

## PERSONAL DEBT AND SOCIAL HOUSING: PANDEMIC RELIEF AS DECOMMODIFICATION

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### ABSTRACT

*The COVID-19 pandemic suddenly made the impossible possible. Eviction moratoriums, loan forbearance, and new funding for both households and social programs were enacted in response to the emergency and enjoyed widespread public support. In this Note, I explore the context and consequences of a provision of a New Jersey pandemic-relief law that forbids landlords from selling or assigning rent debt accrued during the pandemic period. This law, in addition to its practical effect, serves as a reminder that property relations are malleable. I situate the law within the contemporary social context of housing and debt and review efforts to decommodify housing and prioritize its value as home over its value as an investment. The statute provides an opening to question who and what our property laws serve, and an opportunity to organize for change.*

*Have we not found that human beings are not just means to profit? Hasn't government again and again been forced to legislate that men be given a fair wage—just compensation—the right to life, liberty and happiness?*

*The government is reminding us that a man has a dignity—not merely a price, a human value—not merely a use value. And unless we remember this, man will perish.<sup>1</sup>*

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1. *Ingramort v. Borough of Fort Lee*, 293 A.2d 720, 743 (N.J. Super. Ct. Law Div. 1972) (Pashman, J.), *aff'd*, 303 A.2d 298 (N.J. 1973).

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## I. INTRODUCTION

This Note explores the commodification of both housing and debt, and the potential of COVID-19-era pandemic relief legislation to counteract that trend. Although the state legislation considered in this Note applies to the narrow context of the pandemic emergency, it suggests an opportunity for expansion. In a direct sense, the legislation limits the ability of landlords to sell or assign rent debt accumulated during a particular period of the COVID-19 pandemic.<sup>2</sup> New Jersey's COVID relief statute, Public Law 2021, Chapter 188, forbids the sale or assignment of "any civil debt relating to rent that accrued during the [period beginning on March 1, 2020, and ending on August 31, 2021]."<sup>3</sup> In a broader sense, however, this measure challenges the commodification<sup>4</sup> of housing and

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2. See *infra* Section II(a).

3. Act of Aug. 4, 2021, ch. 188, 2021 N.J. Sess. Law Serv. Ch. 188, § 52:27D-287.9(3) (West). Similarly, California's S.B. 91 limits sale or assignment of COVID-19 rental debt. COVID-19 Tenant Relief Act, 2021 Cal. Stat. 3.

4. I adopt Madden and Marcuse's definition of commodification as "the general process by which the economic value of a thing comes to dominate its other uses." DAVID MADDEN & PETER MARCUSE, IN DEFENSE OF HOUSING: THE POLITICS OF CRISIS 17 (2016).

debt. The process of commodification is the product of policy choices and social values,<sup>5</sup> and change is possible to restore housing and debt relationships to a social and personal, rather than financialized,<sup>6</sup> context. Rental housing is a highly regulated area in general,<sup>7</sup> but the pandemic allowed governments to find greater malleability in the landlord-tenant relationship. The dire situation of the COVID-19 pandemic provided an opening that allowed governments to reconsider the relationship between the housing market and the need for housing. The next step is to expand this opening and reshape housing provision to meet human needs.

## II. HOW WE GOT HERE

### A. *The COVID-19 Pandemic*

Federal, state, and local governments quickly recognized the importance of protecting tenants from eviction during the height of the pandemic. In March 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act.<sup>8</sup> This included a 120-day moratorium on residential evictions from buildings that had federally-backed mortgage loans or participated in certain other federal programs.<sup>9</sup> Many states also implemented moratoriums on residential evictions.<sup>10</sup> After the 120-day CARES Act moratorium expired, the Centers for Disease Control and Prevention (“CDC”) issued an order restricting residential evictions nationwide.<sup>11</sup> This moratorium, subsequently

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Facilitation of trade in the thing is part of the process of commodification. Teemu Juutilainen, *Law-Based Commodification of Private Debt*, 22 EUR. L.J. 743, 744 (2017).

5. MADDEN & MARCUSE, *supra* note 4, at 18–19.

6. Madden and Marcuse define financialization as “the increasing power and prominence of actors and firms that engage in profit accumulation through the servicing and exchanging of money and financial instruments.” *Id.* at 31. For a discussion and contextualization of housing financialization and its definitions, see generally Gregory W. Fuller, *The Financialization of Rented Homes: Continuity and Change in Housing Financialization*, 2 REV. EVOLUTIONARY POL. ECON. 551 (2021).

7. See, e.g., MADDEN & MARCUSE, *supra* note 4, at 141 (“In fact, housing has always been dependent upon, and integrally tied to, state action.”).

8. Coronavirus Aid, Relief, and Economic Security Act, 15 U.S.C. §§ 9001–9141.

9. *Id.* § 9058.

10. E.g., N.J. Exec. Ord. No. 106 (2020); see also Nino C. Monea, *Tenant Protections in the COVID-19 Pandemic*, 22 J.L. & SOC’Y 38, 54–57 (2022).

11. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID–19, 85 Fed. Reg. 55292, 55292–93 (Sept. 4, 2020). This order, however, “was not self-executing” and required a tenant declaration. Monea, *supra* note 10, at 48–49. Monea contrasts the CDC moratorium to the automatic Department of Justice and Environmental Protection Agency moratoriums on payments of fines for corporate wrongdoing. *Id.* at 49.

extended, was struck down by the Supreme Court in August 2021 as exceeding the authority of the CDC.<sup>12</sup> Legal wrangling over protections for renters was a consistent feature of this period of the pandemic.<sup>13</sup> Although there was widespread executive and legislative action, the tenant protections enacted during the pandemic varied substantially in structure and effect.<sup>14</sup> In August of 2021, the New Jersey legislature enacted its statute to provide financial assistance for landlords and tenants, bar evictions for nonpayment of rent during the pandemic period, and forbid the sale or assignment of certain rent debt.<sup>15</sup>

Governments used eviction moratoriums, financial assistance, and restrictions on debt transactions to avert mass evictions when business closures suddenly rendered many people unable to pay rent. Direct rent relief was generally inadequate to meet the scale of the need.<sup>16</sup> Had there been enough financial assistance available for tenants to pay rent as usual, legislatures may not have introduced restrictions on rent debt. Without comprehensive rent relief, however, rent debt added to the debt burdens faced by low-income households.<sup>17</sup> Although eviction moratoria offered temporary protection from eviction for nonpayment, debt continued to accrue month by month for those households unable to pay rent.<sup>18</sup>

Many households struggle with debt under normal circumstances, let alone in the midst of a pandemic.<sup>19</sup> Federal moratoria offered temporary relief, but generally did not reduce households' eventual financial obligations.<sup>20</sup> State debt-relief measures were a patchwork.<sup>21</sup> However, states frequently acted to protect CARES Act relief funds from being intercepted by creditors to satisfy existing judgments, helping to ensure

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12. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 766 (2021).

13. See, e.g., Chrysafis v. Marks, 141 S. Ct. 2482, 2842 (2021) (enjoining enforcement of a portion of New York's COVID Emergency Eviction and Foreclosure Prevention Act that allowed tenants to avoid eviction with a self-certification of hardship); Kravitz v. Murphy, 260 A.3d 880, 885–86 (N.J. Super. Ct. App. Div. 2021) (upholding Executive Order 128 allowing tenants to use security deposits to pay rent).

14. See generally Monea, *supra* note 10, at 54–57.

15. N.J. REV. STAT. ANN. § 52:27D-287.9 (West 2024). The California legislature passed a similar bill providing tenant protections and barring the sale or assignment of certain rent debt in January 2021. COVID-19 Tenant Relief Act, 2021 Cal. Stat. 3.

16. Monea, *supra* note 10, at 71–75.

17. See Monea, *supra* note 10, at 71.

18. See Pamela Foohey et al., *The Debt Collection Pandemic*, 11 CALIF. L. REV. 222, 228 (2020); Monea, *supra* note 10, at 71.

19. Foohey et al., *supra* note 18, at 225–26.

20. *Id.* at 228.

