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# **Just Housing**

## **The Moral Foundations of American Housing Policy**

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## 7 Private Property and the Injustice of Tenure Insecurity

Freedom for the wolves has often meant death to the sheep.

—Isaiah Berlin, *Four Essays on Liberty* (1971, xlv)

Chapter 1 examined the multiple sources of housing's value to inhabitants. This chapter examines this issue from the perspective of those who lack secure access to housing. This nonideal theoretic approach reorients the investigation of housing justice to the concrete reality of injustice and provides an application of civic equality to the public justification for private property. I argue that tenure insecurity, if taken seriously, presents a serious challenge to any public justification for private property, because if private property affords legal protections and rights to property owners, it simultaneously denies the same to those without property. I compare and contrast different approaches to publicly justifying private property by appealing to the interests of the propertyless and defend a version of Christopher Essert's (2016) argument that private property is justified not in spite of property's contribution to tenure insecurity but because it uniquely solves the problem of tenure insecurity. I extend Essert's argument by examining the features of a "secure tenure" property regime. I argue that a secure tenure property regime is one that is structured to guarantee the general right to secure tenure, permits the separate incidents of private property to be flexibly assembled into new bundles that protect the right to secure tenure, and creates economic incentives that are compatible with the aim of extending secure tenure to all. The right to housing, understood as a right to secure tenure, is constitutive of, and provides a justification for, the institution of private property. This understanding of the right to housing differs from other conceptions that are based on assumed conflicts between

liberal private property rights and the right to housing (see, for example, Madden and Marcuse 2016).

### The Injustice of Tenure Insecurity

According to the CESCR's General Comment Number 4, the first entitlement of the human right to housing is the legal security of tenure. The term "tenure insecurity" is often discussed in terms of land tenure, so it is useful to say a bit more about the use of this term as a way to characterize insecure housing arrangements. A person's residential tenure is insecure if they lack access to a safe, private dwelling space for a duration of time that they define. Tenure insecurity is not a binary condition but varies in degree from sleeping outdoors to homeownership tenures threatened by foreclosure. Between these extremes, there exist various insecure temporary tenure arrangements, including homeless shelter occupancy and stays on a friend's couch. The insecurity of these arrangements arises not from the temporary nature of occupancy spells or the absence of a roof and four walls but from inhabitants' lack of control over their living situation. Jet-setting millionaires vacationing in luxury hotel suites, college professors hiking the Appalachian Trail while on sabbatical, and retirees living out their golden years in recreational vehicles can choose at any moment to transition from temporary to more permanent living arrangements. Precarious tenure arrangements are associated with several distinct forms of injustice, including insecurity, heteronomy, alienation, indignity, marginalization, and domination.

*Insecurity* refers to the condition of being exposed to external environmental conditions that threaten bodily integrity and human life. Durable, insulated homes are essential for those living in harsh environments with extreme weather conditions. During global pandemics, proximity to other human beings poses risks to human life, regardless of prevailing environmental conditions, and private spaces protect households from exposure. In high-crime neighborhoods, private spaces reduce the threat of personal violence.

What is surprising about the injustice of insecurity is how weakly it alone supports a universal right to housing. As discussed in chapter 6, a house is a sufficient but not a necessary condition for being secure. In temperate climates, a lean-to or a tent may provide adequate protection from

occasional environmental threats. Although climate change may increase the frequency, severity, and duration of extreme weather events, there is nothing about the severity of those events that requires one to be sheltered in a structure that we recognize as a home. Global pandemics and the threat of violence create a need for social isolation, but the extent of this need depends on the risk of encountering others in public spaces.

*Heteronomy*, the antonym of autonomy, refers to the inability to chart out and pursue one's chosen course in life. As discussed in chapters 1 and 6, human beings who lack secure access to a private space are unable to engage in self-reflection and experiment with different ways of living away from the wandering eyes and judgment of others. As Waldron writes,

It would seem to follow that there must be a realm of private freedom somewhere for each individual—an area where he can make decisions about what to do and how to do it, justifying these decisions if at all only to himself. Again, to the extent that all action involves a material element, it seems to follow that such a realm of private decision would require an individual to have control of a certain material environment (a home, for example) from the use of which the interests and concerns of others and of society generally could be taken to be excluded. (Waldron 1988, 295)

A house does not guarantee full autonomy, but those who lack a home or whose tenure is insecure are unable to effectively exercise their capacity for autonomy or pursue autonomously chosen paths in life.<sup>1</sup>

The injustice of heteronomy further elucidates the moral significance of insecurity. Consider Alejandra Mancilla's (2016) distinction between a lone hiker caught in a snowstorm and a homeless person who seeks protection from the cold throughout the winter months. Whereas the lone hiker may be comforted by the knowledge that once the storm passes, their episodic need will no longer exist, the homeless person must engage in long-term planning to ensure that shelter is available for several consecutive nights. Thus, a homeless person's chronic insecurity is not only a harm in and of itself but also the constant need to attend to one's biological needs reduces the time that individuals have to devote to the formulation and pursuit of larger life plans.

