Fordham Urban Law Journal

Spring Symposium

ONE HUNDRED YEARS OF RENT CONTROL: AN EXAMINATION OF THE PAST AND FUTURE OF RENTAL HOUSING

January 18, 2019
9:30 a.m. – 5:30 p.m. | Costantino Room

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Karen Chapple  Karen Chapple, Ph.D., is a Professor of City and Regional Planning at the University of California, Berkeley, where she holds the Carmel P. Friesen Chair in Urban Studies. Chapple studies inequalities in the planning, development, and governance of regions in the U.S. and Latin America, with a focus on housing and economic development. Her books include Planning Sustainable Cities and Regions: Towards More Equitable Development (Routledge 2015, and winner of the John Friedmann Book Award); Transit-Oriented Displacement or Community Dividends? Understanding the Effects of Smarter Growth on Communities (with Anastasia Loukaïtou-Sideris, MIT Press, 2019); and Fragile Governance and Local Economic Development: Theory and Evidence from Peripheral Regions in Latin America (with Sergio Montero, Routledge, 2018).

Harvey Epstein  State Assembleymember Harvey Epstein represents the East Side of Manhattan, including the neighborhoods of the Lower East Side, East Village, Alphabet City, Stuyvesant Town/Peter Cooper Village, Murray Hill, Tudor City and the United Nations.

Chapple has been a public interest lawyer in New York City since graduating from CUNY Law School in 1994. Throughout his career serving our city, Harvey has worked on critical economic development and housing issues; at the same time, he has worked tirelessly on dozens of pieces of legislation that help the lives of everyday New Yorkers. Specifically, Harvey’s efforts during the five years he served as a tenant member of the Rent Guidelines Board were instrumental in successfully orchestrating the first rent freeze for one-year leases in the 47-year history of the Rent Guidelines Board.

An experienced leader and community organizer for social justice, Harvey has been civically active and has served as PTA president for his children’s elementary school. Harvey resides in the East Village with his wife, Anita, two children, Leila and Joshua, and their rescue dog, Homer.

In Fall 2015, she co-founded the Urban Displacement Project, a research portal examining patterns of residential, commercial, and industrial displacement, as well as policy solutions. Chapple’s climate change and tax policy research won the UC Bacon Public Lectureship, and she has also received the 2017 UC-Berkeley Chancellor’s Award for Research in the Public Interest. She received a Fulbright Global Scholar Award for 2017-2018 to expand the Urban Displacement Project to cities in Europe and Latin America.

Chapple holds a B.A. in Urban Studies from Columbia University, an M.S.C.R.P from the Pratt Institute, and a Ph.D. from UC Berkeley. She has also served on the faculties of the University of Minnesota and the University of Pennsylvania. Since 2006, she has served as faculty director of the Center for Community Innovation, which has provided over $1.5 million in technical assistance to community-based organizations and government agencies. She is a founding member of the MacArthur Foundation’s Research Network on Building Resilient Regions. Prior to academia, Chapple spent ten years as a practicing planner in economic development, land use, and transportation in New York and San Francisco.

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Davidson earned his AB from Harvard College and his JD from Columbia Law School. After law school, he clerked for Judge David S. Tatel of the United States Court of Appeals for the District of Columbia Circuit and Justice David H. Souter of the Supreme Court of the United States. Professor Davidson practiced with the firm of Latham and Watkins, focusing on commercial real estate and affordable housing, and served as Special Counsel and Principal Deputy General Counsel at the U.S. Department of Housing and Urban Development. He currently serves as a Member of the Board of the New York State Housing Finance Agency.

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SPEAKERS

Karen Chapple  Karen Chapple, Ph.D., is a Professor of City and Regional Planning at the University of California, Berkeley, where she holds the Carmel P. Friesen Chair in Urban Studies. Chapple studies inequalities in the planning, development, and governance of regions in the U.S. and Latin America, with a focus on housing and economic development. Her books include Planning Sustainable Cities and Regions: Towards More Equitable Development (Routledge 2015, and winner of the John Friedmann Book Award); Transit-Oriented Displacement or Community Dividends? Understanding the Effects of Smarter Growth on Communities (with Anastasia Loukaïtou-Sideris, MIT Press, 2019); and Fragile Governance and Local Economic Development: Theory and Evidence from Peripheral Regions in Latin America (with Sergio Montero, Routledge, 2018).

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Leah Horowitz

Leah Horowitz is the Director of Student Organizations and Publicity at the Public Interest Resource Center of Fordham School of Law. Leah received her law degree from Fordham Law School and her undergraduate degree from Cornell University. During her years at Fordham, Leah was a Stein Scholar and served as the president of two PIRC student organizations. Upon graduation, Leah worked as a public defender at the Bronx Defenders for nine years. While at the Bronx Defenders, in addition to zealously representing clients, Leah created the Client Library to provide books to incarcerated and non-incarcerated clients and started an initiative to address Solitary Confinement.

Leah is admitted to the Bar in New York and Connecticut.

Paula Franzese

Professor Paula Franzese is one of the country’s leading experts in property law, housing reform, and government ethics. Her empirical work on the plight of low-income tenants facing eviction has been widely cited, garnering national attention, and her recent scholarship shines a light on the crisis in safe and affordable housing, spurring state and federal legislative reform efforts. Professor Franzese has championed the right to counsel for low-income tenants facing eviction and her empirical work has spurred legislative reform efforts to end tenant blacklisting. She has written extensively on privatization and the erosion of community and common interest communities as quasi-state actors. She served as Special Ethics Counsel to the NJ Governor, Chair of the NJ State Ethics Commission and Vice-Chair of the Election Law Enforcement Commission. Featured in the book What the Best Law Teachers Do, Prof. Franzese is the unprecedented ten time recipient of the Student Bar Association Professor of the Year Award.

Sheila Garcia

A proud Bronxite, Director Sheila Garcia brings her background in teaching to her love of organizing. As Director, Sheila’s role is to coordinate and develop the CASA Leaders Team, coordinate the Rezoning campaign and Bronx Coalition for a Community Vision, supervise all staff, and engage elected officials. In 2014, Sheila was appointed by Mayor de Blasio to sit on the NYC Rent Guidelines Board (RGB) as a Tenant Member. She was instrumental in the city-wide coalition to organize both the lowest rent adjustment in the history of the RGB of 0% adjustment in 2015 and 2016 and the lowest possible increase of 1.5% in 2018.

Ingrid Gould Ellen

Ingrid Gould Ellen, the Paulette Goddard Professor of Urban Policy and Planning, is a Faculty Director at the Furman Center for Real Estate and Urban Policy. She joined the NYU Wagner faculty in the fall of 1997 and presently teaches courses in microeconomics, urban economics, and urban policy. Professor Ellen’s research interests center on housing and urban policy. She is author of Sharing America’s Neighborhoods: The Prospects for Stable Racial Integration (Harvard University Press, 2000) and has written numerous journal articles and book chapters related to housing policy, community development, and school and neighborhood segregation. Professor Ellen has held visiting positions at the Department of Urban Studies and Planning at MIT, the U.S. Department of Housing and Urban Development, the Urban Institute and the Brookings Institution. She attended Harvard University, where she received a bachelor’s degree in applied mathematics, an M.P.P., and a Ph.D. in public policy.

Howard Husock

Howard Husock is vice president for research and publications at the Manhattan Institute, where he is also director of the Institute’s social entrepreneurship initiative. A City Journal contributing editor, he is the author of Philanthropy Under Fire (2013) and The Trillion-Dollar Housing Mistake: The Failure of American Housing Policy (2003).


A former broadcast journalist and documentary filmmaker for WGBH Boston, his work there won three Emmy Awards, including a National News and Documentary Emmy (1982). Husock serves on the board of directors of the Corporation for Public Broadcasting. He holds a B.A. from Boston University’s School of Public Communication and was a 1981–82 mid-career fellow at Princeton University’s Woodrow Wilson School of Public and International Affairs.

Edward Josephson

Edward Josephson is currently the Director of Litigation at Legal Services NYC and at South Brooklyn Legal Services. From 1996 – 2003, he was the Director of the Housing Law Unit at South Brooklyn. He has defended tenants in eviction proceedings since 1988. Mr. Josephson has litigated a number of affirmative cases on issues of significance to low income New Yorkers, including Grimm v. DHCR, which expanded landlords’ liability for rent overcharges; Brooklyn Tenants v. Lynch, a challenge to pro-landlord amendments to the Rent Stabilization Code; Campos v. Rhea and Torres v. Martinez, federal actions that helped reform procedures in the Section 8 rent subsidy program; Frunzescu v. Martinez, which expedited the issuance of emergency Section 8 subsidy transfers; and Lang v. Patak, a constitutional challenge to laws requiring rent deposits by indigent tenants. He has also litigated numerous cases in federal district and bankruptcy courts to protect the rights of tenants in federally subsidized housing projects. Mr. Josephson is a graduate of NYU Law School.

Matthew G. Lasner

Matthew Gordon Lasner is an historian and theorist of metropolitan life whose work focuses on two aspects of housing in the nineteenth and twentieth centuries: the design politics of affordable housing (the role designers play in generating support for non-market alternatives) and the role played by housing in metropolitan culture and the shaping of urban form: how cities and suburbs are transformed by where we live, and how we live. He is associate professor of Urban Policy and Planning at Hunter College, CUNY, where he teaches courses on U.S. and global planning, housing, and the built environment. His award-winning first book, High Life: Condo Living in the Suburban Century (Yale University Press, 2012), examines the emergence and evolution—social, legal, economic, and architectural—of owner-occupied multifamily housing (co-ops, condominiums, townhouse complexes; market-rate and affordable) in New York City, Chicago, Los
Melissa T. Lonegrass


Samuel J. Levine

Professor Samuel J. Levine joined the Touro Law Center faculty in 2010 as Professor of Law and Director of the Jewish Law Institute. He previously served as Professor of Law at Pepperdine University School of Law, and he has served as the Beznos Distinguished Professor at Michigan State University College of Law.

He is the author of two books, Jewish Law and American Law: A Comparative Study (Two Volumes), and Was Yosef on the Spectrum? Understanding Joseph Through Torab, Midrash, and Classical Jewish Sources, and more than fifty law review articles and book chapters. Professor Levine has been described in the pages of the Notre Dame Law Review as “one of the leading legal-ethics and professional-responsibility scholars of his generation,” and in 2016, he received the Sanford D. Levy Award from the New York State Bar Association’s Committee on Professional Ethics, in recognition of his contributions to the field of legal ethics. He has been described by the Detroit Legal News as “one of the world’s foremost experts on the interplay of Jewish and American law.”

Professor Levine received a J.D. from Fordham Law School, graduating cum laude and Order of the Coif, an LL.M. from Columbia Law School, graduating with Highest Honors as a James Kent Scholar, and Rabbinical Ordination from Yeshiva University. He has served as an appellate prosecutor in the Brooklyn District Attorney’s Office, as a law clerk to United States District Court Judges Loretta A. Preska and David N. Edelstein in the Southern District of New York, and as an adjunct professor at Fordham Law School. He has also taught at St. John’s University School of Law and Bar-Ilan University Law School.

Melissa T. Lonegrass

Professor Melissa (“Missy”) Lonegrass teaches and writes on Louisiana civil law and comparative law, with special emphasis on landlord-tenant law, property law, and contract law. Professor Lonegrass’ scholarship in the area of landlord-tenant law focuses particularly on tenants’ rights to safe and habitable housing and on national and international trends involving the expansion of tenant rights and the role that comparative legal scholarship plays in fostering those trends. Some of her recent articles on landlord-tenant law include Eliminating Retaliatory Eviction in England and Wales—Lessons from the United States, 75 La. L. Rev. 1071 (2015) and the Anomalous Interaction Between Code and Statute—Lessor’s Warranty and Statutory Waiver, 88 Tul. L. Rev. 423 (2014). Professor Lonegrass’ current work-in-progress addresses the role that municipal governments play in securing tenants’ rights and highlights recent successes at the municipal level in the area of landlord-tenant law reform. Professor Lonegrass is a member of the Louisiana State Law Institute and, in addition to serving on numerous drafting committees, is the Reporter for the Landlord-Tenant Committee and the Notaries Committee. In this capacity, Professor Lonegrass has drafted and advocated for the adoption of legislative reforms that would ensure that tenants have access to safe and habitable housing and are treated fairly by landlords both during and upon termination of a lease. Professor Lonegrass has also recently coauthored a textbook titled Advanced Obligations: Sale and Lease which covers Louisiana real estate law and landlord-tenant law in comparative perspective.

Matt Melody

Matthew Melody RA, LEED AP grew up in a family of builders, has been on construction sites since the age of 5, and has been working in Architecture for 16 years. His experience in architecture encompasses multi and single-family residential, exterior restoration, urban planning, and boutique hospitality. Matt has volunteered with Habitat for Humanity NYC and as a mentor with The National Building Museum’s Design Apprenticeship DC Youth program. He leads several of C+GA’s housing and planning projects with a focus on zoning, sustainability, and construction administration.

Matt received his Bachelor of Architecture Degree from California Polytechnic State University San Luis Obispo, studied at the Washington-Alexandria Architecture Center in Washington DC, and is a registered architect in New York and California.

Clare Pastore

Clare Pastore is Professor of the Practice of Law at the University of Southern California Gould School of Law. She teaches several courses related to her long practice in the Los Angeles poverty and civil rights fields, as well as the Access to Justice Practicum, in which students litigate cases and draft legislation with nonprofit partner organizations.

Pastore is co-author of the leading textbook on Poverty Law.

Professor Pastore is widely known for her work on access to justice issues. She was the longtime co-chair (with Justice Earl Johnson (Ret)) of the California Access to Justice Commission’s Right to Counsel Committee, which drafted a model statute proposing a right to counsel in certain civil cases. That draft statute later served as a model for California’s Sargent Shriver Civil Counsel Act (2009). Pastore currently serves by appointment of California’s Chief Justice on the committee overseeing the Shriver projects, and on the Steering Committee of the National Coalition for a Civil Right to Counsel. She has written several articles about the need for an expanded right to counsel in civil matters for low and middle income people.

Professor Pastore received her BA from Colgate University and her JD from Yale Law School, where she was a Senior Editor of the Yale Law Journal. She clerked for the Hon. Marilyn Hall Patel (N.D. Cal.) and began her career as one of the nation’s first Skadden Fellows. She has received many honors and awards for her teaching and advocacy work, including being named a Wasserstein Fellow by Harvard Law School in 2007, a recipient of the Elizabeth Hurlock Beckman Award in 2013, and was commended for her work by resolution of the California Legislature in 2014.
Vincent Reina  
Vincent Reina is an Assistant Professor in the Department of City and Regional Planning at the University of Pennsylvania. His research focuses on urban economics, low-income housing policy, household mobility, neighborhood change, and community and economic development. Reina’s work has been published in various academic journals, such as *Urban Studies*, *Housing Policy Debate*, and *Journal of Housing Economics*. He was given the award for Best Dissertation in Public Policy and Management by the Association of Public Policy and Management (APPAM), and was recently selected for the APPAM 40 for 40 fellowship. Reina was a 2018 Visiting Scholar at the Federal Reserve Bank of Philadelphia, and a 2018 Lincoln Institute for Land Policy Scholar. In 2017 he helped the City of Philadelphia develop its framework and strategy for preserving its stock of existing subsidized housing, and in 2018 worked with City of Philadelphia to write its first citywide housing plan.

Andrew Scherer  
Andrew Scherer is the Policy Director of the Impact Center for Public Interest Law at New York Law School, Director of the Center’s Right to Counsel Project, Co-Director of the Housing Justice Leadership Institute and a Visiting Professor at the Law School. For many years, Professor Scherer has played a prominent role in access to justice, housing policy and other public interest issues, locally, nationally and internationally. In 2010, he stepped down after ten years as Executive Director of Legal Services NYC, the largest nonprofit exclusively devoted to civil legal services in the United States, where he had worked in a variety of capacities since 1978.

John Whitlow  
John Whitlow is an Associate Professor at the CUNY School of Law, where he teaches primarily in the Community & Economic Development (CED) Clinic. The CED Clinic works within a law and organizing framework to address structural inequalities in New York City through strategic litigation, transactional representation, and policy reform. Prior to joining CUNY’s faculty, John was the Co-Founder and Co-Director of the University of New Mexico (UNM) School of Law’s Economic Justice Clinic, which provides legal services to low-wage workers in wage and hour and eviction proceedings. At UNM, John also founded the school’s Anti-Displacement Project and taught constitutional law. Before joining the faculty at UNM, John was a Clinical Professor and Supervising Attorney at CUNY, where he and his students represented tenant associations in affirmative litigation and provided transactional legal assistance to an array of community based organizations.

Prior to entering academia, John was a Supervising Attorney at Make the Road New York, where he oversaw the organization’s housing and public benefits legal services and worked on housing and criminal justice policy initiatives, and a Staff Attorney at the Urban Justice Center’s Community Development Project, where he represented tenant associations and provided transactional legal assistance to grassroots non-profits and worker-owned cooperatives. John began his legal career as a Staff Attorney in the Eviction Prevention Unit of Bedford-Stuyvesant Community Legal Services, where he represented low-income families facing eviction.

John is from Baltimore, Maryland and is a graduate of Baltimore Polytechnic Institute. He holds a BA and a certificate in comparative international economic development from the Johns Hopkins University, an MA from the New School for Social Research, and a JD from the CUNY School of Law. He has been a Faculty Fellow at the Center for Place, Culture and Politics, a Visiting Lecturer at Pompeu Fabra University’s Public and Social Policy Center, and a Guest Lecturer in NYU Law School’s Law, Organizing and Social Change Clinic. John’s research interests are centered on the role of law clinics in countering economic inequality and precarity.

Professor Scherer is the author of the treatise, *Residential Landlord-Tenant Law in New York* (Thomson Reuters), initially published in 1995 and updated annually, and of numerous law review articles and other published works. Professor Scherer is also a consultant to nonprofit, governmental and private clients around matters of access to justice; delivery of legal aid services; housing, property and land rights; and social, economic and civil rights.

Among his many affiliations, Professor Scherer is an active member of the New York City Bar Association, a former chair of its Executive Committee and the current co-chair of the City Bar Task Force on the Civil Right to Counsel; an active member of the New York State Bar Association; a founding member of the National Coalition for a Civil Right to Counsel; and a member of the Steering Committee of the Right to Counsel NYC Coalition. He has lectured widely in the U.S. and in Latin America, Africa and Asia. He received his B.A. from the University of Pennsylvania and his J.D. from NYU Law School. He is fluent in Spanish.
CITY NIMBYS
VICKI BEEN*

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Cities have traditionally been thought of as “growth machines”, while many suburban towns were notorious for exclusionary and growth-limiting not-in-my-backyard (NIMBY) policies aimed at protecting the property values of their “homevoters.” Increasingly, cities are experiencing substantial opposition to proposed new development, driven, in substantial part, by renters who fear that the development will make their homes less affordable and either cause them to have to leave the neighborhood or change the neighborhood to something less familiar and appealing to them.

NIMBYism in cities raises familiar issues, as well as issues quite distinct from more traditional NIMBYism. Neighbors of proposed development in cities are likely to have more wide-ranging interests: while both renters and homeowners fear increasing costs (rents and taxes, respectively) and changes in their neighborhoods, renters and homeowners otherwise are likely to be affected in very different ways from development pressures. Further, while suburban NIMBYism is often associated with attempts to exclude lower income and minority households and pull-up-the-drawbridge behavior by those who just recently arrived in new neighborhoods, opposition to development in cities is often associated with concern about displacement of existing residents. Because cities have historically been the home of disproportionate numbers of the poor and of racial and ethnic minorities, opposition to development in cities also reflects worries about how to preserve racially and economically diverse neighborhoods and prevent neighborhood changes that could disproportionately burden people of color.

This article describes the rising opposition to development in cities, unpacks the reasons for the rise, and shows how they make city NIMBYism different in critical ways from traditional suburban NIMBYism. It then considers the implications those
differences have for how researchers and policymakers should respond. Part I surveys the few academic discussions to date that have focused on growing opposition to development in cities. Part II reviews what we know (and do not know) about whether opposition to new development and regulatory restrictions on development that stem from that opposition are increasingly imposing constraints on new building. Part III assesses the potential consequences of increasing barriers to development. Part IV explores the factors that might explain growing opposition to new construction. Part V discusses what those factors reveal about how opposition to development in cities differs from opposition in suburbs, and suggests the research and policy analysis that might help land use decision-makers respond more effectively to opposition to development in cities.

I. FROM “GROWTH MACHINES” TO “EXCLUSIONARY CITIES”?

Cities have always enjoyed robust discussions about the desirability of particular development proposals—indeed images of Jane Jacobs taking on Robert Moses, or Jackie Kennedy leading the protest against proposals to replace Grand Central Terminal with an office tower, are much more iconic representations of opposition to development than the typical suburban scenes. But at the same time, cities generally have been considered “growth machines” in which land use officials cater to the interests of an elite coalition concerned primarily with economic growth—in contrast to
“exclusionary” suburbs and smaller towns, controlled by “homevoters” and their “mercenary concern with property values.”

Those characterizations were always extremes. Cities differ dramatically in their characteristics, as do suburbs. Further, policies regarding growth and development have varied over time in both cities and suburbs; and neither cities nor suburbs have ever had monolithic populations, as many suburbs as well as cities have included both pro-growth and exclusionary factions. Scholars, accordingly, have cautioned against overly-simplistic categories, noting that some cities act more like suburbs are alleged to act, and vice versa. Nevertheless, the dichotomy has been a useful generalization, and informed much of the thinking about land use policies, the division of land use power between local, regional, and state governments, and the nature of judicial review of land use policy decisions.

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9. Indeed, many older suburbs closest to central cities now share many of the characteristics of under-resourced neighborhoods in cities. See, e.g., SCOTT W. ALLARD, PLACES IN NEED: THE CHANGING GEOGRAPHY OF POVERTY (2017); ELIZABETH KNEEBONE & ALAN BERUBE, CONFRONTING SUBURBAN POVERTY IN AMERICA (2014).


decisions. 12 Recently, however, several scholars have argued that the dichotomy is increasingly inaccurate, as cities have adopted land use practices long associated with suburbs—imposing more restrictions on land through downzonings, charging significant fees for development approval, and taking land off the market through programs to preserve historic landmarks and open space. 13

Several economists first sounded the alarm, warning that the growth of cities was being stymied by the increasing stringency of their land use regulations. 14 David Schleicher was the first legal scholar to write about the change, noting in 2013:

Scholarship on the political economy of land use—using methodologies ranging from public choice to regime theory—has tried to explain a world in which tony suburbs run by effective homeowner lobbies use zoning to keep out development, but big cities allow relatively untrammeled growth because of the political influence of developers. But the world has changed. Over the past few decades, as demand to live in them has increased, big cities have become responsible for substantial limits on development, particularly in desirable neighborhoods. 15

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13. The cities most often mentioned as imposing more restrictions are Boston, Los Angeles, New York, and San Francisco. It is not clear whether the City NIMBYism phenomenon is more pronounced in those high-cost, high-demand, cities (most of which also have rent regulation protections for tenants, which could cause tenants to act more like homeowners).


15. David Schleicher, City Unplanning, 122 YALE L.J. 1670, 1675 (2013). Schleicher and Rick Hills previously observed the phenomenon in passing. See Roderick M. Hills, Jr. & David Schleicher, Balancing the “Zoning Budget”, 62 CASE W. RES. L. REV. 81, 85 (2011) (mentioning the surprising number of downzonings in New York City during the Bloomberg Administration); see also Roderick M. Hills, Jr. & David Schleicher, Planning an Affordable City, 101 IOWA L. REV. 91, 93 (2015) (“[M]any of the biggest and richest cities in America . . . increasingly look like collections of exclusive suburbs, with neighborhoods filled with homeowners stopping the construction of needed commercial and residential development.”).
Around the same time, puzzled by New York City’s land use policies during the Bloomberg administration Josiah Madar, Simon McDonnell, and I analyzed scores of neighborhood-wide rezonings, affecting over 20% of the City’s land that the City adopted between 2002 and 2009.\(^\text{16}\) We investigated the association between the nature of each rezoning and a variety of lot and neighborhood characteristics in order to test various hypotheses that follow from the homevoter and growth machine theories.\(^\text{17}\) We found:

[A] surprising level of empirical support for the homevoter-based theory, even though New York City is probably the last place in the United States that one would expect to see zoning policy catering to the interests of homeowners, rather than the growth machine. New York City has the lowest homeownership rate of any major city in the nation, for example, and its land-use policies have long been associated with the interests of the real estate industry. Nevertheless, our results show considerable evidence that homeowners have much more influence on land-use policy than the received wisdom about urban land-use politics would predict.\(^\text{18}\)

John Mangin then coined the term “the new exclusionary zoning” to describe limits on development that cities began to impose as wealthier households started to pour back into urban neighborhoods in the 2000s (after abandoning the city for the suburbs in the 1960s and 1970s).\(^\text{19}\) He argued: “The effect has been the same as in the exclusionary suburbs: The anti-development orientation of certain cities is turning them into preserves for the wealthy as housing costs increase beyond what lower-income families can afford to pay.”\(^\text{20}\) He documented both the increasing stringency of zoning, parking requirements, historic preservation and environmental regulations, as well as the rise of new approval processes and “double-veto approvals” required for development proposals.\(^\text{21}\) Mangin also was one of the first to note the irony

\(^{16}\) Been et al., supra note 12, at 228.

\(^{17}\) Id.

\(^{18}\) Id. at 229 (footnotes omitted). See also Charles Joshua Gabbe, Do Land Use Regulations Matter? Why and How? (Jan. 1, 2016) (unpublished Ph.D. dissertation, University of California at Los Angeles) https://escholarship.org/uc/item/6db0k1k5 (conducting a similar study of Los Angeles and reaching similar conclusions).


\(^{20}\) Id. at 92.

\(^{21}\) Id. at 100.
that affordable housing and community development advocates sometimes are championing the very limits on development that were driving up prices.22

Most recently, Wendell Pritchett and Shitong Qiao argued that both American and Chinese cities are acting like exclusionary suburbs, and explored why both countries are seeing that phenomenon, despite their many differences.23

II. ARE REGULATORY STRINGENCY AND OPPOSITION TO DEVELOPMENT ACTUALLY INCREASING?

While those scholars and many other observers believe that land use regulations in many cities are becoming more stringent, and opposition to development has become more intense, there is little direct evidence about how either have changed over the years. Researchers have tried to document the restrictiveness of land use regulations directly through surveys and indices,24 but those are

22. Id. at 93–94.
plagued with several problems. First, because land use is primarily regulated at the local level, and local governments differ dramatically in their geography, demography, state and local government structures, land use systems, and implementation regimes, it is difficult to compare across jurisdictions and over time. Second, and most importantly for our purposes, the surveys are point-in-time instruments, and do not provide information about how regulations have changed over the years. While a few researchers have done case studies of regulatory changes over time in particular jurisdictions, those demonstrate the complexity of measuring regulatory stringency and regulatory change, and highlight the difficulty of generalizing from one jurisdiction to another.

Instead, the evidence of increasing regulatory stringency lies in the fact that in many of the American metropolitan areas experiencing increasing demand for housing, the market is not responding to the demand by supplying more housing; instead, prices are increasing. In general, prior to the 1970s, increasing house prices were accompanied, as expected, by increases in construction activity, but in more recent decades, response is less elastic—signaling that supply is being constrained either by natural, geographical limits or by regulation. Economists Edward Glaeser, Joseph Gyourko, and Raven Saks studied the relationship between housing supply and housing prices over the decades since the 1950s, and concluded that:

In a small, but increasing number of metropolitan areas (primarily, but not exclusively, on the coasts), housing prices have soared, and new construction has plummeted. . . . These

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constraints do not appear to be caused by a declining availability of land, but rather they are the result of a changing regulatory regime that makes large-scale development increasingly difficult in expensive regions of the country.\(^\text{29}\)

In addition, in recent decades, housing prices in certain metropolitan areas diverged from the price of land and construction. Prior to 1970, housing prices rose in tandem with land and construction costs. After 1970, however, in a relatively few metropolitan areas, construction costs (materials and labor) stayed comparatively flat after adjusting for inflation,\(^\text{30}\) while land costs increased,\(^\text{31}\) and the gap between housing prices and construction cost widened.\(^\text{32}\) Glaeser and Gyourko recently documented the trend by estimating changes over time in the extent to which market prices equal the full social costs of producing the housing unit—a critical measure of the efficiency of the housing market.\(^\text{33}\) They found that in 1985, over 90% of the metropolitan areas studied had median price-to-cost ratios of around 1 or less, meaning that the housing market was supplying homes at close to the cost of producing those homes (including materials, labor, land, and reasonable profit). Only five areas (in California and Hawaii)—or 6.4% of all areas studied—had medians above 1.25, meaning that the price was more than 1.25 times the cost of production.\(^\text{34}\) By 2013, however, the percentage of markets in which housing prices were more than 1.25 times the cost of production had increased to 15.4%.\(^\text{35}\) Despite the high prices in those markets, the market is not

\(^{29}\) Edward L. Glaeser, et al., *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. 329, 329 (2005) [hereinafter Glaeser, et al., *Prices*]. In the working paper on which the article is based, the authors studied 102 metropolitan areas, and found the median rate of new construction (number of housing units built or permitted in a decade as a share of the units existing at the beginning of the decade) was 36% for the 1970–1980 decade, but had dropped to 14% in the 1990–2000 decade (and was then less than 7% in San Francisco, New York, and Los Angeles). Edward L. Glaeser, et. al, *Why Have Housing Prices Gone Up?* 6, 28 (Nat’l Bureau of Econ. Res., Working Paper No. 11129, 2005), http://www.nber.org/papers/w11129.pdf [hereinafter Glaeser, et. al, *Working Paper*].

\(^{30}\) Gyourko & Molloy, supra note 24, at 1290–91 (“This trajectory is consistent with the idea that any inelasticity of housing does not have at its root an inelasticity of the supply of the structure component of homes.”); Glaeser, et. al, *Prices*, supra note 29, at 329.


\(^{32}\) Gyourko & Molloy, supra note 24, at 1291.


\(^{34}\) Id. at 13.

\(^{35}\) Id. at 13–14.
very responsive to demand, indicating that either geographical or regulatory constraints are interfering with the market.\footnote{36} That indirect evidence of increasing regulatory stringency is bolstered by a wealth of evidence that housing production in many of the nation’s largest cities is lagging far behind population and job growth,\footnote{37} and is below what competitor cities around the nation or globe are producing.\footnote{38}

Just as there is no direct evidence about how regulatory constraints on building have changed in recent years, there also is no direct evidence that local opposition to development in cities has increased, such as comprehensive data about the extent or intensity of public participation in development disputes.\footnote{39} Again, however, there is ample anecdotal evidence that opposition to development by both higher-income neighborhoods of homeowners and lower-income neighborhoods with large shares of renters in the nation’s most productive cities has been particularly intense in recent years.\footnote{40} Further, as detailed above, there is considerable evidence

\footnote{36. See \textit{id}. at 5–8. A similar measure of changing constraints on supply shows that while the physical cost of constructing the house once represented 90% of the value of the home in an expensive metropolitan area, by 2000, there were 27 metropolitan areas for which physical cost accounted for only 60% or less of home value. \textit{Glaeser, et al., Working Paper, supra note 29}, at 5.}

\footnote{37. There is no agreement on how to estimate the supply “gap” for any particular city or region, in part because the market is dynamic: high (low) demand may induce (deter) increases in supply, and low (high) supply may deter (induce) demand. See \textit{Mac Taylor, California’s High Housing Costs: Causes and Consequences 9 (Legislative Analyst’s Office of California 2015)}, http://www.lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf. \textit{Laura Bliss, Is Housing Catching Up?}, \textit{CityLAB} (May 26, 2017), https://www.citylab.com/economy/2017/05/is-housing-catch-up/528246/, compares the number of units added to the housing stock, multiplied by the average household size for the jurisdiction, against the total population growth during the same period. Blanca Torres, \textit{Housing’s Tale of Two Cities: Seattle Builds; S.F. Lags}, \textit{San Francisco Business Times}, Apr. 28, 2017, https://www.bizjournals.com/sanfrancisco/news/2017/04/28/san-francisco-seattle-housing-production-pipelines.html, compares housing growth to job growth (but noting that unaffordable housing may slow job growth, so a gap between housing production and job growth may understate the extent to which housing production is inefficiently low. See, e.g., \textit{Ritasree Chakrabarti & Junfu Zhang, Unaffordable Housing and Local Employment Growth: Evidence from California Municipalities, 52 Urb. Stud. 1134 (2015)}.}

\footnote{38. See, e.g., \textit{Robin Harding, Why Tokyo is the Land of Rising Home Construction But Not Prices}, \textit{Fin. Times}, Aug. 3, 2016, https://www.ft.com/content/023562e2-54a6-11e6-befd-2f0c26b3e660; \textit{Jonathan Woetzel et al., A Tool Kit To Close California’s Housing Gap: 3.5 Million Homes by 2025}, (McKinsey Global Institute 2016) (comparing California’s housing production per capita to that of other states).}


\footnote{40. See, e.g., \textit{Taylor, supra note 37}, at 16; \textit{Paavo Monkkonen, Understanding and Challenging Opposition to Housing Construction in California’s Urban Areas}, (University of California Center Housing, Land Use and Development Lectureship & White Paper 2016); \textit{Kim-Mai Cutler, How Burrowing Owls Lead to Vomiting Anarchists (Or SF’s Housing Crisis Explained)}, \textit{Tech Crunch}, (Apr. 14, 2014), https://techcrunch.com/2014/04/14/sf-housing/. For recent examples, just in New York City, see \textit{Sally Goldenberg & Gloria Pazarino, Phipps}}
that supply is not meeting demand, and that the regulatory process limits supply, in part, because of that opposition.41

III. WHY DOES INCREASING OPPOSITION AND REGULATORY RESTRICTIVENESS MATTER? 42

A. Restrictions on Supply Increase Housing Prices

Dozens of empirical studies have shown that more restrictive land use regulations are associated with higher housing prices. Most of the studies are cross-sectional—comparing cities with more stringent regulations to those with less restrictive regimes. Joseph Gyourko and Raven Saks Molloy43 recently surveyed that literature and concluded: “[t]he vast majority of studies have found that locations with more regulation have higher house prices and less construction.”44 Cross-sectional studies cannot prove causation, however, because they do not eliminate the possibility that other differences between the cities explain the disparities observed in housing construction and prices. Further, what may seem like comparable regulations in the cities studied, may be applied or enforced very differently across cities and over time.


41. See, e.g., Gabbe, supra note 18; Monkkonen, supra note 40, at 8; Matt Weinberger, This Is Why San Francisco’s Insane Housing Market Has Hit The Crisis Point, BUS. INSIDER (July 8, 2017), http://www.businessinsider.com/san-francisco-housing-crisis-history-2017-7.

42. This section draws heavily upon Vicki Been, Ingrid Gould Ellen, & Katherine M. O’Regan, Supply Skepticism: Housing Supply and Affordability, HOUSING POLICY DEBATE (forthcoming, 2018). While this section focuses on restrictions such as land use regulations, housing supply is also constrained by decisions about where to invest in transit and other infrastructure, and by other public policy decisions outside the land use realm.

43. Gyourko & Molloy, supra note 24. For another excellent review, see Edward Glaeser & Joseph Gyourko, The Impact of Building Restrictions on Housing Affordability, FRBNY ECON. POL’Y REV. 21 (2003). For more recent studies not included in those reviews, see Gabbe, supra note 18; Nils Kok, et al., Land Use Regulations and The Value of Land and Housing: An Intra-Metropolitan Analysis, 81 J. URB. ECON. 136 (2014) (concluding that in the San Francisco Bay Area, changes in the regulatory stringency and number of approvals needed to obtain permits or zoning strongly correlate with land value, and thereby lead to higher house prices).

44. Gyourko & Molloy, supra note 24, at 1317.
Jackson, for example, used longitudinal data from California to assess how a city’s adoption of additional land use regulations affected the number of new construction permits issued in the city. He found that each additional land use regulation adopted reduced multifamily permits by an average of more than 6%, and reduced single-family permits by more than 3%. Regulations reducing allowable density had even larger effects. Jeffrey Zabel and Maurice Dalton, using longitudinal data in Massachusetts, found that increases in minimum lot sizes were followed by significant increases in prices. Using longitudinal data about the Boston metropolitan area, Edward Glaeser and Bryce Ward also found that the adoption of more stringent local regulations led to higher house prices.

Other researchers have employed instrumental variables to assess the causal relationship between regulatory restrictions and housing supply and prices. Using that approach, Keith Ihlanfeldt found that predicted regulations in Florida significantly increase the price of single-family homes. Raven Saks Molloy concluded that predicted increases in labor demand led to less residential construction and larger increases in housing prices in metropolitan areas with more restrictive housing supply. Similarly, Christian Hilber and Wouter Vermeulen used instrumental variables to test the causal relationship between a jurisdiction’s regulatory restrictiveness and the elasticity of its housing market’s response to increases in demand. They found that in English municipalities with more restrictions, increases in demand led to increases in local

45. See Jackson, supra note 25, at 46–54.
46. Id. at 54.
47. Id.
49. Edward L. Glaeser & Bryce A. Ward, The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston, 65 J. URB. ECON. 265, 265 (2009). Glaeser and Ward find that the coefficient falls in magnitude and loses statistical significance once they control for population demographics, which they argue should be expected if buyers can find similar homes in other jurisdictions as perfect substitutes. Id. at 267, 275–76. While supply restrictions may increase prices in a market as a whole, they may not increase them disproportionately in the particular locality where they are imposed, if the effects spill over to other jurisdictions. See, e.g., Kristof Dascher, Home Voters, House Prices, and the Political Economy of Zoning (Beiträge zur Jahrestagung des Vereins für Socialpolitik 2012: Neue Wege und Herausforderungen für den Arbeitsmarkt des 21. Jahrhunderts - Session: Political Economy I D10-V1 2012), available at http://hdl.handle.net/10419/62069 (exploring how the spillover effects of zoning may affect the relationship between a jurisdiction’s share of homeowners and its zoning policies).
house prices, rather than increases in supply. Albert Saiz concluded that land use regulations as well as geographic constraints affect the elasticity of a jurisdiction’s response to changes in housing demand—again using instrumental variables to test the causal relationship between regulatory stringency, housing prices, and population growth.

In sum, the evidence shows that restricting supply increases housing prices. In turn, higher housing prices are one reason that housing is unaffordable to an increasing number of American households, as Section IV.B details. Housing prices are just one part of the affordability crisis—stagnant wages and incomes, the increasing volatility of incomes, and the dearth of smaller “starter” homes all may contribute to the nation’s unaffordability crisis. Nevertheless, increasing house prices are a significant part of the problem.

