

A Critique of the Legal and Philosophical Case for Rent Control*

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ABSTRACT. Rent control is an economic abomination. It diverts investments away from residential rent units, it leads to their deterioration, it is responsible for urban decay such as in the South Bronx, it does not help poor tenants, it is a horrendous means of income redistribution. Yet this economic regulation is beloved of intellectuals (hot beds of pro rent control sentiment are Berkeley, Ann Arbor and Cambridge) particularly in the legal and philosophical communities. The present article is dedicated to an exploration and rejection of the arguments on behalf of rent control which emanate from this source.

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The economic case against rent control is overwhelming.¹ It is the cause of apartment shortages, housing deterioration, lessened investment, decreases in tenant and hence, labor mobility, and it artificially and inefficiently promotes condominiums, housing cooperatives and public housing the later of which also brings about great difficulties of its own.

The argument for rent control is often put forth on grounds of equity. Tenants as a group have less wealth than landlords, and this housing policy is a way of increasing the income of the latter and decreasing that of the former. This is not to say that rent control *transfers* wealth from landlord to tenant. It cannot be doubted

that controls dissipate the wealth of the owners of residential rental units. But it is the rare tenant who actually gains thereby.² Certainly this does not apply to the renter who is frozen out of the controlled sector, and must avail himself of what is available in the newer uncontrolled area.³ Nor does it hold true for the tenant, such as in the South Bronx, who sees the services supplied by his unit deteriorate to the low level of this rent, and even below. No, gains go only to the relatively rare tenant in a good neighborhood, located in a high rise with many vacancy decontrols (so that the landlord has both the wherewithal and the incentive to maintain the building in good repair). Rent control thus not so much transfers money from poor tenants⁴ to rich landlords as it impoverishes both.⁵

Even supposing, if only for the sake of argument, that rent control actually transferred money from rich landlords to poor tenants,⁶ it still does not follow that it would be equitable. To infer that it would is to confuse equity with egalitarianism, certainly very different matters. That is, it is not necessarily equitable to reduce the gap between rich and poor, although this would certainly be a move in the direction of egalitarianism. If income equality is to be equitable, it must be shown that the rich do not deserve their (excess) wealth, and that the poor do. This would be the case if, for example, the wealthy had in effect stolen their riches from the impoverished, or somehow "exploited" them out of these monies. While this claim is indeed maintained by the Marxists, it has very little to do with rent control, and no one has at least so far even posited, let alone proved, a special type of housing or rental exploitation. In the absence of

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such a phenomenon, it may well be asked why landlords alone should be forced to make good the impecuniousness of tenants.⁷ After all, grocers and restaurateurs are not the only ones compelled to pay for food for welfare recipients, nor haberdashers to clothe them; rather, these funds come out of general tax revenues.

For these reasons there are very few academics who attempt to defend rent control,⁸ and only the exceptional economist who has done so, at least in print.⁹ The administration of the City of New York is required by law to conduct a semi-annual housing survey in order to continue its rent control legislation. In order to attain this end they have mainly relied upon sociologists, bureaucrats and social workers.¹⁰ This opposition to the measure ranges widely over members of the economics profession, and is representative of all shades of opinion on politics and ethics. Even economists with otherwise impeccable socialist credentials are on record as critics. For example, states Lindbeck¹¹ (1972):

In many cases, rent control appears to be the most efficient technique presently known to destroy a city – except for bombing.

And according to Myrdal¹² (1965, p. 12)

Rent control has in certain western countries constituted, maybe, the worst example of poor planning by governments lacking courage and vision.

Nevertheless, support for rent control is to be found in the law review and philosophical literature (Radin, 1986, 1987; Rose-Ackerman, 1985; Kuflik, 1986) and these commentators, too, deserve to be taken to task for their views. It is to this undertaking that we now turn.

To their credit, the legal philosophers who favor rent control have not for the most part relied upon economic theory in support of their position. Instead, they have reasoned in a very different manner, one no less objectionable, however.

