporary or other informal housing arrangements, like roommates, transitional housing, and other shared living situations. Empowered by racialized economic structures that privilege wealth and capital, the law has divested such lesser-status residential occupants of any right to due process. That means eviction for any reason—or no reason—without notice or a court order.

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When one's home is stripped away, the consequences are dire. Housing insecurity can trigger instability in every aspect of a person's life—employment, physical and emotional health, family and personal relationships, and financial security, among a cascade of others. And because people who rely on informal housing are disproportionately low-wealth people of color, the lack of protection following an extrajudicial ouster can be particularly bleak. For some, that displacement is a pipeline to homelessness. Being relegated to the streets means disparate exposure to illness, substance use, and indiscriminate policing. Homeless shelters—notoriously crowded and unsafe—are a far cry from a baseline of secure, dignified housing that should be a fundamental guarantee to every human being in a civilized society. The exclusion of such broad swaths of residential occupants ignores the realities of housing in the modern urban economy. The law can and should prevent the needless human suffering that necessarily flows from a self-help eviction. To date, however, jurisdictions across the country continue to permit landlords to weaponize extrajudicial evictions as a tool to oust non-tenant residential occupants from their homes.

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INTRODUCTION

In his number one bestseller, *Evicted: Poverty and Profit in the American City*, Matthew Desmond chronicled individual stories of eviction to shed humanizing light on what the housing crisis actually means for real people.[1] Desmond's research, and the personal stories that stem from it, paint a compelling picture of the pain and trauma of eviction. The thrust of Desmond's narrative is focused on the formal—i.e., lawful—eviction process of people the law recognizes as *tenants*. Today, however, informal housing arrangements prompted by housing shortages and insecurity have fueled the growth of a swelling underclass of non-tenant residential occupants who are disproportionately the targets of "informal," extrajudicial evictions. While Desmond acknowledges and warns of a widespread but much less visible practice of "informal eviction," he—like others who have analyzed the eviction crisis—tends to overlook the particular plight of non-tenant residential occupants who are largely excluded from even the inadequate legal protections at the center of his critique.

1 *See* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016).

According to some estimates, "informal evictions"—including threats,[2] harassment and buyouts,[3] discontinuance of essential services,[4] removal of personal property,[5] and lockouts[6]—make up approximately half of "forced tenant moves."[7] Indeed, "what none of the casebooks

2 *See* Philip ME Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & CMTY. 638, 638 (2019) ("We find that landlords generally try to avoid costly evictions, instead relying on the serial *threat* of eviction.").

3 *See* Jim Phillips, *Defendants in Logan Terrace Apartments Suit Deny Claims of Harassment, Substandard Conditions*, LOGAN DAILY NEWS (Oct. 9, 2021), https://www.logandaily.com/news/defendants-in-logan-terrace-apartments-suit-deny-claims-of-harassment-substandard-conditions/article_2a8ccb50-e7ae-5bb8-8418-eae2bdbc65b3.html [https://perma.cc/DMG9-8MPD]; Clara Harter, *City Sues NMS Properties over Alleged Illegal Evictions and Unlawful Rentals*, SANTA MONICA DAILY PRESS (Oct. 6, 2021, 6:00 AM), https://www.smdp.com/city-sues-nms-properties-over-alleged-illegal-evictions-and-unlawful-rentals/209177 [https://perma.cc/UWE2-BGFX] (recounting allegations in a criminal complaint that landlord "used unlawful tactics—such as illegal buyout and eviction notices—in an attempt to evict tenants"); Mona Tong, *Legal Advocates, Grassroots Groups Fight to Protect Durham Tenants from Eviction During COVID-19*, CHRONICLE (Apr. 6, 2021, 11:29 AM), https://www.dukechronicle.com/article/2021/04/duke-university-durham-eviction-legal-advocate-grassroots-organize [https://perma.cc/GXW9-SGUJ] ("We've seen landlords turning to whatever means they can—sending letters every day, calling their tenants every day, just trying to demand that they move out to get possession back of these units.").

4 *See* Dan Margolies, *A Kansas City Tenant Fights Back and Wins Rare Victory Against Landlord Who Tried to Evict Her*, KCUR (Oct. 20, 2021, 1:07 PM), https://www.kcur.org/news/2021-10-20/a-kansas-city-tenant-fights-back-and-wins-rare-victory-against-landlord-who-tried-to-evict-her [https://perma.cc/552X-TXTJ] (noting that landlord changed locks, removed the thermostat, and removed the mailbox in an effort to evict the occupant); Ashley Onyon, *Montgomery Co. Sheriff: Mohawk Landlord Charged with Unlawful Eviction*, RECORDER (Mar. 26, 2021), https://www.recordernews.com/news/local-news/187365 [https://perma.cc/6P7U-J6HB] (discussing charges that landlord "allegedly tried to oust a pair of tenants from an apartment by going to the property and shutting off the power"); Cris Barrish, *Unlawfully Evicted, Blind Wilmington Man Sues Landlord, Court System*, WHYY (Mar. 26, 2021), https://whyy.org/articles/unlawfully-evicted-blind-wilmington-man-sues-landlord-court-system [https://perma.cc/5YWD-3KYK] (discussing allegations that landlord misrepresented occupant's status to law enforcement and turned off water in the home to evict occupant and his family); Justin Glanville, *As Eviction Moratorium Wanes, Some Cleveland-Area Tenants Already Out*, IDEASTREAM PUB. MEDIA (Mar. 22, 2021), https://www.ideastream.org/news/as-eviction-moratorium-wanes-some-cleveland-area-tenants-already-out [https://perma.cc/T4HT-LXYZ] (noting that "[w]hen you hear 'self-help eviction,' you typically think of somebody being locked out of their apartment," but landlords also cut heat and electricity to circumvent court process).

5 Glanville, *supra* note 4 (discussing landlord's self-help eviction effectuated by removing occupant's furniture and belongings).

6 *See generally* Matthew P. Main, *Making Change Together: The Multi-Pronged, Systems Theory Approach to Law and Organizing that Fueled a Housing Justice Movement for Three-Quarter House Tenants in New York City*, 27 GEO. J. ON POVERTY L. & POL'Y 31 (2019) (discussing the prevalence of illegal lockouts as a tool to exclude nontraditional residential occupants from their homes in New York City).

7 *See* Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J.L. & GENDER 55, 100 (2018); Ericka Petersen, *Building a House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J. C.R. & C.L. 63, 75 (2020) ("Countless more individuals and families [than the estimated 2.3 million evictions filed in 2016] are forced to move without a formal eviction being filed.").

address is the role landlord self-help still plays . . . because landlords [induce tenants to leave 'voluntarily' or simply lock them out] in a way that would seem to be indistinguishable from the uncivilized days of self-help evictions."[8] According to data from the Eviction Lab at Princeton University, in a typical, non-pandemic year, landlords file 3.7 million eviction cases in the United States.[9] It is estimated that informal evictions are over five times as likely to occur as evictions effectuated formally through court process.[10] And those numbers may have increased during the pandemic.[11] Despite—or perhaps because of—

8 David A. Dana, *An Invisible Crisis in Plain Sight: The Emergence of the "Eviction Economy," Its Causes, and the Possibilities for Reform in Legal Regulation and Education*, 115 MICH. L. REV. 935, 951 (2017) (book review).

9 Joe Fish, Emily Lemmerman, Renee Louis & Peter Hepburn, *Eviction Moratoria Have Prevented over a Million Eviction Filings in the U.S. During the COVID-19 Pandemic*, EVICTION LAB (Dec. 15, 2020), https://evictionlab.org/missing-eviction-filings [https://perma.cc/W3WV-HD8K].

10 Ashley Gromis & Matthew Desmond, *Estimating the Prevalence of Eviction in the United States: New Data from the 2017 American Housing Survey*, 23 CITYSCAPE: J. POL'Y DEV. & RSCH. 279, 281 (2021) (indicating that the informal-to-formal eviction ratio for the United States is "5.5 informal evictions for every formal eviction," significantly higher than previous estimates); *see also "Mapping Eviction": The Eviction Lab Highlights the Eviction Epidemic with Exhibit and Discussion at the National Building Museum*, WASH. COUNCIL OF LAWS. (Feb. 7, 2019), https://wclawyers.org/mapping-eviction-recap-jan19 [https://perma.cc/9HWV-3VUQ] (suggesting an informal-to-formal eviction ratio of two to one); Peter Hepburn & Yuliya Panfil, Opinion, *The Black Hole at the Heart of the Eviction Crisis*, N.Y. TIMES (Jan. 28, 2021), https://www.nytimes.com/2021/01/28/opinion/eviction-crisis-moratorium.html [https://perma.cc/NKZ7-BGJ8] ("Thousands of evictions that are illegal, or at least legally suspect, are being carried out across the country despite the federal eviction moratorium, but we don't have a way to track or prevent them.").

11 *See* Sarah Schindler & Kellen Zale, *How the Law Fails Tenants (and not Just During a Pandemic)*, 68 UCLA L. REV. DISCOURSE 146, 151 (2020) (noting that landlords continued to issue eviction notices during the pandemic which may have intimidated tenants into vacating their homes even though eviction moratoria technically prohibited landlords from effectuating an eviction); Jonathan Edwards, *Virginia Could Crack Down on Illegal Evictions, if 2 Lawmakers Have Their Way*, VIRGINIAN-PILOT (Dec. 31, 2020, 12:09 PM), https://www.pilotonline.com/government/virginia/vp-nw-fz20-illegal-eviction-legislation-20201231-wiapv3ixkrgelawbigymjwxaxa-story.html (last visited June 19, 2022) ("The number of illegal evictions increased from March through June [2020], particularly of the poor, elderly, disabled, and people of color . . . ."); Monica Vaughan, *Why Some California Renters Are Being Forced from Their Homes Despite "Eviction Moratorium,"* FRESNO BEE (Jan. 27, 2021, 1:57 PM), https://www.fresnobee.com/fresnoland/article248800905.html (last visited June 19, 2022) (noting that during the pandemic "even more people have been kicked out of their homes outside the formal eviction process"); Luke Barber, *Local Housing Assistance Available as State Programs Await Funding*, AVERY J. TIMES (Jan. 6, 2021), https://www.averyjournal.com/covid19/local-housing-assistance-available-as-state-programs-await-funding/article_e20dd0e3-3e93-5970-b8ef-9ca11a94be50.html [https://perma.cc/LR3H-6GSB] (explaining that the moratorium on eviction proceedings in North Carolina has led to an "uptick" in self-help evictions); Nick Vadala, *What Is an Illegal Lockout, and What Should I Do if It Happens to Me?*, PHILA. INQUIRER (Aug.

eviction moratoria across the nation, advocates report that self-help evictions have become common in the era of COVID-19.[12]

People who do not have a formal lease or who rely on any number of informal housing arrangements are most likely to be evicted without court process.[13] For every million households that are evicted each year, "there are many more millions who move out before they miss a payment, who cut back on food and medicine to make rent, who take up informal housing arrangements that exist outside the traditional landlord-tenant relationship."[14] Those occupants are Black and people

17, 2021), https://www.inquirer.com/philly-tips/tenants-rights-philadelphia-illegal-lockout-eviction-20210817.html [https://perma.cc/D4DF-MKYG] (reporting that "various eviction moratoriums" have led to an increase in self-help evictions in Philadelphia during the pandemic).

12 *See* sources cited *supra* note 11; *Hearing on Evictions During COVID-19 Pandemic Before the H. Judiciary Subcomm. On the Const., C.R., and C.L.*, 117th Cong. (2021) (statement of Katy Ramsey Mason, Univ. of Memphis Law Professor) (testifying that in June 2020, ninety-one percent of Legal Aid attorneys surveyed across the nation reported the occurrence of self-help evictions in their area during the pandemic); Mona Tong, *Legal Advocates, Grassroots Groups Fight to Protect Durham Tenants from Eviction During COVID-19*, DUKE CHRONICLE (Apr. 6, 2021, 11:29 AM), https://www.dukechronicle.com/article/2021/04/duke-university-durham-eviction-legal-advocate-grassroots-organize [https://perma.cc/7DZK-CHK3] (noting that landlords have "increasingly resorted to 'extrajudicial' means" to evict); Glanville, *supra* note 4 (noting that limits on lawful evictions may have tempted some landlords to resort to self-help to evict).

13 *See* Giannina Crosby, Sateesh Nori & Julia McNally, *NY Courts Should Protect Housing Rights of All Tenants*, LAW 360 (June 2, 2021, 6:04 PM), https://www.law360.com/articles/1390332/ny-courts-should-protect-housing-rights-of-all-tenants [https://perma.cc/DN6C-D7KG] (arguing that "[t]he rights of occupants who are not in a traditional landlord-tenant relationship is especially relevant" because landlords have "increasingly turned to self-help").

14 Conor Dougherty, *Pandemic's Toll on Housing: Falling Behind, Doubling Up*, N.Y. TIMES (Sept. 10, 2021), https://www.nytimes.com/2021/02/06/business/economy/housing-insecurity.html [https://perma.cc/W6S5-A2J7] (noting that an "outsize share" of requests for rental assistance during the pandemic come from people who do not have traditional leases).

of color,[15] immigrants,[16] poor or low-wealth,[17] women with children,[18] single adults,[19] non-married cohabiting adults,[20] people who are unemployed,[21] elderly and ill,[22] formerly incarcerated people,[23] people

15 Emily A. Benfer et al., *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, 98 J. URB. HEALTH 1, 4–5 (2021) (noting that Black renters, particularly Black women renters, faced the highest eviction rates even before COVID-19, and that "Black households were more than twice as likely as White households to be evicted"); Caroline Glenn, *Locked Out in Florida*, LIMAOHIO.COM (May 29, 2021), https://www.limaohio.com/news/business/461937/locked-out-in-florida [https://perma.cc/7WSM-6WH6] ("Black Floridians, who were already more likely to lose their job to the pandemic and die from COVID-19, were even more likely to be locked out of their homes."); *see, e.g.*, Colin Kinniburgh, *Illegal Evictions Are Rising Across the State, but Landlords Rarely Face Consequences*, CITY & STATE N.Y. (Oct. 21, 2021), https://www.cityandstateny.com/policy/2021/10/illegal-evictions-are-rising-across-state-landlords-rarely-face-consequences/186278 [https://perma.cc/QAT2-FGYW] (noting that illegal evictions in New York State disproportionately target people of color).

16 Héctor Alejandro Arzate, *Oakland Immigrants Face Illegal Evictions and Barriers to Rent Relief*, OAKLANDSIDE (May 27, 2021), https://oaklandside.org/2021/05/27/oakland-immigrants-face-illegal-evictions-and-barriers-to-rent-relief [https://perma.cc/Y92B-28H2] (describing the use of landlord threats to evict immigrant renters in Oakland).

17 *See* Matthew Main, Opinion, *The Rights of Three-Quarter House Residents Still Don't Matter*, CITY LIMITS (Mar. 12, 2020), https://citylimits.org/2020/03/12/opinion-the-rights-of-three-quarter-house-residents-still-dont-matter [https://perma.cc/DK3S-R93R].

18 Sabbeth, *supra* note 7, at 89 (noting that "eviction is extremely widespread for Black and Latina women, and eviction plays a major role in creating and maintaining poverty for their families"); Gee Scott & Ursula Reutin Show, *Tacoma Mother Homeless After Landlord Evicts Her, Despite Paying Rent*, KIRO NEWSRADIO (Jan. 17, 2021, 7:42 AM), https://mynorthwest.com/2465828/tacoma-mother-homeless-covid-eviction [https://perma.cc/78KA-9PBJ] (recounting how a landlord flooded an apartment to constructively evict a woman and her children); Nick Penzenstadler & Josh Salman, *Landlords Skirt COVID-19 Eviction Bans, Using Intimidation and Tricks to Boot Tenants*, USA TODAY (Jan. 26, 2021, 5:53 PM), https://www.usatoday.com/story/news/investigations/2020/11/20/landlords-use-intimidation-tricks-push-renters-out-amid-pandemic/6284752002 [https://perma.cc/3X2Z-3LNG] (noting "a huge spike in tactics from landlords to get people out [without a court order]").

19 *See* Main, *supra* note 6, at 45–48 (discussing how the dearth of stable housing options leaves low-income single adults at particular risk of eviction without court process).

20 *See* Drost v. Hookey, 881 N.Y.S.2d 839, 842 (N.Y. Dist. Ct. 2009) (the definition of those who may be evicted without court process includes "nonmarried adults who shared . . . a home").

21 Penzenstadler & Salman, *supra* note 18 (discussing reports of increased extrajudicial evictions of people who are elderly, single with children, people with histories of substance use and incarceration, and people with disabilities during the pandemic).

22 *See id.*; Paula Vasan, *"He Screwed the Door Shut": Louisville Man Says He Was Evicted While in the Hospital*, WHAS 11 (Nov. 9, 2021, 11:40 PM), https://www.whas11.com/article/news/investigations/focus/he-screwed-the-door-shut-louisville-man-says-he-was-evicted-while-in-the-hospital/417-277ef3cc-d6f8-4779-8b88-844783779b51 [https://perma.cc/JE64-29J2] (explaining allegations that a landlord changed locks and removed the property of an elderly couple while they were in the hospital due to pneumonia, heart failure, and bladder cancer).

23 *See* Main, *supra* note 6, at 50–52 (discussing the particular challenges of pro se litigants who must litigate their occupancy status before a court will proceed to the merits of an unlawful eviction claim).

who use drugs or have a history of substance use,[24] people with disabilities,[25] and people with histories of homelessness,[26] among many other marginalized people who lack stable housing.[27] The time is long overdue to abolish the notion that some people—based on contorted notions of status—are not entitled to notice or court process before they can be dispossessed from their homes.

Because of the prevalence of self-help evictions targeting the most marginalized of residential occupants, Attorneys General in California,[28] Massachusetts,[29] New Jersey,[30] New York,[31] North Carolina,[32] and Rhode Island,[33] among others, each issued warnings to landlords and guidance about tenants' right to court process prior to eviction. Some state and local legislatures have also taken legislative

24 *Id.* at 47–48, 50–53 (discussing rampant illegal evictions from three-quarter houses that recruited people with histories of substance use and incarceration).

25 *See, e.g.*, Whitney Miller, *Coronavirus Forces Some Local Veterans to Leave VA Inpatient Program*, WCPO CIN. (Dec. 9, 2020, 11:09 PM), https://www.wcpo.com/news/coronavirus/coronavirus-forces-some-local-veterans-to-leave-va-inpatient-program (last visited July 28, 2022) (reporting that "[d]ozens of veterans" were discharged from an inpatient facility and moved to a city homeless shelter with less than forty-eight hours notice); Barrish, *supra* note 4 (discussing a landlord's unlawful eviction of a blind occupant).