B. Restrictions on Supply Threaten the Nation’s Productivity

As Ed Glaeser documented in The Triumph of Cities, a central reason for many cities’ success in the decades since their locational

53. Saiz, supra note 24, at 1280, 1286.
56. JOINT CTR. FOR HOUS. STUDIES, STATE OF THE NATION’S HOUSING 3–8 (Harv. Joint Ctr. for Housing Stud., 2017) (reporting the share of small single-family homes fell from 37% of all completions in 1999 to just 21% in 2015; the number of condominiums and townhouses built fell even more dramatically over the past decade) [hereinafter JOINT CTR.].
advantage on transportation hubs became less important is what has come to be called the “new agglomeration economics.” David Schleicher describes agglomeration economics most succinctly: “Location matters. When people and capital congregate in particular cities and regions, they learn and trade more easily, and this creates wealth and generates economic growth.” Glaeser notes that New York City is the nation’s largest city because: “The high value of knowledge mean[s] that being in the city is particularly valuable. . . [and] high density levels are particularly conducive to chance meetings, regular exchanges of new ideas and the general flow of information.”

The value of agglomeration is substantial. While New York City, San Francisco, and San Jose, for example, have 4% of the nation’s population, they are responsible for 12.6% of the nation’s gross national product.

The growth of the most productive cities has been limited however, in part because of restrictive land use policies that limit housing supply and make housing more expensive. Chang-Tai Hsieh and Enrico Moretti argue that the restricted growth has significant consequences for the country as a whole: “Incumbent homeowners in high productivity cities have a private incentive to restrict housing supply. By doing so, these voters de facto limit the number of US workers who have access to the most productive of American cities. In general equilibrium, this lowers income and welfare of all US workers.”

Hsieh and Moretti estimate that relaxing land use regulations in just those three cities to the level of stringency of the median American city would increase the nation’s gross domestic product by nearly 9%. That estimate may be unrealistically high, nevertheless other scholars have estimated that the benefits of


61. See Glaeser, Triumph Of The City, supra note 57.


63. Id. at 24.
relaxing land use constraints in the nation’s most productive cities would be substantial. The best of those estimates take into account both the costs and the benefits of growth in a relatively small number of already booming cities. Of course, allowing additional growth in the nation’s most productive cities does not preclude other cities from improving their productivity.

C. Restrictions on Supply May Increase Income Inequality and Segregation by Income and Race

The inability of cities to grow to accommodate the jobs generated by increased productivity also threatens to worsen inequality, for two reasons. First, making it even harder for low-income, less educated people to move to where job opportunities are by limiting housing supply may further widen the gap between those who are doing well and those who are left behind. Peter Ganong and Daniel Shoag argue that land use restrictions are a major culprit in the widening income gap between different regions of the country. They show that in the century before 1980, per-capita incomes across different areas of the United States were converging, but beginning in the 1980s, that convergence slowed dramatically. At the same time, there was a substantial decline in mobility: prior to 1980, people moved from low-income to higher-income places to take advantage of better employment prospects and higher wages, but over the past 30 years, that is much less true. Ganong and Shoag argue that high housing prices in productive areas are the culprit: while it is still advantageous for high-skilled workers to move to

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64. See AVENT, supra note 14 (removing barriers to greater density could increase GDP by a half a percentage point); Devin Bunten, Is the Rent Too High? Aggregate Implications of Local Land-Use Regulation 30 (Fed. Reserve Bd. Finance and Econ. Discussion Series 2017-064, 2017), http://www.devinbunten.com/research/zoning (finding that aggregate welfare would increase by 1.4% under the optimal stringency, after accounting for the costs of increased density and other effects of relaxing land use regulations); Glaeser & Gyourko, supra note 24, at 5 (overly restrictive land use regulations in the most productive cities impose a cost of about 2% of gross domestic product each year); Andrii Parkhomenko, The Rise of Housing Supply Regulation in the U.S.: Local Causes and Aggregate Implications 33 (Bd. Of Governors of the Fed. Reserve, Working Paper No. 2017-064, 2017), https://www.andrii-parkhomenko.net/files/Parkhomenko_JMP.pdf (estimating that total output would be 2.1% higher and mean wages 2% higher in 2007 than they actually were if regulatory stringency had not increased beyond its 1980 levels).

65. See, e.g., Bunten, supra note 64.


68. Ganong & Shoag, supra note 67, at 76–78.

69. See infra Section IV.A. for further documentation of the falling rates of mobility in the United States.
areas with better employment opportunities, high housing costs offset the gains low-skilled workers would enjoy from moving. They conclude that “[t]ighter regulations impede population flows to high-income areas, weaken convergence in human capital and weaken convergence in per capita income.”

Other research has documented the decline in mobility from areas that lack job opportunities to areas that do offer jobs. In those regions that lost manufacturing jobs due to competition from other countries over the past few decades, for example, high unemployment rates and significant average wage declines have persisted over the subsequent decades. In part, that is because people are not leaving those places to go to areas that have better jobs, but instead are dropping out of the labor market, or remaining unemployed.

A second reason that increasing restrictions on housing supply may exacerbate income inequality is that as cities limit housing supply, existing homeowners in those metropolitan areas capture the increases in housing values—often at the expense of renters. As Matthew Rognlie has noted: “housing plays a pivotal role in the modern story of income distribution.” Homeowners are already a tremendously advantaged group, with a median net worth in 2016 that was 44.5 times that of households that rented. Adding further to their wealth, while limiting the ability of others to build wealth through homeownership, will likely exacerbate those differences.

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Further, existing homeowners have very different demographic characteristics than renters. Homeownership opportunities of Blacks and Latinos have never been equal to those afforded to whites, and in 2016, only 45% of Blacks and 46% of Latinos owned their own homes, compared to 73% of whites. In addition, as Glaeser and Gyourko point out: “As owners tend to be older and renters are younger, the reduction in housing supply [has] created an intergenerational transfer to currently older people who happened to have owned in the relatively small number of coastal markets that have seen land values increase substantially . . . .”

Making it harder for people to move to areas with higher levels of productivity and privileging existing homeowners accordingly likely will exacerbate inequality. It also may increase residential segregation by income and race. Residential segregation by income has increased significantly in recent years. As Harvard’s Joint Center on Housing recently reported:

Between 2000 and 2015, the share of the poor population living in high-poverty neighborhoods rose from 43 percent to 54 percent. . . .

At the same time, high-income households have become more likely to live in largely high-income neighborhoods. From 1990 to 2015, the share of households earning $150,000 or more living in high-income neighborhoods (where 20 percent or more of households have incomes of at least $150,000) grew from 40 percent to 49 percent.

High-income households are also becoming more concentrated in dense urban neighborhoods.

Existing research on the relationship between restrictions on housing supply and residential segregation is limited, but the research does suggest an association between land use restrictions

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76. Lisa J. Dettling, et al., Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances, FEDS NOTES (Sept. 27, 2017), https://doi.org/10.17016/2380-7172.2083. Even among homeowners, the mean net housing wealth of Black homeowners was $94,400, compared with $215,800 for whites. Id.
77. Glaeser & Gyourko, supra note 24, at 18.
78. Id. at 17. See also Sean F. Reardon & Kendra Bischoff, Income Inequality and Income Segregation, 116 Am. J. Soc. 1092 (2011) (noting the rise of income inequality associated with increasing income segregation across cities); Tara Watson, Inequality and the Measurement of Residential Segregation by Income in American Neighborhoods, 55 Rev. Income & Wealth 820, 820 (2009) (one standard deviation increase in income inequality raises residential segregation by income by 0.4-0.9 standard deviations).
and both income and racial segregation. Michael Lens and Paavo Monkkonen recently assessed the relationship between different types of regulation and income segregation using detailed data about regulations, along with measures of income segregation for different income groups in 2000 and 2010, in 95 metropolitan areas. They found that higher levels of income segregation of the affluent, although not of low-income households, are associated with density restrictions, greater levels of local government involvement in permitting processes for development, and multiple levels of regulatory review.\textsuperscript{79}

More stringent restrictions on density also are associated with greater racial segregation in large U.S. metropolitan areas.\textsuperscript{80} Further, density limits are associated with smaller minority populations.\textsuperscript{81} In Massachusetts, for example, Matthew Resseger found that blocks zoned for multifamily housing have Black population shares 3.4 percentage points higher, and Hispanic population shares 5.8 percentage points higher, than the blocks directly across the border from them that are zoned for single family use.\textsuperscript{82}

In conclusion then, restrictions on supply in the nation’s growing cities threaten to increase income inequality, exacerbate the gap in wealth between renters and owners (categories already divided by race, ethnicity, class, and age), further the trend towards greater segregation of wealthy households, and stifle progress in reducing racial segregation.

\textsuperscript{79} Michael C. Lens & Paavo Monkkonen, \textit{Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?}, 82 J. AM. PLAN. ASS’N 6, 11–12 (2016) (noting that the authors find that other forms of regulation, such as exactions or open space requirements, are not associated with income segregation); see generally Jonathan T. Rothwell & Douglas S. Massey, \textit{Density Zoning and Class Segregation in U.S. Metropolitan Areas}, 91 SOC. SCI. Q. 1123 (2010) (finding that more stringent density restrictions lead to higher levels of income segregation).


D. Restrictions on Supply Are Associated with Increased Environmental Harms

Restrictions on supply often are associated with lower density and less compact development, because they prevent further development in lower density areas and divert housing demand to areas further from the central business district. Lower density, in turn, is associated with higher vehicle miles traveled, which results in increased air pollution and greenhouse gas emissions. Higher density and more compact urban forms result in less energy use for heating and cooling buildings, and therefore, result in lower greenhouse gas emissions. Development at higher densities is associated with lower per capita impacts on water quality. Research also finds an association between higher density development and lower rates of destruction of critical habitat and open space.

Given the negative effects restrictions on supply impose, it is important to explore what motivates support for (or at least acceptance of) such restrictions, which depends in turn on why development generates so much opposition.


IV. WHAT EXPLAINS THE RISING OPPOSITION TO DEVELOPMENT IN CITIES?

A. People Are Moving Less, so Their Housing and Neighborhood Conditions Matter More

Households in the United States have become “stuck” in place. Indeed, “[t]he typical American is now half as likely to have moved in the past year as their counterpart in 1950. This is true for both long-distance migration and local mobility, as well as for Americans of nearly all sociodemographic or socioeconomic statuses.” Migration rates are lower “than at any point in the post-war period” and “have also entered a period of continuous decline that is longer than any recorded in the twentieth century.”

Many more people move within the same county than move across state or country lines, but the decline in such short-distance moves (those within the same county) in the past few decades has been dramatic: Between 1986 and 1987, for example, 11.6% of the population moved within the same county, but between 2016 and 2017, only 6.8% moved within the same county. Also, the decline in those moves has been particularly sharp for renters, as Figure 1 shows:

92. The same relationship holds when the respondents are segmented into high income and low income renters and buyers.
The causes of the decline are disputed. As noted earlier, some blame the decline in part on land use restrictions that make it hard to buy or rent in markets with job opportunities. Greg Kaplan and Sam Schulhofer-Wohl find that interstate migration is falling because of “a reduction in the geographic specificity of returns to different types of skills and an increase in workers’ information about how much they will enjoy living in alternative locations.” Others find that the aging of the population contributes to the decline, but cannot fully explain it.

Whatever the cause, the fact that fewer people are moving likely affects their interest in protecting their neighborhood against changes that they would find threatening or undesirable. As people stay in place for longer periods of time, they are likely to take more of an interest in proposed developments that may affect the costs of their current housing, or the quality of life in their current

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94. For a review of the literature on the causes of the decline in mobility, see Molloy, Smith, & Wozniak, supra note 90, at 198–99.

95. Ganong & Shoag, supra note 67, at 89; Hsieh & Moretti, supra note 62, at 12.

96. Kaplan & Schulhofer-Wohl, supra note 89, at 92.

neighborhood. Recent research affirms that although homeowners are more likely than renters to vote, the length of residence in a community by both renters and owners is a significant predictor of electoral participation. While the relationship between mobility, neighborhood conditions, and different forms of civic engagement is complicated, the research suggests that longer residence in a neighborhood is likely to result in more of—at least some—forms of political engagement.

B. As an Increasing Number of Renters Compete for Too Few Units, Rents Are Rising, and More Renters Are Paying Too Much of Their Incomes for Housing

The Harvard Joint Center for Housing Studies reports that the number of renters increased by 9 million over the past decade, the largest ten-year gain on record. The share of households across the nation who rent is “at a 50-year high of 37 percent, up more than 5 percentage points from 2004, when the nation’s homeownership rate peaked.” In the metropolitan areas containing the bigger cities that this article primarily is concerned with (the 53 metropolitan areas that have populations of more than one million), the share of households that rent ranges from about 29% to 52%. Those growing numbers of renters are chasing too few rental units,
despite increasing production of multifamily housing\textsuperscript{104} and conversion of single family housing from homeownership to rentals.\textsuperscript{105} Indeed, the national rental vacancy rate was at a 30-year low of 6.9\% in 2016.\textsuperscript{106}

No doubt, at least in part, because of that shortage, rents have increased substantially in recent years: of the 53 metropolitan areas with populations of more than one million, Sewin Chan and Gita Kuhn Jush of NYU’s Furman Center found that virtually all saw increases in their inflation-adjusted median rents between 2012 and 2015. Indeed, across the 53 metropolitan areas as a group, median inflation-adjusted rents increased at an annualized rate of 1.9\%, with Denver seeing annualized rates as high as 6.6\%.\textsuperscript{107}

Accordingly, renters are facing increasing rents just to stay where they are. If renters need to move, they face even more significant increases in their housing costs. While rents are typically reported for the median or typical renter, those rates reflect all rentals, regardless of a renter’s length of tenure. But for a household looking for new housing, the rent being charged for apartments recent listed is more relevant than the rent people already in apartments are paying. For the 53 metropolitan areas Chan and Jush studied, recently available two-bedroom units had a median rent that was 4.8\% higher than the median rent of all two-bedroom units.\textsuperscript{108} Moreover, in some jurisdictions, the premium for recently marketed units was extraordinarily high: 33\% in San Jose, for example, and 29\% in San Francisco.\textsuperscript{109}

Another way of assessing the concern renters may have about having to find new housing uses the number of homes renting for prices that households making various incomes can afford. For households with low and moderate incomes, the number of homes that are affordable—costing 30\% of the household’s income or less—and available—not rented by higher income households\textsuperscript{110}—falls far short of needs. The National Low Income Housing Coalition estimates that there are only 35 affordable and available homes for every 100 extremely low income (“ELI”) households (the 26\% of all renters making 30\% or less of the “area median income” designated

\textsuperscript{104} JOINT CTR., supra note 56, at 11.
\textsuperscript{106} JOINT CTR., supra note 56, at 28.
\textsuperscript{107} CHAN & JUSH, supra note 103, at 5.
\textsuperscript{108} Id. at 7.
\textsuperscript{109} Id.
\textsuperscript{110} Indeed, many of the households that are now renters, but would likely have been homeowners in the past, are higher income households that can outbid lower income households for lower cost housing. Id.
by HUD for their metropolitan area). Among the largest metropolitan areas, the number of affordable and available homes ranges from 12 for every 100 ELI renter households in Las Vegas, NV to 46 for every 100 in Boston, MA. The situation is not as dire—although still problematic—for higher income renters: for every 100 families making 50% of the area median income or less (about 41% of all renter households) across the country, there are 55 homes available and affordable across the nation. For every 100 families making at or below 80% of area median income (about 61% of all renter households), there are 93 homes available and affordable.

Thus, renters staying in place are facing higher rents. If they move, they face substantial rent premiums and significant gaps in the supply of affordable housing. Those problems have gotten worse in recent years. Across all 53 of the nation’s metropolitan areas with more than 1 million in population, a household earning the median household income of $61,000 in 2015 could afford 75% of the rental units that were rented within the prior 12 months—i.e. could spend no more than 30% of income to rent those units. As recently as 2006, 82% of recently available units were affordable to the median income household.

At the same time, fewer renters have any room in their budgets to absorb rent increases. In 2015, in the 53 metropolitan areas with populations of more than one million, almost 48% of all renters were paying more than 30% of their income for housing related expenses—the standard the Department of Housing and Urban Development uses to identify households that are “rent-burdened.” About 24% were paying more than half of their income towards housing expenses, or were what HUD refers to as “severely rent-burdened.” While those numbers have dropped slightly in the

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112. Id. at 8–9.
113. Id. at 4–5.
114. Id. at 3–5 & Appendix A.
115. CHAN & JUSH, supra note 103, at 24. The number ranged from 95% of units being affordable in Salt Lake City for the median income Salt Lake City household in 2015, to only 43% of units in Miami being affordable for the median income Miami household. Id.
116. Id. at 9. See also JOINT CTR., supra note 56, at 31–32 (assessing rent burden nationally). See also Rental Burdens: Rethinking Affordability Measures, EDGE (Poly Dev. & Res. of the U.S. Dep’t of Hous. & Urban Dev.), https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_092214.html (citing to and expanding upon HUD definition of cost burdens).
last three years, rent burdens across the nation are far higher than in past decades, as Figure 2 shows:

Figure 2: Share of U.S. Renter Households That Were Rent Burdened and Severely Rent Burdened, 1960-2015

Rent-burdened households have already cut spending on a variety of important needs, such as food and healthcare, just to afford their current rents. There is little or no room for additional rent increases in their budgets. Unfortunately, for many households, rising rents will increase the risk of evictions, as Matthew Desmond’s work powerfully shows.

117. Those declines have to be read cautiously because of the changes resulting from the fact that more higher-income households are continuing to rent rather than buy in the past. See Chan & Jush, supra note 103, at 17, 28.

118. This figure shows the percent of all U.S. renter households that spent 30% or more (rent burdened) and 50% or more (severely rent burdened) of their household income on rent. Rent for 1960 is coded to the midpoint of the range (e.g. rent is coded as $54.5 if the range is $50-$59). American Community Survey, IPUMS-USA, University of Minnesota, NYU Furman Center calculations (on file with author).


120. The pressure on renters to avoid rent increases undoubtedly is compounded by the increasing volatility and unpredictability of incomes. See, e.g., Jonathan Morduch & Rachel Schneider, The Financial Diaries: How American Families Cope in a World of Uncertainty (Princeton Univ. Press 2017); see also sources cited, supra note 55.

121. Matthew Desmond, Evicted: Poverty and Profit in the American City (Crown/Archetype 2016).
Further, as Michael Stegman has outlined, the situation in many cities is not likely to improve markedly in the coming years:

Unfortunately, the already unacceptable situation in the rental market is likely to worsen in the coming decade absent a sustained national response. Over the next ten years, new household formation by millions of young millennials will intensify the demand for rental housing. So, too, will the increasing diversity of the U.S. population; the Urban Institute estimates that nearly 90% of new households that will form between 2020 and 2030 will be minority. (Goodman, Pendall & Zhu 2015). At least in the near term, many of these new minority households will lack the resources and credit histories to access affordable mortgage credit and, absent creative market and government responses, will seek rental housing. Add to this mix the millions of aging baby boomers who will seek to downsize from owned housing to rental, and we are in for a very rocky ride.122

At bottom, then, the number of American households in major metropolitan areas who are renting their homes is increasing, but the rental stock is not growing sufficiently to keep up with that demand.123 Rents are accordingly rising, and the number of households stretched to the financial breaking point by rent burdens has increased significantly over recent decades. No wonder then, that renters worry about any land use change that they think could result in even higher rent increases.

C. Neighborhood Residents Are Increasingly Wary That Development in Their Neighborhoods Will Increase Their Housing Costs and Potentially Cause Them to Have to Leave Their Homes

Opposition to new housing may be motivated by many different factors, but often stems from a fear that the proposed development

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will impose more costs than benefits on its neighbors.\textsuperscript{124} As Rolf Pendall has pointed out: “In economic terms, owners of existing dwellings act rationally when they pay attention to proposals for new development in their communities and when they oppose houses that might reduce their own homes’ value.”\textsuperscript{125}

Michael Hankinson recently applied those insights to better understand renters’ opposition to new development in cities, arguing:

\begin{quote}
Imagine you are a renter in a city with high housing prices, living in one of the few remaining affordable neighborhoods. On your street, a new market-rate condominium is proposed. Generally, you believe that new supply helps to mitigate rising prices. However, this one condominium would be a minuscule addition to the overall supply, making it unlikely to appreciably lower prices citywide. Instead, the new building is more likely to signal to other developers that your neighborhood is an undervalued investment. Your landlord may see the new building and consider selling or renovating her own, leading to higher rents or even eviction. In short, the long-run benefit of more supply is eclipsed by the immediate, short-run threat of displacement.\textsuperscript{126}
\end{quote}

Given the tight rental market described above, and the number of households that are already rent-burdened, it is not surprising that renters, especially those in denser cities,\textsuperscript{127} are exhibiting the same risk-averseness that NIMBY homeowners have long shown.\textsuperscript{128} Further, there is little hard evidence to counter their fear that new development in their neighborhood may increase rents nearby.\textsuperscript{129}

While many researchers have studied the effect that new subsidized

\footnotesize
\begin{itemize}
\item 125. Pendall, supra note 39, at 114.
\item 126. Michael Hankinson, When Do Renters Behave Like Homeowners? High Rent, Price Anxiety, and NIMBYism, AM. POL. SCI. REV., at 6 (2018).
\item 127. Land use restrictions tend to be stricter in denser areas, probably because density exacerbates some externalities from nearby land uses. See Gyourko & Molloy, supra note 24, at 1332; Hilber & Robert-Nicoud, supra note 8, at 35; Saiz, supra note 24, at 1274.
\item 128. For helpful discussions of homeowner risk-aversion, which of course is the foundation of Fischel’s homevoter hypothesis, see FISCHEL, HOMEVOTER HYPOTHESIS supra note 8. See also Lee Anne Fennell, THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES (Yale Univ. Press 2009); Lee Anne Fennell, Homeownership 2.0, 102 NW. U. L. REV. 1047 (2008); Fennell, supra note 8; William A. Fischel, Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson’s “Privatizing the Neighborhood,” 7 GEO. MASON L. REV. 881 (1999); Chris Bradford, The Risk of Home Ownership, AUSTIN CONTRARIAN (June 30, 2008), http://www.austincontrarian.com/austincontrarian/2008/06/the-risk-of-homeownership.html
\item 129. Been, Ellen, & O’Regan, supra note 42, at 8–9.
\end{itemize}
affordable housing has on low-income blighted neighborhoods,\footnote{This discussion again draws on Been, Ellen, & O’Regan, supra note 42.} there is very little research about how new market rate (or mixed-income) development affects sales prices for housing in the neighborhood, and none on how new development affects rents.\footnote{132. MAC TAYLOR, PERSPECTIVES ON HELPING LOW-INCOME CALIFORNIANS AFFORD HOUSING 9 (Legislative Analyst’s Office of California 2016).} The best existing evidence is a study of low-income neighborhoods in California’s Bay area, which found that the production of market rate housing was associated with a lower probability that low-income residents in the neighborhood would experience displacement.\footnote{133. See, e.g., Karen Narefsky, What’s In My Backyard?, JACOBIN (Aug. 8, 2017), https://www.jacobianmag.com/2017/08/yimbys-housing-affordability-crisis-density.}

The gap in evidence likely is a function of several methodological challenges. First, it is difficult to establish causation because developers are more likely to build market rate housing in neighborhoods that are already seeing price and rent increases. Those increases signal an unmet demand to developers, so it is hard to disentangle whether any price increases that follow the introduction of new housing result from the housing, or from the increasing demand for housing in the neighborhood. Second, new housing likely will have mixed effects. On the one hand, it may attract additional demand, which could put pressure on the rents of existing housing. On the other hand, it may reduce demand as the construction imposes various costs (such as traffic congestion from construction vehicles, noise, and dust) on the neighborhood, or if the new residents put such a strain on local services that the neighborhood becomes less desirable. Further, new construction will absorb some of the demand that already exists, which will reduce the pressure that demand is already putting on the existing supply.\footnote{134. See, e.g., Karen Narefsky, What’s In My Backyard?, JACOBIN (Aug. 8, 2017), https://www.jacobianmag.com/2017/08/yimbys-housing-affordability-crisis-density.} These different effects probably will vary with neighborhood context, and without further study, it is impossible to know which effect will dominate in various circumstances.

But evidence does exist about the city-wide effects of supply constraints, and despite the evidence, many neighborhood residents, advocates, and even some policy-makers are increasingly skeptical that additional supply will help reduce the rate at which rents are increasing across a city.\footnote{130. For recent reviews of the literature, see Rebecca Diamond & Tim McQuade, Who Wants Affordable Housing in their Backyard? An Equilibrium Analysis of Low Income Property Development (Nat’l Bureau of Econ. Res., Working Paper, 2016); Virginia McConnell & Keith Wiley, Infill Development: Perspectives and Evidence from Economics and Planning, 20–25 (Resources for the Future, Working Paper No. DP 10–13, 2010).}

Ingrid Gould Ellen, Katherine O’Regan, and I have called this phenomenon “supply skepticism”
and have explored the arguments of supply skeptics elsewhere.\textsuperscript{135} We show that those arguments are inconsistent with the empirical evidence and with basic economic principles.\textsuperscript{136} Nevertheless, supply skepticism lies behind some of the opposition to new development in cities,\textsuperscript{137} and makes the risk-averseness that Hankinson describes even more difficult for proponents of additional housing supply to counter.\textsuperscript{138}

V. IMPLICATIONS OF DIFFERENCES BETWEEN CITY AND SUBURBAN OPPOSITION

The reasons Part IV articulates for the increase in opposition to development in cities also suggest the differences between the opposition that is driven by suburban homevoters and opposition in cities. Opposition in cities is more likely to include, and even be led by, renters.\textsuperscript{139} Further, a root cause of some—or perhaps most—of the opposition by renters is fear of rent increases that could lead them to have to leave their neighborhoods. Those factors, combined with the legacy of discrimination and exclusionary zoning that prevented many racial and ethnic minorities from moving out of the inner city, mean that City NIMBYism is more likely to involve concerns that racial minorities and low, moderate, or even middle-income households are being priced, or pushed, out, rather than kept out, of the neighborhood. Objections to development in cities, thus may be more about expulsive zoning rather than exclusionary zoning.\textsuperscript{140} Opposition in cities is also more likely to be more

\begin{itemize}
\item \textsuperscript{135} See Been, Ellen, & O'Regan, supra note 42.
\item \textsuperscript{136} We also conclude that supply skepticism does highlight that adding supply is unlikely ever to meet the housing needs of the very lowest income households in a jurisdiction, and will have to be paired with subsidies, other incentives, or inclusionary housing requirements, to house those families. \textit{Id.} at 9.
\item \textsuperscript{137} For examples, see Been, Ellen, & O'Regan, supra note 42, at 4–9.
\item \textsuperscript{138} Some of that difficulty also stems from the fact that our arguments accept basic microeconomic theories about markets, while some of the supply skeptics reject those tenets. See, e.g., Gar Alperovitz & James Gustave Speth, \textit{America Beyond Capitalism: Reclaiming Our Wealth, Our Liberty, and Our Democracy} (Democracy Collaborative Press 2011); \textit{Cities for People, Not for Profit: Critical Urban Theory and the Right to the City} (Neil Brenner, et al., eds., Routledge 2012); \textit{David Harvey, Rebel Cities: From the Right to the City to the Urban Revolution} (Verso Books 2012); Edward Soja, \textit{Seeking Spatial Justice} (Univ. of Minnesota Press 2010); \textit{see also} \textit{Right to the City, Mission & History}, https://righttothecity.org/about/mission-history/.
\item \textsuperscript{139} Of course, not all opposition to development in cities is driven by tenants; homeowners also sometimes oppose development, and organized interest groups such as advocates for historic preservation also can be powerful opponents of new development.
concerned about growing inequality that disadvantages low, moderate, and middle income families than about protecting the existing privilege of (predominantly) older white suburban residents.

Some City NIMBYism, like some suburban NIMBYism, likely is motivated primarily by self-interest, and some may be motivated by racism, classism, or other intolerance. Further, some suburban NIMBYs, along with some City NIMBYs, have similar and very legitimate complaints about specific development proposals, the public approval process, or the jurisdiction’s plans (or lack of planning) for growth. But today’s City NIMBYism raises legitimate concerns, different from those raised by traditional suburban NIMBYism, that researchers and policy makers need to address head-on.¹⁴¹

First, there must be a better understanding of how new development affects both its host neighborhood and the jurisdiction as a whole. Because the threat of increased rents is top-of-mind for many neighborhood residents, researchers should focus on documenting whether new construction slows or increases the trajectory of rents in a neighborhood that is experiencing increased demand. Because it is difficult to establish causation given that increased demand may both attract new construction, and be driven by new construction, researchers will need sophisticated methodologies to tease out the relationship between new construction and rents. Of course, that relationship likely will be affected by such factors as whether the jurisdiction has any form of rent regulation (and if so, how it enforces the regulatory requirements); whether the existing housing stock in the neighborhood is primarily owner-occupied or rental; and whether the neighborhood is subject to restrictions beyond the usual zoning constraints such as historic preservation or contextual zoning. Research accordingly must account for those different contexts.

Fear that rent increases or conversion of existing housing to other uses may cause displacement is another major factor in opposition to new development. The evidence about whether displacement actually occurs in changing neighborhoods, who is affected by any such displacement, and how they are affected, however, is again woefully inadequate to answer residents’ concerns—this must be a continued focus for research.¹⁴² Similarly,

¹⁴² I have outlined the gaps in our understanding of displacement elsewhere. See Vicki Been, What More Do We Need to Know About How to Prevent and Mitigate Displacement of
more needs to be done to identify how those who stay in a gentrifying neighborhood are affected by the changes in the neighborhood.\textsuperscript{143}

Much more thought and study also needs to be devoted to identifying which responses to displacement work in different contexts.\textsuperscript{144} Many tools, ranging from inclusionary housing requirements to legal assistance for tenants, are being tried in different neighborhoods and jurisdictions,\textsuperscript{145} and it is imperative that the effects of those tools be rigorously evaluated to ensure that jurisdictions can tailor the tools to most effectively address the issues most relevant to their changing neighborhoods.

Concerns that new construction will cause or exacerbate gentrification, and that the population moving into the neighborhood may lead the neighborhood to become less integrated by race and ethnicity or income over time, also need to be examined. Changes in the neighborhood may initially result in a more diverse population, especially if the neighborhood’s population was primarily minority, but residents reasonably fear that changes will lead the neighborhood eventually to become predominantly white and wealthy. Recent research indicates that the demographic trajectories of gentrifying neighborhoods are complex.\textsuperscript{146} All these questions about how neighborhoods are likely to change depend in part upon better information about the race, ethnicity, and income of those who stay, those who leave, and those who move into, areas undergoing change.\textsuperscript{147}

In debates over new construction, some opponents question just how much additional housing is needed. Because the housing market is dynamic, and the supply of housing both affects and is affected by such factors as household formation rates, immigration patterns, employment trends, neighboring jurisdictions’ behavior,


\textsuperscript{144} For a comprehensive assessment of the research needed, see Been, supra note 142.


\textsuperscript{147} See Been, supra note 142.
and mobility patterns and trends, it is difficult to specify what any jurisdiction’s housing “gap” really is. Work that develops a standard measure, and hones a methodology to account for the market’s dynamism, would help give those estimates more rigor and credibility.\textsuperscript{148}

Further, the increasing role of renters in disputes over construction and other changes in neighborhoods requires better thinking and experimentation regarding how best to engage neighborhood residents about their needs, hopes, and views on changes proposed for their neighborhood. It also requires additional debate about how to effectively and fairly mitigate or offset the costs, and distribute the benefits, that change may bring to the community. Shorter term renters will have different interests than longer term renters, and the interests of all renters are likely to be very different from the interests of homeowners and local businesses. Those differences need to addressed openly in discussions about how public participation processes, land use approval procedures, and the nature of negotiations over community benefits and mitigation measures should change to account for legitimate concerns of renters, homeowners, workers, and businesses in the surrounding neighborhoods.

Finally, efforts to open exclusionary suburbs involved giving people who had been shut out of those neighborhoods the choice to move into them.\textsuperscript{149} Those choices involved a myriad of sacrifices by the individuals making the move.\textsuperscript{150} But development in neighborhoods currently populated primarily by people excluded from other neighborhoods by racial and ethnic discrimination in the past (and in some places, still today) now threatens to impose burdens that the residents are not choosing to assume. That critical difference raises a host of legal and social justice issues that need to be confronted forthrightly.\textsuperscript{151}

\textsuperscript{148} Compare TAYOR, supra note 132, and WOETZEL ET AL., supra note 38, for examples of differing estimates used in California.


\textsuperscript{150} See Ludwig, et al., supra note 149.

\textsuperscript{151} Those conversations have begun in, ROTHSTEIN, supra note 75; THOMAS SHAPIRO, TOXIC INEQUALITY: HOW AMERICA’S WEALTH GAP DESTROYS MOBILITY, DEEPENS THE RACIAL DIVIDE, AND THREATENS OUR FUTURE (2017); Vicki Been, Gentrification, Displacement and Fair Housing, FURTHERING FAIR HOUSING: PROMISES, PROTESTS, AND PROSPECTS FOR RACIAL
We are unlikely to make progress towards providing affordable homes in thriving, safe, and high quality neighborhoods if we do not hear, respect, and seriously attempt to resolve the concerns that may lead to opposition to new development in the nation’s growing cities. That is not to say that we should prevent necessary change, entrench privilege, or protect property values over human needs. It is, instead, a call for careful attention to which fears and concerns can and should be addressed, and which must yield to the greater social need to keep our cities affordable and open to all.

Renting In America’s Largest Metropolitan Areas
NYU Furman Center/Capital One
National Affordable Rental Housing Landscape

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Executive Summary

In a study of the 11 largest metropolitan areas in the U.S. – the Atlanta, Boston, Chicago, Dallas, Houston, Los Angeles, Miami, New York City, Philadelphia, San Francisco, and Washington, DC metropolitan areas – this report finds that, between 2006 and 2014, the renter population grew while more and more renters faced difficulty finding affordable housing.

The number and share of renters increased in both the central cities and the surrounding suburbs of all 11 metro areas, and in metro areas nationwide, between 2006 and 2014.

The rental housing stock grew much faster than the ownership stock in all 11 metro areas and in metro areas nationwide between 2006 and 2014.

In six of the 11 largest metro areas, and in metro areas nationwide, the increase in the number of single-family rental units between 2006 and 2014 was larger than the increase in multifamily rental units.

Still, between 2006 and 2014, the renter population grew faster than the stock of rental units in the 11 largest metro areas, and in metro areas nationwide, pushing the average rental household size up and putting pressure on the affordability of rental housing.

The rental vacancy rate dropped in 10 of the 11 largest metro areas, and in metro areas nationwide, between 2006 and 2014.

Seven out of the 11 largest metro areas became less affordable to the typical renter between 2006 and 2014.

Of the 11 largest U.S. metro areas, the Washington, DC metro area was the least affordable to the typical U.S. renter household in 2014, followed by the San Francisco, Los Angeles, and New York City metro areas, while the Dallas and Houston metro areas were the most affordable to the median U.S. renter household.
In 10 of the 11 largest metro areas, and in metro areas nationwide, the median gross rent rose between 2006 and 2014, both in the central cities and the surrounding suburbs.

Incomes did not keep pace in most metro areas, and rent burdens rose in metro areas nationwide. In 2014, one quarter of renters in seven of the 11 largest metro areas, and in metro areas nationwide, were severely rent burdened, facing rents equal to at least half their income.

In 2014, the overwhelming majority of low-income renters were severely rent burdened in the 11 largest metro areas and in metro areas nationwide.

The vast majority of rental units that had recently been on the market in 2014 were unaffordable to low- and moderate-income renters in all of the 11 largest metro areas and in U.S. metro areas as a whole.

In 2014, rental units that had been on the market within the past year in the 11 largest metro areas and in metro areas nationwide had higher rents and were less affordable than units which had not been recently available, raising the prospect of greater affordability challenges yet to come.
Introduction

This study looked at trends in the 11 largest metropolitan areas in the U.S., as well as in metropolitan areas nationwide, to study the changing state of renters and rental housing between 2006 and 2014.

The 11 metro areas in the study – the Atlanta, Boston, Chicago, Dallas, Houston, Los Angeles, Miami, New York City, Philadelphia, San Francisco, and Washington, DC metro areas – represented a population of nearly 90 million (including over 35 million renters), or just over a third of the U.S. metropolitan population and over a quarter of the total U.S. population. According the American Community Survey, in 2014, over 85 percent of Americans, and nearly 90 percent of renters, lived in a metro area.

In all 11 metro areas, the renter population and housing stock grew during this period. By the end of the period, the number and proportion of people renting had increased—both within central cities and in the surrounding suburbs. The number of rental units increased more than 10 percent in each metro area, while owner-occupied units fell in many of them. Much of this growth in rental stock came from single-family homes, and the share of renters living in such units, traditionally considered part of the ownership stock, rose in all 11 metro areas and in metro areas nationwide.

While the rental stock grew, the population grew faster than the stock in all 11 metro areas and in metro areas nationwide. As changes in demand exceeded changes in supply, vacancy rates decreased, the average number of people living in a rental unit increased, and, in most areas, rents rose.

Most of the metro areas in this study saw rents increase faster than incomes, which meant that fewer and fewer units were affordable to the typical renter. In all 11 metro areas, low-income renters faced much more significant affordability challenges. Rising rents were not confined to central cities: in all but one of the metro areas in this study, rents rose in the suburbs as well.

Those looking to move into a rental unit found tight markets in which units that had recently been on the market typically charged substantially higher rents than the rest of the rental stock. In 2014, most rental units that had been available for rent in the previous year were unaffordable to most renters. In addition, when renters struggle to find an affordable unit on the market, they are more likely to remain in housing that is overcrowded or too expensive.

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1 Throughout this report, metropolitan areas are Core-Based Statistical Areas as defined by the Office of Management and Budget’s 2013 delineation. Even when the boundaries of a metropolitan area changed between 2006 and 2014, data for all years use the 2013 delineation. See the appendix for more information on methods and definitions. For clarity, we refer to all metropolitan areas by their most prominent principal city, which we refer to as the central city.

2 All areas outside that central city are called suburbs, even though some areas outside central cities may have a density as high as the central city itself. For the national benchmark, consisting of all metro areas in the U.S., we present figures for principal cities and outside principal cities. Many metro areas have more than one principal city, so this distinction is slightly different than the distinction we make between central cities and suburbs. Fort Worth, TX, for example, is a principal city of the Dallas-Fort Worth-Arlington, TX Metropolitan Statistical Area, and residents of Fort Worth are therefore included in figures for principal cities of U.S. metro areas but are not included in the central city figures for Dallas (and instead are part of the suburbs, as we have defined them).
Renters and Rental Units

The renter population grew

In America’s largest metro areas, the number of renters increased between 2006 and 2014. The growth in the renter population occurred in the central cities and the surrounding suburbs, mirroring national trends: In 2014, there were nearly 22 million more people renting in metro areas in the U.S. than there had been in 2006, and while the renter populations within principal cities increased by more than nine million, the majority of the growth occurred outside of those cities. Indeed, the renter population in the suburban areas outside principal cities grew by more than a third—by more than 12 million people—between 2006 and 2014.

