



1973

More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar

Bruce Ackerman

Follow this and additional works at: <http://digitalcommons.law.yale.edu/ylj>

Recommended Citation

Bruce Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar*, 82 *Yale L.J.* (1973).
Available at: <http://digitalcommons.law.yale.edu/ylj/vol82/iss6/4>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in *Yale Law Journal* by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar

Bruce Ackerman*

I

It would clarify matters if the dispute between Professor Komesar and myself were placed in a more general context. In writing my essay, I set two major problems for myself. The first arose from the perception that three basic elements of our existing slum housing strategy had previously been treated in isolation from one another. There had been a great deal of writing about housing code administration, housing subsidy efforts and the changing law of landlord and tenant, but there had been little systematic inquiry into the relationships among these three parallel governmental responses. As a consequence, the essay sought to isolate the economic and ethical conditions under which the three programs could interact to generate a significant improvement in the lot of the low-income tenant.¹ Finding that a code-subsidy-litigation strategy could, in a large number of theoretical contexts, significantly ameliorate the position of the slum tenant, the essay reached a second basic issue. During the 1960's an impressive number of students of public policy (among whom economists predominated) had argued that ad hoc efforts at redistributing income through the regulation of particular commodity markets should be scrapped and replaced by a negative income tax funded through the progressive income tax system. My analysis of slum housing regulation suggested that some of the advocates of a negative tax had overstated their case. While a negative income tax has an important role to play in a principled effort to aid the poor, I argued that it is not the *only* technique upon which one may sensibly rely to redistribute income in the name of social justice. In a wide range of situations a redistribution program relying exclusively on a negative

* Professor of Law and Public Policy Analysis, University of Pennsylvania Law School. A.B. 1964, Harvard University; LL.B. 1967, Yale University.

1. Unfortunately, my essay only attempted a brief assessment of the law of landlord and tenant in the light of the economic and ethical analysis presented. See Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1193-96 (1971) [hereinafter cited as *Regulating Slum Housing*]. While this project remains on my work docket, it will be years before I reach it. Indeed, I would be overjoyed if one of my readers took this as an invitation to begin serious work on this important, and extremely complex, task.

More on Slum Housing and Redistribution Policy

tax would be no better than, or inferior to, a more complex effort in which a negative income tax was *supplemented* by a coherent effort to regulate the slum housing market on behalf of the poor.

I have restated² the two principal arguments in my essay to permit the reader to judge whether Professor Komesar has undermined them in any significant way. In my view, he has quite plainly failed to do so. In his theoretical critique, Professor Komesar argues that "once it is assumed that costs to landlords are not counted as costs to society, *any* program funded by these landlords' costs has the 'leverage' effect no matter in what form it distributes its benefits. The 'leverage' effect exists on the cost and not on the benefit side."³ I agree. Indeed, I thought I said as much in the very section of the essay that Professor Komesar scrutinizes with such care.⁴ As I explained, the mere possibility of "leverage" does not of itself imply that it is fair to impose a special burden upon landlords; it was for this very reason that after my economic analysis was concluded, I attempted to assess the justice of imposing a special burden upon slum owners. While Professor Komesar indicates some misgivings about the success of this effort in social philosophy,⁵ he does not attempt to elaborate upon his difficulties in a sustained way. Nor does he argue that

2. For the original statement, see *Regulating Slum Housing* at 1186-88.

3. See Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 *YALE L.J.* 1175, 1180 (1973) [hereinafter cited as Komesar].

4. I said there:

Now, of course, the "leverage" effect is not a magic wand by which the government may generate benefits for the poor without social cost. *Ex nihil nihil fit*. Code enforcement does not cost the government anything beyond administration expense precisely because the program places the principal redistributive burden upon the private landlords of Slumville rather than the Athenian taxpayers at large: as a consequence, a major portion of the redistributive impact of the program only appears in the landlords' private budgets without denting the public fisc. Thus, it clearly would be improper at this stage in the analysis to embrace a code enforcement-special housing subsidy scheme for Slumville simply because the program generates more (redistributive) bang for the (government's) buck. Before passing final judgment, it is necessary both to consider the fairness of imposing a special burden for redistributing the wealth upon the landlords of Slumville and to assess the overall efficiency with which the code enforcement scheme redistributes both the government's and the landlord's contribution. This broader analysis will be attempted after an examination of the impact of housing code administration upon rent levels is concluded; nevertheless, even at this early stage, it seems important to emphasize the limited function of the question we are presently pursuing. At best, the analysis attempted in this section of the essay can establish that code enforcement—when backed by a special housing subsidy—can have a place within a larger redistribution strategy. It remains to be considered whether it ought to have such a place; and the simple perception that the code-housing subsidy approach may generate more bang for the government's buck cannot provide the basis for a sophisticated approval of the plan.

