

Law and the Precarious Home

Socio Legal Perspectives on the Home in Insecure Times

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and Caroline Hunter

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Introducing Precarisation: Contemporary Understandings of Law and the Insecure Home

HELEN CARR, BRENDAN EDGEWORTH
AND CAROLINE HUNTER

I. INTRODUCTION

PRECARIOUSNESS AND INSECURITY are provocative ideas and for many are key signifiers of our times. When juxtaposed with the security that is implicit in common understandings of ‘home’ they become particularly unsettling. The chapters in this collection explore aspects of that dissonance and the work that law does in ameliorating or intensifying it.

This introductory chapter has two purposes. First, it sets out the rationale for the book and explains our approach to the term ‘precarious home’ (sections II to IV). It outlines changes in the broader social, economic and political landscape that provide extensive evidence of contemporary ‘insecure times’. It will consider the various ways in which the home, and the legal framework by means of which it is defined and regulated, nationally and locally, formally and informally, have been affected by these changes, that we characterise as a growing ‘precarisation’. The chapter will situate the current position by reference to a constellation of recent changes across advanced industrialised societies that arguably render the home precarious, and to various socio-legal responses to the problem.

The sections V to IX of the chapter explores different dimensions of precarisation as analysed in the various chapters of the book. These dimensions are manifold. They include, first, a jurisdictional dimension, as different state regulatory regimes engage with insecurity of and in the home in different ways. Secondly, there is a political dimension, as groups across society experience highly divergent levels of precariousness of home. The role of government will be examined, for example, by reference to the conditions under which housing is provided by the state to the disadvantaged, and the ways in which the state seeks to balance the rights of private owners and tenants, as well as the state’s role in forcing populations to leave traditional

homelands or deciding if and when claims to home are recognised. Thirdly, a wide range of unpredictable events can operate to undermine the security that might otherwise characterise the home. Natural disasters, homelessness and death all contribute to the precariousness of home, highlighting the contingency of any security the home may be presupposed to offer. Law, in its broadest sense, may or may not help in mitigating this ‘precarity’, and—as our book shows—can contribute to it. Fourthly, there is a temporal dimension to the precarious home. Not only is a sense of enduring relationships arguably implicit in the meaning of home, for some home is replete with nostalgia, located somewhere in the past, while for others it is an aspiration and a future location. Fifthly, there is a spatial dimension, as Ferreri et al suggest: ‘Precarisation ... needs to be understood as a spatial process that generates and sustains a varied geography of insecurity, flexibility and temporariness, at once intensifying and normalising precarity.’¹

The potential of precarity as a focus for understanding the times in which we find ourselves notwithstanding, the contributions to this collection also acknowledge its limits. So, for instance it is clear that for many people, in many parts of the world, experiences of home have always been characterised by insecurity. The illustrations of this point in the chapters on South Africa, China and Poland in this collection are particularly important. Moreover, even within the arguably exceptional security offered by liberal welfare states there has been considerable variation both in the protections offered, and the people who are deemed worthy of protection. The rationale of the book then is not to offer without critique a contrast between a secure past and a precarious present, but to suggest that precarity might offer a useful starting point for socio-legal scholars questioning contemporary modes of governing. One further caveat: in identifying a new precariat, or new precarious ways of living, we wish to avoid equating the precarious with victimhood. Several contributors specifically focus on strategic responses to precarious homes, and the political potential of precarity.

II. THE HOME

This book focuses on ‘home’, an idea that is apparently universally understood. However, theorists have demonstrated that ‘home’ is a disputed and controversial notion. For some, the idea of home beyond its physical form is ‘purely phantasmal’, a ‘chimera’.² For others it is more complex. Mallett noted in 2004 that ‘research on the meaning and experience of home

¹ M Ferreri, G Dawson and A Vasudevan, ‘Living precariously: property guardianship and the flexible city’ (2016) 41 *Transactions of the Institute of British Geographers* 246.

² Stephen Merrett and Fred Gray, *Owner-occupation in Britain* (Routledge & Kegan Paul, 1982) 65.

has proliferated over the past two decades, particularly within the disciplines of sociology, anthropology, psychology, human geography, history, architecture and philosophy.³

These researchers approach the home in a ‘multitude of ways.’⁴ For Easthope what is common to many is that home is something other than the physical structure of the dwelling or the surrounding built environment. ‘While homes may be located, it is not the location that is “home”. Instead, homes can be understood as “places” that hold considerable social, psychological and emotive meaning for individuals and for groups.’⁵ This perspective on home suggests it provides security and a place from which to flourish.

Fox’s influential formulation of the ‘home = house + X’,⁶ with the conceptual challenge to ‘unravel [this] enigmatic “X factor”’ illustrates a socio-legal response to the concept of home. For her, law should give a specific value to ‘X’. However, the literature points consistently to the difficulty of defining or knowing what it is about the home that provides security, due to its complex, subjective construction.⁷ Is there a minimum that is globally pertinent, if home is dependent on the perceptions of both the individual and the society?

A different approach, which moves away from these problems, is to acknowledge the essentially contested⁸ nature of the concept. The focus moves to the question of how law and policy often require low-level administrative workers, legal actors, or even home occupiers themselves to ‘know’—and in some cases articulate—aspects of the meaning of home.⁹ This can allow subjective, ‘common sense’ understandings to be acknowledged.

It can also mean that the negative experience of the home can rest beside the often positive portrait of home in much of the literature. Feminist thinkers have long pointed to the home as a place of violence and abuse and they have had to be continually vigilant in efforts to persuade the state to acknowledge its role in protecting vulnerable people within the home.¹⁰

³ Shelley Mallett, ‘Understanding Home: A Critical Review of the Literature’ (2004) *Sociological Review* 62.

⁴ Hazel Easthope, ‘A place called home’ (2004) 21 *Housing, Theory and Society* 128, 135.

⁵ *Ibid.*

⁶ Lorna Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (2002) 29 *Journal of Law and Society* 580, 590.

⁷ Lewin Fereshteh, ‘Elderly Migrants and the Concept of Home: A Swedish Perspective’ in GD Rowles and H Chaudhury (eds), *Home and Identity in Late Life: International Perspectives* (Springer Publishing Company, 2005) 135.

⁸ Walter Gallie, ‘Essentially Contested Concepts’ (1955) 56 *Proceedings of the Aristotelian Society* 167; John S Dryzek, ‘Can There Be a Human Right to an Essentially Contested Concept? The Case of Democracy’ (2016) 78 *The Journal of Politics* 357.

⁹ Jed Meers, *Reconceptualising Home: A study on the UK Bedroom Tax* (Unpublished PLO., University of York, 2018).

¹⁰ Molly Warrington, ‘“I Must Get out”: The Geographies of Domestic Violence’ (2001) 26 *Transactions of the Institute of British Geographers* 365.

For others, even without the reluctantly acknowledged violence of the home, home is a site of repression. Take for instance Rushdie's essay 'Out of Kansas'¹¹ where Rushdie berates the 'conservative homily' at the end of the *Wizard of Oz*, that there is no place like home:

Are we to believe that Dorothy has learned no more on her journey than that she didn't need to make such a journey in the first place? Must we accept that she now accepts the limitations of her home life, and agree that the things she doesn't have there are not loss to her? *Is that right?* Well excuse me, Glenda, but it isn't ...

Home can also be an exclusionary notion, particularly at a time of global movement. Telling migrants to go home or denying legal rights on the basis that the claimant's home is not here but somewhere else are useful examples. For Banky this points to a precarity of place, which relates to the possibility or impossibility of remaining in a specific place. For Banky,

the permission to remain in one's physical place is perhaps paradoxically at the core of a concept of national assignment of privileges and benefits. 'Precarity of place' describes the absence of such permission and can be defined as vulnerability to removal or deportation from one's physical location.¹²

In order to avoid the discriminatory consequences of a static notion of home, some scholars have written of home as a process, something that emerges over time, through practices, rituals and stories, independently of a fixed location.¹³ Migrants and others in transition can experience the opposite process, home *unmaking*, the '*precarious process* by which material and/or imaginary components of home are unintentionally or deliberately, temporarily or permanently, divested, damaged or even destroyed.' (emphasis added)¹⁴

In this collection we have not sought to limit the understanding of home, but we note that whatever approach to the meaning home is taken, the home can be—and is perhaps simultaneously—a place of security and insecurity, of fulfilment and repression, of inclusion and exclusion, of mobility and immobility. Law, once more broadly understood, is deeply implicated in these multiple experiences of home. What is interesting in our collection is how, for some of our contributors, the notion of the precarious home

¹¹ Salman Rushdie, 'Out of Kansas' in Rushdie, *Step Across This Line: Collected non-fiction 1992–2002* (Jonathan Cape, 2002) p 1.

¹² Susan Banky, 'Precarity of place: a complement to the growing precariat literature' in Matthew Johnson (ed), *Precariat: labour, works and politics* (Routledge, 2015).

¹³ Nigel Rapport and Andrew Dawson, 'Home and Movement: a polemic' in NJ Rapport and A Dawson (eds), *Migrants of Identity: Perceptions of Home in a World of Movement* (Berg, 1998) 3–38.

¹⁴ Richard Baxter and Katherine Brickell, 'For Home Unmaking' (2014) 11 *Home Cultures* 133–44, 134.

ceased to be productive. Instead inspired by Butler, they see ‘precarity’ as an ontological condition. As Butler notes,

[p]recariousness implies living socially, that is, the fact that one’s life is always in some sense in the hands of the other. It implies exposure both to those we know and to those we do not know; a dependency on people we know, or barely know, or know not at all.¹⁵

This framing raises difficult questions about the links between life and home—is home a construct to resist the precariousness of life? Is security therefore inevitably illusory? Can, in such cases, the home ever be seen as precarious itself, separated from life? How might an acceptance of precariousness as a condition of existence reshape or reconfigure accounts of home?—and these are themes which are explored throughout the collection.

III. INSECURE TIMES

One starting point for this book is an examination of what we mean by ‘insecure times’. What is it that makes current social arrangements and institutions apparently more marked by ‘insecurity’ today than at any other time? The question might seem to be particularly relevant to the legal sphere, characterised as it is by its aspirations for fixed and stable institutions, practices and norms, where security would appear to be among its inherent features. This notion of security is acutely pertinent to rights to the home, as these rights have traditionally been presumed to be the most secure of all rights. From William Blackstone’s characterisation of property as being a right of ‘sole and despotic dominion’ over things, and Bentham’s ‘property is security’ to Charles Reich’s formulation of property as providing a secure ‘zone of privacy’ for the individual,¹⁶ the home has been conventionally seen by legal theorists as the paradigm case of the individual property right.

Yet, a closer examination of legal history as well as the socio-legal reality of property rights, particularly in relation to the ‘home’, reveals pervasive insecurity and precariousness.¹⁷ Moreover, this insecurity is arguably increasingly evident. A burgeoning academic literature has begun to focus on the contemporary sociological phenomenon of ‘precarisation’ or ‘precarity’. This concept first emerged a decade or so ago in the sphere of

¹⁵ Judith Butler, *Frames of War: When is Life Grievable?* (Verso, 2009).

¹⁶ W Blackstone, *Commentaries on the Law of England*, Bk 2, Ch 1; Jeremy Bentham, *The Theory of Legislation* (Kegan Paul, 1931) ch 2; C Reich, ‘The New Property’ (1964) 73 *Yale Law Journal* 733.