In 2014, there were nearly 22 million more people renting in metro areas in the U.S. than there had been in 2006.

Figure 1. Renter Population

Sources: American Community Survey, NYU Furman Center
More people rented their homes—both in central cities and surrounding suburbs

In addition to growing in numbers, renters became a larger share of the metropolitan population between 2006 and 2014. In 2014, among the 11 largest metro areas, the majority of central-city residents were renters everywhere except the Houston and Philadelphia metro areas, and Philadelphia was the only metro area where less than a quarter of residents in the suburbs rented their homes. In all 11 metro areas and in metro areas nationwide, renters became a greater proportion of the population since 2006, both inside and outside the central cities.

In all 11 metro areas and in metro areas nationwide, renters became a greater proportion of the population since 2006, both inside and outside the central cities.

Figure 2. Share of Population Renting³

Sources: American Community Survey, NYU Furman Center

³ The total change presented in Figure 5 is for a different range of years (2006 to 2014, rather than 2005 to 2013), so the two figures are not entirely comparable.
The rental housing stock grew much faster than the ownership stock
The additional renters in these metro areas needed places to live, and in all 11 metro areas the number of rental housing units rose by more than 10 percent between 2006 and 2014. In the Atlanta, Dallas, Houston, Miami, and Washington, DC metro areas, the rental housing stock grew by more than 20 percent during this period, surpassing the rate of growth in metro areas nationwide of 18 percent. In comparison, only the Dallas and Houston metro areas experienced substantial growth in the ownership housing stock, with the remaining metros seeing little change in that stock or even substantial declines, as in Miami, where much of the increase in rental units appears to have come from the conversion of owner-occupied units to rental units.

There is some indication that conversions between ownership units and rental units were an important part of the growth in rental housing. An analysis of the American Housing Survey from 2005 and 2013 showed that, within metro areas, among units that converted from one tenure type to another, nearly 70 percent went from the ownership stock to rental stock.

**Figure 3. Percentage Change in Number of Units by Tenure Type, 2006-2014**

<table>
<thead>
<tr>
<th>City</th>
<th>Owner Unit</th>
<th>Rental Unit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlanta</td>
<td>26%</td>
<td>11%</td>
</tr>
<tr>
<td>Boston</td>
<td>1%</td>
<td>1%</td>
</tr>
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Sources: American Community Survey, NYU Furman Center
Single-Family Homes

More renters lived in single-family homes

Further evidence of conversions of owner-occupied housing to rental comes from examining single-family homes. While single-family homes are often assumed to be owner-occupied, a sizable and growing portion of renters live in these units.

In all 11 metros, and in metros nationwide, a greater share of renter households lived in single-family homes in 2014 than did in 2006. In every metro except for Boston and New York City, more than one in five renters lived in a single-family home in 2014.

Unlike some other types of housing, single-family homes can easily fluctuate between being renter- and owner-occupied based on the dynamics of the housing market and the broader economy. During this period, single-family homes were more likely to change tenure types and, of those that did, were more likely to enter the rental stock than to exit it. Of the nearly 6.8 million metropolitan units that, according to the American Housing Survey, converted from one tenure type to the other between 2005 and 2013, 80 percent were single-family homes. Furthermore, while 5.8 percent of metropolitan multifamily units converted tenure types (of which 65 percent went from owner-occupied to renter-occupied), 9.3 percent of metropolitan single-family homes converted (70 percent of which switched from owner-occupied to renter-occupied).

Figure 4. Share of Renter households in Single-Family Homes

Sources: American Community Survey, NYU Furman Center

While single-family homes are often assumed to be owner-occupied, a sizable and growing portion of renters live in these units.
Much of growth in rental housing stock consisted of single-family homes

Comparing the size of the single-family and multifamily rental stock over time shows that much of the growth in the rental housing stock between 2006 and 2014 was attributable to single-family homes. In six of the 11 largest metro areas, more rental single-family homes were added to the housing stock during this period than rental units in multifamily buildings. The New York City metro area was a notable exception, as single-family homes accounted for only about a quarter of the added units, the lowest share among the 11 metros. The Washington, DC metro area, where single-family homes made up just under 40 percent of the additional units, had the second-lowest share. In metro areas nationwide, single-family homes accounted for nearly 60 percent of the increase in rental units.

The American Housing Survey, which tracks units over time, shows that 3.8 million metropolitan single-family homes that were owner-occupied in 2005 were renter-occupied in 2013, compared to 1.6 million single-family homes that went from the rental stock in 2005 to ownership stock in 2013. The net change of 2.2 million units is large relative to the total change in the single-family rental stock in US metro areas, suggesting that much of the growth in single-family rentals came from conversions and not new construction.4

Figure 5. Change in Number of Rental Units by Building Size, 2006-2014

4 The total change presented in Figure 5 is for a different range of years (2006 to 2014, rather than 2005 to 2013), so the two figures are not entirely comparable.
Mismatched Supply and Demand

Growth in renter population exceeded growth in rental stock

In the 11 largest metros, and in metros nationwide, the renter population grew more quickly than the number of rental housing units between 2006 and 2014. As rising demand for rental housing outpaced increases in supply, the market adjusted somewhat differently in each metro area.

Figure 6. Percentage Change in Renter Population and Rental Housing Units, 2006–2014

The mismatched growth in demand and supply for rental pushed rental vacancy rates down

The rental vacancy rate went down in all but one of the largest 11 metro areas. The frictions of the market ensure that the vacancy rate cannot easily fall below a certain level, as some units will be vacant for repairs and renovations, and it may also take time to find a qualified tenant. Above that rate, however, vacant units can constitute slack in the market, which gets taken up as the market tightens. Accordingly, cities with high rental vacancy rates in 2006 generally saw the steepest
declines. Yet even the San Francisco metro area, with the 4th-lowest vacancy rate in 2006 among the 11 largest metros, saw its vacancy rate drop by half, moving past Los Angeles as the metro area with the tightest rental market. The Miami metro area, on the other hand, experienced a slight increase in its vacancy rate, perhaps related to the fact that it had the second-highest rate of growth in the rental housing stock.

Figure 7. Rental Vacancy Rate

As the rental market tightens, household size typically grows as single people struggle to find affordable and available apartments for themselves. Some single people may move in with roommates to split housing costs, or adult children might delay moving out of their parents’ homes. In all 11 of the top metro areas in the U.S., the average number of people in each rental household rose, as it did in metros nationwide. The size of owner households, on the other hand, shrunk in seven of the 11 metro areas and in metro areas nationwide, suggesting that renter household size is not growing merely because of broader demographic shifts.

One possible reason for increasing household size among renters is that larger households in larger units (such as single-family homes) may have moved from owning their own home to being renters during the study period; because of the conversion of single-family homes, the size of rental housing units grew, making them available to larger households.

Sources: American Community Survey, NYU Furman Center
An analysis of the American Housing Survey suggests that this may well be part of the story: Metro area units that were owner-occupied in 2005 but renter-occupied in 2013 had, on average, about 2.8 bedrooms, higher than the average of 2.1 bedrooms among all rental units in 2013. In addition, higher housing costs could have pushed renters to double and triple up with roommates and family members. In most cases, both dynamics likely were at play.

**Figure 8. Percentage Change in Average Household Size by Tenure Type, 2006-2014**

In all 11 of the top metro areas in the U.S., the average number of people in each rental household rose, as it did in metros nationwide.
Affordability and Rising Rents

Median gross rents and median renter incomes were above the national average in most of the 11 metros

Nine of the 11 metro areas had median rents above the national benchmark, and nine out of 11 had median renter incomes above the national benchmark. However, a few stand out as higher-cost cities. In particular, in the Boston, Los Angeles, and New York City metro areas, the median rent was at least $250 above the figure in metro areas nationwide, while in the San Francisco and Washington, DC metros, median rents were over $500 higher than the national benchmark.

For the most part, metro areas with higher rents also had higher renter incomes. The median renter in the Boston, Los Angeles, and New York City metros earned at least $5,000 more in income than their counterparts in metros nationwide, while renters in metropolitan San Francisco and Washington, DC were even further from the national levels, with median incomes more than $20,000—or about 55 percent in percentage terms—above the national benchmark.

The Miami metro area, where the median rent was more than $150 higher than the national benchmark while the median renter’s income was over $1,000 lower than that figure among metros nationwide, pops out as a troubling exception—a high-cost city without high incomes.

Figure 9. Median Gross Rent, 2014

Sources: American Community Survey, NYU Furman Center

5 Figures are rounded to the nearest $10
Seven out of 11 metros became less affordable to the typical renter

In a few of the metro areas in this study, incomes rose to keep up with rents. In seven of the 11 metros, however, by 2014, units that were recently available had become less affordable to the typical renter household. The decline was steepest in metropolitan San Francisco, where the median renter income was sufficient to afford only 31 percent of recently available units, down eight percentage points from the share affordable in 2006. Nationwide, the typical renter in a metro area—earning more than 50 percent of renters in that metro—could have afforded only 35 percent of the recently available rental units in metropolitan areas in 2014, down from 38 percent in 2006. Of the 11 metros we studied, only in Dallas and Houston could the median renter afford the median recently available rental unit. In the Miami metro area, 85 percent of recently available rental units were unaffordable to the typical renter household, making that metro area, for local residents, the least affordable rental market among the 11 largest metro areas.

Sources: American Community Survey, NYU Furman Center

6 Figures are rounded to the nearest $100
Figure 11. Share of Recently Available Rental Units Affordable to Median Metro Area Renter

Sources: American Community Survey, NYU Furman Center
The majority of rental units in U.S. metro areas were unaffordable to the typical U.S. metro renter

Metro areas with high rents usually had high incomes as well. But the typical metropolitan renter household could not afford most rental housing in metro areas in 2014. Such a renter could afford less than a third of the rental units in each of the six high-cost metros in this study, and less than a fifth of the rental units that had been on the market in the previous year. The Washington, DC metro area, where the median U.S. metro renter could afford only 12 percent of all rental units and only six percent of those which had recently been for rent, was the least affordable large metro area for the typical American renter in a metro area, followed by San Francisco, Los Angeles and the New York City metro areas. Of the 11 largest metro areas, Dallas and Houston were the only two to be more affordable than metros nationwide.

Figure 12. Share of Rental Units Affordable to Median U.S. Metro Renter, 2014

Sources: American Community Survey, NYU Furman Center
Rising rents were not confined to the central cities

Rents rose, in real terms, within the central cities of all 11 of the largest American metro areas, as well as within the principal cities of metro areas nationwide. But rents also rose in the suburbs of all 11 metro areas except Miami. In the Dallas and Houston metros, rents rose faster outside the central cities than within city limits, while in most of the other 11 metro areas, the converse was true. In New York City and Washington, DC, in particular, rents within the central cities rose much faster than in other parts of the metro area.

Figure 13. Percentage Change in Real Median Gross Rent, 2006-2014

Sources: American Community Survey, NYU Furman Center
Recent Rent Changes in Perspective

Between 2013 and 2014, median rent rose more quickly than in the previous six years

Rents rose in all 11 of the 11 largest metro areas between 2013 and 2014. But how large were the increases given recent historical trends around rents in these metro areas? Figure 14 shows the annualized percentage change in rents between 2006 and 2013; on average, the real median rent rose by this amount each year between 2006 and 2013. This figure also shows the percentage change in rents just in the year between 2013 and 2014.

In each of the largest metro areas except the Washington, DC metro area, and in metro areas nationwide, rents increased between 2013 and 2014 much more quickly than they did, on average, in the preceding years back to 2006. Indeed, before 2014, median rents in metro areas nationwide were virtually unchanged from 2006. Up through 2013, in all the largest metro areas except the Los Angeles, New York City, and Washington, DC metro areas, the median rent, on average, had increased only a few tenths of a percent more than inflation each year since 2006. The rent increases experienced in these metro areas between 2013 and 2014 are thus quite sizable compared to recent historical trends.

Figure 14. Percentage Change in Real Median Gross Rent

Sources: American Community Survey, NYU Furman Center
Rent Burden: Looking Back and Looking Forward

One quarter of renters in seven metro areas were severely rent burdened

In both 2006 and 2014, a majority of renters in all but three of the largest metro areas were rent burdened, meaning their rents were equal to at least 30 percent of their income. In all but four of the largest metro areas, at least a quarter of renters were severely rent burdened in 2014, meaning they faced rents equal to at least half their household income. Being rent burdened or severely rent burdened indicates that a household’s income is insufficient to afford housing.

While severe burden increased between 2006 and 2014 in just over half of the metros in this study, the national US metro area benchmark indicates that renters in metro areas nationwide faced rising rent burdens. The metros where overall rent burden went down or remained the same—Boston, Chicago, Houston, San Francisco—also saw rising renter incomes, dampening the effects of rising rents. Existing renters may have seen income gains that enabled them to be better able to afford their homes, or the composition of renters may have changed such that more higher-income households became renters.

7 The estimates of change in renter incomes were deemed to be insufficiently reliable to include in this report. However, using a 90 percent confidence interval, the real median renter income did increase in the Boston, Chicago, Dallas, and Houston metro areas. It increased in the San Francisco metro as well with a confidence interval of 85 percent.
The overwhelming majority of low-income renters were severely rent burdened

In all 11 metro areas, and in metro areas nationwide, well over half of low-income renters, earning less than the 25th percentile renter income in their metro area, faced rents at or above half of their household income. In eight of the 11 metros, at least a quarter of moderate-income renters—those earning between the 25th and 50th percentile income among renters in the metro area—faced severe rent burdens. High rent burdens leave less money for families to spend on food, transportation, healthcare, and other necessary expenses.
The vast majority of rental units recently on the market were unaffordable to low- and moderate-income renters

In all 11 metro areas in this study, and on average in metro areas nationwide, a renter at the 25th percentile (or earning more than 25% and less than 75% of renters in the metro area) could afford less than 10 percent of recently available units. Indeed, in all the metro areas other than Boston, such renters could afford 5 percent or less of recently available units. As for renters earning the median income in 2014, only in Dallas could they afford half of the units that had been for rent in the previous year. In the Miami metro, a typical renter, or a renter in the middle of renter income distribution in the metro area, could afford only 15 percent of recently available units. Such a scarcity of affordable units prevents households from moving to units that might suit them better, forcing them to remain in units that are too small, too big, too far from work, or too expensive for their current situation.
Rents for recently available units were higher than for other units
Median rents for recently available units—meaning units that had been on the market within the past year—were higher than for units that had not recently been on the market in all 11 large metro areas and in metro areas nationwide. In some cases, differences were substantial. In the Boston metro area, the typical unit that had been on the market in the past year was over 27 percent more expensive than the typical unit that had not recently been available. Renters looking for a unit in metropolitan Chicago, Los Angeles, Miami, New York City, and San Francisco also faced a premium of at least 10 percent above the typical rent for renters who had stayed in their units. In the San Francisco metro area, the typical unit available in 2014 had a rent of $1,750—the highest among the metro areas in this study. The median rent for recently available apartments was at least $1,500 in three of the other large metro areas: Boston, New York City, and Washington, DC.
Figure 18. Median Gross Rent, by Recent Availability, 2014

Sources: American Community Survey, NYU Furman Center

8 Figures are rounded to the nearest $10
Conclusion

The renter population continued to grow while more renters struggled to find affordable housing

In 2006, 31 percent of the population living in a metro area in the U.S. lived in a rental unit. By 2014, that share increased to 36 percent. Every metro area in our study experienced a growth in the renter population between 2006 and 2014. In most places, supply did not keep up, with vacancy rates falling, renter household size increasing, and median rents rising in a majority of America’s largest metro areas. Median gross rent increased by 1.7 percent beyond inflation between 2006 and 2014 in metro areas nationwide. Some metros experienced greater increases; the Los Angeles, New York City, San Francisco, and Washington, DC metro areas all experienced an increase in median gross rent of greater than five percent between 2006 and 2014.

The number and share of renters increased in both the central cities and the surrounding suburbs of the 11 largest US metro areas

The increase in renting in American’s metro areas was not confined to central cities. In 2006, 23 percent of the population living in metro area suburbs nationwide lived in rental units. By 2014, that share had increased to 29 percent. The Atlanta, Chicago, Miami, San Francisco, and Washington, DC metro areas all saw an increase in the share of suburban residents living in rental units of more than five percentage points between 2006 and 2014.

Rental affordability remains a challenge, especially for recent movers

In all but two of the 11 largest metros, the median renter household in 2014 could have afforded less than 40 percent of recently available units. For lower-income households, the affordability challenges were starker; renters at the 25th percentile of the renter income distribution in these metro areas could afford fewer than seven percent of recently available units.
Methods

Definition of Metropolitan Areas
We studied the 11 largest metropolitan areas by population. Metropolitan areas are Core-Based Statistical Areas (CBSA) as described by the U. S. Office of Management and Budget’s (OMB) 2013 definitions, which were based on data from the 2010 decennial census. Each CBSA is a collection of counties and may cross state lines. Several of the CBSAs in this study added or lost counties between 2006 and 2013, but because we always use the 2013 OMB definitions, indicators for 2006 are tabulated for the CBSAs as they were defined in 2013.

CBSAs are associated with principal cities, which are “the more significant places”—that is, incorporated places or census designated places—“in terms of population and employment” within a CBSA. For example, the city of Chicago is an incorporated place within Cook County, IL, and it is one of the principal cities of the Chicago-Naperville-Elgin, IL-IN-WI Metropolitan Statistical Area (MSA), which contains Cook, DuPage, Grundy, Kendall, McHenry, Will, DeKalb, Kane, and Lake counties in Illinois, as well as Jasper, Lake, Newton, and Porter counties in Indiana and Kenosha County in Wisconsin. The principal cities of the Chicago-Naperville-Elgin, IL-IN-WI MSA are Chicago, Naperville, Elgin, Arlington Heights, Evanston, Schaumburg, Skokie, Des Plaines, and Hoffman Estates in Illinois and Gary in Indiana. For convenience, we refer to MSAs by the largest principal city, and thus we call this MSA the “Chicago metro area.” Furthermore, we refer to the city of Chicago as the central city of this MSA and portions of the Chicago metro area not in the city of Chicago as the suburbs of the MSA.

Our national benchmark indicators are for all MSAs in the United States, which consists of all CBSAs with at least one principal city with a population of at least 50,000 people, according to the 2010 census.

Source of Data and Weighting Procedures
We use data from the one-year estimates of the American Community Survey (ACS), an annual survey conducted by the U.S. Census Bureau, from 2006 to 2014. The ACS summary file includes pre-tabulated estimates for many geographic levels, including metro areas. The summary-file estimates from before 2013 are for the metro areas as they were defined based on standards outlined in 2000. The standards for delineating metro areas was changed in 2010, and new definitions were released in 2013; thus the metro areas in the 2013 and 2014 summary files, in some cases, encompassed different areas than those in previous years’ summary files. For example, the 2013 definitions added Hood and Somervell counties to the Dallas metro area and removed Delta county, making it problematic to compare summary-file figures from before and after 2013. Similar changes were made to the Atlanta, Houston, New York City, and Washington, DC metro areas.

9 The 2013 OMB definitions can be found at: https://www.whitehouse.gov/sites/default/files/omb/bulletins/2013/b-13-01.pdf
For the most part, then, we generate indicators from the household file of the ACS Public Use Microdata Sample (PUMS). The geographic unit of the PUMS data is the Public Use Microdata Area (PUMA), and PUMAs generally have borders that align with counties, and thus with metro areas. Occasionally, however, a PUMA’s boundaries may cross city or metro area borders. Furthermore, the U.S. Census revised the boundaries of PUMAs between 2006 and 2014, to account for new data from the 2010 decennial census. In order to ensure consistency across years and geographies, we used alignment files from the Missouri Census Data Center to weight PUMAs by the fraction of housing units that fell within a city or metropolitan area, using the housing unit counts from the 2010 census. This allows us to calculate estimates for the metro areas as they existed in 2014 for both 2014 and 2006.

For example, PUMA 700 in Indiana contains all of Newton, Jasper, Pulaski, Starke, and Fulton counties. Of those, only Jasper and Newton counties are in the Chicago metro area, but we cannot identify in which county a respondent in PUMA 700 lives, and therefore we do not know for certain whether any respondent is within or outside the Chicago metro area. To address this, we use the Missouri Census Data Center’s geocorr tool to calculate that, of the 45,928 households in PUMA 700 in the 2010 decennial census, 19,198—41.8 percent—are within either Jasper or Newton county and therefore are within the Chicago metro area. When calculating indicators for the Chicago metro area, we therefore weight all observations from PUMA 700 by 0.418 (multiplied by the weighting variable that is included in the PUMS data by the U.S. Census Bureau).

We use a similar process for estimating central-city indicators when PUMAs cross city limits. The suburbs indicators are weighted by the portion of the PUMA’s housing units that were within the MSA, minus the portion that were within the central city.

For certain indicators where we are not comparing across years, we use summary file estimates for metro areas. Those indicators are median gross rent and median renter household income when presented for 2014 alone. We do use PUMS data to calculate changes in median gross rent and to compare rents for recently available and non-recently available units, since the summary file does not present rent data broken out in that way.

For many smaller metro areas, it is difficult to identify a single central city, and the principal cities are small enough that PUMAs, which are designed to contain at least 100,000 people, do not map well onto city boundaries. This raises the risk that the weighting procedure described above could bias estimates in these smaller cities. Therefore, when presenting indicators broken out by central city/suburbs of the 11 metro areas, for the national benchmark we use the summary file’s pre-tabulated estimates for principal cities within metro areas and portions of metro areas that are outside principal cities. This distinction is thus not entirely comparable to the central city/suburbs distinction for the 11 metro areas we studied.

Unless otherwise noted, all indicators (including income, rent, and affordability indicators) are measured at the household level. “Renter population” refers to persons who live in renter households. When not used in the context of renter population, “renters” refers to renter households.
Rounding
All percentages are rounded to the nearest whole percent. All income figures are rounded to the nearest $100. All rent figures are rounded to the nearest $10. Unrounded values are used to calculate percentage change, which is then rounded to the nearest whole percent. Percentage-point changes are the difference between rounded percentages.

Inflation Adjustments
All dollar figures are presented in constant 2014 dollars, adjusted using the Consumer Price Index (CPI) for All Urban Consumers (Current Series) without seasonal adjustments from the Bureau of Labor Statistics over all major expenditure classes for the relevant metropolitan area. For the national benchmarks, dollar amounts are inflated using the national CPI; when respondents in one of the 11 major metro areas are included in the national benchmark calculations, all monetary amounts are adjusted using the national CPI, rather than the CPI for that specific metro area. All figures for changes in incomes and rents constitute inflation-adjusted changes.

Recent Availability and Vacant Units
A unit is defined as recently available if the current tenant moved into the unit within the previous 12 months [prior to the date of their ACS interview, which could have happened at any time during the calendar year]. Since vacant units in the ACS do not have rent data, vacant units are generally excluded from the set of “recently available units.” Furthermore, vacant units are excluded from all indicators that incorporate rents, including median rent and rent burden.

Income Groups, Affordability, and Rent Burden
We used PUMS data to define income levels for each metropolitan area within the renter population. Households earning no more than 25th percentile income for renter households in that metro area are referred to as “low-income renters.” Those earning more than the 25th percentile but less than or equal to the 50th percentile are referred to as “moderate-income renters.” For the national benchmark, we calculated the 25th, 50th, and 75th percentile incomes for renters within each metro area, and all indicators are created using these metro-area-based income limits.
Affordability rates are calculated using precise income levels rather than a range; for example, the “lower-income renter” is one earning exactly the 25th percentile income for renters in that metropolitan area in a particular year. A “middle-income renter” (also called a “typical renter”) is one earning exactly the median income for renters in a particular metropolitan area in a given year.

A unit is considered “affordable” to a particular income level if the gross rent is less than 30 percent of that income level. Thus, the share of recently available units affordable to the typical renter is the fraction of occupied rental units whose tenants moved in during the 12 months prior to their ACS survey and where the gross rent is less than 30 percent of the median income among renter households in that metro area.

We label a household “rent burdened” if the gross rent (rent specified on a lease plus any additional utility costs) is greater than or equal to 30 percent of the household’s income. For rent-burdened households, if the gross rent is equal to 50 percent of income or more, we call that household “severely rent burdened,” while “moderately rent burdened” refers to households with gross rent between 30 and 50 percent of income (exclusive). Note that the renter themselves may not necessarily pay the entire rent specified on a lease, notably when they receive a Housing and Urban Development housing choice voucher.

**Single-Family Homes**

We define a unit as a single-family home if there is only one unit in the building. This includes mobile homes and trailers as well as both attached and detached single-family houses.
## Metro Area Profiles

### Atlanta

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<td>30%</td>
<td>28%</td>
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</tr>
<tr>
<td>Suburbs</td>
<td>25%</td>
<td>28%</td>
<td>26%</td>
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<tr>
<td><strong>Share Severely Rent Burdened - Lowest Income Quartile</strong></td>
<td></td>
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</tr>
<tr>
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<td>84%</td>
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<td><strong>Share Severely Rent Burdened - Lower-Moderate Income Quartile</strong></td>
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<tr>
<td>Metro Area</td>
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<td>35%</td>
<td>27%</td>
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<tr>
<td><strong>Share of Recently Available Rental Units Affordable to 25th Percentile Metro Area Renter</strong></td>
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<td></td>
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<tr>
<td>Metro Area</td>
<td>4%</td>
<td>2%</td>
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<tr>
<td><strong>Share of Recently Available Rental Units Affordable to Median Metro Area Renter</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>39%</td>
<td>32%</td>
<td>37%</td>
<td>4</td>
</tr>
</tbody>
</table>
The increase in the rental population outside of Atlanta city limits was 2.5 times as large as the entire renter population in the city of Atlanta in 2014. Although, in 2014, only 35 percent of residents in the Atlanta suburbs lived in rental housing, compared to 55 percent within city limits, 89 percent of all Atlanta metro area renters lived outside the city of Atlanta. In the metro area, the renter population rose 40 percent—over half a million people—between 2006 and 2014, almost all of which occurred in the suburbs.

The number of rental units in metro Atlanta increased 26 percent between 2006 and 2014—the third highest rate of increase among the 11 largest metro areas. Meanwhile, the ownership stock in metro Atlanta declined two percent. Many of the additional rental units were single-family homes: over 83 percent of the growth in the rental stock was attributable to single-family homes, a higher proportion than in any other metro area among the 11 largest in the country (Chicago’s figure, 72 percent, was the next highest), and higher than the average among all US metro areas of 60 percent.

The renter population in metro Atlanta grew much more quickly than the rental housing stock. The renter population grew 40 percent between 2006 and 2014, while the rental housing stock grew just 26 percent between 2006 and 2014. The mismatch pushed the rental vacancy rate down from 13 percent to 10 percent, although the metro Atlanta vacancy rate was higher than in any of the other 10 metro areas we studied, both in 2006 and in 2014.

Median gross rent barely grew, in real terms, between 2006 and 2014. Median gross rent grew slightly between 2006 ($970) and 2014 ($980). In 2014, Atlanta had the third lowest median rent of all 11 metros in this study. The median income for renter households, however, was also low; only in the Miami and Philadelphia metro areas did the typical renter earn less than in metro Atlanta.

Of the 11 metros areas in this study, Atlanta is among the more affordable metros, with 37 percent of recently available units affordable to the median renter household in 2014. In 2014, the Atlanta metro area was the fourth most affordable among the 11 metro areas in this study. That year, 37 percent of recently available units were affordable to the median renter household down from 39 percent in 2006. The share of renters severely rent burdened did not change during that period, although the share of renters who were moderately rent burdened increased slightly.

Total rent burden in Atlanta metro remained below the rate in metro areas nationwide. But among low-income renters, 82 percent were severely rent burdened in 2014. Among low-income renters, Atlanta metro had the third highest share of severely rent burdened households among the 11 metro areas in this study in 2014, and higher than the 76 percent rate in metro areas nationwide. Furthermore, only two percent of recently available units in that year were affordable to a renter earning the 25th percentile income for renters in the Atlanta metro area, making the recent rental market less affordable to low-income renters than in any of the 11 metro areas except Los Angeles.
### Boston

<table>
<thead>
<tr>
<th></th>
<th>2006</th>
<th>2010</th>
<th>2014</th>
<th>2014 Ranking</th>
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<tr>
<td><strong>Renter Households</strong></td>
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<td></td>
<td></td>
<td></td>
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<tr>
<td><strong>Share of Population Renting</strong></td>
<td></td>
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<tr>
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<tr>
<td>Central City</td>
<td>58%</td>
<td>64%</td>
<td>64%</td>
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<tr>
<td>Suburbs</td>
<td>26%</td>
<td>28%</td>
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<tr>
<td><strong>Share of Renter Households in Single-Family Homes</strong></td>
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<tr>
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<td>5%</td>
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<tr>
<td><strong>Average Renter Household Size</strong></td>
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<td>50%</td>
<td>50%</td>
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<tr>
<td><strong>Share Severely Rent Burdened</strong></td>
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<tr>
<td>Metro Area</td>
<td>26%</td>
<td>26%</td>
<td>25%</td>
<td>7</td>
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<tr>
<td>Central City</td>
<td>28%</td>
<td>30%</td>
<td>28%</td>
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<tr>
<td>Suburbs</td>
<td>25%</td>
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<tr>
<td><strong>Share Severely Rent Burdened - Lowest Income Quartile</strong></td>
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<tr>
<td><strong>Share Severely Rent Burdened - Lower-Moderate Income Quartile</strong></td>
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<tr>
<td>Metro Area</td>
<td>39%</td>
<td>42%</td>
<td>39%</td>
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<tr>
<td><strong>Share of Recently Available Rental Units Affordable to 25th Percentile Metro Area Renter</strong></td>
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<td>6%</td>
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<tr>
<td><strong>Share of Recently Available Rental Units Affordable to Median Metro Area Renter</strong></td>
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<tr>
<td>Metro Area</td>
<td>21%</td>
<td>24%</td>
<td>26%</td>
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</table>
The rental vacancy rate in the Boston metro area declined from seven percent in 2006 to five percent in 2014. As of 2014, the vacancy rate in the Boston metro area tied with the New York City metro area as the third lowest among the 11 metro areas in this study.

Median gross rent in the Boston metro area was nearly 30 percent higher than median gross rent for metro areas nationwide in 2014. In 2014, the median gross rent in the Boston metro area was almost $1,250—more than $250 (nearly 30%) above the median in metro areas nationwide. The median renter income in metro Boston, however, was only 21 percent above the median in metro areas nationwide.

Of the 11 cities in this study, only Boston and Houston saw the share of rent burdened households decline slightly between 2006 and 2014. Despite this decline, in 2014, the proportion of renter households in the lower-moderate income quartile (earning between the 25th and 50th percentile metro area renter income) who were severely rent burdened was 39 percent—higher than in metro areas nationwide.

Renters in the lowest income quartile in Boston were less likely to be severely burdened than in any of the other 11 metro areas. In 2014, 60 percent of renters in the lowest income quartile in Boston were severely rent burdened, a share that is 16 percentage points below the share in metro areas nationwide.

Boston metro area renters at all income levels were confronted with an unaffordable rental market in 2014. In 2014, among units that were on the market within the past year, only seven percent were affordable to a household at the 25th percentile of the renter income distribution. Despite this, greater Boston was the most affordable metro area to the 25th percentile renter household of the 11 metro areas included in this study. Boston metro area ranked eighth in recent affordability for the median and 75th percentile renter households.

Recent movers in the Boston metro area paid rents 27 percent higher, on average, than incumbent renters in the Boston metro area. The median incumbent renter household in 2014, who had been in their home for at least a year, had a gross rent of $1,180. The median gross rent among those who had moved in within the past 12 months, however, was $1,500, or more than 27 percent higher than for incumbent renters. That premium paid by recent movers was higher than in any of the other large metro areas we looked at, and much higher than the average for metro areas nationwide, where the typical recent mover paid just over 4 percent more than the typical incumbent renter household.
Chicago

<table>
<thead>
<tr>
<th></th>
<th>2006</th>
<th>2010</th>
<th>2014</th>
<th>2014 Ranking</th>
</tr>
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<tr>
<td><strong>Renter Households</strong></td>
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<td></td>
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<td></td>
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<tr>
<td><strong>Share of Population Renting</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>27%</td>
<td>31%</td>
<td>33%</td>
<td>10</td>
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<tr>
<td>Central City</td>
<td>47%</td>
<td>51%</td>
<td>52%</td>
<td></td>
</tr>
<tr>
<td>Suburbs</td>
<td>20%</td>
<td>23%</td>
<td>25%</td>
<td></td>
</tr>
<tr>
<td><strong>Share of Renter Households in Single-Family Homes</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Metro Area</td>
<td>17%</td>
<td>22%</td>
<td>23%</td>
<td>9</td>
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<tr>
<td><strong>Rental Vacancy Rate</strong></td>
<td></td>
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<td></td>
<td></td>
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<tr>
<td>Metro Area</td>
<td>10%</td>
<td>9%</td>
<td>7%</td>
<td>6</td>
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<tr>
<td><strong>Average Renter Household Size</strong></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
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<td>2.2</td>
<td>2.2</td>
<td>5</td>
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<tr>
<td><strong>Median Renter Household Income</strong></td>
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<td></td>
<td></td>
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</tr>
<tr>
<td>Metro Area</td>
<td>$36,100</td>
<td>$34,500</td>
<td>$37,100</td>
<td>8</td>
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<tr>
<td><strong>Affordability</strong></td>
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<td></td>
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<tr>
<td><strong>Median Gross Rent</strong></td>
<td></td>
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</tr>
<tr>
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<td>$980</td>
<td>$990</td>
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<td><strong>Median Gross Rent for Non-Recently Available Units</strong></td>
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<tr>
<td>Metro Area</td>
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<td>$960</td>
<td>$960</td>
<td>9</td>
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<td><strong>Median Gross Rent for Recently Available Units</strong></td>
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<td></td>
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</tr>
<tr>
<td>Metro Area</td>
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<td>$1,030</td>
<td>$1,090</td>
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<tr>
<td><strong>Share Rent Burdened (Moderate + Severe)</strong></td>
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<td></td>
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</tr>
<tr>
<td>Metro Area</td>
<td>51%</td>
<td>55%</td>
<td>51%</td>
<td>6</td>
</tr>
<tr>
<td>Central City</td>
<td>55%</td>
<td>55%</td>
<td>52%</td>
<td></td>
</tr>
<tr>
<td>Suburbs</td>
<td>48%</td>
<td>54%</td>
<td>51%</td>
<td></td>
</tr>
<tr>
<td><strong>Share Severely Rent Burdened</strong></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>28%</td>
<td>29%</td>
<td>27%</td>
<td>5</td>
</tr>
<tr>
<td>Central City</td>
<td>30%</td>
<td>31%</td>
<td>27%</td>
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</tr>
<tr>
<td>Suburbs</td>
<td>26%</td>
<td>28%</td>
<td>27%</td>
<td></td>
</tr>
<tr>
<td><strong>Share Severely Rent Burdened - Lowest Income Quartile</strong></td>
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<tr>
<td>Metro Area</td>
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<td>80%</td>
<td>77%</td>
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<tr>
<td><strong>Share Severely Rent Burdened - Lower-Moderate Income Quartile</strong></td>
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<tr>
<td>Metro Area</td>
<td>34%</td>
<td>37%</td>
<td>33%</td>
<td>6</td>
</tr>
<tr>
<td><strong>Share of Recently Available Rental Units Affordable to 25th Percentile Metro Area Renter</strong></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>4%</td>
<td>3%</td>
<td>4%</td>
<td>3</td>
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<tr>
<td><strong>Share of Recently Available Rental Units Affordable to Median Metro Area Renter</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>31%</td>
<td>30%</td>
<td>35%</td>
<td>5</td>
</tr>
</tbody>
</table>
One quarter of Chicago’s suburban population rented their homes in 2014. In 2006, 20 percent of the population living in the Chicago suburbs lived rental housing. By 2014, that share had increased to 25 percent—but it was still the second-lowest rate of the 11 areas included this study.

The growth in renters in Chicago’s suburbs was driven by renters in single-family homes. Between 2006 and 2014, the share of renters living in single-family homes rose from 17 percent to 23 percent. During that period, the Chicago metro area gained nearly 160,000 single- or multi-family rental housing units, and of those more than 70 percent were single-family homes.

The Chicago metro area was hit hard by the credit crisis accompanying the Great Recession, which likely played a big part in the shift toward rental housing. Particularly in the suburbs and among the single-family stock. In 2010, the Chicago metro area had a foreclosure rate of 7.5 percent, the second highest among the 11 metro areas we studied, behind Miami. Of the 11 largest metro areas, the Chicago metro area had the third highest unemployment rate in 2010 (11%, behind the Los Angeles and Miami metro areas).

Chicago’s renter population grew faster than its stock of rental housing. The rental housing stock grew by 13 percent in the Chicago metro between 2006 and 2014, but the population of renters grew by 20 percent. The mismatched growth in supply and demand for rental housing contributed to the rental vacancy rate dropping from 10 percent to 7 percent, and to the average renter household size increasing by 6 percent.

In many ways, renters in the Chicago metro area mirrored trends among renters in metro areas nationwide. The median gross rent in the Chicago metro area was just slightly higher than the median gross rent in metro areas nationwide in 2014, and was the fourth lowest among the 11 metro areas we studied. The median renter’s income was also the fourth lowest in that year, however, and Chicago was therefore not as affordable as some other metro areas in our sample. Chicago was one of only four metro areas we studied where the share of units affordable to the median metro area renter increased between 2006 and 2014.
## Dallas

<table>
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<tr>
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<th>2014</th>
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<tr>
<td><strong>Renter Households</strong></td>
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<tr>
<td><strong>Share of Population Renting</strong></td>
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<tr>
<td>Metro Area</td>
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<tr>
<td>Central City</td>
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<td><strong>Share of Renter Households in Single-Family Homes</strong></td>
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<td>Metro Area</td>
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<td>31%</td>
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<td><strong>Rental Vacancy Rate</strong></td>
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<tr>
<td><strong>Average Renter Household Size</strong></td>
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<tr>
<td><strong>Median Gross Rent</strong></td>
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<td>Metro Area</td>
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<tr>
<td><strong>Share Rent Burdened (Moderate + Severe)</strong></td>
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<tr>
<td>Metro Area</td>
<td>48%</td>
<td>50%</td>
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<tr>
<td>Central City</td>
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</tr>
<tr>
<td>Suburbs</td>
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<tr>
<td><strong>Share Severely Rent Burdened</strong></td>
<td></td>
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<td></td>
</tr>
<tr>
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<tr>
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<td>22%</td>
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<td>25%</td>
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</tr>
<tr>
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<td>21%</td>
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</tr>
<tr>
<td><strong>Share Severely Rent Burdened - Lowest Income Quartile</strong></td>
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<tr>
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<td><strong>Share Severely Rent Burdened - Lower-Moderate Income Quartile</strong></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
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<td>20%</td>
<td>19%</td>
<td>10</td>
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<tr>
<td><strong>Share of Recently Available Rental Units Affordable to 25th Percentile Metro Area Renter</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Metro Area</td>
<td>5%</td>
<td>4%</td>
<td>3%</td>
<td>5</td>
</tr>
<tr>
<td><strong>Share of Recently Available Rental Units Affordable to Median Metro Area Renter</strong></td>
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<tr>
<td>Metro Area</td>
<td>53%</td>
<td>51%</td>
<td>50%</td>
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</table>
The number of renters in the Dallas metro area increased more than 35 percent between 2006 and 2014. In 2014, more than half of the residents in Dallas itself, and more than a third of the residents of the surrounding suburbs, rented their homes. The renter population outside of the city of Dallas increased by more than half a million people between 2006 and 2014, accounting for 80 percent of the renter population growth in the metro area and exceeding the renter population of the city of Dallas in 2006.