*Alienation* refers to the condition of being separated from one's identity or personhood. According to Radin (1993), an individual's sense of

personhood is often bound up with the home they inhabit, and the strength of this relationship can be measured by the pain that is occasioned by the loss of home. Those who have formed a strong emotional and psychological connection to a place suffer an intensely personal loss when forced to move, even if they are not rendered homeless by the eviction. Mindy Ful-lilove (2004, 11) refers to this loss as “root shock,” which she describes as “the traumatic stress reaction to the destruction of all or part of one’s emotional ecosystem. It has important parallels to the physiological shock experienced by a person who, as a result of injury, suddenly loses massive amounts of fluids. . . . Just as a burn victim requires immediate replacement of fluids, so, too, the victim of root shock requires the support and direction of emergency workers who can erect shelter, provide food, and ensure safety until the victim has stabilized and can begin to take over these functions again.”

Madden and Marcuse (2016, 56) also refer to alienation, but they equate it with the elevation of housing’s exchange value relative to its use value. The authors appeal to Karl Marx to argue that just as the selling of labor to a capitalist in exchange for money separates the laborer from their species-being, the commodification of housing alienates inhabitants from their home. I understand alienation slightly differently. The commodification of housing and conversion of inhabited space into a tradable market good may or may not foster alienation as I define it. Indeed, the opposite may be true if individuals freely acquire homes that embody their autonomously chosen life paths. What matters is whether an inhabitant’s identity-based attachment to home is secured or severed by the exchange of money for property (Dawkins 2020b).

*Indignity*, the antonym of dignity, refers to the loss of the social bases of self-respect and the respect of others. Someone without a private place to defecate, urinate, bathe, and engage in intimate activities invites the scorn of bourgeois society (Waldron 1991). Those recognized as homeless also invite others’ feelings of pity or in some cases contempt. As discussed in chapter 6, dignity is a socially constructed concept that embodies a society’s conception of what constitutes a dignified life. If access to a home is an important part of that conception, those who lack homes are unable to participate in society’s common culture and are stigmatized as a result (Phillips 1999). The social meaning of home defines a home’s contribution to human dignity.

In the United States, for example, the indignity of homelessness is a direct juxtaposition of the elevated social rank that homeowners enjoy.

*Marginalization* refers to the loss of the rights, privileges, and benefits of social citizenship. Whereas indignity refers to social stigmatization, marginalization refers to the loss of the formal legal entitlements and public goods owed to all citizens. The bundling of housing with the rights of citizenship provides a justification for viewing the right to housing as a “basic right” because without housing one is unable to fully enjoy many of the other rights of citizenship (Shue 1996). Those who are homeless are unable to fully exercise their right to privacy. Laws that punish those who sleep in public violate a homeless person’s right to be free from cruel and unusual punishment. Until recently, the right to vote was often tied to residency requirements, and even if no proof of residency is required to vote, homeless persons often lack access to information about voting alternatives and public meetings. A variety of local public services, such as libraries and educational institutions, are only made available to those who are residents of a local jurisdiction.

*Domination* refers to the state of being subject to the arbitrary will of others, or the state of lacking civic (republican) freedom. A homeless person who sleeps on property owned by someone else faces legally sanctioned eviction and possible punishment, and many local governments in the United States sanction the same sorts of punishment for those who sleep in public spaces. Those who are homeless and those who lack secure tenure have no private space where they can engage in activities without being subject to the arbitrary will of others (Waldron 1991). According to Arendt (1958, 29–30), “What prevented the polis from violating the private lives of its citizens and made it hold sacred the boundaries surrounding each property was not respect for private property as we understand it, but the fact that without owning a house a man could not participate in the affairs of the world, because he had no location in it which was properly his own.” One implication of the connection between homelessness and domination is that some forms of collective housing provision may simply replace one form of unfreedom with another. If the government provided all housing, citizens would be subject to the arbitrary will of a government agent rather than the decentralized wills of private property owners (Essert 2016).