Regulating Slum Housing, *supra* note 1, at 1122. Moreover, an entire section of the essay—elaborately entitled "It May Be Cheaper for the Government, But is it Cheaper for Society?"—devotes nine pages to the question which Professor Komesar seems to suggest I have concealed from view. *Id.* at 1177-86.

5. Komesar, *supra* note 3, at 1178 and note 7.

I have misapplied economic theory in suggesting that a code-subsidy-litigation strategy will have a "leverage" effect in the markets I have modelled. Consequently, it appears that Professor Komesar cannot be said to undermine my essay's first thesis: that under certain economic conditions, a morally viable code-subsidy-litigation strategy will significantly ameliorate the conditions of the poor tenant.

To be fair, however, Professor Komesar seems far more interested in my essay's second major thesis: that a negative income tax is not necessarily the *sole* component of an appropriate redistribution effort. He argues, in contrast, that the code-subsidy-litigation strategies I describe in my article will not always be the *best* ways to redistribute the landlord's quasi-rents to poor tenants. To make out his case, he proposes alternative systems of slum regulation which, in his judgment, may improve upon the Ackerman Strategies. Even if Professor Komesar were correct, it would not undermine my major thesis in any way. Even if the Komesar Strategies were superior to the Ackerman Strategies, it would *not* follow that *an exclusive reliance upon a negative income tax* would be superior to the Ackerman Plan. Indeed, the Komesar analysis, if valid, would carry a very different implication from the one suggested in the critique. For if Komesar were right, there are many systems of housing regulation (including the Ackerman and Komesar Plans) which may appropriately supplement a negative tax scheme in a wide variety of contexts.

It would appear, then, that despite Professor Komesar's call for modesty of scholarly ambition, his real complaint with my work is that it is not ambitious enough. In Professor Komesar's view, it was not enough to establish the conditions under which a code enforcement-housing subsidy-litigation strategy served as a viable redistributive tool, even in a world with a negative income tax. Instead, he wishes to impose an obligation upon me to define those conditions under which *each conceivable* mode of slum housing regulation would be the *best* possible system of redistributing the quasi-rents earned by slum landlords. When his critique is understood in this way, I cheerfully agree that such a task would require a much more elaborate discussion than I have yet attempted.

This said, I must express some very real doubts concerning the Komesar Strategies. At several points,⁶ he suggests that a rent control program will, under my models, generate superior redistributive outcomes at no greater cost than my code enforcement-housing subsidy

6. *Id.* at 1180, 1183 and notes 12 & 19.

program. I cannot agree. Putting aside the vastly greater administrative costs of rent control, a government price-fixing regime suffers from obvious disadvantages. Under the code approach, prices are permitted to vary so as to allocate scarce housing types efficiently to those most willing to pay for them. By contrast, rent control, especially the imposition of a price freeze of the kind suggested by Professor Komesar,⁷ would make it impossible for prices to adjust to changes in demand over time, causing substantial inefficiencies as a result. Thus, it is far from obvious that a rent control scheme would improve the typical slum tenants' real income more than would comprehensive code enforcement, even in the simplest of Slumvilles. In the more sophisticated Slumville models, where changes in supply are considered, price flexibility is even more important.⁸ While it is not inconceivable that *certain* sorts of rent control could serve as a viable redistribution technique in certain limited circumstances, Professor Komesar has not attempted a sophisticated argument along these lines.

More interesting is his suggestion that "slumlord tax-cash grant" schemes are superior to the code enforcement technique of in-kind transfers. Starting from my essay's five page sketch of the tax-grant concept,⁹ Professor Komesar attempts a two-pronged analysis. He first discerns serious errors in my original treatment and then attempts to devise alternative tax-grant schemes superior to code enforcement. I have serious difficulties with both branches of the critique.