The number of rental units in the Dallas metro area grew by 25 percent between 2006 and 2014. The Dallas metro area was one of only two metro areas in this study’s sample of 11 (the other being nearby Houston) where there was a sizable increase in the size of the ownership housing stock, as well. In 2014, 33 percent of renter households lived in single-family homes, the fourth highest rate among the 11 metro areas in this study, and the majority of the units added to the rental housing stock since 2006 were single-family homes.

The growth rate of the renter population between 2006 and 2014 was 10 percentage points higher in the Dallas metro area than the growth rate of the rental stock. This mismatch in supply and demand contributed to the rental vacancy rate falling from 13 percent in 2006 to eight percent in 2014. The average size of a renter household rose by eight percent during that period, as well.

In 2014, the Dallas metro had the second-lowest median gross rent of the 11 metros in this study; only nearby Houston had lower rents. Dallas metro area rents were lower than the national benchmark as well. The median renter’s income, however, was over $2,500 higher in the Dallas metro area than in metro areas nationwide, and it exceeded the median renter’s income in the Houston metro. Indeed, in 2014, half of recently available rental units were affordable to the median metro area renter household, a substantially higher share than in metro areas nationwide (35%) and higher than in any of the metros we studied (although that share had decreased by three percentage points since 2006).

Some indicators suggest that the Dallas metro area has become more expensive in recent years. While, on average, the real median gross rent grew by just a fraction of one percent each year from 2006 to 2013, between 2013 and 2014 rents increased by 3.8 percent, more than double the increase in metro areas nationwide. Furthermore, the percentage of renters in the Dallas metro area who were severely rent burdened (facing rents equal to at least half of their income) increased by three percentage points between 2006 and 2014.

While middle-income renters have not faced the same magnitude of affordability challenges as their peers in other metro areas, low-income renters in Dallas have struggled. In 2006, five percent of recently available units were affordable to renter households earning the 25th percentile income, but by 2014 that share had dropped to three percent—seventh among the metro areas in this study. In both years, by contrast, Dallas was the most affordable metro area in our sample for the median renter household.
## Houston

<table>
<thead>
<tr>
<th>Renter Households</th>
<th>2006</th>
<th>2010</th>
<th>2014</th>
<th>2014 Ranking</th>
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<tbody>
<tr>
<td>Share of Population Renting</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>33%</td>
<td>34%</td>
<td>38%</td>
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<tr>
<td>Central City</td>
<td>42%</td>
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<td>46%</td>
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<td>24%</td>
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<td>29%</td>
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<td>Share of Renter Households in Single-Family Homes</td>
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<tr>
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<td>3</td>
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<tr>
<td>Rental Vacancy Rate</td>
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<tr>
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<td>13%</td>
<td>15%</td>
<td>9%</td>
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<tr>
<td>Average Renter Household Size</td>
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<td>2.1</td>
<td>2.3</td>
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<tr>
<td>Median Renter Household Income</td>
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</tr>
<tr>
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<td>$36,900</td>
<td>$38,200</td>
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<tr>
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<td>Share Rent Burdened (Moderate + Severe)</td>
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<td>49%</td>
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<td>48%</td>
<td>11</td>
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<tr>
<td>Central City</td>
<td>50%</td>
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<td>49%</td>
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<tr>
<td>Suburbs</td>
<td>47%</td>
<td>49%</td>
<td>45%</td>
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</tr>
<tr>
<td>Share Severely Rent Burdened</td>
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</tr>
<tr>
<td>Metro Area</td>
<td>24%</td>
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<td>10</td>
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<tr>
<td>Central City</td>
<td>25%</td>
<td>26%</td>
<td>24%</td>
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<tr>
<td>Suburbs</td>
<td>23%</td>
<td>23%</td>
<td>20%</td>
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<tr>
<td>Share Severely Rent Burdened - Lowest Income Quartile</td>
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<tr>
<td>Metro Area</td>
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<td>82%</td>
<td>76%</td>
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<tr>
<td>Share Severely Rent Burdened - Lower-Moderate Income Quartile</td>
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<tr>
<td>Metro Area</td>
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<td>18%</td>
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<tr>
<td>Share of Recently Available Rental Units Affordable to 25th Percentile Metro Area Renter</td>
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<td>Metro Area</td>
<td>2%</td>
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<td>3%</td>
<td>5</td>
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<tr>
<td>Share of Recently Available Rental Units Affordable to Median Metro Area Renter</td>
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<tr>
<td>Metro Area</td>
<td>46%</td>
<td>48%</td>
<td>48%</td>
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</tr>
</tbody>
</table>
The rental population in the Houston metro area increased by 37 percent between 2006 and 2014. This represented the second highest rate of increase among the metro areas in this study.

Much of the growth in the Houston metro area renters was driven by renters in single-family homes. In 2014, 34 percent of renter households in metro Houston lived in single-family homes, the third highest share in our sample and an increase of six percentage points since 2006. The number of rental units grew by 28 percent between 2006 and 2014, the fastest rate of growth among the 11 largest metro areas. Also notable was the 10 percent growth in the ownership stock, again the highest rate in the metro areas we looked at.

Of the 11 largest metro areas, metro Houston had the strongest economic growth in recent years. Houston’s strong overall housing market is not surprising given the metro area’s strong economic growth. The Houston metro area also had the lowest unemployment rate (4.9%) among the metro areas in our sample in 2014, due in large part to the then-booming oil and gas industry. Between 2006 and 2014, the mismatch between the growth in renter population and growth in rental housing stock helped push the rental vacancy rate down from 13 percent to nine percent. The average rental household size also rose by seven percent.

In 2014, the Houston metro area had the lowest median gross rent among metro areas in our sample, and tied for the highest income growth between 2006 and 2011 among the 11 largest metro areas. In 2014, the Houston metro area had the lowest median gross rent among the metro areas in our sample—lower than the median rent within metro areas nationwide. The median renter household’s income, though, was over $2,000 higher than the national benchmark, and between 2006 and 2014, the median renter income increased by about six percent, tied with Chicago for the highest income growth among the 11 largest metro areas.10

The Houston metro area was the second most affordable rental market for typical renters among the 11 metro areas in this study. In Houston, 48 percent of recently available rental units were affordable to the median metro area renter in 2014. Like all the metro areas in our sample, the vast majority (76% in 2014) of the lowest-income renters in the Houston metro area were severely rent burdened. The rent burden picture improves, however, if we look at the quartile of renter households just above the lowest-income renters. Of renter households earning more than the 25th percentile income metro area renters and no more than the median, only 18 percent were severely rent burdened in 2014, a lower share than in any of the other 10 metro areas we studied or in metro areas nationwide.

10 The 90% margin of error on the change in renter income in metro Houston was 4.8 percentage points, meaning that the 90% confidence interval for income growth was between 1.5% and 11.1%. For the Chicago metro area it was 3.6 percentage points.
## Los Angeles

<table>
<thead>
<tr>
<th></th>
<th>2006</th>
<th>2010</th>
<th>2014</th>
<th>2014 Ranking</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Renter Households</strong></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td><strong>Share of Population Renting</strong></td>
<td></td>
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</tr>
<tr>
<td>Metro Area</td>
<td>45%</td>
<td>48%</td>
<td>50%</td>
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<tr>
<td>Central City</td>
<td>57%</td>
<td>59%</td>
<td>60%</td>
<td></td>
</tr>
<tr>
<td>Suburbs</td>
<td>40%</td>
<td>43%</td>
<td>46%</td>
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</tr>
<tr>
<td><strong>Share of Renter Households in Single-Family Homes</strong></td>
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<td></td>
<td></td>
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<tr>
<td>Metro Area</td>
<td>28%</td>
<td>30%</td>
<td>31%</td>
<td>5</td>
</tr>
<tr>
<td><strong>Rental Vacancy Rate</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>5%</td>
<td>6%</td>
<td>4%</td>
<td>10</td>
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<tr>
<td><strong>Average Renter Household Size</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
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<tr>
<td><strong>Median Renter Household Income</strong></td>
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</tr>
<tr>
<td>Metro Area</td>
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<td>$41,700</td>
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<tr>
<td><strong>Affordability</strong></td>
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<tr>
<td><strong>Median Gross Rent</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
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<td>$1,200</td>
<td>$1,280</td>
<td>$1,310</td>
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<tr>
<td><strong>Median Gross Rent for Non-Recently Available Units</strong></td>
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<td>$1,260</td>
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<td><strong>Median Gross Rent for Recently Available Units</strong></td>
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<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>$1,400</td>
<td>$1,420</td>
<td>$1,480</td>
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<tr>
<td><strong>Share Rent Burdened (Moderate + Severe)</strong></td>
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<td></td>
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<tr>
<td>Metro Area</td>
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<td>60%</td>
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<tr>
<td>Central City</td>
<td>58%</td>
<td>61%</td>
<td>62%</td>
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<tr>
<td>Suburbs</td>
<td>55%</td>
<td>58%</td>
<td>60%</td>
<td></td>
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<tr>
<td><strong>Share Severely Rent Burdened</strong></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>29%</td>
<td>32%</td>
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<tr>
<td>Central City</td>
<td>31%</td>
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<td>35%</td>
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<tr>
<td>Suburbs</td>
<td>28%</td>
<td>31%</td>
<td>31%</td>
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<tr>
<td><strong>Share Severely Rent Burdened - Lowest Income Quartile</strong></td>
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<tr>
<td>Metro Area</td>
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<td>81%</td>
<td>83%</td>
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<tr>
<td><strong>Share Severely Rent Burdened - Lower-Moderate Income Quartile</strong></td>
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<tr>
<td>Metro Area</td>
<td>34%</td>
<td>42%</td>
<td>45%</td>
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<tr>
<td><strong>Share of Recently Available Rental Units Affordable to 25th Percentile Metro Area Renter</strong></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>2%</td>
<td>2%</td>
<td>2%</td>
<td>10</td>
</tr>
<tr>
<td><strong>Share of Recently Available Rental Units Affordable to Median Metro Area Renter</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>24%</td>
<td>24%</td>
<td>21%</td>
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</table>
Suburban Los Angeles had the highest share of renters (46%) among the suburbs of the 11 largest metro areas in this study. In 2014, 6 million people rented their homes in the Los Angeles metro area, over 775,000 more than in 2006. Of metro area renters, 65 percent live outside Los Angeles city limits, and suburban Los Angeles had the highest share of renters (46% of the population in 2014, up from 40% in 2006) among the suburbs of the 11 largest metro areas.

The number of rental units increased 12 percent between 2006 and 2014 in the Los Angeles metro area. This represented the third slowest growth in the rental housing stock among the 11 metro areas in our sample. Just over half of that increase in rental housing stock was attributable to single-family homes.

The Los Angeles metro area’s vacancy rate is among the lowest of the 11 metro areas in this study. The rental vacancy rate in the Los Angeles metro area dropped only slightly, from the already low five percent in 2006 to four percent in 2014, the lowest vacancy rate, along with the San Francisco metro area, among the metro areas in our sample.

The median rent in the Los Angeles metro area in 2014 was the third highest among the metro areas in this study. Only San Francisco and Washington, DC had higher rents in that year. Renter incomes, however, were the fifth highest among the 11 metro areas. The Los Angeles metro was the second least affordable in our sample, with only 21 percent of recently available units affordable to the median metro Los Angeles renter household in 2014 (the Miami metro area, at 15%, was the least affordable).

Of the 11 metros in this study, Los Angeles had the second-highest share of both overall rent burden and severe rent burden in 2014. Rents went up between 2006 and 2014, with the real median gross rent increasing nine percent within Los Angeles city limits (tied for third highest in our sample) and six percent in the surrounding suburbs (also tied for third highest). Rent burden also rose, with the share of renter households that were severely rent burdened, meaning their gross rent was equal to half their income or more, rising from 29 percent to 33 percent; a larger increase than in any other metro area we studied.

Los Angeles metro area is unaffordable to renters at all income levels. In 2014, 83 percent of Los Angeles’ lowest-income quartile of renters were severely rent burdened—the second-highest share in our sample. Meanwhile, only two percent of rental units that had been on the market within the past year in 2014 were affordable to a household earning the 25th percentile income or less for renters in the metro area. Even the median renter household could only have afforded 21 percent of recently available units, a lower share than in all but one of the metro areas in our study.
### Miami

<table>
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<tr>
<th></th>
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<td><strong>Renter Households</strong></td>
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<td></td>
</tr>
<tr>
<td><strong>Share of Population Renting</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>31%</td>
<td>35%</td>
<td>40%</td>
<td>4</td>
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<tr>
<td>Central City</td>
<td>60%</td>
<td>64%</td>
<td>68%</td>
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<tr>
<td>Suburbs</td>
<td>29%</td>
<td>33%</td>
<td>38%</td>
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<tr>
<td><strong>Share of Renter Households in Single-Family Homes</strong></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>27%</td>
<td>31%</td>
<td>31%</td>
<td>5</td>
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<tr>
<td><strong>Rental Vacancy Rate</strong></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>8%</td>
<td>12%</td>
<td>9%</td>
<td>2</td>
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<tr>
<td><strong>Average Renter Household Size</strong></td>
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<td><strong>Median Renter Household Income</strong></td>
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<td></td>
</tr>
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<td>$34,000</td>
<td>$34,300</td>
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<tr>
<td><strong>Affordability</strong></td>
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<td></td>
</tr>
<tr>
<td><strong>Median Gross Rent</strong></td>
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<td></td>
<td></td>
</tr>
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<tr>
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<td>$1,120</td>
<td>$1,090</td>
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<td><strong>Median Gross Rent for Recently Available Units</strong></td>
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<td></td>
</tr>
<tr>
<td>Metro Area</td>
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<td>$1,200</td>
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<tr>
<td><strong>Share Rent Burdened (Moderate + Severe)</strong></td>
<td></td>
<td></td>
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<tr>
<td>Metro Area</td>
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<tr>
<td>Central City</td>
<td>69%</td>
<td>68%</td>
<td>68%</td>
<td></td>
</tr>
<tr>
<td>Suburbs</td>
<td>60%</td>
<td>63%</td>
<td>64%</td>
<td></td>
</tr>
<tr>
<td><strong>Share Severely Rent Burdened</strong></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>32%</td>
<td>35%</td>
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<tr>
<td>Central City</td>
<td>36%</td>
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<tr>
<td>Suburbs</td>
<td>32%</td>
<td>34%</td>
<td>35%</td>
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<tr>
<td><strong>Share Severely Rent Burdened - Lowest Income Quartile</strong></td>
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<tr>
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<td>83%</td>
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<td><strong>Share Severely Rent Burdened - Lower-Moderate Income Quartile</strong></td>
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<tr>
<td>Metro Area</td>
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<td>53%</td>
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<tr>
<td><strong>Share of Recently Available Rental Units Affordable to 25th Percentile Metro Area Renter</strong></td>
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<tr>
<td>Metro Area</td>
<td>2%</td>
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<tr>
<td><strong>Share of Recently Available Rental Units Affordable to Median Metro Area Renter</strong></td>
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<tr>
<td>Metro Area</td>
<td>16%</td>
<td>14%</td>
<td>15%</td>
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</tbody>
</table>
Between 2006 and 2014, the number of renters in the Miami metro area grew by over 450,000—a 29 percent increase. Nearly 90 percent of renters in the metro area lived outside of Miami proper in 2014, the second highest suburban share among the 11 metro areas. But the rental share is still higher in the city. Within the city of Miami, 68 percent of residents lived in rental housing in 2014, up from 60 percent in 2006 and the highest share among the metro areas in our sample—between 2006 and 2014, Miami area surpassed even New York City in the share of central-city residents who were renters. Outside the central city, renters made up 38 percent of the population in the Miami suburbs in 2014, compared to 29 percent in 2006.

The Miami metro area rental housing stock grew 27 percent between 2006 and 2014—the second-fastest growth of the 11 largest metro areas in this study. In comparison, the ownership stock decreased by 10 percent during the same period, the largest decline in ownership stock among the metro areas we studied. The foreclosure rate in the metro area in 2010 was over 18 percent, the highest rate among metro areas in the US, more than double the second-highest rate among the 11 largest metro areas, and more than three times the rate in metro areas nationwide.

The average number of residents in a rental household in the Miami metro area increased by only two percent between 2006 and 2014, the smallest increase among the 11 largest metro areas. The growth rates in renter population and rental housing stock between 2006 and 2014 differed by only two percentage points in the Miami metro area, which contributed to the very small change in rental vacancy rate and average household size.\(^{11}\)

Median rents in Miami metro area were higher, and incomes lower, than the median among metro areas nationwide. The median gross rent in the Miami metro area in 2014 was over $150 above the median in metro areas nationwide. The median rental household’s income in that year, however, was the lowest among the metro areas in our sample, and was nearly $1,500 below the median among metro areas nationwide.

Of the 11 metros in this study, the Miami metro area was the least affordable to the median renter. The median Miami metro renter could afford just 15 percent of recently available units in 2014. The share of renters in Miami who were severely rent burdened increased during our study period, from 32 percent in 2006 to 35 percent in 2014. In both years, that share was the highest among the 11 largest metro areas. Among the lowest-income quartile of renters, 83 percent were severely rent burdened in 2014, as were 54 percent of the next-lowest quartile of renters, who made more than the 25th percentile renter income and no more than the median. A household earning the 25th percentile income among metro Miami renters could have afforded just three percent of recently available units in 2014.

\(^{11}\) While, according to American Community Survey (ACS) Public Use Microdata Sample data, the rental vacancy rate increased from eight percent to nine percent, ACS Summary File data indicate a slight drop in rental vacancy rate, although the decrease is not statistically significant.
# New York City

<table>
<thead>
<tr>
<th></th>
<th>2006</th>
<th>2010</th>
<th>2014</th>
<th>2014 Ranking</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Renter Households</strong></td>
<td></td>
<td></td>
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<tr>
<td><strong>Share of Population Renting</strong></td>
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</tr>
<tr>
<td>Metro Area</td>
<td>41%</td>
<td>44%</td>
<td>46%</td>
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<tr>
<td>Central City</td>
<td>62%</td>
<td>65%</td>
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<tr>
<td>Suburbs</td>
<td>27%</td>
<td>28%</td>
<td>31%</td>
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</tr>
<tr>
<td><strong>Share of Renter Households in Single-Family Homes</strong></td>
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<tr>
<td>Metro Area</td>
<td>9%</td>
<td>10%</td>
<td>11%</td>
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</tr>
<tr>
<td><strong>Rental Vacancy Rate</strong></td>
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<tr>
<td>Metro Area</td>
<td>6%</td>
<td>6%</td>
<td>5%</td>
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<tr>
<td><strong>Average Renter Household Size</strong></td>
<td></td>
<td></td>
<td></td>
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<tr>
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<td>2.3</td>
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<tr>
<td><strong>Median Renter Household Income</strong></td>
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</tr>
<tr>
<td>Metro Area</td>
<td>$43,400</td>
<td>$43,100</td>
<td>$42,500</td>
<td>4</td>
</tr>
<tr>
<td><strong>Affordability</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Median Gross Rent</strong></td>
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<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>$1,160</td>
<td>$1,240</td>
<td>$1,280</td>
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</tr>
<tr>
<td><strong>Median Gross Rent for Non-Recently Available Units</strong></td>
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<tr>
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<td>$1,190</td>
<td>$1,250</td>
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<td><strong>Median Gross Rent for Recently Available Units</strong></td>
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<tr>
<td><strong>Share Rent Burdened (Moderate + Severe)</strong></td>
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<tr>
<td>Metro Area</td>
<td>51%</td>
<td>54%</td>
<td>55%</td>
<td>3</td>
</tr>
<tr>
<td>Central City</td>
<td>51%</td>
<td>54%</td>
<td>55%</td>
<td></td>
</tr>
<tr>
<td>Suburbs</td>
<td>51%</td>
<td>55%</td>
<td>54%</td>
<td></td>
</tr>
<tr>
<td><strong>Share Severely Rent Burdened</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>27%</td>
<td>29%</td>
<td>30%</td>
<td>3</td>
</tr>
<tr>
<td>Central City</td>
<td>28%</td>
<td>29%</td>
<td>30%</td>
<td></td>
</tr>
<tr>
<td>Suburbs</td>
<td>27%</td>
<td>29%</td>
<td>30%</td>
<td></td>
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<tr>
<td><strong>Share Severely Rent Burdened - Lowest Income Quartile</strong></td>
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<td></td>
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<tr>
<td>Metro Area</td>
<td>71%</td>
<td>74%</td>
<td>73%</td>
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<tr>
<td><strong>Share Severely Rent Burdened - Lower-Moderate Income Quartile</strong></td>
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<tr>
<td>Metro Area</td>
<td>37%</td>
<td>40%</td>
<td>45%</td>
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<tr>
<td><strong>Share of Recently Available Rental Units Affordable to 25th Percentile Metro Area Renter</strong></td>
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<td></td>
<td></td>
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<tr>
<td>Metro Area</td>
<td>4%</td>
<td>4%</td>
<td>4%</td>
<td>3</td>
</tr>
<tr>
<td><strong>Share of Recently Available Rental Units Affordable to Median Metro Area Renter</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>24%</td>
<td>23%</td>
<td>22%</td>
<td>9</td>
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</table>
New York City metro area had a slower rate of growth in the number and share of renters between 2006 and 2014 than any of the other 10 largest metro areas. Although the New York City metro area had 8.5 million renters in 2014, 2.5 million more than in any other metro area in that year, the number of renters had grown just 14 percent between 2006 and 2014.

Between 2006 and 2014, the number of rental units in the New York City metro area grew by only 11 percent. New York metro tied with Boston for the slowest growth rate of rental units among the metro areas in this study. The New York City metro also stood out for the very low share of rental units that were single-family homes: 11 percent in 2014, up from nine percent in 2006, both shares lower than any of the other 10 largest metros and far lower than the share in metros nationwide.

New York City metro area’s rental housing stock did not keep pace with its growth in renter population. Overall, the growth in the renter population in the New York City metro area between 2006 and 2014 (14 percent) outpaced the growth in the rental housing stock (11 percent) by three percentage points. Relative to the other metro areas we studied, that disparity was relatively small, and accordingly the rental vacancy, already quite low at six percent in 2006 (in our sample, only the Los Angeles metro had a tighter rental market in that year), dropped just one percentage point by 2014.

Rental housing in the New York City metro area remains unaffordable to the median renter. The New York City metro area median gross rent was over $300 higher than the median in metro areas nationwide, but it was also more than $200 less than the median in the San Francisco and Washington, DC metro areas. When considering the market for rental housing, the distributions of rents and renters’ incomes was such that the median metro area renter household could have afforded only 22 percent of recently available rental units in 2014, down from the 2006 figure of 24 percent. The median rent for recently available units in 2014 was 20 percent—or $250—higher than the median rent for units that had not been recently available.

Median gross rents rose more quickly in New York City limits than its surrounding suburbs between 2006 and 2014. While the median gross rent rose in the New York City metro area between 2006 and 2014, it rose more quickly within city limits: a 15 percent increase during that period, compared to a four percent increase in areas outside New York City proper. The pace of the growth in median gross rent in the New York City metro area appeared to be accelerating. In the seven years between 2006 and 2013, the real median gross rent in the New York City metro area grew by an annualized rate of 0.9 percent per year, while in the one year between 2013 and 2014, it grew by 3.5 percent.

As rents rose between 2006 and 2014, and the New York City metro area became increasingly unaffordable, rent burdens grew. The share severely rent burdened, facing housing costs equal to at least half of their household income, rose from 27 percent in 2006 to 30 percent in 2014. This share was tied for the third-highest among the 11 metro areas we studied. Among the lowest-income renters, earning less than the 25th percentile income for renters in the metro area, 73 percent were severely rent burdened in 2014.
## Philadelphia

<table>
<thead>
<tr>
<th>Renter Households</th>
<th>2006</th>
<th>2010</th>
<th>2014</th>
<th>2014 Ranking</th>
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</thead>
<tbody>
<tr>
<td><strong>Share of Population Renting</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>24%</td>
<td>27%</td>
<td>29%</td>
<td>11</td>
</tr>
<tr>
<td>Central City</td>
<td>38%</td>
<td>43%</td>
<td>45%</td>
<td></td>
</tr>
<tr>
<td>Suburbs</td>
<td>20%</td>
<td>22%</td>
<td>24%</td>
<td></td>
</tr>
<tr>
<td><strong>Share of Renter Households in Single-Family Homes</strong></td>
<td></td>
<td></td>
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<td></td>
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<tr>
<td>Metro Area</td>
<td>35%</td>
<td>35%</td>
<td>37%</td>
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<tr>
<td><strong>Rental Vacancy Rate</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>11%</td>
<td>9%</td>
<td>8%</td>
<td>4</td>
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<tr>
<td><strong>Average Renter Household Size</strong></td>
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<td><strong>Median Renter Household Income</strong></td>
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<td><strong>Affordability</strong></td>
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<tr>
<td><strong>Median Gross Rent</strong></td>
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<tr>
<td>Metro Area</td>
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<td>$1,010</td>
<td>$1,020</td>
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<td><strong>Median Gross Rent for Non-Recently Available Units</strong></td>
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</tr>
<tr>
<td>Metro Area</td>
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<td>$1,000</td>
<td>$990</td>
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<tr>
<td><strong>Median Gross Rent for Recently Available Units</strong></td>
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</tr>
<tr>
<td>Metro Area</td>
<td>$1,080</td>
<td>$1,060</td>
<td>$1,080</td>
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</tr>
<tr>
<td><strong>Share Rent Burdened (Moderate + Severe)</strong></td>
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<td></td>
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</tr>
<tr>
<td>Metro Area</td>
<td>51%</td>
<td>55%</td>
<td>55%</td>
<td>3</td>
</tr>
<tr>
<td>Central City</td>
<td>57%</td>
<td>58%</td>
<td>58%</td>
<td></td>
</tr>
<tr>
<td>Suburbs</td>
<td>47%</td>
<td>53%</td>
<td>53%</td>
<td></td>
</tr>
<tr>
<td><strong>Share Severely Rent Burdened</strong></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>27%</td>
<td>30%</td>
<td>30%</td>
<td>3</td>
</tr>
<tr>
<td>Central City</td>
<td>33%</td>
<td>35%</td>
<td>34%</td>
<td></td>
</tr>
<tr>
<td>Suburbs</td>
<td>24%</td>
<td>28%</td>
<td>27%</td>
<td></td>
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<tr>
<td><strong>Share Severely Rent Burdened - Lowest Income Quartile</strong></td>
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</tr>
<tr>
<td>Metro Area</td>
<td>76%</td>
<td>78%</td>
<td>78%</td>
<td>5</td>
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<tr>
<td><strong>Share Severely Rent Burdened - Lower-Moderate Income Quartile</strong></td>
<td></td>
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</tr>
<tr>
<td>Metro Area</td>
<td>36%</td>
<td>43%</td>
<td>39%</td>
<td>4</td>
</tr>
<tr>
<td><strong>Share of Recently Available Rental Units Affordable to 25th Percentile Metro Area Renter</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>3%</td>
<td>4%</td>
<td>3%</td>
<td>5</td>
</tr>
<tr>
<td><strong>Share of Recently Available Rental Units Affordable to Median Metro Area Renter</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>27%</td>
<td>26%</td>
<td>28%</td>
<td>7</td>
</tr>
</tbody>
</table>
Between 2006 and 2014, the share of the population who rented their homes increased both in Philadelphia proper and in the surrounding suburbs. Still, only 45 percent of Philadelphians rented their homes in 2014, compared to 49 percent in principal cities of metro areas nationwide, and less than a quarter of residents of the Philadelphia suburbs were renters. In the Philadelphia metro area, 37 percent of renter households lived in single-family homes, the second-highest among the 11 largest metro areas and comparable to metro areas nationwide.

Rental housing stock in the Philadelphia metro area did not keep pace with the rise in renter population between 2006 and 2014. While the renter population increased by 23 percent in the Philadelphia metro area between 2006 and 2014, the number of rental housing units only grew by 14 percent. As a result, the rental market tightened. The rental vacancy rate fell from 11 percent to eight percent, and the average household size for rental households rose by eight percent.

In 2014, incomes in the Philadelphia metro area were the second lowest of the 11 largest US metro areas, making it difficult for many households to afford rents. The median gross rent in the Philadelphia metro area was slightly above $1,000, the fifth-lowest median rent among the 11 metro areas we examined and about $50 more than the median in metro areas nationwide. A household earning the median income for renters in the metro area could have afforded only 28 percent of recently available units in 2014.

The share of metro Philadelphians who were rent burdened rose between 2006 and 2014, from 51 percent to 55 percent. The share of renters who were severely rent burdened, with gross rents equal to at least half their income, rose from 27 percent in 2006 to 30 percent in 2014. Both these shares were tied for the third-highest among the metro areas we examined. Among the lowest-earning quartile of renters, the share severely rent burdened in 2014 was 78 percent.

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12 A metro area can have more than one principal city, and the Philadelphia metro area has three principal cities: Philadelphia, PA, Camden, NJ, and Wilmington, DE. We present some figures here for the city of Philadelphia and for the suburbs, which we define as the areas of the Philadelphia metro area outside Philadelphia itself. For metro areas nationwide, however, the comparable figures are for all principal cities and areas outside principal cities but within metro areas, respectively, due to constraints of the American Community Survey data. See the main report and the section on Methods for more information.
## San Francisco

<table>
<thead>
<tr>
<th></th>
<th>2006</th>
<th>2010</th>
<th>2014</th>
<th>2014 Ranking</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Renter Households</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Share of Population Renting</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>37%</td>
<td>42%</td>
<td>44%</td>
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<tr>
<td>Central City</td>
<td>54%</td>
<td>57%</td>
<td>55%</td>
<td></td>
</tr>
<tr>
<td>Suburbs</td>
<td>33%</td>
<td>39%</td>
<td>41%</td>
<td></td>
</tr>
<tr>
<td><strong>Share of Renter Households in Single-Family Homes</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Metro Area</td>
<td>26%</td>
<td>28%</td>
<td>29%</td>
<td>7</td>
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<tr>
<td><strong>Rental Vacancy Rate</strong></td>
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<tr>
<td>Metro Area</td>
<td>8%</td>
<td>6%</td>
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<td>10</td>
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<tr>
<td><strong>Average Renter Household Size</strong></td>
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<tr>
<td><strong>Median Renter Household Income</strong></td>
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<td></td>
<td></td>
</tr>
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<td>$55,100</td>
<td>$53,400</td>
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<td><strong>Affordability</strong></td>
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<td><strong>Share Severely Rent Burdened - Lower-Moderate Income Quartile</strong></td>
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<tr>
<td><strong>Share of Recently Available Rental Units Affordable to 25th Percentile Metro Area Renter</strong></td>
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<tr>
<td>Metro Area</td>
<td>39%</td>
<td>34%</td>
<td>31%</td>
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The growth in renter population grew faster in the San Francisco suburbs than in the city proper between 2006 and 2014. While the share of San Franciscans (living within city limits) who rented their homes rose slightly from 2006 (54%) to 2014 (55%), in the parts of the San Francisco metro area outside of the city and county of San Francisco, the share of the population who rented their homes rose by eight percentage points, from 33 percent in 2006 to 41 percent in 2014. Overall, the population of renters in the San Francisco metro area grew by 33 percent between 2006 and 2014.

Rental housing stock in the San Francisco metro area did not keep pace with the rise in renter population between 2006 and 2014. During the same period, the growth rate for the rental housing stock, in contrast, was just 15 percent, less than half that for the renter population. This disparity in the rate of growth in the demand for and supply of rental housing was higher than in any of the other 10 metro areas we studied. As a result, the rental vacancy rate was halved, from eight percent to four percent, between 2006 and 2014. As the rental market tightened considerably, renter households got larger, as renters doubled and tripled up. The average household size for renter households increased by 15 percent, the largest increase among the 11 largest metro areas and three times the increase in metro areas nationwide.

Median gross rents and median rents in the San Francisco metro area were substantially higher than those of metro areas nationwide in 2014. The median gross rent in the San Francisco metro area in 2014 was over $1,500—56 percent higher than the median gross rent in metro areas nationwide. Dampening the effects of such high rents, however, was the metro area’s very high median renter household income, which was 59 percent (or more than $21,000) higher than the median renter household income for metro areas nationwide. Even with such high incomes, however, renters in the San Francisco metro faced a highly unaffordable rental market.

Of the 11 largest metro areas, San Francisco metro area saw the steepest decline in affordability to median renter households between 2006 and 2014. In 2014, the median metro area renter could have afforded just 31 percent of recently available rental units, a sharp 8-percentage-point decline between 2006 and 2014—the steepest decline in affordability among any of the 11 largest metro areas. Between 2006 and 2014, the real median gross rent increased both within San Francisco proper and in the surrounding areas. Between 2013 and 2014, the median rent in the metro area increased 4.5 percent, more than in any other metro area in our sample.

Rent burdens were not as high in the San Francisco metro as in many other large metros. Among the lowest-income quartile of renters, the share severely rent burdened in 2014 (70%) was lower than all but one of the 11 largest metro areas. Among the next-lowest quartile of renters by income, earning more than the 25th percentile metro area renter and no more than the median metro area renter, 29 percent were severely rent burdened in 2014, a lower share than in many metro areas with lower median rents but also lower median incomes, such as the Miami, Boston, and Philadelphia metro areas.

Renters in San Francisco metro area needing to move faced a 20 percent premium for recently available units. Units that had been on the market in the past year in 2014 commanding rents nearly $300 higher than units that had not been on the market. Indeed, the median rent for recently available units in 2014 was $1,750, the highest among the metro areas in our study.
## Washington, DC

<table>
<thead>
<tr>
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<th>2006</th>
<th>2010</th>
<th>2014</th>
<th>2014 Ranking</th>
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<td><strong>Share of Population Renting</strong></td>
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<td>Central City</td>
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<td><strong>Share of Renter Households in Single-Family Homes</strong></td>
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<td><strong>Rental Vacancy Rate</strong></td>
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<td><strong>Average Renter Household Size</strong></td>
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<td><strong>Median Gross Rent</strong></td>
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<td><strong>Share Rent Burdened (Moderate + Severe)</strong></td>
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<tr>
<td>Central City</td>
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<td>51%</td>
<td>48%</td>
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<td>Suburbs</td>
<td>46%</td>
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<tr>
<td><strong>Share Severely Rent Burdened</strong></td>
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<tr>
<td>Metro Area</td>
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<tr>
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<td>Suburbs</td>
<td>20%</td>
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<tr>
<td><strong>Share Severely Rent Burdened - Lowest Income Quartile</strong></td>
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<td>72%</td>
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<tr>
<td><strong>Share Severely Rent Burdened - Lower-Moderate Income Quartile</strong></td>
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<td><strong>Share of Recently Available Rental Units Affordable to 25th Percentile Metro Area Renter</strong></td>
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<td><strong>Share of Recently Available Rental Units Affordable to Median Metro Area Renter</strong></td>
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<tr>
<td>Metro Area</td>
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<td>38%</td>
<td>38%</td>
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The renter population in the Washington, DC metro area grew by 35 percent—nearly half a million people—between 2006 and 2014. The share of the population living in rental housing increased both within DC proper and in the surrounding suburbs between 2006 and 2014, with renters accounting for 57 percent of Washingtonians and 32 percent of those in the suburbs in 2014.

The number of rental housing units also grew in the Washington, DC metro area, though not as fast, with the rental housing stock increasing 24 percent between 2006 and 2014. Other than the New York City metro area, the Washington, DC metro area was the only one in our sample where less than 40 percent of the added rental housing stock came from single-family homes, although the share of rental households in single-family homes did increase from 26 percent in 2006 to 29 percent in 2014.

The rental vacancy rate fell in Washington, DC metro area between 2006 and 2014. The more than ten-percentage-point gap between the growth rates of renter population and rental housing stock contributed to the rental vacancy rate dropping from nine percent in 2006 to seven percent in 2014, as well as to the nine percent increase in the average size of a renter household during that period.

The typical renter’s high income mitigated the very high rents in metro Washington, DC. In 2014, among the 11 largest metro areas, the Washington, DC metro area, together with the San Francisco metro area, had the highest median gross rent, 57 percent higher than the median gross rent in metro areas nationwide. The Washington, DC metro area also had the highest median income among renter households, more than 60 percent (or over $22,000) higher than the median income for renters in metro areas nationwide. The Washington, DC metro area was the third most affordable rental market for the typical renter of the cities in this study, with the median metro area renter in 2014 being able to afford 38 percent of recently available units. However, the share declined by four percentage points from 2006 to 2014, suggesting that metro DC renters may face tougher affordability challenges in the future.

Rents rose significantly in the Washington, DC metro area from 2006 to 2014. Within the District itself, rents rose 27 percent between 2006 and 2014—a faster rate of increase than in any of the central cities in our sample. Although rents did not grow as quickly outside the central city, the 8 percent increase between 2006 and 2014 in those areas was still a greater increase than in the suburbs of any of the other 11 largest metro areas except the Houston metro area.

The share of severely rent burdened renters in metro Washington, DC tied for the lowest (with Houston) among the 11 largest US metro areas. In part due to rising rents, the share of metro Washington, DC renters who were severely rent burdened, or paying more than half of their income on rent, increased between 2006 and 2014, from 21 percent to 23 percent.
About the NYU Furman Center/Capital One National Affordable Rental Housing Landscape Research Study
The study commissioned by Capital One and conducted by the NYU Furman Center, analyzes rental housing affordability trends in the central cities of the 11 largest metropolitan areas in the U.S. This study delves more deeply into recent trends in rent levels, rent burdens, affordable units, and the gap between the number of low-income households in need of affordable housing and the number of existing affordable units. Data analysis is based on data from the U.S. Census Bureau, including data from the American Community Survey from 2006 through 2014, and uses geographic information from the Missouri Census Data Center.