### Tenure Insecurity and the Public Justification for Private Property

If tenure insecurity is unjust, then the institution of private property is complicit in this injustice. While private property protects the security, autonomy, identity, dignity, citizenship status, and civic freedom of those with secure tenure, it simultaneously fails to safeguard the same conditions for those who lack rights to private residential property.<sup>2</sup> In a city where all land is carved into privately owned lots, the propertyless must either receive the permission from a property owner to shelter, compromising their civic freedom, or face legal punishment (Waldron 1991). In this section, I explore the implications of tenure insecurity for the public justification of private property and compare and contrast different approaches to integrating the concerns of the propertyless into a public justification for private property.<sup>3</sup>

Any public justification for private property must satisfy certain minimum conditions. First, the justification offered must be truly “public,” in the sense of satisfying a condition of acceptability for everyone (Gaus 1996). Publicity is a particularly important dimension of the justification for private property because not everyone owns property. Since property rights are in rem rights, a justification for private property must also consider reasonable objections that may arise from noncitizens. For this reason, the public justification for private property faces a stronger justificatory burden than justifications for other laws and institutions that only apply to citizens.

What constitutes an acceptable public justification? It is unreasonable to base a public justification on the actual consent of all members of the public because this would be practically impossible, particularly if the relevant public includes those who are not citizens. Nor does acceptability necessarily require that public reasons arise from a democratic procedure, as majoritarian processes often fail to account for the interests of minority groups. Jürgen Habermas (1996) proposes a procedural interpretation of acceptability that stipulates that public deliberation processes satisfy certain ideal speech requirements. This, too, is often impractical, because public deliberation rarely corresponds to ideal speech conditions. I follow Scanlon (1998) in defining acceptability as the absence of any reasonable objection to the justification offered. Acceptability as Scanlonian reasonable rejectability is strengthened by, but does not require, deliberative processes that reveal all relevant reasons. I also follow Rawls’s (1993) suggestion that only reasonable and uncontroversial objections not based on a conception of

the good qualify as candidates for rebutting a public justification. A useful way of interpreting the condition of acceptability is to ask what justifications would be reasonably rejected by Adam Smith's (2000 [1759]) impartial spectator, who is from a different society but is still capable of offering an impartial judgment on reasons for actions (Sen 2009).

The challenge facing property theorists is to find a justification for the exclusionary institution of private property that would not be reasonably rejected by those who are excluded from that same institution. I will examine five ways in which property theorists have responded to this challenge.

### **Preemptory Rights to Necessity**

Some appeal to the human right to life to argue that this right is so important that it preempts private property rights when one is in a state of severe material deprivation. Many have argued that the need to preserve human life grounds a duty of charity to the needy, but Hugo Grotius was the first to propose that human beings have a natural right to necessity that preempts private property rights during times of need. Grotius also argued that individuals have a right to take what is needed from those who own property during times of need, under certain conditions (Mancilla 2016). In times of dire need, the "ancient Right of using Things, as if they still remained common, must revive, and be in full Force: For in all Laws of human Institution, and consequently, in that of Property too, such Cases seem to be excepted" (Grotius 2005 [1625], 434). Mancilla (2016) and Pogge (2002) offer contemporary understandings of the human right to necessity.

This justificatory argument is distinguished by its ground (human status) and preemptory force. In most accounts of property, the right to own property is grounded in an appeal to citizenship and can be overridden by civil laws that constrain property rights. The right to necessity, on the other hand, is a basic human right that grounds other rights, including the right to own property. In contrast to other justificatory strategies examined here that appeal to positive rights to the provision of public assistance, the right to necessity can be interpreted as a purely negative right that prevents others from interfering with a needy person's use of the resources required to sustain human life.

One limitation of this approach is that it fails to address all injustices associated with tenure insecurity. The right to necessity, at most, grounds a right to inhabit a shelter owned by others during episodic environmental



threats. It does not ground a homeless person's right to remain in that shelter after the threat has been lifted, nor does it ground a homeless person's positive right to shelter provision. Grotius placed conditions on the exercise of the right to necessity. He argued that a needy person must first ask the magistrate for aid before appealing to a private property owner for shelter, and only if the property owner refuses shelter does the right to necessity have preemptive force. Furthermore, the owner must be compensated for any inconveniences caused by the trespass (Horne 1990).

Another limitation of the right to necessity is that current human rights law decentralizes the responsibility for progressively realizing human rights to individual nations. As discussed in chapter 5, the United States has not ratified the ICESCR, which secures the human right to housing. While the right to necessity explains why the United States *should* ratify the ICESCR, the human right to necessity does not currently have preemptory force under US law.

A final limitation of the preemptory right to necessity is that it does not justify the institution of private property itself. Instead, it provides a reason for rejecting the institution of private property. If the right to necessity is fully recognized by a nation that also recognizes private property rights, the institution of private property must be justified on separate grounds that possibly conflict with the human right to necessity.

