

Chapter I

Move along to where? Property in service of democracy

(A tribute to André van der Walt)

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*[P]roperty must reflect, and must be accountable to, the fundamental choices we have made in favour of living in a democracy characterised by dignity and equality.****

AJ van der Walt

I Introduction

When cities prohibit sleeping on sidewalks and in parks, those homeless persons whom the police ask to ‘move along’ from these public spaces have begun to respond with a simple question: ‘Move along *to where?*’ If the police do not have a specific answer to this question – if, for example, shelters are full or closed during the daytime, and invitations by private parties are not at hand – those who have been asked to ‘move along’ are subject to a sovereign

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*** AJ van der Walt ‘The modest systemic status of property rights’ (2014) 1 *J L Prop & Soc’y* 15–106.

command with which they have no capacity to comply.¹ We may think of a homeless person as a person without real property. But, as Jeremy Waldron reminds us, '[e]verything that is done has to be done somewhere.'² If one has no place where one can legally move along to, then one has no place where one can legally perform life's most essential functions.³ The state has condemned this person to die, not because of anything she did, but as a result of her circumstance.

Of course, the command to move along is not literally a death sentence. But if the law instructs that there is no place where a person is entitled to be, what in fact is it? How does it operate as 'law'? It is not an *enforceable* law, at least not all of the time. It seems the command to move along is obscuring what is really going on, and that is lawmakers' attempt to hide from their consciousness the fact that such a command – if consistently made and consistently followed – would turn people into outlaws. Taken to its logical end, this command could only work if the people subject to it ceased to exist.

Certain fundamental values characterise our democracy, among them the values of dignity and equality. The meanings of these values are, of course, contested. Yet it would seem that under *any* reasonable conception, they must include a human being's equal right to exist. And yet the uncomfortable sequence outlined above illustrates an approach by which the state initially defines property rights and rigidly enforces those rights without concern for the consequences of doing so in individual cases. On this approach, it is only after defining and enforcing property rights in this way that the state can move to respect fundamental democratic values in the space that remains.

Drawing inspiration from the work of our friend, André van der Walt, we advocate an alternative course. Property, in our view, is a socially constructed institution that exists *in service of* our fundamental democratic values. Identifying these values, that is, comes first. Conceiving of property as existing in service of democracy suggests that the state bears a primary obligation to define and to enforce property rights in a manner that respects fundamental democratic values.

On this alternative approach, something is amiss when property law casually and mechanically renders a person homeless and, in some instances, even calls into question this person's right to exist. This dilemma has several

¹ John Austin quipped that only a 'stupid or cruel legislator may affect to command that, which the party cannot perform, although he desire to perform it'. See J Austin *Lectures on jurisprudence* 136 (S Austin 2 ed 1861–1863) (emphasis removed), cited in JW Singer 'Legal realism now' (1988) 76 *Cal L Rev* 465–544 497 n105.

² J Waldron 'Homelessness and the issue of freedom' (1991) 39 *UCLA L Rev* 295–324.

³ J Waldron 'Homelessness and the issue of freedom' (1991) 39 *UCLA L Rev* 295–324.

layers. At the outset, it bears noting that the problem of homelessness is not beyond the reach of our material resources in the US.⁴ But having chosen not to recognise an affirmative right to housing (as South Africa has done) and provide the resources necessary to realise such a right, it does not seem especially demanding to require the state to avoid affirmatively causing or contributing to homelessness without substantial justification. Therefore, among other measures, the state should deem it relevant in every case that eviction may make the displaced person homeless (as, again, South Africa has done). But given that the state has chosen not to pursue this course either, we suggest in this paper that the state should *at the very least* enforce the limited property rights that it has already explicitly conferred on tenants to protect them from eviction in specific instances. Yet, below, we offer two ongoing stories that indicate the state is not even taking this minimal step.

These stories emphasise that, on the face of its rental housing codes, the state has defined property rights in landlords (as owners of reversions) and tenants (as owners of leaseholds to habitable units) that in some partial way respect dignity and equality. However, its approach to enforcement has created conditions that allow landlords routinely to deprive tenants of their property rights under these laws. As illustrated in some detail below, the legislature has failed to fund enforcement adequately; the executive is not using the funds that have been appropriated to prevent displacement; and the judiciary is acting as a bystander when unrepresented tenants do not raise what would be an effective defence relating to code violations. In this role, as an accomplice of sorts to the landlord's conduct, the state itself is depriving tenants of their property rights, and it is doing so without due process or just compensation.

2 Eviction

*As a general rule, people who rent residential property will have less power and be more open to arbitrary (or at least non-negotiable) exercise of social and economic power by others, unless the rental market is pointedly and specifically regulated in some way to prevent or restrict those exercises of power.*⁵

AJ van der Walt

⁴ Indeed, some studies suggest that investing in eliminating homelessness would save the state money in the form of avoided emergency health care and related costs.

⁵ AJ van der Walt *Property in the margins* 60 (2009); S Maass & AJ van der Walt 'The case in favor of substantive tenure reform in the landlord-tenant framework' (2011) 128 *SALJ* 436–451; AJ van der Walt & S Maass 'The enforceability of tenants' rights (part 2)' 2012 *TSAR* 228–246.