My earlier discussion imagined a tax-grant scheme structured so that, after taxing each substandard unit \$45 (for example), the state would pay a \$45 cash subsidy to any *Slumville family willing to reside in the unit*. Such an arrangement, I argued, would be an utterly ineffective redistribution device. If the equilibrium pre-tax rent was \$100, tenants would permit landlords to raise their rent to \$145 since the receipt of \$45 in subsidy would reduce their actual cash outlay to the old \$100 rent level with which even the marginal tenant previously was content. Professor Komesar argues, in contrast, that the result of my tax-grant scheme will be indeterminate, and that an equilibrium rent may be re-established at any place between the point at which tenants pay only \$55 (net of subsidy) and the point at which they pay \$100 (net of subsidy).

.

7. *Id.* at 1184.

8. Here, as elsewhere, Professor Komesar's discussion has an unfortunate tendency to concentrate exclusively on the simplest of the Slumville models, ignoring entirely the wide range of additional models which were introduced precisely to make the discussion more realistic.

9. *Regulating Slum Housing*, *supra* note 1, at 1181-86.

To understand the error underlying this "indeterminacy" claim, consider why rents were \$100 rather than \$55 in Slumville *before the introduction of the tax-grant scheme*. Rents remained in equilibrium at \$100 because, whenever a family would threaten to vacate a unit and double-up with friends unless the landlord cut his price below \$100, the landlord would accept the offer and rent his unit to members of another Slumville family who were willing to split up and occupy two apartments so long as the rent for each was no greater than \$100. Indeed, that is what an economist means when he says that \$100 is an equilibrium rent. Now, if before the tax-grant scheme Slumville's tenants were unable to compete successfully for apartments unless they were willing to pay \$100, there is no reason to believe that they will be successful in obtaining an apartment by paying a lesser sum after the program's introduction. To put the matter in a nutshell, if I can sell a house for \$100, why shouldn't I be able to sell a (house + \$45) for \$145?¹⁰ Yet this is precisely the effect of a tax-grant program which offers a payment of \$45 to any group of people willing to live in a substandard unit. Professor Komesar fails to grasp this point because he has failed to grasp the concept of an equilibrium price. In making his indeterminacy argument, Professor Komesar asserts that "[b]oth supply and demand are unresponsive"¹¹ to price changes in the simplest Slumville model. If this were the case, there could be no such thing as an equilibrium price either *before* or after the introduction of the tax-grant scheme and so prices would be *completely* indeterminate. However, it is most emphatically not the case that even the most elementary Slumville model assumes that *both* supply and demand are completely inelastic. This is apparent from Professor Komesar's highly simplified statement of the model's assumptions, which correctly explains that in the elementary Slumville, "the supply of slum housing units is fixed . . . and the demand is responsive to changes in rent"¹² (emphasis added). Since demand is responsive, there will be an equilibrium price both *before* and *after* the tax-grant scheme; and, for the reasons I have given, that equilibrium price will remain unchanged.

10. To put the problem in the more familiar terms of antitrust analysis, what we have here is a government created tie-in in which the "tied product" is the \$45 subsidy check, while the "tying product" is the slummy house. Whatever the evils of other sorts of "tie-ins," no authority—not even the Supreme Court—has suggested (before Professor Komesar) that the tie-in of a cash rebate would permit the owner of the tying product (*i.e.*, the house) to exploit his market power to an enhanced degree. For the furthest the Supreme Court has gone in this direction, see Dam, *Fortner Enterprises v. United States Steel*: "Neither a Borrower Nor a Lender Be," 1969 SUP. CT. REV. 1.

11. Komesar, *supra* note 3, at 1183.

12. *Id.* at 1177.