### **The Right to Redistribution**

Another justificatory strategy emphasizes not the justification for private property but the justification for the right to a share of the resources generated from private property ownership. Legal advocates appealed to this type of argument during the 1960s to argue on behalf of welfare rights to public assistance. This approach is consistent with, but differs slightly from, Rawls's (1971) proposal to distribute economic resources so that the least advantaged are as well off as possible. Chester Hartman (1998) presents the case for a right to housing along these lines.

Unlike the preemptory right to necessity, the right to redistribution assumes the prior existence of an institution of private property that generates enough wealth and income to be redistributed to those who have less. According to Rawls's (1971) "difference principle," if the distribution of economic resources maximizes advantages for those who are least advantaged, those without private property have no complaint. One familiar objection to

this argument is the sufficientarian's claim that redistribution of government-collected largesse may fail to raise everyone to an acceptable threshold level of economic sufficiency. Although the disadvantaged may be better off than under any other possible distributive arrangement, the disadvantaged may still lack the resources required to live a dignified life.

Another problem is that a needy person's rights to redistribution do not strictly assign a space of freedom within which the needy person is permitted to act with a corresponding duty on the part of others to respect the needy person's freedom. In other words, the right to redistribution cannot be interpreted as a claim right, according to Hohfeld's (1919) typology, because those who generate income are not obligated to earn enough money to satisfy the needs of others. Whereas the right to necessity can be understood as a claim right to occupy private property owned by others during times of urgent need, the right to redistribution does not correlate to a similar obligation, because the right only pertains to a share of the income generated from private property, not a right to the use of property itself.

### **Conditional Justifications for Private Property**

This justificatory strategy specifies the conditions under which private property itself is justified. Since the acquisition of private property entails a loss of others' opportunity to acquire the same property, this justification appeals to the argument that those without property should be compensated for the reduction in property acquisition opportunities created by an owner's appropriation. If the redistribution of government-collected largesse is interpreted as a form of compensation owed to those who are disadvantaged by a private property regime, this justification is comparable to the right to redistribution argument. Unlike the right to necessity argument, the conditional justification for private property derives from the original justification for property rather than from the human right to life. The similarities between this approach and the two examined previously suggest that the conditional justification approach faces many of the same problems already discussed.

Compensation may be a necessary or a sufficient justification for an owner's appropriation. Locke (1980 [1690]) offers a classic version of the sufficient justificatory approach. According to Locke, the property rights held by those mixing labor with land are justified when enough property is left for others to acquire, property is not allowed to spoil, and human life is preserved. Locke viewed seventeenth-century America as an example of a

place on earth with enough property for others to acquire; however, one might question whether he would view contemporary America in the same light (Waldron 1988). Michael Otsuka (2003) interprets the Lockean proviso to leave “enough, and as good” for others as a sufficient condition for legitimate property acquisition as long as property owners leave enough unappropriated property to guarantee equal access to the opportunities from property acquisition. For Thomas Paine, the emergence of private property entails a loss of one’s “natural inheritance,” or the natural right to unowned property in a state of nature. He argues that if land inheritances are taxed and redistributed in support of a universal social insurance system, private property is conditionally justified (Lamb 2015). Corey Brettschneider (2012) offers a contemporary version of the necessary justificatory approach. He argues that private property institutions must be publicly justifiable to those who are excluded from property. Still, he offers several possible forms of legitimate compensation and stops short of claiming that any one provides a sufficient justification for private property.

A problem with any conditional justification for private property is that the condition may not cohere with the original justification for private property and may lack force if the form of compensation is not necessary and sufficient to justify private property. Under Paine’s proposal, for example, pensions for the elderly, disability assistance, and a stakeholder grant would be funded from a 10 percent tax on land inheritances. Still, there is no guarantee that this amount or these forms of social insurance adequately offset each person’s loss of natural inheritance. Even if we accept that the revenues from an inheritance tax are sufficient to compensate everyone for their loss of the natural right to property, the mere presence of the compensation scheme itself calls into question the original justification for property. If private property creates the need for a compensation scheme to offset its negative effects, then why institute private property in the first place?

### **Justifications for Limited Private Property Rights**

Others interpret the objections of the propertyless to imply that the separate incidents of property require different justifications, where the incidents of ownership include the right to possess, use, modify, manage, exclude non-owners, earn income from, and alienate owned property for a term determined

by the owner (Honoré 1961). As discussed in chapter 2, nineteenth-century anarchists such as Ezra Heywood and Joshua Ingalls argued that only the right to occupancy and use of property could be justified.