About Capital One
Capital One Financial Corporation, headquartered in McLean, Virginia, is a Fortune 500 company with more than 900 branch locations primarily in New York, New Jersey, Texas, Louisiana, Maryland, Virginia, and the District of Columbia. Its subsidiaries, which include Capital One, N.A., and Capital One Bank (USA), N. A., offer a broad spectrum of financial products and services to consumers, small businesses and commercial clients. We apply the same principles of innovation, collaboration and empowerment in our commitment to our communities across the country that we do in our business. We recognize that helping to build strong and healthy communities – good places to work, good places to do business and good places to raise families – benefits us all and we are proud to support this and other community initiatives. Capital One recognizes that housing plays a crucial part in neighborhood revitalization and economic recovery and, in 2015 alone, provided $1.5 billion in affordable housing loans. To learn more, visit http://www.capitaloneinvestingforgood.com/.

About the NYU Furman Center
The NYU Furman Center advances research and debate on housing, neighborhoods, and urban policy. Established in 1995, it is a joint center of the New York University School of Law and the Robert F. Wagner Graduate School of Public Service. More information can be found at furmancenter.org and @FurmanCenterNYU.

The study and infographic is available online at www.FurmanCenter.org/NationalRentalLandscape
Rent Regulation and Housing Affordability: Context, Evidence, and Program Design

December 12, 2018

by Ingrid Gould Ellen and Mark A. Willis

Rent Regulation Sparks New Interest

In many US cities and towns, housing costs are increasing faster than incomes. Americans who rent their homes have been hit especially hard: nearly half of renters shoulder unaffordable housing costs. A forthcoming report by the New York University Furman Center for Real Estate and Urban Policy shows that between 1970 and 2016, the share of rent-burdened households went up in the 100 largest metropolitan areas nationwide.

As housing costs escalate, calls for stringent rent regulation have intensified. Last month, California voters rejected a ballot initiative that would have allowed cities to expand rent control after a contentious public debate and campaign, and rent regulation proponents have vowed to try again. In New York, Democrats gained control of the state legislature, in part through pledges to strengthen New York’s rent stabilization laws. Pew Stateline reports that lawmakers in Hawaii, Illinois, Minnesota, New Jersey, and Washington have all considered rent regulation bills in the previous two years.

Clearly, rent regulation is having a legislative moment. At its core, rent regulation protects tenants from sharp increases in housing costs by limiting the amount rents can be raised from year to year. But its design and implementation raises many choices for policymakers, each with the potential to affect the housing market. Should a community decide rent regulation is a
good fit, evidence-based guidance on LocalHousingSolutions.org—a joint project of the NYU Furman Center and Abt Associates—can help officials pair it with other policies to mitigate potential unintended consequences. Most importantly, the tools and supports available through the site can help communities create or refine a comprehensive and balanced housing plan that combines smart rent regulation with tools to increase housing supply across the income spectrum.

**Potential Benefits**

A basic policy rationale behind rent regulation is to protect tenants from displacement in tight rental markets, and evidence suggests it can accomplish this goal. As of 2008, for example, rent-stabilized tenants in New York City had lived in their units an average of 12 years, compared with 6 years for households in market-rate units. This difference was pronounced in the priciest parts of Manhattan, where 35 percent of households in rent-stabilized apartments had lived in their units for 20 years or more, compared with just 2.7 percent of households in market-rate apartments. Further, a study of newly regulated buildings in San Francisco found that tenants in place when the law was passed were 10 to 20 percent more likely to remain at the same address.

Rent regulation is also appealing for policymakers seeking to preserve neighborhoods’ economic and racial diversity in the face of gentrification and rising housing costs. In an era of perpetual resource scarcity for subsidized housing, it is not surprising that a policy solution that does not require direct government subsidies is on the political agenda. Yet despite these potential benefits, rent regulation presents several trade-offs that merit careful consideration.

**Trade-Offs, Drawbacks, and Risk Mitigation**

The incentives and economic consequences of rent regulation are important as debate continues in New York, California, and beyond. Even the most
aggressive rent regulations exclude new construction to minimize any disincentive for the production of new housing, which is essential to moderating upward pressure on rents. Other subsections of the housing stock, such as single-family homes and smaller multifamily buildings, may also be exempted to minimize the regulatory burden on small landlords.

Recent research suggests that despite these exemptions, the long-term effects of rent regulation may reduce the overall rental housing supply, leading to higher costs for renters. The same study of newly regulated buildings in San Francisco suggests that the city’s rent stabilization law provided incentives for condo conversions, major renovations, and owner occupancy, all of which resulted in deregulation. The study concluded that regulated buildings saw a 15 percent decline in the number of renter residents and a 25 percent decline in those living in the rent-controlled units, which contributed to rent increases across the metropolitan area.

By limiting rental income, rent regulations also risk discouraging owners from maintaining and investing in buildings, leading to gradual deterioration of the rent-regulated housing stock. One response to this issue is to allow for large rent increases at vacancy, but this approach limits the protective effect of rent regulation to the current occupant and makes long-term affordability less likely, particularly in hot housing markets. Allowing rent increases to cover the costs of replacing and upgrading major building systems can combat disinvestment, but administration and enforcement have proven difficult, and the increases do reduce affordability over time.

Vacancy-based rent increases can also create an “incentive to harass,” whereby landlords stand to profit by quickly churning through tenants to raise regulated rents to market levels. This unwelcome by-product of rent regulation can be problematic when vacancy-based rent increases are combined with rules that allow for deregulation above certain rent levels. These perverse incentives also grow in proportion to the gap between regulated and market rents, so it is often the neighborhoods where rent
regulation’s protective effects are most needed that experience the most severe and shocking instances of landlord abuse. This kind of tenant harassment is difficult to detect and quantify, but a study that examined rent control in San Francisco found that rent regulation increases the rate of no-fault evictions as rents rise and landlords have an incentive to turn over units to reset their rents to market levels.

As policymakers consider adopting or reforming rent regulations, they need to balance these concerns against the desire to shield tenants from large rent increases. They should also check LocalHousingSolutions.org for policies that can counter potential side effects. For example, rent regulation is commonly accompanied by just-cause eviction requirements, right-to-lease renewals, or other tools to hold landlords accountable, such as the “Certificate of No Harassment” or “Speculation Watchlist” recently announced in New York City.

A Resource for Policymaking and Practice

Despite the recent attention to rent regulation and the strong feelings it inspires, it is important for those on both sides of the debate to view it in the proper context: rent regulation is only one of dozens of tools policymakers have at their disposal to address housing costs. No tool on its own can address the crisis at scale. As policymakers and advocates consider whether rent regulation makes sense in their communities, they can turn to LocalHousingSolutions.org, which pulls together guidance on more than 80 policies to help communities promote housing affordability. Local governments must develop comprehensive and balanced housing plans that leverage multiple policy approaches and resources, and involve a broad range of stakeholders, to tackle high housing costs. The good news is that a sound plan can lay the foundation for housing affordability, stability, quality, and choice.

LocalHousingSolutions.org was created by Ingrid Gould Ellen and Mark A. Willis of the NYU Furman Center and Jeffrey Lubell of Abt Associates. It provides resources to help cities, towns, and counties develop
comprehensive and balanced local housing strategies that enhance affordability, protect low-income residents from displacement, and foster inclusive neighborhoods.

Photo by Silver K Black Stock/Shutterstock
Beware of Tactics Landlords Use to Evict Rent-Stabilized Tenants

Despite more money available for legal aid, lawyers say landlords are stepping up tactics to oust tenants from rent-stabilized apartments.

MANHATTAN — When Sarah Burns received a lease renewal from the landlord of her West Harlem apartment last year, she noticed something strange about the document: her name wasn't on it.

Despite having been on the lease for the rent-stabilized apartment for 8 years, the new lease was made out to her ex-boyfriend, who had moved out months before — something her landlord knew, according to the 32-year-old Burns.

"I contacted them and said, ‘You know I live here too, my name is on the lease,’” she recounted. "I didn't really get any response back from them."

Shortly after, the management company stopped cashing Burns' rent checks, and sent her a non-payment notice a few months later. She believes it was a ploy to get her out of her unit.
Such tactics are not unusual among predatory landlords who own rent-regulated units, advocates said. And while the de Blasio administration has increased funding for free legal services for tenants, lawyers working with low-income New Yorkers say that isn't solving the problem, citing the arsenal of strategies landlords can use to evict rent-stabilized tenants since they can increase rents up to 20 percent — without making any renovations — when units are vacant.

“They’re paying us to plug up the loopholes,” said Edward Josephson, director of litigation and housing at Legal Services NYC, who believes without the state changing rent laws that allow for big hikes on vacant apartments, "the laws will never be respected.”

Burns ended up going to housing court to dispute her landlord's claim that she'd failed to pay rent. The landlord eventually conceded, and she continued to live in the rent-stabilized apartment.

"As far as I can tell, they just really enjoy wasting people's time," Burns said.

But evictions are draining an already over-taxed housing court system, advocates say.

Yale Fox, a TED Fellow focused on income inequality and housing rights, estimated there are roughly 206,000 evictions per year in the city, based on open source data.

“If each one costs $5,000, which I believe is a conservative estimate” — including costs for the judge, legal aid lawyers, stenographers and more — “then that's $1.03 billion per year,” he said, “all of which falls on the taxpayers.”

Here are tactics that housing advocates and lawyers are seeing across the city:

â–º Landlords stop accepting rent and then take the tenant to
As in Burns’ case, it’s not uncommon for landlords to stop accepting rent payments and then wait a few months to take a tenant to court for non-payment, advocates said.

“The judge will order them to pay, and most landlords have this idea that tenants don't know how to save money or budget,” said Fox, founder of the rental listings site Rentlogic, which pulls open source data from various government agencies to try to make it easier for renters to see if a landlord has been behaving badly.

“They bank on the fact that they spent the last few months rent,” he noted.

If a case is settled and the tenant repays, the landlord might bring the tenant back to court for the same reason in the future, and when low-income tenants are forced to return again and again to court and miss work, they risk their jobs, said Ellen Davidson, of the Legal Aid Society.

“Landlords hope that if tenants have to take time off from work and they make them lose time and money, the tenant will just leave,” Davidson said.

Landlords, on the other hand, don’t have to appear in court since they can just send their lawyers.

Landlords claim there’s chronic rent delinquency.

When tenants frequently fall behind on rent, landlords can claim “chronic rent delinquency” and say they want to evict a tenant because they’re tired of going to court, explained Edward Josephson, director of litigation and housing at Legal Services NYC.

In the past, he saw this strategy used when tenants had accrued about 15 to 20 such cases. Now he’s seeing landlords filing such cases after just one late payment.
“You’re evicting people for being poor,” Josephson said. “Especially at the low-end of the labor market where people have temporary jobs and are re-hired and then catch up with their rent, they are now being punished.”

Landlords often don’t evict immediately. Rather the court puts the tenant on probation and says if there are any late payments within one year, they can be evicted, Josephson said.

"Really, landlords are giving them ropes to hang themselves with. These are the type of tenants who can’t always pay on time,” he said.

**Landlords give misinformation on succession rights.**

Under rent stabilization laws, certain family members designated by law, who have lived in an apartment for at least two years — or one year in the case of disabled or elderly tenants — are entitled to succession rights when the lease holder passes away or leaves, lawyers said.

But housing advocates have seen landlords violate this, often while tenants are grieving over the loss of a loved one.

“They use complicated language and speak in a legal manner. Understandably, tenants think the landlords can call the shots,” said Aaron Carr, of Housing Rights Initiative, a nonprofit that investigates rent fraud in rent-stabilized buildings.

Often when they help tenants call the landlords to complain, the landlords simply say “it was a clerical error,” Carr said.

**Landlords improperly de-regulate units.**

Increasingly, landlords are telling tenants that their rent-stabilized leases were given in error and that they should have a market-rate lease — even when that’s not true, Josephson said.
“When the lease expires, they will bring them to court,” he said.

The tenant has to go to the state’s Division of Homes and Community Renewal and get a printout of their apartment’s past rent history, Josephson noted, but, “even then, they would need legal expertise to decipher it.”

Using preferential rent is another tactic landlords use to improperly deregulate units, he added.

Landlords can lease rent-stabilized units for less money than the maximum amount allowed under state regulations, often in order to compete in the neighborhood’s rental market — as long as they note on the first lease they are using preferential rent.

“When the lease expires, the landlords say, ‘We don’t feel like giving the preferential rent anymore’ and will raise it to the legal rent, but it turns out, often the preferential rent is the legal rent,” Josephson said.

And since it can be more difficult for tenants to dispute rent overcharges after 4 years because of a statute of limitations, landlords often wait after 4 years to raise the rent, Josephson pointed out.

That’s why it’s important for tenants to get their rent histories, Carr advised.

“Once you sign the lease and are in the apartment,” he suggested, “the first thing you should do is get the rental history and determine if they’re registering correct rents. Preferential rent is confusing to a lot of people, understandably so. But one day you wake up to a $2,000 raise, and you want to make sure preferential rent is based on the legal rent.”

Landlords abuse construction practices.

Sometimes landlords will refuse to do repair work, as a way to force tenants out. Other times they may do construction in the entire building except for the rent-stabilized family’s unit, forcing them to live in a dangerous
construction zone, Davidson said.

And still other times, they’ll ask tenants to move into a different unit to accommodate work that needs to be done, and then a few years later, the landlord will say that the new unit is not stabilized.

“Really the rent stabilization should go with you, but tenants don’t always get that in writing,” she said.

There’s also a rule that allows a landlord to evict tenants if the building is being demolished. So a landlord may file for demolition evictions — but in the end, the buildings don’t always get demolished, Fox said.

He’s also seen new owners send letters to tenants saying they’re moving in to their unit as their primary residence, giving them 30 days to find a new place.

“The landlord just evicts them, and then doesn't move in to that unit,” Fox said. “They do this with lots of people in the building until the long term tenants are gone.”

Landlords crack down on pets.

If a building has a no-pet policy, but a tenant has kept a pet in their apartment “openly” for at least three months, the pet is allowed to stay, under state law, unless it is a nuisance.

Yet, there have been recent cases, like one in East Williamsburg, where landlords begin cracking down on pets.

“I’ll get tenants saying the landlord is trying to evict them because they have a dog and had it for years,” Carr said.
2010 WL 4109465 (N.Y.) (Appellate Brief)
Court of Appeals of New York.

In the Matter of the Application of Sylvie GRIMM, Petitioner-Respondent,
v.
STATE OF NEW YORK DIVISION OF HOUSING and Community
Renewal, Office of Rent Administration, Respondent-Appellant,
and
151 Owners Corp., Intervenor-Respondent-Appellant.

No. 2010-0171.
August 13, 2010.

New York County Index No. 105441/07

Brief of Petitioner-Respondent Sylvie Grimm

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Time Requested: 15 Minutes

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*1 COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Appellate Division correctly apply this court's decision in Thornton v. Baron to circumstances outside the narrow fact pattern in that case?

Petitioner-Respondent submits that the answer is “yes.”

2. Was the Appellate Division's ruling consistent with the Statute of Limitations set forth in the 1997 amendments to the Rent Stabilization Law.

Petitioner-Respondent submits that the answer is “yes.”

3. Did the Appellate Division correctly determine that the record contained sufficient indicia of fraud to justify remand to the DHCR for an investigation of whether possibly fraudulent conduct on the part of the landlord justified application of DHCR's default formula?

Petitioner-Respondent submits that the answer is “yes.”

*2 PRELIMINARY STATEMENT
Petitioner-Respondent Sylvie Grimm requests that this court affirm the holding of the Appellate Division below, which remanded her rent overcharge proceeding to the DHCR based upon indicia of fraud that would render the “base date” rent unreliable as a basis for determining the existence of an overcharge. Although the Appellate Division did not reach a determination of whether fraud existed in this case, it correctly held that DHCR failed to investigate substantial and credible evidence presented to it of fraud, and that if, upon remand, DHCR ultimately found that there was a fraudulent scheme in existence on the base date, it should determine the rent based on application of the default formula, pursuant to this court's holding in Thornton v. Baron, 5 N.Y.3d 175 (2005). Appellants wrongly ask this court to validate the egregiously inflated base date rent before a full investigation of the suspicious circumstances surrounding the base date tenancy is completed by DHCR. For the reasons set forth below, the decision of the Appellate Division should be affirmed.

*3 STATEMENT OF FACTS

A. History of the Subject Apartment

It is uncontroverted that in 1999 the rent registered for apartment 7 at 151 Ludlow Street was $578.86. In or about April 2000, the apartment was rented to Tracy Hartman and Jon Bozak at a monthly rent of $1,450. According to the uncontested statement of Jon Bozak (R. 366 - 367), the managing agent told Mr. Bozak and Ms. Hartman that the rent “would be $2,000, but that if we agreed to make repairs and paint the Apartment, at our expense, the monthly rent we would be charged would be $1,450.”

The landlord's representation that the legal rent collectible for the apartment was $2,000 was equivalent to a claim that the apartment was exempt from rent stabilization, since pursuant to Section 26-504.2 of the Rent Stabilization Law, an apartment that is rented to a new tenant “with a monthly rent of $2,000” is exempt from stabilization even if the actual rent charged is less than $2,000.

The landlord never produced a copy of the initial or any renewal lease signed by Hartman and Bozak, but Mr. Bozak stated that the initial lease did not contain a rent stabilization rider. (R. 367). Moreover, it is undisputed that the year Hartman and Bozak took occupancy, the landlord stopped registering the apartment with DHCR. The landlord did not file any further registrations until September 2005 - two months after Sylvie Grimm filed her overcharge complaint.

*4 Furthermore, the landlord's offer to charge a supposedly discounted rent in exchange for the tenants' agreement to waive their rights under the warranty of habitability indicates that the landlord was acting pursuant to a fraudulent scheme to treat its new tenants as if they were protected by rent stabilization, since tenants who are protected by the rent laws are not expected (or permitted) to waive their statutory rights.

The landlord has never offered any justification for its claim that either $2,000 or $1,450 was the legal rent for the apartment (increases of 340 and 240 percent respectively). Indeed, although the landlord argues in its brief that “lawful increases” such as “installation of new equipment or improvements... could have accounted for the differential” of 240 percent between the 1999 and 2000 rents (see Brief of 151 Owners Corp. at 40, n.15), such could not have been the case here where the new tenants were requested to repair and paint the apartment themselves, as well as pay for the renovation. See, Rent Stabilization Code § 2522.4(a)(1).

Thus from the facts in the record, it appears that the had enacted a scheme to improperly decontrol the apartment and treat Hartman and Bozak, and then Sylvie Grimm, as unregulated tenants, thus denying them their rights under rent stabilization.
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In April 2004, Sylvie Grimm moved into the subject apartment. Her initial lease did not state that her apartment was subject to rent stabilization, nor did it contain a rent stabilization rider explaining how her rent was calculated. The landlord did not file a DHCR registration statement in 2004, nor was one ever sent to Ms. Grimm. In April 2005, Ms. Grimm entered into a one year renewal lease at a monthly rent of $1500.75. The renewal lease was not in the format prescribed by DHCR for rent stabilized tenancies. The landlord did not register the new lease in April, nor did it send Ms. Grimm any rent registration statements, pursuant to DHCR procedure. The landlord belatedly filed retroactive rent registrations in September, and only after Ms. Grimm had filed her overcharge complaint.

B. The Overcharge Complaint

In July 2005, Ms. Grimm filed an overcharge complaint with DHCR, alleging that the “owner is fraudulently renting apartment as a non-rent stabilized unit and raised rent illegally in 2005. Initial 2004 rent is also illegal.”

Immediately upon receipt of Ms. Grimm's complaint, the landlord sent Ms. Grimm revised versions of her 2004 and 2005 leases. The new leases clearly advise that the apartment is subject to rent stabilization, thus illustrating the deficiencies of the leases actually offered to Ms. Grimm prior to her DHCR complaint. Amazingly, even at this late date, the landlord had difficulty making itself adhere to the requirements of the Rent Stabilization Law, since the new revised lease attempted to increase Ms. Grimm's legal rent retroactively by 17 percent to $1,686, and to characterize Ms. Grimm's $1,450 rent as a temporary preferential rent.

In September 2005, the landlord filed its initial response to DHCR, simultaneously filing registration statements for the years 2001 - 2005 (the year 2000 was never registered). The hastily prepared, handwritten registration statements failed to set forth any lease terms for Tracy Hartman during 2001 - 2003. Sections 11 - 13 of each form, where the landlord is supposed to indicate the reason for any rent increases, were left blank on each registration.

Although the landlord supplemented its response several times during the course of the administrative proceeding, it never explained the basis for the drastic rent increase charged in 2000, never provided proof that Hartman and Bozak were given a rent stabilized lease or rider or were otherwise treated as rent stabilized tenants, never proved or asserted that Ms. Grimm was advised of her rent stabilized rights or status at the inception of her tenancy, and never explained why it mysteriously stopped filing registration statements after Hartman and Bozak took occupancy. Nor did the owner explain its peculiar behavior in pretending to have trouble obtaining information from the former owner, when, as was noted by the Appellate Division, it was later revealed that both owners shared the same principal.

At no time during the month-long administrative proceeding did DHCR affirmatively inquire into any of the above issues, nor did it affirmatively request any information of the parties or the prior tenants or landlords.

C. DHCR's rulings

On June 21, 2006, DHCR denied Ms. Grimm's overcharge complaint. The Rent Administrator's four sentence decision failed to analyze the voluminous submissions of the parties, or to make any determination regarding the legality of the base date rent. The decision stated only that the complaint was denied because all rent adjustments subsequent to the base date have been lawful.

Ms. Grimm then filed a Petition for Administrative Review, which was denied by the Commissioner on February 21, 2007. Although the Commissioner credited Mr. Bozak's testimony that he had agreed to pay a rent of
$1,450 and renovate the apartment himself, based on the landlord's claim that the legal rent was actually $2,000, and although she acknowledged that the owner stopped registering the building immediately upon renting the apartment to Hartman and Bozak under these dubious circumstances, she ruled that the base date rent of $1,450 was a proper basis for determining Ms. Grimm's rent, because nothing in the record presented “a question of a fraudulent or an ‘illusory tenancy.’” (R. 496).

D. The Article 78 proceeding

In April 2007, Ms. Grimm filed an Article 78 petition challenging DHCR's ruling. In December 2007, the Hon. Shirley Kornreich granted the petition, remanding the proceeding to DHCR for reconsideration. (R. 32 - 35). Justice Kornreich correctly observed that DHCR had never specifically rejected the claim that the base date rent was tainted by fraud, as suggested by the landlord's failure to notify the base date tenants of their rent stabilized rights through a rent rider or registrations. The court correctly found that the Commissioner wrongly limited the holding of Thornton to situations involving illusory tenancies, and therefore remanded the proceeding for a determination whether fraudulent conduct on the part of the landlord rendered the registered base date rent “unreliable.”

Upon appeal by DHCR and the landlord intervenor, the Appellate Division, First Department, affirmed. The Appellate Division correctly read this court's decision in Thornton v. Baron to hold that where the base date rent is tainted by fraudulent conduct on the part of the landlord, it may not be used as a basis for calculating the subsequent regulated rents. Although recognizing that rent records prior to the base date may not be used in calculating an overcharge, the Appellate Division followed Thornton in holding that in cases of fraud, the base date rent should be determined by DHCR's default formula.

The Appellate Division made no finding that fraud had actually occurred; it simply found that DHCR must fulfill “its obligation to investigate whether there was fraud by the landlord,” and if “DHCR finds that there was indeed fraud, then use of the default formula would be necessitated.”

The dissent, arguing that any challenge to the base date rent was barred by the Statute of Limitations, based its analysis on the erroneous assertion that

[t]he only basis for finding an overcharge with respect to the subject apartment, as alleged in petitioner's July 2005 complaint, is an examination of the rental history in 1999, which is beyond the four-year period permitted by the statutes.

However, as the majority recognized, a challenge to the base date rent was justified not only by the 1999 rent, but by the landlord's fraudulent conduct in representing the base date rent as a facially unregulated $2,000, and concealing the regulatory status of the apartment by failing to provide lease riders and registrations. Even the dissent acknowledged that Thornton would apply to “an apartment that was improperly taken out of rent stabilization” - as the record suggests may have been the intent of the landlord in the instant case. The 2540% increase charged to the base date tenants merely provides evidence of the landlord's fraudulent deregulation scheme to remove the apartment from the protections of rent regulation, just as the 8 year history of fraud recounted in Thornton shed light on the fraudulent nature of the base date rent.

*11 I. THE APPELLATE DIVISION PROPERLY APPLIED THIS COURT'S HOLDING IN THORNTON V. BARON TO THE PROCEEDING BELOW.

A. Thornton's reasoning and holding is not limited to cases involving illusory tenancies.
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In Thornton v. Baron, 5 N.Y.3d 175, 179 (2005), the Court of Appeals held that where no reliable rent records are available in overcharge cases due to the landlord's fraudulent conduct, the DHCR default formula is the proper means of determining the legal rent. In Thornton, the owner of an apartment building took advantage of the statutory exemption for non-primary residences to create a scheme to remove apartments from the protections of rent regulation. Id. at 178. The owner and an illusory tenant stipulated that the apartments would not be used as primary residences, thereby allowing the owner to offer leases that charged far more than the legal stabilized rent. Id. The apartments were then leased to the actual occupants who were required to sign agreements that - contrary to fact - they would not use the apartments as their primary residences. Id. The owner used the courts to legitimize this fraudulent agreement by entering into consent judgments, which upheld the terms of the agreement. Id. The owner then filed annual rent registrations, and, using the agreed-upon rents, listed the apartments as exempt from rent stabilization. Id. at 178-79.

Under these circumstances, this court found that the DHCR default formula was the proper means of determining the legal rent. Id. at 179. The court reached *12 this result through the following logic: first, the court held that improperly circumventing the Rent Stabilization Law is a violation of the public policy of New York. Id. at 181. Second, the court determined that because the base date rent was fraudulent and because the statute of limitations precluded the court from examining the rental history beyond the four-year period, neither the base date or the pre-base date rent could be used to establish the legal rent and that therefore, the DHCR default formula was the “appropriate vehicle” for setting the base date rent. Id. at 180-181. The court concluded that where a lease established an illegal rent, the rent registration that listed this illegal rent was a nullity and that in these circumstances, “the default formula used by DHCR to set the rent where no reliable rent records are available was the appropriate vehicle for fixing the base date rent...” Id. at 181.

The Court of Appeals offered a compelling rationale for using the default formula where there are no reliable records available on the base date:

The dissent would ignore the defendant's fraudulent conduct and fix the rent at an amount likely soon to result in the apartment's permanent removal from rent stabilization, thereby rewarding the owner's wrongdoing. Under the dissent's rule, a landlord whose fraud remains undetected for four years - however willful or egregious the violation - would, simply by virtue of having filed a registration statement, transform an illegal rent into a lawful assessment that would form the basis for all future rent increases. Indeed, an unscrupulous landlord in collusion with a tenant could register a wholly fictitious, exorbitant rent and, as long as the fraud is not discovered for four years, render that rent unchallengeable. That surely was not the intention of the Legislature when it enacted the *13 RRRA. Its purpose was to alleviate the burden on honest landlords to retain rent records indefinitely ... not to immunize dishonest ones from compliance with the law.

Id. at 181 [emphasis added].

Appellants wrongly contend that Thornton must be limited to situations involving an illusory tenancy. In fact, however, the Thornton decision gives no indication that this court intended its holding to be limited to the peculiar fact pattern therein. As the facts of the instant case indicate, schemes for evading the rent laws may take many forms, and the intent of Thornton was surely not to encourage unscrupulous landlords to simply concoct new and different schemes for defrauding their tenants.

It is worth noting that this court's decision in Thornton marked a significant departure from prior appellate rulings that had interpreted the 1997 amendments to the Rent Stabilization Law as precluding any challenge to a base date rent, no matter how fraudulent the landlord's conduct. For example, in Myers v. Frankel, 292 A.D.2d 575, 740 N.Y.S.2d 366 (2nd Dep't 2002), reversing, 184 Misc.2d 608, 708 N.Y.S.2d 566 (App. Term, 2nd and 11th Jud. Dists 2000), the landlord undisputedly used an illusory tenancy to persuade her tenant that she was renting an unregulated apartment in a scheme closely resembling that in Thornton. The Second Department, relying in part on the amicus brief submitted by DHCR
in support of the landlord, ruled that the base date rent was sacrosanct despite the landlord's fraudulent conduct, and allowed the landlord to avoid all overcharge penalties. Again, in *Cecilia v. Irizarry*, 292 A.D.2d 557, 740 N.Y.S.2d 89 (2nd Dep't 2002), the Appellate Division allowed a landlord to profit from a scheme to deregulate an entire building based on false claims that the premises had been substantially rehabilitated. In contrast, *Thornton* sent a signal that such schemes to evade the rent laws would no longer be tolerated by the judiciary. The fact that both DHCR and the landlord appellant cite *Myers* as good law suggests that neither appellant has fully absorbed the import of the *Thornton* case.

Contrary to appellants' contentions, *Thornton* has properly been applied to situations where the landlord's fraud did not involve an illusory tenancy. In *Levinson v. 390 West End Associates, L.L.C.*, 22 A.D.3d 397, 802 N.Y.S.2d 659 (1st Dep't 2005), for example, the tenant rented directly from the landlord, rather than from an illusory prime tenant, but was overcharged based on a fraudulent provision in his lease stating that the apartment would not be used as his primary residence. The Appellate Division stated that “the absence of an ‘illusory tenancy’ does not meaningfully distinguish [this case] from *Thornton*” 22 A.D.3d at 401. The court explained that

We are not persuaded by landlord's efforts to distinguish *Thornton*. Here, as in *Thornton*, a default formula must be used to determine the current legal rent, since it is conceded that the rent actually charged on the base date was unlawful, and the statute of limitations does not permit us to use any rental history prior to the base date in setting the current legal rent.

*Cf. Mangano v. DHCR*, 30 A.D.3d 267, 817 N.Y.S.2d 262 (1st Dep't 2006) (DHCR properly applied default formula where landlord submitted unreliable affidavit of alleged base date tenant); *Ruradan Corp. v. Natiello*, 21 Misc.3d 1129(A), 873 N.Y.S.2d 515 (Civ. Ct. N.Y. Co. 2008) (“*Thornton* ... dictates how to set the rent when it is found that the wrongful deregulation occurred over four years prior to commencement of the proceeding.”)

*Thornton* and its progeny are in harmony with the legislative intent underlying the Rent Stabilization Law - to preserve a stock of affordable housing - and a public policy that discourages the improper removal of apartments from rent regulation. The Rent Stabilization Law expressly prohibits improper removal of an apartment from the purview of the law. *Jazilek v. Abart Holdings, LLC*, 10 N.Y.3d 943 (2008); *Drucker v. Mauro*, 30 A.D.3d 37, 39, 814 N.Y.S.2d. 43 (1st Dep't 2006). “Any lease provision that subverts a protection afforded by the rent stabilization scheme is not merely voidable, but void (Rent Stabilization Code § 2520.13), and this Court has uniformly thwarted attempts, whether by mutual consent or by contract of adhesion, to circumvent regulated rent maximums.” *Id.*

The Appellate Division was therefore correct in applying *Thornton* to the instant case, based on evidence that the landlord fraudulently treated rent stabilized tenants as exempt from regulation.

*Appellants devote substantial portions of their briefs to proving a principle not controverted by the tenant or the courts below: that rent records prior to the four-year base date generally may not be used in the computation of a tenant's legal rent. The Appellate Division, however, did not direct DHCR to base Sylvie Grimm's rent on a rent charged prior to the base date; it held only that her rent should be determined by DHCR's default formula if DHCR finds that the base date rent was rendered unreliable due to fraud. 68 A.D.3d at 32. This was the exact holding of this court in *Thornton* and in *Partnership 92 LP v. DHCR*, 11 N.Y.3d 859 (2008).
Indeed, the methodology of the Appellate Division closely followed this court's analysis in *Thornton*. In *Thornton*, the tenants filed an overcharge complaint in 2000, eight years after taking occupancy of the apartment pursuant to the landlord's fraudulent deregulation scheme. Since evidence of fraud was apparent from examining the illusory base date overlease and sublease, this court found that the base date rent must be disregarded and the default formula *17* employed. However, it is important to note that in assessing the nature of Baron's fraudulent scheme, this court emphasized that the landlord was “charging rent far in excess of the legal stabilized rent.” 5 N.Y.3d at 178. This observation was necessarily based on a comparison of the base date rent with the $507 rent of the last legitimate tenant. *Id.* Yet this court found such a comparison to be proper, notwithstanding the “four-year rule,” because the prior tenant's rent was examined not for the purpose of calculating the current rent, but for the purpose of determining whether a fraudulent scheme existed on the base date.

In the instant case, the Appellate Division took the same approach. The court below found indicia of fraud existing on the base date itself: “the tenants immediately preceding petitioner were never given a rent-stabilized lease rider, were never provided with annual registration statements, and were not told how their initial monthly rent was calculated.” 68 A.D.3d at 32. Combined with the landlord's statement that the legal rent for the apartment was above the $2,000 deregulation threshold, these indicia provided ample grounds for the Appellate Division's remand. As this court did in *Thornton*, the Appellate Division noted the disparity between the base date rent and the $578 rent of the last registered tenant. Such an observation was again proper because the grossly unlawful rent increase *18* constituted one element of the fraudulent scheme that may have existed on the base date itself. 3

DHCR wrongly attempts to extend the reach of the four-year rule when it argues that “the sine qua non of the base date rent is that it is a rent that is not subject to challenge,” DHCR Brief at 25. DHCR's argument shows that its real disagreement is not with the ruling below, but with this court's own holding in *Thornton*, since *Thornton* clearly held that notwithstanding the four-year statute of limitations, base date rents are most certainly subject to challenge where unscrupulous landlords evade the rent laws by charging “fictitious, exorbitant” rents. 5 N.Y.3d at 181.

The ruling below properly permitted Sylvie Grimm's challenge to the base date rent based not upon pre-base-date registrations, but upon indicia of fraud existing on the base date itself. The Appellate Division's ruling was thus fully consistent with *Thornton*.

*19* II. THE APPELLATE DIVISION PROPERLY REMANDED THIS PROCEEDING TO DHCR BASED ON SUBSTANTIAL INDICIA OF FRAUD IN THE RECORD.

DHCR wrongly argues that the Appellate Division's holding would “eviscerate” the four-year rule and recognize “‘a colorable claim of fraud’ in almost any overcharge case where the rent history contains an unexplained increase in rent.” DHCR Brief at 34. The court below, however, had ample grounds to remand this proceeding to DHCR based on findings of fraud specific to this case.

DHCR oddly insists that “the concept of fraud has little application in the realm of rent overcharge,” since “the word ‘fraud’ does not appear in the Rent Stabilization Law.” DHCR Brief at 28. However, the Rent Stabilization Code plainly states at the outset that “this Code shall be construed so as to carry out the intent of the Rent Stabilization Law to ensure that such statute shall not be subverted or rendered ineffective, directly or indirectly, and to prevent the exaction of unjust, unreasonable and oppressive rents and rental agreements, and to forestall profiteering, speculation and other
disruptive practices.” RSC § 2520.3. See also, RSL § 26-511(b)(5). There is ample room for the concept of “fraud” in this broad language.

*20 Indeed, in an Opinion Letter dated April 17, 2008, DHCR Policy Director Gregory C. Fewer wrote:

You correctly note that the Court of Appeals has held that in cases of fraud, the four year statute of limitations for overcharges does not apply. You are apparently referring to the case of Thornton v. Baron, 5 N.Y.3d 175, 800 N.Y.S.2d 118 .... The court held that the fraudulent lease rent was a nullity, even though the lease had been entered more than four years prior to the filing of the overcharge complaint.... Whether the situation you describe would be seen as sufficiently fraudulent as to warrant making an exception to the four year rule can only be determined in the context of a formal overcharge proceeding, wherein both parties will have the opportunity to be heard....

This statement is consistent with the Appellate Division's decision below, which remanded the proceeding for precisely the investigation suggested in Mr. Fewer's letter. See, Letter of Gregory C. Fewer, reproduced in the Appendix.

As in Thornton, the record below suggests that the landlord not only sought to charge an unlawful rent, but to fraudulently remove the apartment from rent stabilization. According to the prior tenant, Jon Bozak, the managing agent told Mr. Bozak and Ms. Hartman that the rent “would be $2,000, but that if we agreed to make repairs and paint the Apartment, at our expense, the monthly rent we would be charged would be $1,450.” (R. 366 - 367). The landlord's representation that the legal rent collectible for the apartment was $2,000 was in essence an assertion that the apartment was exempt from rent stabilization, since *21 pursuant to Section 26-504.2 of the Rent Stabilization Law, an apartment that is rented to a new tenant “with a monthly rent of $2,000” is exempt from stabilization even if the actual rent charged is less than $2,000.

The landlord's intention to deregulate the apartment was further indicated by its failure to attach a rent stabilization rider to Hartman and Bozak's lease, and its decision to cease registering the apartment beginning with the Hartman/Bozak tenancy. The landlord's suggestion that Hartman and Bozak should waive their rights under the warranty of habitability also suggests that the landlord did not consider them subject to the protections of the Rent Stabilization Code (“An agreement by the tenant to waive the benefit of any provision of the RSL or this Code is void,” R.S.C. § 2520.13). Cf., Jazilek v. Abart Holdings, LLC, 10 N.Y.3d 943 (2008); Drucker v. Mauro, 30 A.D.3d 37 (1st Dep't 2006).

The landlord also treated Sylvie Grimm in accordance with its apparent intention to fraudulently decontrol the apartment: it failed to offer her a rent stabilized lease or rider, and failed to serve or file registrations for the first two years of her tenancy.

In the lengthy proceedings below, the landlord has never offered any evidence to rebut the inference that it was attempting to exempt the apartment from rent stabilization. Neither the current managing agent, Michelle Goldstein, nor her predecessor, Yanina Ilan, offered any explanation for their failure commencing in *22 the year 2000 to offer their tenants rent stabilized leases and the coincidentally simultaneous interruption in the filing of DHCR registrations. (R. 92 - 98, 299 - 300). Nor did the current or former owner ever attempt to justify its claim that either $2,000 or $1,450 (increases of 340 and 240 percent respectively) was the legal base date rent for the apartment.

Thus the Appellate Division had ample grounds to infer the possible existence of fraud over and above the simple collection of a rent in excess of the applicable vacancy and renewal guidelines. It properly remanded the matter to DHCR for a further exploration of the issue of fraud.

III. DHCR'S INTERPRETATION OF THE RSL IS NOT ENTITLED TO SPECIAL DEFERENCE.
This court has repeatedly observed that:

[where] the question is one of pure statutory interpretation dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations ... And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight.