While I find Professor Komesar's critique of my earlier treatment of the tax-grant scheme unpersuasive, my brief discussion was not intended to be comprehensive. In particular, Professor Komesar is quite correct in suggesting that under a tax-grant variant which assures each tenant family living in a substandard unit a cash subsidy *regardless of whether it remains in the unit or moves out*, it no longer follows that landlords will be completely successful in appropriating the subsidy by raising rents. It does not follow, however, as Professor Komesar seems to suggest, that landlords will be completely *unsuccessful* in raising rents either. If any of the tenants spend their new money on more housing space within Slumville, the price of units will rise, forcing some tenants to settle for less space than previously. This "income effect" on housing prices will dissipate some of the value of the subsidy to some of Slumville's tenants.¹³

There are, however, several far more important issues which must be resolved before Professor Komesar's variant of the "slumlord tax-cash grant" idea can be transformed into a viable regulatory program. First, the marginal cost of improving buildings to code levels will typically vary quite widely from house to house: It may, for example, cost landlords anything between \$40 and \$60 a month to keep their units rat-free.¹⁴ If the city levies a uniform slumlord tax in excess of \$40 a month, some landlords will improve their buildings rather than pay the impost. Thus, the uniform tax will generate a situation equivalent to partial code enforcement, in which landlords of rat-free dwellings will generally find it possible to pass on some of their costs to their tenants.¹⁵ It is true, of course, that the city will still collect taxes from the noncomplying landlords and will then be able to distribute the revenue collected to the Slumville tenants. The total benefit received by Slumville tenants will depend, however, upon (a) the number of houses which remain sub-code; (b) the extent to which rents in the rat-free dwellings have risen; and (c) the amount of the tax. Given these facts, it is not at all obvious—as Professor Komesar asserts—that the total benefit obtained from his tax-grant variant will generally exceed the benefits generated by comprehensive code enforcement.

Second, even in those cases in which the tax-grant scheme seems

13. Over time this effect can be expected to diminish, as higher prices within Slumville induce Middleburg landlords to rent to low-income tenants. See *Regulating Slum Housing*, *supra* note 1, at 1113-17.

14. It should be noted that at no point in any of the Slumville models is it assumed that the marginal cost of making an improvement is the same for every unit.

15. See *Regulating Slum Housing*, *supra* note 1, at 1104, 1109-10, 1112, 1134-40.

on the surface to be a superior distribution tool, its superiority will depend critically upon the government's choice of tax rate. Conceivably a slumlord tax of \$47 would make tenants somewhat better off as a class, but a tax of \$52 would not because, while more units would be rat-free, less tax money would be collected and prices in rat-free dwellings might still be considerably above their old levels. Thus, the data and economic sophistication needed to impose the tax seem to transcend the capacities of even the most sophisticated local governments. At any rate, the considerable cost of obtaining, analyzing and updating the data and revising the tax rate should be taken into account in assessing the two programs.

Third, though a slumlord tax would often lead only some slumlords to improve their dwellings, Professor Komesar altogether ignores the substantial "external" benefits which are internalized as a result of comprehensive code enforcement. Consider a program of rat-eradication. Because rats move relatively freely between dwellings, total eradication in one dwelling is extremely costly—if not impossible—unless the entire community is committed to the program. And partial eradication in a dwelling brings relatively little benefit, whatever its costs: two rats are better than five—but not much better.

Fourth, Professor Komesar's version of the tax-grant program will require the administering agency to engage in extremely expensive efforts at drawing distinctions of dubious value between potential beneficiaries. Professor Komesar requires that the monthly subsidy "be paid to each Slumville family whether or not it continued to occupy a single rental unit,"¹⁶ thereby permitting families to double up and avoid landlord efforts to appropriate the subsidy by a rent increase. While structuring the subsidy in this way will accomplish Professor Komesar's objective, it will have other consequences which he does not explore. Suppose, for example, one of Slumville's families decides to move to a house recently repaired by a landlord seeking to avoid paying the Komesar slumlord tax. If this family is removed from the beneficiary list, the Komesar subsidy induces poor families to remain in substandard dwellings even though, given the relative prices of the competing accommodations, they would otherwise prefer to move into improved units. Slumville families will be understandably bitter at losing assistance simply because they wish to spend their money on housing services. Even worse, the subsidy structure will create a powerful incentive for families to *report* that they have moved into crowded quarters with another family, while, in fact, they