In many tenancy proceedings in South Africa, judges are tasked by statute with considering whether tenants have somewhere else to live before they sign an eviction order.⁶ That a tenant does not have somewhere else to live does not mean that a court must or will refrain from evicting that tenant; however, it may lead a court to delay execution of the order or, perhaps, even refuse to issue it at all.⁷ In contrast, under prevailing US law, whether or not an evicted tenant might have somewhere else to live is regularly deemed immaterial. The fact that an eviction will result in homelessness does not affect the property rights of the parties. Judges operate under the impression that they can order evictions upon landlords' requests – and call on sheriffs' officers to implement such orders when they are not complied with voluntarily – without concerning themselves with the impossible position in which those orders might place tenants.⁸

In his last lecture, Professor Van der Walt revealed the injustice of the prevailing US approach by explaining that property law is best understood as 'part of a single system of law that is driven and inspired by the Constitution'.⁹ There is not one set of laws governing relations among persons (eg landlords and tenants) and an entirely different set of laws governing these persons' relations with the state. If the constitution is premised on certain fundamental values, then the laws governing relations among individual persons cannot violate those values without adequate justification. That is, the values embedded in the constitutional framework are horizontally applied to the common, statutory and administrative law of private property.

⁶ See eg Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (applicable to unlawful occupiers, including previously lawful tenants who 'hold over' following the termination of their leases, applied in *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA)). Professor Van der Walt lamented the decision in *Brisely v Drotsky* for holding that, absent explicit statutory direction, courts have no authority to consider the availability of alternative accommodation in common-law eviction proceedings, despite the Constitution's command that they take into account all 'relevant circumstances'. AJ van der Walt *Property in the margins* 120–21 (2009). Section 26(1) and (2) of the South African Constitution places an obligation on the state to abstain from any action that would unnecessarily deprive people who already have housing of their rights to occupy that housing. See eg *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

⁷ AJ van der Walt *Property in the margins* 123 (2009) ('considerations . . . such as the social or economic status and circumstances of the occupier and the availability of alternative accommodation, can influence the decision whether to allow eviction in a specific case').

⁸ For a notable exception, see *United States v Duro*, 625 S. Fupp. 2d 938, (C.D.Cal. 2009) (refusing to order eviction of tenants from substandard and dangerous conditions because they had nowhere else to go).

⁹ AJ van der Walt 'Property law in the constitutional democracy' (2017) 28 *Stell LR* 8.

It is a contradiction to adopt a fundamental value – one as simple as the equal claim to exist – and then, without justification, to delegate the power of the state to people who are entirely free to ignore that value.¹⁰

In a democracy characterised by the fundamental values of dignity and equality – a democracy that the property system *was created to serve* – the justification for allowing the state to ignore the possibility that its actions at the hands of landlords might render people homeless and, in some cases, go so far as to call into question these people's very existence, is wanting. Property law cannot treat the concerns of homelessness as irrelevant. A state that evicts a tenant when such an eviction is not justified as consistent with these fundamental values is shaping and enforcing a property law system that is at war with itself, for it undermines one of the key reasons for having property rights in the first place.

3 Two stories in eviction law

*[A]ny property dispute that also involves a non-property constitutional right such as life and human dignity should, as a first step, start off with ensuring or safeguarding the non-property right...*¹¹

AJ van der Walt

None of the foregoing is meant to imply that tenants should not pay their rent when it is due. Rather, we merely seek to emphasise that the state should *take into account* the possibility that an eviction order may consign a tenant to the streets. On this view, the state must take great care not to evict a tenant when doing so would render that person homeless – and this is especially true when the law gives the tenant a substantive defence to an order of eviction despite non-payment of rent. Surprisingly, though, while eviction is the leading cause of homelessness in the US, especially for families with

¹⁰ The contradiction is evident in the US Supreme Court's 'state action' jurisprudence, which in many instances denies that the US Constitution's guarantee of 'equal protection of the laws' applies to relations among human beings. See eg E Chemerinsky 'Rethinking state action' (1985) 80 *Nw U L Rev* 503–557; S Gardbaum 'The "horizontal effect" of constitutional rights' (2003) 102 *Mich L Rev* 387–459; I Saidel-Goley & JW Singer 'Things invisible to see: State action and private property' (2018) 6 *Tex A&M L Rev* (forthcoming). See also ET Freyfogle 'Private ownership and human flourishing: An exploratory overview' (2013) 24 *Stell LR* 430–454 449 (critiquing the 'public-private' distinction for its emphasising that the government acts in the public interest while private owners can act purely in their own interest, when the very purpose of having a private property system is to benefit society as a whole).

¹¹ AJ van der Walt 'The modest systemic status of property rights' (2014) 1 *J L Prop & Soc'y* 15–106.

children,¹² it is often effected when the rent *is not actually due*. This section highlights two instances in which the state facilitates this injustice.

The first focuses on the legislature's failure sufficiently to fund enforcement of housing codes and the executive's failure, with the enforcement resources that *are* made available to it, to prevent the displacement of tenants in the face of landlord non-compliance. The second concentrates on courts' evicting tenants who lack legal representation, a large percentage of whom may well have a viable defence to their landlord's claim for unpaid rent in light of their landlord's failing to maintain their units in accordance with the applicable housing code. Following these stories, we propose several potential reforms that could improve the current state of affairs.

3.1 Story #1: Eviction through non-enforcement of housing codes

Many US jurisdictions have adopted state or local housing codes. The existence of such codes means that landlords have *obligations* to provide heat, hot water, light, ventilation, door locks, pest control, and other basic services to their residential tenants. It also means that tenants are *entitled* to these services. On the face of it, housing codes' articulation of these obligations and entitlements add specificity to a value proposition that is fundamental to our democracy: that all people, including landlords and tenants alike, have an equal right to live in dignity.