21. *Id.* at 229–30.

that the funds actually served their purpose of pandemic relief.<sup>22</sup> When pandemic cash assistance did reach households, debt collectors nevertheless benefited from recipients using CARES Act funds to pay down debts.<sup>23</sup> Low-income people and people of color were both most affected by the health impacts of COVID-19 and most at risk with respect to debt.<sup>24</sup> In the realm of housing, many homeowners with mortgages took advantage of forbearance programs to meet their housing costs.<sup>25</sup> Despite losing labor income at a higher rate than homeowners, tenants lacked this option to restructure their housing expenses during the pandemic.<sup>26</sup> And as Nino Monea points out, homeowner assistance programs predated the pandemic.<sup>27</sup> Not only do mortgage holders benefit from the mortgage interest tax deduction, but “[a] lender cannot foreclose on a home [without] working with a homeowner to make it through their financial hardship.”<sup>28</sup> Tenants in some states benefited from eviction moratoriums, but these were frequently narrow and allowed many exceptions for landlords to continue evictions.<sup>29</sup> Additionally, the amount of available financial rental assistance varied by state, but in general was dwarfed by the scale of debt that tenants accrued.<sup>30</sup>

Activists and movement lawyers in New York City proposed rent cancellation for tenants and financial relief for landlords.<sup>31</sup> As Marika Dias explains, this approach emphasized that “[a]ll tenants deserve protection from eviction” and that “[r]elief for renters always amounts to

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22. *Id.*; see, e.g., N.J. Exec. Ord. No. 233 (2021) (protecting American Rescue Plan Act funds).

23. Paul Kiel & Jeff Ernsthausen, *Debt Collectors Have Made a Fortune This Year. Now They're Coming for More.*, PROPUBLICA (Oct. 5, 2020, 5:00 AM), <https://www.propublica.org/article/debt-collectors-have-made-a-fortune-this-year-now-theyre-coming-for-more>.

24. Foohey et al., *supra* note 18, at 240.

25. See CHERYL R. COOPER ET AL., CONG. RSCH. SERV., COVID-19: HOUSEHOLD DEBT DURING THE PANDEMIC 15 (2021).

26. *Id.*

27. Monea, *supra* note 10, at 75.

28. *Id.*; see Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1159–60 (2019) (discussing the “two-track” system of social welfare and comparing the mortgage interest tax deduction to a direct housing subsidy); Sarah Schindler & Kellen Zale, *The Anti-Tenancy Doctrine*, 171 U. PA. L. REV. 267, 290–94 (2022) (contrasting the consequences for renters and homeowners of falling behind on housing payments).

29. Monea, *supra* note 10, at 57–58.

30. *Id.* at 71–72 (“New Jersey received 444.7 million dollars in federal support for rent relief and expected 400 million dollars more, but still landlords were short two billion dollars in rent.”).

31. Marika Dias, *Paradox and Possibility: Movement Lawyering During the COVID-19 Housing Crisis*, 24 CUNY L. REV. 173, 191–92 (2021).

relief for landlords.”<sup>32</sup> Reframing the issue of rent relief in this way highlights the inadequacy of restrictions on debt when the debt should never have accrued. Nevertheless, while inadequate as solutions to poverty and debt, limitations on sale and assignment serve to re-personalize the landlord-tenant and debtor-creditor relationship.

Today, evictions in New Jersey are returning to pre-pandemic levels.<sup>33</sup> Additionally, the present inflation of housing costs has a particularly strong impact on low-income renters.<sup>34</sup> As David Stein notes, the Federal Reserve’s response to inflation in general—raising interest rates—may harm tenants.<sup>35</sup> “[M]odest rental housing is out of reach for nearly every worker in the bottom half of the wage distribution.”<sup>36</sup> In 2022, New Jersey was the seventh-most-expensive state as measured by the two-bedroom housing wage.<sup>37</sup> While the hourly wage needed to afford a two-bedroom apartment at fair market rent was \$31.32, the mean renter wage was \$23.29.<sup>38</sup> The time is ripe for change.

### B. Commodification and Financialization of Housing

Housing has become increasingly commodified, and its value as a place to live has been subsumed by investment considerations.<sup>39</sup> Housing has also become increasingly financialized.<sup>40</sup> “Over the past half-century or so, home mortgages were transformed from an industry dominated by

32. *Id.* at 192–93 (noting, also, the administrative simplicity of delivering relief to landlords rather than tenants).

33. Ashley Balcerzak, *NJ Evictions: How Is Landlord-Tenant Court Going Five Months After Moratorium Ended?*, NORTHJERSEY.COM (June 13, 2022, 4:00 A.M.), <https://www.northjersey.com/story/news/2022/06/13/nj-evictions-how-landlords-tenants-faring-after-moratorium-end/9945362002/>.

34. Scott Fulford, *Housing Inflation is Hitting Low-Income Renters*, CFPB (July 27, 2022), <https://www.consumerfinance.gov/about-us/blog/office-of-research-blog-housing-inflation-is-hitting-low-income-renters/>.

35. David Stein, “*In a Good Economy Homelessness Goes Up*”: *Inflation and the Housing Question*, L. & POL. ECON. PROJECT: LPE BLOG (Mar. 21, 2022), <https://lpeproject.org/blog/in-a-good-economy-homelessness-goes-up-inflation-and-the-housing-question/> (advocating for federal rent control).

36. NAT’L LOW INCOME HOUS. COAL., *OUT OF REACH: THE HIGH COST OF HOUSING* 4 (2022).

37. *Id.* at 3. “Housing Wage is the estimated full-time hourly wage that workers must earn to afford a decent rental home at HUD’s Fair Market Rent while spending no more than 30% of their income on housing costs.” *Id.* at 16.

38. *Id.* at 24.

39. MADDEN & MARCUSE, *supra* note 4, at 17 (“The commodification of housing means that a structure’s function as real estate takes precedence over its usefulness as a place to live.”).

40. *Id.* at 32.

local lending, thrifts, and passbook accounts to one dominated by global corporate banking and securitization.”<sup>41</sup> The consequences have been severe: “[t]he 2008 global financial crisis revealed the fragility, volatility and predatory nature of financialized housing markets and the potential for catastrophic outcomes both for individual households and for the global economy.”<sup>42</sup> Real estate investments, among other financial instruments, have also become increasingly globalized.<sup>43</sup> Discussing real estate investment trusts (REITs) and listed real estate operating companies (REOCs), Gregory Fuller notes that “[c]onnecting the pool of global capital to locally distinct housing markets requires instruments that bridge the gap between the global financial system and local property markets.”<sup>44</sup> Fuller goes on to explain that low-income people are not the targeted tenants for REITs and REOCs, and that “the expansion of higher-quality urban housing often results in the removal of existing property serving these poorer communities.”<sup>45</sup> The globalization of markets for housing-derived financial instruments disconnects housing provision from the needs of the local community, orienting development toward the profits of distant actors.<sup>46</sup>

Although multi-family dwellings have been a site of private equity investment since at least the 1990s, single-family rental housing has emerged more recently as an attractive investment.<sup>47</sup> In the aftermath of the 2008 financial crisis, “the unprecedented supply of cheap housing in good neighborhoods made corporate single-family home management feasible for the first time.”<sup>48</sup> Private equity firms began buying up houses that had previously been owner-occupied, particularly homes suitable for first-time home buyers.<sup>49</sup> In order to generate the returns which private

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41. *Id.*

42. Leilani Farha (Special Rapporteur on Adequate Housing), *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, U.N. Doc. A/HRC/34/51 (Jan. 18, 2017).

43. *See id.* at 8–11; Desiree Fields, *Unwilling Subjects of Financialization*, 41 INT’L J. URB. & REG’L RSCH. 588, 590 (2017); Fuller, *supra* note 6, at 555.

44. Fuller, *supra* note 6, at 563.

45. *Id.* at 567.

46. FARHA, *supra* note 42, at 9–10 (“Financialized housing markets respond to preferences of global investors rather than to the needs of communities.”); MADDEN & MARCUSE, *supra* note 4, at 35.

47. Fields, *supra* note 43, at 589.

48. Francesca Mari, *A Sixty Billion Dollar Housing Grab by Wall Street*, N.Y. TIMES MAG., <https://www.nytimes.com/2020/03/04/magazine/wall-street-landlords.html> (Oct. 22, 2021).

49. *Id.*; *see also* FARHA, *supra* note 42, at 10 (noting increases in rent and poor conditions as a result of flipping by absentee corporate landlords).

equity expects, these corporate landlords tend toward predatory behavior.<sup>50</sup> In particular, they “create extra revenue streams of excessive late charges and maintenance fees that shift the costs and responsibilities of traditional landlords onto tenants to an unprecedented extent.”<sup>51</sup> One tenant of Invitation Homes, a subsidiary of the private equity firm Blackstone, signed a lease that made him liable for any bedbug infestation and relieved Invitation Homes of liability for any exposure to mold.<sup>52</sup> These approaches seem to be working for landlords: annual returns on family rentals were twenty-one percent between 2016 and 2021, compared with twelve percent for apartments and five percent for offices.<sup>53</sup> In order to support these returns, corporate landlords quickly turn to eviction.<sup>54</sup>

In addition to the rise of investor-owned single-family rentals, traditional apartment housing has attracted the attention of private equity. In the first decade of the 2000s, private equity firms took advantage of New York City’s partial rent deregulation and the broader financial environment to purchase multi-family buildings.<sup>55</sup> The private equity model depends on debt financing, and the need to make debt payments drives extraction from tenants.<sup>56</sup> The double-digit yields

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50. See Mari, *supra* note 48 (“In a 2016 fourth-quarter earnings call, Tuomi, the chief executive of Colony Starwood (formerly Colony American), declared that ‘not getting every charge that you are legitimately due under leases’—termination fees, damage fees and the like—is ‘revenue leakage.’”); see also David Birchall, *Challenging the Commodification of Human Rights: The Case of the Right to Housing*, 19 SANTA CLARA J. INT’L L. 1, 37–38 (2021) (discussing the UN Special Rapporteur on the Right to Housing’s letter to the Blackstone Group criticizing its exploitative practices).