¹⁷ See N Piska, *The Precarization of Real Property Law: an Essay on the Evisceration of Equity and Financial Capitalism* (unpublished, 2017) paper with author.

industrial relations to describe the effects of the broad changes consequent on the ‘deregulation’ of the economies of advanced industrialised societies from the 1980s onwards, and corresponding transformations of the post-war welfare state. More specifically, the deregulation of labour markets was central to the legal transformation of the post-war welfare state. As late modern economies shifted from Fordist to post-Fordist patterns of production, that is to say, where plant size is reduced, and mass production is less pronounced, union membership decreased and workforces became, or were forced to become, more ‘flexible’.

Further, the widespread political rejection by governments over the last three decades of collectivist solutions to social problems in favour of more individualist policies has progressively undermined the legal entitlements of employees in the workplace.¹⁸ Despite large differences across different states, the new model is manifested by principles that give greater primacy to *individual* rights in the workplace, and ‘the rediscovery of the individual in labour law’.¹⁹ These rights include the right of individual employees not to be members of unions, and the right to negotiate directly with an employer as to rates of pay and conditions of work without union collective bargaining over rights and obligations in the workplace; the labour contract takes on more of the characteristics of the traditional individual contract. The ‘freer’, contractual rights reflect the parties’ respective strengths, so tend to be accompanied by a reduced package of statutory rights in relation to such matters as redundancy payments, minimum wage requirements, rights to security of employment and protections against unfair dismissal. The general process that some writers referred to as ‘the death of contract’ that accompanied the rise of the regulatory and welfare state²⁰ has started to give way to ‘the rise’ of freedom of contract, as contract assumes an increasingly dominant place in the landscape of employment relations.²¹

In this changed landscape, the post-war process that Glendon referred to as the ‘occupational bonding’ reflecting the enhanced legal security given to many (but not all) employees in welfare-regulatory states started to wane. The growing bundle of rights of employees, which assumed the form of ‘new property’,²² has come to be progressively eroded with the incorporation of individualist market-oriented principles into labour law. Where once

¹⁸ Lord Wedderburn, M Rood, G Lyon-Caen, W Daubler and P Van der Heyden, *Labour Law in the Post-Industrial Era: Essays in Honour of Hugo Sinzheimer* (Dartmouth, 1994).

¹⁹ S Simitis, ‘The Rediscovery of the Individual in Employment Law’ in R Ragowski and G Teubner (eds), *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (Kluwer, 1994) 183.

²⁰ P Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979); G Gilmore, *The Death of Contract* (Ohio State University Press, 1974).

²¹ FH Buckley (ed), *The Fall and Rise of Freedom of Contract* (Duke University Press, 1999).

²² MA Glendon, *The New Family and the New Property* (Butterworths, 1981) 143–70.

labour unions, usually within a corporatist political framework, would offer nationwide representation to workers, in the newly disorganised environment, employment contracts, and therefore wages and conditions, reflect local, individual and increasingly insecure, conditions.²³ Similarly, the heavily due-process-driven ‘industrial justice’, widely institutionalised at the height of the regulatory welfare state,²⁴ has been progressively dismantled. The result is an increasingly precarious existence for workers. As Leah Vosko puts it: ‘In the early 21st century, precarious employment encompasses forms of work characterised by limited social benefits and statutory entitlements, job insecurity, low wages, and high risks of ill-health.’²⁵

Importantly, Vosko insists on examining the legal dimensions of this development in order to understand fully the way in which it operates:

Legal definitions are central to any conception of precarious employment. They relate to whether workers confront insecurity because of whom a given law or policy is designed to cover, the parameters around which it is framed, and how it is applied. They are critical to revealing how and in what ways law and policy on the books shape, mirror, or contrast law and policy in practice.²⁶

Although Vosko’s analysis is confined to the labour market, the phenomenon of ever more fragile workers’ rights in employment has come to be paralleled across society as a whole over the last four decades or so, as the central elements of post-war regulatory welfare states have been subjected to radical transformation. One manifestation of the change, closely inter-related to the changes in employment, is the transformation of welfare. Universal entitlements to social welfare, being the ‘cradle to grave’ rights characteristic of the fully-fledged social citizenship of post-war Keynesian welfare states, have been progressively pared back. Welfare rights have become increasingly curtailed, or made conditional, as social welfare safety nets have become less a policy priority for governments in recent decades, leading to lower levels of legal security.²⁷ While different jurisdictions experience these processes in widely divergent ways, some shared factors link them. For example, rights to many benefits are now harder to obtain, and harder to retain. Moreover, the administration of welfare increasingly places

²³ S Lash and J Urry, *The End of Organised Capitalism* (Polity, 1987); Ben-Israel, ‘From Collective to Individual Justice’ in J Beellace and M Rood (eds), *Labour Law at the Crossroads* (Kluwer, 1997) 27–34; Leah F Vosko, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (McGill-Queen’s Press, 2006).

²⁴ P Selznick, *Law, Society and Industrial Justice* (Transaction Books, 1969).

²⁵ LF Vosko, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (McGill-Queen’s Press, 2006) 11.

²⁶ Ibid, 12. See also N Kountouris, ‘Legal Determinants of Precariousness in Personal Work Relations: A European Perspective’ (2013) 34 *Comparative Labor Law & Policy Journal* 21.

²⁷ C Pierson, *Beyond the Welfare State* (Polity Press, 1991).

in jeopardy the rights of recipients, as states seek to rein in welfare expenditure, a process that fuels greater insecurity of income.²⁸

These reforms have not only entailed the retraction of many welfare programmes, they are accompanied by the imposition of more restrictions and obligations on the receipt of social security, particularly unemployment benefits, and the establishment of ever harsher and more punitive compliance regimes.²⁹ These reforms reflect an accelerating global trend of withdrawal of support for the Keynesian welfare state, and the forms of economic and financial security that went with it, as a newly-configured ‘workfare’ state comes into being.³⁰ But this novel state form begins to insinuate itself into increasing domains of social life. The overall result, according to Isabell Lorey, is that

precarization is not a marginal phenomenon, even in the rich regions of Europe ... Precarization means more than insecure jobs, more than the lack of security given by waged labour. By way of insecurity and danger, it embraces the whole of existence, the body, whole modes of subjectivation. It is threat and coercion, even as it opens up new possibilities of living and working. Precarization means living with the unforeseeable, with contingency.³¹

The welfare-regulatory state’s universalised social rights effected a significant reversal of class inequality.³² By contrast, as Kosonen concludes, in summarising trends in Europe, the former capacities of welfare states to ameliorate class disadvantage have faded where ‘unemployment rates and poverty rates have increased, public social security has weakened, and a shift toward private arrangements has occurred’.³³ This point was made over two decades ago; more recent studies reveal even more acute levels of inequality and poverty.³⁴ It may be that in some cases the new regimes reverse a debilitating dependency by encouraging a more active citizenry

²⁸ P Henman and M Fenger, ‘Introduction’ in Paul Henman and Menno Fenger (eds), *Administering Welfare Reform: International Transformations in Welfare Governance* (Policy Press, 2006) 1.

²⁹ *Ibid.* See also, L Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press, 2009); KS Gustafson, *Cheating Welfare: Public Assistance and the Criminalization of Poverty* (New York University Press, 2011).

³⁰ *Social Citizenship and Workfare in the United States and Western Europe: The Paradox of Inclusion*, JF Handler (Cambridge University Press, 2004); G Esping-Andersen, ‘After the Golden Age? Welfare State Dilemmas in a Global Economy’ in G Esping-Andersen (ed), *Welfare States in Transition: National Adaptations in Global Economies* (Sage, 1996) 1; B Kus, ‘Neoliberalism, Institutional Change and the Welfare State: The Case of Britain and France’ (2008) 47 *International Journal of Comparative Sociology* 488.

³¹ I Lorey, *State of Insecurity: Government of the Precarious* (Verso, 2015) 1.

³² T Marshall, *Sociology at the Crossroads* (Heinemann, 1963).

³³ P Kosonen, ‘European Welfare State Models: Converging Trends’ (1995) 25 *International Journal of Sociology* 81, 99.

³⁴ See generally, J Stiglitz, *The Price of Inequality* (Penguin, 2010), Thomas Piketty, *Capital in the Twenty First Century* (Harvard University Press, Arthur Goldhammer (trans), 2014).

to participate productively in labour markets; but much of the empirical evidence suggests that the primary consequence of getting claimants off the register leads to a substantial growth in the number of the working poor.³⁵ Overall, the combination of privatisation, deregulation and diminishing welfare rights lead to a growing insecurity of the more vulnerable citizens in the emergent contracting state. For the political philosopher Nancy Fraser these recent changes, in combination, have the effect of, to some extent, displacing the notion of the ‘poor’ as a social category, insofar as the latter term tends to obscure the factors that cause poverty. A far better term, she suggests, ‘is the “precariat”’. This expression suggests multiple degrees and forms of inclusion/exclusion ... it stresses their shared vulnerability and the ease with which those in the relatively favoured categories can slip back into the disfavoured ones.’³⁶

At this moment it might be useful to consider the relationship between vulnerability³⁷ and precariousness. Berg, in her study of global labour migration, places the precariousness engendered by immigration law in the closely connected frames of ‘precariousness’, ‘vulnerability’ and ‘dependency’ developed in feminist legal and political theories. These take a more holistic approach to precariousness, recognising that insecurity is inherent in human life.³⁸

Similarly, the chapters in this volume use this ‘wider lens of precariousness’ to consider the current position of particular housing situations in a range of advanced industrialised societies.

IV. THE HOME AND INSECURE TIMES

This creeping, society-wide precarisation can be argued to be evident not only in the context of workers’ rights, but also in the context of housing provision. Many western liberal democracies following the Second World War attempted to advance general security by increasing housing security across each of the various forms of tenure, by increasing levels of traditional home ownership, increasing protection for tenants in private residential

³⁵ M Matsuda, ‘Were You There? Witnessing Welfare Retreat’ (1997) 31 *University of San Francisco Law Review* 779.

³⁶ N Fraser, ‘Social Exclusion, Global Poverty, and Scales of (In)Justice: Rethinking Law and Poverty in a Globalising World’ in S Liebenberg and G Quintot (eds), *Law and Poverty: Perspectives from South Africa and Beyond* (Juta, 2012) 19. See also, and generally, G Standing, *The Precariat: the New Dangerous Class* (Bloomsbury, 2011).

³⁷ See, for example, MA Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) 60 *Emory Law Journal* 251–75; Emory Public Law Research Paper No. 10–130. Available at SSRN: <https://ssrn.com/abstract=1694740>.

³⁸ L Berg, *Migrant Rights at Work: Law’s Precariousness at the Intersection of Immigration and Labour* (Routledge, 2015) 9.

markets, and providing much greater levels of social housing. There were always those who were excluded or at best conditionally included: women, the disreputable working class, the vagrant and the migrant. Nonetheless these efforts were important in democratising the legal security of the home, although housing has been characterised as the ‘wobbly pillar’ of the welfare state.³⁹ Just as labour rights have been eroded, these attempts to provide housing security have been measurably weakened in recent years.⁴⁰

For example, the rights of tenants have been widely reduced in a manner generally consistent with the precarisation of employment and welfare provision, as market principles have increasingly intruded. First, state provision of public housing has been significantly curtailed. In contrast to the post-war boom in public housing provision for the poor at heavily state-subsidised rents, states now have reduced or even reversed these policies. The most dramatic example is the United Kingdom where a comparatively large public housing stock has been sold off in recent years so that tenants’ rights in the nature of public rights against the state, based on need, have become private rights of ownership in the property market.⁴¹ At the same time, this shift in the direction of the market has been complemented by greater reliance on market rents by public housing authorities in many countries.⁴² Furthermore, in the private sector, the former redistributive features of laws that gave tenants security of tenure and rights to affordable rents have been diluted. Increasingly, security of tenure is measured not by legal rules limiting landlord’s rights to terminate, based on a tenant’s long-term need, but simply by contractual agreement between landlord and tenant.⁴³ Equally, rents increasingly are determined by market pressures, as mechanisms for rent control are gradually dismantled.⁴⁴

The growing resort to market-based solutions—to what some have referred to as a ‘neoliberal’ approach to economic and social problems that originated in the 1970s—has been further accentuated by the onset of the

³⁹ Ulf Torgersen, ‘Housing: The Wobbly Pillar under the Welfare State’ (1987) 4 *Scandinavian Housing and Planning Research* 116; Peter Malpass, ‘Housing and the New Welfare State: Wobbly Pillar or Cornerstone?’ (2008) 23 *Housing Studies* 604. However, see Binger’s contribution (Chapter fourteen below) for an argument that the wobbly pillar may be more positively understood.