26 *See* Annie Powers, *"You're Contaminating Us,"* KNOCK LA (Jan. 25, 2021), https://knock-la.com/los-angeles-homeless-sweeps-continue-2c41b4be5cc6 [https://perma.cc/ZT89-UE8H] (describing the use of "weekly eviction sweeps" by city authorities as a tool to "ensure the houseless cannot ever reliably predict whether they are safe from eviction, police violence, or the sudden destruction of their personal property").

27 *See* Edwards, *supra* note 11 ("[I]llegal ousters are disproportionately hurting those who are most vulnerable: the poor, people of color, workers with jobs in the service sector . . . .").

28 *See COVID-19 Consumer Information and Resources: Tenants*, CAL. OFF. OF THE ATT'Y GEN., https://oag.ca.gov/consumers/covid-19#tenants [https://perma.cc/4Q64-AMNA]; Press Release, State of Cal. Dep't of Just. Off. of the Att'y Gen., Att'y Gen. Bonta Announces Judgment Against Real Estate Investment Company for Unlawfully Evicting Tenants from Foreclosed Properties (Dec. 8, 2021), https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-judgment-against-real-estate-investment-company [https://perma.cc/6K7S-3JWW].

29 *See* Advisory, Off. of Mass. Att'y Gen. Maura Healey, Eviction Know Your Rights Flyer (Mar. 30, 2021), https://www.mass.gov/doc/eviction-know-your-rights-flyer/download [https://perma.cc/7SSM-9KYV].

30 *See* Directive, State of N.J. Off. of the Att'y Gen., Att'y Gen. L. Enf't Directive No. 2021-2: Directive Protecting Tenants from Illegal Evictions (Mar. 30, 2021), https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2021-2_Illegal_Evictions.pdf [https://perma.cc/9HR4-F3CR].

31 *See* Press Release, N.Y. State Off. of the Att'y Gen., Att'y Gen. James Issues Tenant Guidance for New Yorkers During Coronavirus Pandemic (Apr. 16, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-issues-tenant-guidance-new-yorkers-during-coronavirus [https://perma.cc/B3BV-E55Z].

32 *See Coronavirus Updates: Dealing with Economic Hardship*, N.C. OFF. OF THE ATT'Y GEN., https://ncdoj.gov/covid19 [https://perma.cc/UR5Z-EBRZ].

33 *See* Guidance for Law Enforcement Officials from Peter F. Neronha, Att'y Gen. of R.I., to Chiefs of Police, Landlord-Tenant Disputes and Law Enforcement (Apr. 6, 2020), https://riag.ri.gov/media/2496/download [https://perma.cc/8VD3-TU4G].

action in an attempt to curb the proliferation of self-help evictions.[34] Those actions were, apparently, deemed necessary despite nationwide eviction moratoria that prohibited most types of residential evictions.[35] Despite those efforts and the ongoing incongruence of those efforts with the interpretation of laws governing self-help in the context of unlawful entry and detainer proceedings in court proceedings around the nation, illegal lockouts have continued unabated.[36] Evidence suggests that extrajudicial evictions have increased during the pandemic.[37]

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34 *See, e.g.*, S.B. 1215, 2021 Leg., 1st Spec. Sess. (Va. 2021) (enacted) (providing remedies to tenants who are excluded from dwelling unit without court process). Action by the federal government to combat self-help evictions is also on the table. *See, e.g.*, H.R. 1451, 117th Cong. (2021) (proposing to prohibit self-help eviction of tenants during a national emergency). Not every state legislature seeks to expand the rights of residential occupants, however. *See* H.B. 366, 2021–2022 Gen. Assemb., Reg. Sess. (N.C. 2021) (proposing to classify people who live in hotels for less than ninety days as "transient" occupants, which would permit hotel owners to remove people without a court order); *see also* N.Y. REAL PROP. ACTS. LAW § 711 (McKinney 2022) (prohibiting removal of any "lawful occupant" from a dwelling except in a special proceeding); *id.* § 768(1)(a), (2) (making it a misdemeanor to evict an "occupant" who has occupied a dwelling unit for thirty days or more). In addition, in 2014, the New York City Police Department issued a so-called "Finest Message" to protect occupants of three-quarter houses from evictions without court process. *See* Memorandum from Lieutenant Corbett, N.Y.P.D. Deputy Comm'r of Collaborative Policing, Enforcement of Unlawful Evictions at Three-Quarter Houses (Aug. 23, 2014), http://mobilizationforjustice.org/wp-content/uploads/NYPD-FINEST-Message.pdf [https://perma.cc/7QS3-NYB5] (indicating that three-quarter houses are not exempt from New York City's Unlawful Eviction Law and clarifying that occupants—whether tenants or licensees—cannot be "discharged" without a court order). In 2016, the Mayor's Task Force on Three-Quarter Housing began distributing information about the illegal eviction laws to three-quarter house residents. In 2017, the New York City Council, responding specifically to the actions of three-quarter house operators, required the Human Resources Administration to provide information about the illegal eviction laws to all shelter allowance recipients. *See* N.Y.C. ADMIN. CODE § 21-138 (2022) (requiring that the New York City Department of Social Services provide information about legal protections to all tenants receiving the public assistance shelter allowance in New York City, helping educate and protect them from illegal evictions).

35 *See* Benfer et al., *supra* note 15, at 6 ("During the pandemic, governors, courts, and legislative bodies in 43 states issued eviction moratoria that varied in duration, stage of eviction frozen, and the type of eviction forestalled.").

36 *See, e.g.*, Jake Offenhartz, *East Village Landlord Accused of Clearing Tenant's Apartment While He Was Hospitalized with COVID*, GOTHAMIST (Mar. 25, 2021), https://gothamist.com/news/east-village-landlord-accused-trashing-tenants-apartment-while-he-was-hospitalized-covid [https://perma.cc/7K3T-DGMW]; Jake Offenhartz, *City Sues Brooklyn Landlords Who Attempted Illegal Eviction this Summer*, GOTHAMIST (Nov. 18, 2020), https://gothamist.com/news/city-sues-brooklyn-landlords-who-attempted-illegal-eviction-summer [https://perma.cc/D67E-YDZX] (noting that the occupants of buildings owned by a couple that attempted egregious illegal eviction in Brooklyn last summer were mostly "young service industry employees . . . [who] were offered single rooms without leases and denied basic maintenance services").

37 *See* Penzenstadler & Salman, *supra* note 18 (discussing reports of a nationwide increase in landlords' use of extrajudicial tactics to evict). In Oakland, one legal services provider reported that they have seen a "steady uptick" in complaints about illegal evictions and landlord

The focus of this advocacy, of course, is on the rights of *tenants*.[38] While in common parlance, "tenant" may be understood to encompass all people who occupy a place to live in property owned by someone else, in reality, it is a term of art, like many others in the law, that serves a gatekeeper function to distinguish the "haves" from the "have nots."[39] There can be no doubt that the legal landscape for tenants is far from a panacea. For decades, tenants have fought for more just and equitable housing conditions.[40] And tenants, of course, occupy a "second-class status" vis-à-vis homeowners in a range of legal contexts that themselves disproportionately target and affect communities of color.[41]

If it is true that tenants occupy second-class status vis-à-vis homeowners—which it seems fair to accede—it is not hard to conceive that non-tenant residential occupants would be relegated to some still

harassment since the start of the pandemic. Laura Thompson, *Despite Moratorium, Bay Area Landlords Are "Taking the Law into Their Own Hands" to Drive Tenants Out*, MOTHER JONES (May 20, 2021), https://www.motherjones.com/politics/2021/05/eviction-moratorium-landlord-covid-bay-area (last visited June 19, 2022) ("On average, [East Bay Community Law Center has] gotten 33 calls per month complaining of illegal evictions and 46 calls per month reporting landlord harassment [since the start of the pandemic]."). The same is true in Rhode Island. Jack Perry, *Seeing Increase in Illegal Eviction Attempts, RI Attorney General Warns Landlords*, PROVIDENCE J. (Nov. 2, 2020, 3:41 PM), https://www.providencejournal.com/story/news/local/2020/11/02/seeing-illegal-evictions-increase-ri-attorney-general-warns-landlords/6122559002 [https://perma.cc/V5KT-7WTB] ("[W]e have seen a recent increase in people being bullied into leaving their homes or served with illegal eviction notices.").

38 *See, e.g.*, H.R. 1451 (a bill that would prohibit landlords from evicting a *tenant* without a court order during a national emergency).

39 *See, e.g.*, Bailey v. Poindexter's Ex'r, 55 Va. (14 Gratt.) 132, 142–43 (1858) ("That fundamental idea is, that, in the eye of the law, so far certainly as civil rights and relations are concerned, the slave is not a person, but a thing. The investiture of a chattel with civil rights or legal capacity is indeed a legal solecism and absurdity."); People v. Liberta, 474 N.E.2d 567, 570 (N.Y. 1984) ("'A male is guilty of rape in the first degree when he engages in sexual intercourse with a female by forcible compulsion.' 'Female,' for purposes of the rape statute, is defined as 'any female person who is not married to the actor.'" (quoting N.Y. PENAL LAW §§ 130.00, 130.35 (McKinney 2022))); Jennifer Sroka, Note, *A Mother Yesterday, but not Today: Deficiencies of the Uniform Parentage Act for Non-Biological Parents in Same-Sex Relationships*, 47 VAL. U. L. REV. 537, 546 (2013) (explaining that, because who the law recognizes as a "parent" depends on the legislative definition, "granting legal rights to a non-biological parent in a same-sex relationship is heavily dependent on the language of the statute").

40 *See, e.g.*, *NYC Tenant Organizing History*, RIGHT TO COUNSEL NYC COALITION, https://editor.mediahistorytimeline.org/t/d2ywxewgmb6es6yf79l1t0366667t7bu [https://perma.cc/79J2-KS6C] (tracking struggles for habitable housing conditions and tenant rights from settler colonization to the present in New York).

41 Schindler & Zale, *supra* note 11, at 153, 156 ("Like so much else in the history of U.S. housing law—racial zoning, racially restrictive covenants, exclusionary zoning, redlining, and other legal and financial barriers to obtaining mortgages—the unequal status of renters and owners is another example [of] communities of color being harmed by facially neutral laws and policies.").

further inferior status when it comes to legal protections.[42] That inequity is not merely a question of access to counsel. Even though informal evictions "often would have been avoidable if the tenants had an attorney," access to an attorney does not and will not solve the housing crisis.[43] When laws deliberately exclude a particular class of residential occupants from legal relief, the presence of a lawyer becomes virtually futile. In the context of self-help evictions, non-tenant residential occupants have been intentionally subjugated by the law to maintain a hierarchical social order determined by race, class, wealth, and political power.

This Article argues that consistent with the principles of common law and the nature of the contemporary housing economy, the prohibition of self-help eviction should extend uniformly and without exception to all residential occupants. Part I discusses the development of the "landlord-tenant" relationship and the history of the common law remedy of self-help to evict. It explains how that history, grounded in racial capitalism, led to a prohibition of self-help that omitted licensees and other non-tenant occupants of residential premises. Part II dissects the historical malleability of how traditional occupancy statuses of tenant, licensee, and squatter have been defined subject to the whims of settler colonialists and the propertied class. Part III then sets out the case for the abolition of self-help against all residential occupants as a necessary measure to protect those who are both most at risk of extrajudicial eviction and most in need of stable housing. Finally, the Article concludes by urging courts and lawmakers to recognize a common-sense approach that prioritizes housing security and human dignity over antiquated principles of title grounded in hierarchy, white supremacy, and status.

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[42] *See, e.g.*, Marc L. Roark, *Under-Propertied Persons*, 27 CORNELL J.L. & PUB. POL'Y 1, 12 (2017) (discussing the structural advantages experienced by propertied, as opposed to "under-propertied" people, and how "rights of property owners to exclude or set the terms of exclusion that apply against under-propertied persons interfere with community-making by poor residents").

[43] Petersen, *supra* note 7, at 76; Sabbeth, *supra* note 7, at 100.

I. THE DEVELOPMENT OF THE "LANDLORD-TENANT RELATIONSHIP" AND GENESIS OF SELF-HELP EVICTION

"In many, if not all instances, a licensee, such as a roomer or lodger, may be subjected to self-help eviction, whereas a tenant generally may not be so evicted."[44]

Social status and legal rights have long been entwined with the ownership of property.[45] The concept of a landlord-tenant relationship dates back to English feudal times when leases were developed for commercial rather than residential purposes.[46] Differing social positions and relationships were expressed through property.[47] An "estate" in land was a euphemism for one's social status.[48] The hierarchical relationship between "landlord" and "tenant" evolved from an agrarian interest where the objective was to produce income from the cultivation of land.[49] The "lords" of the land permitted serfs—the tenants—to use and live on the land in exchange for a portion of the profits derived from the serfs' cultivation of the land.[50]

Serfs, because they were descendants of a disfavored class, punished for the commission of a crime, or persecuted due to extreme poverty, were consigned to a state of slavery where they cultivated the lord's land in exchange for a plot of land from which they could extract subsistence.[51] The serfs' relationship to the land was considered a *status*, not a property interest, because the serf held the land entirely at the will

44 Harkins v. Win Corp., 771 A.2d 1025, 1027 (D.C.), *amended on reh'g in part*, 777 A.2d 800 (D.C. 2001) (citation omitted).

45 Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 140 (2000) ("In general, the nature of the services [exacted by the crown on the landholder] not only determined the holder's rights in the land, it also determined the landholder's position—or status—within the social system."); *see* Kristen David Adams, *Do We Need a Right to Housing?*, 9 NEV. L.J. 275, 311 (2009) ("On an internal level, housing may be an important part of belonging, comfort, and security. On an interpersonal level, housing may be part of how society defines personhood and citizenship.").

46 Christopher Wm. Sullivan, Note, *Forgotten Lessons from the Common Law, the Uniform Residential Landlord and Tenant Act, and the Holdover Tenant*, 84 WASH. U. L. REV. 1287, 1291 (2006).

47 *See* Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 290 (1998) ("These social relationships were expressed through property. A limited number of approved estates in land cemented a limited number of 'estates,' i.e., social positions.").

48 *See id.*

49 Heidi Lee Cain, Comment, *Housing Our Criminals: Finding Housing for the Ex-Offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131, 141–42 (2003).

50 *See id.*

51 Paul Sullivan, Note, *Security of Tenure for the Residential Tenant: An Analysis and Recommendations*, 21 VT. L. REV. 1015, 1022 (1997).

of the lord.[52] That status imbalance empowered the lord to evict the serf arbitrarily.[53]

Principles of property law operated as an apparatus to maintain social hierarchy and the tremendous power of the property owner. Social order and status flowed from the property law "principle of seisin, which not only embodied the modern conception of 'possession,' but also added elements of what today might be called 'title.'"[54] A freehold estate, for which seisin attached, held higher status and was afforded greater protection in courts than a leasehold estate for which seisin did not attach.[55] In the absence of seisin, possessory remedies were unavailable.[56] "By design, the courts and the remedies they provided were available only to persons with land and privilege and were not available to those without them."[57] That exclusion from judicial recourse for those of lesser status empowered the ruling class and gave

52 *See id.*

53 Cain, *supra* note 49, at 142. As discussed in Part III, *infra*, that status imbalance and the preservation of the white ruling class continues throughout history and remains central to the question of who does and does not have a right to court process in residential settings in the contemporary housing economy.

54 Spector, *supra* note 45, at 140 ("Although persons who occupied the modern position of 'landlord' did not enjoy exclusive rights to the land they occupied, their attributes of ownership of land were connected to a high level of status within the social system.").

55 Sullivan, *supra* note 46, at 1292–93.

56 *Id.* at 1293; Spector, *supra* note 45, at 140–41, 147 (noting that only those "who occupied a high level of status within the social system, had standing . . . to assert an action for possession," and because most tenants were not freeholders, they could not invoke protection of the courts).

57 Spector, *supra* note 45, at 141. American jurisprudence is rife with such exclusionary policies that were justified post hoc to permit atrocities from the hijacking of land from Indigenous people to the displacement of formerly enslaved human beings. *See* Anthony Peirson Xavier Bothwell, *We Live on Their Land: Implications of Long-Ago Takings of Native American Indian Property*, 6 ANN. SURV. INT'L & COMPAR. L. 175, 196 (2000) ("Indians' land rights had been devastated by the *M'Intosh* theories of 'Indian title,' discovery, and conquest. Native rights were further eroded in 1903 when the Supreme Court decided Congress had 'plenary power' to take the lands and evict the Indians without compensation."); Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV'T L. REV. 1, 6–7 (2017) (critiquing the 1955 case of *Tee-Hit-Ton Indians v. United States*, where the Court concluded that Indian title was "not a property right," language that is typically reserved to characterize permission to remain on land that "can be revoked at any moment for any reason"); Ayesha Bell Hardaway, *The Breach of the Common Law Trust Relationship Between the United States and African Americans: A Substantive Right to Reparations*, 39 N.Y.U. REV. L. & SOC. CHANGE 525, 556–57 (2015) (noting that the July 16, 1866 Freedmen's Bureau Bill qualified the conveyance of land to recently emancipated African Americans such that "those who did not meet the technical requirements to have their titles recognized [by presenting a valid possessory title] were given no option but to leave the property they had cultivated and made home").

rise to the common law right of landlords to exercise "self-help" to remove others from their land.[58]

Because of their superior status in the eyes of the law, landlords were historically vested with an absolute right to take possession upon breach or expiration of a lease.[59] "So strong was the landlord's right that it 'was one of the few areas where the right to self-help was recognized.'"[60] Under common law principles of self-help, landlords were permitted to enter their land and recover it by force.[61]

A. *Limiting the Unfettered Power of Landlords to Use Self-Help to Evict*

The power imbalance, and the violence it fueled, subjected the remedy of self-help to condemnation dating back centuries. The "indulgence of the common law," which allowed forcible self-help, declared William Hawkins, "having been found by experience to be very prejudicial to the public peace, by giving an opportunity to powerful men, under the pretense of feigned titles, forcibly to eject their weaker neighbors . . . [gave rise to] many severe laws, to restrain all persons from the use of such violent methods of doing themselves justice."[62]

As observed by Sergeant Hawkins in the early Eighteenth Century, the fraught history of self-help evictions at common law motivated a desire to adopt alternatives intended to prevent violence and breaches of the peace.[63] Among the first steps in that evolution was limiting the landlord's remedy to recovery of land in a "peaceable" manner, without the use of force.[64] Judicial alternatives to self-help also developed. Chief

58 *Cf.* Adams, *supra* note 45, at 308 ("[S]ociety relegates homeless persons, not having achieved the requisite socioeconomic status to be deemed 'persons,' to a position of lesser freedom, even a kind of slavery.").

59 Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 925, 1009.

60 *Id.* (quoting Lindsey v. Normet, 405 U.S. 56, 71 (1972)); *see also Lindsey*, 405 U.S. at 71 ("The landlord-tenant relationship was one of the few areas where the right to self-help was recognized by the common law of most States, and the implementation of this right has been fraught with 'violence and quarrels and bloodshed.'" (quoting Entelman v. Hagood, 22 S.E. 545, 545 (Ga. 1895))).