John Christman (1991; 1994) contends that A. M. Honoré's (1961) classic conception of "full liberal ownership" includes two distinct types of rights—*control rights* (rights to use, possession, management, modification, and alienation) and *income rights* (rights to the increased benefit from relinquishing ownership temporarily or permanently)—each requiring separate justifications. According to Christman (1991, 30), "If control rights are to be justified at all, essential reference must be made to individualist interests such as liberty, autonomy, and self-determination." He further argues that whereas the justification for control rights stands on its own without reference to the distribution of those rights, the justification for income rights is connected to their distribution. Individuals do not necessarily have a claim to all profits earned from the sale or rent of property because property-based income depends on several factors that are beyond the control of the property owner. Prices are determined by market conditions, which are in turn determined by the structure of property rights and other rules of the game that influence the distribution of profits. Using Rawls's (1971) terminology, prices are determined by the "basic structure of society," which shapes the distribution of advantages and disadvantages.

Given that control rights secure the primary interests that justify property ownership, a distributive arrangement of income rights that enables a more widespread distribution of control rights is more defensible than one that distributes control rights narrowly. Henry George (1942) appeals to a version of this idea to argue that landowners have no claim to the full economic rent from landownership because land rent is produced by natural resources and the collective efforts of society. George's arguments resemble those of Thomas Paine, who writes in *Agrarian Justice* (Paine 1995 [1797], 428; italics in the original) that "personal property is the *effect of Society*; and it is as impossible for an individual to acquire personal property without the aid of Society, as it is for him to make land originally. . . . All accumulation, therefore, of personal property, beyond what a man's own hands produce, is derived to him living in society; and he owes, on every principle of justice, of gratitude, and of civilization, a part of that accumulation back again to society from whence the whole came."

Gaus (2012) identifies one problem with this argument. If the justification for private property derives in part from property's contribution to autonomy and the freedom to pursue autonomously chosen projects, this justifies the most expansive conception of property possible so that owners have the flexibility to autonomously alter the incidents of ownership, including the right to alienate certain incidents, to meet their individual needs. This critique is not very persuasive. One does not require full income rights to use property freely and autonomously, particularly if others have a similar right to property use.

### General Rights to Private Property

In the view of nineteenth-century land reformers such as Thomas Skidmore, everyone enjoys a natural right to enough landed property to establish a homestead, and government distribution of free land combined with limitations on the right to accumulate property are justified ways of distributing private property as widely as possible. In contrast to Henry George, who endorsed the partial attenuation of income rights, Skidmore sought to extend full liberal ownership rights to all workers, subject to the condition that everyone owned some property. The advantage of this approach is that the original justification for private property is connected to a justification for its widespread distribution.

G. W. F. Hegel's *The Philosophy of Right* (1967 [1821]) offers an argument for private property along these lines. For Hegel, property is constitutive of freedom itself because property represents the externalization of an individual's will in material objects. Individuals need some property to transform their purely subjective conception of themselves into one that is concretely realized in and recognized by the external world. Thus, property is something that everyone needs and is only justified if everyone has access to some property. For this reason, Waldron (1988) argues that Hegel's argument, if taken seriously, is an argument for a *general* right to property (see chapter 2).

It is important to emphasize that a general right to property is not a general right to the *opportunity* to acquire property, nor is it a right to *compensation* for being excluded from property that is owned by others. A general right to property is only satisfied if everyone has something recognizable as property (Waldron 1988). Katy Wells (2016) argues that citizens' interests in privacy justify the inclusion of a right to rent or occupy housing (but not

necessarily full liberal ownership rights to housing) among the basic liberties guaranteed to all citizens under Rawls's (1971) first principle of justice as fairness. According to Wells (2016, 374), "This is because citizens' interest in having privacy, which, I have suggested, has clear connections to the protection of self-respect, personal independence and to guaranteeing the supporting basic liberties, requires the protection of something very close to this set of rights. The right in question is a right to actually have these rental rights, rather than simply a right to be eligible to have them, because privacy is secured by actually having these rights over some living space, not by having the ability to have such rights."

Christopher Essert (2016) offers a similar argument without appealing to Rawls's (1971) conception of justice. In Essert's account, homelessness and tenure insecurity are not conditions that weaken the case for private property, but they are the very reason that private property is instituted in the first place. According to Essert (2016, 281), "The moral problem of homelessness calls for the creation of an institution of property, and any such institution can be justified only insofar as and to the extent that it solves this problem." Essert argues that private property is uniquely positioned to secure republican (civic) freedom. To reach this seemingly paradoxical conclusion, Essert observes that in a state of nature where private property is not recognized, no one has the moral or legal authority to exclude anyone else from an inhabited space. Those who occupy space must continually receive permission from everyone else and are therefore in a state of perpetual unfreedom because all actions are subject to the arbitrary will of others. Collective housing provision is also insufficient because it merely replaces one form of unfreedom with another. Private property provides a unique solution to this problem by decentralizing normative control over geographic space to an individual designated as the owner.