⁴⁰ See, for example, in England: Suzanne Fitzpatrick and Beth Watts, ‘Competing visions: security of tenure and the welfarisation of English social housing’ *Housing Studies* On-line: <http://dx.doi.org/10.1080/02673037.2017.1291916> (2017).

⁴¹ R Forrest and A Murie, *Selling the Welfare State: The Privatisation of Housing* (Routledge, 1988).

⁴² J Kemeny, *From Public Housing to the Social Market: Rental Policy Strategies in Comparative Perspective* (Routledge, 1995) 114–25.

⁴³ R Cranston, *Legal Foundations of the Welfare State* (Weidenfeld and Nicolson, 1985) 116; A Bradbrook, ‘Residential Tenancies: The Second Stage of Reforms’ (1998) 20 *Sydney Law Review* 402–34.

⁴⁴ R Cranston, *Legal Foundations of the Welfare State* (Weidenfeld and Nicolson, 1985) 116–17.

global financial crisis in 2008. The responses of governments across the world has largely been to adopt ‘austerity’ packages, which have had the effect of shifting bulk of the burden of restoring state finances, and paying off corporate debt, onto the most disadvantaged members of the community. The result has generally been to reduce further levels of social security and social housing provision, while leaving the incomes and property rights of the most advantaged largely intact, with enormous subsidies or tax breaks now available for middle-income home-owners or real estate investors. Yet, pro-poor housing assistance policies struggle on meagre budgets, and concern with evictions in the public and private sector has lessened. The overall result of these legal reforms is that housing has become the especially ‘wobbly pillar’ under the welfare state.⁴⁵

For Marcuse and Madden⁴⁶ something else, closely connected, has happened, that is global in extent. Their starting point is that housing is a precondition both for work and leisure. But because the home has become commodified there is a ‘conflict between housing as lived, social space and housing and housing as instrument for profitmaking—a conflict between housing as *home* and as *real estate*.’⁴⁷ This commodification exacerbates precarity.

In these respects, the growing ‘precarity’ reflects broader tendencies of contemporary societies to exhibit greater extremes of poverty and inequality, actively supported or at least tolerated by their governments and legal systems.⁴⁸ Precarisation, both in general, and specifically in relation to the home, is an agent of inequality, a phenomenon that affects only certain groups in society. The increasing insecurity of the home impacts differentially: women, migrants, the poor, ethnic minorities and others who are socially excluded suffer disproportionately from increasing domestic insecurity.

While the more recent forms of legal insecurity represent a novel historical phenomenon, or perhaps the reappearance in novel forms, of older patterns of employment insecurity, there are aspects of insecurity that have always beset what might otherwise be the security offered by the home. In particular, various social, economic and environmental factors produce different types of insecurity for home-dwellers. The various chapters in the book below examine the many aspects of this broad, if uneven, trend of historical, sociological and legal change. They measure the extent of precariousness of the contemporary home, but they also consider the theoretical

⁴⁵ Torgersen, n 39 and Malpass, n 39 above.

⁴⁶ D Madden and P Marcuse, *In Defence of Housing* (Verso, 2016).

⁴⁷ *Ibid*, 4.

⁴⁸ See generally, Joseph Stiglitz, *The Price of Inequality* (Penguin, 2010), Thomas Piketty, *Capital in the Twenty First Century* (Harvard University Press, Arthur Goldhammer (trans), 2014).

potential of re-imagining the home in precarious times. The authors suggest that an understanding that the home is precarious could lead to much more imaginative engagements with the notion of home. In doing so, different strategies might be considered to deal with this emerging condition.

We now turn to provide an overview of how the chapters in the book address these issues.

V. UNDERSTANDING PRECARISATION

Responding to the theme of the ‘precarious home’, the collection starts with Sarah Blandy’s focus on home ‘sharing’. Her chapter uses sharing as a lens for interrogating the idea of the precarious home. She explores a range of risk factors associated with sharing the home, starting with a consideration of how ‘home’ is conceptualised in contemporary Western culture and specifically in the United Kingdom. First, the chapter explores three distinct meanings of the concept of sharing. At its simplest, it means a ‘one-off allocation’ as when there is a grant of property rights in a building used as a home. It may also mean ‘to possess or use a resource in common with others’. Finally, it may mean ‘to participate or contribute to’, which suggests a more active and wider meaning that can be applied to housing issues more generally. The chapter then moves on to examine different tenure types, from owner-occupation to squatting, which determine the extent of the property rights a resident enjoys in their home and therefore their degree of security. In the final section of the chapter, the specific meaning of to ‘share’ that expresses the idea of collaboration and participation and collaboration will come to the fore in an exploration of political and protest alliances around housing issues. The continuum of sharing identified sheds light on the home’s precariousness, and the precarity of different groups in relation to the home.

This chapter is followed by Nestsor Davidson’s exploration of psychological aspects of property in general, and how these might bear on a sense of insecurity. Like all legal institutions, property requires justification. One dominant set of normative justifications emphasises the relationship between property and the self. Another related approach invokes Aristotelian virtue ethics⁴⁹ to emphasise the role played by property in human flourishing. Both approaches appear to have psychological elements to them. But what if those psychological underpinnings were empirically suspect? Might a more grounded, empirically validated set of findings about human nature yield a different type of property law? To rely on psychological realism can open

⁴⁹ See generally, Gregory S Alexander and Eduardo Penalver, *An Introduction to Property Theory* (Cambridge University Press, 2012).

new possibilities for understanding the normative underpinnings of property. In the case of home, the insights of positive psychology would highlight the nature of home, less as a source of individual attachment, and more as a locus for positive experiences and a forum for the development of human relationships. Home in this view is a means to an end, and less a question of individual identity than a resource for what might connect and add meaning to people's lives. Accordingly, when the home becomes insecure, it generates very specific forms of psychological harm. The chapter argues that we can add to our existing normative understandings of property law's foundations a grounding generally in empirical psychology and more specifically in what has been shown in the research to support flourishing. This more realistic approach adds important nuance to prescriptions for the structures of property law in general, and for secure rights to the home in particular.

VI. RENTAL SECURITY

The next Part focuses on the rented home. Continuing the theme of 'insecure times', Caroline Hunter and Jed Meers examine an emergent form of particularly precarious housing in Western Europe; namely property guardianship. The growth in property guardians may be seen as 'a form of unregulated, semi-formal housing in the context of the growing shift of many housing practices from marginal to mainstream.'⁵⁰ They use the example of property guardians to examine the legal determinants of housing precarity for non-owners (tenants and those with less security), mirroring the work of Nicola Kountouris⁵¹ on the legal determinants of precariousness in work relations. Using a framework of immigration status, tenure/time, control, cost, and conditions, they illuminate the elements that can exacerbate precarity. They highlight how two intersecting dimensions of precariousness—'organisational precariousness' and 'legal uncertainty'—can be useful in highlighting how the legal dimensions can compound precariousness. The third section of their chapter focuses on the role of local authorities as a particular organ of the state, using some empirical data. They conclude that it is clear that the state is less concerned in the tenure/time dimension, whether by local authorities using property guardian firms for their own empty properties or at a national level stripping away that dimension for tenants. The position in terms of conditions is more ambivalent.

In the second chapter of this Part Brendan Edgeworth, using the State of New South Wales in Australia as a case study, points to a decisive shift in

⁵⁰ Mara Ferreri et al, n 1 above.

⁵¹ Nicola Kountouris, 'Legal Determinants of Precariousness in Personal Work Relations: A European Perspective' (2013) 34 *Comparative Labor Law & Policy Journal* 21.

legal regimes which have unfolded, from the 1970s onwards, in the sphere of social housing. He shows how the formerly secure legal framework of tenancy law in favour of tenants, reflecting the ‘politics of redistribution’ characteristic of welfare states,⁵² has been progressively stripped away. As a result, tenants face increasing insecurity as the state more vigorously polices tenant behaviour, rendering tenants more vulnerable than ever. A core change in the legal framework has been the move from decision-making in the courts to a residential tenancies tribunal. The tribunal’s more informal mechanisms for dispute resolution, far from reducing the impact of law on the resolution of conflict, actually increase it, and in ways that render public housing tenancies more, rather than less, insecure.

The final chapter in this Part is a provocation. It suggests that not only may the relentless pursuit of owner-occupation be counterproductive, but also the legislative insistence on security for tenants. By taking the Polish residential market as a case study, Magdalena Habdas argues that the lack of long-term housing policies, promoting only owner-occupation, and disregarding the need to strike a balance between the general and the individual interest of landlords, have hampered the development of the residential tenancy market and have left many housing issues, specifically issues of supply and quality, unresolved. The courts both nationally and particularly internationally (in the guise of the European Court of Human Rights) have ensured a different balance.

VII. THE HOME AND GOVERNMENTAL PRECARISATION

In this Part of the collection the contributors examine the contemporary socio-legal landscape of the home by focusing more carefully on governmental precarisation in the context of the home. By ‘governmental precarisation’ we mean laws and policies specifically enacted and implemented by states that bear directly on the capacities of citizens to remain secure in their homes.⁵³

In the first chapter of this Part Helen Carr suggests a long and complex history to the precarious home and expands the notion of security beyond the right not to be evicted. Her examination of the interrelationship between the precarious home and ‘thermal comfort’ notes how the English home appears to be peculiarly vulnerable to the characteristic cold and damp of the local climate and that this porousness to the weather impacts particularly on the poor and the vulnerable. ‘Excess winter deaths’ because of governmental failure do not appear to have been given priority by governments,

⁵² Nancy Fraser, ‘From Redistribution to Recognition: Dilemmas of Justice in a “Postsocialist” Age’ (1995) 212 *New Left Review* 68–93.

⁵³ Lorey, n 31 above, 13.

which have either sought to solve other housing problems such as limited supply or chosen to prioritise the privatisation and affordability of domestic energy supplies. The chapter uses the thermally precarious home as a lens through which to challenge accounts of the emergence of social problems which fail to interrogate the role of power and ideology.

In the next chapter in this Part, Richard Goulding examines another recent phase of UK social housing policy, at odds with the organising presumptions of earlier decades. Specifically, he looks at the reshaping of social housing providers as an example of financialisation through the imposition of housing insecurity, drawing on contemporary debates in critical urbanism. Financialisation of housing is an inherently spatial and temporal process, and recent years have seen growing calls for research into the specific connections between states, real estate actors and financial markets in structuring patterns of accumulation.⁵⁴ This has been facilitated by neoliberal reforms through which the state actively restructures both itself and other arenas of social life along market and quasi-market lines.