51. ACCE INST. ET AL., WALL STREET LANDLORDS TURN AMERICAN DREAM INTO A NIGHTMARE 9 (2018).

52. Mari, *supra* note 48. Blackstone has become the largest landlord in the world. SAMUEL STEIN, CAPITAL CITY: GENTRIFICATION AND THE REAL ESTATE STATE 3 (2019).

53. *Why Wall Street Is Snapping Up Family Homes*, ECONOMIST (Sept. 22, 2022), <https://www.economist.com/finance-and-economics/2022/09/22/why-wall-street-is-snapping-up-family-homes>.

54. Mari, *supra* note 48 (“Invitation Homes’ securitized bond model assumed a 94 percent paying-occupancy rate, putting pressure on the company to evict nonpaying tenants right away.”); see also ELORA RAYMOND ET AL., FED. RESRV. BANK OF ATLANTA CMTY. & ECON. DEV. DEP’T, CORPORATE LANDLORDS, INSTITUTIONAL INVESTORS, AND DISPLACEMENT: EVICTION RATES IN SINGLE FAMILY RENTALS 1 (Cmt’y. & Econ. Dev., Discussion Paper No. 04-16, 2016) (“Some of the largest firms file eviction notices on a third of their properties in a year and have an 18 percent higher housing instability rate even after controlling for property and neighborhood characteristics.”).

55. Fields, *supra* note 43, at 590–92 (noting the role of rent deregulation laws); see also MADDEN & MARCUSE, *supra* note 4, at 33 (noting that private equity firms purchased 90,000 rent-stabilized units in NYC between 2004 and 2008).

56. Fields, *supra* note 43, at 594.



expected by private equity are inherently incompatible with the rent increases allowed by New York City's rent stabilization policies, leading private equity landlords to seek new means of extraction.<sup>57</sup> During and following the 2008 financial crisis, living conditions became worse for many tenants as investment firms engaged in financial machinations while failing to keep apartments in good repair.<sup>58</sup>

The financialization of housing increases precarity, leading to instability and eviction. David Madden and Peter Marcuse apply the concept of alienation to housing, asserting that "[c]ommodified dwelling space is not an expression of the residential needs of those who live in it."<sup>59</sup> The ultimate alienation, however, is the loss of one's home through eviction or foreclosure.<sup>60</sup> Both fear of this loss and the loss itself can cause depression, anxiety, and other health issues.<sup>61</sup> During the height of the COVID-19 pandemic, public health provided a ready justification for eviction moratoriums.<sup>62</sup> The widespread harm of the COVID-19 pandemic brought public health to the surface, and although the moratoriums have ceased, the health impacts of eviction remain.

Dispossession is violent: as Madden and Marcuse put it, "[e]viction represents the violent assertion of the rights of property owners over the needs of inhabitants."<sup>63</sup> In *Civil Procedure in the Shadow of Violence*, Shirin Sinnar examines the violence of summary eviction proceedings.<sup>64</sup> These proceedings are intended to dispossess tenants more quickly than a full trial, and exist in every state.<sup>65</sup> Although putatively intended to avoid the violence of "self-help" evictions, in Sinnar's analysis summary proceedings have merely shifted this private violence to state violence.<sup>66</sup>

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57. *Id.*; see also MADDEN & MARCUSE, *supra* note 4, at 42–45 (recounting harassment aimed at driving out existing tenants in order to raise rents).

58. Fields, *supra* note 43, at 597–98.

59. MADDEN & MARCUSE, *supra* note 4, at 55, 59.

60. *Id.* at 64–65.

61. *Id.*; see generally MINDY THOMPSON FULLILOVE, *ROOT SHOCK* (2004).

62. See *Temporary Halt*, *supra* note 11, at 55294. ("In the context of a pandemic, eviction moratoria—like quarantine, isolation, and social distancing—can be an effective public health measure utilized to prevent the spread of communicable disease."); N.J. Exec. Ord. No. 106 (2020) ("[R]emovals of residents pursuant to evictions or foreclosure proceedings can increase the risk to those residents of contracting COVID-19, which in turn increases the risks to the rest of society and endangers public health . . .").

63. MADDEN & MARCUSE, *supra* note 4, at 64.

64. Shirin Sinnar, *Civil Procedure in the Shadow of Violence*, in *A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES* 32, 32 (Brooke Coleman et al., eds., 2022).

65. *Id.* at 33.

66. *Id.* at 35 ("Civil procedural regimes are designed . . . to structure the rights and relative advantage of different groups, enforced by the threat of force.").

Eviction is both an individual and social harm. The commodification and financialization of housing has brought increased rents and a decoupling of the value of real estate from the fundamental need for housing.

Policies have tended to protect financial interests, and preserve financialization, while deprioritizing human needs.<sup>67</sup>

### C. *Debt as Personal Obligation and Property*

Generally, debts can be sold and assigned freely. This is a core part of the modern financial system, but it is neither immutable nor a historical truth.<sup>68</sup> The rise of capitalism substantially changed the relationship between debtor and creditor.<sup>69</sup> For example, in rural Massachusetts communities prior to the middle of the nineteenth century, “locally incurred debts were carried on the books for years, often paid off only at death or when the parties owed each other roughly equal amounts.”<sup>70</sup> Farmers bristled at the insistence of the Massachusetts Hospital Life Insurance Company on punctuality in mortgage payments and its rejection of these social norms.<sup>71</sup> Similarly, the depersonalization of credit relationships was reflected and encouraged by the development of credit reporting.<sup>72</sup> In particular, it increased the abstraction of debts from human relationships.<sup>73</sup> The development of capitalism has included the shift of debts from interpersonal obligations to impersonal and unyielding requirements.<sup>74</sup> As David Graeber puts it, “[t]he story of the

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67. FARHA, *supra* note 42, at 21 (“By providing tax subsidies for homeownership, tax breaks for investors, and bailouts for banks and financial institutions, States have subsidized the excessive financialization of housing at the expense of programmes for those in desperate need of housing.”).

68. See generally Mary Poovey, *Demonizing Debt, Naturalizing Finance*, in DEBT: ETHICS, THE ENVIRONMENT AND THE ECONOMY 39 (Ind. Univ. Press 2013).

69. See, e.g., Tamara Plakins Thornton, “A Great Machine” or a “Beast of Prey”: A Boston Corporation and Its Rural Debtors in an Age of Capitalist Transformation, 27 J. EARLY REPUBLIC 567, 568–69 (2007).

70. *Id.* at 573.

71. *Id.* at 590 (“The Company represented itself as the impersonal agent of an abstract entity, never deviating from Company bylaws, and demanding strict adherence to the rules.”).

72. Josh Lauer, *The Good Consumer: Credit Reporting and the Invention of Financial Identity in the United States, 1840–1940*, 11 ENTER. & SOC’Y 688, 691 (2010).

73. *Id.* Credit reporting was motivated by an increasingly impersonal economy, but the rise of credit systems also prompted economic change. “[U]nder new pressures to compete, . . . retailers . . . felt forced against their better judgment to provide credit accommodations.” *Id.* at 693.

74. Similarly, a personal dimension to the landlord-tenant relationship encourages landlords not to maximize rent, and housing commodification removes these noneconomic motivations. See MADDEN & MARCUSE, *supra* note 4, at 44.

origins of capitalism . . . [is] the story of how an economy of credit was converted into an economy of interest; of the gradual transformation of moral networks by the intrusion of the impersonal—and often vindictive—power of the state.”<sup>75</sup> Part of the separation of economic activity from social ties was the increasing portability of debt.