16. Komesar, *supra* note 3, at 1184.

have rented one of the newly available rat-free apartments, and the public assistance authority will be obliged to launch the usual massive investigation of "cheaters." If, on the other hand, a family moving into a rat-free unit is permitted to remain on the special subsidy rolls, the share of the slumlord tax fund which will trickle down to those remaining in the worst conditions will be considerably reduced. Similarly, since the Komesar subsidy runs to each "family," the poor are encouraged either to divide their families in fact or—at the very least—to create this impression in the mind of the authorities. In short, the Komesar plan seems to have all the defects of the notorious "man in the house" rule.¹⁷

Fifth, the premises of the Komesar tax program do not in general provide a sound moral basis for imposing a special burden upon slum landlords. As Professor Komesar makes perfectly clear,¹⁸ the "ideal" slum tax in his judgment would be set at a level *just below* the amount it would cost each landlord to improve his unit to code levels, since this tax level would maximize revenues obtained for distribution to the tenantry. Thus, under a perfectly executed Komesar tax, *none* of the landlords would improve their dwellings. But if Professor Komesar does not want slum landlords to improve their units, on what ground does he justify imposing a special tax on their profits? Surely such a program cannot be justified on the theory developed in my earlier essay. I argued there that slum landlords—as members of a privileged class in an unjust society—have an obligation to structure their ongoing relationships with the poor in a fashion which comports with fundamental decency.¹⁹ Since Professor Komesar wants the landlords to pay their tax, and *not* improve their buildings, he can hardly believe that landlords are under an obligation to rent buildings which are in a decent condition. Consequently, to justify his special tax as fair, he must have recourse to a "neutrality" theory whereby a tax is "unfair" to the extent that it distorts the preexisting allocation of resources. While the neutrality theory does provide some ethical support for the slumlord tax, my earlier essay discusses at length why this theory cannot provide a fully satisfactory justification for singling out slum landlords for a special burden.²⁰ First, the fairness of taxing a slumlord's quasi-rents remains problematic so long as the political system refrains from imposing similar levies upon other rentiers and

17. See Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963).

18. Komesar, *supra* note 3, at 1182.

19. *Regulating Slum Housing*, *supra* note 1, at 1169-74.

20. *Id.* at 1165-69.

monopolists. Second, a Komesar tax will in many contexts induce a contraction in supply; the greater the contraction, the less the neutrality of the tax. While the neutrality principle supplies a *supplementary* rationale for a special burden on the slum landlord (as it does in the justification of code enforcement), it can provide an *exclusive* rationale for a special imposition (as in the case of the slumlord taxes) only in a relatively narrow class of cases.

Sixth, the distribution of benefits under the Komesar program is not intuitively equitable. Thus, if two "families" occupied *separate* apartments at the time the Komesar program were inaugurated, they would be entitled to a *double* subsidy payment when they later chose to double-up; in contrast, a "family" which was already living in overcrowded conditions at the beginning of the program would obtain only a *single* subsidy payment. If the underlying purpose of the subsidy scheme is to compensate tenants for living in substandard conditions, this disparate treatment hardly seems just. If anything, the family living in overcrowded conditions both before and after the tax-grant plan would seem to deserve the larger subsidy.²¹

To sum up, there are at least six issues which must be considered in appraising a Komesar-type tax-grant scheme: (1) the "incidence" problem—who will bear the tax; (2) the "data collection and analysis" problem; (3) the "externalities" problem; (4) the "administration" problem; (5) the "fairness to the landlord" problem; and (6) the "fairness to the tenant" problem. I suspect that if each of these issues were thoroughly canvassed, the Komesar approach would confront so many serious difficulties that it could not plausibly serve as a viable redistribution program. Since Professor Komesar's essay does not even glimpse, let alone resolve, these six critical issues, it does seem premature to proclaim that the traditional code-subsidy-litigation strategies are clearly inferior to his version of the "tax-grant" scheme.²²

21. Similarly, if in response to the administrative difficulties discussed earlier, Professor Komesar permits Slumvillites who move to the recently improved units to retain their subsidies, he will have great difficulty justifying the equity of this result when it is challenged by (a) those still living in substandard dwellings and (b) those who lived in code level dwellings before the program began and hence are not entitled to a subsidy.