De-municipalisation of public housing and reforms to social housing development finance from the 1980s onward facilitated the spread of new commercial models and the use of derivatives for larger, predominantly London-centred housing associations—non-government organisations registered with the state's housing regulator and able to provide social housing. The adaptability of financialisation following the 2008 crisis can be seen in how a renewed housing bubble, centred on London, has allowed capital markets to become a new source of finance, while state-implemented urban austerity policies have restricted non-commercial provision through weakened tenant protections and slashed welfare incomes. This has entailed uneven development, exposed the sector to new sources of risk as it becomes dependent on real estate markets tied into global capital flows, and increased the precariousness of everyday life as growing numbers of people are excluded from accessing social housing.

Written in the immediate aftermath of the fire at Grenfell Tower in West London, Edward Kirton-Darling's chapter examines the accounts of precarity and precarisation in the work of Lorey⁵⁵ and Butler⁵⁶ through an in-depth analysis of the deaths of three women and three children in a fire at Lakanal House, South London, in 2009. The analysis unpicks the responses of government to concerns set out by the Coroner in letters following the conclusion of the inquests into those deaths, and focuses on the way in which these deaths at home and the role of law and ownership

⁵⁴ Manuel B Aalbers (ed), *Subprime Cities: The Political Economy of Mortgage Markets* (Wiley-Blackwell, 2012).

⁵⁵ Lorey, n 31 above.

⁵⁶ Butler, n 15 above and Judith Butler, *Precarious Life: the Powers of Mourning and Violence* (Verso, 2004).

in those deaths reveal aspects of the governance of contemporary life. The discussion highlights that a general account of precariousness risks glossing over important nuances, including the importance of distinguishing different approaches by ‘the state’. In addition, the case study demonstrates the importance of examining the relationship of space and law in efforts to compartmentalise life and property, and argues that Lorey’s emphasis on the hegemony of governmental precarisation misses the ways in which liberal protection continues to exist as a strategy of governance.

VIII. GLOBAL/LOCAL PRECARIOUSNESS

This Part of the collection contains chapters that reflect on the precariousness which is the consequence of global events or conditions which are, or appear to be, outside of local control.

So, Richard Warren examines the United Kingdom’s increasingly restrictive approaches to resettlement of migrants. The chapter considers, through a legal lens, what home might mean in contemporary times for the migrant to the UK. The argument is that there has been a shift from an understanding that the UK seeks to integrate migrants and provide them with a secure and permanent home, to a position where migrants enjoy, at best, institutionalised insecurity and a highly conditional ‘home’. This shift is not productive, but contradictory and destabilising and with serious consequences for the indigenous, as well as the migrant population.

The chapter reflects on the etymology of precariousness, suggesting that its original meaning reveals a connection with the exercise of arbitrary power, which usefully illuminates the migrant’s encounters with the law. It then provides some examples of how the law works to create the new migrant precariat, and how, contrary to the argument by Habdas, legal counter-narratives, such as those deriving from Article 8 of the European Convention on Human Rights, have failed to protect migrants. The author then considers recent policy shifts from social integration to conditionality, before focusing on the prevailing neoliberal rationalities which underpin these shifts. In the final section of the chapter Warren argues not only that we should resist the creation of a migrant precariat but points to the contradictions and broader consequences.

Another instance of precariousness of home arises where migration is not from one country to another, but from one part of one country to another. So, in contemporary China, mass migration from the country to the city has been occurring for many decades. To address the problem of housing the rural migrants, in many areas in China a *de facto* property market is emerging that consists of affordable properties called ‘minor rights properties’. This does not constitute a formal legal concept. These sorts of properties are

built by farmers on collectively owned land that is reserved for agricultural purposes or farmers' residential use, and which cannot be commodified in the sense of being transferred on the formal property market according to relevant provisions of the Land Administration Law (2004) and the Property Law (2007). Buyers of such properties can obtain an ownership certificate issued by the township government. However, the legality of such ownership certificates is highly questionable, as according to the law, only governments at the county level or above have the authority to issue these ownership certificates and register these properties. Ting Xu and Wei Gong's chapter explores the nature of the minor rights properties and the ways in which it is linked to the inequality embedded in the urban-rural divide, the government and property developers' pursuit of profits, and the manner in which central and local government wrestle for power. Specifically, it adopts a legal pluralist analysis, examining the interplay of legal and extra-legal property rights, and of state law and informal norms, and their implications for the understanding of informality and extra-legality in perceiving the idea of property. It argues that we should recognise extra-legal property as legitimate, drawing upon the continuum of land rights approach adopted there.

In the final chapter of this Part, Ann Dupuis, Suzanne Vallance and David Thorns consider how trust and certainty in social institutions can be rebuilt after a natural disaster such as New Zealand's Canterbury earthquakes in order that people can recreate and maintain their sense of ontological security. The chapter raises further challenges to the notion of ontological security in circumstances of a 'natural', rather than a 'human-made' disaster. Their suggestion is that the home is better understood, not as a haven, but rather as a socio-legal space and they argue that the earthquakes have exposed new vulnerabilities that were previously almost unimaginable. As a consequence the notion of the home takes on new meanings. Because of the many complex insurance issues to do with damage and remediation, this chapter presents a new framing of 'the home' as a site co-constituted in and through socio-legal processes. This view has implications for the way the home is secured and serviced and raises major questions of where responsibility lies in these processes.

IX. RESISTANCE AND STRATEGIES

This final Part of the collection concentrates on strategies that the precarious use in order to manage or reduce their precarious status.

In the first chapter, Laura Binger takes us back to a period which may be seen as the 'golden age' of the welfare state, where nonetheless a group of homeless families were housed in an isolated and bleak hostel (King Hill) in the south of England in the 1960s. The residents started a campaign, and

negotiated with local government for a charter of rights. Using Lorey's⁵⁷ framework for thinking about precariousness, Binger analyses the King Hill Hostel Campaign in raising questions about the conditions of life at the hostel and the relationships in which that precariousness existed. She argues for a shift away from assuming that a precarious welfare state only leads to its erosion; rather it allows for an analysis of the power relationship between the institutions of the welfare state and the people who encounter it in their everyday lives, and that shift is important to understanding struggles like the Campaign and more generally to allowing us to see the agency of the residents of the hostel.

Gabriele D'Adda, Lucia Delgado and Eduard Sala take us to the mortgage crisis in Spain and the work of PAH (*Plataforma Afectados por la Hipoteca*) to help owner-owners to avoid evictions and to negotiate directly with banks to obtain a resolution of their cases through different strategies. Using empirical evidence from the Barcelona PAH, they argue that PAH challenges the system by rejecting the public blame of people affected and instead involving them in a process of awareness and empowerment. By-passing Spanish mortgage law, which exclusively protects the creditors, PAH has successfully promoted thousands of individual and direct negotiations between owners and creditor banks. These negotiations are preceded and accompanied by a collective awareness and empowerment process developed through the weekly welcome assembly but also during the actions, the interventions to block evictions and the mobilisations promoted by PAH. The affected people gradually lose their sense of guilt and the fear of losing their home that often accompanies them when they first arrive at PAH. At the same time, they realise that they are not alone and, listening to other people's situations, they learn strategies that they can use in their own negotiation. Furthermore, by taking part in actions and mobilisation, affected people feel a sense of community and they become aware that, being part of the PAH, they can count on other people and on the forces of the movement. It is a tale of resistance outside of the law.

The collection finishes with Danie Brand's chapter. He uses a South Africa Supreme Court of Appeal case—*The Baphiring Community v Tswaranani Projects CC*⁵⁸—to focus on the contentious issue of restitution of land rights in post-Apartheid South Africa. This process is intended to rebalance the scales of justice. Successful restitution claimants may be awarded either the rights to the actual land that they lost, rights to alternative land, or monetary compensation. In a growing number of cases before South African courts, claimants who were seeking returned access to the actual land they had lost—their erstwhile homes—have been awarded alternative land, as

⁵⁷ Lorey, n 31 above.

⁵⁸ *The Baphiring Community v Tswaranani Projects CC* [2013] ZASCA 99.

return to the original land was held not to be 'feasible'. On offer was a different tract of land roughly of the same size and productive capacity.

Against their claim, arguments were raised that their return to the land would not be economically feasible or desirable—not in the sense that it would be too expensive to acquire the land, but that it would in a more macro-economic sense be detrimental to national food and general agricultural production. The chapter argues that the notion of restoration of home and of the spiritual, historical, communal and emotional links to a certain physical place has been progressively elided by the courts in favour of supposedly ideologically empty notions of efficiency and 'feasibility'. This development can be seen as part of a broader development in the local jurisprudence dealing with access to basic resources, of regarding rights as that which is possible rather than as ideals, and regarding justice as efficiency. The chapter concludes with a critique of the notions of efficiency, feasibility and the possible, and problematises the idealistic notions of home, community and history.

X. CONCLUSION

This collection does not aim to provide a definitive analysis of precarity and the home. Indeed, when the editors are all too conscious of gaps and limitations in the approaches taken to precarity, particularly the insufficiency of attention paid to feminist analysis of the home, and to the relationship between race, home and precarity, it would be foolish to make any such claim. Instead, the collection has a much more limited aim: it seeks to suggest that the notion of the precarious home offers socio-legal scholars a particular perspective that is worth interrogating, and that the theoretical insights developed in the context of labour relations may be worth applying to the home, whether understood as a space or a form of entitlement. Moreover, at a time when those of us who are United Kingdom-based are in shock about the tragic loss of life at Grenfell Tower, in the Royal Borough of Kensington and Chelsea, one of the wealthiest boroughs in the world, we would also suggest that socio-legal scholarship has an important role in revealing that the security inherent in the concept of home may be illusory. The anger and sense of betrayal resulting from the failure of the state to provide secure homes for some of its most vulnerable citizens are significant. But so too are suggestions that there may be progressive possibilities within the concept of precarity. If the collection stimulates thoughtful responses to the interface of home, precarity and law we will consider that it has succeeded.

Governing Risk and Uncertainty: Financialisation and the Regulatory Framework of Housing Associations

RICHARD GOULDING*

I. INTRODUCTION

ENGLISH HOUSING ASSOCIATIONS are private registered providers of social housing, subsidised by the government and regulated by the Homes and Communities Agency (HCA), a non-departmental body that combines the functions of both a funder and a regulator. The HCA—and its predecessor organisation prior to 2008, the Housing Corporation—has been crucial to the development of the sector as it has become the primary conduit for social housing in the UK, enabling associations to register and bid for grants while establishing performance and reporting standards.¹ Since the Housing Act 1988 associations have also combined grants with private borrowing in order to develop and acquire housing, with recent years seeing larger associations increasingly diversify into more commercial products such as market sale and rented housing, while bond markets have become an important source of finance.² Austerity policies implemented since 2010 have cut funding and weakened the security of social housing tenants, raising concerns over the move to a more commercial footing in the sector that undermines its traditional welfare functions.³

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¹ David Cowan and Morag McDermont, *Regulating Social Housing: Governing Decline* (Oxford, Routledge-Cavendish, 2006).

² Andrew Heywood, 'Investing in Affordable Housing: An analysis of the affordable housing sector' (The Housing Finance Corporation, 2016).

³ Tony Manzi and Nicky Morrison, 'Risk, Commercialism and Social Purpose: Repositioning the English Housing Association Sector' (2017) *Urban Studies*. Published online 2 May 2017.