Debts have not always been alienable, and certainly not to the present degree. In Roman law, a debt could originally not be transferred to another creditor without the agreement of the debtor, but a mechanism for transfer developed.<sup>76</sup> Similarly, at common law, choses in action were not alienable without a debtor’s consent or an act of sovereign power.<sup>77</sup> Courts of equity, however, developed mechanisms to deal with transfers of debt.<sup>78</sup> Additionally, the common law allowed for an assignee to sue in the name of the assignor through either an express or implied power of attorney.<sup>79</sup> Eventually, this became a formality and was finally dropped.<sup>80</sup> Although debts have long been assignable, with varying degrees of complexity or formality to the process, more recent developments have radically reshaped the nature of credit relationships.<sup>81</sup>

Securitization has emerged in the last few decades and forms a new aspect of the commodification of debt.<sup>82</sup> “Securitisation involves pooling together of receivables from mortgages or other loans and refinancing that pool, usually by selling it to a specially established company or other entity.”<sup>83</sup> Mortgage-backed securities formed a crucial part of the housing bubble that led to the 2008 financial crisis.<sup>84</sup> Securitization is also vital to the private equity financial model for single-family rentals.<sup>85</sup> As

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75. DAVID GRAEBER, *DEBT: THE FIRST 5,000 YEARS* 332 (2014).

76. Juutilainen, *supra* note 4, at 746.

77. Walter Wheeler Cook, *The Alienability of Choses in Action*, 29 HARV. L. REV. 816, 817 (1916).

78. *See id.* at 821–22.

79. *Id.* at 822.

80. *Id.* at 833–34.

81. *See id.* at 821–22, 833–34.

82. *See* Juutilainen, *supra* note 4, at 743. Juutilainen is writing from a European civil law perspective but includes comparison to the United States. He decomposes commodification into propertification, impersonalization, and risk abstraction. *Id.* at 750–53.

83. *Id.* at 743 n.1.

84. Mari, *supra* note 48; Juutilainen, *supra* note 4, at 752–53; *see* MADDEN & MARCUSE, *supra* note 4, at 32–33.

85. *See* Mari, *supra* note 48 (“[Private equity] firms . . . create[ed] a new financial instrument: a single-family-rental securitization, which was a mix of residential mortgage-backed securities, collateralized by home values, and commercial real estate-backed securities, collateralized by expected rental income.”).

Juutilainen notes, the “impersonalization” of debt, the “diminishing relevance to the creditor of the identity and circumstances of the debtor,” insulates loan originators from the consequences of their lending decisions.<sup>86</sup> This shifts risk to investors in the securities formed from these loans and encourages predatory lending.<sup>87</sup> Furthermore, the creation of a financial product from a debt erases the initial significance of that debt in a social context.<sup>88</sup> Although debts have long been alienable, commodification and large-scale debt transactions remove debt from a social or interpersonal context and prioritize financial interests over human needs.<sup>89</sup> The pandemic-era legislative restrictions on the alienability of debt move against this abstraction and place rent debt back in a social context.

#### D. Contemporary Debt Collection

The ease and scale with which debts are bundled, sold, and collected leaves the system ripe for abuse. Debt transactions, and attempts to collect on those debts, happen at tremendous scale and in a completely depersonalized way. Across the court systems of eighteen states, “the top ten private filers typically accounted for between one fifth and one third of all of the cases filed.”<sup>90</sup> The majority of these cases are consumer debt-collection suits.<sup>91</sup> In these “assembly-line” cases, procedural defects and default judgments are common.<sup>92</sup> In fact, debt collection suits have been marked by a high rate of defaults since the days of colonial America.<sup>93</sup> And then, as now, debt collection lawsuits functioned largely as a means

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86. Juutilainen, *supra* note 4, at 752–53.

87. *See id.* at 752.

88. *See id.* at 754. The removal of a debt from its context also changes the apparent risk of that debt. *See id.* Juutilainen traces the global financial crisis in part to this risk abstraction. *Id.*

89. *Id.* at 753–54.

90. Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1708 (2022). For example, in New Jersey, the top ten filers filed forty-one percent of the 281,000 total cases in 2019. *Id.*

91. *Id.* at 1709.

92. Wilf-Townsend, *supra* note 90, at 1721–22. *See generally* Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41 (2015) (noting how little information about the underlying debt is provided to buyers and proposing that debts sales without documentation and warranties be made an unfair and deceptive act or practice).

93. Dalié Jiménez, *Decreasing Supply to the Assembly Line of Debt Collection Litigation*, 135 HARV. L. REV. F. 374, 379 (2022).

for creditors to enlist the help of the state in collecting their debts.<sup>94</sup> Furthermore, debt collection and debt are marked by racial disparity.<sup>95</sup>

Apart from a sense that repaying debts is the right thing to do, debt collection is justified as an important component of capital markets, and its presence is touted as expanding availability of credit.<sup>96</sup> Indeed, regulation of debt collection may reduce access to credit.<sup>97</sup> Although access to credit is a valid concern, scholars have noted the pitfalls of promoting credit as a means for people to meet their basic needs.<sup>98</sup>

Creditors who win judgments against debtors are able to garnish wages and bank accounts, jeopardizing people's ability to meet their ongoing basic needs.<sup>99</sup> Federal law provides no protection for money in bank accounts and allows garnishment of up to twenty-five percent of after-tax wages.<sup>100</sup> State law varies widely, with some states further limiting paycheck garnishment and protecting bank account balances and others providing no additional protection.<sup>101</sup> Notably, wages are not protected once deposited into a bank account.<sup>102</sup> New Jersey limits garnishment to ten percent of income unless the debtor's income exceeds 250% of the poverty level.<sup>103</sup> Additionally, interest can continue to accrue on a judgment, which can lead to people paying far, far more than the

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94. *Id.* at 380; Wilf-Townsend, *supra* note 90, at 1709.

95. ANNIE WALDMAN & PAUL KIEL, RACIAL DISPARITY IN DEBT COLLECTION LAWSUITS: A STUDY OF THREE METRO AREAS 18–21 (2015); Jessica K. Steinberg et al., *The Democratic (Il)legitimacy of Assembly-Line Litigation*, 135 HARV. L. REV. F. 359, 363 (2022) (“[P]ro se defendants in debt cases are disproportionately likely to be low-income people of color.”).

96. See Viktor Fedaseyev, *Debt Collection Agencies and the Supply of Consumer Credit* 5 (Fed. Rsrv. Bank of Phila., Working Paper No. 20-06, 2020).

97. See Julia Fonseca et al., *Access to Credit and Financial Health: Evaluating the Impact of Debt Collection* 15 (Fed. Rsrv. Bank of N.Y., Staff Report No. 814, 2017) (“Our analysis suggests that restricting collection activities leads to a decrease in access to credit and to a deterioration in indicators of financial health.”); Fedaseyev, *supra* note 96, at 41 (“While stricter third-party debt collection laws appear to modestly reduce the availability of unsecured credit, the impact of such laws on consumer welfare is ex ante ambiguous . . . .”); Jiménez, *supra* note 92, at 43 (noting that the “secondary market for consumer debts lowers the overall cost of credit”).

98. See Atkinson, *supra* note 28, at 1154; Tonya L. Brito et al., *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1277–81 (2022).

99. See Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), <https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods>.

100. WALDMAN & KIEL, *supra* note 95, at 2.

101. PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE CIVIL COURTS 18 (2020).

102. *Id.*

103. N.J. REV. STAT. ANN. § 2A:17-56 (West 2024). The debtor's income must also exceed \$48.00 per week for a court to grant an order for wage execution. § 2A:17-50.

original amount of the loan.<sup>104</sup> As predatory as this system can be in general, its application to debts stemming from the fundamental human need for housing is particularly cruel.

### III. NEW JERSEY

#### A. Housing Regulation

The New Jersey statute restricting alienation of rent debt appears within a long history of regulation of the landlord-tenant relationship. At the federal level, the Supreme Court “has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.”<sup>105</sup> At the state level, New Jersey has an extensive history of its own. New Jersey was the first state to enact good-cause eviction protections, which it did in 1974.<sup>106</sup> The New Jersey statute enumerates permissible causes for eviction, including nonpayment of rent, breach of the landlord’s rules and regulations, and permanent retirement of the property from residential use.<sup>107</sup> Through the courts, New Jersey established an implied warranty of habitability in residential leases and provided that tenants may arrange for repairs and deduct the cost from their rent.<sup>108</sup> New Jersey also has a long history of rent control.<sup>109</sup> In *Inganamort v. Borough of Fort Lee*, the New Jersey Supreme Court upheld municipal rent control ordinances enacted in the context of a housing shortage.<sup>110</sup> Subsequently, the court held that the validity of rent control ordinances

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104. See Kiel & Waldman, *supra* note 99 (offering an example of a \$4,900 debt that, with pre-judgment and post-judgment interest, will become \$13,000 of payments if it is ever paid off).

105. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440–41 (1982); see *Yee v. City of Escondido*, 503 U.S. 519, 532 (1992) (upholding a rent control ordinance against a takings claim and holding that the ordinance did not work a *per se* taking but was rather a regulation of the landlord’s use of the property).