61 *See* Mendes v. Johnson, 389 A.2d 781, 783 (D.C. 1978).

62 Dickinson v. Maguire, 9 Cal. 46, 50 (1858) (quoting I WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 64, § 2 (1762)).

63 *Lindsey*, 405 U.S. at 71 ("An alternative legal remedy to prevent such breaches of the peace has appeared to be an overriding necessity to many legislators and judges.").

64 Nickens v. Mount Vernon Realty Grp., LLC, 54 A.3d 742, 750 (Md. 2012) ("The titleholder's right to gain repossession in a 'peaceable' manner evolved into the common law remedy of peaceable self-help.").

among those alternatives was a statutory remedy for unlawful entry and detainer, which required court process prior to eviction.

The first forcible entry and detainer statute was enacted in England in 1381 with a purpose of preserving peace and preventing disturbances of public order.[65] "Forcible entry," initially codified under English common law statutes, was a criminal statute that made "an entry on real property peaceably in the possession of another, against his will, without authority of law, by actual force" a criminal misdemeanor.[66] "Forcible detainer," in contrast, is the civil law counterpart—a separate cause of action—where a civil remedy of possession may be available.[67] The theory was that an efficient mechanism to resolve questions about the possession of real property could maintain peace and order in the immediate while leaving ultimate, sometimes more complicated, questions of title and the right to future possession to be determined by the court at a later date.[68] "Known as the *assize of novel disseisin*, this early action for possession was considered 'subsidiary and preliminary' to an action for title."[69] Notably, that early prohibition against self-help "extended to persons having a right to possession," not merely to those with a leasehold or estate in the land.[70]

Viewed as an affront to the respect for judicial process and citizen safety, self-help remedies have long been disfavored in the United States.[71] For instance, in 1860, the Supreme Court of California reasoned that because "[t]he law gives ample redress" to landlords, to allow the "extraordinary mode [of self-help] for redressing personal grievances . . . would be of dangerous tendency, and lead to breaches of the peace and oppression."[72] Several states enacted forcible entry and

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[65] Forcible Entry Act 1381, 5 Rich. 2 St. 1 c. 7 (Eng.) (providing "none [may] make any entry into lands . . . but only in peaceable and easy manner"); *see Dickinson*, 9 Cal. at 50–51; *see also* Vincent R. Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015*, 47 ST. MARY'S L.J. 1, 35–36 (2015) (describing implementation of popular reforms of *novel disseisin*, *mort d'ancestor*, and *darrein presentment* by Henry II, "perhaps the greatest [legal innovator] in English history").

[66] Forcible Entry Act 1381 (Eng.); *see* Eubanks v. First Mount Vernon Indus. Loan Ass'n, Inc., 726 A.2d 837, 846 (Md. Ct. Spec. App. 1999).

[67] *See* Forcible Entry Act 1429, 8 Hen. 6 c. 9 (Eng.).

[68] *See* Jordan v. Talbot, 361 P.2d 20, 24 (Cal. 1961).

[69] Spector, *supra* note 45, at 142 (quoting THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 359 (5th ed. 1956)).

[70] *See Jordan*, 361 P.2d at 23 n.2.

[71] *See* Spector, *supra* note 45, at 155–56; Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 507 (1982) (noting that in the eighteenth and nineteenth centuries, "courts were hesitant to subject a tenant to immediate dispossession [because] . . . legislatures were concerned about the effects an abrupt termination could have upon a tenant").

[72] Fox v. Brissac, 15 Cal. 223, 225–26 (1860).

detainer statutes to constrain the ability of landlords to evict without court process.[73] Such statutes were among the first passed by many legislatures, some even before their states entered the Union.[74] Today, pursuant to longstanding policy objectives to preserve the public peace and prevent landlords from taking the law into their own hands, nearly every state has abolished the use of self-help and permits landlords to evict tenants only through judicial proceedings.[75] Because of antiquated exclusions grounded in racism and classism, however, that prohibition has remained a far cry from a panacea for the most marginalized residential occupants.

B. *The Exclusion of Non-Tenants from the Prohibition Against Self-Help*

As noted in the prior Section, most jurisdictions have adopted some formal prohibition of self-help evictions. Yet the law is far from settled in many jurisdictions. On the contrary, the law has dexterously carved out exceptions that leave the most vulnerable populations at risk.

In New York, for example, the state's highest court has declared that "[t]he law is clear and well established that a landlord may not oust an occupant of an apartment from those premises without resorting to proper legal process and providing legal notice."[76] Nonetheless, New York courts have continued to permit the unceremonious ouster of non-tenants by extrajudicial means.[77] Thus, a person who paid rent to occupy a room in a "supportive living facility" for over six months had

[73] Shannon Holmberg, *Squashing the Squatting Crisis: A Proposal to Reform Summary Eviction and Improve Case Management Services to Stop the Squatter Supply*, 65 DRAKE L. REV. 839, 856 (2017). With the right to court process came the remedy of restoration to possession in the event of an extrajudicial ouster. *See* Dustin v. Cowdry, 23 Vt. 631, 638 (1851) ("[T]he statute of 8 Henry VI did give both the power of making restitution of possession, and treble damages to the party thus thrust out.").

[74] Spector, *supra* note 45, at 152.

[75] Randy G. Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 764, 777 (1994) ("With the availability of a speedy remedy for landlords, the majority of states have banned self-help evictions, requiring resort to legal process instead."); *see* Fults v. Munro, 95 N.E. 23 (N.Y. 1911); Town of Oyster Bay v. Jacob, 96 N.Y.S. 620 (App. Div. 1905).

[76] Romanello v. Hirschfeld, 98 A.D.2d 657, 658 (N.Y. App. Div. 1983) (Fein & Milonas, JJ., dissenting), *modified*, 468 N.E.2d 701 (N.Y. 1984).

[77] *See, e.g.*, Felli v. Cath. Charities of Steuben Cnty., 108 N.Y.S.3d 624 (App. Div. 2019) (concluding that the occupant failed to state a cause of action for unlawful eviction because the occupant was a licensee, not a tenant); Paulino v. Wright, 620 N.Y.S.2d 363, 364 (App. Div. 1994) (permitting extrajudicial ouster of squatters).

no right to restoration when the landlord used self-help to evict him.[78] Similarly, a boyfriend was permitted to evict his girlfriend with whom he had cohabitated for three years because, despite the long duration, she occupied the space with "less than a landlord/tenant relationship" as a licensee who was not entitled to notice or court process.[79]

Likewise, in Washington, D.C., despite broad recognition that the common law right of self-help has been abrogated by statute, a "roomer" who occupied a rooming house for eight months was not entitled to relief following his extrajudicial ouster.[80] Similarly, in Maine, a woman who "was and had been for some time the occupant of her hotel room" was not entitled to notice or due process before being evicted for an alleged debt for past occupancy.[81] In Michigan, one court explained that "[t]he distinction between a guest and a tenant is significant whereby a guest is not entitled to notice of termination and can be the subject of self-help eviction, including a lockout, by the proprietor, while a tenant has protection against such measures."[82] In New Hampshire, a husband and wife who resided in a hotel and paid eighty-four dollars per night for eighteen months were not entitled to a remedy for the owner's use of extrajudicial means to evict because the court determined that they were "not tenants."[83] And in New Jersey, appellate courts have determined that protections against wrongful eviction simply "do not apply to transient or seasonal tenants residing at a hotel, motel or other guest house."[84] Numerous other states maintain the same incongruity, prohibiting self-help unless the occupant is among the disfavored class of residential occupants who—often because of race, class, immigration status, illness, financial circumstances or personal crisis—do not meet the formal definition of "tenant" under the law.[85]

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78 Andrews v. Acacia Network, 70 N.Y.S.3d 744 (App. Term 2018) (holding that a licensee could not maintain a proceeding to seek restoration following self-help eviction from the premises).

79 People v. Hyland, 862 N.Y.S.2d 816, at *3 (N.Y. Dist. Ct. 2008).

80 Harkins v. Win Corp., 771 A.2d 1025 (D.C.), *amended on reh'g in part*, 777 A.2d 800 (D.C. 2001).

81 Sawyer v. Cong. Square Hotel Co., 170 A.2d 645, 646–47 (Me. 1961).

82 Ann Arbor Tenants Union v. Ann Arbor YMCA, 581 N.W.2d 794, 798 (Mich. Ct. App. 1998).

83 Anderson v. Robitaille, 205 A.3d 1105, 1112 (N.H. 2019).

84 Hurdle v. Citimortgage, Inc., No. A-1251-07T2, 2009 WL 1118748, at *9–10 (N.J. Super. Ct. App. Div. Apr. 28, 2009). The gaps in protection by the law exist despite a statutory mandate requiring eviction by legal process for "any real property occupied solely as a residence." *See* N.J. STAT. ANN. § 2A:39-1 (West 2022).

85 *See* Amy M. Campbell, *When a Hotel Is Your Home, Is There Protection?—*Baker v. Rushing, 15 CAMPBELL L. REV. 295, 300 (1993) ("Arguably, in the absence of a residential

II. THE CONSTRUCTION OF RESIDENTIAL STATUS AS A MEANS TO MAINTAIN HIERARCHY, WHITE SUPREMACY, AND PRIVATE PROPERTY

> *"To be a tenant a person must have some estate, be it ever so little, such as that of a tenant at will or on sufferance. A person may be in occupation of real property simply as a servant or licensee of his master. In that case the possession is not changed; it is always in the master."*[86]

Through the eighteenth and nineteenth centuries, the rules governing the landlord-tenant relationship remained largely unchanged from English common law.[87] After World War II until the late 1960s, legislatures at the federal and state levels began to emphasize policies of affordability and habitability in housing.[88] Pressured by grassroots activists, arcane common law rules gave way to a so-called legislative "revolution" in landlord-tenant law.[89]

Much has been written of a "revolution" in landlord-tenant law during the 1960s.[90] That "revolution" refers to a series of reforms broadly intended to protect the rights of residential tenants, including the birth of the warranty of habitability, rent control, protections against retaliatory eviction, and the prohibition of self-help to evict.[91] Those reforms stemmed from a renewed belief in the law as "an engine for social, political, and economic change" and the potential for the government to be a "positive force in people's lives."[92] Although far from leading to a fundamental shift in the capitalistic social order, the period did mark a new era for the rights of tenants vis-à-vis landlords.

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landlord-tenant relationship, peaceable self-help remains as an alternative to evict occupants."); ARIZ. REV. STAT. ANN. § 33-1374 (2022) (prohibiting forcible removal of a "tenant"); State v. Main, 764 P.2d 1155, 1157 (Ariz. Ct. App. 1988) ("In Arizona the landlord cannot use self-help to eject hold-over tenants. [The] only remedy is to bring an action for possession."); Young v. Harrison, 284 F.3d 863, 868 (8th Cir. 2002) ("Although South Dakota appears to have never faced or decided the issue of whether a hotel guest is a tenant or something less, like a licensee, we think that if faced with the issue, South Dakota would join many other jurisdictions in concluding that a hotel guest is not a tenant and is subject to self-help eviction.").

86 Presby v. Benjamin, 62 N.E. 430, 431 (N.Y. 1902).

87 *See* Michael A. Brower, *The "Backlash" of the Implied Warranty of Habitability: Theory vs. Analysis*, 60 DEPAUL L. REV. 849, 855 (2011) ("Attempts to reform the common law through legislation provided some reprieve for tenants, but the common law perspective remained largely unshaken.").

88 *Id.* at 856.

89 *See, e.g.*, Glendon, *supra* note 71, at 503 ("It is generally acknowledged that the 1960's and 1970's saw a revolution of sorts in American landlord-tenant law.").

90 *See, e.g.*, Cain, *supra* note 49, at 143–45.

91 *See* Glendon, *supra* note 71, at 503–05.

92 Gerald Korngold, *Whatever Happened to Landlord-Tenant Law?*, 77 NEB. L. REV. 703, 707–08 (1998).

But in the context of an evolving landscape of urban housing norms, broad swaths of residential occupants who are not clearly identifiable as "tenants" were left out.

The exclusion of certain occupants is consistent with the history of property law as a tool of social stratification. Property rights are fluid social constructs.[93] They are designed to further political ends.[94] And they function to maintain a racial hierarchy that furthers the accumulation of wealth by the monied class.[95] The deliberate exclusion of non-tenants from the prohibition against self-help—and the necessary companion right to restoration—codifies a history of racial and economic inequality by erasing an entire class of residential occupants who are disproportionately Black, Indigenous, and people of color who are low-wealth or working class.

The absence of a formal landlord-tenant relationship is commonplace among marginalized communities. Informal housing markets exist and expand to meet the needs of individuals and families who cannot afford shelter in the formal housing marketplace.[96] Noah J. Durst and Jake Wegmann argue that the prevalence of informal housing in the United States is obscured by a "blind spot" in housing-related scholarship that fails to consider it.[97] Rather than recognize tiers of substandard housing in the United States, reference to and use of terms like "colonia," "favela," or "hood" serve to distance and racialize informal housing communities as "third world."[98] According to Durst and Wegmann, informal housing is "geographically uneven, . . . interwoven with formal housing . . . and hidden, both in a figurative and sometimes literal sense."[99] Given housing shortages, they

[93] Williams, *supra* note 47, at 290–91 ("[P]roperty rights do not have one 'natural' set of characteristics, but instead are configured and reconfigured over time to achieve ever-varying sets of political goals.").

[94] *See id.*

[95] Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CALIF. L. REV. 1511, 1523 (1991) ("If the racially charged 'discovery' and conquest from which so many American land titles spring is one demonstration of the fact that race is at the heart of American property law, then surely the institution of slavery is another.").

[96] *Illegal Dwelling Units: A Potential Source of Affordable Housing in New York City*, CHHAYA CMTY. DEV. CORP. (2008), https://basecampaign.files.wordpress.com/2013/10/illegal_dwelling_units1.pdf [https://perma.cc/NR4C-P9P4].

[97] Noah J. Durst & Jake Wegmann, *Informal Housing in the United States*, 41 INT'L J. URB. & REG'L RSCH. 282, 282 (2017).

[98] *See id.*; *see also* RICHARD MINER IV & KOFI LOMOTEY, HANDBOOK OF URBAN EDUCATION (2d ed. 2021) (discussing the pejorative nature of terms like "inner-city," "ghetto," "slum," "barrio," and "hood" that refer to spaces occupied by non-white and poor people and that are often separated by "geographic boundaries and socio-economic structures [to] reinforce racial/spatial disparities").

[99] *Id.* at 283.

posit that the state "willfully ignores, legitimates or benefits from certain extralegal housing market activities."[100] Because housing stock in informal markets meets needs that the formal market cannot, the willful failure to enforce codes and ordinances related to occupancy standards has become a de facto policy initiative to meet housing needs.[101] Indeed, "[m]ost individuals who are unable to afford housing do not live in shelters or on the street but rather with friends and family members,"[102] or have extended stays in hotels or motels.[103] As of 2018, nearly four million people were in "doubled up" situations, "sharing the housing of others for economic reasons."[104] As discussed below, the informality of these housing arrangements has also obfuscated the ability of courts to clearly identify the residential status of many such occupants.[105]

100 *Id.* at 284.

101 *See id.* at 289–90.

102 Benfer et al., *supra* note 15, at 3.

103 Mya Frazier, *When No Landlord Will Rent to You, Where Do You Go?*, N.Y. TIMES MAG. (Oct. 1, 2021), https://www.nytimes.com/2021/05/20/magazine/extended-stay-hotels.html [https://perma.cc/6A97-2GDK]; *see* Esther Schrader, *Overextended Stay: People Living in Long-Term Residential Hotels Fight Evictions to Avoid Homelessness*, S. POVERTY L. CTR. (Oct. 8, 2021), https://www.splcenter.org/news/2021/10/08/overextended-stay-people-living-long-term-residential-hotels-fight-evictions-avoid [https://perma.cc/MSZ4-SEET] ("These sorts of extended-stay hotels can provide a source of stable, safe housing for folks, many of them low-income Black and Brown folks, who otherwise would be on the street."); *"Don't Choke Us!" Covid-19 Eviction Moratoriums: The Hotel Owner's Perspective*, REFORM LODGING, https://www.reformlodging.org/wp-content/themes/reformlodgingda/pdf/RL-Eviction-Moratorium-Perspective-Paper.pdf [https://perma.cc/VZA3-SYSR] (noting the "variety of reasons," including convenience, proximity to work, and navigating transitionary periods stemming from "family relations or other personal matters," that people rely on extended stays at motels or hotels for housing); Lauren Lindstrom, *"It's Hard Out Here." North Carolina Bill Would Let Hotels Bypass Court to Evict Residents*, TIMES NEWS (July 1, 2021, 2:13 PM), https://www.thetimesnews.com/story/news/2021/07/01/north-carolina-bill-would-let-hotels-bypass-court-evict-residents/7829786002 [https://perma.cc/KCF5-G8Z5] (describing reasons why people live long term in motels, including "those with financial barriers to housing, as well as families who were recently homeless, escaping domestic violence or had to leave their last residence").

104 STATE OF HOMELESSNESS: 2021 EDITION, NAT'L ALLIANCE TO END HOMELESSNESS (2021), https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-report [https://perma.cc/J88H-MZMV]; *see* Benfer et al., *supra* note 15, at 2 ("Eviction increases the likelihood of 'couch surfing,' residing in shelters, sleeping in cars or outdoors, and doubling up with friends and family who may themselves be at risk for COVID-19.").

105 *See* Wilma Metcalf, *Doubled-Up: How HUD Mistakenly Excludes a Vulnerable Population*, 50 STETSON L. REV. 331, 331–32 (2021) (discussing the exclusion of people who are "doubled up"—i.e., "those temporarily living with someone else *without any property interest in the home*"—from the definition of "homeless" as interpreted by the United States Department of Housing and Urban Development (emphasis added)).

A. *Untangling Classifications of Those Who Occupy Land of Another: Tenants, Licensees, and Squatters*

The power to exclude without resort to court process is muddled in a web of archaic classifications based on various circumstances that give rise to a person's physical occupancy of property.[106] At the most basic level, a person's relationship to the land they occupy can be broken into two categories: people who enter with permission of the owner and those who do not.

1. Trespassers and Squatters

Entering the property of another without permission is trespass, an act that can subject the trespasser to civil and criminal liability.[107] That *act of trespass*, or intrusion, however, does not necessarily render the trespasser a squatter, a term that describes a *relationship to the property*.[108] Although the initial entry may have been a trespass, the trespasser becomes a squatter only after deciding to remain therein.[109] Although a person's criminal trespass may end after the initial entry, continued presence may establish a relationship with the property, transforming the trespasser into a squatter.[110] Continued occupancy under a claim of title can ultimately transform the squatter's adverse possession into legal title.[111] Due to the correlation between the trespassory act and continued occupation of the premises without

[106] Traditionally, the legal "right to exclude others" has been recognized as an "essential element" of what constitutes a property right. *See* Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918). As discussed in Section II.B, *infra*, who possesses and does not possess that right has been manipulated by racialized politics of wealth and power.