In a system that takes these obligations and entitlements seriously, a tenant alleging that her landlord has failed to fulfil these obligations can call an inspector to visit her home, document the failings, and enforce them against the landlord through a variety of measures. The goal of enforcement in a given case is not solely or even primarily to punish the non-compliant landlord but rather to improve housing conditions by bringing this property up to code and deterring future offences.

What happens if the state *does not* take these obligations and entitlements seriously – if it fails to enforce housing codes, allows rental buildings to become so dilapidated that they pose imminent danger to the public, and pays no mind to tenants who are displaced when the state ultimately must order these dilapidated buildings vacated? In the 1960s and early 1970s,

¹² See United States Conference of Mayors *Hunger and homelessness survey* (Washington, DC: United States Conference of Mayors, 2013).

numerous analysts found these failings quite widespread.¹³ One particularly thorough study, which involved personal interviews with over 130 code enforcement officials in myriad US cities, outlined the basic ills: limited funding, limited staffing, a dearth of training requirements for inspectors, a 'complaint inspection' system that focuses only on the specific violation the calling tenant alleges (as opposed to an 'area inspection' system requiring periodic comprehensive inspections of all rental properties),¹⁴ and inattention to the plight of tenants displaced by the state's complicity in their landlords' obstinacy.¹⁵ These failings could prompt one to conclude that, despite the law ostensibly requiring it, property rules surrounding the leasing of residential units in that era were not in actuality designed in a way that respects our most fundamental democratic values.

Despite considerable academic attention in the intervening fifty years, these failings continue apace today. Consider, for instance, the current state of housing code enforcement in what by many metrics is considered one of the country's most progressive states, Vermont.

On the face of it, Vermont's code represents the state's allocative decision to set specific minimum standards for the creation of residential leaseholds.¹⁶ These laws afford all tenants security from their landlords' interfering in numerous ways with their occupancy and use of their rented

¹³ See eg RE Carlton, R Landfield & JB Loken 'Enforcement of municipal housing codes' (1965) 78 *Harv L Rev* 801–860; J Bribetz & FP Grad 'Housing code enforcement: sanctions and remedies' (1966) 66 *Colum L Rev* 1254–1290; BR Dick & JS Pfarr Jr 'Detroit housing code enforcement and community renewal: A study in futility' (1969) 3 *Prospectus* 61–93; B Ackerman 'Regulating slum housing markets on behalf of the poor: Of housing codes, housing subsidies, and income redistribution policy' (1971) 80 *Yale LJ* 1093–1197.

¹⁴ A complaint inspection approach must be driven exclusively by calls from low-income tenants who often may be unaware of enforcement services or do not avail themselves of those services, either in light of other priorities or in fear of landlord retribution. Among other advantages, area inspections permit landlords to make investment decisions on the assumption that neighbouring properties will be kept to code; while a given landlord still may find it more profitable not to maintain his rental units, compelling him to do so does not put him at a competitive disadvantage with his similarly situated peers.

¹⁵ See RE Carlton, R Landfield & JB Loken 'Enforcement of municipal housing codes' (1965) 78 *Harv L Rev* 801–860, 804–820.

¹⁶ A state statute obliges landlords to provide rental premises that are 'safe, clean, and fit for human habitation, and which comply with the requirements of applicable building, housing, and health regulations' Vt Stat tit 9 §4457. The state's Department of Health promulgated statewide minimum housing code standards. See 'Rental Housing Health Code,' 12–5 Vt Code R §25:1.0 et seq ('The purpose of this code is to protect the health, safety and well-being of the occupants of rental housing. This code establishes minimum health and habitability standards that *all residential rental housing in Vermont must conform to*' (emphasis added)). Local governments are free to establish more stringent standards, and several of Vermont's largest cities have chosen to do so.

units.¹⁷ Landowners obviously maintain the ability to let their properties for residential purposes, though they ostensibly are limited by the code's requiring that they provide a series of basic services and amenities.¹⁸ Yet a landlord's obligation to ensure the habitability of rental units and a tenant's security of having this complied with are meaningful only to the extent that these obligations are reasonably enforced.

Resource constraints often are a primary and understandable reason underlying the reality that not all arguable violations of all laws can possibly be pursued. Housing code violations – like, say, violations of posted speed limits – occur so frequently that avoiding non-enforcement wholesale would be an impractical goal; that the law's expansiveness outpaces its conceivable enforcement does not necessarily raise concerns regarding the state's accountability. However, residential tenants might inquire whether there is *some juncture* at which the state's pointing to a lack of resources loses some of its potency. That is, is there some juncture when an enforcement scheme makes a property right reflective of the values of dignity and equality so empty that one should question whether that property right actually should be deemed an existing right at all?

In Vermont, enforcement of the state's housing code is primarily the province of local governments. According to state statute, every municipality must have a Town Health Officer, whose responsibility it is to enforce the bulk of the housing code and numerous other public health and safety

¹⁷ Vt Stat tit 9 §4457 ('In any residential rental agreement, the landlord shall be deemed to covenant and warrant to deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean and fit for human habitation and which comply with the requirements of applicable building, housing, and health regulations.');

12–5 Vt Code R §25:1.0 et seq (rental housing health code establishing minimum standards for rental housing).