106. Kenneth K. Baar, *Rent Control in the 1970’s: The Case of the New Jersey Tenants’ Movement*, 28 HASTINGS L.J. 631, 631 (1977). For a contemporary assessment of the statute, see generally *New Rights for New Jersey Tenants—“Good Cause” Eviction and “Reasonable” Rents*, 6 RUTGERS–CAM L.J. 565 (1975).

107. § 2A:18-61.1. See generally JADE VASQUEZ, SARAH GALLAGHER, NAT’L LOW INCOME HOUS. COAL., PROMOTING HOUSING STABILITY THROUGH JUST CAUSE EVICTION LEGISLATION (2022) (describing the New Jersey law, among others, and discussing existing and proposed eviction protections).

108. *Marini v. Ireland*, 265 A.2d 526, 534–35 (N.J. 1970).

109. See Baar, *supra* note 106, at 649–59.

110. *Inganamort v. Borough of Fort Lee*, 303 A.2d 298, 307 (N.J. 1973).

did not depend on the existence of an emergency.<sup>111</sup> The court also held, however, that in the absence of an emergency rent control ordinances “must permit a just and reasonable return” on a landlord’s investment.<sup>112</sup> This balancing of landlord and tenant interests connects decades of efforts at rent regulation in New Jersey.<sup>113</sup>

More recently, landlords challenged New Jersey Executive Order 128, which allowed tenants to pay rent using security deposits they had made with their landlords.<sup>114</sup> Executive Order 128 allowed landlords to require tenants to replenish the security deposit when renewing the lease, and also allowed landlords to recover any funds from the tenant that they would otherwise have retained from the security deposit.<sup>115</sup> The federal district court dismissed the plaintiff landlords’ Contracts Clause claim, noting that landlords operate in a heavily regulated context and that the executive order did not substantially impair their contract rights.<sup>116</sup> Landlords also sued in state court, with no greater success.<sup>117</sup> The state court noted that landlords still had legal remedies to enforce leases, and that “tenants’ obligations regarding rent and damages were not impaired by EO 128.”<sup>118</sup> New Jersey’s long history of sparse and unaffordable housing, and corresponding history of landlord-tenant regulation, established a landscape that allowed significant action in response to the COVID-19 pandemic.

### *B. COVID-19 Relief Legislation*

Along with many other states, New Jersey enacted legislation to reduce evictions during the COVID-19 pandemic and to provide financial relief to tenants struggling to pay rent.<sup>119</sup> Provisions of the statute include establishing and funding rental relief programs, setting court

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111. *Hutton Park Gardens v. Town Council of W. Orange*, 350 A.2d 1, 10–11 (N.J. 1975).

112. *Id.* at 14–15.

113. *See Inganamort v. Borough of Fort Lee*, 293 A.2d 720, 744 (N.J. Super. Ct. Law Div. 1972) (Pashman, J.) (“The right to shelter is consistent with the right to fair profit.”); N.J. STAT. ANN. § 52:27D-287.7 (“[T]he Legislature deems it necessary to help struggling tenants avoid displacement and to compensate landlords for providing this necessary shelter to many tenants without compensation during the pandemic.”).

114. *Johnson v. Murphy*, 527 F. Supp. 3d 703, 710 (D.N.J. 2021), *vacated as moot sub nom. Johnson v. Governor of New Jersey*, No. 21-1795, 2022 WL 767035 (3d Cir. Mar. 14, 2022); *see* N.J. Exec. Ord. No. 128 (2020).

115. N.J. Exec. Ord. No. 128 (2020).

116. *Murphy*, 527 F. Supp. 3d at 716–18.

117. *See, e.g., Kravitz v. Murphy*, 260 A.3d 880, 885–86 (N.J. Super. Ct. App. Div. 2021), *cert. denied*, 272 A.3d 405 (2022).

118. *Id.* at 901–02.

119. *See generally* N.J. REV. STAT. ANN. § 52:27D-287.9 (West 2024).

fees, and barring evictions for nonpayment for many households.<sup>120</sup> Additionally, and importantly, the statute also bars landlords from reporting nonpayment and court filings to credit reporting agencies.<sup>121</sup> Furthermore, it bars landlords from refusing to rent to tenants because of nonpayment during the covered period, and from sharing information about a tenant “on a list for the use of other landlords for any purpose” as a consequence of nonpayment.<sup>122</sup> An eviction record can hinder both tenants in finding a new place to live and in other areas of life.<sup>123</sup> “Eviction judgments also undermine opportunities for employment, insurance, and, more broadly, any activities that depend on good credit.”<sup>124</sup> Mere involvement in an eviction case, regardless of its merit or whether it resulted in a judgment, can end up on records collected by tenant-screening bureaus.<sup>125</sup> Restricting the ability of landlords to share nonpayment and eviction filing information will help prevent tenants from being penalized for circumstances which, even more than usual, are out of their control. New Jersey provides remedies for violations of these restrictions, including damages payable to the tenant, fines, and attorney fee awards.<sup>126</sup>

New Jersey and California included provisions in their COVID relief statutes that prevented rent debt accrued during a portion of the pandemic from being sold or assigned. In New Jersey: “Notwithstanding any law to the contrary, no person shall sell or assign any civil debt relating to rent that accrued during the covered period.”<sup>127</sup> New Jersey also permanently eliminated nonpayment during the covered period as a permissible cause for eviction.<sup>128</sup> California enacted a broad prohibition on selling or assigning COVID-19 rental debt accrued between March 1, 2020, and June 30, 2021, which was automatically repealed on July 1, 2021.<sup>129</sup> The California statute also included a permanent bar on sale or assignment of rental debt accrued by people who would have qualified for

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120. *Id.*

121. *Id.* § 52:27D-287.9(i).

122. *Id.* § 52:27D-287.9(i)(2).

123. Kathryn A. Sabbeth, *Erasing the “Scarlet E” of Eviction Records*, THE LAB (Apr. 12, 2021), <https://theappeal.org/the-lab/report/erasing-the-scarlet-e-of-eviction-records/>.

124. *Id.*

125. *Id.*

126. § 52:27D-287.9(i)(3).

127. *Id.* § 52:27D-287.9. The covered period is March 1, 2020, through August 31, 2021. *Id.* § 52:27D-287.8 New Jersey’s eviction moratorium lasted through August 31, 2021, or December 31, 2021, with a tenant certification of low income and COVID-related hardship. N.J. Exec. Ord. No. 249 (2021).

128. § 52:27D-287.9.

129. CAL. CIV. CODE § 1788.66 (Deering 2024).



pandemic rental assistance and have a household income less than or equal to eighty percent of the area median income.<sup>130</sup>

These statutes may make it less likely that landlords will ever collect on debt accrued during the pandemic. However, debt originators are not subject to the limitations on collection activities imposed by the Fair Debt Collection Practices Act (“FDCPA”), which applies to third-party debt collectors.<sup>131</sup> Taking into account the limits that the FDCPA imposes on third-party debt collectors, landlords doing their own collections may be a mixed blessing. In 2021, the Consumer Financial Protection Bureau (“CFPB”) promulgated a regulation requiring debt collectors to notify debtors of the existence of a debt before reporting it to credit reporting agencies.<sup>132</sup> This regulation does not apply to landlords, but does apply to third-party debt collectors.<sup>133</sup> However, “[o]nly about five percent of landlords (typically the very largest ones) report on tenant debt to consumer reporting agencies (CRAs).”<sup>134</sup> Therefore, the potential drawback of pushing landlords toward first-party debt collection may be negligible. Nevertheless, applying the protections of the FDCPA to first-party debt collection would harmonize the collection procedures and ensure tenants have notice of their alleged debts. Landlords might be less likely to pursue collection without the option of delegating to a debt collector. Also, without other protections, tenants can still be evicted for nonpayment. As discussed above, eviction is traumatic. But limiting involvement with debt collection litigation may still be a worthwhile improvement.

### *C. Policy Possibilities*

New Jersey requires good cause for residential evictions; one of the permissible causes is nonpayment.<sup>135</sup> Without a corresponding moratorium on evictions due to nonpayment of rent, restricting the alienability of rent debt would not directly preserve tenancies. There would undoubtedly be legal challenges to any attempt to enact a long-term restriction on the ability of landlords to evict for nonpayment. And, without more fundamental change to our system of housing provision, such as a tremendous increase in the supply of public housing, enabling

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130. *Id.*

131. Jiménez, *supra* note 92, at 107.

132. *Defenses to Collection of Rental Debt*, NAT’L CONSUMER L. CTR. (Jan. 13, 2022), <https://library.nclc.org/article/defenses-collection-rental-debt-0>.