Let us begin our analysis by considering the views of Radin (1987, p. 1857) who states:

. . . residential rent control, minimum wage requirements, and other forms of price regulation,

as well as residential habitability requirements, safety regulation and other forms of product quality regulation all become contests over the issue of commodification.

She is indeed correct in this claim. If we embrace a moderate version of the Marxist critique of private property rights, rent control can be seen as an attenuation of landlord ownership. A more extreme version of noncommodificationism, of course, would spell the death knell of private ownership of rental property entirely, and would obviate the “need” for rent control in the first place.

But her argument rests upon the implication that there is a case against commodificationism or private property rights, and this is something to be proven, not merely asserted. In any case, even from her own socialistic perspective, the argument for noncommodificationism is strongest when it comes to the human being (voluntary slave contracts should be nonenforceable; strict specific performance contracts must be set aside) and weakest when it comes to physical property (no individuals can own much of anything outright). After all, the success of the west in the Cold War, and the failure of the U.S.S.R. can be traced to their very different treatments of assets such as rental housing.

Another of her arguments is that (Radin, 1987, p. 1878)

. . . the economic analysis of residential rent control take into account not only the monetary costs to landlords and would-be tenants, but also the decline in well-being of tenants who are forced to lose their homes, break up their communities, and endure the frustration, disruption and other “costs” of moving. But in practice the analysis proceeds differently. Reasoning in market rhetoric, with its characterization of everything that people value as monetizable and fungible, tends to make it easy to ignore these other “costs.” Money costs and easily monetizable matters are at the center of the map, and personal and community disruption are at the edges. Because it tends to ignore “costs” that are not readily monetizable, commodification-talk tends to err on the side of alienation.

Radin (1987, p. 1878, ft. 107) cites Hirsch (1984, p. 604) as a typical example of reasoning

poisoned by market rhetoric; that is, one that ignores subjective costs. Whether this occurs in this one case is for others to say. But the claim that economics in general ignores or deprecates that which is not easily or directly monetizeable is false. Introductory economics textbooks typically drum into students the concepts of psychic income, consumer and producer surplus, subjectivity of tastes, nonmonetary values, etc., all of which constitute counter evidence to Radin's point about market rhetoric.¹³

But this is all theoretical. Let us get down to practicalities. Take the case of the tenant who can no longer afford to pay the rent, either because he lost his job, or he was demoted and his salary reduced, or there was a greater demand to live in that neighborhood on the part of other people, and the landlord could now require a higher fee as a result. The market, then, would "force" this person out of his apartment, and into more modest accommodation. The newcomer would presumably value the dwelling more highly, at least as shown by the fact that he was willing to pay more for occupancy. The landlord, led by Adam Smith's "invisible hand," earns a greater return by placing the housing unit in the hands of the hands of the more efficient user.

Radin in effect objects to this line of reasoning on the ground that we are ignoring the non-monetizable costs to the tenant who was evicted. Not at all, replies the economist. For the presumption is that the nonquantifiable amenities of the evictee (rent asunder from neighbors, community, etc.) will be offset by the nonquantifiable benefits conferred on the new tenant (closeness to work, prestige of living in an increasingly upscale neighborhood, etc.). If Radin wants to object to this analysis, she must show that this implicit weighting of imponderables is faulty. This, needless to say, she does not even begin to do; instead she contents herself with the unsubstantiated charge that economists ignore all subjective values.

But her criticism of economics transcends far more than merely housing analysis. It applies to virtually all markets. For example, at present living standards, the poor, unless they wish to confine their total expenditures to automobiles, are pretty much frozen out of the Rolls

Royce market. This, undoubtedly, forces them to "endure the frustration, disruption and other 'costs'" associated with having to drive Hondas and Fords. But this is highly problematic. There is no particular problem with the luxury car market. We cannot of course specify the subjective benefits which accrue to those who purchase Rolls Royces any more than we can the owners of lower end products. But, contrary to Radin's implicit criticism, we have no reason to suppose that these considerations vitiate the market. The burden of proof to the contrary would appear to rest with Radin, but she is as far from meeting this burden as she appears to even recognize it.