¹⁸ These services and amenities include the provision of adequate and safe boilers, Vt Stat Ann tit 20 § 2881 et seq; 12–5 Vt Code R §25:7.0; fire safety measures, Vt Stat Ann tit 20 § 2681 et seq; electrical installations, Vt Stat Ann tit 15 § 881 et seq; 12–5 Vt Code R §25:9.0; plumbing, Vt Stat Ann tit 26 § 2198 et seq; potable water, Vt Stat Ann tit 10 §1971 et seq; sewage disposal, Vt Stat Ann tit 24 §1971 et seq; bathroom facilities, Vt Stat Ann tit 24 §3501 et seq; and insect- and rodent-free quarters, 12-5 Vt Code R §25:6.0.

protections.¹⁹ Several of the state's largest towns provide a salary for their Town Health Officers, and in some instances, Deputy Town Health Officers, too. In most towns, however, including all of those in the poorest areas of the state, Town Health Officers are compensated, if at all, only for reasonable expenses incurred.²⁰ In this latter group of towns, the town council – known in many parts of Vermont as the 'select board' – regularly solicits volunteers interested in assuming the position.²¹ The state does not require Town Health Officers to have any experience regarding public safety and health hazards or to complete any training. Instead, the state mails each new Town Health Officer a manual that it encourages the appointee to read.²²

The state does not require Town Health Officers to conduct inspections at any recognised intervals; instead, inspections occur only upon the complaint of a tenant or, in certain instances, a tenant's neighbour. Even these inspections, though, are not certain. According to one prominent attorney who regularly represents tenants, some Town Health Officers are disinclined to perform inspections, including, in one recent instance, an unwillingness due at least in part to the Town Health Officer's asserted fear that he would contract the bed bugs of which the tenants were complaining.

Even where inspections are performed, relief for tenants is not always on the horizon. Consider, for example, the facts presented in *Alger v Department of Labor & Industry*.²³ In response to tenants' repeated calls complaining about serious code violations, the state occasionally issued orders requesting compliance from these tenants' landlords. However, for years, the state failed to utilise the code's enforcement provisions, including its powers to

¹⁹ This individual is responsible, according to the state, for 'investigating possible public health hazards and risks within the town or city; taking action to prevent, remove, or destroy any public health hazards; taking action to lessen significant public health risks; and enforcing health laws, rules and permit conditions, and taking the steps necessary to enforce orders' – <http://healthvermont.gov/environment/town-health-officer>. See also 18 Vt Stat §602a. The Division of Fire Safety, under the auspices of the state's Department of Public Safety, promulgates building code regulations relating to fire hazards. These regulations often overlap with the Department of Health's regulations regarding the habitability of residential units, such that Town Health Officers implicitly are tasked with enforcing them, too. Where they do not overlap, their enforcement presumably is outside the jurisdiction of Town Health Officers.

²⁰ 18 Vt Stat § 602(b).

²¹ By default, the chairperson of the town's select board – akin to the town's mayor – serves as the town's Town Health Officer if the town does not identify a volunteer to recommend to the state's Department of Health, who formally makes the non-paid appointment.

²² The Vermont League of Cities and Towns conducts an optional annual training program for Town Health Officers.

²³ *Alger v Dep't of Labor & Indus.* 917 A.2d 508 (Vt 2006).

pursue injunctive relief, impose administrative penalties, assess fines, and seek prosecution.²⁴ The state's course of action effectively allowed these landlords to ignore order after order, for non-compliance brought no injurious consequences, at least in the near or medium term. Only when the violations created such precarious living conditions that the premises could not be safely occupied did the state act. And while it conceivably might have moved to fix the problems, the state instead ordered the units vacated, some upon a week's notice and others with no notice at all.²⁵

A tenant's unexpected and unwelcome relocation is economically and psychologically disruptive, especially where alternative accommodations, if available at all, are far from the tenant's current employment and children's school. And state law entitles tenants to habitable housing *in the units they choose to rent*. Where a landlord fails to comply with her obligations to provide such housing, the landlord is depriving the tenant of property rights recognised under state law. But does *the state* bear some responsibility, too, when it *creates the conditions* that allow landlords to do this? Here, the state created these conditions in at least two ways: *first*, by constraining the extent to which meaningful housing code inspections could be conducted through a lack of funding and training, and, *second*, by disregarding the habitability issues revealed by those inspections that did occur until vacation was the state's only rational option.²⁶ For all practical purposes, the state's reaction to landlords' non-compliance adjusted the state's original allocative decision that provided tenants security from their landlords' interfering with their occupancy and use by denying tenants their security right, or, one might say, redistributing it to their landlords.

Alger presented a bit of a messaging war. The tenants referred to the state's approach to code enforcement as 'a voluntary . . . scheme' that is 'inherently ineffective with respect to ensuring anything but the minimum level of housing code compliance necessary to avoid imminent hazards'.²⁷

²⁴ *Alger v Dep't of Labor & Indus.* 917 A.2d 508, 511–513 (Vt 2006).

²⁵ *Alger v Dep't of Labor & Indus.* 917 A.2d 508, 511 (Vt 2006).

²⁶ The state has long had the power to order the vacation of a building when serious public health concerns or other pressing public interests demand it. The common law recognised the state's authority to abate nuisances at the owner's expense through orders to vacate, see eg *Egan v Health Dep't*, 20 Misc. 38 (NY Sup. Ct 1897), and currently, summary vacation powers are codified in many housing codes. The question here, though, is whether the state has any obligation to enforce its own laws in a way that reduces the prospects of such displacement from happening.

²⁷ Fourth Amended Complaint, at ¶ 3, *Alger v Dep't of Labor & Indus.*, 917 A.2d 508 (Vt. 2006) (No s479-02 Fc), 2007 WL 5600833.

Others more benignly described the state's approach as 'comply or close'.²⁸ Yet, regardless of the label one chooses, the result in the end is the same. Though one would imagine that Vermont's housing code was principally enacted to protect low-income tenants, the state's approach to the code's enforcement seemingly has just the opposite effect: it displaces these tenants from their homes.