In contrast to Christman's (1991; 1994) justificatory strategy, Essert does not offer a separate justification for each incident of private property but appeals to the aim of extending to everyone the tenure security enjoyed by private property owners. Essert rejects justifications for limited private property rights. Still, he allows for the possibility that the structure of private property rights may be modified to eliminate homelessness. For example, a landlord's reversion interest and power to terminate a lease puts the renter at a disadvantage if the landlord has the power to evict a tenant without notice. Laws specifying minimum lease durations or those that require the

landlord to show just cause for a failure to renew a lease restructure property rights to favor those with less secure tenure.

By appealing to private property's role in alleviating homelessness, Essert's (2016) justification is tied to a defense of private property's widespread distribution. This has a corollary disadvantage: private property, as currently defined, fails to live up to its justification because it fails to alleviate homelessness and tenure insecurity. In the United States, private property is allocated according to ability and willingness to pay, which precludes those with limited economic resources from obtaining secure tenure. Allocating private property in accordance with willingness to pay is also arguably procedurally unfair because the allocation mechanism distributes property in a way that is inconsistent with the rationale for private property's existence (Scanlon 2018). The justificatory strategy proposed by Essert (2016) ultimately fails unless the institution of private property has some inherent feature guaranteeing that property will be distributed first to those with no means to acquire it.

### **The Secure Tenure Property Regime**

The failure of Essert's (2016) justificatory strategy stems in part from the object of justification: the bundle of full liberal ownership rights. He is unable to justify all elements of the bundle because income rights (rights to earn income from the rent or sale of property) enable the exclusion of those unable to afford rent. In this section, I address this challenge and extend Essert's argument in two ways. First, I demonstrate that Essert's homelessness alleviation argument provides an instrumental justification for (limited) income rights. Second, I extend Essert's approach by applying it more broadly to the justification for a "secure tenure" property regime that includes the right to housing as a constitutive element.

Property theorists often justify income rights by appealing to the idea that property owners deserve rental income as appropriate compensation for investing in a socially beneficial activity (Dewilde and Ronald 2017). This desert-based meritocratic argument has been criticized by political economists and philosophers. Henry George (1942) maintains that property owners only deserve to collect earned income. Monopoly rents are unearned because they arise from the monopolist's market power, and land rents are unearned because they are produced from nature, which no one

deserves to own, or from the collective efforts of society, in which everyone has an equal ownership stake. Rawls (1971) goes one step further to argue that because natural talents and endowments result from the natural lottery, no one deserves the unequal advantages that arise from the exercise of talents. Most desert-based justifications for income rights ultimately fail because it is difficult to establish a reason for someone's deservingness that justifies a reward equal to the full rental value of property. The most an owner deserves is a profit sufficient to induce the owner to invest in the first place. If, as suggested in chapter 1, the justification for property holdings derives from property's special connection to leisure, not labor, those who lack space for leisure arguably have a stronger claim to improved space than those who use property only to extract economic value.

Property theorists have also appealed to utilitarianism to justify income rights. According to Bentham (1843), private property maximizes utility by encouraging the efficient use of resources. If property owners enjoy the right to keep all profits from the sale or rent of property, they face strong incentives to improve property using the least costly methods. The utilitarian justification for income rights is a combination of two separate arguments: (1) the instrumentalist argument (income rights create incentives to use property in ways that produce the best outcomes) and (2) the maximum utility argument (the best outcomes are those that maximize aggregate utility). The instrumentalist argument does not entail the maximum utility argument. For example, private property can be instrumentally justified on egalitarian grounds if income rights are structured to equalize, rather than maximize, the utility from property use.

The instrumentalist argument provides a way to incorporate (limited) income rights into Essert's homelessness alleviation justification for private property. According to Christman (1991; 1994), the most important sticks in the property rights bundle are control rights to property use, possession, management, modification, and alienation. Those who enjoy secure control rights to residential space avoid the injustices of tenure insecurity mentioned previously. If control rights deliver the tenure security that justifies residential property ownership, income rights are then instrumentally justified to the extent that property-based income encourages property owners to invest in the production of residential space for those experiencing tenure insecurity. The strength of this argument is tied to the nature of the incentives facing residential property owners.