133. *Id.*

134. *Id.*

135. N.J. REV. STAT. ANN. § 2A:18-61.1 (West 2024).

people to live rent-free might have undesirable consequences on the quality and availability of rental housing.

However, focusing on restrictions on the sale and assignment of rent debt, apart from an eviction moratorium, two questions remain. First, whether such restrictions would be helpful to tenants, and second, whether such restrictions would withstand legal challenges.

Restrictions on the sale and assignment of rental debt are likely to prove helpful to tenants, especially if paired with additional reforms to debt collection litigation. As Dalié Jiménez points out, creditors are often able to attempt to collect debts indefinitely, and these debts can continue to grow with interest and fees.<sup>136</sup> Jiménez proposes that creditors be given seven years to collect on debts, after which the debt would be extinguished.<sup>137</sup> Under her proposal, any judgment, such as those resulting from New Jersey's treatment of unpaid rent as civil debt during the covered period, would also have a seven-year expiration.<sup>138</sup> This measure, like the restrictions on sharing nonpayment and eviction data discussed above, would help tenants make a fresh start. When coupled with the restriction on sale or assignment, it disincentivizes landlords from aggressively pursuing debts.<sup>139</sup> Landlords would be more likely to let some debts—small to the landlord, but large to the tenant—go uncollected. As Wilf-Townsend notes, “the efficiency enabled by these plaintiffs’ litigation machines can make it worthwhile to file claims for \$700 or \$800 in consumer debt.”<sup>140</sup> By reducing the efficiency of debt collection plaintiffs, the minimum value that is worthwhile to collect can be shifted upward.<sup>141</sup> Preventing landlords from transferring debts to debt collectors serves this efficiency-reducing function.

New Jersey could also go further in reducing the efficiency of debt collection by landlords. Public Law 2021, Chapter 188 provides that “[a]n action by a landlord against a residential tenant to recover unpaid rent which accrued during the covered period may be commenced in the Superior Court, Special Civil Part, regardless of the amount in controversy.”<sup>142</sup> Ordinarily, the Special Civil Part, which offers a

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136. Jiménez, *supra* note 93, at 388; *see also* Kiel & Waldman, *supra* note 99.

137. Jiménez, *supra* note 93, at 389–90.

138. *Id.*

139. *See id.*

140. Wilf-Townsend, *supra* note 90, at 1721 (discussing economies of scale and sophisticated techniques for high-volume litigation by debt collection firms).

141. *Id.* at 1753.

142. Act of Aug. 4, 2021, ch. 188, 2021 N.J. Sess. Law Serv. Ch. 188, § 52:27D–287.9(3) (West).

simplified procedure relative to the Civil Part,<sup>143</sup> has jurisdiction when the amount in controversy does not exceed \$20,000.<sup>144</sup> This statutory change required the Supreme Court of New Jersey to modify the court rules to relax the jurisdictional limits for the Special Civil Part.<sup>145</sup> Any measure that makes it easier for landlords to file and collect reduces the ability of tenants to move forward and find stable housing. Lowering the jurisdictional cap for the Special Civil Part would force landlords to either file in the Special Civil Part and waive any arrears over the jurisdictional limit or incur the cost and delay of filing in the Civil Part. Changes to both law and court rules should be explored to shift the balance in favor of tenants and debtors.<sup>146</sup>

Similarly, when landlords are seeking possession rather than a money judgment, they could be required to file in the Civil Part rather than enjoying the summary proceeding offered in the landlord-tenant courts of the Special Civil Part.<sup>147</sup> This would benefit tenants by allowing them to assert counterclaims, engage in discovery, and otherwise use the full range of civil procedure to defend against eviction. As Shirin Sinnar points out, summary eviction proceedings emerged as an alternative to violent self-help by a landlord, where their haste was viewed as a reasonable compromise.<sup>148</sup> This “seems anomalous at a time when our intuitive response to the threat of violence is to restrain the perpetrators and protect the victims, rather than stack the legal deck in favor of one side.”<sup>149</sup> Eliminating summary eviction proceedings has the potential to both deter landlords from filing for eviction and provide tenants with a wider range of defensive options when faced with eviction.

#### IV. TOWARD DECOMMODIFICATION OF HOUSING

##### A. *Introduction*

Procedural changes around debt and eviction offer improvements for tenants, but fail to address the fundamental inequality of the landlord-tenant relationship. New Jersey’s pandemic relief statute opened an opportunity, however small, to reconsider the financialization and commodification of rental housing. By imposing an eviction moratorium

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143. See, e.g., N.J. CT. R. 6:2-1 (specifying form to use for summons).

144. *Id.* 6:1-2(a).

145. Order Temporarily Modifying Cases Affected by the COVID-19 Pandemic (2021).

146. See generally Sinnar, *supra* note 64.

147. See N.J. CT. R. 6:3-4.

148. Sinnar, *supra* note 64, at 34.

149. *Id.*

and restricting the sale and transfer of rent debt, it incrementally shifted housing away from an asset and toward a place to live. This shift exists in a broader context of decommodification projects and models for decommodified housing.

A variety of mechanisms are available to further decommodification. Through property regulation, the tax code, development policy, and financing mechanisms, the state itself exerts enormous influence over housing. Housing movements provoke conceptual shifts and achieve policy results including the right to counsel. Tenant unions advocate both against their individual landlord and for tenant interests more broadly. Social housing and community land trusts offer alternatives to traditional ownership that retain the stability of secure tenure. These pathways all have a role in furthering the project of decommodification and promoting the goals of stable and affordable housing.

#### *B. Property and the State*

Fundamentally, questions of housing are questions of property, and the state plays a central role. Joseph Singer contests the description of property rights as contrary to government regulation, arguing against the idea that “property means ownership free from governmental regulation” and that regulations “are presumptively pernicious and bear a heavy burden of justification.”<sup>150</sup> Of particular relevance to our discussion of rental housing, Singer argues that “[r]ather than identifying an owner and presuming that owner controls a particular resource for all purposes, we can understand property as rules that structure the contours of human relationships by adjusting the relations among multiple ‘owners.’”<sup>151</sup> In concrete terms, the idea of a housing market apart from the government is factually inaccurate.<sup>152</sup> State action can either preserve the status quo or work toward reducing inequality.<sup>153</sup>

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150. Joseph William Singer, *Property*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 240, 254 (David Kairys ed., 1998).

151. *Id.* at 256–57.

152. MADDEN & MARCUSE, *supra* note 4, at 141–42 (cataloging the legal and infrastructural framework that makes housing construction possible); *see, e.g.*, *Ingram v. Borough of Fort Lee*, 303 A.2d 298, 538 (N.J. 1973) (“The police power is vested in local government to the very end that the right of property may be restrained when it ought to be because of a sufficient local need.”). But Madden and Marcuse also criticize housing policy as a concept, describing it as “an artificially clear picture of what the state actually does in myriad uncoordinated and at times contradictory ways.” MADDEN & MARCUSE, *supra* note 4, at 119.

153. *Id.* at 143–44.

*C. Decommodification*

The contradiction between housing as a necessity and housing as a business results in individual gain at social expense.<sup>154</sup> “Every day, thousands of housing investors make ‘sound business decisions’ that result in the elimination of affordable housing units and even in the intentional destruction of housing.”<sup>155</sup> Kathy McAfee criticizes the typical demands for rent control, eviction protections, and expanded subsidies, arguing that they do not go far enough to help low-income renters and perpetuate the role and profits of the real estate industry.<sup>156</sup> McAfee distinguishes between reforms that perpetuate profit-driven housing and reforms that move toward fundamental change.<sup>157</sup> Madden and Marcuse draw a similar distinction, advocating for “transformative demands,” or “actions that improve present conditions while also progressively enabling the building of a different world.”<sup>158</sup> They enumerate and explore a variety of possibilities, including increased public housing as an end in itself as well as a means to limit the ability of private developers to dictate the terms of development.<sup>159</sup> Even without direct provision of housing, a number of measures can move toward decommodified housing: “rent controls, more secure tenancies, public ownership of land, public financing, limits on speculation,” and regulation of finance mechanisms.<sup>160</sup>

Emily Paradise Achtenberg and Peter Marcuse advocate also for transformative change and offer a useful definition of decommodification: “to limit the role of profit from decisions affecting housing, substituting instead the basic principal of socially determined need.”<sup>161</sup> Achtenberg and Marcuse are willing to accept some degree of private development

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154. See Ana Maria Peredo & Murdith McLean, *Decommodification in Action: Common Property as Countermovement*, 27 ORG. 817, 824 (2020).

155. Kathy McAfee, *Socialism and the Housing Movement: Lessons from Boston*, in CRITICAL PERSPECTIVES ON HOUSING 405, 406 (Rachel G. Bratt et al. eds., 1986).