Should the persons displaced by the state's approach to code enforcement not have anywhere else to go, the state has made them homeless. It is, of course, unlikely that the state is determinedly trying to deprive people of their homes. But homelessness is the foreseeable result of a policy that enforces a housing code by ordering buildings vacated without ensuring that displaced persons have a place to which they can go. The state is acting in a manner that shows moral indifference to the effects of its law enforcement policy.

The state's approach can even create a windfall for unscrupulous landlords. These landlords can ignore orders to remedy code violations with the confidence that they can continue to collect rent even though they are failing to respect the tenants' property rights to habitable housing. Initially, landlords avoid spending money by failing to pay the costs of repairs. Thereafter, the state steps in to eject the landlords' tenants before the landlords are legally able to do so, saving the landlords the costs and delays of eviction proceedings. With the tenants gone, the landlords can make some repairs, find new tenants (perhaps at a higher monthly rate), and start the whole process over again.

The state appears to be operating under the assumption that non-enforcement of law is not an exercise of state power. The tenants' property rights in their leaseholds include the right to safe housing as defined by the housing code. Landlords have the obligation to comply with the code, and that obligation is only meaningful if the state will enforce it. If the tenants set up tents in the backyard of their landlord's home, the police will protect the landlord's property right to exclude by enforcing state trespass law. Should the state not feel a similar responsibility to protect the property rights of tenants to habitable housing?

Property rights work only because the state protects them through law. Non-enforcement means non-protection. As seminally outlined by Professor Wesley Newcomb Hohfeld, a legal right entails a 'correlative' duty to act or refrain from acting.²⁹ Professor Hohfeld's analysis pressed us to contemplate

²⁸ *Alger v Dep't of Labor & Indus.* 917 A.2d 508, 524–525 (Vt 2006) (Burgess J. concurring in part and dissenting in part).

²⁹ See WN Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 *Yale LJ* 16–59 28–32.

the effect upon others when legal rights are acknowledged and exercised.³⁰ Correspondingly, of course, it also induced us to consider the effect upon others when legal rights are *not* acknowledged. If a 'duty' cannot be enforced, no duty actually exists, and there is, therefore, no corresponding legal right.

In *Alger*, the state explicitly argued that it 'owe[d] no duty to tenants'.³¹ Yet the state's approach to enforcing its housing code both denies tenants' property rights to habitable housing and, upon the state's issuance of orders to vacate, in some cases renders people homeless.³² This is especially noteworthy in circumstances, as here, where these people *have done nothing wrong*. Under the system described here, tenants in Vermont can timely pay rent, timeously raise concerns with both their landlords and the state regarding housing code violations, receive no meaningful relief, and, when conditions become bad enough, be expelled by the state at a moment's notice to the streets, where they may or may not be allowed to sleep.³³ To call this 'inaction' seems untoward given that the state is depriving tenants of property rights that existing law says they own. The state has on the face of it conferred property rights, only to step aside and allow non-owners to appropriate those rights for free. To say that the state owes no duty to tenants is to say that it has no duty to protect property rights.

Failings in housing code enforcement theoretically might be alleviated in part by protecting tenants from eviction when landlords violate their duty to provide habitable housing. This threat might prompt landlords to respond more quickly and meaningfully to tenants' housing code concerns than they otherwise would, and thereby reduce the likelihood of orders to vacate akin to that at issue in *Alger*. However, although the law in most states (including Vermont) now implies such a warranty in all residential leases,³⁴ this

³⁰ WN Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 *Yale LJ* 16–59 28–32.

³¹ Brief of Defendants/Appellees at 6, *Alger v Dep't of Labor & Indus.* 917 A.2d 508 (Vt. 2006) (No S479–02 Fc), 2005 WL 1464527 at *6.

³² Several Vermont legislators recently proposed a bill aimed at improving housing code enforcement statewide. Among other provisions, the law would assure that funding appropriated for housing services is not, as is currently often the case, repurposed; impose fees to generate revenue that would be dedicated to inspections; require landlords to file and post in rented units a notice certifying compliance with the housing code before renting a given unit; and compel area inspections of all rental properties every two years. Vermont House, Bill 181 (introduced February, 2017).

³³ The City of Burlington, Vermont, for example, prohibits 'the use of any public park for sleeping between the hours of 10:00 pm and 7:00 am'. See Burlington, VT, Code of Ordinances, Ch 22, art 7.

³⁴ See eg *Hilder v St. Peter* 478 A.2d 202 (Vt 1984); *Willard v Parsons Hill Partnership*, 882 A.2d 1213 (Vt 2005).

warranty has proven ineffective in most cases involving poor tenants. There are a host of procedural and substantive hurdles that limit the warranty's effectiveness,³⁵ several of which serve as the centerpiece of our second story below.

3.2 Story #2: Eviction without legal counsel

Consider the situation of tenants in substandard housing evicted because they stopped paying rent. As discussed above, the law in the US requires landlords to comply with the local housing code. If the landlord does not comply, the tenant is protected by a doctrine called the implied warranty of habitability. The doctrine entitles the tenant to stop paying rent until the problem is fixed. And if the tenant has notified the landlord of the habitability issue and the landlord has failed to fix the problem in a reasonable time, the tenant cannot be evicted for non-payment of rent.³⁶

Lawyers know about this rule of law. They learn it in the first year of law school. Tenants who are represented by lawyers often get to stay in their homes. The courts will not evict them because their lawyers, often after bringing to light potential violations of the landlord's duty to provide habitable premises, help negotiate a settlement. If you have a lawyer, the law lets you keep your apartment while it pressures your landlord to bring it up to code.