Roberts v. Tishman Speyer Props., LP, 13 N.Y.3d 270, 285 (2009), citing KSLM-Columbus Apts., Inc. v. DHCR, 5 N.Y.3d 303 (2005). Accordingly, in Roberts, this Court did not hesitate to disagree with DHCR's interpretation of the Rent Stabilization Law, which would have excluded from the protection of the statute tenants whose coverage was mandated under the J-51 law.

Similarly, in KSLM-Columbus, this Court rejected DHCR's contention that owners leaving the Mitchell-Lama program could apply for rent increases based upon the “unique and peculiar circumstances” standard encompassed in the Emergency Tenant Protection Act. In Dworman v. DHCR, 94 N.Y.2d 359 (1999), this Court again overruled DHCR’s position that the RRRA amendments of 1997 divested it of all discretion to excuse the late filing of an income certification by a tenant seeking to avoid deregulation under RSL § 26-504.3(c)(1) and (c)(3). See also, ATM One, LLC v. Landaverde, 2 N.Y.3d 472 (2004) (rejecting DHCR's interpretation of Section 2504.1 of the ETPR to mean that service of a ten-day notice to cure was complete upon mailing by the owner).

In the instant case, the Appellate Division properly rejected DHCR's contention that the four-year rule divested the agency of its duty to investigate the indications of possible fraud in the record, since DHCR's position was contrary to the prior holdings of this court, and to the intent and purposes underlying the Rent Stabilization Law.

CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the Appellate Division below.

Appendix not available.

Footnotes

1 Although the initial lease bore a legend stating that an “attached rider sets forth rights ... under the rent stabilization law,” no such rider was actually attached, and paragraph 32 of the lease says “this section applies if the Apartment is subject to the NYC Rent Stabilization Law,” suggesting that the status of the apartment was not set forth in the lease itself.

2 But see, Ador Realty, LLC v. DHCR, 25 A.D.3d 128, 802 N.Y.S.2d 190 (2nd Dep't 2005) (records may be used to compute longevity increase); H.O. Realty Corp. v. DHCR, 46 A.D.3d 103 (1st Dep't Oct. 2007) (records may be examined for evidence of willfulness); Pastreich v. DHCR, 50 A.D.3d 384, 856 N.Y.S.2d 61 (1st Dep't 2008) (4 year rule does not preclude examination of the original preferential rent rider).

3 Analogously, in H.O. Realty Corp. v. DHCR, 46 A.D.3d 103, 108, 844 N.Y.S.2d 204 (1st Dep't 2007), the Appellate Division held that courts may examine events prior to the base date for evidence of willfulness - an issue clearly analogous to fraud. In the instant case, any examination looking back beyond the four-year period served merely to corroborate the conclusion that the owner may have perpetrated a fraud calculated to deregulate the subject apartment.
The Case for Public Housing

The market can’t solve the nation’s affordable housing crisis. The gap between costs and incomes is just too large.

By Matthew Gordon Lasner May 6, 2016

Across the United States, from the Rio Grande to northern New England, housing activists, civic leaders, and policy-makers are struggling to produce affordable, below-market housing. In rapidly gentrifying city centers but also in suburbs and rural areas, the challenge is fundamentally the same: to bridge the gap between stagnant wages and the high cost of quality housing.

This quest has spawned a tangle of small-scale programs and partial
financing mechanisms, local, state, and federal, each promising its own kind of byzantine, incremental salvation. Tax credits, low-interest loans, land trusts, zoning, and other land-use regulations have all been deployed in the service of lowering the cost of housing for increasingly rent-burdened Americans. Yet amid these myriad offerings, the one remedy capable of providing the quantity and quality of affordable housing we need is not even on the menu: deep cash subsidies for construction and/or operation of buildings.

Decades ago, these kinds of subsidies, provided by the federal, and in a few places state government, gave rise to what was once praised—and is now maligned—as public housing. If we want to solve the problem of the high cost of quality housing today, we will have to embrace this kind of active government engagement again.

To understand the singular importance of government subsidies, it helps to look back at the country’s long history of attempts to solve its various housing crises.

The Birth of Public Housing

Americans have more than a century of experience in the field of affordable housing. Roughly 140 years ago, Alfred Tredway White began work on the country’s first subsidized apartment complex, the Home Buildings, in what is today the heart of Gold Coast Brooklyn: Cobble Hill. A well-to-do Unitarian, White became interested in the housing question when tasked by his minister to investigate the topic. White’s solution, following examples in the United Kingdom, was to wrest control over production and ownership from the speculative market by developing so-called model tenements on a low-profit basis, offering “wage earners” quality apartments at below-market rents.

Half a century later, an entire industry had emerged in New York and other cities, including Washington, Philadelphia, and Chicago, to provide
immiserated workers better housing than the market, at lower rents. Nonprofit, subsidized housing as an alternative to tenements was just as important as strong building codes in making cities livable, advocates claimed. Some of the housing, like the Home Buildings, was developed and managed by organizations set up by single benefactors. Other complexes were built by joint-stock companies designed to allow larger numbers of smaller investors to participate. Yet others were owned, and sometimes built, by the tenants themselves on a nonprofit, consumers’ cooperative basis, often with the support of trade unions. Along the way, local and state governments started to support private nonprofit housing with property-tax abatements and long-term low-interest construction loans.

The system cannot not close the cost gap. The Second Gilded Age has brought housing costs to a historic high.

The energy and creativity that went into these efforts generated thousands of units that rented (or, in the case of co-ops, sold) at below market rates. But it was not until public housing emerged out of the desperation of the Great Depression—when activists and politicians like New York City Mayor Fiorello LaGuardia and US Senator Robert Wagner (D-NY) convinced Congress to fund the program, later matched by state and local programs in a handful of places—that the country really began to adequately address the need.

The impact was dramatic, especially in New York, the nation’s largest, densest, and most expensive city, whose leaders aggressively pursued the federal funds and found space on which to build. In 1936, the year before Congress funded a permanent federal public housing program, two million people in the city still lived in tenements erected in the 19th century, before robust building codes. By the 1970s, the city had nearly 180,000 public housing apartments, with another 105,000 deeply subsidized “middle-income” apartments built through a 1955 state program called Mitchell-Lama.

The End of Subsidies
But the public housing program survived less than 40 years (and Mitchell-Lama less than 20); such was hostility to the idea and to the disenfranchised African Americans whom housing subsidies increasingly served. Initially, public housing drew a mixture of families: white and black, poor and working class; many were upwardly mobile. But as mass-suburbanization relieved pressure on city housing markets, those who could afford to do so left. Congress—pressured by builders to fund only housing that would not compete with the private market—forced cities to economize on construction, compounding the problem. The situation was made yet worse by careless management and policies prioritizing tenancy by the most desperate households: an idea that however reasonable on paper, proved disastrous without a rise in support for social services.

By the late 1960s, public housing’s reputation was tarnished. Following the implosion of Pruitt-Igoe, a 18-year-old high-rise complex in St. Louis, and with the support of the “silent majority” of suburban whites, President Nixon put a moratorium on public housing development in 1973.

In the decades since public housing ended, activists and city and county officials in high-need areas coast to coast have worked creatively to fill the gap. In the 1970s and 1980s, cities like New York capitalized on large stocks
of housing abandoned by owners or seized in lieu of property taxes, and on the willingness of many tenants to invest sweat equity, to add below-market units with minimal cash subsidies. In the 1980s and 1990s, leaders pressured Congress for new subsidies like the Low-Income Housing Tax Credit, introduced in 1986. Some began to promote consumer-cooperative and other non-speculative models repackaged with fresh-sounding names like “mutual” housing and community land trusts.

As in the earliest days, nonprofits spearheaded much of this activity. In fact, virtually all of the approximately three million units of below-market housing built in the United States since 1973 have been developed by an increasingly professionalized network of private affordable-housing providers. For further evidence of the system’s sophistication, witness the beauty, stability, and popularity (among tenants and prospective tenants), of buildings like Via Verde in the South Bronx, completed in 2012, or any of the dozens of affordable complexes in the Bay Area designed in the past decade by architects like David Baker Architects and Michael Pyatok.

And yet, no matter how good the buildings or how happy the tenants, Americans deserve better. The nonprofit model, while always evolving, has consistently failed to deliver enough housing or housing that is cheap enough, for long enough to help those most in need. Nearly all pre-public affordable housing changed hands decades ago and if it remains affordable, it is only by virtue of city rent regulations. Nearly all of more recent programs to encourage development of affordable housing have come with expiration dates, allowing owners to convert complexes to market-rate after as few as 15 years.

More important, like a lot of affordable housing today, the model tenements of earlier years were unaffordable for all but the best-paid working families. The most important reason for this is that then, as now, the cost of construction—let alone that of urban land—was too high to be offset by eliminating developers’ and landlords’ profits. Even before costly modern
furnishings like electric wiring (not to mention kitchen appliances and air conditioners), second bathrooms, and double-glazed windows became standard, nonprofit apartments were simply too expensive for families living on low wages.

At the same time, the system is cumbersome, relying on multiple small actors, each with its own culture and red tape. Moreover, many programs, like the federal tax credits, were set up in ways that disadvantaged high-need areas because funds were distributed on a per capita basis to the states, without regard for variations in income inequality and housing privation.

The largest problem, though, is the oldest: the system cannot not close the cost gap. From Boston to the Bay Area and the South Bronx to Santa Monica, the Second Gilded Age has brought housing costs to near historic highs. In Los Angeles renters now spend a record share of income on housing, nearly 49 percent. In New York City, this situation led Mayor Bill de Blasio to make housing inequality one of his top priorities, while in San Francisco several initiatives designed to cool the housing market appeared on last year’s ballots.

But what can cities really do?

**The Zoning Gambit**

Unable to redistribute wealth through taxes—because states restrict cities’ ability to tax and because the bulk of American wealth lies beyond city limits—they have come to pursue this goal about the only way they can: by forcing those who can afford new housing, on a building by building basis, to subsidize it for those who cannot.

This idea first appeared in the United States in the 1970s, when a few progressive suburban counties mandated inclusionary zoning, requiring that all developments over a certain size include a certain share of below-market units. New York and other cities began to embrace the approach in the 1980s,
offering density bonuses—and thus the lure of extra profits—to developers who included affordable units. Today, a somewhat more robust variation has become a crucial, if highly contentious, piece of Mayor de Blasio’s affordable housing program in New York.

The controversy—and the program itself—would be worth it if it delivered the volume and depth of subsidies cities need. That is, if it were an adequate substitute for true government subsidies. But it does not and it is not. Between the mid-1930s and 1970s, New York City saw an average of approximately 12,500 units of government-subsidized, below-market housing built each year. About 37 percent (180,000) of them were in low-income public housing and the rest (310,000) were in other kinds of low- and middle-income complexes serving families earning a bit more money. In the peak years of the 1950s and 1960s, as many as 20,000 units were built. De Blasio, by contrast, hopes to see 8,000 units a year built. Most will be too expensive for those at the bottom of the market.

But what if, instead of tax credits, mansion taxes, housing trust funds, community land trusts, block grants, legal aid, and anxiety over gentrification—and what if instead of protesting the good intensions of the mayor—we fought for the one system that really works: deep government subsidies?

And what if people in cities suffering from housing inequality all over the country joined forces to begin pushing for this solution together?

For those who worry about the troubled legacy of public housing—racially and economically segregated “towers in the park,” miles from public transportation, shopping, and other basic amenities, beset by crime and poor management—we do not need to begin building anew places like Pruitt-Igoe, with its 33 towers on 57 windswept acres, or the equally neglected Robert Taylor Homes, built in 1962 on Chicago’s South Side.

Public housing could look and feel very different today than in the past. Like in Northern Europe—where between 20 percent and 60 percent of housing in
larger cities is still publicly funded, and where there are often no income ceilings and many upwardly mobile families choose to stay in their apartments—money could be channeled directly to nonprofit providers, including the very firms and community development corporations that have been doing such a good job with limited resources since the 1980s. Housing could continue to be small in scale, planned with community input, and beautiful. It could include a mixture of uses, including retail, as appropriate to its area. It could also include a mixture of income levels, enabling complexes to sustain themselves financially while ensuring robust support for future subsidies and hedging against stigmatization.

The key difference would be that we would have a lot more of this nonprofit-developed housing than now, and it would be a lot more affordable. Every neighborhood could see new buildings for households earning anywhere from minimum wage up to at least 100 percent of “area median income” (AMI), the federal index used to establish income ceilings in subsidized housing. In New York City, that’d be $90,600 for a family of four. Additionally, private developers could be offered subsidies—or required to take them—adjusted to a given market. This would enable every building, no matter how expensive the neighborhood to include below-market units at no cost to the builder—or to their market-rate tenants, and all without the lure of density bonuses.

To realize this vision, activists and grassroots groups need to put considerable pressure on federal and state lawmakers to suspend, after more than four decades, the moratorium on deep housing subsidies. More important, we as a nation must let go of the mistaken idea that housing subsidies ought to be for the poor only, or that accepting a housing subsidy represents a moral failure. Tens of millions of Americans, mostly middle class and well to do, take about $270 billion a year in tax breaks offered to homeowners in part to offset the cost of mortgage interest and property taxes: more than four times what we spend on subsidies for below-market housing. Meanwhile, in virtually every other rich country it is well understood that housing subsidies are essential to the wellbeing of cities. In a city without quality housing for working and
middle-income families, and where people regularly spend 50 percent or 60 percent of their income on rent, we are all impoverished. The United States is no exception.

Trending Today
Equitably Housing (Almost) Half a Nation of Renters

ANDREA J. BOYACK†

INTRODUCTION

Across America, the rent is too damn high.¹ The country’s population of renters is growing faster than the supply of available rental units.² Rental vacancies are

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¹ Professor of Law, Washburn University School of Law. J.D., University of Virginia School of Law; M.A.L.D., Fletcher School of Law & Diplomacy, Tufts University; B.A., Brigham Young University. I would like to thank Tim Iglesias and the participants of the University of San Francisco School of Law’s Symposium on Housing for Vulnerable Populations and the Middle Class: Revisiting Housing Rights and Policies in a Time of Expanding Crisis for the thought provoking discussion and helpful input reflected in this Article. A special thank you to my son, Bowen, who inspires me to think outside the box.


The current state of housing market problems involving inadequate, expensive rental housing is discussed in the Joint Center for Housing Studies of Harvard University’s most recent annual report. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION’S HOUSING 2015, at 30–32 (2015) [hereinafter STATE OF THE NATION’S HOUSING 2015]; see also infra Part I. The country’s increasing rental demand is both predictable and predicted. See Arthur C. Nelson, The New Urbanity: The Rise of a New America, 626 ANNALS AM. ACADEMY POL. & SOC. SCIENCE 192 (2009) (forecasting that the current shift into rental households will be “the most remarkable change in America’s built environment since the end of World War II”). Professor Arthur Nelson of the University of Utah predicts that half of all homes built between now and 2030 will have to be rental units to meet this growing demand. Id.; see also Arthur C. Nelson, Demographic Outlook, 68 URB. LAND 196, 197 (2009); Arthur C. Nelson, Catching the Next Wave: Older Adults and the “New Urbanism,” 33 J. AM. SOC’Y ON AGING 37, 39, 41 (2010).
reaching new lows, and rental rates are reaching new highs.\footnote{Josh Miller, \textit{Eye on Housing: Rental Vacancy Rate at 20 Year Low}, NAT'L ASS’N HOMEBUILDERS (Jan. 29, 2015), http://eyeonhousing.org/2015/01/rental-vacancy-rate-at-20-year-low; NAT'L LOW INCOME HOUS. COAL., \textit{OUT OF REACH} 2015, at 4 (2015) [hereinafter OUT OF REACH], http://nlihc.org/sites/default/files/oor/OOR_2015_FULL.pdf; ROBERT R. CALLIS & MELISSA KRESIN, U.S. DEP’T COMMERCE, U.S. CENSUS BUREAU, \textit{RESIDENTIAL VACANCIES AND HOMEOWNERSHIP IN THE FOURTH QUARTER 2014} (2015) [hereinafter U.S. CENSUS BUREAU], www.census.gov/housing/hvs/files/qtr414/currentvhsprees.pdf.} Millions of former homeowners have lost their homes in foreclosure and, due to today’s much tighter mortgage underwriting realities, will not realistically re-enter the ranks of owner-occupants.\footnote{Approximately 4.5 million families lost their homes to foreclosure between September 2008 and May 2013. CORELOGIC, \textit{CORELOGIC NATIONAL FORECLOSURE REPORT 2} (2013), http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-may-2013.pdf. Lenders’ underwriting standards have significantly tightened since the Foreclosure Crisis. Although the Consumer Financial Protection Bureau and the Dodd-Frank Act have called for more responsible credit standards in residential mortgage lending, most analysts believe that “the pendulum has swung too far from the excesses of the pre-bust era, and today’s credit box is tighter and more restrictive than underwriting practice and experience justify.” BIPARTISAN POLICY CTR., \textit{HOUSING AMERICA’S FUTURE: NEW DIRECTIONS FOR NATIONAL POLICY} 29 (2013) [hereinafter HOUSING AMERICA’S FUTURE], http://bipartisanpolicy.org/library/housing-americas-future-new-directions-national-policy.} For a number of reasons—variety of incomes, different stages in life, and a range of personal preferences and lifestyles—homeownership is not for everyone. And yet federal government housing policy has consistently prioritized homeownership over renter-specific issues, such as affordability, rental supply, and distribution.\footnote{See WILLIAM AFGAR, \textit{RETHINKING RENTAL HOUSING: EXPANDING THE ABILITY OF RENTAL HOUSING TO SERVE AS A PATHWAY TO ECONOMIC AND SOCIAL OPPORTUNITY} 4 (2004), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w04-11.pdf; see also infra Part II.} State and local housing assistance programs are shockingly insufficient to meet ballooning needs. Reallocation of focus and funds at the federal level, however, could help grow the supply of rental housing and provide renters at all income
levels a realistic chance of occupying quality and affordable rental housing, even in a “high opportunity neighborhood.”

To help create a more renter-friendly alternative to the “American Dream of homeownership,” the government must first reorient its myopic housing policy focus away from an over-emphasis on building homeownership. It must free up government funds for use in support of affordable rental

6. The term “High Opportunity Neighborhood” comes from the “Moving to Opportunities” experiment conducted between the late 1960s and 2015. See Margery Austin Turner et al., Urban Inst., Benefits of Living in High-Opportunity Neighborhoods: Insights from the Moving to Opportunity Demonstration (2012), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412648-Benefits-of-Living-in-High-Opportunity-Neighborhoods.PDF. This major, decades-long housing mobility experiment was sponsored by the U.S. Department of Housing and Urban Development (HUD), building on earlier academic studies. Id. at 1. The study followed 4600 low-income families with children who lived in the most disadvantaged neighborhoods across the country. Families were randomly assigned into one of three groups, and the members of the test group were given housing vouchers that could only be used to move to a “high opportunity neighborhood.” Id. A “high opportunity neighborhood” for purposes of the Moving to Opportunity experiment was defined as a neighborhood with poverty rates below 15% and labor force participation rates above 60%, with more than 20% of adults having completed college. Id. at 2. The neighborhood was also by definition predominantly (more than 70%) non-Hispanic white, and there were more than 200,000 low-wage jobs located within five miles of the tract centroid. Id.


8. “Having a place to call home is a signature component of the American dream.” Matthew Johnson, Stepping Up: How Cities Are Working to Keep America’s Poorest Families Housed, Urban Inst. (June 16, 2015), http://www.urban.org/features/stepping-how-cities-are-working-keep-americas-poorest-families-housed; see also infra Part II.
housing. In addition, government funds and agency efforts should be carefully allocated to increase the availability of housing assistance and government gap funding of affordable housing as well as to encourage private investment in the supply of affordable rental housing.\(^9\)

Part I of this Article discusses the origins and impacts of our widening gap between supply of and demand for affordable rental housing. Part II advocates that federal housing policy should change its primary emphasis from building homeownership to supporting the development of affordable rental options. Part III explores ways that the federal government could act to encourage development of an adequate and de-concentrated supply of rental units for all income levels.

I. BE IT RENTED OR OWNED, THERE’S NO PLACE LIKE HOME

America’s population of renters is large and rapidly growing larger.\(^11\) Not only is the population of the country growing—expected to reach 334 million by 2020 and 416 million by 2060—but the percentage of this population that rents rather than owns their home is growing as well.\(^12\) The country’s homeownership rate, for the first time in decades, has fallen below 64%, and only 55.5% of the country’s


\(^11\) “2014 marked the 10th consecutive year of robust renter household growth” which “puts the 2010s on track to be the strongest decade for renter growth in history.” State of the Nation’s Housing 2015, supra note 2, at 25.

housing units are currently owner-occupied.13 The drop in homeownership naturally means that more households are renting, and the recent, dramatic increase in renter households is expected to grow even more dramatically in the decades to come.14 Renters are more likely to be younger (or older), to be minorities or immigrants, and more likely to be unmarried.15 As a whole, however, the renter population is an incredibly diverse group.16 Minority households and low-income households are disproportionately renter households.17

The demographics of our country are profoundly changing during this generation, and these changes are “transforming the country and our housing needs.”18 Members of the “Baby Boom” generation are moving out of


16. Apgar, supra note 5, at 3.

17. Id. at 23; see Housing Vacancies and Homeownership (CPS/HVS), supra note 15; see also Segal & Sullivan, supra note 15; Thomas P. Boehm & Alan M. Schlottmann, The Dynamics of Race, Income, and Homeownership, 55 J. URB. ECON. 113, 114–15 (2004).

their prime homeownership years, retiring and downsizing.\textsuperscript{19} Even though a large percentage of baby boomers are currently homeowners (larger than any other age group), and even though many of these homeowners intend to age in place (at least in the short term), as the Baby Boom population continues to age and as the economic challenges of being on a fixed income continue to create housing affordability problems for seniors, more will move into smaller units or assisted living and senior housing developments.\textsuperscript{20}

Although “Generation X” is entering what traditionally would be prime homeownership years,\textsuperscript{21} homeownership for Americans in their 30s and 40s was hit hard by the Foreclosure Crisis and has been falling ever since.\textsuperscript{22} A high percentage of the members of this generation first became homeowners during the boom years before the Crisis, and thus were more likely to have overpaid for their homes and have taken out risky mortgages.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{20} State of the Nation's Housing 2015, supra note 2, at 1, 5, 13. “Paying too much for housing leaves seniors with inadequate income to pay for medications, healthy food, and other necessities.” Housing America’s Future, supra note 4, at 19.
\item \textsuperscript{21} George Masnick, of the Harvard Joint Center for Housing Studies, defines this generation (which he calls the “baby bust”) as including individuals born between 1965 and 1984. George Masnick, Defining the Generations, Harvard Joint Ctr. For Hous. Studies (Nov. 28, 2012), http://housingperspectives.blogspot.com/2012/11/defining-generations.html.
\item \textsuperscript{22} See Wei Li & Laurie Goodman, Urban Inst., Comparing Credit Profiles of American Renters and Owners 16 (2016), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000652-Comparing-Credit-Profiles-of-American-Renters-and-Owners.pdf; see also Shane Ferro, Gen X Is the Most Screwed Generation When It Comes to Real Estate, Huffington Post (Mar. 30, 2016), http://www.huffingtonpost.com/entry/gen-x-screwed-real-estate-housing-crisis_us_56fad298e4b0143a9b497c9c.
\item \textsuperscript{23} See Li & Goodman, supra note 22, at 16.
\end{itemize}
are correspondingly more likely to have lost or be at risk of risk losing their homes, and many have already joined or will eventually join the ranks of former-homeowner renters.24

The “Echo Boom” or “Millennial Generation” exerts a very strong influence on housing trends in the United States.25 On average, Millennials have been delaying independent household formation by moving home or in with roommates after college and by staying single (and childless) longer.26 This younger segment of the American population has shown both a more pronounced preference for renting and a greater financial inability to become homeowners.27 More than 69% of Millennials rent their homes compared with 36.4% of all householders in the country.28 The preference for rental housing, and the inaccessibility or delay of Millennial homeownership, “contributes to the high demand for rental housing that is driving rent increases in many metro areas across the country.”29 In addition, the

24. See id.


27. Id. at 2; LEIGH GALLAGHER, THE END OF THE SUBURBS: WHERE THE AMERICAN DREAM IS MOVING 158 (2013); c.f. HOUSING AMERICA’S FUTURE, supra note 4, at 10. (indicating that “[m]illions of Americans continue to see homeownership as a critical cornerstone of the American Dream” and that “[t]his sentiment is especially strong within the growing Hispanic community”).

28. NAT’L HOUS. CONFERENCE & CTR. FOR HOUS. POLICY, PAYCHECK TO PAYCHECK: A SNAPSHOT OF HOUSING AFFORDABILITY FOR MILLENNIAL WORKERS (2015) [hereinafter PAYCHECK TO PAYCHECK]. Notwithstanding affordability hurdles, over 65% of Millennials hope to become homeowners within five years. Id.; see also M. LEANNE LACHMAN & DEBORAH L. BRETT, URBAN LAND INST., GENERATION Y: AMERICA’S NEW HOUSING WAVE (2011).

29. PAYCHECK TO PAYCHECK, supra note 28, at 5; see Marine Cole, Housing Recovery Leaves Millennials Out in the Cold, FISCAL TIMES (May 4, 2014),
racial and ethnic makeup of our country is changing. Compared to earlier generations, a much higher percentage of Millennials are non-white, and, as a whole, America is becoming more and more diverse. These changes make affordable rental housing and residential integration increasingly critical issues for each of the country’s demographic groups.

Growing demand for rental housing outpaces supply. As fewer and fewer people buy homes, rental demand increases and rental markets “rapidly tighten.” In 2014, as the country’s homeownership rate dropped to its lowest rate in twenty years, the national rental vacancy rate fell to a twenty-plus year low of 7%. In some places, such as in Oregon, rental vacancy rates are less than 1%. In nine of America’s eleven largest cities there has been double-digit growth in the percentage of renters since 2006. The adequacy of rental housing supply is threatened not only by low quantity of new units, but also by the loss of existing units. Much of the nation’s rental housing is old and deteriorating and requires rehabilitation to remain usable. Furthermore, over the past few decades, many multifamily affordable rental buildings have been converted into


31. OUT OF REACH, supra note 3, at iii.

32. Miller, supra note 3; OUT OF REACH, supra note 3, at 4; U.S. CENSUS BUREAU, supra note 3.

33. OUT OF REACH, supra note 3, at iii.

34. OUT OF REACH, supra note 3, at 4; see also INGRID GOULD ELLEN & BRIAN KARFUNKEI, NYU FURMAN CTR. & CAPITAL ONE, RENTING IN AMERICA’S LARGEST METROPOLITAN AREAS (2016), http://furmancenter.org/files/nyu_furman_center_capital_one_national_affordable_rental_housing_landscape_2016.pdf.
condominiums or market-rate rentals. Since 2001, “[o]ver 12.8% of nation’s supply of low-income housing, or 650,000 units, ha[s] been permanently lost from the stock of affordable rental housing . . . due to conversion . . . demolition, or obsolescence.”

Supply inadequacies in rental housing across most income levels have exacerbated housing affordability problems. Already, for decades, the United States has been struggling with an acknowledged “crisis” in rental housing affordability. The median asking rate for rentals is now higher than ever before, having nearly doubled in the past two decades. “Unlike trends in earlier years, rents are rising nationwide, with many mid-sized metropolitan areas such as Denver, CO experiencing rents rising on par or faster than larger metropolitan areas such as San Francisco, CA.” Some of the fastest-growing rental markets in January 2015 were mid-sized cities, including Denver, CO; Kansas City,
Rental rates for apartments “have risen nationally for 23 straight quarters.” On average, rents went up 15.2% between end of 2009 and mid-2014. Rapidly rising rents outpace wages, which have become fairly stagnant for most Americans. “Expanding and preserving the supply of quality, affordable housing is essential to any strategy to end homelessness, poverty, and economic inequality.”

Affordable units are nearly as costly to build as luxury units (same or similar construction and land acquisition costs), and they offer far less rental income return on investment. In some ways, affordable units are even costlier to develop in terms of regulatory compliance and land use approvals, and in terms of financeability. As a result, even though the market has naturally responded to the growing demand for rental housing by starting to build more rental units, most newly constructed rental housing has been high-end, luxury apartments. Building luxury rental units does increase supply, but only for the top echelon of renters, and higher rental rates for new luxury units actually “puts


42. Out of Reach, supra note 3, at 4.


45. Out of Reach, supra note 3, at 1; see also Ellen & Karpfunkel, supra note 34.

46. Out of Reach, supra note 3, at 5; see State of the Nation’s Housing 2015, supra note 2, at 33. Difficulties in financing affordable housing development are increased when capital subsidies dry up because of government budgetary cuts. See Out of Reach, supra note 3, at 5.

“upward pressure” on the rental rates of existing units. Analysts expect that each year over the next decade, an average of over 400,000 new renter households will enter the rental housing market and that the majority of these will be low-income. Based on the current rate of additional affordable rental units and the growing need for rental housing, the gap between rental housing supply and demand will continue to grow, rents will continue to rise, and housing affordability will become increasingly out of reach.

Along with income inequality, the number of low- and extremely low-income renters has grown significantly in recent years. In 2013, close to one out of every four of the nation’s renter households was an extremely low-income (ELI) household. Those approximately 10.3 million ELI renter households struggle with various “economic challenges” including “lagging wages, inconsistent job growth, and the rising cost of living.” As the number of ELI renters has increased, the supply of rental housing affordable to these lowest-income renters has stagnated. Thus, “in 2013, for every 100 [ELI] renter households, there were just 31 affordable and available units.” We need 8.2 million more affordable rental homes for ELI households

48. Paycheck to Paycheck, supra note 28; Kusisto, supra note 47.
49. Expanding LIHTC, supra note 36.
50. Id.; see Ellen & Karfunkel, supra note 34.
51. See Urban Land Inst. & Enterprise, Bending the Cost Curve: Solutions to Expand the Supply of Affordable Rentals 8 (2014), http://uli.org/wp-content/uploads/ULI-Documents/BendingCostCurve-Solutions_2014_web.pdf (pointing out that “as of 2011 there were 12.1 million extremely low-income renters, an increase of 2.5 million since 2007”).
52. Out of Reach, supra note 3, at 5–6; Nat’l Low Income Hous. Coal., Affordable Housing is Nowhere to Be Found for Millions, Housing Spotlight, Mar. 2015, at 1, 2.
53. Out of Reach, supra note 3, at 1.
54. Id. at 5. An extremely low-income household is defined as a household earning less than 30% of the Area’s Median Income. Id.
than we currently have.\textsuperscript{55} The lack of affordable options means that ELI households pay an inordinately high percentage of their income on housing: 75\% of them (7.8 million) spend more than 50\% of income on housing.\textsuperscript{56} On average, ELI households can afford to spend, at most, $509 in monthly rent.\textsuperscript{57} To make matters worse, over the past decade, 13\% of units that had rented for less than $400 per month have been removed from the housing stock.\textsuperscript{58}

The affordable rental-housing crisis creates the greatest harm to those at the lowest income levels, but it affects renters across the spectrum. Today’s market rents are “out of reach” for many workers, and “the number of renters spending more than they can afford on housing is unacceptably high and growing.”\textsuperscript{59} The total number of households spending more than 50\% of their income and/or living in severely inadequate housing is up 49\% since 2003.\textsuperscript{60} This means that, “[a]n unprecedented 11 million renter households—more than one in four of all renters in the U.S.—spend more than half of their monthly income on rent.”\textsuperscript{61} There is not a single state in which a minimum wage full-time worker earns enough to afford a one-bedroom apartment at fair market rent.\textsuperscript{62} A worker in America today needs to earn an hourly wage of $19.35 just to afford the

\begin{itemize}
\item \textsuperscript{55} Affordable Rental Hous. A.C.T.I.O.N., Building Affordable Housing Communities Using the Low-Income Housing Tax Credit 5 (Spring 2015), www.taxcreditcoalition.org/wp-content/uploads/2015/03/Housing-Credit-Ed-Deck-March-2015-ver-14-3.pdf; see also OUT OF REACH, supra note 3, at 7 (estimating the gap in extremely low-income housing at 7.1 million units).
\item \textsuperscript{56} OUT OF REACH, supra note 3, at 5–6; see also Nat’l Low Income Hous. Coal., supra note 52, at 2.
\item \textsuperscript{57} OUT OF REACH, supra note 3, at 6.
\item \textsuperscript{58} Affordable Rental Hous. A.C.T.I.O.N., supra note 55, at 4.
\item \textsuperscript{59} HOUSING AMERICA’S FUTURE, supra note 4, at 7; see also OUT OF REACH, supra note 3, at 1–2.
\item \textsuperscript{60} Expanding LIHTC, supra note 36.
\item \textsuperscript{61} Id. (emphasis removed); see also OUT OF REACH, supra note 3, at iii.
\item \textsuperscript{62} OUT OF REACH, supra note 3, at 1.
\end{itemize}
average priced two-bedroom rental unit. In thirteen states and the District of Columbia, the housing wage has risen above $20 per hour. The 53 million Millennials currently attempting to form households as they come of age find it increasingly difficult to afford housing because of a combination of a tight job market, flat or declining real wages, ballooning student loan debt, and increasingly high rental rates. These Millennials, who currently make up about one third of the country’s workforce, are far less likely to be able to afford homeownership than were members of prior generations when they were in their twenties. The National Housing Conference and the Center for Housing Policy reported that Millennials “have difficulty finding housing they can afford,” whether rental or owned. The study found that not only can the majority of Millennials ill afford homeownership; most must pay in excess of 30% of their income as rent. In some areas, the percentage of income necessarily devoted to rent can approach three times that affordability threshold. For example, in Los Angeles, a cashier would have to pay more than 75% of her paycheck “just for housing.” And “the gap

63. Id.
64. Id.
65. Paycheck to Paycheck, supra note 28. This study defines “Millennials” as adults who were born after 1980. See id. at 2; see also Dickerson, supra note 25, at 436.
66. See id. at 2.
67. Id. at 1. The study defines affordable rentals as a rental rate that is no more than 30% of income and defines affordable home as a home that will require a mortgage payment of no more than 28% of income if a 10% down payment is paid at closing. Id. at 2. The study found that “[h]ouseholds that spend more than 30 percent of their income on housing are often forced to cut back on other essentials, such as food, healthcare or childcare, or to live in substandard housing or overcrowded conditions.” Id. at 5; see also Maya Brennan et al., Nat’l. House. Conference, The Impacts of Affordable Housing on Education: A Research Summary (2014), http://media.wix.com/ugd/19cfbe_c1919d4c2bdf40929852291a57e5246f.pdf.
68. See generally Paycheck to Paycheck, supra note 28.
69. Paycheck to Paycheck, supra note 28, at 3.
between what people earn and the price of decent housing continues to grow.\textsuperscript{70}

Our affordable housing crisis is caused by a combination of factors, including “increased demand for rental units,” government budget cuts, “years of stagnating income at the low end of the economic spectrum,” and loss of supply from the rental housing stock.\textsuperscript{71} Low-income renters face additional and more intense challenges as the affordability of housing decreases. When lower income renters spend more on housing, they may be unable to spend enough for food, healthcare, childcare, and other essentials. “In both rural and urban America, renters are affected by the affordable housing shortage, with 49% having a cost burden [paying more than 30% of income on housing], and 27% with a severe cost burden [paying more than 50% of income on housing].”\textsuperscript{72}

To date, government responses to the affordable rental crisis have been insufficient. In 2008, the federal government established the National Housing Trust Fund (NHTF) “to address the need for additional affordable housing.”\textsuperscript{73} The NHTF purportedly created “a dedicated pool of funding” to be used to create additional units for “the lowest income, most vulnerable households” (90% for rental only and 75% of that amount for designated ELI households).\textsuperscript{74} Although desperately needed, the NHTF was immediately rendered impotent when Congress suspended its funding in 2008.\textsuperscript{75} The suspension of funding continued through 2014. Finally, starting January 1, 2015, Congress permitted funding to be

\textsuperscript{70} Out of Reach, supra note 3, at 1.

\textsuperscript{71} Affordable Rental Hous. A.C.T.I.O.N., supra note 55, at 4.

\textsuperscript{72} Out of Reach, supra note 3, at 6 (explanatory information in brackets taken from Affordable Rental Hous. A.C.T.I.O.N., supra note 55).


\textsuperscript{74} Out of Reach, supra note 3, at 7.

\textsuperscript{75} See id.
approved for the NHTF.\textsuperscript{76} Over the course of calendar year 2015, \$120 to \$300 million was slated to be allocated to the NHTF, but even if that funding was made (and it is it not yet clear that it was), it would not be sufficient to cover the growing unmet need for housing assistance.\textsuperscript{77} The National Low Income Housing Coalition has recently proposed modest changes to the mortgage interest tax deduction that would generate enough new revenue to take NHTF to scale.\textsuperscript{78} To date, however, a reduction in the mortgage income tax deduction has proved to be a political non-starter.

Federal housing assistance programs help approximately five million households afford housing, but only one-fourth of eligible households receive housing assistance.\textsuperscript{79} In 2013, “[t]here were an estimated 7.7 million unassisted very low-income renters with worst case housing needs.”\textsuperscript{80} Furthermore, supply of federally subsidized housing is shrinking because subsidy contracts are expiring.\textsuperscript{81} Lack of sufficient federal housing assistance to cover needs means that there are long (and sometimes closed) waiting lists for public and assisted housing.\textsuperscript{82} For example, “[a]fter the Chicago Housing Authority opened its waiting list for new residents for the first time in several years, 80,000 city residents applied for assistance in a single

\textsuperscript{76} Id.

\textsuperscript{77} Id. The first NHTF dollars are now available. National Housing Trust Fund, NAT’L LOW INCOME HOUSING COALITION, http://nlihc.org/issues/nhtf (last visited Oct. 29, 2016). “During 2015, States will begin developing their [N]HTF Allocation Plans and solicit input from their constituents and submit these plans to HUD along with their 2016 Annual Action Plans. HUD anticipates that grantees will receive their [N]HTF allocations by summer 2016.” \textit{Housing Trust Fund, supra note 73}.

\textsuperscript{78} \textit{Out of Reach, supra note 3, at 7.}

\textsuperscript{79} \textit{Housing America’s Future, supra note 4, at 10–11; see also Out of Reach, supra note 3, at iii (noting that “only 25 percent of eligible households receive housing assistance”).}

\textsuperscript{80} Expanding LIHTC, supra note 36.

\textsuperscript{81} Out of Reach, supra note 3, at 5.