States Radin (1987, p. 1920):

Regulation of residential tenancies can be seen as connected to identity and contextuality: attempting to make possible and protect the constituting of one's personhood in one's home, and one's continuity or residence there, because the home is a justifiable kind of personal property. Regulation can be seen as attempting to ensure that tenants are not forced to move from their homes for ideological, discriminatory, or arbitrary reasons, or by a sudden rise in market prices, and to ensure that rental housing is decent to live in and a decent place for family life.

This sounds all well and good, until we reflect upon the fact that A's home, the place where he lives, is actually *owned* by B, the landlord.¹⁴ Suppose B wants to live in the apartment himself. According to Radin, he would have no such right, since to do this would be to violate the "human flourishing" (Radin, 1987, p. 1849) of A. But what about B's "human flourishing?" And suppose that B wants to evict A not for owner occupancy, but in order to maximize the returns on his investment in rental housing, like every other capitalist. At first glance this seems cold, heartless and cruel. We can just hear Radin, in our mind's eye, resorting to the Marxist aphorism "People before profits." But where does this author and her ilk think that the investment for the housing which is now supporting the "human flourishing" of A came from? She forgets all about B, in her virtually total focus¹⁵ on A.

But there are even more basic problems with Radin's (1987, p. 1849) concept of "human

flourishing." Perhaps there is no more subjective, ideologically charged concept than this in all of political economy. No independent criteria are offered in its defense. One gathers the spirit of a poker game where the rules are continually changed in midstream. Further, why is freedom¹⁶ not part of "human flourishing?"¹⁷ The way Radin uses the term, it is a recipe for supporting the desires of those she favors (e.g., some tenants protected by rent control) and riding roughshod over the rights of all other people (landlords, and the tenants hurt by rent control.) After pillorying economists for not incorporating subjectivity into their analysis, it comes with particular ill grace for Radin to overlook this concept in her own.

As well, there is the economic point that if B is so totally constrained in his ability to benefit from the ownership of the dwelling, why would he want to own it in the first place? And if he does not, that is, if people are unwilling to become landlords, then, by definition, no one can be a tenant either. The obvious rejoinder from the Radins of the world is "Fine, who wants landlords anyway; let's all become single family owners." The trouble with this economically unsophisticated response is that it costs a significant amount of money to build or purchase a housing unit, which is beyond the reach of many people. Instead of benefiting tenants, then, rent control and other restrictions on property owners mentioned by Radin push the poor one step closer to living on the street.

Imagine the plight of a young person just starting out on his own, looking for a place to live. If he must build a home with funds now available to him, he will be in a very unenviable situation. Fortunately, capitalism allows *renting*. This means that other people can build accommodation, and this young man can avail himself of it for a relatively low price (compared to the costs of building it for himself). In much the same way as the entrepreneur invests in plant and equipment workers would be unable to undertake on their own account, the landlord provides shelter which would otherwise be unobtainable. Radin's "human flourishing," intent upon driving a wedge between the capitalist employer and the capitalist real estate investor, on the one hand,

and the people they serve on the other (tenants, employees) thus renders the situation of the latter a very precarious one indeed.

For the advocate of free enterprise, all of these interferences with markets – whether in the workplace or at home or anywhere else – are unjust and inefficient. They are a rogue's gallery of much that is wrong with modern society. All the more reason then, to nip this tendency in the bud by not acceding to *any* diminution of total alienability of rental housing, up to, and including, the entire elimination of rent control. This, after all, is a matter of principle, not merely expediency.

Rose-Ackerman (1985, p. 941) offers another argument in favor of the punitive aspects of rent control against landlords: "Compensation is also not justified if the owners accepted the risk of the restriction at the time of purchase. This expectation will have been reflected in the original purchase price, and it would be redundant to compensate the owners further."

The idea, here, one would suppose, is to obviate the argument from "takings" (Epstein, 1985). That is, rent control can easily be interpreted as a "taking" from the landlord, for which the government must offer compensation. To be sure, this is not a seizure of physical property, as in the nationalizations utilized by the Soviets and other communists. On the other hand, in prohibiting the property owner from charging a market rent, the government is clearly engaging in a taking of sorts: it artificially reduces the value of the landlord's property.¹⁸ The problem, from the point of view of rent control advocates such as Rose-Ackerman, is that if the government must compensate property owners for its taking from them, one, they will be less inclined to promote legislation of this sort, and, two, it will reduce the penalty imposed upon landlords, a result to be avoided if at all possible.