Tenants who do not have lawyers, on the other hand, do not know about this rule of law. The implied warranty of habitability is a defence to an eviction claim, and tenants who do not know about this defence do not raise it. Without offering a defence, they are evicted for non-payment of rent. They are evicted – and potentially rendered homeless – because they are not aware of a rule of law that entitles them to stay in their homes. To be sure, they are the only ones who do not know about this rule of property law. The landlord knows. The landlord's lawyer knows. The judge knows. They know that if the tenant spoke up, at the right moment and in the right way, the tenant would not be forced to leave her home. They know but they do nothing about it. Instead, they operate with the understanding that defences are raised

³⁵ See eg PA Franzese, A Gorin & DJ Guzik 'The implied warranty of habitability lives; making real the promise of landlord-tenant reform' (2016) 69 *Rutgers U L Rev* 1–45; DA Super 'The rise and fall of the implied warranty of habitability' (2011) 99 *Cal L Rev* 389–464.

³⁶ To raise this defence successfully, some jurisdictions require that the tenant prove she stopped paying rent *because of* the housing code violation. For a critique of this approach, see eg D Kennedy 'The effect of the warranty of habitability on low income housing: "milking" and class violence' (1987) 15 *Fla St U L Rev* 485–519.

exclusively by the defendant. If the defendant does not raise a defence, she loses the case.

But are these eviction cases somehow different? Evictions cause people with homes to become people without homes. Of course, many tenants find someplace else to live. But some do not. And importantly, if the law allows the tenant to stay in her home, the law gives her property rights in her continued tenancy. When the court evicts her, the court deprives her of property rights she has under current law. It does so not because she is not entitled to stay, but simply because she is unaware of the protections that the law provides to her.

The result of this set of circumstances is that the judge is taking a property right away from the tenant that the tenant has a right, under current substantive law, to keep. The only reason she is not able to keep it is because she did not comply with the procedural rules to raise the legal defence at the appropriate time. She did not do so because she is too poor to afford a lawyer and because the US does not adequately fund legal services for the poor, resulting in many poor people going unrepresented when they would be entitled to receive legal services if the government had chosen to fund them adequately to meet the need.

How is the tenant being granted due process of law? She has notice and an opportunity to be heard. But she does not have an *effective* opportunity to be heard because she does not have a lawyer to tell her what she owns. The state has created eviction procedures that routinely deprive tenants of property rights they own under state law. It does so because neither it nor the US Supreme Court views the loss of a home as a deprivation of a fundamental right that should be effected only in full compliance with the procedural rights of the parties. Similarly, the tenant is being deprived of a right to continue occupying her home when the substantive law (properly applied) would allow her to keep her home. She is deprived of this property right without compensation by a court of law, the quintessential state actor.

So we have a person with a home rendered potentially homeless by agents of the state applying the laws of the state in a half-hearted and incomplete way. It is not evident that this result complies with basic constitutional norms. It is not evident that the tenant has been afforded appropriate process. It is not evident that the parties' property rights have been respected.

oOo

The stories outlined in this section depict the state as on the face of it *defining* tenants' property rights in a manner that respects dignity and equality. However, they illustrate that this professed definition is fleeting, for the state

is not fulfilling its obligation to *enforce* these property rights in a manner that respects dignity and equality. For all intents and purposes, then, the property law system is operating in these stories much as it operates in the context of the police commanding the homeless to ‘move along’ so as to comply with a prohibition on sleeping in public spaces: without concern for consequences in individual cases and in disregard of the fundamental values that characterise our democracy.

Consistent with these values, homeless people have a right to be somewhere and tenants have a right to habitable housing. Yet the state at times orders both to ‘move along’ in violation of these rights. It does so because those enforcing the law conceptualise property rights as divorced from democratic values. But democracies cannot legitimately define property rights in a manner that ignores these values. Property rights do not exist in a vacuum. We recognise them *because* they promote values such as dignity and equality. We cannot shape or enforce them in ways that deny these basic values.

4 Law reform

How might we mend this unjust state of affairs? In this section, we outline several potential legal reforms.

For starters, tenants might seek novel applications of existing liability schemes against the state. For example, perhaps constitutional takings law could be interpreted to recognise that decisions not to enforce existing regulations should be assessed to determine the extent to which deprivations resulting from these decisions are justified without compensation.³⁷ It is true that no federal or state court has found a taking based on the non-enforcement of an existing regulation, and most courts to have addressed such claims have rejected them summarily.³⁸ However, it is not clear this categorical approach is consistent with the view that property exists in service of fundamental democratic values. Housing codes do not merely define the obligations of owners who lease property for residential purposes. They also confer rights on owners of leaseholds. Housing codes recognise that tenants have a right

³⁷ TM Mulvaney ‘Non-enforcement takings’ (2018) 59 *BC L Rev* 145–215.

³⁸ The Texas Supreme Court most recently articulated this majority view in *Harris County v Kerr*, 2016 WL 3418246 (Tex 2016) (‘the law does not recognize takings liability for failure to complete [a flood control plan]’). The Vermont Supreme Court’s decision in *Alger*, *Alger v Dep’t of Labor & Indus.* 917 A.2d 508 (Vt 2006), is one of just four cases nationwide to deem a non-enforcement takings claim sufficient to survive summary judgment. See *Jordan et al v St. Johns County*, 63 So. 3d 835 (Fla Dist Ct App. 2011); *Swartz v Beach*, 229 F Supp 2d 1239 (D. Wyo. 2002); *Litz v Maryland*, 131 A.3d 923 (Md 2016).

to live in dignity that is equal to that of landlords. Tenants are *entitled* under these laws to habitable housing. Non-enforcement takes that property right away.