Given that a variety of property-based institutions shape the incentives to invest in the production of housing, the appropriate object of justification is not merely the bundle of rights held by property owners but the entire private property “regime,” which includes the rights held by property owners, inhabitants, and investors; the public regulations that constrain certain incidents; and the tax and subsidy policies that redistribute the income earned from property. If the incentives created by the entire regime have the combined effect of encouraging the provision of housing first to those who are unsheltered, the regime is justified according to Essert’s argument, even if the bundle of private property rights or individual sticks in the bundle fail to reward actions that alleviate homelessness. For example, if individual property owners enjoy unrestricted income rights but face a progressive tax schedule that redistributes a portion of rental income to those unable to afford residential space, the combination of these two incentives may work together to address the problem of tenure insecurity.

I define a “secure tenure” property regime as one that recognizes the right to housing, understood as a general right to secure tenure, as the most important stick in the property rights bundle. Other sticks in the bundle, including income rights, would be structured to extend the right to secure tenure to everyone. While it is beyond the scope of this book to fully examine the complex issues associated with the design of a secure tenure property regime, I argue that such a regime is one that minimally satisfies three requirements. First, a secure tenure regime delivers *tenure security* by guaranteeing everyone’s general right to occupy and use a private dwelling space. Second, a secure tenure regime fosters *bundle flexibility* by allowing the incidents of ownership to be easily modified to enhance tenure security. Third, a secure tenure regime exhibits *incentive compatibility* when the regime’s various economic incentives work together to encourage the provision of housing to those experiencing tenure insecurity. I will explore each of these requirements.

**Tenure security** A secure tenure property regime is one that first and foremost guarantees security of tenure for all. The general right to secure tenure can be understood as a partitioning of property rules that reassigns the rights over certain incidents—such as the right to possess, use, manage, and possibly modify residential space—to those who inhabit or seek to inhabit a dwelling. If residential property owners enjoy full liberal ownership rights,

an owner's right to own property will necessarily conflict with a nonowner's right to establish secure tenure on that same property. Still, if ownership arrangements leave open the possibility that inhabitants hold rights to occupancy that prohibit owners of the same property from interfering with the inhabitant's residential use, the right to housing is constitutive of, rather than in conflict with, ownership rights.

To better understand the right to secure tenure's role in housing justice, it is useful to examine how those who own homes free and clear avoid the injustices described previously. Those who own well-constructed homes enjoy security from external environmental threats. Within the home, owner-occupants can freely engage in autonomous pursuits and pursue a conception of the good life. Homeownership provides a place-based frame of reference that shapes the homeowner's personal identity. Homeowners enjoy an elevated social status and receive all the place-based benefits of citizenship. Homeownership secures a private realm where civic freedom can be enjoyed. Although some homeowners enjoy these benefits more extensively than others do, all homeowners enjoy a minimum level of tenure security that provides protection from the most severe forms of housing injustice. Importantly, homeowners do not require full liberal ownership rights to avoid these housing injustices.

The most important stick in the homeowner's property bundle is the control right to occupy and use a private residential space for a duration of time determined by the homeowner. The tenure security requirement extends this stick in the property bundle to everyone, while possibly modifying other sticks in the bundle to guarantee equal access to secure housing arrangements. The expansion of control rights to secure tenure may require the contraction of rights to labor income (if resources financed by income taxes are used to finance affordable housing subsidies) or property income (if rent stabilization measures are adopted to enhance tenure security). Still, if tenure security justifies the private property regime, income rights are secondary to the right to secure tenure.

The principle of state neutrality discussed in chapter 6 suggests that actions taken to expand tenure security should not favor any particular housing type or tenure arrangement. Given that most homeowners already enjoy secure control rights,<sup>4</sup> state neutrality is consistent with measures designed to enhance the level of housing security that alternative tenure arrangements deliver. State neutrality justifies granting renters a "vested interest" in

the occupancy of their property for a term of occupancy determined by the renter, effectively transforming renters' occupancy rights into rights that are comparable to those enjoyed by owner-occupants (Indritz 1971). Limited-equity cooperative (LEC) tenure arrangements that convert renters to shareholders,<sup>5</sup> just-cause eviction laws, and rent stabilization ordinances are a few examples of reforms that enhance the tenure security of rental tenure arrangements. State neutrality also justifies local land-use policy reforms that create regulatory parity among different housing types and styles. If taken seriously, state neutrality justifies radical changes in local land-use practices, including the repeal of single-family-only zoning regulations and the elimination of prohibitions on nontraditional housing types.

For those who are homeless, the right to secure tenure can only be satisfied by providing a home directly, providing the resources to enable those who are homeless to secure a home for themselves, or allowing the homeless to occupy property that is currently owned by someone else. If the right to secure tenure is to be understood as a claim right, the solution to homelessness should address what homeless persons can claim for themselves, not what others are obligated to do (Mancilla 2016). The right to secure tenure should do more than merely justify homeless persons' right to complain; it should provide them with an expectation of what they may claim as a right. A homeless person's claim right can only be satisfied by allowing them to occupy property currently owned by someone else during times of urgent need.