[107] *See* N.Y. PENAL LAW § 140.15 (McKinney 2022) (providing that a person who "knowingly enters or remains unlawfully in a dwelling" is guilty of criminal trespass in the second degree); Long Island Gynecological Servs., P.C. v. Murphy, 748 N.Y.S.2d 776, 777 (App. Div. 2002) ("Liability for civil trespass requires the fact-finder to consider whether the person, without justification or permission, either intentionally entered upon another's property, or, if entry was permitted, that the person refused 'to leave after permission to remain ha[d] been withdrawn.'" (alteration in original)).

[108] *See* Shannon Dunn McCarthy, *Squatting: Lifting the Heavy Burden to Evict Unwanted Company*, 9 U. MASS. L. REV. 156, 166–67 (2014) (explaining the nuances in the trajectory from the act of trespass, to the continued presence of a squatter, to the granting of legal title to the adverse possessor).

[109] *Id.* at 168; *see* Williams v. Alt, 123 N.E. 499, 501 (N.Y. 1919); *Squatter*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining squatter as "[s]omeone who settles on property without any legal claim or title").

[110] *See* McCarthy, *supra* note 108, at 166–67.

[111] *See id.*

permission, courts have generally been more inclined to permit the self-help eviction of squatters.[112] Somewhat confusingly, however, it does not follow that all occupants who occupy land with permission of the owner are protected from self-help.

2. Licensees and Tenants

Those who occupy land with permission of the owner are broadly classified as either tenants or licensees.[113] A tenant is generally entitled to court process prior to eviction.[114] A licensee is not.[115] At common law, a licensee was one who merely occupied the land but lacked a legal "interest" or "estate" in the land.[116] A person who held a *possessory interest* in the land of another—what is considered a leasehold—generally fell into one of four categories: term-of-years tenancy, periodic tenancy, tenancy at will, or tenancy at sufferance.[117] The

112 *See, e.g.*, P & A Bros. v. City of N.Y. Dep't of Parks & Recreation, 184 A.D.2d 267, 268 (N.Y. App. Div. 1992) ("While it is true that tenants as defined [by statute] may be evicted only through lawful procedure, others, such as licensees and squatters, who are covered by [the unlawful entry and detainer statute] are not so protected. Thus, [the unlawful entry and detainer statute] merely permits a special proceeding as an additional means of effectuating the removal of non-tenants, but it does not replace an owner's common-law right to oust an interloper without legal process."). Although there are certainly strong arguments for why squatters should also have a right to court process, not the least of which is that many squatters elect to occupy unused or otherwise abandoned property because of a basic need for shelter. *See* McCarthy, *supra* note 108, at 166.

113 *See* Presby v. Benjamin, 62 N.E. 430, 431 (N.Y. 1902) ("To be a tenant a person must have some estate, be it ever so little, such as that of a tenant at will or on sufferance. A person may be in occupation of real property simply as a servant or licensee of his master.").

114 *See, e.g.*, *License and Lease Distinguished*, 1 TIFFANY REAL PROP. § 79 (3d ed. 2021).

115 *See id.*

116 *See, e.g.*, Dolittle v. Eddy, 7 Barb. 74, 75 (N.Y. Gen. Term. 1849) ("[A license] is not a permanent interest in the land; nor is it an estate; nor does the relation of landlord and tenant exist."); Blue River Sawmills, Ltd. v. Gates, 358 P.2d 239, 255 (Or. 1960) ("It is a matter of universal acceptance that: 'A license in respect of realty is an authority to do an act on the land of another *without possessing any estate in the land*, and is to be distinguished from a grant or demise creating some interest in the property.'"); Spinks v. Equity Residential Briarwood Apartments, 90 Cal. Rptr. 3d 453, 482 (Ct. App. 2009) ("Unlike a tenancy, a license does not convey a possessory interest in land.").

117 *See* Martorana v. Fed. Nat'l Mortg. Ass'n, No. 11-10312, 2012 WL 124930, at *7 (E.D. Mich. Jan. 17, 2012). Periodic tenancies, such as tenant from year to year, were an outgrowth of the tenancy at will. *See* Alonzo D. Rice, *Landlord and Tenant—Periodic Tenancy at Common Law—Developments and Substitutes in the United States and Texas*, 19 TEX. L. REV. 185, 189–90 (1941). Upon acceptance of rent for a definite period, a tenancy at will becomes a periodic tenancy terminable only upon proper statutory notice. *See id.* "Periodic tenancies are those where the agreement provides no fixed term, but is for period to period at the will of the lessor or the lessee. [They] endure[] for a certain period and will continue for subsequent like periods unless

contemporary understanding of who is a tenant stems from those classes of tenancy at common law.

a. Four Categories of Tenancy at Common Law

The term-of-years tenancy is the nonfreehold estate that is most familiar in the modern rental economy. Under the terms of a tenancy for years, the tenant has the right to possess the land and exclude others from entering the land for a fixed period of time agreed upon by the tenant and landlord.[118] A periodic tenancy resembles the term-of-years tenancy but instead of including a fixed time when the relationship ends, the periodic tenancy continues and is renewed automatically unless the landlord gives advance notice of termination.[119]

A tenant at will is one who enters upon land with the owner's permission, and retains that permission when remaining on the land "for an indefinite period, even without the reservation of any rent[.]"[120] Like the tenant at will, the tenant at sufferance also enters upon land with the permission of the landlord.[121] Rather than remain in possession with express or implied permission of the landlord, however, the tenant at sufferance "holds over by wrong," remaining in possession after the landlord's permission is revoked or expired.[122] "A tenant at sufferance has no estate nor title, but only a naked possession, without right and wrongfully, and stands in no privity to the landlord."[123] The tenant at sufferance, it has been said, is "the most shadowy estate recognized at common law" only distinguishable from the trespasser in that they "cannot be subjected to an action in trespass before entry or demand for possession."[124] Nonetheless, a tenant at sufferance—like each of the other classes of "tenant"—may not be evicted without court process.[125]

terminated by one of the parties at the end of the period." 49 AM. JUR. 2D *Landlord and Tenant* § 115 (2022).

118 *See Creation of Tenancy—by Interference on General Letting*, 1 TIFFANY REAL PROP. § 169 (3d ed. 2021); 52 C.J.S. *Landlord & Tenant* § 227 (2022).

119 *See* 52 C.J.S. *Landlord & Tenant* § 227 (2022).

120 Larned v. Hudson, 60 N.Y. 102, 104 (1875); *see also* Livingston v. Tanner, 14 N.Y. 64, 66 (1856).

121 52 C.J.S. *Landlord & Tenant* § 262 (2022).

122 *Id.*

123 Margosian v. Markarian, 192 N.E. 612, 613 (Mass. 1934); *see also* Mount Calvary Missionary Baptist Church v. Morse St. Baptist Church, No. 2-04-147-CV, 2005 WL 1654752, at *7 (Tex. Ct. App. July 14, 2005) ("A tenant at sufferance is merely an occupant in naked possession of property after his or her right to possession has ceased.").

124 Brady v. Scott, 175 So. 724, 724–25 (Fla. 1937).

125 *See, e.g.*, Evans v. J Four Realty, LLC, 62 A.3d 869, 875 (N.H. 2013); Hinton v. Sealander Brokerage Co., 917 A.2d 95, 108 (D.C. 2007).

b. Licensees

In contrast to a landlord-tenant relationship, which "exists for a fixed term, [is] not revocable at will, and [is] terminable only on notice," a license "is cancellable at will, and without cause."[126] "Whereas a license connotes use or occupancy of the grantor's premises, a lease grants exclusive possession of designated space to a tenant . . . ."[127] That licensee status, it appears, is malleable. Although "mere occupancy," even with consent of the owner, may only create a license, an occupant may elevate status to become a tenant at will, "rather than a mere licensee," when there has been payment of rent or "an agreement of some sort from which a tenancy may be inferred."[128] And even though a license is generally "revocable at will without notice,"[129] a license, too, becomes irrevocable where there is reasonable reliance by the licensee.[130] Even though the remedy of self-help has generally remained available to an owner to remove squatters because "trespassers never gain[] possession," the requisite legal possession that would erect a barrier to self-help arises when the owner offers "something like acquiescence in the physical fact of [the trespasser's] occupation."[131] In other words, "self-help is not available when a landlord gives a squatter permission, whether implicit or express, to occupy his property."[132]

In light of these inconsistencies, the case law is littered with acrobatics in logic and common sense undertaken by courts to interpret the legal significance of these purportedly distinct residential statuses. It is no surprise that, over time, these definitions have become muddied and conflated. For instance, according to the Court of Appeals in New York, if a person is "placed upon the land as a mere occupier, without any term prescribed or rent reserved, he is strictly a tenant at will."[133]

126 Am. Jewish Theatre, Inc. v. Roundabout Theatre Co., 610 N.Y.S.2d 256, 257 (App. Div. 1994).

127 *Id.*

128 E.W.H., *Status as Licensee or Lessee of One in Occupation of Land in Anticipation of the Making or Execution of a Lease*, 123 A.L.R. 700 (1939).

129 *License and Lease Distinguished*, 1 TIFFANY REAL PROP. § 79 (3d ed. 2021).

130 Saratoga State Waters Corp. v. Pratt, 125 N.E. 834, 838 (N.Y. 1920) ("A license is revocable and carries no interest in the land in or over which it is to be enjoyed. It may become irrevocable through the expenditure of money by the licensee, and, when executed, will prevent the owner of the land from maintaining an action of trespass for the acts done under it."); Prosser v. Gouveia, 470 N.Y.S.2d 231, 232 (App. Div. 1983) ("An irrevocable license coupled with an interest may be found where there is an agreement founded on consideration and the licensee altered his or her position in reliance on the license.").

131 Walls v. Giuliani, 916 F. Supp. 214, 217 (E.D.N.Y. 1996) (citing POLLOCK ON TORTS 292 (15th ed. 1951) (1887)).

132 *Id.* at 218.

133 Larned v. Hudson, 60 N.Y. 102, 104 (1875).

That characterization is notably indistinguishable from the definition of a licensee as one who is granted "use and occupancy" of a premises without a fixed term.[134] Another court similarly jumbles in its description of a tenant at sufferance as "a bare licensee."[135] In an apparent attempt to delineate the categories of occupant, yet another court acknowledges that the common law definitions of tenant at will and licensee "do tend to blur," but they both "involve common concepts of temporary permission to occupy premises for an undetermined time period."[136] Thus, "synthesized down to its most basic common denominator," the court reasons, "a 'tenant at will' recognizes a landlord-tenant relationship" while "a 'licensee' acknowledges an absence of a landlord-tenant relationship."[137] In other words, what distinguishes a tenancy at will from a license is the post hoc legal fiction that one creates an estate or "interest" and the other does not.[138]

B. *Distinguishing a Leasehold from a License*

To appreciate the thrust of this article—that it is time to abolish the anachronistic exclusion of non-tenant residential occupants from a right to court process prior to eviction—the history of that right and its limitations are instructive. According to Blackstone, there are four degrees of title: (1) naked possession or actual occupation, (2) right of possession, (3) mere right of property (without possession or the right to possession), and (4) complete title.[139]

Traditionally, to maintain an action for unlawful detainer, the occupant must demonstrate both the first and second degree.[140] Whether an occupant is deemed to hold a lease or license has been essential to meet that burden and, importantly, to protect against the

134 *See, e.g.*, Am. Jewish Theatre, Inc. v. Roundabout Theatre Co., 610 N.Y.S.2d 256, 257 (App. Div. 1994).

135 Margosian v. Markarian, 192 N.E. 612, 613 (Mass. 1934) ("A tenant at sufferance is a bare licensee to whom the landlord owes merely the duty not wantonly nor wilfully to injure him.").

136 Drost v. Hookey, 881 N.Y.S.2d 839, 841 (N.Y. Dist. Ct. 2009).

137 *Id.*

138 *See* Covina Manor, Inc. v. Hatch, 284 P.2d 580, 582–83 (Cal. App. Dep't Super. Ct. 1955).

139 *See* Pannill v. Coles, 81 Va. 380, 383–84 (1886).

140 *See, e.g.*, Chapman v. Deutsche Bank Nat'l Tr. Co., 302 P.3d 1103, 1108 (Nev. 2013) ("Unlawful detainer actions fall into the second 'degree' of title in a property, 'right of possession,' and accordingly, are actions that affect interests in a thing—real property.").

whims of overzealous landlords who take the law into their own hands to evict without due process.[141]

As discussed above, it is generally agreed that a lease conveys an "interest" in a particular space or real property while a license is merely permission to use or occupy the land.[142] Accordingly, whether one may claim the panoply of rights that attach to a leasehold depends on whether one can establish a possessory interest in the residential premises—in other words, (1) actual possession and (2) a *right* to continued or future possession.[143]

1. Actual Possession

Black's Law Dictionary defines "actual possession" as bare "physical occupancy or control over property," in contrast to "possessory interest," which is the "present *right* to control property."[144] "Actual possession exists where the thing is in the immediate occupancy of the party . . . ."[145] "Possession" is satisfied by "any overt acts indicating dominion and a purpose to occupy and not to abandon the premises."[146] Indeed, "possession" and "occupation" "are frequently used synonymously."[147]

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141 *See* John V. Orth, *Who Is a Tenant? The Correct Definition of the Status in North Carolina*, 21 N.C. CENT. L.J. 79, 84 (1995) ("The correct definition of 'tenant' is crucial to the modern law of landlord and tenant, in which so many rights are based on status. The public policy of aiding tenants, for so long disadvantaged by the market and by common law rules favoring landlords, supports an expansive definition.").

142 *See, e.g.*, Mumford v. Whitney, 15 Wend. 380, 381 (N.Y. Sup. Ct. 1836) ("A license is an authority to enter upon the lands of another and do a particular act or a series of acts, without possessing any interest in the lands . . . ."); Am. Jewish Theatre, Inc. v. Roundabout Theatre Co., 610 N.Y.S.2d 256, 257 (App. Div. 1994) ("Whereas a license connotes use or occupancy of the grantor's premises, a lease grants exclusive possession of designated space to a tenant . . . .").

143 *See, e.g.*, Thomas E. Plank, *The Outer Boundaries of the Bankruptcy Estate,* 47 EMORY L.J. 1193, 1268 (1998) ("If a debtor has possession of property items at the time of filing the petition, the possessory interest—the actual possession and the right of possession—are part of the property of the estate."); Sarafian v. Wool Bros. Corp., 347 N.Y.S.2d 793, 794 (Civ. Ct. 1973) ("The possession spoken of [for the purposes of maintaining a summary proceeding] is not the legal right to possession but the physical possession.").

144 *Actual Possession*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Possessory Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added).

145 Brown v. Volkening, 64 N.Y. 76, 80 (1876).

146 Town of Oyster Bay v. Jacob, 109 A.D. 613, 615 (N.Y. App. Div. 1905); Fleming v. City of Bridgeport, 935 A.2d 126, 137 (Conn. 2007) ("Continuous presence is not required, but there must be evidence of 'actual physical control, with the intent and apparent purpose of asserting dominion.'").

147 Woods v. Broder, 129 A.D. 122, 124 (N.Y. App. Div. 1908) ("It requires no strained construction to read the words 'in the *occupation* of said premises' as meaning 'in the *possession*

Actual possession is a question of physical fact, and may exist unrelated to—or even in conflict with—enforceable possessory interest, which is a legal question.[148] For instance, a thief may have possession of stolen goods but have no "right" to possession of those goods.[149] Similarly, a person can be in "actual possession" of a premises without having a "possessory interest" in it.[150] Many who have no right of possession, like guests and roommates or squatters and trespassers, are nonetheless in "actual possession."[151] Similarly, a person who has a lease but has not yet physically entered the property may have legal possession—and a right to future possession—yet not actual possession of the premises.[152]

of said premises,' for the words are frequently used synonymously, especially in leases and like instruments."); Kedrovsky v. Rojdesvensky, 204 N.Y.S. 442, 444 (App. Term 1924) (equating "quiet possession" and "peaceful occupation" for the purposes of unlawful entry and detainer); *see* 1 WILLIAM BLACKSTONE, COMMENTARIES *10 ("[A]nd possession, or occupancy, confirms that right against all the world besides."); Pannill v. Coles, 81 Va. 380, 383–84 (1886) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *195) (equating naked possession and actual occupation); Cocchiarella v. Driggs, 884 N.W.2d 621, 630–31 (Minn. 2016) (Anderson, J., dissenting) ("'Occupying' is hardly a technical or legalistic word. And the context in which this word appears shows that a common and ordinary meaning is intended—i.e., actual, physical possession of a residential dwelling.").

148 *Fleming*, 935 A.2d at 137 ("The question of actual possession is a question of fact."); Uthus v. Valley Mill Camp, Inc., 246 A.3d 1225, 1231 (Md. 2021) ("[T]he question [of] whether the relation of landlord and tenant existed between the parties . . . [is] a question of law to be determined by the Court upon the consideration of the facts." (alteration in original) (quoting Delauter v. Shafer, 822 A.2d 423, 427 (2003))).

149 *See, e.g.*, Errico v. Cnty. of Westchester, 39 Misc. 2d 1090, 1092 (N.Y. Cnty. Ct. 1963) (noting the distinction between suspected burglar's actual possession of stolen money and his "right to possession" of it).

150 *See* Wilcox v. Ferraina, 920 A.2d 316, 323 (Conn. App. Ct. 2007) (citing "a squatter in an apartment building" as an example of someone who has "no right of possession" but nonetheless is in "actual possession"); Bailey v. Sec. Tr. Co., 167 P. 409, 411 (Cal. Dist. Ct. App. 1917) (clarifying that the personal property in question was in "actual possession, but not in legal possession").

151 *See Wilcox*, 920 A.2d at 323.

152 *See Cocchiarella*, 884 N.W.2d at 625 (extending the right to commence an unlawful exclusion proceeding in Minnesota to a person who "held the present legal right to possess the premises but did not hold a key or otherwise physically occupy the premises"); Mirsky v. Horowitz, 92 N.Y.S. 48, 49 (App. Term 1905) (reasoning that tenant was in legal possession even though "strangers" were in actual possession of the premises on the day the term of the lease was to commence); Hannan v. Dusch, 153 S.E. 824, 828 (Va. 1930) ("Under [the American] rule . . . 'the landlord is not bound to put the tenant into actual possession, but is bound only to put him in legal possession . . . .'" (internal citation omitted)).