One who adopts a narrow view of the 'state action' doctrine may question whether non-enforcement alone constitutes state action. But even those who harbor such a view would be hard pressed to deny that an order to vacate or an order of eviction that comes on the heels of non-enforcement is state action. Since these actions are occurring because the landlord deprived the tenant of property rights protected by law and because the state failed to protect these property rights, there is a reasonable argument that the state unjustifiably has taken the tenants' property rights without just compensation. The prospect of having to pay takings judgments in this instance might prompt the state to change course on its approach to creating, funding, and implementing enforcement mechanisms.³⁹

However, we recognise the gravity of constitutionalising even a narrow interest in enforcement that is protected by a mandatory compensation remedy. Therefore, we concentrate in the remainder of this section on non-constitutional measures that might attend, at least in part, to the harms experienced by those shouldering an unfair brunt of non-enforcement.

First, rather small substantive adjustments to statutes and local ordinances involving habitability protections could have a significant impact. In many US cities – including Vermont's largest city of Burlington – local law states that if an inspector orders premises vacated because they endanger the health and safety of the occupying tenants or the general public, the landlord is responsible to pay the relocation costs of any displaced tenants.⁴⁰ Those states that do not currently impose this requirement statewide should

³⁹ In noting this possibility, we do not mean to suggest that monetary costs are always wholly commensurate with political costs. On this issue, see eg LA Fennell 'Taking eminent domain apart' (2004) 2004 *Mich St L Rev* 957–1004 994–95; DJ Levinson 'Making governments pay: markets, politics, and the allocation of constitutional costs' (2000) 67 *U Chi L Rev* 345–420 345; K Wyman 'The measure of just compensation' (2007) 41 *UC Davis L Rev* 239–288 246–48. For the argument that local governments are particularly likely to be risk-averse when it comes to takings liability, see C Serkin 'Big differences for small governments: local governments and the takings clause' (2006) 81 *NYU L Rev* 1624–1698, 1665–70.

⁴⁰ See Burlington Code of Ordinances, Ch. 18, Art. II, Div. 1, Sec. 28. Mirroring San Francisco and certain other cities, Portland, Oregon adopted an ordinance in February of 2017 that goes beyond Burlington's ordinance in that it requires landlords to pay relocation costs in all cases of no-cause eviction. See http://www.oregonlive.com/politics/index.ssf/2017/02/portland_landlords_must_pay_re.html.

do so.⁴¹ Moreover, state legislatures might consider strengthening such a provision by (i) requiring landlords to demonstrate on a periodic basis that they have sufficient capital on hand to cover temporary relocation costs for their current tenants should the need arise, and/or (ii) drawing on the repair and receivership programs in place in some jurisdictions to task the state with initially funding displaced tenants' relocation, which the state could seek to recoup from the responsible landlords via some type of lien or indemnification suit.⁴²

Second, relatively simple procedural reforms could allow tenants, under the implied warranty of habitability, to realise their rights that, as described above, in many instances have proved elusive for low-income tenants lacking legal representation. For one example, consider the canons of judicial ethics. In Massachusetts, these canons were recently changed to allow judges to help unrepresented parties by explaining the rules of procedure.⁴³ This is a deviation from the basic rule that judges must be neutral between the parties and cannot favor one over the other; it is a deviation from the principle that the parties are in charge of their own lawsuits with the judge simply serving as a referee to enforce existing rules. However, the canons do not allow judges to help unrepresented parties by telling them what their substantive legal rights are. But if the judge knows that the tenant has legal rights,

⁴¹ Statutory law in Vermont is not clear on this point. The owner of a mobile home 'that is condemned by a governmental agency due to the willful failure or refusal of the owner to comply with any obligations imposed by law shall provide for reasonable relocation costs of affected leaseholders and residents, except when the owner can demonstrate that he or she has no financial capacity to comply'. Vt Stat Ann tit 10 § 6265. This provision presents several potentially large holes. First, it implicitly precludes the landlord's paying relocation costs when his failure to comply with the applicable housing codes is not willful, even if it is reckless or negligent. Second, it encourages landlords to organise their finances in such a way that they do not have reserves on hand to pay the relocation costs upon condemnation, at which point they are exempted. Third, it is not evident the provision applies when the state does not condemn a building but rather orders a building vacated until the landlord performs repairs. Fourth, it appears that there is no corollary provision under Vermont statutory law that is applicable to rental properties that are not mobile homes.

⁴² In those jurisdictions permitting receivership, courts under certain conditions may appoint a state or private entity as a 'receiver' to operate and fund restoration of an occupied residential building until the landlord demonstrates sufficient reserves to perform the needed repairs. See eg Multifamily Housing Preservation and Receivership Act, NJ Stat §2A:114-42.

⁴³ Mass Supreme Judicial Court R 3:09: Code of Judicial Conduct, Rule 2.6(A) ('A judge may make reasonable efforts, consistent with law, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard'); see also Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants, <http://www.mass.gov/courts/court-info/trial-court/exec-office/ocm/jud-institute/jg-self-rep.html>.

and the landlord knows that the tenant has legal rights, and the landlord's lawyer knows that the tenant has legal rights, why is there a violation of the neutrality principle for the judge to tell the tenant what everyone but the tenant knows?