The risks and uncertainties of this environment also imply a more precarious environment for the homes of social housing tenants. This chapter explores the extent to which the restructuring of social housing in the aftermath of the financial crisis is reshaping the precariousness of home, focusing on the case of housing associations, as the main conduit for the provision of new subsidised social housing within England. Precariousness is understood here not as the absence of security but, following Butler, the uncertainty generated through the shared vulnerability of social relations.⁴ The home, for example, can be subject to precariousness due to the mutual dependencies of voluntary or involuntary sharing, or the obligations placed on it through a financial agreement.⁵ Precarity, by contrast, can be understood as the hierarchical distribution of precariousness through society.⁶ A mortgage agreement, for example, can insure a bank against the uncertainties of lending by giving it a security interest in the home of a borrower. While this enables a mortgagor to access credit for a house, providing the security of homeownership, this comes at the expense of the precarity of repossession for a homeowner if they cannot keep up with repayments.

To explore these issues, I draw on policy documents, housing and financial sector reports, and qualitative fieldwork data collected over the course of PhD research over 12 months from Spring 2015 to Spring 2016. Original data used here is sourced from a wider sample of 20 semi-structured elite interviews averaging one hour in length with actors involved in shaping housing policy, including social housing executives, policymakers, auditors, solicitors, treasury consultants, valuers, fund managers, and officers from representative sectoral bodies. Interviews have been analysed according to themes of precariousness, commercialisation, and how risks and uncertainties are understood by the actors involved in shaping the sector, and the precarisation effect this may have for tenants.

The remainder of the chapter is structured as follows. In section II, I establish my analytical framework, arguing that the transfer of risks and uncertainties has been crucial to the financialisation of aspects of the welfare state such as social housing providers. In section III, I argue that the shift to private finance since the 1980s has led to the creation of risks which undermine the security of tenants.⁷ This has been a process mediated by legal and regulatory frameworks that have sought to minimise risks through the governance of associations: however, with the regulatory stability this provides enabling associations to borrow at rates lower than they could otherwise expect.⁸ In section IV, I argue that austerity has undermined this

⁴ Judith Butler and Athena Athanasiou, *Dispossession: the performative in the political* (Cambridge, Polity, 2013) 20.

⁵ See Sarah Blandy, Chapter two of this volume.

⁶ Butler and Athanasiou (n 4 above).

⁷ Cowan and McDermond (n 3 above).

⁸ Heywood (n 2 above).

model, however. Funding cuts and a diminished ability of the regulator to govern the stability of associations have resulted in an increase in the sector's precariousness,⁹ as it becomes more exposed to ongoing financial and real estate volatility.¹⁰ Drawing on original fieldwork data, in the section V, I argue that faced with this diminished capacity, regulatory emphasis has switched to ensuring resilience in the face of crisis rather than preventing instability, in accordance with a wider entrenchment of business logics in the sector and normalising insecurity as a tool of governance.¹¹ These developments in turn create the risk of greater precarity being passed down to current and prospective tenants in social housing, through the raised potential for more exclusionary lettings policies and exposure to greater risks in the event of a disaster such as a provider insolvency.

II. FINANCIALISATION, RISK AND UNCERTAINTY

A broad and contested term, financialisation has received increasing academic debate over the past 15 years. The concept has been used to focus attention on numerous overlapping aspects of the spread of financial relations and institutions in contemporary society. These include increased profit-making through financial channels and corporate reorganisation,¹² the growing influence of the financial sector on international political economy since the 1970s,¹³ and the spread of financial logics and metrics such as credit and debt relations as a form of governance in daily life.¹⁴ This chapter attempts to gain analytical purchase on financialisation by using the example of English housing associations to build on literature that views financialisation not as the presence or importance of financial relations such as capital markets,¹⁵ but as the spread of financial logics and calculus into other areas of social life.¹⁶

⁹ Butler and Athanasiou (n 4 above).

¹⁰ Rodrigo Fernandez and Manuel Aalbers, 'Financialisation and Housing: between globalisation and varieties of capitalism' (2016) 20 *Competition and Change* 71.

¹¹ Isabell Lorey, *State of Insecurity: government of the precarious* (London, Verso, 2015).

¹² Greta Krippner, 'The financialization of the American economy' (2005) 3 *Socio-economic Review* 173; Ismail Ertürk, Julie Froud, Sukhdev Johal, Adam Leaver and Karel Williams (eds), *Financialisation at Work: Key Texts and Commentary* (London, Routledge, 2008).

¹³ Gerald Epstein, *Financialisation and the World Economy* (Cheltenham, Edward Elgar, 2005); Costas Lapavistas, *Profiting without Producing: How finance exploits us all* (London, Verso, 2013).

¹⁴ Randy Martin, *Financialization of Daily Life* (Philadelphia, Temple University Press, 2002); Paul Langley, *The Everyday Life of Global Finance: saving and borrowing in Anglo-America* (Oxford, Oxford University Press, 2008).

¹⁵ Epstein (n 13 above).

¹⁶ Dick Bryan and Michael Rafferty, 'Financial Derivatives as Social Policy Beyond Crisis' (2014) 48 *Sociology* 887; Emma Dowling, 'In the Wake of Austerity: Social Impact Bonds and the Financialisation of the Welfare State in Britain' (2017) 22 *New Political Economy* 294.

Outsourcing and marketisation within social housing are not themselves new, but build on over four decades of neoliberalisation in which the state has actively extended market relations through other areas of social activity.¹⁷ Finance has played a structural role in enabling these processes, allowing capital to be levered in upfront to acquire and operate services in areas such as health, housing, or infrastructure, while receiving long-term interest payments in return.¹⁸ A common justification for such policies is that they pass risks onto the private sector, with companies receiving payments in exchange for accepting the risks of meeting service delivery and value-for-money targets, with extra costs—such as raising finance privately rather than through government borrowing—being offset by efficiencies achieved through greater market discipline.¹⁹

As argued by Froud²⁰ in an analysis of the use of private finance in delivering public services however, this is a justification that conflates risk and uncertainty, two concepts with very different implications for profitability. Uncertainty acts as a limit to what is knowable, given circumstances where there are no scientific grounds for predicting future events. In contrast, risk as understood and put into practice by private sector actors is a probabilistic concept, grounded in practices such as cost-benefit analysis that attempt to provide actionable grounds for making the future knowable.²¹ Attempts to identify and transfer risk to the private sector change the nature of services and projects that can be delivered, however, as contracts and other legal criteria are used to lock-in the costs and levels of service that the private sector can be expected to deliver.²² This removal of uncertainty through contract design in turn creates risks and costs for the state, with the private sector's limited flexibility in delivering services restricting the state's much greater ability to react to the contingency of future events when attempting to fulfil policy goals.²³

While Froud's analysis specifically focuses on public-private partnerships such as the Private Finance Initiative (PFI), this need to manage risks and uncertainties when services are divested from the state can be applicable to issues such as housing association financialisation, where the private borrowing by housing associations drives commercial pressures on

¹⁷ Jamie Peck and Adam Tickell, 'Neoliberalising Space' (2002) 34 *Antipode* 380.

¹⁸ Dexter Whitfield, *Public Services or Corporate Welfare: Rethinking the Nation State in the Global Economy* (London, Pluto Press, 2001); Allyson Pollock, *NHS plc: The privatisation of our healthcare* (Verso, 2004); Ewald Engelen et al, *After the Great Complacency: Financial crisis and the politics of reform* (Oxford, Oxford University Press, 2011).

¹⁹ Whitfield (n 18 above).

²⁰ Julie Froud, 'The Private Finance Initiative: Risk, uncertainty and the state' (2003) 28 *Accounting, Organisations and Society* 567.

²¹ *Ibid* 573.

²² *Ibid* 580.

²³ *Ibid* 587.

them to maintain payments to lenders or risk default. In this respect, the financialisation of welfare services such as social housing can therefore be characterised not just by an increase in the size of the financial sector,²⁴ but the extension of financial metrics and logics into other areas of social life through a broader process of commodification, including the production and transfer of risks.²⁵ As opposed to characterisations of privatisation or neoliberalisation that view financialisation as a form of deregulation and the shrinking of the state in favour of the free market, this is a process that is deeply mediated by legal and regulatory frameworks.²⁶ These delimit outcomes and assign risks in order to ensure that the private sector can profitably deliver its expected services or recover interest rates from financing them.²⁷ Fiscal retrenchment through austerity policies can open up new opportunities for this financialisation, a process that often involves costs that are passed downward to be managed by the social reproduction of service users.²⁸ How precarities arising from these processes in the financialisation of housing associations have been managed and distributed is the question which the remainder of the chapter now considers.

III. GOVERNING RISKS AND PRECARIOUSNESS WITHIN SOCIAL HOUSING FINANCE

A diverse sector, English housing associations consist of over 1,500 providers and range in size from small and specialist organisations to large and increasingly commercialised property management companies that operate many tens of thousands of homes.²⁹ Over 95 per cent of the sector's stock is concentrated among roughly 300 providers that own over 1,000 homes each however, and these form the focus of policy attention and regulatory oversight.³⁰ Associations are still largely non-profit in that they do not distribute profits to shareholders, but they operate in order to generate surpluses, are exposed to development risk, and issue private sector assured tenancies, although of a much more secure form than assured shorthold tenancies available in the private rented sector.³¹ Although 85 per cent of

²⁴ Epstein (n 13 above).

²⁵ Bryan and Rafferty (n 16 above).

²⁶ Manuel B Aalbers, 'Regulated Deregulation' in Simon Springer, Kean Birch, Julie MacLeavy (eds), *The Handbook of Neoliberalism* (London, Routledge, 2016).

²⁷ Phillip O'Neill, 'The financialisation of infrastructure: the role of categorisation and property relations' (2013) 6 *Cambridge Journal of Regions, Economy and Society* 441.

²⁸ Dowling (n 16 above).

²⁹ Homes and Communities Agency, '2016 Global Accounts of Housing Providers' (HCA, 2017).

³⁰ *Ibid* 1.

³¹ David Hughes and Stuart Lowe, *Social housing law and policy* (London, Butterworths, 1995).

the sector's income still derives from 'general needs' social housing lets, since the 1980s many associations have built low-cost products for owner occupation such as shared ownership.³² The last 10 years have nonetheless seen increasing commercial diversification among larger providers into market sale and rental, alongside other areas such as care accommodation and student housing, as larger providers have been able to exploit their assets in order to become prominent developers in addition to their functions as social landlords.³³

Prominent voices within the sector are keen to portray an image of commercial acumen as a means to achieving communal goals, with representative bodies such as the National Housing Federation (NHF) operating promotional campaigns under slogans such as 'In Business for Neighbourhoods'. The role of the state has nonetheless been vital for the sector's growth, acknowledged by NHF head, David Orr in his presentation of the sector as 'the most successful public-private partnership in the history of our economy'.³⁴ The relationship with the regulator has been of crucial importance to the sector's development, the regulator being a non-departmental body acting on behalf of the government in a role originally fulfilled by the Housing Corporation until its abolition in 2008 and replacement with the Homes and Communities Agency (HCA) as successor.³⁵ For most of this period funding and regulatory functions have been combined under a single body, with the exception of the short-lived Tenant Services Authority from 2008-12, that was intended to act as a separate regulator until its intended abolition was announced in 2010 by the incoming Cameron government before finally being closed in 2012.³⁶

The containment of risk and uncertainty can be seen in the opening up of housing associations to private finance. From the Housing Act 1988 associations have also combined public grants with private finance, replacing an earlier funding system made up of grants and government loans in which the state assumed development risk by paying for costs at the end of a completed project.³⁷ The Act reformed the grant system by ensuring providers would be paid at the beginning of a project, formally passing development risk and recorded debts from the Treasury onto associations while expecting

³² Homes and Communities Agency. '2015 Global Accounts of Housing Providers' (HCA, 2016) 3.

³³ Heywood (n 2 above).

³⁴ Helia Ebrahimi, 'Why Are Housing Associations Failing to Build Enough Homes?' (*Channel 4 News*, 23 July 2015): www.channel4.com/news/housing-associations-homes-property-bob-blackman-david-orr.