156. See *id.* at 407. Marika Dias makes a similar point while arguing that pandemic aid ultimately benefits landlords, and that assistance should have been structured as compensation for landlords’ business failures. See Dias, *supra* note 31, at 192.

157. See McAfee, *supra* note 155, at 408.

158. MADDEN & MARCUSE, *supra* note 4, at 200. These transformative demands are also known as “non-reformist reforms.” *Id.* (citing André Gorz, STRATEGY FOR LABOUR: A RADICAL PROPOSAL (Martin A. Nicolaus & Victoria Ortiz trans., Beacon Press 1967) (1964)).

159. See *id.* at 203–04.

160. *Id.* at 201.

161. Emily Paradise Achtenberg & Peter Marcuse, *Toward the Decommodification of Housing*, in CRITICAL PERSPECTIVES ON HOUSING 474, 476–77 (Rachel G. Bratt et al. eds., 1986).

for profit, but advocate for removal for housing from the speculative market through a variety of mechanisms.<sup>162</sup> They also argue for greater government control over housing product, even by private developers, and financing for non-profit housing development through direct government spending.<sup>163</sup>

Samuel Stein explores the power of real estate, and real estate interests, in the planning process and in the policy decisions that cities make.<sup>164</sup> Stein suggests that inclusionary upzoning, typically a measure that encourages gentrification, could be used instead to “forc[e] the wealthy to integrate at least a little bit.”<sup>165</sup> Stein also compares the costs of revitalizing public housing with the present expenditures on housing through tax benefits and subsidies for private housing, noting government spending of \$200 billion annually on these programs.<sup>166</sup> Stein proposes changes to the tax code, including taxes to recoup the private gain from land value that reflects public infrastructure.<sup>167</sup> Taxes could also deter vacancy, foreclosure, and luxury unit production.<sup>168</sup> Stein mentions reindustrialization as a way to provide a force in favor of low property values to counter real estate interests.<sup>169</sup> Stein also discuss a five-point plan developed by New York City Not For Sale that demands radical, but theoretically possible, change.<sup>170</sup> The demands are to end homelessness and enact a citywide eviction moratorium, enact universal rent control, use existing mechanisms to establish tenant control of derelict buildings, fully fund the New York City Housing Authority, develop new public housing, and devolve development decisions to

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162. *Id.* at 477 (offering possibilities including “direct ownership by government or nonprofit entities, collective ownership by resident-controlled corporations or neighborhood councils, nonequity or limited equity cooperatives, or nonspeculative resident ownership of single-family homes.”).

163. *Id.* at 478.

164. STEIN, *supra* note 52, at 6. Stein observes the inequality that stems from the outsize role of real estate in municipal policy: “[H]yper-invested and deeply disinvested cities are not necessarily separate places. Often they coexist within the same municipality, and even on the same block. Cities like Newark and Chicago are simultaneously expanding and collapsing in value.” *Id.* at 195.

165. *Id.* at 159–60. Stein acknowledges the issue of inclusionary zoning’s reliance on inducing private actors to generate a public good through the promise of profits. *Id.* at 159.

166. *Id.* at 165 (“Most of that spending goes to homeowners, including over \$85 billion to households making over \$100,000.”).

167. *Id.* at 166–67.

168. *Id.* at 166.

169. *Id.* at 168 (advising caution, however, to avoid environmental and labor harms as well as real estate speculation in another form).

170. *Id.* at 183–84.

community boards.<sup>171</sup> Change is possible, but will not happen without social and political will.

#### *D. Housing Movements*

In addition to achieving tangible results, tenant organizations and housing movements shift social conceptions of property and housing. Lisa T. Alexander explores how housing rights movements “construct the human right to housing in American law by establishing through private and local laws” various rights to shelter and community and “give legal content to a future American constitutional right to housing.”<sup>172</sup> Alexander discusses how the Chicago Anti-Eviction Campaign and other organizations have used the concept of a human right to housing to justify their occupation of foreclosed and abandoned homes.<sup>173</sup> Movements have advocated for municipalities to use their power of eminent domain to transfer unoccupied homes to community land trusts, with some success.<sup>174</sup> Marika Dias discusses the historical and contemporary fights of New York City housing movements, including the 2017 achievement of a right to counsel in eviction cases.<sup>175</sup> As Dias points out, movement action can provoke conceptual shifts regardless of whether the action is immediately successful.<sup>176</sup>

#### *E. Tenant Unions*

Increasing the opportunity and capacity for collective tenant action offers one way to counter exploitation. Kate Andrias and Benjamin I. Sachs propose legal changes to foster mass-membership organizations, including tenant unions, to counter the influence of wealth on politics.<sup>177</sup> They identify several attributes and requirements for a tenant union law, including space for tenants to organize, building access for organizers,

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171. *Id.*

172. Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 248 (2015).

173. *See id.* at 268–71.

174. *See id.* at 272–76.

175. *See* Dias, *supra* note 31, at 180. Organizers were realistic about the limits of this achievement: “Tenants fought for a right to counsel, not because they thought that lawyers could defeat gentrification, but to counteract landlords’ acute weaponization of housing court.” *Id.*

176. *See id.* at 196 (“By creating space to challenge the logic of the system, the cancel rent bill served as a powerful organizing tool, regardless of whether it ultimately passed.”).

177. *See* Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 551–52, 557 (2021).

information to enable tenants to organize, funding mechanisms, and collective bargaining power.<sup>178</sup> Andrias and Sachs note the importance of framing the housing issue in legislation, providing a way for tenants to identify their own position and that of their opposition within a system.<sup>179</sup> Kathy McAfee positions tenant unions as a step toward larger change, rather than a solution in themselves.<sup>180</sup> Andrias and Sachs also consider the role of law in supporting protest through a right to strike and protections against reprisal.<sup>181</sup>

Short of a law that explicitly creates new rights to unionize, existing law and policy can be reinvigorated to encourage collective action. For example, New York's Rent Strike Law, also known as Article 7-A, allows organized tenants to petition for an administrator to control their building when the owner fails to maintain it.<sup>182</sup> The requirement that one-third of tenants in a building join an action encourages communication and organization among tenants.<sup>183</sup> This type of receivership procedure can be combined with other measures to encourage transformation of buildings neglected by private owners to social housing through municipal foreclosure or purchase.<sup>184</sup>

178. *Id.* at 585–86; see OKSANA MIRONOVA ET AL., COMMUNITY SERVICE SOCIETY, PATHWAYS TO SOCIAL HOUSING IN NEW YORK: TWENTY POLICIES TO SHIFT FROM PRIVATE PROFIT TO PUBLIC GOOD 37 (2022) (advocating for an “Open Books” law to provide tenants with their landlord’s financial information to assist with social housing conversions and verify landlord claims of financial hardship).

179. Andrias & Sachs, *supra* note 177, at 591 (“Framing high rents as an injustice suffered by tenants in a city can activate a collective identity of city tenants.”); see Dias, *supra* note 31, at 196 (describing tenant meetings questioning the justice of our property system as “liberation moments”).

180. McAfee, *supra* note 155, at 419 (“These demands are there because they provide specific, short-range goals that working-class people can fight for while building power to win more far-reaching measures.”). This approach matches the focus on “transformative demands” and “non-reformist reforms” discussed *supra* at note 158 and accompanying text.

181. Andrias & Sachs, *supra* note 177, at 629–30. Conflict and disruption have been shown to be important for working class social movements to achieve their goals. *Id.* at 631 n.384. See also Dias, *supra* note 31, at 207–08 (criticizing the historical role of nonprofit organizations and lawyers in channeling movements to legal avenues).

182. Greg Baltz, *Resurrecting the Rent Strike Law*, 26 U. PA. J.L. & SOC. CHANGE 1, 3–4 (2023); MIRONOVA ET AL., *supra* note 178, at 48 (remarking that an average of twenty-three 7A cases were filed per year between 2016 and 2019). But see Dias, *supra* note 31, at 202 (supporting rent strikes but acknowledging that they do not disrupt the assumption that property ownership entitles the owner to rent); cf. McAfee, *supra* note 155, at 417 (noting the tendency for tenants to “accept[] the notion that those who own the shelter of others have a right to profit from it.”).