2. A Right to Continued or Future Possession

Naked possession absent an "interest" in land generally implies less protection to the occupant.[153] What constitutes an "interest," however, is scrambled by a history of inconsistency and contradiction. Joan Youngman hits the nail on the head:

> A license is sometimes considered an "interest in land," and sometimes not, and sometimes considered a type of hybrid, an interest but not a significant one. It is sometimes even considered a possessory interest. Some of these determinations explicitly recognize the subjective element of such classifications, possession being "a social rather than a physical fact."[154]

Consistent with Youngman's critique, reasoning to support a conclusion that a particular occupant is a licensee can be uncomfortably circular. Instead of deducing that an occupant is a licensee *because* they do not have a possessory interest, some courts have clumsily reached the inverse conclusion: an occupant has no possessory interest *because* they are a licensee.[155]

According to the First Restatement of Property, from 1944, a license is the "legal consequence of a consent given to one person to use the land of another."[156] That consent "includes always . . . [a] privilege to use certain land[, which] constitutes an interest in that land."[157] In contrast, however, the most recent update to *The Law of Easements & Licenses in Land*, the treatise compiled by Professors Jon W. Bruce and James W. Ely, Jr., asserts that "[g]enerally, a license is not viewed as an interest in the land."[158] The inconsistency is not merely an evolution of the times. While there is certainly authority for the proposition that a

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153 *See, e.g.*, Campbell, *supra* note 85, at 300 ("[In North Carolina] a hotel guest is within the classification of licensees. The guest acquires no interest in land and, thus, courts are less willing to afford a guest the same protection as a tenant.").

154 Joan M. Youngman, *The Role of Valuation in Determining Ownership for Tax Purposes*, 43 TAX LAW. 65, 76–77 (1989) (footnotes omitted).

155 *See, e.g.*, Felli v. Cath. Charities of Steuben Cnty., 108 N.Y.S.3d 624, 625 (App. Div. 2019) (reasoning that occupant could maintain an action for deprivation of property without due process because a "licensee acquires no possessory interest in property"); Aubuchon v. Foster, 215 S.W. 781, 784 (Mo. Ct. App. 1919) ("[B]eing a licensee as already stated, had no possession as against the owner . . . .").

156 RESTATEMENT (FIRST) OF PROP. § 512 cmt. c (AM. L. INST. 1944).

157 *Id.*

158 JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS & LICENSES IN LAND § 11:1 (2021).

license is a privilege to use or occupy land but does not convey a possessory interest, authority to the contrary remains.[159]

Whether a particular occupant has the right to remain on land is both political and politicized. The elasticity of these principles is consistent with theories of private property and ownership deeply rooted in a history of racial capitalism, colonialism, and conquest.[160]

a. Colonialism and "Indian Title"

The imposition of Western notions of property rights vis-à-vis Indigenous peoples in the Americas provides a stark example. In 1955, the U.S. Supreme Court declared it "well settled" that the tribes that inhabited the colonized lands now denominated as states held claim to the land "under what is sometimes termed original Indian title or permission from the whites to occupy."[161]

The Indigenous peoples, according to the Court, were "permitted" to occupy portions of the land after conquest.[162] That so-called permission to occupy the lands—lands that they, of course, occupied for generations before the arrival of European settlers—amounted to what the Court described as "mere possession not specifically recognized as ownership."[163] Thus, "Indian title" was "not a property right" but rather a "right of occupancy" that could be terminated at any time by the sovereign.[164] As argued by Professor Cheryl Harris, only possession and occupation of land by white people was validated for the purposes of establishing property rights.[165] Even though Indigenous peoples were the first occupiers and possessors of land in the New

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159 *See, e.g.*, Harris v. Gillingham, 6 N.H. 9, 11–12 (1832) (permitting ouster because license expired and licensee "had no right to be there"); Kalins v. Commonwealth, 500 A.2d 200, 204 (Pa. Commw. Ct. 1985) ("The more modern view, however, is that a license is an interest in real estate."); Stadium Concessions, Inc. v. City of Los Angeles, 131 Cal. Rptr. 442, 446 (Ct. App. 1976) ("[A] possessory interest may be a leasehold interest or the interest of either an easement holder or a Mere permittee or licensee." (quoting KENNETH A. EHRMAN & SEAN FLAVIN, TAXING CALIFORNIA PROPERTY (1967))).

160 Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1716 (1993) ("The origins of property rights in the United States are rooted in racial domination.").

161 Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955); *see also* Harris, *supra* note 160, at 1724 (discussing how the "legal legacy of slavery and of the seizure of land from Native American peoples" is supported by the law's protection of an "actual property interest in whiteness itself, which shares the critical characteristics of property").

162 *Tee-Hit-Ton Indians*, 348 U.S. at 279.

163 *See id.*

164 *See id.*

165 Harris, *supra* note 160, at 1716.

World, "the possession maintained by [Indigenous peoples] was not 'true' possession and could safely be ignored."[166]

Professor Joseph William Singer has critiqued the equation of Indian title with a license. Indeed, the Court's description resembled the way that licenses have traditionally been defined—permission to be on someone else's land that can be revoked at any moment for any reason.[167] According to Professor Singer, however, the relationship is more akin to "the property rights in a leasehold [that] are split between landlord and tenant."[168] Just because the discovery doctrine "gives 'title' to the colonial power does not mean that 'Indian title' is not a property right."[169] Professor Singer charges that in reading judicial opinions, lawyers must interpret the rhetoric in light of the particular facts and the outcome reached by the court.[170] The apparent thrust of Professor Singer's argument is that because politicized legal determinations have resulted in fewer legal protections for tribal property rights than those given to non-Indians, "[o]ne can only conclude that property rights are being denied on the basis of race."[171]

b. The "Master-Servant" Relationship

The advent of the master-servant relationship can be traced to chattel slavery. Apart from the dispossession and genocide of Indigenous peoples by colonial settlers, discussed above, there is no clearer subversion of rights than the enslavement of human beings. Black people who were enslaved in the United States had no property rights because the institution of slavery purported to convert their very bodies into property.[172] As infamously asserted by Justice Taney in *Dred Scott*, "for more than a century," the U.S. Constitution permitted Black

166 *Id.* at 1722. An analogous justification has been employed by Israeli settlers who have asserted a superior right to Palestinian land in East Jerusalem. *See* Tania Krämer, *With Jerusalem on Edge, Palestinian Families Face Eviction*, DEUTSCHE WELLE (May 8, 2021), https://www.dw.com/en/with-jerusalem-on-edge-palestinian-families-face-eviction/a-57471530 [https://perma.cc/E8WW-2AB5]. With the founding of the State of Israel in 1948 came mass displacement of Palestinians who were removed from their lands by Israeli settlers. The United Nations Relief and Works Agency for Palestine Refugees (UNRWA) resettled Palestinians in East Jerusalem and the West Bank. *Id.* Israeli settlers have asserted that the Palestinian refugees are merely "squatters," with no right to remain on the land. *Id.*

167 Singer, *supra* note 57, at 7.

168 *Id.* at 22.

169 *Id.*

170 *See id.* at 22–23.

171 *See id.* at 46–47.

172 *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 451 (1857) (enslaved party) ("[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States . . . ."), *superseded by constitutional amendment*, U.S. CONST. amend. XIV

bodies to be "bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it."[173] In his concurring opinion, Justice Daniel expounded. Enslaved people of African descent were, he said, "strictly *property*," who lacked legal capacity "to deny the relation of master and slave, since none can possess and enjoy, as his own, that which another has a paramount right and power to withhold."[174]

Just as the status of enslaved people as slaves served to strip the legal capacity to "possess and enjoy," so too have the statuses of servant, laborer, and licensee operated to suppress basic protections and property rights. Accordingly, "[a]n action for forcible entry and detainer will not lie where the ousted occupier is a servant or mere licensee. In such a case the possession is not changed, for it remains in the master or licensor."[175] Likewise, where an employee's occupancy on land is "merely incidental" to their employment, courts have overwhelmingly declined to find any right to notice or court process prior to eviction.[176]

The master-servant relationship has been used to justify the dispossession of Black and working people for over a century. In Missouri, it has long been held that people who occupy property as sharecroppers have no entitlement to statutory notice prior to eviction.[177] "While a tenant has a possessory interest in the land, the sharecropper has only an incorporeal interest such as a license to farm the land."[178] That legal premise permitted the mass eviction of Missouri

173 *Id.* at 407.

174 *Id.* at 475–76 (Daniel, J., concurring).

175 Napier v. Spielmann, 111 N.Y.S. 983, 985 (App. Div. 1908), *aff'd*, 90 N.E. 1162 (N.Y. 1909).

176 *See* 13A CARMODY-WAIT 2D § 90:84 (2022); Uthus v. Valley Mill Camp, Inc., 221 A.3d 1040, 1048 (Md. Ct. Spec. App. 2019), *aff'd*, 246 A.3d 1225 (Md. 2021) (holding that an employer was not required to commence an action to oust occupant because occupant was an employee who occupied the premises as a licensee); Moore v. Williams Coll., 702 F. Supp. 2d 19, 23 (D. Mass. 2010), *aff'd*, 414 F. App'x 307 (1st Cir. 2011) (holding that a college professor was not entitled to landlord-tenant protections against his employer because he occupied the housing as a condition of his employment); Durivage v. Tufts, 51 A.2d 847, 849 (N.H. 1947) (dismissing an illegal eviction claim because occupant was "solely [an] employee" whose occupancy of the premises was "incidental to his employment"); Angel v. Black Band Consol. Coal Co., 122 S.E. 274, 276 (W. Va. 1924) ("If he was a mere servant, and the court held he was, the employer had the right of possession and the right to remove the defendant with his effects and to use the force necessary to accomplish that purpose."); Lane v. Au Sable Elec. Co., 147 N.W. 546, 549 (Mich. 1914) (finding extrajudicial ouster permissible where occupation is "convenient" for the purposes of the employment).

177 Hoffman v. Est. of Siler, 306 S.W.3d 584, 589 (Mo. Ct. App. 2010); Davidson v. Frakes, 639 S.W.2d 164, 165 (Mo. Ct. App. 1982).

178 *Hoffman*, 306 S.W.3d at 588; s*ee also* Smith v. McNew, 381 S.W.2d 369, 373 (Mo. Ct. App. 1964) ("[T]he principal distinction drawn between a 'tenant' and a 'cropper' is that the tenant

sharecroppers by landowners in the late 1930s. Under the Agricultural Adjustment Administration (AAA) of 1933, part of the New Deal,[179] the federal government implemented a controlled shortage of food on the theory that reduced supply would drive up costs and increase income for farmers.[180] To achieve that result, the government paid farmers to hold some of their land out of production.[181] Landowners were expected to share the government subsidies with the croppers who occupied the unfarmed land and were left without work due to the stoppage.[182] The mostly white farmers instead effectuated mass evictions of the mostly Black sharecroppers without notice and with apparent impunity.[183]

Promoting a series of idyllic social norms was embedded in the implementation of New Deal "relief and land adjustment programs."[184] The "problem of tenancy," argued some New Dealers, was the assumed incompatibility with capitalistic objectives to produce in terms of creating market value and wealth.[185] Failure to cede—or the presumed incapacity to cede because of preconceived notions grounded in white supremacy[186]—to normative cultural attitudes, including "responsibility of autonomous family units, rational planning, efficiency measured in terms of financial outcomes, deferred gratification, sobriety, and hard work," guided government policy of who should benefit from federal resettlement programs and who should

has a possessory interest in the land, whereas the cultivator has only an incorporeal interest which may be merely a license . . . .").

179 7 U.S.C. § 601.

180 *See* Louis Cantor, *A Prologue to the Protest Movement: The Missouri Sharecropper Roadside Demonstration of 1939*, 55 J. AM. HIST. 804, 809–10 (1969); Jane Adams & D. Gorton, *This Land Ain't My Land: The Eviction of Sharecroppers by the Farm Security Administration*, 83 AGRIC. HIST. 323, 328 (2009).

181 *See* Cantor, *supra* note 180, at 809–10.

182 *Id.*

183 *See id.* According to reports at the time, croppers received only oral notice "that their services were no longer needed" before being ousted from the land. *Id.* at 813 n.46. It is worth acknowledging here that the then landless sharecroppers did not simply crumble and dissipate in defeat. Instead, with the support and collective action of the Southern Tenant Farmers Union (STFU), croppers staged mass demonstrations and a makeshift tent city along the main highway that ran between Memphis and St. Louis. *Id.* at 812–13. The demonstrations galvanized the Roosevelt Administration to order emergency relief funds, tents, and field kitchens. *Id.* at 814.

184 Adams & Gorton, *supra* note 180, at 328 (noting that the goal of the Farm Security Administration (FSA) "was to address the increasing number of landless (tenant) farmers and to enable rural working people to gain access to the benefits of the modern world").

185 *See id.* at 341–43.

186 *See id.* at 339 (noting "African Americans' perceived inferiority and lack of worthiness" supported a view that there was "a much greater percentage of competent and deserving white tenants . . . than there is colored").

be evicted.[187] Policymakers "viewed sharecroppers and tenants almost entirely through their contractual economic relationships with their landlords."[188] As such, the lives of croppers were commodified—focused on production of material goods with market value—to strip away broader relationships to family, community, and other sources of income beyond farming.[189] Those who ceded to the dictated farming norms remained; those who did not were evicted.[190] The result was dispossession as a tool to convert "erstwhile tenants into day laborers."[191] The invisibility of those dispossessed sharecroppers illustrates the use of law and policy to "define[] who is worthy and who is expendable."[192]

Maintaining a formal—even if flimsy—distinction between tenant and other classes of often non-white occupants was essential to divest such occupants of any rights over the property they occupied or even the fruits of their own labor.[193] For example, in 1877, an Arkansas court held that a Black sharecropper who farmed the land pursuant to an agreement with the owner could not sell or mortgage any of the crop when the owner declined to provide the agreed-upon share to the cropper because he was "only a cropper, [who] had no interest in it he could either sell or mortgage."[194] Similarly, in 1921, in Oklahoma, the court considered whether the relationship between a Black sharecropper and the landowner created that of "landlord and tenant or simply that of servant."[195] There, the cropper claimed that he had a one-half interest in the crop that he harvested because the owner had agreed to share one half of the proceeds from the harvest.[196] The court concluded, however, that he had "no legal possession of the premises" and was merely a laborer—"a servant"—not a tenant, because he "ha[d]

187 Adams & Gorton, *supra* note 180, at 342 (discussing the "shared . . . common assumption" among New Dealers that specific cultural attitudes would ensure success).

188 *Id.* at 341.

189 *See id.* at 341–43 (contrasting the "lived experience of most sharecroppers, who relied on knowledge and material support from networks of kin and other informal associations for survival, and who drew upon many potential income streams in addition to farming").

190 *See id.* at 341.

191 *Id.* at 345.

192 *Id.* at 346.

193 Harris, *supra* note 160, at 1724 ("[T]he rules of first possession and labor as a basis for property rights were qualified by race.").

194 Ponder v. Rhea, 32 Ark. 435, 438 (1877); *see also* Douglass v. Lamb, 247 S.W. 77 (Ark. 1923). Noting twice that the occupant was "negro," the court found that testimony was sufficient to warrant a finding that the occupant "was not technically a tenant of the appellees, but only a share cropper or laborer" and thus had no right to notice. *Id.* at 78.

195 Chickasha Gas & Elec. Co. v. Linn, 195 P. 769, 770 (Okla. 1921).

196 *Id.* at 769–70.

no estate in the land."[197] Likewise, in 1923, an Arkansas court, after twice noting that the occupant was "a negro," concluded that the white owners maintained legal possession of the land because the occupant "was not technically a tenant of the appellees, but only a share cropper or laborer" and thus had no right to notice.[198] In Missouri, in 1982, a court concluded that a Black sharecropper was not entitled to notice prior to eviction *because* he asked for permission to live on the premises.[199] That request, according to the court, was indicative of "mutual recognition" that the occupant did not have legal possession of the land.[200]

Given the prevalence of sharecropper arrangements during Reconstruction and well into the 1900s, these examples are more than mere anecdotes.[201] Relegating the occupancy status of Black, Indigenous, and other people of color as well as that of poor and working people was a critical device to preserve the wealth and power of the propertied class.[202]

Today, many informal housing arrangements similarly subvert occupancy status to something "less than" tenant, leaving broad swaths of residential occupants at the mercy of the landlord and perpetually at risk of eviction on a moment's notice or without any notice at all.[203] It hardly seems a coincidence that such informal housing situations, where the law squelches even the most basic due process rights, are the necessary housing of last resort for some of the most marginalized groups in the modern housing economy.[204] Now more than ever it is

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197 *Id.* at 770.

198 *Douglass*, 247 S.W. at 78.

199 Davidson v. Frakes, 639 S.W.2d 164, 166 (Mo. Ct. App. 1982).

200 *Id.*

201 *See* James C. Giesen, *Sharecropping*, NEW GA. ENCYCLOPEDIA (Sept. 29, 2020), https://www.georgiaencyclopedia.org/articles/history-archaeology/sharecropping (last visited June 20, 2022) (noting that sharecropper arrangements "defined the agricultural system in rural Georgia for close to 100 years" and that by 1910, thirty-seven percent of the state's farms were operated by sharecroppers).

202 *See* Robert S. Driscoll, *The Law of Premises Liability in America: Its Past, Present, and Some Considerations for Its Future*, 82 NOTRE DAME L. REV. 881, 887 (2006) ("The 'modern consensus' is that the 'dominance and prestige of the landowning class in England during the formative period of this development' led directly to a system of classifications 'bound up with the values of a social system that traced much of its heritage to memories of feudalism.'" (quoting FOWLER V. HARPER ET AL., THE LAW OF TORTS § 27.1 (2d ed. 1986))).

203 *See* Benfer et al., *supra* note 15, at 7 (noting that people relegated to substandard housing, disproportionately people of color, are at the highest risk of eviction); *see* Adams, *supra* note 45, at 308–09 ("[R]esidents of low-income housing frequently experience life as if they were merely denizens, not fully citizens of the community in which they live. As one example, persons who are homeless or underhoused tend to be politically disenfranchised.").

204 *See supra* notes 9–17.

time to put an unequivocal end to the use of self-help to evict any residential occupant.

III. The Case for Expanding the Prohibition of Self-Help Evictions and Right to Restoration for All Residential Occupants

"[I]t would [be] unjust, and contrary to the law of nature, to [drive] . . . by force [a person who is in the occupation of any determined spot of land]."[205]

The maintenance of "purely formal distinctions about economically equivalent relationships" has been a desirable tool wielded by propertied people to circumscribe the rights of occupants and limit liability.[206] Thus, "well advised parties" can determine matters of when and how another's occupancy of property can be terminated by simply opting to denominate an agreement as a "license" as opposed to a lease.[207] The availability of basic due process rights that exist to promote and preserve housing security should not hinge on arbitrary designations of occupancy status.