³⁵ Morag McDermond, *Governing independence and expertise: the business of housing associations*. (Oxford, Hart Publishing, 2010).

³⁶ Homes and Communities Agency, 'The Regulatory Framework for Social Housing in England from 2012' (HCA, 2012).

³⁷ Hughes and Lowe (n 31 above).

them to top up grants through private loans.³⁸ The logic of this was to reduce the exposure of the state to the uncertainties of the development process, avoiding having to 'shell out' for unexpected costs. This in turn created the policy problem of how to induce financial institutions to lend to the sector however, with lenders expecting low risks if they were to enable associations to borrow at affordable rates.

An important way in which this was achieved has been through the transfer of risks onto tenants, exposing them to greater precariousness through a reduction in their security of tenure, with the Housing Act 1988 creating a new private sector 'Assured Tenancy' for housing association tenants.³⁹ Although stronger than assured shorthold tenancies in the private rented sector proper, assured tenancies have weaker protections against court-ordered evictions in the event of rent arrears than secure tenancies still used in council housing.⁴⁰ The 1988 Act also lifted associations out of the statutory 'Fair Rent' system of rent control, leading to a sharp rise in rents throughout the early 1990s that led to concerns and debates over affordability between the regulator and representative bodies such as the NHF.⁴¹ The state continued to share risk in this system through the social security system however, with a rise in housing benefit payments to cover the rent increases passing part of the cost onto the public as well as renters.⁴² This shift to private finance acted as a major driver of a more commercial sector, encouraging rounds of consolidation and the spread of market-simulating accounting and valuation techniques; this early wave of financialisation was characterised by providers facing new requirements to manage their assets as collateral and secure more debt.⁴³

IV. DE-RISKING LENDING THROUGH THE USE OF STOCK AS COLLATERAL

Financialisation has further been de-risked for lenders via associations using stock as collateral in order to secure loans against their assets, introducing a further source of precariousness into the homes of social housing tenants.⁴⁴ In the event of a provider becoming insolvent or otherwise in breach of a

³⁸ Ibid.

³⁹ Norman Ginsburg 'The Housing Act 1988 and its policy context: A critical commentary' (1989) 9 *Critical Social Policy* 56.

⁴⁰ David Cowan, *Housing Law and Policy* (Cambridge, Cambridge University Press, 2011).

⁴¹ Hughes and Lowe (n 31 above).

⁴² Ibid.

⁴³ Michael Pryke and Christine Whitehead, 'The provision of private finance for social housing: An outline of recent developments in funding existing housing associations in England' (1993) 8 *Housing Studies* 274.

⁴⁴ Heywood (n 2 above).

loan agreement, this meant that the lender could legally repossess the home of a tenant if it had a charge attached to it, bringing that home out of the regulated social housing sector. A tenant would be likely in such a situation to keep the protection of their tenancy agreement, ensuring some security, but would lose the rent level protection that comes with being in the social housing sector.⁴⁵ Unless housing benefit were to cover their rent, then this could expose tenants in a repossessed property to the risk of rent hikes and possible eviction. Both tenants and providers were therefore exposed to the risk of greater precarity, with a default also making it likely that lenders would charge much higher rates on the borrowing of the sector as a whole. Although an unmanaged insolvency is yet to occur and it is uncertain what action the state would take given the potential costs, it has nevertheless enabled lenders to attain a position of power within the sector's governance, given the willingness of lenders to provide capital essential for housing associations to access money for development and refurbishment.⁴⁶

Lending to the sector up to the 2008 financial crisis was largely dominated by a small number of high street banks, with just five holding 85 per cent of the sector's debt in 2008.⁴⁷ Associations prefer to borrow on fixed-rate terms for long 25-year periods that enable them to embed certainty into their business plans. This is not ideal for banks, who raise cash to fund their loans on an ongoing basis from money markets with unpredictable interest rate fluctuations, but an implicit expectation of stability due to the sector's regulatory governance helped de-risk the sector from the perspective of lenders and provide them with reassurance that they would get their money back.⁴⁸ This stability was bolstered through indirect subsidies to the sector in the form of housing benefit, a means-tested social security payment intended to partly cover rental costs, which was paid directly to landlords rather than tenants, providing assurance against arrears.⁴⁹ Financialisation in associations from the late 1980s therefore depended heavily on the sector's relation to the state as mediated through the regulatory framework, with ratings agencies classifying them as analogous to public sector organisations despite their independent existence as privately owned property companies, though ones run on a not-for-profit basis.⁵⁰

Development of the regulatory governance of housing associations has been a process in which the regulator, providers and lenders and their

⁴⁵ Fieldwork interview with senior housing policymaker (Summer 2015).

⁴⁶ Cowan and McDermont (n 1 above).

⁴⁷ Tenant Services Authority, 'Private Finance Strategy' (TSA, 2009).

⁴⁸ Peter Williams, 'Private Finance for a Social Purpose: Mortgage Lenders and Housing Associations Within the UK' (June 2003) *Housing Finance International* 9.

⁴⁹ Hughes and Lowe (n 31).

⁵⁰ TradeRisks, 'Social Housing Bonds' (TradeRisks, 2012); Moody's Investors Service, 'Rating Methodology: English Housing Associations' (Moody's Investors Service, 2013).

respective representative bodies have all taken active roles in negotiating and defining the sector's identity through shaping standards and practices, such as audit and account formats that can be readily understood and used by lenders.⁵¹ In the development of this framework however, the retention by lenders of their power to access security has been a major determining factor in the sector's development, due to the serious consequences if social housing stock is repossessed. Although this power has not yet been used, lenders have actively defended their rights against the government; a potential infringement of this ability in draft bills of the Housing Act 1996 prompted a capital strike by lenders until the offending provisions were struck out.⁵² Repossession of housing association stock is not necessarily an option they would wish to take given the chance of reputational damage and the risk that it would not cover costs, but this power nonetheless provides protection against uncertainty, an example of how financialisation in public services such as social housing can rest on legal powers to mediate and pass on risk.

The rights of lenders to take possession of collateral from an association in default have been a fundamental power minimising the inherent uncertainty of lending, acting as a key enabler of financialisation even if it is a power that has never been activated. Liberalisation in the consents regime governing stock disposals has enabled greater freedom for associations in asset management and the use of their stock as collateral, associated with auditing and accounting practices that have taught them to think of their stock as assets. Although operational and development risk was formally passed to associations throughout this period, the state still played an implicit role in acting as a backstop to the sector, with risk to lenders minimised through the assumption that the government would act to guarantee the debts of the sector in the event of a crisis.⁵³ Managing the regulation of the sector with an eye to lenders has been a constant focus of the regulator, even leading to criticism by select committee MPs in 2013 when it emerged that the HCA was reluctant to officially downgrade the viability ratings of housing associations in the fear that it might trigger a repricing of debt by creditors.⁵⁴ How austerity has the potential to increase the precariousness of this model and generate the potential for greater precarity among providers and tenants is the question to which this chapter will now turn.

⁵¹ Morag McDermont, 'Territorializing Regulation: A Case Study of "Social Housing" in England' (2007) 32 *Law and Social Inquiry* 373.

⁵² Christine Whitehead and Peter Williams, 'Development and Change: Private Finance for Social Housing in the UK.' (A Background Paper for the LSE London Finance Seminar, London, LSE, 2009).

⁵³ Heywood (n 2 above).

⁵⁴ Communities and Local Government Select Committee, *The Work of the Regulation Committee of the Homes and Communities Agency: Second Report of 2013–14* (2013–14, HC 310).

V. PRECARITY AND UNCERTAINTY UNDER AUSTERITY URBANISM

The financial crisis devastated the balance sheets of many banks, raising their cost of funds and causing many of the loans they had made to housing associations prior to 2008 to become unprofitable.⁵⁵ Although banks scaled back lending, associations were able to sustain access to capital through the bond markets, with institutional investors such as pension funds and insurance companies hunting for safe long-term assets with which to offset their own liabilities in the context of a global slump and weak growth.⁵⁶ Lending through the bond markets can be attractive for associations in that it offers long-term fixed-rate debt on the 25-year timescales they require, although bonds are less flexible and setting up deals requires assembling a more complex and daunting range of different organisations.⁵⁷ Large associations are able to participate in their own bond issues, while smaller providers pool resources through aggregator companies such as The Housing Finance Corporation, a non-profit entity founded by the government in the 1980s.⁵⁸ Lenders can also be wary of associations taking on greater levels of commercialisation by expanding beyond core social housing services into areas such as market sale or rent, given the greater exposures to risk this brings, troubling their status as safe and reliable assets.⁵⁹

Austerity policies imposed since 2010 potentially undermine this stability through means such as welfare cuts, reduced grants and funding regimes predicated on a greater reliance on commercial income. Social housing tenants disproportionately rely on benefits to cover their incomes and have been hit hard by welfare retrenchment, with sanctions becoming a *de facto* routine part of the benefits system and spending reductions and more restrictive criteria aimed at groups such as people in receipt of disability benefits who are disproportionately represented in social housing.⁶⁰ Overall planned welfare reforms come to a £19 billion spending reduction if fully implemented, with likely effects being to intensify spatial concentrations of deprivation while increasing the possibility of rent arrears.⁶¹ Specific housing benefit cuts such as the politically-named ‘bedroom tax’ that deducts payments if social housing tenants are deemed to have one or more spare

⁵⁵ Ibid 35.

⁵⁶ International Monetary Fund, ‘Safe Assets: Financial System Cornerstone?’ (IMF, 2012).

⁵⁷ Andy Taylor, ‘Coping with Financial Cuts: Keeping the Core Business on Track’ (Barclays Corporate, 10 May 2011).

⁵⁸ Heywood (n 2 above).

⁵⁹ Thomas Wainwright and Graham Manville, ‘Financialisation and the Third Sector: Innovation in social housing bond markets’ (2017) 49 *Environment and Planning A* 819.

⁶⁰ Christina Beatty, Mike Foden, Lindsey McCarthy and Kesia Reeve, ‘Benefit Sanctions and Homelessness: a scoping report’ (Centre for Regional Economic and Social Research, March 2015).

⁶¹ Christina Beatty and Steve Fothergill, ‘The Local and Regional Impact of the UK’s Welfare Reforms’ (2014) 7 *Cambridge Journal of Regions, Economy and Society* 63.

bedrooms have garnered particular controversy,⁶² while the proposed rolling of existing benefits into a single 'Universal Credit' may increase the risk of arrears through paying housing benefit to tenants rather than directly to landlords.⁶³ Cumulatively these have the potential to increase displacement, with one quantitative study from the regional city of Leeds indicating greater housing precarity and moves from social housing into the private rented sector, associated with housing benefit cuts.⁶⁴

This increase in the precarity of tenants was accompanied by a reduction in their security however, changes that have the potential to place their relationship with housing associations on a more commercial footing.⁶⁵ Precariousness has been increased through the Localism Act 2011's removal of the statutory underpinnings by which associations were obliged to grant so-called 'lifetime' tenures, although the actual uptake of 'fixed-term' tenancies by associations beyond probationary periods for new tenants has so far been patchy and uneven.⁶⁶ Grant funding has been reduced as a proportion of new developments, with remaining subsidies largely made available for shared ownership products and a new form of 'affordable rent' tenure that can be offered at up to 80 per cent of market rent, intended to shift the weight of finance onto the rental streams of providers rather than grants from central government.⁶⁷ At the same time, regulatory powers over tenant standards have been downgraded since 2012, with grounds for intervention by the regulator subject to a highly stringent 'serious detriment' test that would require the possibility of occurrence of major harms before the HCA would step in.⁶⁸ Although the impact of these reforms is necessarily long term, they have the potential to change the relation between providers and tenants, cementing the final residualisation of the tenure and converting it into an 'ambulance service' for the most vulnerable as it becomes less and less likely to be able to act as a tenure that can provide secure, long-term housing.⁶⁹

⁶² Helen Carr and David Cowan, 'The Social Tenant, the Law and the UK's Politics of Austerity' (2011) 5 *Oñati Socio-legal Series* 73.