\textsuperscript{82} See Out of Reach, supra note 3, at 5.
day."\(^{83}\) In Boston, the Massachusetts Rental Voucher program issued only seventy-three new vouchers, for which over 10,000 city residents competed.\(^{84}\) Because state allocating agencies annually receive more than twice as many applications for Housing Credit as is available, only one quarter of the households eligible for assistance receive it.\(^{85}\)

Furthermore, most affordable rental housing options are geographically clustered in impoverished, majority-minority neighborhoods, further entrenching racial housing inequality and its related social injustices. The propensity for affordable housing to be located in minority neighborhoods is well known and was one of the cited justifications for the U.S. Department of Housing and Urban Development’s (HUD) new Affirmatively Furthering Fair Housing Rule.\(^{86}\) Concentrating affordable housing in high-poverty neighborhoods keeps populations segregated by income, and this leads to disparate neighborhood opportunities offered to the poor and to the rich. It also perpetuates *de facto* housing


\(^{84}\) OUT OF REACH, supra note 3, at 5; see also Katie Johnston, *Demand Soars for Affordable Housing in Boston Area*, BOS. GLOBE (Nov. 28, 2014), https://www.bostonglobe.com/business/2014/11/28/demand-for-affordable-housing-soars/hCb4RSkLTbpqdMJR1cCYTI/story.html.

\(^{85}\) Affordable Rental Hous. A.C.T.I.O.N., supra note 55, at 5.

segregation by race. Nevertheless, there has historically been tension between fair housing advocates arguing for inclusion and affordable housing advocates claiming that the paramount concern is creating more affordable housing units, even if these are located in low-income neighborhoods. Finding a way to create a greater quantity of affordable housing options located within lower-poverty neighborhoods is the only way to address both rental affordability and neighborhood segregation housing concerns.

II. HOUSING POLICY AND THE OWNER/RENTER DIVIDE

A defensible housing policy must prioritize support of affordable rentals at least as much as homeownership. There are compelling fairness and stability problems in a housing system that forces people to choose between affordable housing and quality neighborhoods with accessible employment options and decent quality education. To achieve an integrated supply of rental homes at all income levels and in all locations, government policies and priorities must shift.

Historically, and increasingly in the past few decades, our society and government policies have deliberately rewarded and promoted homeownership as the preferable housing choice, justifying subsidies by claiming that homeownership grows individual well-being and achieves

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87. Myron Orfield, Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit, 58 Vand. L. Rev. 1747, 1753 (2005) (explaining “the deep legal and philosophical contradiction in the United States between civil rights guarantees—particularly the duty to affirmatively further fair housing—and state and federal low-income housing policy” and arguing that fair housing duty should take priority before other policy considerations); see also John J. Infranca, Housing Resource Bundles: Distributive Justice and Federal Low-Income Housing Policy, 49 U. Rich. L. Rev. 1071, 1137 (2015) (advocating for equality and utilization of the “bundle of resources approach” to achieve this end).

88. HOUSING AMERICA’S FUTURE, supra note 4, at 10.
broader civic goals.\textsuperscript{89} Property owners traditionally have been favored over renters in a variety of contexts, including historic property requirements for voting and holding public office, past and present tax policies specifically benefitting owners but not renters, and existing local land use policies that limit access of renters to high-opportunity neighborhoods.\textsuperscript{90} The government’s policy preference for homeownership reflects the “ideology of property” that justifies preferential treatment of owners, over mere occupants, based on a view that owners are better citizens and therefore more deserving.\textsuperscript{91} Until the Foreclosure Crisis, the vast majority of economic and social science research supported this centerpiece of U.S. housing policy, namely that encouraging homeownership is a proxy for and a means to achieve a wide variety of positive social outcomes, “including household wealth, savings and investment behavior, mobility, labor force participation, urban spatial structure, residential segregation, home maintenance, political and social activities, health, self-esteem, education and other children-related outcomes.”\textsuperscript{92} The research did not, however, adequately justify treating homeownership as the correct, necessary, or only means to these ends.\textsuperscript{93}

The government promotes homeownership in both direct and subtle ways. The government-created secondary residential mortgage market is one of the biggest policy-driven contributors to increased homeownership in America. The government-sponsored secondary mortgage market increases the supply of residential mortgage capital and decreases the cost of residential mortgage capital, allowing

\begin{itemize}
\item \textsuperscript{89} See Apgar, supra note 5, at 4.
\item \textsuperscript{90} Id. at 16.
\item \textsuperscript{92} Apgar, supra note 5, at 4.
\item \textsuperscript{93} See id. at 37–38.
\end{itemize}
more people to leverage the purchase of a home. The National Housing Act of 1934 led to the creation of the Federal Housing Administration (FHA) and the Federal National Mortgage Association (now officially known as “Fannie Mae” or just “Fannie”).94 By 1970, Fannie and its sibling entity, the Federal Home Loan Mortgage Corporation (“Freddie Mac” or just “Freddie”) developed into privately funded, publicly regulated, “government sponsored enterprises” (GSEs).95 The GSEs were charged with promoting housing options for Americans, and they did this by purchasing qualifying residential mortgage loans to pool and securitize in order to create mortgage capital market liquidity. The GSEs also provide capital support for multifamily housing projects.96 The GSEs have been most active and visible in their homeownership-promotion role, and over the course of a couple decades, the “robust secondary market for mortgages” which they created “markedly changed the nature of the U.S. residential


95. Van Order, supra note 94; Andrea J. Boyack, Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac, 60 AM. U.L. REV. 1489 (2011) [hereinafter Boyack, Laudable Goals].

Previously, in 1968, Fannie Mae had been split into a “private” corporation (Fannie Mae) and a publicly financed institution with explicit government guaranty of repayment of securities (Government National Mortgage Association or Ginnie Mae). Ginnie Mae bought and securitized mortgages which were made to government employees or veterans (such mortgages also being guaranteed by the government). In addition to Fannie Mae and Freddie Mac, there are twelve Federal Home Loan Banks (the FHLBs, sometimes called the “mini-GSEs”). These banks perform similar functions as Fannie Mae and Freddie Mac (providing funds to originating lending institutions).

Id. at 1495 n.19 (citations omitted).

96. See infra Section III.B.
mortgage system and increased market liquidity and capital available for home financing.”

Federal capital support for mortgage lending, first through various government programs such as FHA mortgage insurance and the GI Bill, and then also through the activities of the GSEs, has been a critical contributing factor in growing homeownership in the United States, although recently the public cost and benefit of maintaining the GSEs has been intensely debated. The GSEs’ secondary market purchases were funded by private capital, and their salutary effects in the market were intended to be tax and budget-neutral, but because of the government’s implicit (and later explicit) guaranty of Fannie and Freddie solvency, private profit in the boom times ended up being funded through socialized losses (taxpayer bailout) when the market

97. Boyack, Laudable Goals, supra note 95, at 1495–508.
In the wake of the Foreclosure Crisis, policy debates raged about the future of the GSEs. The issue has not yet been resolved.

Saving Fannie and Freddie was critical to salvaging the U.S. economy and protecting American homeowners and renters alike. After the Foreclosure Crisis, private mortgage capital dried up, and GSE mortgage capital funds served as the essential lifeblood of the mortgage market. The GSEs, together with the FHA, have funded or subsidized funding for more than 90% of single-family residential mortgage loans in the years since the Crisis. It was the existence of government-supported mortgage funding that helped homeownership in this country to increase about

100. See Boyack, Laudable Goals, supra note 95, at 1518–27. “Instead of public support paying for a public good (increased market liquidity), taxpayer funds ended up being allocated to prop up individual market players.” Id. at 1520; see also Oversight Hearing to Examine Recent Treasury and FHFA Actions Regarding the Housing GSEs: Hearing Before H. Comm. on Fin. Servs., 110th Cong. (2008) (statement of Herbert M. Allison, President and CEO, Fannie Mae) (testifying on the GSE’s post-bailout goals); Robert Van Order, Privatization Won’t Reduce Risk, N.Y. TIMES (March 8, 2011, 2:17 PM), http://www.nytimes.com/roomfordebate/2011/03/07/should-fannie-and-freddie-be-dissolved/privatization-wont-reduce-risk (“That is the paradox of guarantees. They produce incentives to take on too much risk, as they did with Fannie and Freddie after 2004 and with the savings and loans in the 1980s, but they also limit systemic risk and panic. It’s hard to have one without the other.”).


102. See id. at 1521–27. “Rescuing Fannie Mae and Freddie Mac in 2008 was necessary to keep the residential mortgage market machinery from grinding to a halt and to mitigate the impact of the crash on homeowners and homebuyers.” Id. at 1526. But compare Paul Krugman, Fannie, Freddie, and You, N.Y. TIMES (July 14, 2008), http://www.nytimes.com/2008/07/14/opinion/14krugman.html (arguing that Fannie and Freddie were not significantly to blame for the foreclosure crisis and the subsequent GSE bailout), with Bill Mann et al., The People Responsible for Fannie Mae and Freddie Mac, MOTLEY FOOL (Sept. 10, 2008, 12:00 AM), http://www.fool.com/investing/dividends-income/2008/09/10/the-people-responsible-for-fannie-mae-and-freddie.aspx (claiming that Fannie and Freddie were major contributors to the “widespread gross financial misconduct” that led to the crisis).

103. HOUSING AMERICA’S FUTURE, supra note 4, at 8.
twenty-three percentage points from 1940–2000. \[104\] And it was the existence of government-supported mortgage funding that allowed the purchase and sale of residential real estate to continue in the aftermath of the 2008 Foreclosure Crisis.

Another key, and likely more quantifiable, way that the government encourages homeownership is through tax subsidies. Homeowners enjoy a variety of tax benefits, including the mortgage interest deduction. The mortgage interest tax deduction represents a federal subsidy of homeownership costs, to the tune of approximately $80 billion a year. \[105\] If homeownership were less central to federal housing policy, then savings from reducing this huge tax subsidy could be applied towards growing and diversifying affordable rental housing. \[106\] For example, the National Low Income Housing Coalition pointed out that even a small change to the mortgage interest tax deduction would free up enough revenue to fully fund the heretofore resource-starved National Housing Trust Fund. \[107\]

Making homeownership the primary housing policy priority in lieu of ensuring the adequacy of rental housing has, in several ways, imposed huge costs on the country. Public funds that could otherwise be applied to reduce

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105. The Joint Committee on Taxation estimated that the cost of the mortgage interest tax deduction in 2016 would represent a $79.2 billion tax expenditure in 2016. STAFF OF JOINT COMM. ON TAXATION, 113TH CONG., REP. NO. JCS-1-13, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2012–2017, at 33 (Comm. Print 2013); see also Will Fischer & Chye-Ching Huang, Mortgage Interest Deduction Is Ripe for Reform, CTR. ON BUDGET & POL’Y PRIORITIES (June 25, 2013), http://www.cbpp.org/research/mortgage-interest-deduction-is-ripe-for-reform.

106. “A portion of any revenue generated from changes in tax subsidies for homeownership should be devoted to expanding support for rental housing programs for low-income populations in need of affordable housing.” HOUSING AMERICA’S FUTURE, supra note 4, at 12.

poverty and to help the most financially and socially vulnerable segments of society have instead been allocated to upper-middle income families and have been used to create incentives for homeownership even in particular personal situations where homeownership did not make financial sense. Back in 2004, William Apgar of Harvard's Joint Center for Economic Studies predicted that homeownership incentives would eventually have an adverse effect on the most vulnerable segments of the population.

As William Apgar notes:

When families take on debt that they are unable to repay, homeownership does not build wealth, but rather diverts scarce resources away from meeting other pressing needs. In the worst case scenario, lower-income homeowners may become trapped in declining neighborhoods with little access to employment, good quality schools or social services and equally limited potential for price appreciation. In these situations, all too often the dream of homeownership becomes the nightmare of a financially devastating foreclosure.108

This nightmare has indeed come true for many low-income and minority Americans who became homebuyers during the housing boom. Housing policies need to adjust to reflect the lessons that were taught so compellingly in 2007 and 2008.

Furthermore, compelling societal goals justify a recalibration of policy aims toward creating “access to decent and affordable housing” in a suitable living environment for all Americans.109 Quality housing—be it rental or owner-occupied—is a more justifiable policy aim than universal promotion of homeownership that not only excludes an

108. Apgar, supra note 5, at 6.
109. Id. at 1, 4–5. “By overstating the potential benefits of homeownership, today’s policy makers risk diverting resources away from more effective means of addressing many of the most critical problems that continue to confront low-income and low-wealth households.” Id. at 4.
increasingly large segment of the population, but also increases the likelihood of adverse economic outcomes for many vulnerable homebuyers.110

III. PUBLIC STRUCTURES TO ENCOURAGE PRIVATE INVESTMENT RENTAL HOUSING

It will take money to increase the supply of rental housing and ensure that adequate rental housing remains affordable to all segments of society. As demand for rental housing increases, of course, market forces encourages the growth of rental housing supply. Investors are abundantly aware of today’s increasing demand for rental housing, and savvy market players are already making and taking creative efforts to share in profits from this growing sector. Private developers have been creating luxury rental projects, and private equity has been pouring into Wall Street-created investment pools backed by single-family homes intended for rental.111 The forces of supply and demand still work, but there are barriers to a purely market answer to the affordable housing crisis.

One barrier to a private, market resolution is that the cost of new construction and rehabilitation outweighs rents that the lowest-income Americans are able to pay.112 One way to engage more private investment in affordable housing is to drive down associated costs, such as the cost of zoning and other regulatory approvals.113 Another way to engage more private investment is to use tax credits and other

110. APGAR, supra note 5, at 5 (writing in 2004 that “[t]oday, many low-wealth and low-income families are being “pushed” into homeownership, not necessarily because they fully appreciate the implications of their choices, but because they perceive (or rather hope) that homeownership in and of itself will help them achieve a better life”). Apgar also accurately foretells that for many low-income households, the choice to become a homeowner “is a risky and potentially costly mistake.” Id. at 6.

111. See infra Section III.B.


113. See APGAR, supra note 5, at 27–29.
government-structured or sponsored financings to increase available equity capital and reduce the cost of debt. The government also can (and does) intervene to fund the gap between what people can pay and what landlords must receive as rent. This Article focuses on government efforts to grow the supply of affordable housing rather than on the government’s demand-side housing assistance such as tenant-based and project-based housing vouchers.

Although most government-enabled funding for rental housing has been applied in the context of multifamily rentals, recently, private capital has targeted the acquisition, development, and rental of scattered single-family sites—perhaps because demand for this particular housing type has been increasing the most rapidly in recent years.116 Increases in private investment in the rental sector, however, has done little to lower rental rates because (a) rental supply has not adequately increased to meet ballooning demand, and (b) private investment in rental housing is (understandably) clustered at the highest end of the market. There remains a very real need for active government involvement in rental housing to channel

114. Streamlining applicable affordable housing program requirements can, and should, be prioritized to reduce regulatory compliance costs so that the programs can maximize funding allocation to actual creation of affordable housing. See infra Section II.A.

115. Rental prices are constrained by people’s income. Already, a significant percentage of households in America are spending so much on housing that there is very little left for food, healthcare, and other essentials. See OUT OF REACH, supra note 3, at 6. If incomes are not going to rise to allow people to pay higher prices for rentals, then housing assistance payments must be available so that lower-income renters can afford decent shelter.

116. See Ryan Kurth, Single-Family Housing—The Fastest Growing Component of the Rental Market, 2 FANNIE MAE DATA NOTE 2 (March 2012), http://www.fanniemae.com/resources/file/research/datanotes/pdf/data-note-0312.pdf (“From 2005 to 2010, single-family units as a share of renter-occupied stock grew from 30.8 percent to 33.5 percent, which was the largest increase among all rental property types.”); see also Brenton Hayden, Who is the Modern Day Tenant? Census Bureau Has New Data, BIGGER POCKETS, https://www.biggerpockets.com/renewsblog/2013/01/12/modern-day-tenant (last updated Nov. 14, 2014).
private investment into growing the supply of affordable housing. In addition, thoughtful government involvement can control the locations and rental parameters of affordable housing options in a socially positive way.

Current federal government programs that help create and preserve affordable rental housing supply include the Low Income Housing Tax Credit (LIHTC),\textsuperscript{117} the HOME Investment Partnerships Program,\textsuperscript{118} and Community Development Block Grants (CDBGs).\textsuperscript{119} Property-based Section 8 rental assistance and Housing Choice Vouchers impact supply of affordable housing, albeit in a different, less direct, way.\textsuperscript{120} Section 8 assistance takes the form of either project-based vouchers, used to pay landlords the gap between affordable rents and a landlord’s necessary return on investment, as well as Housing Choice Vouchers that tenants can use to fund the shortfall between rents they can pay and rents that landlords require. Over 5 million people in 2.2 million low-income families use housing assistance vouchers.\textsuperscript{121} These programs are valuable and likely should be expanded to better incentivize private capital investment in affordable housing, but they contribute to rental price


increases or, at the very least, do not exert a downward pressure on prices the way that increasing the supply would. Therefore, it is critical to provide more government tax credit incentives and gap funding for affordable housing developments that will grow the housing supply. Government efforts to grow affordable housing supply through tax credits and gap funding is discussed in Section III.A.

In addition to addressing the need to expand current government efforts to grow affordable housing supply, Section III.B explains why Fannie Mae and Freddie Mac (the GSEs) should expand their role with respect to investment in affordable housing throughout the country, particularly by re-defining rental projects to which their funding could be allocated, looking beyond large, multi-family buildings. The GSEs could possibly expand capital availability for rental housing development by creating more variety of government-sourced or pooled debt initiatives, such as asset-backed securitization structures for scattered site rentals. These structures could marshal widespread investment support for affordable rental housing, much as forward-looking players in the private sector have begun to do for market and above-market scattered site rentals. If properly designed and managed, securitization of rental housing mortgages could better attract private investment funds and apply these to grow affordable housing. Involvement of the GSEs, furthermore, could help ensure that rental housing is produced and maintained for all income levels, and that a wide variety of rental options are available in all neighborhoods, including neighborhoods that are “high opportunity” locations.

A. Tax Credits and Gap Funding for Affordable Housing Development

Developing real estate is expensive. The costs associated with real estate development include acquisition of land, construction of improvements, and the variety of regulatory compliance/permitting involved at all stages of development. Renting at below-market rates reduces an owner’s ability to
recoup these costs. One study estimated that land development costs would have to be reduced by 28% to make it profitable for the private sector to create affordable housing.\textsuperscript{122} Incomes cannot stretch to allow lower-income individuals to pay much more for housing, and landlords cannot make a profit by charging much less. Because rental rates are necessarily constrained by incomes, the government must step into the gap to help fund the creation of affordable rental housing so that lower rents can be charged. The two primary methods that the government currently employs to increase and subsidize private investment in affordable housing are tax credits and gap funding. If employed correctly, the combination of tax incentives and gap funding can make private investment in affordable rental projects profitable.

The LIHTC uses tax policy to encourage the production of affordable rentals.\textsuperscript{123} The LIHTC was created by the Tax Reform Act of 1986 and gives “[s]tate and local LIHTC-allocating agencies the equivalent of nearly $8 billion in annual budget authority to issue tax credits for the acquisition, rehabilitation, or new construction of rental housing targeted to lower-income households.”\textsuperscript{124} States receive low-income housing tax credits equivalent to $2.35 per person (in 2016), to be distributed in accordance with the state’s housing finance agency’s tax credit program.\textsuperscript{125} The high demand for the limited number of available credits and the shortage of affordable housing units likely justifies

\textsuperscript{122} See Affordable Rental Hous. A.C.T.I.O.N., supra note 55, at 6.


\textsuperscript{124} Low Income Housing Tax Credit, supra note 117.

doubling or even tripling the amount of tax credits available for low-income housing development.\textsuperscript{126} The LIHTC has leveraged nearly $100 billion in private investment capital, financing the development of almost 2.9 million affordable rental homes.\textsuperscript{127} During each year from 1995 to 2014, an average of approximately 1420 projects and 107,000 rental units were brought into service because of incentives provided by the LIHTC.\textsuperscript{128} Without the LIHTC virtually no affordable rental development would happen; it is a key financing source in almost every affordable rental project.\textsuperscript{129}

The LIHTC provides tax credits to investors who build, lease, and maintain affordable housing units throughout a fifteen-year compliance period.\textsuperscript{130} Housing qualifies as affordable housing for purposes of the LIHTC if rents are affordable (no more than 30\% of income) and units are rented to persons who earn under 60\% of the area’s median income (AMI).\textsuperscript{131} Generally speaking, most of the actual residents of LIHTC units earn even less than this threshold—nearly one-half are below 30\% of the area’s AMI.\textsuperscript{132}

Market real estate developments are 60–90\% debt financed, but majority-debt financing for affordable housing would be economical only if construction costs drastically fell.\textsuperscript{133} Affordable housing development is typically only 10–

\textsuperscript{126} State LIHTC agencies routinely receive applications at a rate double or triple the number of available allocations annually. \textit{Id.}

\textsuperscript{127} \textit{Id.} at 4–5.

\textsuperscript{128} \textit{Low Income Housing Tax Credit, supra} note 117.

\textsuperscript{129} \textit{See Affordable Rental Hous. A.C.T.I.O.N., supra} note 55, at 6, 11–13.

\textsuperscript{130} \textit{About the Low-Income Housing Program, supra} note 123. To qualify, rental units must be self-contained (have their own kitchen and bath). \textit{Joe Biber, CSH, Financing Supportive Housing with Tax-Exempt Bonds and 4% Low-Income Housing Tax Credits} 3 (2007), \url{http://www.csh.org/wp-content/uploads/2012/01/Report_financing-withbondsand-litch_1012.pdf}.


\textsuperscript{132} \textit{Id.} at 3.

\textsuperscript{133} \textit{See id.} at 8–10.
30% hard debt financed.\textsuperscript{134} The remainder of necessary development funds comes from equity investment and soft debt (gap funding through government programs, discussed \textit{infra}).\textsuperscript{135} The LIHTC creates an incentive for equity investment that acts as a substitute for debt.\textsuperscript{136}

Even though the raw number of the LIHTC tax credits available did not decline in, during, and after the Financial Crisis, affordable housing development was periodically constrained during the years prior to 2016 by falling Low-Income Tax Credit rates.\textsuperscript{137} In 1986, the Housing Credit rate was set at 9\% for new construction and substantial rehabilitation, and at 4\% for acquisition of affordable units, but these rates were not fixed, rather, they were to fluctuate according to a formula related to federal borrowing rates. The 4\% credit is less competitive, but creates a smaller investment incentive.\textsuperscript{138} The 9\% LIHTC units are more commonly used for more expensive supportive housing (housing combined with services, for example for seniors), but 9\% credits are more limited in number, and it is more competitive to obtain the 9\% credits.\textsuperscript{139} After the Foreclosure Crisis, low-income housing tax credit rates dipped to historic lows—what had been 9\% fell to 7.5\%, and what had been 4\% dropped to 3.2\%.\textsuperscript{140} Decreasing rates meant 15–20\% less housing credit equity became available to finance any given

\textsuperscript{134} Id. at 9.

\textsuperscript{135} Id. at 10.

\textsuperscript{136} Id. at 9.

\textsuperscript{137} David Black et al., \textit{Low-Income Housing Tax Credits: Affordable Housing Investment Opportunities for Banks}, OFF. COMPTROLLER CURRENCY 21 n.69, 24, https://www.occ.gov/topics/community-affairs/publications/insights/insights-low-income-housing-tax-credits.pdf (last revised Apr. 2014).

\textsuperscript{138} Tax-exempt bonds frequently make up the difference in necessary equity for these projects. See Biber, \textit{supra} note 130, at 2, 5, 7–9.

\textsuperscript{139} See id. at 2; Black, \textit{supra} note 137, at 10.


The permanent increase of credit rates to 9% (and 4%) was a significant way to ensure continued investment in affordable housing. An example can illustrate why. Imagine that a sample property with 88 units (22 units at 40% AMI, 34 units at 50% AMI, and 32 units at 60% AMI) costs $16.8 million to build, with $13.8 million of that cost qualifying for housing credit.\footnote{A 9% rate would bring in $1.24 million in annual credits to the project, creating incentives for $11.78 million in private investment (assuming the current rate of}
$0.95 tax credit price per credit dollar). Holding everything else constant and merely dropping the housing credit rate to 7.47% (as the housing credit rate did in February 2015, for example), would reduce the amount of annual housing credits to the project to only $1.03 million, meaning that only $9.79 million of equity investment would be made available—a reduction of 17%. This would reduce the housing credit value by $2 million, and that shortfall would have to be made up somewhere else (A smaller project? Fewer affordable units?).

The Protecting Americans from Tax Hikes Act of 2015 stabilized the LIHTC rates, but even more could be done to improve effectiveness of the program. Because investors apply for tax credits at a rate of two to three times greater than the number of credits available, increasing the volume of available credits could easily grow affordable housing supply. Even just increasing available credits by 50% would allow 350,000–400,000 additional affordable units to become available over ten years. Such an increase is justified. After all, Congress has not increased the volume of available credits for decades even though the population of renters has been growing at an increasing rate. In addition, because the government controls the program, it could use the tax credit as a vehicle to break up concentrations of poverty, perhaps by mandating that recipients locate LIHTC projects in better neighborhoods. Increasing the number of LIHTCs available and adding a location requirement could allow not only for an increasing quantity of affordable rental units to be

145. Id.

146. Id.

147. This example is taken from the tables and charts included in Building Affordable Housing Communities using the Low-Income Housing Tax Credit. Id. at 10.

produced, but also could increase the number of affordable housing units located in better quality neighborhoods.\textsuperscript{149} Increasing the employment of LIHTCs in high-opportunity neighborhoods would be a key way to increase neighborhood integration, because projects in higher-cost markets often require more financial support to be feasible than do projects in neighborhoods of concentrated poverty.\textsuperscript{150} This integration component is a vital next step in affordable housing which must be made available in various high-opportunity neighborhoods to be sustainable and create more equitable outcomes.\textsuperscript{151} De-concentration of LIHTC housing would lead to de-concentration of poverty and integration of minority households.\textsuperscript{152}

The government could also expand the positive effect of the LIHTC by allowing credits to be used more flexibly, in integrated market/affordable developments, for example. The Brookings Institute suggested that the LIHTC could be used not only to promote development of more affordable housing units, but also to help create vibrant integrated “revitalizing communities” and “opportunity-rich communities.”\textsuperscript{153} Development flexibility could also be channeled to integrate affordable rental units in high-opportunity neighborhoods. For example, LIHTCs could also be made available for the acquisition, rehabilitation, and rental of scattered site single-family homes (following the recent Wall Street trend) and two to four unit small rental

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{149} See An Overview of HUD’s Proposed Affirmatively Furthering Fair Housing Rule, supra note 86, at 2, 7, 10, 14; Devaney, supra note 86; Katz & Turner, supra note 86, at 2; Orfield, supra note 87, at 1753, 1789–91; see also Infranca, supra note 87, at 1137.
\item \textsuperscript{150} CANTWELL, supra note 125, at 4, 7. These concepts are endorsed in HOUSING AMERICA’S FUTURE, supra note 4, at 92, 99, 103.
\item \textsuperscript{151} FURMAN CTR. FOR REAL ESTATE & URBAN POLICY & MOELIS INST. FOR AFFORDABLE HOUS. POLICY, WHAT CAN WE LEARN ABOUT THE LOW-INCOME HOUSING TAX CREDIT PROGRAM BY LOOKING AT THE TENANTS? 2–4, 7–8 (2012).
\item \textsuperscript{152} See id.
\item \textsuperscript{153} See Katz & Turner, supra note 86, at 11–12. “Revitalizing communities” referred to communities with “the broadest possible mix of incomes.” \textit{Id.} at 12.
\end{enumerate}
\end{footnotesize}
operations, and it is simpler and more politically feasible to integrate single-family rental units in high-opportunity neighborhoods than it would be to build large multi-family rental buildings in those neighborhoods.\textsuperscript{154} Senator Maria Cantwell, one of the authors of the 2015 Protecting Americans from Tax Hikes Act, recently introduced legislation that would “[e]xpand LIHTC allocation by 50 percent” and “[p]romote broader income mixing in LIHTC projects.”\textsuperscript{155} Senator Cantwell, also suggests that states should be given more flexibility “in financing projects targeting homeless individuals and extremely low-income families.”\textsuperscript{156}

To date, the LIHTC has not focused on this qualitative aspect of affordable housing and has stressed quantity over locality; however, broadening the LIHTC in these ways could increase the quantity of affordable housing available, and providing either more location-targeted requirements or, conversely, allowing states the flexibility to pursue fair housing goals through design and application of tax credits could increase the quality of such housing in terms of the ever-important location, location, location.\textsuperscript{157}

Tax credits alone are usually not enough to encourage adequate private investment in affordable housing, particularly housing that is affordable to extremely low-income renters. There are several ways that the government supports additional financing to supplement the LIHTCs, including having Fannie or Freddie provide conventional


\textsuperscript{155} CANTWELL, supra note 125, at 6–7. This legislation is endorsed by the report, “Housing America’s Future.” HOUSING AMERICA’S FUTURE, supra note 4, at 11.

\textsuperscript{156} CANTWELL, supra note 125, at 7.

\textsuperscript{157} See An Overview of HUD’s Proposed Affirmatively Furthering Fair Housing Rule, supra note 86, at 2, 7, 10, 14; Devany, supra note 86; Katz & Turner, supra note 86, at 2; Orfield, supra note 87, at 1753, 1789–91; see also Infranca, supra note 87, at 1137.
loans for multifamily projects, using federal programs to source soft/gap financing, and raising funds through the issuance of tax-exempt (or taxable) bonds. Federal gap financing is discussed below, and GSE finance is discussed in Section III.B. Bond financing is in some ways preferable to conventional financing under GSE programs, because GSE financing usually involves “shorter maximum terms to maturity, more restrictive amortization requirements, higher minimum debt-service coverage ratios and higher loan-to-value thresholds than are applicable to bond-funded loans.”

Additional funding, whether through bonds or soft financing or even the GSE programs, may help make housing more accessible to extremely low-income tenants.

Tax-exempt bonds play an important role in financing about 40% of LIHTC developments. Local bonds used with federal housing credits have financed the development of over 3 million affordable homes, and are particularly useful in funding higher-cost developments, such as supportive housing for seniors. Tax-exempt bonds have a lower interest rate and come with tax credits, but the federal government caps their availability. Taxable bonds are


159. See Biber, supra note 130, at 2–3, 5; Cooper, supra note 158, at 28.

160. See Michael A. Spotts, Enterprise, Giving Due Credit: Balancing Priorities in State Low-Income Housing Tax Credit Allocation Policies 4 (2016); Biber, supra note 130.

161. “Because interest paid on tax-exempt debt is exempt from federal (and often state) income tax, investors require less interest than they would from taxable debt to produce the same after tax return.” Cooper, supra note 158, at 3–4.

162. The “volume cap” for tax-exempt bonds imposed by the IRS Code in 2015 is the greater of $100 per state resident or $301,515,000. IRS Publishes Housing Credit and Bond Caps for 2015, Nat’l Council State Hous. Agencies (Nov. 3, 2014), https://www.ncsha.org/blog/irs-publishes-housing-credit-and-bond-caps-2015. Volume cap figures are published by the IRS on an annual basis. See id. All eligible projects (housing, infrastructure, etc.) must compete for this financing. Biber, supra note 130, at 3. Tax-exempt bond funding is also constrained by the
uncapped, but have higher interest rates and cannot be used together with tax credits.\textsuperscript{163} Only local public (or perhaps quasi-public) agencies, such as the state Housing Finance Agency or city housing or redevelopment agencies, can issue tax-exempt bonds for multi-family rental housing.\textsuperscript{164}

In addition to local bond funding, federal grant programs, such as the HOME Investment Partnerships and the CDBG Programs provide funding to supplement LIHTC-inspired equity investment in affordable housing developments. The HOME Program provides formula grants to participating jurisdictions for them to use (often in conjunction with local non-profits) in funding acquisition, building, and rehabilitation of affordable housing.\textsuperscript{165} “HOME is the largest Federal block grant to state and local governments designed exclusively” for use in support of affordable housing.\textsuperscript{166} Participating jurisdictions must provide twenty-five cents of value for each federal dollar used.\textsuperscript{167} HOME grants could also be tailored to promote integration of affordable rental units in lower-poverty neighborhoods. Once again, this might work better if affordable housing development could think outside the (big) box of large apartment complexes and consider funding smaller 2–4 unit buildings and single-family rental options.

The CDBG program provides communities with development resources. Under this program, annual grants are allocated to larger cities to help in the development of “a suitable living environment” for low- and moderate-income

\textsuperscript{95/5 Requirement} that mandates at least 95% of bond proceeds be allocated to costs incurred after the bond issuance. \textit{Id.} In addition, only 25% of bond proceeds can be allocated to acquisition costs. \textit{Id.}

\textsuperscript{163} \textit{See id.} at 2.

\textsuperscript{164} \textit{Id.} at 3.

\textsuperscript{165} Some grants also may be used to provide direct rental assistance to low-income renters. \textit{HOME Investment Partnership Program, supra} note 118.

\textsuperscript{166} \textit{Id.}

\textsuperscript{167} \textit{Id.}
households. The CDBG works with the Neighborhood Stabilization Program, targeting the neighborhoods that were the “hardest hit” by the Foreclosure Crisis in order to rehabilitate homes and revitalize the neighborhood. Metropolitan cities with at least 50,000 people and urban counties of 200,000 or more are entitled to funding under the CDBG program, and smaller non-entitlement localities may receive funds that have been allocated to states for distribution. In order to obtain funding under these grants, the grantee must first develop a plan that provides for citizen participation in the community, with a particular emphasis on citizenship participation by low/moderate income residents in slum or blighted areas. Traditionally, the CDBGs have been only allocated to blighted areas, but in order to create more integrated housing options, the program could be expanded to apply to affordable housing creation within non-blighted areas, especially in “neighborhoods of opportunity.”

Although federal grants could (and should) do more to improve the quality of location for affordable housing developments that they support, arguably the biggest problem in gap funding by the government is that there simply is not enough of it. A decade ago, housing analysts called upon the government to expand the availability of gap funding and private equity capital incentives, indicating that it was critically important to expand the supply of affordable rental housing across the nation. Unfortunately, during the past decade of economic recession, federal funding for housing affordability grants programs (and other housing assistance, such as voucher programs), was slashed rather than augmented. Instead of increasing grant funding in

168. Community Development Block Grant Program—CDBG, supra note 119.
169. Id.
170. Id.
171. See id.
172. See Katz & Turner, supra note 86, at 14.
response to increasing rental demand, grants and soft financing through the HOME and CDBG programs is growing even scarcer. For example, funding for HOME Programs has been cut 44% since 2011.

Today, gap funding is inadequate to keep up with growing demand for new units and necessary rehabilitation, let alone make up for the recent budget crisis years that caused the supply shortfall to worsen. Funding needs to be sufficient both to build new affordable rental units and maintain and renovate the numerous affordable housing units that are older and rapidly deteriorating. For example, the Center for Budget and Policy Priorities estimates that $26 billion is immediately required to adequately rehabilitate and maintain existing public housing. Proposed legislation, such as the Housing Opportunities Through Modernization Act of 2016, would try to address the supply shortfall and the dire and unmet need for affordable housing renovation by giving local agencies greater flexibility in the use of public funds.

Another deficiency in current government tax credit and grant programs concerns the type of housing to which the programs apply. Affordable housing grant and tax credit programs typically subsidize larger properties and projects,

174. Id.
175. See APGAR, supra note 5, at 3.
177. Id. The House of Representatives unanimously passed the Housing Opportunities Through Modernization Act (H.R. 3700) in February 2016. Id. If it passes the Senate and is signed into law, the Act will be the first major authorizing federal legislation affecting voucher and public housing programs since the Quality Housing and Work Responsibility Act in 1998. Will Fischer, Housing Bill Unanimously Passed by House Would Build on Effectiveness of Rental Assistance, CTR. ON BUDGET & POL’Y PRIORITIES http://www.cbpp.org/research/housing/housing-bill-unanimously-passed-by-house-would-build-on-effectiveness-of-rental (last revised Feb. 17, 2016).
not smaller ones.\textsuperscript{178} It is challenging for owners of smaller rental properties to obtain adequate capital to maintain the units. This is one reason why scattered single-family rentals are being funded through the private market, even though multifamily housing projects are often funded with government participation and input. Again, a complete picture of the affordability conundrum for rental housing must acknowledge that it is not just a question of how many units are available, and how much rental charges will be, but also where the rental options are located and the housing type being offered for rent.

B. Expanding the Rental Market Role of the GSEs

Fannie Mae and Freddie Mac are famous for the pivotal role they have played in encouraging homeownership, but Fannie and Freddie also provide critical support for multifamily rental housing development.\textsuperscript{179} The GSEs are the primary lender for multifamily housing developments. For example, in 2008, Fannie Mae and Freddie Mac provided funding for 84\% of all mortgage loans secured by multifamily rental buildings.\textsuperscript{180} In 2014, the GSEs provided over $57 billion of funding for multi-family loans, although this amount was well below the 2007 GSE multi-family funding amount of $67 billion.\textsuperscript{181} In terms of market share, however, the GSE’s once dominant position has recently fallen to just under 30\% of all multi-family mortgage originations.\textsuperscript{182}

GSE-funded mortgage loans to multifamily housing projects do not represent direct government aid—rather,
they are a government-structured channeling of private investment capital into certain investments, much in the same way as Fannie and Freddie channel capital into the single-family residential mortgage market by purchasing, pooling, and securitizing prime loans. The GSEs stabilize home mortgage capital, and have contributed to America’s residential mortgage capital flows being, arguably, the most consistent in the world.¹⁸³ Fannie and Freddie play such a dominant role in residential mortgage financing that non-governmental mortgage finance providers, such as banks, pension plans, and life insurance companies, have historically focused on purely commercial projects rather than multifamily residential developments.¹⁸⁴ In the rental market, the GSEs play a less visible but still vitally important role. Fannie and Freddie attract and allocate investment to multifamily mortgage loans, contributing to the production of millions of units of market-rate rental housing.¹⁸⁵

Fannie’s and Freddie’s homeownership promoting role came under fire during the Foreclosure Crisis in 2008 when the government placed both of the GSEs into conservatorship because of losses related to home mortgage loans. Post-Crisis proposals called for termination of the GSEs, but generally neglected to consider Fannie and Freddie’s contribution to


¹⁸⁵. NMHC Perspective, supra note 180.
the multifamily rental market. When concerns about inadvertent, adverse impacts to the rental market from winding up the GSEs did come up, government officials made assurances that winding down Fannie and Freddie would not necessarily mean the end of governmental capital support of multifamily rental development. Everyone who recognized Fannie and Freddie’s role in rental housing capitalization agreed that the loss of GSE support of multifamily rental capital would have been catastrophic. Because the GSEs had not experienced losses in the multi-family sector, and because of the continuing critical need to encourage rental housing production, many industry experts remained confident that Fannie and Freddie would continue their role in providing capital to market-rate rental developments. For example, Richard Campo, CEO of Camden Properties Trust, stated “[t]he idea that the government is going to do something negative to affordable housing in this interim period . . . seems pretty far fetched.” In spite of Campo’s assertion that government support of affordable rental housing was secure, however, government funding of affordable housing initiatives was gutted in the aftermath of


188. See id. at 7. Had the GSEs not continued funding multifamily housing from 2008 to 2010, there would have been widespread foreclosures on performing apartment property loans as owners of these projects would have been unable to obtain capital to re-finance at maturity. See generally Joint Ctr. for Hous. Studies, Harvard Univ., Meeting Multifamily Housing Finance Needs During and After the Credit Crisis: A Policy Brief 12–13 (2009) (warning that without loan purchases by Fannie Mae and Freddie Mac, “apartment transactions could come to a near standstill”).