22. Professor Komesar also deals briefly with a final variant of the tax-grant scheme under which the proceeds of the slumlord tax are transferred to general revenues for use for redistribution or other beneficial social programs. While Professor Komesar claims that my essay "assails the would-be proponents of [such] schemes," I do not understand what passages in my article gave him this impression. It certainly is not the passage which he quotes in his supporting footnote 23. I argued there that the economic impact of a slumlord tax of the sort presently under discussion would be no different than the impact of a code enforcement effort enforced by the imposition of fines. I do not understand how Professor Komesar can read this argument to suggest my opposition to slumlord taxes of the sort he is discussing. Indeed, just the reverse follows. Since I am in favor of both partial and comprehensive code enforcement in a broad range of situa-

II

In the second half of his critique, Professor Komesar argues that the assumptions made in the various Slumville models so depart from contemporary realities as to deprive my theoretical analyses of any significant value. To assess the merit of this claim, it is important to keep in mind the fact that the Slumville models are intended to serve two, quite different, functions. First, they aim to direct sophisticated empirical researchers along avenues which will most fruitfully enlighten the issues of greatest concern to public policy makers. The empirical literature now suffers from an understandable tendency to measure those parameters most easily measurable and to ignore factors—such as consumer response to quality changes—which are far less amenable to the standard techniques. Second, the models serve to identify for decision-makers operating in the here-and-now the empirical issues most relevant to the problems with which they are dealing. Given the paucity of scientific analysis, policy (whether it be a policy of aggressive action or passivity) can be grounded at best upon a sensitive, but thoroughly unscientific, perception of the realities in any given slum context.

Once again, Professor Komesar's critique—even if it were sound—does not ask, let alone answer, the hard questions. First, he does not attempt a sophisticated empirical study of the factors isolated by the Slumville models; nor does he even seek to demonstrate that I overlooked some of the implications of the existing corpus of empirical analysis. Second, Professor Komesar seems to criticize *any* effort to assess in a nonscientific (but hopefully sensitive) fashion the relative importance of factors at work in slum markets. He does not even consider whether legal scholars have an obligation to supply policy makers with reasoned “quasi-empirical” arguments during the lengthy interregnum of scientific ignorance. Indeed, I am afraid that Professor Komesar's refusal to make intelligent guesses may simply conceal a belief that, unless an overwhelming empirical case can be made for governmental intervention, *laissez faire* represents the best policy. This is, of course, a very debatable view: It would have been far better if Professor Komesar had chosen to argue for, rather than assume, its merits.

tions, it follows that I am equally in favor of slumlord taxes which induce partial or total compliance; for the only difference between the two programs is whether the money payment exacted from landlords is labelled a “fine” or a “tax.” Similarly, in those contexts in which code enforcement is not a desirable goal, a plausible argument can be made for a rather modest slumlord tax so long as the difficulties of applying the neutrality rationale canvassed in the text are not deemed overly serious.

Instead, Professor Komesar spends most of his time arguing in a nonscientific way about some of the nonscientific judgments I reached in my essay. For example, he takes me to task for suggesting that enforcing housing codes in the slums will not induce a *significant* number of persons in the (lower) middle class to move to a Slumville which still would have more than its share of urban afflictions. While I never claimed that this judgment was grounded in hard empirical data, it nevertheless appears to me a sound guess until some solid contrary evidence is provided. Moreover, I took care to make clear that my guess served as "a critical premise which provides the underpinning for our [major] argument."²³ Having cautioned the reader in this way, it seems to me perfectly appropriate (indeed desirable) to proffer an opinion on the probable practical significance of this factor in an overall assessment of the viability of the code enforcement technique. Otherwise, the article would have degenerated into a sterile exercise in which countless factors were enumerated without any indication of their probable importance.

At times, however, Professor Komesar's critique moves beyond the simple announcement of disagreement to an attempt to demonstrate, in a rough and ready fashion, that my empirical judgments are not soundly based. In particular, the critique argues that I have substantially underestimated the deleterious impact code enforcement will have upon the supply of housing to the poor both in the short and long run. Though the critique's principal arguments are very seriously flawed, I do not wish to claim that my own judgments are based on unassailable empirical data. Simply because Professor Komesar's arguments are wrong does not mean that my conclusions are right. Only serious and disciplined empirical work²⁴ can settle the issue.