⁶³ Anne Power, Bert Provan, Eileen Herden and Nicola Serle, 'The Impact of Welfare Reform on Social Landlords and Tenants' (Joseph Rowntree Foundation, 2014).

⁶⁴ Stuart Hodkinson, Andy Turner and Chris Essen, 'Exploring the Impacts and Implications of a Changing UK Welfare State under Digitalisation and Austerity: the Case of Leeds. Final Report, Pilot Study on Welfare and Austerity for the RCUK Digital Economy 'Communities and Culture' Network +' (University of Leeds, 2016).

⁶⁵ Power et al (n 63 above).

⁶⁶ Elizabeth Parkin and Wendy Wilson, 'Social Housing: the end of "lifetime" tenancies in England?' (Briefing Paper 07173, House of Commons Library, 2016).

⁶⁷ Stuart Hodkinson and Glyn Robbins, 'The Return of Class War Conservatism? Housing policy under the UK Coalition government' (2013) 33 *Critical Social Policy* 57.

⁶⁸ Homes and Communities Agency, 'The Regulatory Framework for Social Housing in England from 2012' (n 36 above).

⁶⁹ Hodkinson and Robbins (n 67 above); Suzanne Fitzpatrick and Hal Pawson, 'Ending Security of Tenure for Social Renters: Transitioning to 'ambulance service' social housing?' (2014) 29 *Housing Studies* 597.

The unexpected re-election of the Conservatives with a full working majority in 2015 brought a range of new measures into the sector that have the potential to undermine the perceived stability that associations have so far relied on in dealing with lenders, however. Among these has been the planned extension of the Right to Buy to housing association tenants, a controversial measure still undergoing trials that is likely to undermine the asset base of providers if implemented, even though they will be compensated for sales.⁷⁰ An annual one per cent rent cut between 2016 and 2020 has also been imposed through the Welfare Reform and Work Act 2016 in order to bring down housing expenditure, a move likely to have a huge cumulative impact on association business plans through undermining their income streams.⁷¹ The vote for the UK to leave the European Union is likely to have further effects on the sector, given the possibility of economic turbulence and political upheaval, though any full assessment of the impacts at this time is speculative and beyond the scope of this chapter.

As argued above, this stability provided by the legal and regulatory system has been a vital mediator of financialisation within housing associations, acting to insulate lenders from the risks of insolvency, while the preservation of the ability of lenders to take charge of their collateral has acted as a major hedge against uncertainty. In exploring how this is reshaped under austerity in a post-financial context of greater volatility, the next section of this chapter draws on fieldwork data with social housing stakeholders generated over 12 months between 2015 and 2016 immediately prior to and in the aftermath of the Conservative re-election. Grounded in semi-structured interviews with key stakeholders such as accountants, policymakers, consultants and association executives, the following explores the extent to which any precarities arising from this situation are passed on to providers and, ultimately, tenants.

VI. GOVERNING PRECARIOUSNESS IN A 'POST-CRISIS' CONTEXT

By undermining public subsidy and opening up housing associations to further commercial pressures, austerity generates new risks and uncertainties within social housing that have to be managed in order for financialisation to continue in the aftermath of the financial crisis. This section argues that in governing enhanced precariousness, the regulatory framework is adapting to a form comparable to the managed precarity outlined by Lorey,⁷² enacted

⁷⁰ National Housing Federation, 'An Offer to Extend Right to Buy Discounts to Housing Association Tenants' (NHF, 2015).

⁷¹ Nick Billingham, 'Social Landlords in the Firing Line: Rent reduction and the Welfare Reform and Work Bill 2015' (2015) 18 *Journal of Housing Law* 106.

⁷² Lorey (n 11 above).

less through the granting or withholding of collective security, and more by the normalisation of precariousness as part of a wider retrenchment of neoliberalisation. For the Homes and Communities Agency (HCA) 'poor governance' is recognised as 'a leading indicator of financial weakness',⁷³ and recent emphasis has been on improving the ability of associations to act in a crisis through measures such as stress testing, asset and liability registers, and greater skills requirements on boards. These are intended to enable quick response in a crisis, identifying the circumstances that would break a provider's cash flow and its implications for the stricken association's stock, while developer associations liable to these risks are intended to have governing board members with the requisite expertise to handle the situation.⁷⁴

In governing this precariousness however, I argue there has been a shift in regulatory emphasis in how the sector's orientation to future uncertainty is managed through the entrenchment of commercial approaches that redistribute risks from lenders onto providers and tenants. This in turn leads to greater precarity in the present, as greater numbers of people risk exclusion and displacement from social housing through these practices. As pointed out by Langley,⁷⁵ measures such as stress testing have a performative aspect, in that they attempt to 'manage the financial future in the present'⁷⁶ by dealing with the uncertainty of crisis events that cannot be predicted through probabilistic risk calculations, shaping actions now through anticipation of future events. Prior to the financial crisis for example, financialisation was often discursively legitimised on the grounds that it enabled the accurate pricing and trading of exposures to risk for market participants, an assumption undermined by the credit crunch and the failure to account for systemic risk.⁷⁷ Managing the uncertainties of this new situation has been a significant legacy of financialisation in a 'post-crisis' context, with consequences for how any precarity the shift to finance generates is transferred to groups such as social housing tenants.

In particular, I argue that the weakened power of the regulator in a context of heightened uncertainty has manifested itself in a shift in regulatory and legal emphasis toward preparedness for the next crisis, rather than trying to prevent associations experiencing the impacts of crisis. In his analysis of stress testing in the financial sector, Langley⁷⁸ draws on the typology

⁷³ Homes and Communities Agency, 'Regulating the Standards' (HCA, 2016) 8.

⁷⁴ Ibid.

⁷⁵ Langley, *The Everyday Life of Global Finance: saving and borrowing in Anglo-America* (n 14 above).

⁷⁶ Ibid 68.

⁷⁷ Randy Martin, Michael Rafferty and Dick Bryan, 'Financialisation, Risk and Labour' (2008) 12 *Competition and Change* 120.

⁷⁸ Langley, *The Everyday Life of Global Finance: saving and borrowing in Anglo-America* (n 14 above).

by Anderson⁷⁹ of three strategies for coping with future uncertainty. These include preventing an identified threat through *precaution*, taking action on the basis of indeterminate threats through *pre-emption*, and attempting to anticipate disaster through *preparedness*. For Langley, new regulatory frameworks in the aftermath of the financial crisis have entailed a greater shift to preparedness as a strategy, with a heightened need for market actors to demonstrate resilience in the face of unpredictable but nevertheless feasible threats, such as another market crash. Within social housing, as the regulator experiences diminished resources under austerity while associations have come to rely on more commercial sources of income, it has faced a policy problem of how to manage the risk exposure of creditors in such a way as to continue to induce them to lend. Returning to the earlier point made by Froud⁸⁰ in section II of this chapter however, the removal of uncertainties for lenders has resulted in both the continued exposure of the state to the consequences of provider failure, restricting its future policy options, while intensifying the precarity experienced by tenants as associations are encouraged to adopt more commercial approaches.

A. Precariousness and the Precautionary Insolvency Regime in the Governance of Housing Associations

Recent years have increased the precariousness of the operating environment for associations, with measures such as the imposed one per cent annual rent cut coming alongside a greater push for associations to commercialise and the greater size and complexity of many providers within the sector.⁸¹ This is a potential problem for the perceived stability of associations that has hitherto underpinned lending to the sector however, which has so far relied on an implicit assumption that government and regulatory support would continue to ensure that no association would collapse. This perception among lenders has been undermined by government actions since the election such as the rent cut and right to buy expansion, leading to an erosion of trust in the sector's stability as illustrated by the following quote from a financial consultant to the sector:

There's been a very beneficial willing suspension of disbelief on the part of investors, the HCA and the government. There is no guarantee but let's pretend there is, sort of thing, and very right. It's £60bn of private finance on very good terms

⁷⁹ Ben Anderson, 'Preemption, precaution, preparedness: Anticipatory action and future geographies' (2010) 34 *Progress in Human Geography* 777.

⁸⁰ Froud (n 20 above).

⁸¹ Trowers & Hamblins, 'Quarterly Housing Update: Housing and Planning Act 2016 edition' (Trowers & Hamblins, 2016).

that's been arranged on that, and government action has at a stroke more or less destroyed that. (*Financial consultant*)⁸²

The increased precarity of lenders in this more precarious context is further illustrated by the introduction of a new insolvency regime under the Housing and Planning Act 2016, following on from recommendations in the Altair report that was commissioned to investigate the near collapse of Cosmopolitan.⁸³ Previously the regulator in the event of an insolvency would have to secure the agreement of all creditors for a moratorium period of 28 days while it attempted to engineer a rescue in order to prevent social housing stock from being repossessed, most likely a merger with another, larger association.⁸⁴ Alongside extending its scope to all assets owned by an association, not just its social housing assets, the new insolvency regime contains a crucial innovation through enabling the regulator to apply for a court appointed administrator to oversee a stricken housing association. A court appointed administrator would have a 12-month period to oversee proposals and attempt to rescue the provider as a going concern or otherwise govern the disposal of its assets, a more feasible time period with which to work with.⁸⁵ This may be considered an example of precautionary action, given the identified threat of needing to deal with an insolvency, but, as argued below, this turn to the courts also suggests a new and potentially more adversarial relation between associations and the regulator, in view of the perceived greater likelihood of default.

The involvement of the courts sparked concern among lenders over issues such as the power of the administrator to withhold interest rates. This led to a burst of lobbying that ensured that the wording of the legislation explicitly prioritised the achievement of a solution in the best interest of creditors over the goal of ensuring that social housing stock that may be effected remained within the housing association sector, though the need to rescue a provider as a going concern continued to be the primary priority in statute.⁸⁶ Reassurance of lenders in this case can therefore be seen to have come through the transfer of precarity downward onto housing association tenants, who now have fewer legal rights against having their homes repossessed from the social housing sector in the event that their landlord becomes bankrupt. This nevertheless gave comfort to lenders, although the turn to the courts and the beefed up regime nevertheless left creditors feeling less certain over

⁸² PhD fieldwork data (Spring 2016).

⁸³ Altair Consulting, 'Cosmopolitan Housing Group: lessons learned' (Altair Consulting, 17 June 2014) altairltd.co.uk/2014/06/cosmopolitan-housing-group-lessons-learned/.

⁸⁴ Trowers & Hamlin (n 81 above).