It is a myth to suggest that a person's occupancy status is purely a product of individual choice or preference. As discussed above, determining whether an occupant is classified as "licensee" or "tenant" is largely circumstantial, subject to particular framing and normative values ascribed by the court.[208] Like the legal analysis in *Tee-Hit-Ton Indians* that served to deprive Indigenous people of any future right in their lands,[209] or sharecropper cases where occupants were stripped of

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205 1 William Blackstone, Commentaries *3–4.

206 Youngman, *supra* note 154, at 78.

207 *Id.* In some instances, landlords might assert that an occupant is a "squatter" to curtail or obscure the occupant's rights. *See, e.g.*, Thompson, *supra* note 37 (noting that a landlord nearly succeeded in evicting a family despite payment of rent, disingenuously referring to them as "squatters" who were "impeding [the landlord's] plans to renovate the house"); Rebecca Burns, *Like Airbnb, but for Flophouses*, New Republic (June 23, 2021), https://newrepublic.com/article/162513/affordable-housing-cheap-rent-padsplit [https://perma.cc/P5B4-F95E] (discussing the business model of "co-living" startup, PadSplit, which sought to operate within the "gray area" between Georgia's "'innkeeper' laws for short-term occupancies" and landlord-tenant protections that require court process to evict a tenant).

208 *See* Harris, *supra* note 160, at 1727 (explaining that even the "most basic" of property rights, such as the rule of first possession, were historically determined by how colonizers perceived "custom" and "common sense"); Braschi v. Stahl Assocs., 543 N.E.2d 49, 54 (N.Y. 1989) (concluding that "in using the term 'family,' the Legislature intended to extend protection to those who reside in households having all of the *normal* familial characteristics." (emphasis added)).

209 Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

any protection to remain in occupancy of the land where they lived and worked,[210] classifying an occupant as a licensee, as opposed to some other legal status, has served as a tool to quash the housing rights of Black, Indigenous, and other people of color. The inferior and superior statuses are not derived from any "inherent superiority" of any particular race, class, or occupancy status, but instead from manipulation of how laws are created to enforce the rights of some, but not others.[211]

There are numerous examples of analogous ad hoc justifications for a finding that a particular occupant should or should not be relegated to the underclass of licensee. In *Francis v. Trinidad Motel*, the New Jersey Superior Court shed light on just how easily courts can shift the law to protect a litigant who the court views as desirable.[212] In *Francis*, the court discussed the pliability of a prior decision, *Poroznoff v. Alberti*, where it concluded that the YMCA could evict an occupant without court process even though the room in the YMCA was the occupant's only residence and he had been residing there on a week-to-week basis.[213] The *Poroznoff* decision, the court explained, "did not mean that a hotel resident could never acquire the protection [against self-help evictions]."[214] On the contrary, it continued, tenancy status was established in another case where a *family* resided in a hotel but did so with "all of the necessary amenities for total living."[215] Noting that the hotel had a stove, oven, and refrigerator, that the family had their own linens and did their own housekeeping, that the wife was a registered voter, and that the two children attended public school based on the hotel's address, the "family occupation of their hotel premises, had escalated to *the complete living experience exemplified by the traditional family rental of an archetype apartment*."[216]

In New York, the state's highest court has similarly relied on subjective norms to concoct a "familial relationship" exception that

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210 *See, e.g.*, Smith v. McNew, 381 S.W.2d 369, 373 (Mo. Ct. App. 1964) ("[T]he principal distinction drawn between a 'tenant' and a 'cropper' is that the tenant has a possessory interest in the land, whereas the cultivator has only an incorporeal interest which may be merely a license . . . .").

211 *See* Driscoll, *supra* note 202, at 896–97 ("This superiority is not derived from any inherent superiority of one race to another; rather, the advantage is derived from positive laws of government which are more fully able to enforce the right that each individual has by nature.").

212 *See* Francis v. Trinidad Motel, 618 A.2d 873, 876–77 (N.J. Super. Ct. App. Div. 1993).

213 Poroznoff v. Alberti, 401 A.2d 1124, 1124 (N.J. Super. Ct. App. Div. 1979).

214 *Francis*, 618 A.2d at 876 (citing *Poroznoff*, 401 A.2d at 1124).

215 *Id.* (discussing the court's reasoning in *Williams v. Alexander Hamilton Hotel*, 592 A.2d 644 (N.J. Super. Ct. App. Div. 1991)).

216 *Francis*, 618 A.2d at 876–77 (emphasis added).

further obscures the definition of "licensee."[217] In *Braschi v. Stahl*, the New York Court of Appeals reasoned that the legislature intended to extend the protection of the New York Rent Stabilization Law to "those who reside in households having all of the *normal familial characteristics*."[218] Based on a series of factors, including "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services," the court showcased how easily normative values and priorities can be marshaled to promote an otherwise prototypical licensee to a more secure occupancy status.[219] According to the court, the goal in making such determinations is to draw a distinction between those who are "genuine family members, and those who are mere roommates."[220] That malleability has, of course, been beneficial to non-tenant residential occupants and their families who, despite maintaining a family connection that departs from the heteronormative values that are traditionally legible in the law, have been able to succeed to the status of "tenant" upon the death of a loved one who previously secured that status.[221] Reference to *Braschi* is not meant to criticize the outcome in that case but to instead reinforce the subjective arbitrariness that may often underlie a determination of occupancy status.

As a result of that arbitrariness, distinguishing the various classifications of estates can be elusive.[222] Determining who is in

217 *See* Rosenstiel v. Rosenstiel, 245 N.Y.S.2d 395, 402 (App. Div. 1963) (excluding "a wife, in her occupation of the marital home" from the definition of licensee to prevent eviction of wife by husband); Braschi v. Stahl Assocs., 543 N.E.2d 49, 53 (N.Y. 1989). In *Braschi*, the Court reasoned that the definition of "family" should not be "rigidly restricted" to those who have formalized their legal relationship by means of, for instance, a marriage license or adoption certificate. *Id.* Instead, to determine whether a person cohabitating with another should be considered "family," and thus excluded from the status of licensee, courts should consider the factors indicated below to establish whether the individuals are "genuine family members." *Id.* at 54–55.

218 *Braschi*, 543 N.E.2d at 54 (emphasis added).

219 *See id.* at 55.

220 *Id.* at 54.

221 *See, e.g.*, *id.* at 50–51, 55 (adopting an expansive definition of "family" to conclude that New York City's rent control regulations could include a same-sex domestic partner who would therefore be entitled to protections from eviction beyond those of a "mere licensee"); Morris v. Morris, 95 N.Y.S.3d 724, 726, 729 (Civ. Ct. 2018) (declining to allow sister to evict brother who occupied family home as mere licensee); Kakwani v. Kakwani, 967 N.Y.S.2d 827, 834 (N.Y. Dist. Ct. 2013) (declining to allow eviction of in-law as mere licensee).

222 Harkins v. Win Corp., 771 A.2d 1025, 1027 (D.C.), *amended on reh'g in part*, 777 A.2d 800 (D.C. 2001) ("[T]he distinction between a roomer and a tenant can be elusive. At one end of the spectrum is the transient one-night roomer; at the other end is the long-term tenant with a written lease.").

"possession" or who has an "interest" in a particular residential setting has been fraught.[223] Indeed, the meanings of "possession" and "interest" have been obscured and complicated to manipulate a barrier between those who have a remedy at law and those who do not.[224] Eliminating the legal significance of that distinction for the purposes of unlawful entry and detainer is a tangible legislative step to fully realize an unequivocal end to self-help evictions.

A. *The Spirit of the Law that Led to a Prohibition of Self-Help as to Tenants Applies Equally to Licensees*

Despite the existence of an unwieldy hierarchy of occupancy statuses, the primary aim of contracting with a landlord to occupy a house, apartment, room, or some portion of a room is generally to secure living space.[225] The nuanced distinctions, although interesting for the law student or legal scholar, have little significance for most residential occupants.[226] Housing insecurity is traumatic and destabilizing no matter how one's formal occupancy status is defined.[227] Promoting peace, order, community safety, and adherence to the rule of law are the stated reasons for which self-help has traditionally been prohibited. If those principles apply to all residential occupants, regardless of one's particular status, the exclusion of any occupant from the prohibition of self-help eviction can never be justified.

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223 Youngman, *supra* note 154, at 76–77.

224 *Compare* Vasquez v. Glassboro Serv. Ass'n, 415 A.2d 1156, 1167 (N.J. 1980) (concluding that a migrant farmworker who shared unpartitioned space in the barracks with approximately thirty other men "does not have possession of his living quarters"), *with* Tiller v. Shuboney, 894 N.Y.S.2d 343, 345, 347 (City Ct. 2009) (finding that the tenant of record could not lawfully evict a roommate with whom she entered an oral agreement to live at the premises where the roommate was a college student whose mother paid rent and utilities on her behalf each month).

225 Matthew R. Hays, *Crusading for the Helpless or Biting the Hand that Feeds? Applying Landlord-Tenant Law to Residents in Shelters*, 83 NOTRE DAME L. REV. 443, 448 (2007).

226 *See* Main, *supra* note 6, at 48–52 (discussing the particular challenges of pro se litigants who must litigate their occupancy status before a court will proceed to the merits of an unlawful eviction claim).

227 *See generally* Clark Merrefield, *Eviction: The Physical, Financial and Mental Health Consequences of Losing Your Home*, JOURNALIST'S RES. (Oct. 15, 2021), https://journalistsresource.org/economics/evictions-physical-financial-mental-health [https://perma.cc/UC79-JNA3].

1. Manipulating Rationales for the Prohibition of Self-Help Eviction as a Tool to Exclude

In *Mendes v. Johnson*, the District of Columbia Court of Appeals articulated four rationales to support its conclusion that a landlord's common law right of self-help to evict a tenant was abrogated by statute.[228] First, self-help evictions could only be avoided if the statutory remedy was exclusive.[229] Second, permitting self-help in an urban area with housing shortages would invite violence.[230] Third, allowing self-help would deprive ousted tenants of an opportunity to assert various equitable defenses and rights afforded by statute.[231] Finally, a law-abiding society in which there are legal and political safeguards against oppression and abuse requires that those who have grievances rely exclusively on political, legislative, and judicial processes to seek redress.[232] Those rationales would seem to support a sweeping prohibition of self-help eviction, regardless of occupancy status. Twenty-three years later, that court nonetheless declined to extend the prohibition of self-help to a roomer who occupied a hotel room for eight months.[233]

In *Harkins v. Win Corp.*, citing unspecified "unforeseen consequences," the court first reasoned that its prior holding, abrogating the common law right to self-help, should be confined to situations where a landlord-tenant relationship is present.[234] Next, without any apparent support in the record, the court reasoned that the potential for violence in the context of a self-help eviction of a roomer is "somewhat diminished" because "[a] roomer may not have as much need to remain in a particular accommodation and may be less affected by any housing shortage" than a tenant who may have more difficulty "find[ing] a new permanent residence to house all of their possessions."[235] The court then dismissed the final two rationales from *Mendez*. Roomers, the court said, have less need to avail themselves of equitable remedies because a "roomer generally has less of a need to remain in possession of a particular accommodation while engaging in

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228 Mendes v. Johnson, 389 A.2d 781, 786–87 (D.C. 1978), *abrogated by* Davis v. Moore, 772 A.2d 204 (D.C. 2001).

229 *Id.* at 786.

230 *Id.*

231 *Id.*

232 *Id.* at 786–87.

233 Harkins v. Win Corp., 771 A.2d 1025, 1027–29 (D.C.), *amended on reh'g in part*, 777 A.2d 800 (D.C. 2001).

234 *Id.* at 1028.

235 *Id.*

litigation." Finally, the court barely recognized the final *Mendez* rationale, noting only that its "research ha[d] not revealed" precedent that would tend to support why this situation should be redressed by "political, legislative, and judicial processes" as opposed to self-help.[236] Acknowledging the "legitimate concerns" of long-term residential occupants who are not tenants, the court concluded that resolution of questions regarding the rights of such occupants "is probably better suited, and prudently left, to the legislative forum."[237]

Conspicuously absent from the court's reasoning was any concern about basic shelter, safety, or wellbeing. The refrain mirrors that of the past: the law should be responsive to the need to protect private property. Because non-tenant occupants, in the court's view, may be less likely to show any connection to tangible property, they are beyond the reach of the law's protection.

2. A Simpler Approach: Restricting the Inquiry to Actual Possession

Viewing the issue of self-help eviction through the lens of housing as a fundamental right grounded in equity and humanity, rather than a mere principle of property law, supports a simpler inquiry for courts in self-help eviction cases. That narrow inquiry—whether the ousted person was in actual possession of the premises at the time of the alleged ouster—would promote more housing stability in all types of residential settings.

A common-sense approach that would confine the inquiry to actual possession is not novel. From the earliest days of common law, "[p]ossession was the primary substantive issue, and the primary remedy available was the return of possession" in property disputes.[238] Where entry by force upon a person in actual possession is shown, it is generally understood that the person excluded is entitled to redress and "[q]uestions of title or right of possession" are irrelevant.[239]

> The inquiry in such cases [should be] confined to the actual peaceable possession of the [occupant] and the unlawful or forcible ouster or detention by [the landlord because] the object of the law [is] to prevent the disturbance of the public peace, by the forcible assertion of a private right.[240]

236 *Id.* at 1027–28.

237 *Id.* at 1029.

238 Spector, *supra* note 45, at 153.

239 Jordan v. Talbot, 361 P.2d 20, 24 (Cal. 1961).

240 *Id.*

Some jurisdictions have begun to adopt such an approach. In California, for example, the prohibition of self-help appears to extend to cover all occupants in actual possession of a residential premises.[241] Similarly, in Maryland the statutory protection from self-help evictions extends to all "protected resident[s]," which include "a grantee, tenant, subtenant, or other person in actual possession."[242] Notably, that Maryland statute was created in direct response to the state's highest court sanctioning peaceable self-help as an available remedy for landlords to evict.[243] Connecticut courts have also made overtures to abandon the licensee-tenant distinction in favor of an inquiry exclusively restricted to actual possession.[244] In identifying the intent of the Connecticut statute prohibiting self-help to prevent the risk of "public disturbance, and perhaps of serious bodily injury to the parties," the Connecticut Appellate Court has concluded that the forcible entry and detainer statute was created to protect all occupants, even "a trespasser" from eviction "by any but lawful and orderly means."[245]

The simplified approach advocated here is fundamentally grounded in the belief, theory, and principle that people who occupy any space for residential purposes necessarily have a cognizable interest in that property. That "interest" may look different from the way such interests have been viewed in the past, but the fluid nature of the law allows—or perhaps demands—it to fluctuate with the changing times.[246] A series of public health and safety principles militate in favor

241 *Id.* ("Regardless of who has the right to possession, orderly procedure and preservation of the peace require that the actual possession shall not be disturbed except by legal process."); Kassan v. Stout, 507 P.2d 87, 89 (Cal. 1973).

242 *See* MD. CODE ANN., REAL PROP. § 7-113 (West 2022) (defining protected resident to include a "grantee, tenant, subtenant, or other person," but not a "trespasser or squatter," in actual possession).

243 Wheeling v. Selene Fin. LP, 228 A.3d 791, 798, 800 (Md. Ct. Spec. App. 2020) (explaining that a statute extending protection from self-help evictions to "[p]rotected resident[s]," which include "a grantee, tenant, subtenant, or other person in actual possession" was in direct response to *Nickens v. Mount Vernon Realty Group*, 54 A.3d 742, 754–55 (Md. 2012), where the Maryland Court of Appeals sanctioned the remedy of peaceable self-help to evict).

244 Wilcox v. Ferraina, 920 A.2d 316, 324 (Conn. App. Ct. 2007) ("An examination of the goals underlying the entry and detainer statute further emphasizes the reasons why actual possession, rather than right of possession, must remain the ultimate inquiry.").

245 *Id.*

246 *See* Morris v. Morris, 95 N.Y.S.3d 724, 726–27 (Civ. Ct. 2018) ("The law is not stagnant but changes and adapts to the changes in societal mores . . . . [I]t [must be viewed] as an evolving or living thing that must change and adapt to the times.").

of a broader, more holistic, and more practical view of who has an interest in a particular residential space.[247]

B. *Public Policy Grounded in Community Safety, Health, and Wellbeing Also Militates in Favor of Extending the Prohibition Against Self-Help to All Residential Occupants*

It has been argued that occupants of homeless shelters should not have a right to court process because they cannot establish a landlord-tenant relationship.[248] According to that argument, applying a landlord-tenant framework in the context of shelters would be "counterproductive" because it would "deprive shelters of their ability to easily remove problematic residents, even when they threaten the staff and other residents."[249] Resources should be spent instead on "helping as many [people] as possible, not battling litigious residents."[250] Setting aside the flawed premise that easy removal of "problematic residents" should be the guiding rationale for any policy proposal that relates to people who are housing insecure, that argument stifles the opportunity to imagine a framework that recognizes and promotes a principle of housing as a fundamental human right. The stakes are high, and the consequences can be dire for any tenant who is evicted without court process. But those stakes are even higher for people who occupy any number of non-traditional residential spaces without the security of a formal landlord-tenant relationship.[251] Protecting all residential occupants—regardless of status—from self-help eviction would both prevent homelessness and promote public health, and also discourage over-policing of low-income communities of color.

247 *See* Crosby, Nori & McNally, *supra* note 13 (arguing that legislative reforms to the unlawful entry and detainer statute in New York were "intended to cover all possible manifestations of occupancy"); Lisa T. Alexander, *Evicted: The Socio-Legal Case for the Right to Housing*, 126 YALE L.J.F. 431, 446–47 (2017) (book review) (arguing that efficacy of local laws, policies, and housing markets should be evaluated through a framework that promotes a fundamental right to housing).

248 Hays, *supra* note 225, at 455–56.

249 *Id.* at 467.

250 *Id.*

251 *See infra* Section III.B.2.

1. Prevent Homelessness and Promote Public Health

The link between eviction and homelessness is well documented.[252] For a substantial and increasing swath of renters, eviction—whether by court order or self-help—means homelessness.[253] Noting the connection between self-help evictions and homelessness, it was argued over twenty-five years ago that barring self-help could reduce homelessness "by putting impartial judicial authorities—rather than self-interested landlords—in control of whether tenants should be forced out of their homes."[254] Both the individual occupant and the larger community have an interest in preventing homelessness.

For the individual, court process "confers a significant substantive benefit on the occupant" by affording a right to occupy the premises for the duration of court proceedings and, if necessary, use that time to seek alternative housing.[255] Even where an occupant may have no right to remain in possession of the premises long term, notice and process stymie the immediate chaos and crisis of extrajudicial ouster.[256] When a low-wealth person is excluded from the residential premises they occupy as "home," they may not be able to point to tangible losses in the form of personal property.[257] Because damages in wrongful eviction cases are often limited to "actual damages," in the form of lost personal property, that means that the lowest income and most vulnerable occupants may be left without remedy at law.[258] Indeed, "[t]he

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[252] *See, e.g.*, Victor Geminiani & Jennifer F. Chin, *Evicted in Hawaii—Lives Hanging in the Balance*, 20 HAW. B.J. 23, 30 (2016) (citing studies demonstrating that eviction is a significant cause of homelessness).