We could change the rules governing the conduct of judges to require them to explain to tenants being evicted that they have a right to remain in their homes if those homes are in violation of the applicable housing codes. Landlords would not like this direction, of course, but they have no right to violate the housing code in the first place. Therefore, they cannot complain that their property rights are being violated by this change in judicial ethics rules. Indeed, it is the landlord that is violating the rights of the tenant, first by not maintaining the property and second by evicting the tenant when those violations persist.

Similarly, if even less dramatically, we could begin to protect tenants' property rights in habitable units by altering eviction procedures to ensure that tenants facing eviction are notified of their legal rights and the means to assert them. For example, the summons sent to the tenant could include instructions on what the implied warranty of habitability is and how to assert it.⁴⁴

For another procedural reform, rather than making a violation of the implied warranty of habitability a defence, we could change the burden of proof to make it an element of the landlord's claim for eviction. We could require landlords who want to evict tenants to obtain a certificate from the housing inspector showing that they are in compliance with the housing code before they can obtain possession of the property from the tenant. A more moderate (and admittedly likely less effective) approach might be to require landlords to plead affirmatively that they are in compliance with the implied warranty of habitability, using common terms that are accessible to legally unsophisticated tenants.⁴⁵

Adopting even just one among this small sampling of potential constitutional, statutory, and procedural reforms would lead to the state's more accurately respecting current law, which imposes obligations on landlords to provide basic services to their tenants and which confers property rights on tenants

⁴⁴ For a time, the City of Detroit included information on the implied warranty of habitability on the form summons used by landlords in eviction proceedings. According to some analysts, this led to a significant increase in tenants' raising the defence in eviction court. See JI Rose & MA Scott "'Street talk" summonses in Detroit's landlord-tenant court: a small step forward for urban tenants' (1975) 52 *J Urb L* 969–1034 997–1019.

⁴⁵ See eg L Cunningham 'Procedural due process aspects of D.C. eviction procedures' (2005) 7 *Rutgers Race & L Rev* 107–148 113.

to the same in a manner that respects the fundamental democratic values of dignity and equality.⁴⁶

5 Conclusion

The stories of eviction described above paint the following picture: We have granted rights to tenants on the face of rental housing codes, but we have not created, funded, and implemented enforcement mechanisms designed to ensure that those rights are real. We have stood by while courts make tenants homeless even though, under existing law, these tenants may well have the right to remain in their homes. We have operated on the assumption that the state has no responsibility when it forcibly removes a tenant from her home and later asks that person to ‘move along’ from her makeshift camp in the park. In short, we have pretended that these matters largely involve relations among private parties, relations that the state bears no legal or moral obligation to shape.

André van der Walt knew better.

Free and democratic societies hold that all human beings are created equal and thus are equally entitled to pursue happiness. The property law system in such a society, therefore, must be based on the premise that each person must have a realistic opportunity to live with the material basis needed to allow such equal pursuit. One embodiment of these principles is the law’s regulating the conditions under which landlords can rent residential premises to tenants. The law does not assign property rights to landlords and allow them to exercise their rights in any way they please, regardless of how they might affect those over whom they have power. Instead, the law regulates property relationships to ensure that tenants have property rights needed to live safely in dignity, just as landlords do. That is, at a threshold level, property law appropriately recognises that landlords and tenants have equal rights to live in dignity.

The property system requires identifying minimum standards for property relationships that are compatible with democratic values, and thereafter defining and interpreting property rights accordingly. Housing codes reflect

⁴⁶ We note, though, that these reforms are not offered to detract from or replace efforts – through social demonstration or other more formal means – to stimulate open conversation about the reality that fairly administering a private property system in service of democratic values requires significant public investment. Enforcing housing codes costs money. But enforcing any property laws costs money. We have deemed some property relationships inconsistent with the values that characterise our democracy, including arrangements by which landlords and the state treat tenants as less than human. Tax revenues must be sufficient and sufficiently allocated to make it so on the ground.

one set of such minimum standards. Mirroring debates surrounding most minimum standards 'regulations', there has been considerable academic discussion regarding whether, as a matter of economic theory, housing code enforcement hurts poor people by decreasing the supply of affordable housing.⁴⁷ But if the economic argument remains contested, the moral one should not.

Relieving landlords of the obligation to provide safe and habitable housing would treat poor tenants as second-class, i.e., unequal, citizens. If empirical study confirms that both landlords and tenants need subsidies to ensure that housing is safe and habitable, a society that does not provide those subsidies – or otherwise ensure that safe and habitable housing is available to each human being – has created a property law system that treats the poor as if they were not equally entitled to live in dignity. A society that does this protects the property rights of the rich but not the poor. A society that adopts such a stance is not a truly democratic society. The fundamental values of dignity and equality come first, and our property system must be shaped to embody those values. Democracies do not serve property rights; property rights serve democratic values.

⁴⁷ Some scholars suggest that landlords subject to housing code obligations will abandon rental properties they find too expensive to repair to the housing code's liking or recoup the costs of repairs they do perform by raising rents. See eg R Posner *Economic analysis of law* 9 ed (2014); N Komesar 'Return to Slumville: A critique of the Ackerman analysis of housing code enforcement and the poor' (1973) 82 *Yale LJ* 1175, 1188–91. Others, though, contend that code enforcement also *increases* housing supply by eliminating landlords' premature 'milking' of rental properties (ie by eliminating landlords' halting maintenance and collection of as much rent as possible thereafter until a unit is un-rentable at any price, at which point the landlords will abandon the unit), and that therefore such increases must be weighed in context against the potential decreases resulting from abandonment or cost-recoupment. See eg D Kennedy 'The effect of the warranty of habitability on low income housing: "milking" and class violence' (1987) 15 *Fla St U L Rev* 485–519.