Does the homeless person's right to secure tenure trump the rights of those who currently occupy residential property? Margaret Radin's (1993) personhood justification for property implies that the rights of current occupants may trump the rights of the homeless because current occupants more strongly identify with the property that they occupy. Because the homeless, by definition, lack any personal attachment to a residence, existing occupants have a stronger claim to their occupied dwelling. This argument suggests that although the homeless may not have special claims to inhabit property currently occupied by others, the homeless have a right to inhabit vacant residential structures or public parks if shelter space is otherwise unavailable. An interesting implication of this argument is that the potential threat of unwelcome squatting provides the very reason that property owners should support the public provision of homeless shelter space under a private property regime where the right to secure tenure is

recognized. A legal regime that recognizes and protects the right to secure tenure delivers tenure security to current and prospective inhabitants of residential property.

**Bundle flexibility** The bundles of private property rights recognized under a secure tenure property regime should be flexible enough to permit a variety of ways of realizing secure tenure. In one sense, this requirement seems to only further promote the “disintegration of property” (Grey 1980, 69) that first began during the Progressive Era, but this is not necessarily true. The goal of bundle flexibility is not to arbitrarily disassemble the property rights bundle or reassign use and occupancy rights to collective agents but rather to deconstruct and reassemble the bundle in ways that promote a widespread distribution of individual rights to secure tenure.

In some cases, it may be appropriate to reassign control over certain incidents to collective agents to facilitate the expansion of individual rights to secure tenure. This does not mean that the right to housing is a collective right, because the right to secure tenure is still a privately held individual right guaranteed to everyone (see chapter 8). Still, if some lack rights to secure tenure, establishing collective control over certain property incidents, particularly the right to earn income from property, may facilitate the expansion of individual rights to secure tenure. Washington, DC’s, TOPA law, for example, grants tenants the collective right of first refusal, thereby enhancing the tenure security of individual tenants. Similarly, rent stabilization laws expand tenure security for individual renters by reassigning the right to earn rental income from individual rental property owners to the community at large. Collective rights to land use, such as those established under land-use zoning, may conflict with the goal of expanding tenure security if collectivized land-use rights exclude affordable housing.

**Incentive compatibility** The inner workings of the private property regime, as evidenced by the incentives facing owners and occupants of property, should encourage the provision of secure housing tenure to those who lack it. Under the current US property regime, private owners of residential property capture all returns from increases in land value attributable to collective community improvements. Furthermore, owners have significant control over the terms of rental contracts. While these rights have been attenuated somewhat by fair housing laws, and in some states implied

warranties of habitability and rent control statutes, landlords still offer rental contracts as take-it-or-leave-it options subject to contract durations defined by the landlord.

Housing producers also have few incentives to invest in cost-saving innovations that lower the price of housing. Rather than earn profits by reducing production costs, many housing producers maximize profits by taking advantage of housing market segmentation and product differentiation. The segmentation of housing markets by location and type increases the market power of housing producers within submarkets. Facing few competitors for differentiated products, housing producers can set the price and/or quantity of housing offered to consumers that exhibit unique housing preferences (Leishman 2001). In highly segmented markets, the profits gained by catering to distinctive tastes may outweigh any benefits from high-volume production. Land-use regulations contribute to housing market segmentation by differentiating neighborhoods into submarkets defined by housing type, use, size, and density.

Although a secure tenure property regime will likely attenuate the right to earn monopoly profits within segmented housing markets, extraction of all profits from the residential sector through the full decommodification of housing would eliminate the economic incentives to invest in housing production. The challenge facing policymakers is to create market incentives that stimulate the production of low-cost housing in underserved markets. One approach is to eliminate regulations that stifle innovative low-cost housing solutions such as manufactured housing, tiny homes, and accessory dwelling units. Another is to devote public funding to housing research and development.

### **Toward Secure Tenure for All**

Many contemporary housing advocates view the right to housing as a right that conflicts with the right to own private property. Reform proposals based on the decommodification of housing through the socialization of housing provision ignore the possibility that private property provides a unique solution to the very problem it creates. Private property both creates and solves the problem of tenure insecurity. This chapter presented an argument for a right to housing, understood as a right to secure tenure, that is constitutive of, and justifies, the institution of private property. I argued

that a secure tenure property regime is one that is structured to guarantee the general right to secure tenure, allows the incidents of property to be flexibly assembled to extend the right to secure tenure to everyone, and creates economic incentives that are compatible with the aim of extending tenure security to all. Chapter 8 expands this argument by demonstrating how the objective of extending tenure security to all can be achieved while simultaneously promoting housing equality.