[253] *See* Sam Gilman, *The Return on Investment of Pandemic Rental Assistance: Modeling a Rare Win-Win-Win*, 18 IND. HEALTH L. REV. 293, 295 (2021) (discussing the link between evictions and homelessness).

[254] Gerchick, *supra* note 75, at 786.

[255] *See* Walls v. Giuliani, 916 F. Supp. 214, 220 (E.D.N.Y. 1996).

[256] *See* Main, *supra* note 6, at 45–46 (discussing the thin line between housing and homelessness when people must rely on nontraditional housing of last resort).

[257] *See, e.g.*, Okeke v. Ewool, 964 N.Y.S.2d 249, 250–51 (App. Div. 2013) (awarding only one dollar in nominal damages for wrongful eviction because occupant failed to establish value of personal property allegedly lost due to unlawful ouster).

[258] *See, e.g.*, ALASKA STAT. ANN. §§ 34.03.210, 34.03.350 (West 2022); CONN. GEN. STAT. ANN. §§ 47a-43, 47a-46, 53a-214 (West 2022); IDAHO CODE ANN. §§ 6-317, 6-324 (West 2022); IOWA CODE ANN. § 562A.26 (West 2022); MD. CODE ANN., REAL PROP. § 8-216 (West 2022); MASS. GEN. LAWS ANN. ch. 186, § 15F (West 2022); N.Y. REAL PROP. ACTS. LAW §§ 768, 853 (McKinney 2022); N.C. GEN. STAT. ANN. § 42-25.9 (West 2022); OHIO REV. CODE ANN. § 5321.15 (West 2022); TENN. CODE ANN. § 66-28-504 (West 2022); VA. CODE ANN. § 55.1-1243.1 (West 2022); WASH. REV. CODE ANN. §§ 59.18.290, 59.18.300 (West 2022).

demoralizing violence of being plunged into homelessness is not pecuniary loss."[259]

There is, however, a "human cost" to homelessness.[260] Housing displacement can force people into crowded and unsafe environments.[261] It may decrease financial stability and have detrimental impacts on employment, education, civic involvement, personal relationships, and on physical and emotional health.[262] The life expectancy for people experiencing homelessness is nearly half that of the general population.[263] People who experience homelessness are disproportionately affected by respiratory disease, diabetes, substance use disorders, and mental health disabilities.[264] They are also more likely to contract communicable diseases such as HIV, Hepatitis B, typhus, and Covid-19.[265] "The mere threat of eviction can increase stress levels, anxiety, and depression—all of which can weaken the immune system."[266] Just as people experiencing homelessness are disproportionately affected by physical, emotional, and mental health disabilities, they are also disproportionately the targets of physical and sexual assaults.[267] Eviction and homelessness also exacerbate the risk of

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259 *See* Main, *supra* note 6, at 51.

260 Holmberg, *supra* note 73, at 868.

261 Benfer et al., *supra* note 15, at 2 ("[E]viction and housing displacement force families into transiency, homelessness, and crowded residential environments that increase new contact with others and make compliance with pandemic health guidelines difficult or impossible.").

262 *See* Alexander, *supra* note 247, at 446–47 (describing the "long-term costs of increased crime, skyrocketing homeless and emergency services, missed opportunities, and other costly social ills" that result from a failure to secure a right to adequate housing).

263 Holmberg, *supra* note 73, at 868 ("The average life expectancy in the United States is close to 80 years, but this drops to between 42 and 52 years for the homeless population.").

264 Gerchick, *supra* note 75, at 769.

265 *See* Gilman, *supra* note 253, at 295 ("Evictions have been linked to job loss, difficulty finding future housing, homelessness, chronic illness, poor learning outcomes, generational poverty, diseases of despair, and now death by COVID-19."); Allyson E. Gold, *How Eviction Courts Stack the Deck Against Tenants*, APPEAL (Apr. 13, 2021), https://theappeal.org/the-lab/explainers/how-eviction-courts-stack-the-deck-against-tenants [https://perma.cc/G568-DVKS] ("Unstable housing and eviction are linked to negative health outcomes in children, adverse birth outcomes, poor mental health, increased vulnerability to COVID-19, and other harmful health effects."); Chris Woodyard, *As Homeless Are Suffering, Risk of Hepatitis, Typhus and Other Diseases Is Growing*, USA TODAY (July 10, 2019, 8:32 PM), https://www.usatoday.com/story/news/nation/2019/06/18/homeless-homelessness-disease-outbreaks-hepatitis-public-health/1437242001 [https://perma.cc/Z655-JC53] ("From Los Angeles to Kentucky, across the USA, experts said, growing homeless populations are increasingly susceptible to outbreaks of contagious diseases, including typhus, Hepatitis A and Shigella.").

266 Benfer et al., *supra* note 15, at 3. For further discussion about the association between housing instability and eviction, see *id.* at 7–8.

267 Holmberg, *supra* note 73, at 868.

drug overdose.[268] It is no exaggeration that for some, even with the benefit of court process, eviction is a matter of life or death.[269]

For the broader community, homelessness also carries an array of "public and social costs."[270] When people are forced from their homes, constituencies must bear the costs of increased need for emergency services at city shelters, hospitals, and other community-based resources.[271] And, as discussed below, housing displacement may lead to growth in actual or perceived crime rates that both contribute to and purport to justify over-policing in the low-income communities of color that bear the brunt of fallout from housing displacement.[272]

2. Discourage Overpolicing of Targeted Communities

People who are evicted, housing insecure, and unhoused are more likely to have contact with the criminal legal system.[273] Eighty-six

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268 *See* Atheendar S. Venkataramani & Alexander C. Tsai, *Housing, Housing Policy, and Deaths of Despair*, 55 HEALTH SERVS. RSCH. 5, 5 (2020) ("Evictions may both serve as a cause and consequence of substance use disorders."); Ashley C. Bradford & W. David Bradford, *The Effect of Evictions on Accidental Drug and Alcohol Mortality*, 55 HEALTH SERVS. RSCH. 9, 10–11 (2020).

269 *See* Venkataramani & Tsai, *supra* note 268; Bradford & Bradford, *supra* note 268; Kathryn M. Leifheit et al., *Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality*, 190 AM. J. EPIDEMIOLOGY 2565, 2568 (2021) ("Moreover, structural racism and poverty, fundamental causes of eviction risk, also manifest as comorbidities and poor access to care in Black and Latinx communities and low-income households, creating vulnerabilities to COVID-19 case fatality."); Kenny Stancil, *"Housing Is Healthcare": Evictions Have Exacerbated Covid-19 Pandemic, Research Shows*, NATION OF CHANGE (Dec. 1, 2020), https://www.nationofchange.org/2020/12/01/housing-is-healthcare-evictions-have-exacerbated-covid-19-pandemic-research-shows [https://perma.cc/4CCS-DZ26] ("[T]his is a time where it's not an overstatement to say that for many people, eviction can lead to death.").

270 Gilman, *supra* note 253, at 314 (noting that public and social costs include local, state and federal funds dedicated to responding to evictions and homelessness, plus "additional costs to individuals, landlords, neighborhoods, and society").

271 *See id.*

272 *See* Evanie Parr, Note, *When a Tent Is Your Castle: Constitutional Protection Against Unreasonable Searches of Makeshift Dwellings of Unhoused Persons*, 42 SEATTLE U. L. REV. 993, 1001–02 (2019) (discussing criminalization of unhoused people and the use of the armed police to forcibly remove poor people from the streets where they live due to displacement); Runa Rajagopal, *Diary of a Civil Public Defender: Critical Lessons for Achieving Transformative Change on Behalf of Communities*, 46 FORDHAM URB. L.J. 876, 891 (2019) ("[P]oor communities are targeted, overpoliced, and over-criminalized . . . .").

273 *See Responses to Homelessness*, BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST. (May 28, 2021), https://bja.ojp.gov/homelessness-initiative-test [https://perma.cc/86MS-TGS5] (describing the "self-perpetuating cycle" stemming from the myriad factors that explain the relationship between housing insecurity and contact with the criminal legal system); Roark, *supra* note 42, at 15 ("Homeless persons regularly find themselves subject to police scrutiny for infractions by which other, better situated persons are unaffected."); Cain, *supra* note 49, at 148

percent of unhoused single adults are Black or Latinx, populations that already bear the brunt of racialized policing.[274] Paradoxically, the overpolicing and indiscriminate arrest of Black and Brown people puts those communities at an even higher risk of eviction.[275] "These communities are, in a word, 'doubly burdened' by the simultaneous threats of both victimization and criminalization. They are overpoliced, yet often remain underprotected."[276] As activists have long argued, police are used as a tool to protect property rights rather than human rights.[277] "Police brutality and the behavior of the landlords [have been] connected in the minds of many of the [Black Lives Matter] protesters."[278] The Defund Police Movement has also highlighted the interconnectedness between policing and housing security.[279] Indeed, in many instances, police make evictions possible as agents of social control, deputized to support the commodification of the housing market by "cleaning up our streets."[280]

(noting that people with criminal convictions who obtain adequate housing are less than half as likely to be convicted of a subsequent offense than those whose housing remains insecure).

274 COAL. FOR THE HOMELESS, STATE OF THE HOMELESS 2020: GOVERNOR AND MAYOR TO BLAME AS NEW YORK ENTERS FIFTH DECADE OF HOMELESSNESS CRISIS 11 (2020); Colleen Walsh, *Solving Racial Disparities in Policing*, HARV. GAZETTE (Feb. 23, 2021), https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing [https://perma.cc/WUY6-KCYN] ("Rooted in slavery, racial disparities in policing and police violence, they say, are sustained by systemic exclusion and discrimination, and fueled by implicit and explicit bias.").

275 *See* Forrest Stuart, *Becoming "Copwise": Policing, Culture, and the Collateral Consequences of Street-Level Criminalization*, 50 LAW & SOC'Y REV. 279, 291 (2016) ("Arrest and incarceration rendered at least five residents I came to know unable to pay their rent on time, which led to their prompt eviction. As they sat behind bars, their landlords removed and dumped all of their belongings onto the sidewalk in front of their buildings.").

276 *Id.* at 286.

277 *See* Nawal Arjini, *Defending One Brooklyn Brownstone Is Just the Beginning*, NATION (July 13, 2020), https://www.thenation.com/article/politics/crown-heights-eviction-defense [https://perma.cc/XR2Z-MBSM] ("We've just been shown that police don't protect us. They protect property.").

278 *Id.*; *see* Julian Francis Park, *Tenants Block Evictions by Any Means*, SHELTERFORCE (Nov. 10, 2020), https://shelterforce.org/2020/11/10/tenants-block-evictions-by-any-means [https://perma.cc/2QND-L8ZT] ("Some have explicitly connected the tenants' movement and police abolition campaigns, with slogans like 'evictions are police brutality,' referring to the role law enforcement plays in executing court-ordered evictions, sometimes backing up landlords' extralegal evictions, and in maintaining residential segregation more broadly.").

279 *See* Housing Justice for All, *Police Violence and Housing Justice*, FACEBOOK (June 17, 2020), https://www.facebook.com/housing4allNY/videos/police-violence-and-housing-justice/561761944484401 [https://perma.cc/7TGA-NZFC].

280 *Id.* at 03:32.

The process of eviction, particularly self-help eviction, is violent.[281] Nonetheless, ambiguity about who the law does and does not protect from self-help eviction has facilitated the ability of landlords to commandeer police assistance to effectuate extrajudicial ousters.[282] Landlords can and do rely on the police to circumvent court process to remove unwanted occupants.[283] In contrast to landlords, the occupants who are most likely to be targeted for a self-help eviction are unlikely to involve law enforcement to help protect their rights.[284] Even though illegal eviction is a criminal offense that can—and should—subject a landlord to criminal penalties, it is the ousted occupant, not the landlord, who is often at risk of arrest, injury, or other ramifications of the criminal legal system for contacting the police.[285] By facilitating

281 *See* Brief for the Housing Justice League et al. as Amicus Curiae Supporting Plaintiffs-Appellees at 20, Efficiency Lodge, Inc. v. Neason, No. A21A1263 (Ga. Ct. App. Aug. 12, 2021) (noting that "several residents were forced out of their homes at gunpoint by armed private security officers"); Cortlynn Stark & Robert A. Cronkleton, *First and Foremost, Disengage: How Jackson County Court Deputies Train for Evictions*, KAN. CITY STAR (Jan. 29, 2021, 3:09 PM), https://www.kansascity.com/news/local/crime/article248632570.html (last visited June 20, 2022) (quoting police captain who commented that it is "common for violence to occur during an eviction process"); Tatiana Flowers, *Armed Guards Helped Evict Residents from an East Colfax Motel in Violation of Tenant Laws, Suit Claims*, COLO. SUN (Nov. 23, 2021, 4:02 AM), https://coloradosun.com/2021/11/23/aurora-tenants-sue-landlord-the-vareco [https://perma.cc/UV6C-8LH5] (recounting landlord's use of armed guards to force residents to leave without a court order).

282 For a discussion of how landlords curry favor of police by marshalling the stigma carried by some low-income occupants of color, see Main, *supra* note 6, at 55.

283 Gold, *supra* note 265 (noting that police were "hesitant to intervene" until lawyer spoke directly with responding officer about the alleged illegal eviction); Sarah Rahal, *Tlaib, Protesters Demand Detroit Police Halt Assisting Evictions*, DETROIT NEWS (Jan. 16, 2021, 11:37 PM), https://www.detroitnews.com/story/news/local/detroit-city/2021/01/16/tlaib-protesters-demand-detroit-police-halt-assisting-evictions/4157371001 [https://perma.cc/428J-A5N5]; *see* Marnie Eisenstadt, *Illegal Evictions in NY: Police Fail a Tenant Who Returns Home to Find Everything Gone*, SYRACUSE.COM (Dec. 16, 2021), https://www.syracuse.com/news/2021/12/illegal-evictions-in-ny-police-fail-a-tenant-who-returns-home-to-find-everything-gone.html [https://perma.cc/6BSK-GQZY] (describing how officers failed to respond to occupant who sought assistance after the landlord locked her out of her home).

284 Roark, *supra* note 42, at 16 (explaining that some renters are discouraged from contacting police due to fear that landlord will retaliate or that city authorities will vacate the property due to habitability concerns); Ashley Balcerzak, *NJ Renters Still Being Locked Out by Landlords Despite COVID Eviction Freeze*, NORTHJERSEY.COM (Mar. 12, 2021, 8:58 AM), https://www.northjersey.com/story/news/2021/03/11/nj-rental-assistance-covid-eviction-freeze-ignored-some-landlords/6892203002 [https://perma.cc/D28Y-4RN7] (noting the difficulty of tracking self-help evictions because occupants do not seek help from police or attorneys when landlords evict without court process).

285 *See* Main, *supra* note 6, at 55 (discussing the risk of arrest and parole violation when residents of three-quarter houses seek police assistance after an illegal eviction); Ashley Holden, *Woman Claims She Was Yanked from Watonga Home by Former Police Chief Under Investigation*, NEWS 9 (June 23, 2021, 8:07 PM) https://www.news9.com/story/

removal of occupants who are not generating profit for landlords, the police are complicit—even instrumental—to the ability of landlords to increase rents, which drives housing displacement and decimates communities.[286] Just as so-called "Broken Windows Policing" facilitates the criminalization of unhoused or underhoused people, the failure of police to enforce laws that protect occupants from self-help eviction contributes to a cycle of housing insecurity that promotes that criminalization.[287] As such, "[f]ighting for Black housing is fighting for Black lives."[288]

C. *Grassroots Collective Action to Prevent Illegal Eviction*

To be clear, this Article does not argue that more policing should be the strategy to end self-help evictions. To the contrary, grassroots activism rooted in principles of mutual aid and community solidarity militate in favor of an abolitionist approach to the self-help eviction crisis.[289] Rather than rely on the criminal legal system—stained by an ongoing legacy of racism and inequality—community-based organizations around the nation have demonstrated the power of collective action and coordinated resistance to derail the eviction machine.

60d3dcc9e5e61027b0afebb2/woman-claims-she-was-yanked-from-watonga-home-by-former-police-chief-under-investigation. [https://perma.cc/UW8B-C96E] (describing allegation that police chief grabbed occupant by the arm, causing lasting injury, to remove her from the premises without a court order).

286 *See, e.g.*, *Against Rent and the Cops*, TENANT AND NEIGHBORHOOD COUNCILS, https://baytanc.com/abolition-now [https://perma.cc/8SDV-TWJC] ("Police violence against the unhoused is also crucial in the gentrification process, just as the fear of becoming unhoused is crucial to coercing rent."); Main, *supra* note 6, at 89 n.350 ("The irony is that by failing to hold the monied class of landlords accountable for their so-called 'minor' illegal eviction offenses, the police were necessarily complicit in the destabilization of an entire community of low-income tenants.").

287 Brittany Scott, *Is Urban Policy Making Way for the Wealthy? How a Human Rights Approach Challenges the Purging of Poor Communities from U.S. Cities*, 45 COLUM. HUM. RTS. L. REV. 863, 880 (2014) ("Premised on the fallacy that individuals, if faced with high enough fines and jail time, will stop choosing to be poor and homeless, these policies increasingly subject low-income communities to police surveillance seeking to manage street life.").

288 *See* Arjini, *supra* note 277.

289 *See generally* ABOLITION ACTION, ABOLITION: HOW WE KEEP US SAFE (2020), https://libby.ecuad.ca/publishingthepresent/catalog/abolition-how-we-keep-us-safe [https://perma.cc/4BTL-MSSY] (discussing eviction as a form of policing and providing a guide driven by collective action to resist); *Against Rent and the Cops*, *supra* note 286 ("The support of mutual aid, combined with the unity of resisting the landlord, lay ground for developing abolitionist practices of conflict resolution through tenant councils.").

Community activists have taken to the streets and put their bodies on the line to successfully prevent landlords—and police—from circumventing lawful court process to evict.[290] In Memphis, for example, community activists used social media to put out a call for community members to descend on the home of a renter to block a landlord's repeated attempt to evict without court process.[291] Activists took shifts to monitor the resident's home and physically prevent the ability of the landlord to effectuate the self-help eviction.[292] In Brooklyn and Queens, New York, community activists similarly used collective action to support residents in their communities when landlords attempted to take the law into their own hands to evict.[293] In both instances, neighbors and activists joined the ousted residents at the premises to demand that the residents be allowed back into their homes.[294] In Detroit, activists have mounted campaigns to end the practice of local police assisting landlords who exercise self-help to evict, which ultimately led the Detroit Police Department to issue a formal apology.[295] In Chicago, grassroots tenant unions help fight illegal lockouts by replacing locks for ousted tenants, providing mutual aid

290 *See* Park, *supra* note 278 ("Tenant organizers across the country—in places like Virginia, Louisiana, and New York—have taken direct action against surging eviction cases through tactics like mass outreach, shutting down court hearings, and picketing lawyers who represent landlords.").