On, then, to Professor Komesar's particular contentions. First, he argues that the prospect of code enforcement some twenty or thirty years in the future will have a significant impact upon investors when they are considering the profitability of new housing construction for the middle class. Professor Komesar tries to make his point by considering a hypothetical decision to build a million-dollar apartment

23. *Regulating Slum Housing*, *supra* note 1, at 1140.

24. Important work, which will in time permit a far deeper understanding of the empirical realities, includes G. INGRAM, J. KAIN & J. GINN, *THE DETROIT PROTOTYPE OF THE N.B.E.R. URBAN SIMULATION MODEL* (1972); I. LOWRY, *A MODEL OF METROPOLIS* (1964); E. MILLS, *STUDIES IN THE STRUCTURE OF THE URBAN ECONOMY* (1972); R. MUTH, *CITIES AND HOUSING* (1969); R. BARRAS *et al.*, *An Operational Development Model of Cheshire*, 3 *ENVIR. & PLANNING* 109 (1971). For preliminary efforts to understand consumer responses to housing quality changes—an issue of especial importance here—see King & Meiszkowski, *An Estimate of Racial Discrimination in Rental Housing*, *J. POL. ECON.* (forthcoming); Kain & Quigley, *Measuring the Value of Housing Quality*, 65 *J. AM. STAT. ASS'N* 532 (1970).

house, and calculates both the present cost of an increase of one-half of one percent in the mortgage rate (\$995) and the present cost of a code enforcement program which reduces the landlord's income by \$50 a month for the last twenty years of a building's forty year life (\$1250). Finding both costs of the same order of magnitude, he inquires: "Why would investors be highly sensitive to \$995 while considering \$1250 de minimis?"²⁵

While the casual reader of the text is permitted to believe this to be a rhetorical question, the determined footnote reader finds that Professor Komesar is perfectly aware that his textual example is extremely misleading. Footnote 38 recognizes that the future costs of code enforcement have a present value of \$1250 only if it is assumed that the entrepreneur is *100 percent* certain that they will begin to accrue in the twentieth year. But it is obvious that, even if an effective code-subsidy system were presently in operation, a reasonable investor in 1973 would not consider it certain that such an effort would continue unabated between the years 1993 and 2013. Indeed, it is difficult for me to think that an investor would assign a probability of more than sixty-six percent to *any* of his present guesses about the state of the world twenty to forty years from now, given the incredibly diverse number of scenarios that are possible. A sixty-six percent probability would cut the \$1250 estimate to \$825, but even this figure is far too large. For in making his calculation, Professor Komesar has also assumed that an entrepreneur considers it *certain* that after twenty years the building will be in a slum neighborhood so that allowing its deterioration below code quality levels will make profit-maximizing sense. It should be obvious, however, that the preponderant majority of twenty year old buildings still serve middle-class folk who are willing to pay for code quality or better. Indeed, even forty years after their construction, a very substantial proportion of housing units remain in middle-class areas, inhabited by persons willing to pay for a decent home.²⁶ Reflecting this possibility, the

25. Komesar, *supra* note 3, at 1190. It should also be noted that when Professor Komesar introduces the subject of mortgage rates, he cautiously states that "an increase of one half of one percent can *perceptibly* diminish construction activity" (emphasis supplied), while caution is thrown to the winds in the rhetorical question, quoted in the text, which climaxes the argument by suggesting that investors are "highly sensitive" to such a change.

26. The only data I know of which enlightens these questions were collected and analyzed by Allan Manvel for the National Commission on Urban Problems chaired by Paul Douglas. Using 1960 census data, Manvel estimated that 5.5 million units in "poverty areas" in all metropolitan areas of over 250,000 inhabitants were twenty years of age or older. This represents only 31.4 percent of the 17.5 million units which were over twenty years of age in these cities. Since it seems reasonable to assume that relatively more forty year old houses were in Manvel's "poverty areas" than twenty year old houses, it follows