Her argument, then, turns on the fact that all owners of residential rental units always face the risk that rent control will one day be imposed upon them. When this occurs, well, the landlords deserve it: that is, they deserve the full brunt of it, with no compensation for any supposed takings. To hammer the nail into the coffin, she avers, the landlords purchased their

property at a lower price which capitalizes the risk of just this sort of law being enacted. To compensate them for what the market has already paid them (through this lower price) would in effect be adding insult to injury.

There are grave problems, however, with this view, no matter how reasonable it sounds at first. To see them, consider the following case. Suppose the government has a policy of compensating victims of crime. I buy a home in Harlem, a high crime area. I am mugged. I apply for compensation. According to Rose-Ackerman, I should be turned down since the purchase price of my house reflects the high risk of crime. Even on the left liberal philosophical grounds underpinning the arguments of Rose-Ackerman this is appalling, since the poor would be excluded from this program. More generally, the police should not come to the aid of any resident of Harlem for the same reason. After all, this person bought his home at a price which reflected the greater risk of being robbed; "let him hire his own private guards," would seem to be the implication of this perspective. The fact that he already pays taxes for police protection should be ignored, it would appear.

Rose-Ackerman (1985, pp. 958-959) offers yet another case for rent control, based on "conditional coercion,":

At present, the prisoner's dilemma may well provide an important justification for subsidized housing programs with coercive conditions. Poorly maintained housing affects the value of neighboring property with the net result that no one may find it worthwhile to incur maintenance expenses. If all could be induced to upgrade their property, all would benefit. Subsidies could be provided to landlords and homeowners on the condition that they fix up their property. However, if property owners can sell their upgraded assets to the highest bidder, a subsidy program of this kind is not conditionally coercive. Conditional coercion arises when the government wishes not merely to improve neighborhood quality but also to make it possible for the former residents to remain in the newly upgraded housing. Thus, landlords may be forbidden to evict tenants and tenants may be eligible for subsidy only if they live in apartments that fulfill housing code standards. Similarly, urban homesteading programs, which are quite self con-

sciously modeled after the homesteading programs for nineteenth century farmers, encourage low and moderate income people to fix up old housing and impose resale restrictions to ensure that the rehabilitated building continues to provide housing for families with low and moderate incomes.

At the outset this might not appear to be an argument for rent control, for this program is nowhere mentioned in the quote above. However, rent control must of necessity be part and parcel of this urban homesteading plan, for if it is not in effect the extant residents of the newly renovated property will not be able to afford the higher rents which could now be charged for the improved accommodations. If the government is to "make it possible" for these tenants to continue to occupy their premises, rent control of some sort must be imposed.

Having settled that issue, let us now consider some criticisms of the Rose-Ackerman argument. She is resorting to the "market failure" argument based on externalities or "neighborhood effects":¹⁹ if one landlord improves his property, he can only recoup some part of his investment as long as the others maintain the status quo, since upscale high paying tenants will still avoid him, for while his apartments are now of high quality, the neighborhood itself is still a nondistinguished one. From this Rose-Ackerman draws the conclusion that government subsidies are warranted; but she goes too fast, as there are several market responses to just this type of situation. For example, a bunch of landlords can act in concert, whether explicitly, through a property owners' association, or implicitly, in response to the same market forces that accounted for the fact that one of them was led to an upgrading procedure. On the other hand, if the transactions costs are too steep for such explicit cooperation, then one real estate firm may purchase the holdings of a large group of landlords. This company may do so at low prices which reflect the relative state of nondevelopment. Then, it may engage in repair of the entire group of high rises, capturing for itself all of the neighborhood or externality effects which in the fallacious view of Rose-Ackerman, justify government intervention into the marketplace. But suppose that this market internalization of