183. Baltz, *supra* note 182, at 12. But note that this requirement also “incentivizes landlords to retaliate against individual tenants and cause them to abandon the case.” *Id.*

184. MIRONOVA ET AL., *supra* note 178, at 48; Chester Hartman & Michael E. Stone, *A Socialist Housing Alternative for the United States*, in CRITICAL PERSPECTIVES ON HOUSING



*F. Social Housing and Secure Tenure*

Chester Hartman and Michael E. Stone explore ways to provide housing security outside the typical roles of owner and tenant, noting the insecurity attendant to both ownership subject to mortgage and tenancy subject to eviction.<sup>185</sup> They advocate for an option for homeowners to convert their homes to social ownership, losing the ability to sell but gaining secure tenure.<sup>186</sup> Stein proposes this, too, for households at risk of foreclosure.<sup>187</sup> A somewhat less radical option is to provide aid for households facing foreclosure through “public mandates for loan modifications and principal write-downs, possibly using the power of eminent domain.”<sup>188</sup> Hartman and Stone argue too for “a compulsory buyout of the nation’s entire rental housing stock.”<sup>189</sup> Existing owners would receive the value of their initial investment, plus whatever they spent on maintenance and improvements, but not the appreciation in value during their ownership.<sup>190</sup> Hartman and Stone analogize their proposal to urban renewal programs, noting that courts upheld the use of eminent domain in that context.<sup>191</sup> Hartman and Stone link this program of state and social ownership to rents set at tenants’ ability to pay.<sup>192</sup> Under this program, some tenants would effectively subsidize others rather than creating profits for landlords.<sup>193</sup>

Another way to improve security of tenure, although not to the same extent, is to enact good-cause eviction protections. New Jersey has

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484, 504 (Rachel G. Bratt et al. eds., 1986) (proposing receivership with a deadline for the landlord to sell to the tenants or another social owner, with condemnation as a backup).

185. Hartman & Stone, *supra* note 184, at 490.

186. *Id.* at 490–94; *see also* McAfee, *supra* note 155, at 419–20 (“The intention here is to separate the negative aspects of homeownership (the burden of debt and the temptation to exploit one’s tenants) from the socially positive aspects (security of tenure and the incentive to improve one’s home).”).

187. STEIN, *supra* note 52, at 164.

188. MADDEN & MARCUSE, *supra* note 4, at 207–08 (citing Josh Harkinson, *Inside the Radical Plan to Fight Foreclosures with Eminent Domain*, MOTHER JONES (Jan. 7, 2013), <https://www.motherjones.com/politics/2013/01/eminent-domain-mortgage-gluckstern/>); *see also* Alexander, *supra* note 172, at 278–84 (detailing a plan for the use of municipal eminent domain power to refinance underwater mortgages). Madden and Marcuse put it well: “Foreclosure is currently a mechanism for dispossession and gentrification, but it could be turned into a force for redistribution of dwelling space in favor of those who inhabit.” MADDEN & MARCUSE, *supra* note 4, at 208.

189. Hartman & Stone, *supra* note 184, at 498.

190. *Id.* Repayments of mortgage principal would not be included: “these have in effect been made by the tenants all along via their rents.” *Id.*

191. *Id.* at 499.

192. *Id.* at 500.

193. *Id.*

required good cause for many residential evictions for decades.<sup>194</sup> New York has good-cause protection for some units, but advocates are working toward a universal right to lease renewal.<sup>195</sup>

Community land trusts (“CLTs”) provide an opportunity to decouple use value from exchange value and maintain affordability of housing over the long term. Ana Maria Peredo and Murdith McLean explore community land trusts and their restrictions on alienation, as a movement against markets in land.<sup>196</sup> “The [community land trust] acts as trustee for the land, allowing persons to obtain a long-term ground lease on which privately owned housing may exist or be built.”<sup>197</sup> There are variations of community land trusts, but generally they control the sale price of dwelling units and retain a right of first refusal, with the aim of maintaining long-term affordability.<sup>198</sup> Samuel Stein also considers community land trusts, citing the example of Cooper Square in New York.<sup>199</sup> Stein proposes that cities add properties delinquent on taxes to scatter-site community land trusts, rather than selling the tax liens to speculators.<sup>200</sup> Another option to bring existing housing into a social housing program is for cities to have a right of first refusal for all home sales.<sup>201</sup> If the city exercised the right to buy, the housing would be added to a community land trust or other social housing program. Similarly, tenants could be afforded a right of first refusal, either directly or in cooperation with a nonprofit organization or community land trust.<sup>202</sup> In addition to its explicit purpose, this measure would also deter

194. See N.J. STAT. ANN. § 2A-18:61.1 (West 2024).

195. MIRONOVA ET AL., *supra* note 178, at 33; see Erica Braudy & Kim Hawkins, *Power and Possibility in the Era of Right to Counsel, Robust Rent Laws & COVID-19*, 28 GEO. J. POVERTY L. & POL’Y 117, 155 (2021).

196. Peredo & McLean, *supra* note 154, at 824–25. Peredo and McLean situate community land trusts and worker-recovered cooperatives within the framework of the “double movement” theorized by Karl Polanyi. *Id.* at 820; see also KARL POLANYI, *THE GREAT TRANSFORMATION* 75–79 (Beacon Press 2001) (1944).

197. Peredo & McLean, *supra* note 154, at 825.

198. See *id.* at 824–27. The Champlain Housing Trust reported good results in both initial and long-term affordability as well as high community stability. See *id.* at 826–27.

199. STEIN, *supra* note 52, at 162–63.

200. *Id.* at 164.

201. *Id.*; see also MADDEN & MARCUSE, *supra* note 4, at 208 (citing Feargus O’Sullivan, *Paris Wants to Keep Central Neighborhoods from Becoming “Ghettos for the Rich”*, CITYLAB (Dec. 19, 2014), <https://www.bloomberg.com/news/articles/2014-12-19/paris-wants-to-keep-central-neighborhoods-from-becoming-ghettos-for-the-rich>).

202. MIRONOVA ET AL., *supra* note 178, at 13–14; see Baltz, *supra* note 182, at 34 (presenting tenant opportunity to purchase alongside a tenant power to initiate sale when a building is under the control of an administrator).

speculative investment and provide tenants with information on the value of the building.<sup>203</sup>

Yet even the decommodified models of community land trusts or social housing are not a panacea. Below-market-rate rents will be unaffordable for some, and evictions for nonpayment remain a possibility. In a tenant-owned building, nonpayment by some tenants falls directly on those who are paying. There is still a need for subsidies and emergency assistance within decommodified models. By reducing the drive for profit and the role of distant financial interests, however, decommodification offers a path toward housing that serves the needs of those who occupy it.

The effort to shift power away from speculative investment and prioritize the use value of housing can proceed along several paths. Changes that increase tenant power within the for-profit housing system can, in addition to improving conditions for tenants, further organization toward social housing and deter speculation.<sup>204</sup> These incremental changes, however, should be made with an eye toward true decommodification.

## V. CONCLUSION

Although the covered period is over, low-income renters still face serious challenges.<sup>205</sup> The statutes discussed in this Note demonstrate the possibility of restructuring the contractual underpinnings of the landlord-tenant relationship. The pandemic relief statutes discussed above operate at the intersection of housing and debt. Both housing and debt are frequently exploitative. They are also intertwined, with unpaid rent becoming debt and poor credit scores prompting landlords to reject applications. Both statutes are limited in temporal scope and were enacted strictly in response to the economic effects of the pandemic, rather than broader considerations of need. The best merit of these statutes—and any expansion of them—may be the conceptual shift they engender toward a more personal and reciprocal relationship in housing transactions. They counter the tendency toward depersonalization that is essential to commodification and serve as a reminder that change is possible. Housing should be a social responsibility, and reframing debt

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203. See MIRONOVA ET AL., *supra* note 178, at 14.

204. *Id.* at 4 (noting the role of regulation and enforcement in limiting profits and thus deterring speculative investment).

205. Fulford, *supra* note 34.

as an interpersonal relation may help to reframe housing as an interpersonal relation.

These statutes indicate some possibility and provide a conceptual opening, but much more needs to be done to protect tenants and decommodify housing. Dimensions include social ownership, public financing, and neighborhood control.<sup>206</sup> New York City has implemented several tenant protections, including right to counsel, permanent rent regulation, and enhanced abatement claims, that should be used more widely.<sup>207</sup> Many ideas have been proposed to reduce speculation on land and housing, increase community control of development, and create long-term affordability. The ongoing work of housing movements must continue to generate the necessary social and political will to enact these changes and create a meaningful right to housing.

The emergency situation of the pandemic made restrictions on eviction and debt collection politically possible. Although passed during extraordinary times, the statutes offer the hope of more profound restructuring of landlord-tenant relations and of our housing system. However, it will take more, both in conceptual shifts and in incremental protections, to make housing provision a social responsibility.

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206. See generally Achtenberg & Marcuse, *supra* note 161.

207. See Braudy & Hawkins, *supra* note 195, at 117 (arguing also for the abolition of summary proceedings and possessory judgments, noting that possessory judgments were temporarily barred by the Tenant Safe Harbor Act). But see Dias, *supra* note 31, at 199 (arguing that the Tenant Safe Harbor Act was not true tenant assistance and favoring rent cancellation as the response to the pandemic).