present value of future code enforcement costs should be no greater than \$350 or \$300.²⁷ Yet even this overstates the burden. The Komesar calculation assumes that code enforcement will cost the owner \$50 each and every month between the twentieth and fortieth year. In truth, however, it will cost less than this average sum to maintain code quality when the house is twenty years old and more than this sum as the unit approaches forty. By wonders of compound interest, this postponement of heavy expenses to the later periods means that the present value of code costs will be even lower than was previously suggested. Finally, even if code enforcement were nonexistent at the time of the investment decision, the prescient developer would take into account the possibility that such a code enforcement effort might nevertheless occur between 1993 and 2013. Thus, beginning a code-subsidy effort in 1973 affects new housing investment *only* to the extent that builders are apt to consider code enforcement *more* likely in 1993-2013 simply because it is a reality in 1973. In view of all these uncertainties, a rational entrepreneur planning Professor Komesar's hypothetical million dollar apartment project would assess code costs at a present value of no more than about \$200, if he took the trouble to worry about the matter at all. This amounts to .02 percent of the entire project's cost, which certainly seems *de minimis* to me.

Professor Komesar also argues that I have underestimated the amount of state subsidy which will be required over time as Slumville landlords withdraw units which, because of aging, become increasingly expensive to maintain at code levels. Thus if 3000 units must be subsidized during the first year, 3500 will be required in the next,

that the number of twenty year old houses in "poverty areas" may be a good deal less than thirty-two percent of the total. Thus, if an entrepreneur relied upon Manvel's estimates, he would be justified in discounting the probability of his unit ending up in a slum in its twentieth year by a factor well in excess of sixty-six percent.

Manvel also reports that some 1.5 million units in "poverty areas" are less than twenty years in age. Most of these are the product (I imagine) of various federal and local subsidy efforts. The remainder should, however, be taken to indicate that there exist rare cases in which a unit finds itself in a slum even before twenty years have elapsed. To the extent to which it would be more profitable to rent these units at subcode quality levels, Professor Komesar's calculation understates the impact of code enforcement.

Of course, Manvel's 1960 data, and his definition of a "poverty area," must be treated with care in assessing the probable impact of code enforcement between the years 1993 and 2013 on investment decisions undertaken in 1973. The study is simply being invoked to supplement the non-scientific argument being made in the text. *See* A. MANVEL, HOUSING CONDITIONS IN URBAN POVERTY AREAS 11-12 (Table 7), (The National Commission on Urban Problems Research Rep. No. 9, 1968).

27. Present value calculations in this range are generated if we assume—as the Manvel data, *supra* note 26, suggest is reasonable—that the chance a unit will be located in a "slummy" area after twenty years is no more than 1 out of 4 and that the chance after forty years is no better than 1 out of 2. For purposes of comparability, the calculations assume (like Professor Komesar's) that our hypothetical entrepreneur faces a discount rate of eight percent.

4000 in the next. . . . Unfortunately, in conjuring up the spectre of an ultimate government take-over of the entire market, Professor Komesar has only tarried long enough to view a single aspect of the problem. Though units will be withdrawn over time it is also true that other units will "trickle down" from richer areas and will become available to Slumville tenants for the first time. Rather than ignoring the problem, as is claimed, my earlier essay explicitly stated that "whether the number of units trickling down is greater than, less than, or equal to, the number of units removed from the market as a result of strict code enforcement is an empirical question which cannot be answered a priori."²⁸ Thus it does not follow, as Professor Komesar seems to suggest, that in order to support code enforcement over time at the appropriate level,²⁹ the government must necessarily undertake an ever-increasing effort to subsidize housing supply. Rather, the size of the state subsidy effort may increase or decrease over time depending upon local conditions.

III

I am sensible of the compliment Professor Komesar has given my essay by taking it seriously. While I have tried to consider thoughtfully each of the main points raised in his critique, I remain unconvinced. Nevertheless, Professor Komesar has served an important function by emphasizing the need for far more sophisticated and comprehensive efforts, both on the theoretical and empirical planes, and by permitting the reader to decide which of the various lines of possible research are most fruitful in our present state of ignorance. Moreover, the critique is an encouraging indication that lawyers may now be willing to undertake the hard work required before we can fashion a law of property cognizant of urban realities.

28. *Regulating Slum Housing*, *supra* note 1, at 1114.

29. The appropriate level of a government subsidy effort in support of code enforcement is considered in *id.* at 1133-34.