⁸⁵ *Ibid.*

⁸⁶ Stephen O'Grady and Jack Isaacs, 'The New Special Administrations Regime for Social Housing Providers in England' (*Out-Law*, 8 September 2016); www.out-law.com/en/articles/2016/sepember/the-new-special-administration-regime-for-social-housing-providers-in-england/.

protecting their loan interests, as this subsequent quote from the consultant referenced above indicates:

I think the HCA has managed to satisfy most lenders with the wording around the primary function of administration would be to protect first charge lenders and housing tenants, and that's given comfort to most lenders, but I think there's still a few that are very concerned about that change and the uncertainty that adds to in terms of existing and new lending. (*Financial consultant*)⁸⁷

Although this new regime acts as an infringement on the formal rights of lenders compared to the previous moratorium process, the change in process to a court appointed administrator represents a deeper underlying shift in the relationship between lenders and the regulator. As pointed out by Veitch,⁸⁸ drawing on Loughlin,⁸⁹ in the former's analysis of how legal forms structure who can be made accountable for collective harms, the translation of political conflicts into 'justiciable' legal terms can transform normative understandings, shifting policy disputes into 'dispute over competing rights claims that can be adjudicated by courts'.⁹⁰ It is possible therefore that the shift to a court appointed administrator process may be a reflection of a declining authority of the regulator to reconcile the interests of creditors, particularly given the increased range and complexity of lenders via the recent turn to bond markets. While this is a topic that requires further research, it could indicate an important new source of precariousness within the housing association sector if the relation between lenders and the regulator is increasingly framed as an adversarial one of competing rights claims legally enforceable by the state, rather than being governed by less formal and more mutual understandings.

B. Managed Precarity and the 'Preparedness' of Housing Associations

Responding to this greater precariousness has been important for the regulation of housing associations, with the need to maintain the willingness of creditors to lend to the sector in an environment where the regulator has fewer resources and the primary attraction of housing associations as safe assets needs to be maintained to attract institutional finance. The near collapse of Cosmopolitan Housing Group in 2013 due to failed student housing developments—an association with complex financial arrangements poorly

⁸⁷ PhD fieldwork data (Spring 2016).

⁸⁸ Scott Veitch, *Law and Irresponsibility: On the legitimization of human suffering* (Oxford, Routledge-Cavendish, 2007).

⁸⁹ Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Oxford, Hart Publishing, 2000).

⁹⁰ Veitch (n 88 above) 83.

understood by its governing board that exposed its social housing stock to liabilities in its commercial developments—represented a major crisis for this model, however. Unmanaged failure in one association would likely raise the cost of finance for the sector as a whole, damaging their reputation as safe and stable assets. Ensuring that such a failure does not happen has been a major priority for the regulator, as indicated by this following quote from a solicitor in a law firm that advises the sector:

Cosmopolitan slightly shocked the world, and I think in a way that's why the HCA post-Cosmopolitan have been very, very, very, very, very keen to make all their registered providers understand that this was a really serious, a really serious thing. And I think almost, because it happened at a time when the private investors, the institutional investors were just beginning to go into the market, and all of a sudden all the things they feared most were happening. (*Solicitor*)⁹¹

Ensuring that the housing association sector as governed by its regulatory framework can demonstrate that another Cosmopolitan either does not happen or could be managed effectively without risking the money of creditors has therefore been a major priority for the HCA. This precariousness of housing associations in the event of such a crisis, given a less favourable policy context and the possibility of further housing market upheaval, remains a major concern for the regulator even given the current high surpluses and seeming robustness enjoyed by many associations, as indicated by this quote from a senior housing policymaker:

What is worrying is that even in this relatively benign period where welfare reform has rolled out slowly, the housing market has been pretty buoyant, and interest rates have been at all-time lows ...

... which has led to the higher surpluses, but even in that very benign period we've had quite a number of associations getting into trouble. (*Senior housing policymaker*)⁹²

Although the regulator retains powers over setting standards in governance and viability and value for money that impact on how associations are perceived by lenders, austerity has reduced the funding available for it to intervene to ensure the security of providers in the event of a major crisis, such as another property market crash.⁹³ The recent imposition of regulatory liberalisation in the Housing and Planning Act 2016 additionally removes tools such as the ability to withhold consent for the use of social housing stock in index-linked finance deals such as those involved in

⁹¹ PhD fieldwork data (Summer 2015).

⁹² PhD fieldwork data (Summer 2015).

⁹³ Interview with a senior housing policymaker (Summer 2015).

the Cosmopolitan debacle, further limiting the direct scope for intervention by the regulator and placing the sector as a whole into a more precarious position. Within this context, an emphasis on increasing the sector's crisis management capacity through means such as stress testing, asset and liability registers and greater skills requirements for boards can be viewed as instituting greater preparedness in the event of a harsher future environment, making associations more resilient in the face of volatility.

C. Commercialisation and the Transfer of Risk onto Tenants and the Public

The emphasis on preparedness raises the issue, however, of the implications of regulating insecurity as a tool of governance highlighted by Lorey,⁹⁴ including the transfer of risk and precarity onto others within social housing such as tenants, in a post-financial crisis context where the future has become subject to greater uncertainty.⁹⁵ Associations now have a greater expectation for resilience, but this may also further embed financialisation that may further entrench precariousness within contemporary UK cities, making associations structurally dependent on acting more in accordance with commercial practices, for example in dealing with rent arrears. This is reflected in the changing stance of the regulator, which has shifted to a more permissive stance with respect to evictions, given the need for associations to reduce their own uncertainty over their incomes, as indicated by the following quote from a solicitor advising the sector:

Until relatively recently the HCA's policy was that they shouldn't evict people just on the basis of rent arrears. There normally had to be some other compelling reason why. But I think now housing associations are saying they have committed to a business plan, we cannot—I mean, don't get me wrong, they will do all they possibly can to help somebody, but at the end of the day they cannot risk too great arrears. (*Solicitor*)⁹⁶

In addition to a greater chance of evictions there is also the possibility of a changing tenant profile, as social housing becomes more exclusionary for people impacted by welfare reform. Cuts to housing benefit and other support, alongside the planned move toward universal credit paid directly to the tenant rather than the social landlord, are likely to make rental streams less secure. The recovery from the financial crisis has been precarious for many on low incomes, and although mass unemployment seen in previous

⁹⁴ Lorey (n 11 above).

⁹⁵ Paul Langley, 'Anticipating uncertainty, reviving risk? On the stress testing of finance in crisis' (2013) 42 *Economy and Society* 51.

⁹⁶ PhD fieldwork data (Summer 2015).

recessions has not occurred, real wage growth in the UK has been poor and its labour market is increasingly characterised by ‘flexible’, precarious and temporary work.⁹⁷ As a result welfare reform has the potential to impact a broad range of tenants who move in and out of employment, resulting in the potential for more associations to explicitly include affordability criteria when deciding who to house, as indicated by the quote below from a housing association executive in a northern city:

The thing is most of the people we rehouse are on zero hours contracts or part-time employment, fairly insecure employment, so even when you house people and they are in employment, chances are a few months later they’re not going to be. So will we therefore start to vet our tenants based on incomes and ability to pay, whereas in the past it’s been, our lettings policies have been based on need pretty much. It’s a big change. (*Housing association executive*)⁹⁸

As implied in this quote the extent to which associations adopt this remains a matter of debate within the housing association sector itself, given the significance of moving from a needs-based lettings system to one where the ability to pay takes a greater role. This indicates attitudinal and cultural shifts play a role in the extent to which associations adopt commercial values and metrics, indicating that financialisation is not a mechanical process but one that has to be actively negotiated and internalised through the organisational identity of associations.⁹⁹ Although the regulator may not directly prescribe these measures, it nonetheless can enable these attitudinal reforms within the sector through taking a less prescriptive stance toward lettings policies. This is indicated by the highlighted portion of this quote from a senior housing policymaker familiar with the regulatory framework in regards to greater commercial pressures driving associations in an ‘upmarket’ direction:

There will be I guess some pressures that could be construed as driving housing associations upmarket. But equally they’re very alive to that risk and they have to, that’s one for them to balance rather than for us to balance. We don’t tell associations what business model they ought to have, but we are conscious that they would be faced with those kinds of dilemma. And it’s their job to work out how they best meet their usually charitable objectives. (*Senior housing policymaker*)¹⁰⁰

Here can be seen how the enactment of financialisation has resulted in a transference of risk onto tenants as mediated by the regulatory framework,

⁹⁷ Jeremy Green and Scott Lavery, ‘The Regressive Recovery: Distribution, inequality and state power in Britain’s post-crisis political economy’ (2015) 20 *New Political Economy* 894.

⁹⁸ PhD fieldwork data (Autumn 2015).

⁹⁹ See also Manzi and Morrison (n 3 above).

¹⁰⁰ PhD fieldwork data (Summer 2015).

with a greater permissiveness toward commercialisation as a means of negotiating a more precarious housing context. The cost of this is likely to be greater precarity for tenants, as more find themselves excluded from social housing in the future as associations are pressured in a more commercial direction.

Recalling the distinction by Froud¹⁰¹ between risk and uncertainty however, the contingencies and uncertainties of future events mean that the state still bears some of the risks of this transition. A genuine unmanaged insolvency and the collapse of a provider with its stock repossessed by lenders would likely be politically disastrous to a government that still requires housing associations in order to meet housing policy criteria. Pushing associations too far in a commercial direction if they are perceived as unready to meet these risks may result in lenders ultimately withdrawing from the sector, leaving the government with the possibility of having to take responsibility for both the sector's £60 billion debts and the £40 billion in public grants the government has historically invested in it. The ambiguities of this are indicated in the following quote from an auditor in reference to the contestation between lenders and the Conservative Finance Minister of the time, George Osborne:

The funders are saying that if you push too far we'll see it as more risky, and then the government's got to think about where that funding will come from. The worst thing they want is that funding comes back onto them, into public, and ... they'll ease off them. He does not want all that debt, George Osborne, does he? Coming back onto public books. (*Auditor*)¹⁰²

The entrenchment of financialisation in the more precarious context since the financial crisis therefore indicates the continued need for state intervention and support if the welfare state is to continue to be a source of profitable accumulation for financial actors. Financialisation can therefore be seen here not to be a matter of deregulation or the retreat of the state provision in favour of the market,¹⁰³ but a process that requires the ongoing mediation of legal and regulatory frameworks to manage risks and uncertainties within a more precarious housing context.

VII. CONCLUSION

Financialisation of welfare services is often justified through the transference of risk to the private sector in exchange for the assumed benefits of

¹⁰¹ Froud (n 20 above).

¹⁰² PhD fieldwork data (Spring 2016).

¹⁰³ Aalbers (n 26 above).

market efficiency. This rests on a conflation between risk and uncertainty however,¹⁰⁴ as private actors need to be insulated from the uncertainties and contingencies of social delivery, a process often mediated through legal and regulatory frameworks that see risks re-appear through their transfer back to service users and ultimately the state. These can have consequences for the imposition of greater precarity on service users, as risks are passed from lenders to providers to welfare state recipients. Although associations operate independently and are still largely not-for-profit actors, the shift to private finance since the late 1980s has brought greater commercialisation into the sector that is likely to be exacerbated by current austerity policies that have increased the precariousness of the sector.

Although financialisation has continued in the aftermath of a the financial crisis, an operating environment characterised by greater risk has led to a weakening of the regulator in its relationship with a changing profile of lenders, as indicated by the shift toward the courts in the process for dealing with the potential insolvency of a provider. Weakened regulatory powers have led to a renewed emphasis on resilience among associations in light of the greater precariousness they are subject to, indicating how preparedness in the face of uncertainty is becoming a more important mode of governance in the aftermath of the financial crisis.¹⁰⁵ In associations this has also led to a greater emphasis on commercialisation and regulatory permissiveness toward more restrictive lettings policies, potentially increasing the precarity of social housing tenants through the exclusion of greater numbers of people from the sector. Financialisation has therefore been able to persist in the aftermath of the financial crisis, but at the cost of a rescaling of risks downwards, passed progressively from lenders, to providers, to low-income renters living within a more precarious housing system.

¹⁰⁴ Froud (n 20 above).

¹⁰⁵ Langley, 'Anticipating uncertainty, reviving risk? On the stress testing of finance in crisis' (n 95 above).