291 Hannah Grabenstein, *Community Rallies to Protect South Memphis Family from Illegal Eviction, Intimidation*, MLK50 (Jan. 7, 2021), https://mlk50.com/2021/01/07/community-rallies-to-protect-south-memphis-family-from-illegal-eviction-intimidation [https://perma.cc/T5T9-SD7D].

292 *Id.*

293 David Brand, *Queens Activists Take Eviction Protest to Maspeth Landlord's Doorstep*, QUEENS DAILY EAGLE (Jan. 11, 2021), https://queenseagle.com/all/activists-protest-maspeth-landlords-after-tenant-locked-out-of-apartment [https://perma.cc/6MRE-5PQN] (reporting that some fifty community activists showed up at the residence and vowed to "be [t]here every single day" until tenant was restored to possession); Ben Verde, *Crown Heights Tenants Say Prominent Brooklyn Couple Tried to Illegally Evict Them*, BROWNSTONER (July 9, 2020, 9:00 AM), https://www.brownstoner.com/real-estate-market/crown-heights-brooklyn-tenants-harassment-eviction-1214-dean-street-gendville-brooks-church [https://perma.cc/CTR7-7YC2] (noting that protesters occupied resident's stoop and were able to stall the eviction).

294 *See* Brand, *supra* note 293; *see also* Verde, *supra* note 293.

295 Rahal, *supra* note 283 (noting that "[m]ore than 50 protesters gathered" in front of the Detroit Police Department to demand that officers stop assisting landlords to evict); Slone Terranella, *"I Had to Rebuild My Life Step-by-Step": Woman Relives Story of Being Wrongfully Evicted*, DETROIT FREE PRESS (Apr. 11, 2021, 11:26 AM), https://www.freep.com/story/news/local/michigan/detroit/2021/04/10/detroit-activists-march-against-wrongful-police-involved-evictions/7158149002 [https://perma.cc/5UFR-FSX3] (same).

and rent assistance, and mounting public campaigns.[296] Similar coordinated resistance has been successful around the nation.[297]

Examples of community resistance, resilience, and action are too numerous to cite. Nonetheless, each provides a window into the work of affected people that has effectively deterred and combatted self-help evictions when the law falls short. Importantly, these examples also remind one that legislative reform and courtroom advocacy alone will not resolve this crisis. As with the most consequential legislative and policy shifts, change is only possible where legislative reform is coupled with on-the-ground activism and community investment.

D. *An Unequivocal Prohibition of Self-Help Must Contemplate a Right to Restoration*

A paper ban on all self-help evictions is not enough. Although many states provide a right to restoration for occupants who are evicted without court process, several others do not.[298] That remedy is essential. Despite a good faith attempt by the New York State Legislature to end self-help evictions, the courtroom aftermath of that remedial legislation illustrates the shortcomings of legislative reform that do not fully appreciate the stakes for people who are evicted through extrajudicial means.[299]

In 2018, the Appellate Term for the judicial department that encompasses Brooklyn, Queens, and Long Island dealt a blow to residential occupants who do not meet the definition of "tenant" under state statutes.[300] In *Andrews v. Acacia Network*, the court determined

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296 Noah Tesfaye, *Tenant Unions Form to Cope with the Crisis*, S. SIDE WKLY. (Feb. 7, 2021), https://southsideweekly.com/tenant-unions-form-to-cope-with-the-crisis [https://perma.cc/B2KS-WE44].

297 *See* Park, *supra* note 278 (citing examples of community resistance to eviction in Virginia, Louisiana, and New York among others).

298 *See, e.g.*, FLA. STAT. ANN. § 83.67 (LexisNexis 2022); IND. CODE ANN. § 32-31-5-6 (LexisNexis 2022); ME. REV. STAT. ANN. tit. 14, § 6014 (2021); MD. CODE ANN., REAL PROP. § 8-216 (West 2022); N.J. STAT. ANN. § 2A:39-1 (West 2022); N.D. CENT. CODE § 32-03-29 (2021); OHIO REV. CODE ANN. § 5321.15 (West 2022); UTAH CODE ANN. § 78B-6-814 (LexisNexis 2022); WIS. ADMIN. CODE ATCP § 134.09(7) (2022).

299 *See* N.Y. REAL PROP. ACTS. LAW § 711 (McKinney 2019) (as amended by the New York Housing Stability and Tenant Protection Act); *see, e.g.*, H.R. 1451, 117th Cong. (2021) (providing only civil penalties for landlord's self-help eviction of tenant).

300 *See* Andrews v. Acacia Network, 70 N.Y.S.3d 744, 745 (App. Term. 2018); *see also* Padilla v. Rodriguez, 110 N.Y.S.3d 865 (App. Term. 2018) (holding that a "licensee does not have 'possession'" and "cannot maintain an unlawful entry and detainer proceeding"). *Andrews* was not the first case to deny relief to an occupant based on a finding that the occupant was a licensee,

that an occupant of a shared room in a supportive living facility was a licensee because he was "not given exclusive dominion and control of a part of the premises" and there were no locks on the "dormitory-style rooms."[301] Thus, the occupant, who paid rent to reside in the building for over six months, could not maintain a proceeding to be restored to possession after the landlord—a non-profit organization charged to provide supportive services to residents—removed him from the premises without resorting to court process.[302] According to the trial court's decision, the reason the organization opted to take the law into its own hands to evict the occupant onto the streets on a moment's notice was because staff "didn't like [the occupant's] attitude and that [the occupant] was smoking cigarettes."[303]

Litigation about whether an occupant was a "licensee" or "tenant" in the context of an unlawful entry and detainer proceeding "created a procedural quagmire that wasted time and squandered scarce judicial resources—all while the occupant remained homeless, barred from reentering [their] home."[304] In 2019, "[t]enant activists and advocates successfully lobbied to modify the [New York State unlawful entry and detainer] statute, which now *clearly provides a right to court process for all* '*lawful occupants*.'"[305] Prior to the amendment, the statute provided that "[a tenant] shall not be removed from possession except in a special proceeding."[306] The legislature sought to broaden protections by amending the language to expand upon the class of residential occupants who are covered.[307] Accordingly, the statute was amended to read: "No tenant *or lawful occupant* of a dwelling or housing

but it came on the heels of years of advocacy following rampant trends of self-help evictions effectuated disproportionately against Black people and other people of color, formerly incarcerated people, individuals with histories of substance use, and other people marginalized by homelessness, mental health disabilities, or other personal crises. *See* Main, *supra* note 6, at 37–39.

301 *Andrews*, 70 N.Y.S.3d at 745–46.

302 *Id.* at 745; *see* Andrews v. Acacia Network, No. 11437/16, 2016 NYLJ LEXIS 4942, at *6, *13 (Civ. Ct. Mar. 9, 2016).

303 *Andrews*, 2016 NYLJ LEXIS 4942, at *1, *6.

304 *See* Main, *supra* note 6, at 49–50 n.90; *see also* Brief for the Housing Justice League et al. as Amicus Curiae Supporting Plaintiffs-Appellees, *supra* note 281, at 19–31 (arguing that extended-stay hotel residents should have a right to court process prior to eviction because their experience mirrors that of tenants who have that right).

305 Main, *supra* note 6, at 49–50 n.90 (emphasis added).

306 N.Y. REAL PROP. ACTS. LAW § 711 (McKinney 1985) (amended 2019).

307 *See Rental Housing & Tenant Protections: N.Y. State Assemb. Standing Comm. on Hous.*, 2019 Leg. 322 (2019) ("So adding language [such as 'or lawful occupant'] to the existing statutes that would clarify the unlawfulness of self-help lockouts would prevent unnecessary homelessness for tenants who still maintain legal possession of their residence." (statement of Debra Collura, Senior Attorney, Legal Aid Society of Northeastern, New York)).

accommodation shall be removed from possession except in a special proceeding."[308] That should have resolved the problem, but it did not. The status of licensee continues to exclude marginalized residential occupants from the protections against self-help evictions.[309]

In the context of self-help evictions, restoration to possession "has always been the primary civil remedy."[310] However, the purpose of such statutes was also to benefit landlords. In New York, for instance, summary eviction proceedings were "designed to remedy [the denial of justice to landlords] by providing the landlord with a simple, expeditious and inexpensive means of regaining possession of [the] premises."[311] While the benefit conferred on landlords in summary proceedings remains intact, the promise for non-tenant residential occupants remains elusive.

Without a remedy at law, a paper right is meaningless. When the right at issue is the uninterrupted possession of one's home, the failure to attach swift judicial remedies to enforce that right can be

308 *See* N.Y. REAL PROP. ACTS. LAW § 711 (McKinney 2022) (emphasis added) (codified as amended by the Housing Stability and Tenant Protection Act of 2019, pt. M, § 12 (2019)).

309 *See, e.g.*, Qian Zhu v. Xiao Hong Li, 70 Misc. 3d 139(A), at *1 (App. Term Feb. 5, 2021) (dismissing petition because occupant "was a licensee and not a tenant"); Felli v. Cath. Charities of Steuben Cnty., 108 N.Y.S.3d 624, 625 (App. Div. 2019) (concluding that complaint failed to state a cause of action for unlawful eviction because occupant was a licensee); Jimenez v. 1171 Wash. Ave., LLC, 67 Misc. 3d 1222(A), at *8 (Civ. Ct. June 1, 2020) (holding that occupant "lacked any possible claim to possession," i.e., restoration, because he was a licensee); Frazier v. McCall, No. LT-18486-19/KI (N.Y. Civ. Ct. Oct. 30, 2019) (holding that the occupant was only a licensee and did not have possession so as to entitle her to relief in a summary unlawful entry and detainer proceeding); Tavares v. Tavares, No. 32668/18, 2019 NYLJ LEXIS 2638, at *10 (Civ. Ct. June 12, 2019) ("As licensees [the occupants] had no possessory interest in the subject apartment. Therefore, [the tenant of record] was permitted to remove [the occupants] without legal process, under the common-law right of ouster.").

310 Eubanks v. First Mount Vernon Indus. Loan Ass'n, 726 A.2d 837, 846 (Md. Ct. Spec. App. 1999); *see* Warren v. James, 130 Mass. 540, 541–42 (1881) (indicating that the "general object and purpose" of the statutory remedy for unlawful ouster is restoration to possession); Chapman v. Deutsche Bank Nat'l Tr. Co., 302 P.3d 1103, 1107 (Nev. 2013) ("The primary purpose of an unlawful detainer action is to restore the possession of property to one from whom it has been forcibly taken or to give possession to one from whom it is unlawfully being withheld.").

311 Reich v. Cochran, 94 N.E. 1080, 1081 (N.Y. 1911); *see* Velazquez v. Thompson, 451 F.2d 202, 204 (2d Cir. 1971) ("Summary eviction procedures exist in virtually every state and their primary purpose is to enable landlords to regain possession quickly and inexpensively and thereby avoid the plenary action for ejectment and its incident delays which had prompted landlords to short circuit the judicial process by resort to 'self-help.'" (citation omitted)); Spector, *supra* note 45, at 158–59 (explaining that the limited remedies available to tenants in summary proceedings "are the basis for the view that the summary eviction proceeding is a convenient, safe, and relatively speedy alternative to self-help"); Gerchick, *supra* note 75, at 778 (noting that "the existence of the speedy eviction action" coupled with a need to protect tenants' right to assert statutory defenses against eviction, "abrogates any need for extra-judicial action" by landlords).

devastating.[312] Failure to attach relief to the expanded prohibition against self-help eviction is exactly what happened in New York. Because of a complicated interplay—and apparent disconnect—between the statutory restrictions on self-help and the framework to seek relief when a landlord disregards those restrictions, some courts have found a way to maintain the ancient status quo. Thus, even though courts have acknowledged that an extrajudicial ouster violates the law, they have declined to order restoration on the premise that the legislature failed to provide restoration as a remedy.[313] Likewise, landlords are rarely prosecuted for the crime of illegal eviction.[314] And the tail of archaic legal status distinctions continues to wag the dog of legislative process. Indeed, at least one court has relied on principle that "licensees do not have possessory interests" to conclude that licensees are, therefore, "not 'lawful occupants'" for purposes of the prohibition of self-help eviction, effectively nullifying the legislature's 2019 amendment to the law.[315] The perverse result is an unspoken renewal of

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312 *See, e.g.*, Sabbeth, *supra* note 7, at 100; Petersen, *supra* note 7, at 68–80 (arguing that the loss of housing touches "every facet of life," including physical and emotional wellbeing, continuity of employment, education, community, and the essence of human dignity and self-perception).

313 *See* ANDREW SCHERER & FERN FISHER, RESIDENTIAL-LANDLORD TENANT LAW IN NEW YORK § 7:13 (2021) ("A number of courts have held that a licensee without a colorable claim to continued possession is not entitled to restoration to possession after a self-help eviction."); *see, e.g.*, Rojas v. Zabbar, No. LT-10766-20/QU (N.Y. Civ. Ct. July 24, 2020) (finding that landlord's actions constituted an illegal eviction but declining to restore occupant to possession because occupant was a licensee); *Jimenez*, 67 Misc. 3d at *9 (holding that occupant "lacked any possible claim to possession," i.e., restoration, because he was a licensee); *Frazier*, No. LT-018486-19/KI (holding that the occupant was "only a licensee and did not have possession so as to entitle her to relief in a summary unlawful entry and detainer proceeding").

Even before the current judicial bolster of the dichotomy between licensees and tenants, courts have exercised the flexibility of the remedy of restoration to exclude non-tenants from relief following an extrajudicial eviction. "Under the so-called 'futility of restoration' doctrine, courts decline to restore an ousted occupant to possession where it is clear that the landlord could prevail were it to commence a summary proceeding to evict that occupant." Main, *supra* note 6, at 51; *see* Brown v. 165 Conover Assoc., 5 Misc. 3d 128(A), *1 (App. Term Oct. 21, 2004) ("Since petitioner, the sister of the deceased tenant of record, did not claim tenancy rights, her status was that of a mere licensee whose license expired upon the death of the tenant of record. In these circumstances, restoration should not be granted."); Walker v. Daramdas, No. LT-304246-21/QU, *4 (N.Y. Civ. Ct. July 29, 2021) (noting that while there is "no dispute that tenants have a right" to maintain an unlawful entry and detainer proceeding seeking restoration to possession, a licensee is not entitled to restoration).

314 *See, e.g.*, Kinniburgh, *supra* note 15 (noting that "[j]ust 25 landlords faced charges for illegally evicting a tenant in 2020 . . . [but] [m]ost of the cases were dismissed, and none led to a criminal conviction").

315 Kalikow Fam. P'ship v. Doe, 152 N.Y.S.3d 283, 288 (Civ. Ct. 2021).

the landlord's license to employ self-help to remove the most vulnerable of residential occupants without court process.[316]

The simplified approach suggested here is grounded in the belief, theory, and principle that people who occupy any space for residential purposes necessarily have a cognizable interest in that property. The failure to recognize that interest—the fundamental human interest in safety, security, dignity, and equality—allowed and continues to fuel settler colonialism. So too here, in the context of residential housing, a legal fiction that some residential occupants have an interest in safety, security, and due process while others do not continues to fuel a power imbalance that deputizes private property owners with a ruthless and unchecked license to dispossess.

CONCLUSION

> *"But how or when, then, does property commence? I conceive no better answer can be given than by occupancy . . . . All the writers on international law concur in the doctrine that actual occupancy is essential to perfect the title to land newly discovered and vacant."*[317]

Complacency with the shortcomings of an "ancient body of law long unsuited to reform" can lead to acceptance of the misery inflicted by operation of that law.[318] The perverse result is the injustice that law permits may "now seem[] normal enough, even fair."[319] At the cusp of the so-called "revolution" in landlord-tenant law, some fifty years ago, advocates and scholars posited that agrarian roots of the law should be abandoned as "old ideas" that were "strangely and radically out of joint" with modern urban housing realities.[320] Antiquated laws gave way to a new landscape intended to guarantee basic standards of habitability and protect the rights of tenants.[321] That revolution also led to a codification of laws that prohibited self-help eviction of tenants.[322] Non-tenant residential occupants were left out then. In many jurisdictions, they remain left out today.[323] Based on contorted, archaic notions of

316 *See* Crosby, Nori & McNally, *supra* note 13.

317 2 WILLIAM BLACKSTONE, COMMENTARIES *8 n.1, *9 n.2.

318 Thomas M. Quinn & Earl Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 249 (1969).

319 *Id.* at 250.

320 *Id.* at 231–32.

321 *See* Glendon, *supra* note 71.

322 *See id.*

323 *See supra* Section I.B.

occupancy status, tenants are protected, while residential occupants who are deemed *less than* tenants are not.

Attempting to distinguish those residential occupants who have a right to court process versus those who do not has been a demonstrably futile exercise in circularity. To characterize one residential occupant as having an "interest" to which a bundle of rights attaches, and another bereft of that interest often results in a distinction without a difference.[324] When the goal is to protect people from being thrust out of their homes without notice or court process, those distinctions are and should be irrelevant.

For the purposes of liability in tort, an owner's duty to protect occupants historically depended on the occupant's common law status as invitee, licensee, and trespasser.[325] In recognition of modern realities, and to prevent confusion and judicial waste, the imposition of particularized duties based on those classifications has been abolished in favor of "a general duty of care to anyone lawfully on the premises."[326] That change was deemed necessary to "bring the common law into accord with present day standards of wisdom and justice rather than to continue with some outmoded and antiquated rule of the past."[327] So too here, for the purposes of unlawful entry and detainer proceedings—the essence of which is the loss or preservation of one's safety, shelter, and stability in their home—consideration of an occupant's common law status of licensee should be eradicated. It follows that consistent with the principles that underly the prohibition of self-help to evict *tenants*—preventing violence and promoting housing security—the law should extend uniformly and without exception to all residential occupants.

[324] *See, e.g.*, Cole v. Ralph, 252 U.S. 286, 294–95 (1920) (equating licensee and tenant at will, asserting that "no right can be initiated or acquired through a forcible, fraudulent or clandestine intrusion upon [the occupant's] possession").

[325] Melissa T. Lonegrass, *Convergence in Contort: Landlord Liability for Defective Premises in Comparative Perspective*, 85 TUL. L. REV. 413, 420 n.26 (2010).

[326] *Id.*; *see* Driscoll, *supra* note 202, at 888–89 (explaining that the prevention of "confusion and judicial waste" provided justification to depart from the "rigid common law" that was "no longer desirable in modern times").

[327] *See* Driscoll, *supra* note 202, at 888–89.