189. Timiraos, supra note 180 (alterations in original).
the Foreclosure Crisis and continues to suffer government budgetary shortfalls at every level today.\textsuperscript{190}

Unlike federal aid programs that focus on significantly below-market housing that would be affordable to low- and extremely low-income renters, GSE support of multifamily development tends to grow the supply of rental units that are at-market or slightly below-market.\textsuperscript{191} About 90\% of the rental units financed through the GSE programs, however, have been affordable to families at or below median income.\textsuperscript{192} The GSE lending and securitization models coupled with the low default rates for rental housing loans mean that the financing of such affordable units has not only been essentially tax and budget neutral to date, but has actually earned money for the government to use elsewhere.\textsuperscript{193} Because of the federal deficit crisis, it is particularly helpful (and hopeful) to focus on efforts that increase the overall supply of rental housing without requiring a government subsidy,\textsuperscript{194} and Fannie and Freddie

\begin{footnotesize}
\textsuperscript{190} See supra notes 140–143 and accompanying text.

\textsuperscript{191} This is by design: The GSE’s multifamily rental finance role was envisioned to allocate private funds to provide housing to those who can afford to pay reasonable housing costs, freeing up governmental funds to provide subsidies to people who cannot. See Boyack, \textit{Laudable Goals}, supra note 95, at 1506. “Fannie Mae and Freddie Mac developed expertise in profitably providing financing to the middle of the rental market, where housing is generally affordable to moderate-income families.” \textsc{Treasury/HUD Report}, supra note 186, at 20. The vast bulk of below-market housing costs, on the other hand, are provided through the FHA. See Anthony Pennington-Cross & Anthony M. Yezer, \textit{The Federal Housing Administration in the New Millennium}, 11 \textsc{J. Housing Res.} 357 (2000).


\textsuperscript{193} “The multifamily portfolio has earned net revenues of \$2 billion for the taxpayers since conservatorship.” Id.

\textsuperscript{194} See \textit{Rental Housing Finance}, supra note 184. Approximately 30 million of the 36.7 million rental units in America have not been subsidized by the federal government. Id. at 9; 2008 \textsc{Harvard Balancing Study}, supra note 10, at 12. Even so, the specter of un-affordability of housing hangs over rental housing as a whole, since renters spend a disproportionately higher share of their income to meet their housing needs. 2010 \textsc{Harvard Housing Study}, supra note 10, at 27; see also supra Part I.
\end{footnotesize}
have been able to fund multifamily rental housing at little to no taxpayer cost, even during the Financial Crisis.\textsuperscript{195}

Providing liquidity for market-rate multifamily rental mortgages may seem less related to housing affordability than direct aid to low-income tenants and their landlords, tax credits, and gap funding of low-income rental projects, but capital access does play a vital role in helping the housing market better respond to burgeoning rental demand nationwide. Increased flow of mortgage capital lowers the cost of producing rental units, and allows suppliers to respond more cost-effectively to housing consumers’ demands. Lower costs and higher availability of capital for rental housing projects will help to naturally grow the supply of rentals, and increased supply will put downward pressure on prices, keeping market rents from getting too high. Because rental affordability is currently an issue for almost all renters—not only those at the lowest end of the income spectrum—this sort of market solution is a key aspect to solving the housing affordability puzzle.

Not only do the GSEs increase multifamily mortgage capital availability at little to no taxpayer cost on the front end, this is done with significantly less taxpayer risk on the back end because it is less likely that government funds will be expended in a bailout due to rental project mortgage defaults than due to owner-occupied mortgage defaults. To date, defaults in the multifamily rental sector have been extremely low; less than 1% of the GSE-guaranteed loans have defaulted.\textsuperscript{196} One reason that the multifamily housing loan portfolios of the GSEs did not contribute to entity losses and taxpayer bailout even when home mortgage sectors were

\textsuperscript{195} See \textit{Rental Housing Finance}, supra note 184, at 10; see also Michael Stoler, \textit{Fannie, Freddie, and the Multifamily Market}, N.Y. SUN (Sept. 18, 2008), http://www.nysun.com/real-estate/fannie-freddie-and-the-multifamily-market/86102 (explaning that the multifamily housing sector was “holding up the best” even at the height of the crisis, but that if the GSEs focused on their single family problems and ignored multi-family lending, that could change).

\textsuperscript{196} \textit{Rental Housing Finance}, supra note 184, at 11–12; \textit{NMHC Perspective}, supra note 180.
plummeting is because multifamily rental projects remained well underwritten, even during the heyday of bad mortgages (2005–2007). In addition, because a far lower percentage of multifamily loans are securitized (compared with securitized single-family home mortgages), a significant portion of multifamily loans remain in GSE portfolios, giving the companies more “skin in the game.” It is less necessary and more difficult to pool and securitize multifamily rental loans because they are individually bigger and more idiosyncratic than single-family residential mortgages.

197. One reason that rental properties in general have fared better during the housing crisis is that revenue-producing properties were usually subject to a different pricing methodology, namely stream-of-income method. Valuation based on the stream of income was linked to a less-manipulable variable, namely salary levels, and these provided some constraint in appraisals. The bubble did not grow as fast or as large in sectors where housing was priced according to the stream-of-income method, which meant the fundamentals upon which a loan was assessed and underwritten were more reliable and the loan less risky. For an in depth discussion of stream-of-income valuation and other more bubble-prone systems, see Andrea J. Boyack, Lessons in Price Stability from the U.S. Real Estate Market Collapse, 2010 Mich. St. L. Rev. 925, 932–36 (2010).


199. “Larger individual loans make the risk harder to spread through pooling (multifamily loan pools typically have fewer, larger mortgages), and lower uniformity of these transactions increases the costs of credit and collateral due diligence as well as the cost of pricing and underwriting the loans.” Boyack, Laudable Goals, supra note 95, at 20. Commercial loans generally share these characteristics as well: they are larger, more idiosyncratic, and less uniform. In addition, there is no federal or quasi-federal agency guaranty for commercial loans, so all commercial mortgage lending operates outside the GSE sphere. This is why commercial lending lagged residential mortgage backed securitization both in terms of timing (starting later historically) and in terms of volume (lower amounts of CMBS). See Sophie Ahlswede & Tobias Just, Commercial Real Estate Loans Facing Refinancing Risks: CMBS Only Part of a Growing Problem, DEUTSCHE BANK RES. 7–9 (July 6, 2010), http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD0000000000259822.PDF. The only time CMBS volume represented significant market share was in the five to ten years prior to the housing crisis, suggesting it was fueled by over-speculation rather than stable investment capital choices. See id. at 8; see also John B. Levy, CMBS Volume Hits Record High, NAT’L REAL EST. INV. (Aug. 1, 2005), http://nreionline.com/commentary/cmbs-volume-hits-record-high. Global CMBS issuance hit its highest point ever in 2007 at a volume of $324 billion—five times the volume of 2000. Ahlswede & Just, supra, at 8. Then the CMBS market
Even though Fannie and Freddie have long played a key and cost-effective role in supporting affordable housing, their participation in the multifamily market has recently steeply decreased. Some of this reduction was motivated, perhaps, by the Federal Housing Finance Agency (FHFA) Strategic Plan introduced in 2012 that mandated reduced volumes of lending in multiple sectors for both Fannie and Freddie, including lending in the multi-family market. The Strategic Plan required each of Fannie and Freddie to cut their multifamily rental lending by at least 10%, supposedly in order to entice more private capital investment to support multifamily rental development. In the wake of this regulatory mandated reduction, not only did multifamily mortgage volume fall by nearly 13%, but the aggregate loss of lending in three underserved segments of the rental market fell by much more—lending to projects involving subsidy-dependent targeted affordable multifamily housing, manufactured housing, and small multifamily projects suffered a combined reduction of 24% in 2013. In 2014, the FHFA, which oversees the GSEs, took steps to exempt these underserved market segments from mandatory volume reductions for the GSEs; but nevertheless, the lending volume for these categories fell by another 15% that year.

These recent reductions in the volume of GSE support of rental housing is rather alarming, especially considering the plummeted over the following year to $25 billion in 2008—only about 10% of its value just the year before. Id. In 2008, however, CMBS volume fell dramatically. Al Yoon, CMBS Volume Now Seen Plunging to Six-Year Low, REUTERS (Apr. 3, 2008), http://www.reuters.com/article/mortgages-commercial-volume-idUSN0342726520080403; Jim Clayton, P&Ls: Pricing, Liquidity and Leverage, PREA Q., Winter 2009, at 46. Multifamily housing has not suffered from any such drop, however, since it has been—and is still—supported through GSE secondary market purchasing.

200. See generally KAUL, supra note 181.
201. See id. at 6–8.
202. See id. at 6.
203. Id.
204. Id. at 6–7.
increasing demand for rentals and the intensifying crisis in rental affordability.\textsuperscript{205} Not only should the GSEs continue to play their critical role in providing capital liquidity to market multifamily rental projects, this role should be expanded. The volume of rental housing capital support must be augmented, not reduced, particularly in the context of affordable housing development.

In addition to robustly supporting multifamily rental development, Fannie and Freddie should lend to smaller rental projects as well. Under the FHA’s definitions, “multifamily” means a structure with five or more residential units, and “single-family” lumps single-family homes in with duplexes and three- and four-unit dwellings.\textsuperscript{206} GSE mortgage programs for rental projects focus almost exclusively on “multifamily” rentals. The “single-family” mortgages sponsored by the GSEs, on the other hand, usually require owner-occupancy. This means that there is virtually no GSE capital support for single-family rental homes, as well as rentals of units in two, three, or four-dwelling unit structures.

Single-family rentals, including one-dwelling-unit homes as well as two- to four-unit houses, make up 53\% of all rental units in the United States, 22.6 million units of housing.\textsuperscript{207} By grouping one- to four-unit buildings into “single family” wherein owner-occupancy is key, the GSEs have ignored half of the rental market. These rather shortsighted groupings of housing types therefore end up shutting many rental options out from public financing, which

\textsuperscript{205} \textit{See, e.g.}, \textit{Freddie Mac, Multifamily Outlook 2016: Executive Summary} 1, 5 (2016) (explaining that “[d]emand for multifamily rental housing was higher than expected in 2015, absorbing much of the newly completed supply,” and that “[t]he multifamily sector performed better than anticipated in 2015 despite the large flow of new completions to the market”).

\textsuperscript{206} \textit{Apgar, supra note 5, at 27.}

perhaps explains why Wall Street has found such fertile
ground for investment in single-family rentals. Even
though private investment in housing is desirable, public
funding permits more control of rental rates and location and
may help achieve fair housing objectives at the same time as
affordable housing needs are addressed.

There is no logical reason why GSE financing programs
for rentals should not be expanded to cover smaller scattered
site rental projects of one to four units. In fact, the GSEs
could even do much better with respect to financing five to
fifty unit buildings. Smaller multifamily rental
developments traditionally have struggled with more limited
financing (in both the public and private sectors) simply
because secondary market resale and securitization of these
middle-sized idiosyncratic mortgages are more challenging
and expensive. Nevertheless, these sorts of projects are
incredibly important in order to have neighborhoods that
combine owner-occupancy options with rental options of all
types and for all income levels. GSE use of securitization to
support rental housing could, therefore, be improved and
expanded (even if it requires a partial federal subsidy to do
so).

Wall Street has seized upon this gap in federally
sponsored funding, recently targeting smaller rental projects

208. See infra notes 194–196 and accompanying text.

209. See APGAR, supra note 5, at 27; see also MAGER & GOODMAN, supra note 207, at 2–4.

210. See id.

211. See id.; CHRISTOPHER E. HERBERT, ABT ASSOC., AN ASSESSMENT OF THE
AVAILABILITY AND COST OF FINANCING FOR SMALL MULTIFAMILY PROPERTIES (2001),

212. Apgar suggests that affordable housing finance go beyond project-specific
financing and more aggressively use capital markets to raise funds by
aggregating, pooling, and syndicating mortgage capital (perhaps both equity &
debt). See Apgar, supra note 5, at 8. Apgar notes that aggregating and
securitization can create efficiencies, noting that affordable housing projects are
high performing/low risk investments. See id.
as untapped sources for new real estate investments.\textsuperscript{213} Analysts now predict a near trillion-dollar single-family rental securitization market by 2019.\textsuperscript{214} From 2012 to 2014 alone, private equity firms and institutional investors invested nearly $20 billion in rental real estate, acquiring over 200,000 single-family homes (mostly in foreclosure sales) to serve as assets backing securitized debt pools sold to investors.\textsuperscript{215} If this structure sounds eerily familiar, it is because it is similar to the private label mortgage-backed securitization that funneled capital into residential mortgage markets and drove up home purchase prices creating a housing bubble during the first several years of the twenty-first century. Of course, this bubble was followed by the devastating Foreclosure Crisis in 2007–2008. In both mortgage-backed securitization (MBS) and single-family rental (SFR) securitization, mortgage-backed debt obligations are sold off to investors as securities, and the equity investment capital is used to acquire additional mortgage interests. In 2014 and 2015, however, title to collateral real estate was held by a Wall Street firm’s subsidiary company rather than by thousands of individual homeowners, and instead of tens of thousands of individual loans secured by individual mortgages, there is typically one huge loan to the company, secured by thousands of


mortgages on the individual properties it owns and rents out.\footnote{216} Although the structure of SFR securitization is basically the same as pre-crisis MBS, in theory, SFR securitization should be less risky (in some ways) because a diversified corporate entity, rather than a collection of individual owners, holds the title to the collateral, and because the properties’ collateral value derives from a rental income stream, not from a predicted resale value and appreciation gains. SFR securities have proved popular in the short term. In just two years since their creation, these SFR securitizations, have attracted more than $13 billion in investment dollars.\footnote{217}

The trend of Wall Street investment in, and securitization of, scattered-site rental properties could be either troubling or encouraging (or, ironically, both). On the one hand, some commentators decry the transfer of ownership from individual homeowners to corporate entities because this could represent a parallel transfer of wealth from households to financial institutions. On the other hand, transfer of ownership from homeowners who lost their homes in foreclosure is already, in most cases, a foregone conclusion, resulting from the bad loans made during the housing boom. A good case could be made that institutional investment purchase of these homes at foreclosure created a neighborhood benefit, because the alternative may well have been that foreclosing mortgage lenders would have taken title to these properties and would have continued to hold them as vacant post-foreclosure inventory (REO properties). Multiple vacant REO properties in a neighborhood are


devastating to the entire community, including the non-defaulting homeowners.\textsuperscript{218} If Wall Street investment in foreclosed homes prevents that reality, perhaps it is the lesser of two evils.\textsuperscript{219}

Wall Street’s SFR sector is new and notable and raises intriguing possibilities (good and bad), but to date, institutional investment in scattered site rentals remains very limited—a mere 2\% of the existing single-family stock.\textsuperscript{220} Even though this housing type provides some of the most affordable rental options in the market, the vast majority of single-family rentals are financed without institutional or public support. This leads to the conclusion that if capital access were improved for this sector, such housing types could become even more affordable to renters. Currently, however, neither the LIHTC nor GSE multifamily loans are available and allocated to single-family rentals.\textsuperscript{221}

The GSEs have an important role to play in the market, occupying a place in between purely private Wall Street real estate investment structures and publicly funded housing assistance, tax credits, and grants. If properly structured, the GSEs could seize more control of rental placement and rental rates in their financed projects, because the capital provider role will give the GSEs (and the FHFA) a means to exert oversight over landlords. At the same time, this oversight need not be purchased with taxpayer funds, because GSE financing structures do attract private

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218. See Boyack, \textit{A New American Dream for Detroit}, supra note 154, at 26–27.


220. \textit{Magder & Goodman}, supra note 207, at 3.

221. \textit{Magder & Goodman}, supra note 207, at 5. HUD’s 223f multifamily loans and loans under the Community Reinvestment Act are likewise unavailable to single-family rental developments. \textit{Id.}
\end{flushleft}
investment. The GSEs could therefore even further enlarge private sector funding of housing.

Fannie and Freddie’s investment in rental project mortgages can also work to ensure diversity on two levels: sources of funding and location of rental housing. GSE involvement in securitization ensures that many types and sizes of lenders (including neighborhood and community banks, credit unions, etc.) can access the secondary mortgage market.222 The only way that such smaller lenders can realistically compete with Wall Street investment firms is through partnering with the GSEs, much as they do in the realm of single-family mortgage lending. In addition, Fannie and Freddie could, and likely should, promote efforts to de-concentrate the location of rental housing and encourage a wide variety of types of rentals in every residential neighborhood. In this way, the GSEs could help not only to address the growing rental population and the housing affordability crisis, but also make inroads in de-segregating housing across America.

CONCLUSION

America’s rental housing is inadequate in terms of location, quality, and affordability. Based on the current “sweeping changes” in the country’s demographics and

222. HOUSING AMERICA’S FUTURE, supra note 4, at 8–9, (calling for greater private sector funding of housing and calling “the dominant position currently held by the government” capital “unsustainable”). The report advocates for “greater participation by risk-bearing private capital” and a “greater diversity of funding sources.” Id. Interestingly, this report does not recommend an expanded securitization role for the GSEs, and in fact, advocates winding down Fannie and Freddie and replacing them with a wholly-owned government corporation that would provide a government guarantee backstop for owner and renter markets. See id. The report suggests that all mortgage-backed securitization should be privatized (“originators, issuers of securities, credit enhancers, and mortgage servicers—should be private-sector entities fully at risk for their own finances”), id. at 9, but this suggestion ignores the comparative disadvantage that smaller lenders (for both homeowner purchasers and rental projects) would have in comparison to Wall Street. Centralizing securitization in Wall Street in itself creates problems.
economy, these inadequacies are likely to grow. Federal housing policies do not sufficiently consider and address the growing unmet needs of almost half of the nation’s residents who rent, rather than own, their homes. This must change. Although homeownership remains an individual goal for many Americans, from a social policy standpoint, it is more pressing that the government allocate its primary efforts and funds toward improving universal adequacy of rental housing in terms of its quality, location, and affordability.

The federal government already plays a critical role in subsidizing the development of affordable rental housing, but these efforts would have to be quadrupled just in order to cover existing needs. The significant shortfall in affordable housing availability justifies diverting taxpayer support of homeownership—for example, from the $80 billion mortgage interest deduction subsidy—toward an expanded number of low-income housing tax credits and gap funding (as well as housing assistance vouchers). Expansion of federal affordable housing funding should simultaneously strive to de-concentrate poverty and increase neighborhood diversity.

Government support of rental housing can also occur through less expensive, more creative, structuring efforts, however, and there is no budgetary reason not to expand such efforts. Fannie Mae and Freddie Mac have long played a pivotal role in assembling and allocating private capital to multifamily rental projects, and this role has helped support the growth of rental housing supply. These efforts must continue at least until rental rates become affordable. In addition, GSE and other funding methods should be broadened to apply to more than large multifamily projects. Channeling public and private funding into other types of rental housing, including in particular scattered site single-family and two to four unit housing projects, would reduce costs associated with these dwellings and therefore improve rental affordability. More than half of the nation’s rental

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223. See Nelson, The New Urbanity, supra note 2, at 192 (calling the shift to rental households “as sweeping a change to America’s metropolitan landscape as the half century after World War II”).
units are outside of large multi-family projects, and these housing types should not be forgotten or ignored. For example, if the GSEs supported single-family rental housing at the secondary mortgage market level, capital costs for such housing would drop, as would the landlords’ required rental rates.

Finally, growing the supply of affordable housing should be done in a way that specifically promotes fair housing goals as well. Currently, publicly subsidized housing is concentrated in high-density structures in low-income neighborhoods. If tax credits, grant funding, and GSE-supported lending were allocated preferentially to affordable rental housing located in high-opportunity neighborhoods, more affordable housing options would be located in such neighborhoods, helping to de-concentrate poverty and integrate populations in terms of both income and race.

Integration of rental housing into high-opportunity neighborhoods is fraught with political difficulties. Indeed, the Obama administration recently bemoaned the fact that “local barriers to housing development” have “intensified” over the past thirty years.224 But zoning and other legal barriers to locating affordable housing in higher-income neighborhoods primarily focus on housing type (multifamily, for example), rather than rental rates or non-owner-occupant status. It would therefore be far easier to integrate single-family rentals into such communities than it would be to coerce these communities to accommodate new, large multifamily affordable housing developments. Broadening capital availability can therefore both increase the supply of rental housing as well as enable affordable housing to be located in less renter-concentrated neighborhoods. In addition, GSE and government involvement in rental housing development may permit government oversight to ensure fairness of rental terms and rates.

Anti-displacement protest, Oakland, California, 2016.
Income Inequality and Urban Displacement: The New Gentrification

Karen Chapple

Keywords
capitalism, middle class, working class, Marxism, inequality

In the less affluent areas of U.S. cities, when neighborhoods revitalize, observers have long chalked it up to gentrification. The popular image is of an influx of “gentry”—solidly middle class and especially upper-middle class—which has transformed a poor or working-class area of the central city into a middle-class enclave. The losers of the process are the displaced, while the winners include those who benefit from the new profitability of these areas: some new residents and some existing residents, but most of all those who stand to benefit from the accumulation of capital in entire neighborhoods—large financial institutions and the cities themselves.3

How might we characterize this phenomenon in the twenty-first century, when a weakened middle class lacks the wherewithal to spur wholesale transformation, and in any case, the central city no longer has many working-class neighborhoods left to gentrify? In the past, gentrification was clearly related to the dynamic of uneven development—the devaluation of capital and the subsequent shift of accumulation processes into devalued neighborhoods. But now, even this uneven development process seems less pronounced at first glance, as the initial “rent gap” has long since been recaptured.

Thirty years ago, theorists had already pointed out that gentrification is a “chaotic conception” that masks complex multiple processes; gentrifiers are a diverse set, often including households that look quite similar to the displaced. Yet arguably, there is increasing coalescence now around one particular pattern: The only households truly insulated from displacement belong to upper-income groups, particularly the one percent. Where uneven development previously spread profit across residents of different income levels, now the gains accrue mostly to the few who supply luxury housing to a high-income niche.

While the dynamic of uneven development pressures policy makers to prioritize new construction, policies focused on labor and income . . . might be more effective.

At the core of this displacement crisis is income inequality driven by declining real wages—in other words, a labor question brought on by the reorganization of work. What is widely viewed as a housing crisis, then, is actually an income crisis. Framing it as a housing crisis leads to building more housing supply in the central city to alleviate market pressures. This approach well suits the financial and development industry, as overbuilding in the suburbs in the 2000s, and the subsequent foreclosure crisis, has made it challenging to realize significant profit in the suburbs. It may not, however, mitigate the displacement pressures on central city neighborhoods. While the dynamic of uneven development pressures policy makers to prioritize new construction, policies focused on labor

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and income—including human capital development, wage subsidies, targeted business assistance, and/or preservation of industrial land—might be more effective.

A case in point is that of the San Francisco Bay Area. San Francisco has experienced an extremely tight housing market in recent years due to strong job growth in the tech industry and changing housing preferences, among other factors. The patterns in the San Francisco housing market are generally similar to those in other strong market regions such as New York, Boston, Denver, and Washington, D.C., except that the peaks and troughs of its real estate cycles make it an extreme case.

**Revisiting the Debates: Gentrification and Displacement**

The long-standing debate over the causes of gentrification offers lessons that are still relevant today. The demand-side school, represented mostly by geographers and sociologists, claimed that gentrification was caused by demographic factors that drove increased demand for urban residences, a changing economic base that created a large number of white-collar jobs in the city center, and the mainstreaming of an urban aesthetic pioneered first by artists and alternative households. The supply-side school, represented largely by Marxist geographers, in contrast, held that gentrification is driven by capitalist interests, especially property owners and the real estate and financial industries, profiting from a cycle of disinvestment and reinvestment in land and property and capitalizing on the rent gap. Facilitated not just by private capital investment, but also by public policy and investment, the return of capital from the suburbs to the city drives gentrification; the change in neighborhoods is the spatial manifestation of the restructuring of capital accumulation, in a process of uneven development. Interestingly, this initial debate generally equated gentrification with displacement, without interrogating the relationship further.

It was not until the twenty-first century that the economists and urban planners began weighing in. For most, the key issue was not so much the causes of gentrification but whether it led to displacement. Most of this research has found that exclusionary displacement is occurring in gentrifying neighborhoods: in-movers are wealthier, whiter, and of higher educational attainment and out-movers are more likely to be renters, poorer, and people of color. This research also consistently shows that rent appreciation and high-rent burden (relative to income) predict displacement, but that gentrification per se does not. Instead, a number of studies have shown that various types of displacement pressures, such as landlord harassment and uncertainty associated with the planning of new public infrastructure, as well as the variety of displaced households, are not captured well by census and housing survey data.

Insightful as this research is, by focusing only on gentrification, it offers a narrow lens that misses the bigger displacement crisis. Only by shifting the focus from certain neighborhoods to the nature of advanced capitalism itself does the full crisis of displacement come into view. As urban studies professor Damaris Rose highlighted some thirty years ago: “The social and spatial restructuring of labour processes are shaping and changing the ways that people and labour power are reproduced in cities.” She identified a transformation that was characterized by the loss of manufacturing jobs, decline of labor unions, and reduced job security, and that continues today with stagnant or declining wages in both the private and public sectors and declining upward mobility. At the same time, this transformation is producing different kinds of gentrifiers. A new division of labor produces high-end workers with new demand for urban housing, while the rise of low-wage and informal work, self-employment, contingent work, and unconventional career ladders helps foster the rise of alternative households and non-nuclear families.

Many of these service economy workers find themselves excluded from traditional middle-class housing markets. Householders with multiple jobs or employed women with children looking for a central location end up becoming displacers themselves, either because they are priced out of their previous urban neighborhoods
or because work-life complications make conventional suburban life impossible. In other words, rather than resulting from lifestyle choices, or even housing market dynamics, gentrification serves as a coping strategy for the social problems incumbent in advanced capitalism: the challenges of making daily schedules and budgets work despite poor job quality and city transportation systems designed for a commute by a sole breadwinner head of household.

Rather than resulting from lifestyle choices, or even housing market dynamics, gentrification serves as a coping strategy for the social problems incumbent in advanced capitalism ...

Gentrification, then, is just one symptom of a much larger crisis. From the onset of the gentrification studies, researchers failed to examine a wide array of causes—of both gentrification and displacement—and looked only at short time frames that could not capture the entirety of change. That story is told elsewhere; here, it will suffice to point out that how the crisis is framed—narrowly or broadly, short or long term—matters because it leads to different policy implications.12 If the issue is that there is not enough central city housing to accommodate demand, then the solution is to build more housing in those neighborhoods. But if it is that low- and moderate-income households are not able to find and stay in housing anywhere, then it is an income crisis, necessitating intervention in the labor market. On one hand, this means ensuring that workers are earning a “housing wage,” enough to cover rent without spending more than 30 percent of their income on housing costs.13 On the other hand, it means safeguarding the middle-wage, low-skill jobs left in the city—those paying a living wage for workers without a college degree—whether through strengthening unionization, providing targeted business assistance, or protecting industrial land.

For the typical worker, wages in real terms are now below what they were in the late 1970s, when many of these studies were taking place. Arguably, the working class of today includes the middle class, putting further pressure on the need for affordable housing. Yet, even as the need grows, the amount decreases, as high-income households occupy the older housing stock that used to trickle down. And the income inequality of today—made worse by the economic “recovery” from the Great Recession—is reshaping the map of displacement, as the case of the San Francisco Bay Area illustrates.

### Twenty-First Century Displacement in the San Francisco Bay Area

The San Francisco Bay Area illustrates the breadth of the displacement crisis, the role of increasing income inequality, and the push for new housing supply as the solution. The Urban Displacement Project provides a typology analysis that characterizes Bay Area neighborhoods (census tracts) according to their experience of gentrification and risk of displacement.14 This is based upon a gentrification index (defined as a vulnerable neighborhood with disproportionate growth in above-median-income, college-educated households, as well as disproportionate investment in the form of housing price appreciation, and/or market-rate construction). However, it looks at not just gentrification but also displacement, which is measured by three different proxies: the loss of low-income households, the loss of naturally occurring affordable housing, and/or the declining in-migration of low-income residents.15 The Urban Displacement Project divides the Bay Area region into low-income and moderate-high income census tracts to capture the displacement pressures not just in gentrifying neighborhoods, but also in non-gentrifying neighborhoods that are also losing or excluding low-income households. The analysis shows that displacement risk is not just in low-income neighborhoods, but also in non-gentrifying neighborhoods that are also losing or excluding low-income households. The analysis shows that displacement risk is not just in low-income neighborhoods, but also in moderate- to high-income neighborhoods as well (Figure 1).

Overall, just over 10 percent of Bay Area households (a total of more than 265,000) live in neighborhoods that are undergoing gentrification or have gentrified already. From 2000 to 2013, the nine-county region has lost almost 105,900 naturally occurring affordable housing units—but just 12 percent of these were located in gentrifying neighborhoods, such as those
near downtown San Francisco and Oakland. Overall, the region lost 49,000 low-income households, but just 13 percent were displaced from gentrified neighborhoods. In fact, though 53 percent of low-income households lived in neighborhoods at risk of or already experiencing displacement pressures, more than half of those neighborhoods are moderate-to-high income areas. In other words, due to price increases either low-income households can no longer afford to live in these areas, or they are excluded from moving in when units formerly inhabited by low-income households become available. This phenomenon is occurring particularly among communities of color, especially Latinos.

...[T]he income inequality of today—made worse by the economic “recovery” from the Great Recession—is reshaping the map of displacement...

Not only is displacement occurring in all types of neighborhoods, but it occurs disproportionately to moderate-income households. Overall, the region gained in both high- and low-income households from 2000 to 2013; though gentrified neighborhoods gained both income groups, a disproportionate share of high-income households moved in (Figure 2). However, the entire region experienced a net loss of moderate-income households (a total of 36,000). At the same time, rent burden increased, not only for low-income households but households in general, especially in gentrified neighborhoods (Figure 3). Meanwhile, much of the region saw middle-class households replaced by lower- and upper-class households (Figure 4). Taken together, these patterns suggest the breadth of displacement processes and the impact of the loss of the middle class.

Particularly in the Bay Area then, one would expect the policy response to the displacement crisis to be multipronged, with interventions to improve incomes, preserve housing affordability, and build new supply. Instead, there has been a steady drumbeat of demands to increase housing supply, encapsulated ably in the title of a 2016 New York Times article: “In Cramped and Costly Bay Area, Cries to Build, Baby, Build.” The arguments come not just from pro-growth groups like the San Francisco Bay Area Renter’s Federation and San Francisco Planning and Urban Research, but also reach up to the state, where the Legislative Analyst’s Office has released several reports advocating dramatic increases in housing supply to ease price pressures, and the governor has suggested allowing more housing development by right, that is, without requiring approval for individual

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**Figure 1.** Distribution of displacement/gentrification types—San Francisco Bay Area. Source. Calculations by the author. Note. MHI = moderate- to high-income neighborhood; LI = low-income neighborhood.
projects. Blocking more development are a well-established set of barriers: NIMBYism, the environmental review process, restrictive zoning regulations, and slow permitting processes. The pro-development point of view dominates the national conversation as well. A quick search of the top twenty-two urban blogs in the United States and United Kingdom yields thirty-eight articles focused exclusively on the housing affordability crisis; of these, twenty-nine mention housing production as the solution, while twenty-two focus on preservation (sixteen mention both). Even the White House’s recent Housing Development Toolkit calls for eliminating the barriers to housing production—without providing any evidence of a shortage in supply.

Yet, we might ask whether there is actually a widespread shortage of housing. In fact, in the aggregate, housing construction nationwide is well aligned with household growth, due in part to slow household formation in recent years. Just under ten years ago, when the housing market collapsed, there was actually a glut of vacant homes: both rental and homeowner

**Figure 2.** Change in households, gentrified versus all neighborhoods, 2000 to 2013—San Francisco Bay Area.
*Source.* Calculations by the author.

**Figure 3.** All rent-burdened and low-income rent-burdened households, gentrified versus all neighborhoods, 2000 and 2013—San Francisco Bay Area.
*Source.* Calculations by the author.
vacancy rates hit historic highs. In the decade of the 2000s in the Bay Area, developers built almost twice as many units than were needed for new households (Figure 5)—albeit mostly in the wrong places, outlying suburbs. In the future, surpluses may return, as aging baby boomers leave their single-family homes for more efficient living arrangements.\(^2\) In the long run, do we really need market-rate housing produced at a faster rate? Perhaps, instead, we need to revisit the rules of the game, once again, to ensure that the core areas where we need housing most remain affordable in the face of rising income inequality.

...[W]e need to... ensure that the core areas where we need housing most remain affordable in the face of rising income inequality.

There is little question that major cities such as San Francisco, New York, and London have not built enough housing to meet demand for central city living. But this does not necessarily mean that these cities can build their way out of the problem today.\(^2\) The cost—of a minimum of $500,000 for an eight hundred square foot unit in a city like San Francisco, with land costs accounting for just one-fourth of the total—means that in the absence of subsidy, it is only profitable for developers to build for the high end of the market, which is why we currently have a glut of ultra-luxury apartments.\(^2\) This new construction will take generations to filter down to those in need of affordable housing, and in any case, massive amounts of construction would be needed to have any leveling effect on housing prices.\(^2\)

It is precisely because of the high land costs in the urban core that developers increasingly are pressuring cities to rezone industrial land for residential use. Ironically, in many cities, this land houses the most significant concentrations of middle-wage jobs. A study of industrial land in the Bay Area I conducted for the Association of Bay Area Governments found that in 2011, middle-wage jobs (paying $18 to $30 per hour, and employing workers without a college degree) counted for a near majority (44 percent of jobs on industrial land, compared with just 27 percent of
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all jobs in the region; Figure 6). Projections to 2040 suggest that this regional concentration will remain stable—unless the land is converted to residential. Ironically, the pressure to build more housing may actually result in the conversion of the land with the greatest concentrations of jobs paying a “housing wage.”

Viewing the crisis through the lens of uneven development helps explain the continued push to build. Changes in how the country’s major financial institutions underwrote mortgages facilitated capital accumulation in the suburbs, leading to overbuilding. With diminishing returns, developers returned to the city, where they found profitability in the market for luxury apartments. If current patterns—land costs, construction costs, and so on—do not change significantly, building central city housing for the working and middle class will never be profitable. Thus, relying exclusively, or even mostly, on a supply strategy is neither viable nor necessary.

Housing prices have risen much faster than incomes, particularly in strong market regions such as New York, and in regions with high-income inequality, low-income households find housing less affordable. Had incomes kept up, the crisis would have been significantly (though not fully) mitigated. Yet this perspective is largely absent from the debate on the housing crisis. Of the above-mentioned thirty-eight national blogs focused on the housing crisis, just thirteen framed it as an income crisis, and only one mentioned intervening in the labor market (e.g., to improve wages) as a solution. Of those that mentioned income, most highlighted the plight of low-income households and millennials trying to enter the housing market; there was little mention of the challenges faced by the middle class.

It makes little sense to dedicate resources to saving housing without also ensuring the buying power of workers.

It is time to start thinking more creatively about policy. The hottest neighborhoods are losing naturally affordable housing units—and their low- and moderate-income occupants—much faster than they can build replacement housing. Many creative approaches to housing preservation are emerging, and offer potential to house more households at lower cost than new housing production. But why not consider how to preserve residents’ incomes at the same time? It makes little sense to dedicate resources to saving housing without also ensuring the buying power of workers.

It is not hard also to envision how the $500,000 that builds a new housing unit might be more fruitfully employed in strategies that enhance resident income: full college scholarships for five students, wage subsidies to bring thirty minimum wage workers up to living wage for a year, wages and benefits for five elementary school teachers, finance capital for five minority-owned start-ups, or industrial space for a handful of expanding businesses. Only when we start to think more holistically about our housing crises will we be able to protect our communities from the inequality that is displacing us.

Figure 6. Wage distribution of jobs on industrial land in 2011 and 2040, compared with the wage distribution for all jobs—San Francisco Bay Area, 2010.

Source. Calculations by the author.
Acknowledgments
I would like to thank my collaborator on the Urban Displacement Project, Miriam Zuk. I am grateful to the editors for their insightful comments and to Rebecca Coleman for her able research assistance. Any remaining errors are my own.

Declaration of Conflicting Interests
The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding
The author(s) received the following financial support for the research, authorship, and/or publication of this article: This article is based on research supported by the Metropolitan Transportation Commission and the University of California Transportation Center. The author is solely responsible for the article’s content.

Notes
3. The rent gap is defined as the difference between the potential ground rent of a piece of property and the actual rent. See Neil Smith, “Toward a Theory of Gentrification: A Back to the City Movement by Capital, Not People,” *Journal of the American Planning Association* 45, no. 4 (1979): 538-48.
5. Ibid, 66.
9. Zuk et al., *Gentrification, Displacement and the Role of Public Investment*.
10. Instead, primary data collection such as interviews and ethnography provide a much more illuminating picture of housing pressures and insecurity, as shown so effectively in Matthew Desmond’s, *Evicted* (New York, Penguin Random House, 2016).
12. Zuk et al., *Gentrification, Displacement and the Role of Public Investment*.
14. This project was a side product of a larger study funded by the Metropolitan Transportation Commission (via the U.S. Department of Housing and Urban Development’s Sustainable Communities Initiative) that involved extensive qualitative and quantitative regional analysis to better understand the nature of neighborhood change and displacement in the Bay Area and its relationship to transit.
15. Naturally occurring affordable housing units are affordable to those at 80 percent of area median income or less, paying 30 percent or less of their income for rent. On using the loss of low-income households between 2000 and 2013: as a proxy for displacement, on average, Bay Area census tracts’ low-income population grew by fifty-nine households between 2000 and 2013. Therefore, we assume that a tract that lost low-income households during this period underwent some process of displacement when combined with other indicators such as a loss of market-rate affordable units or a decline of the in-migration of low-income population into that tract beyond the regional median. Although the change in low-income households could be due to income mobility (e.g., low-income households moving into middle- or upper-income categories, or vice versa), from our analysis of data from the Panel Study on Income Dynamics, we estimate that there would have been a net increase in low-income households in most
places likely due to the Great Recession; therefore, our estimates of displacement are likely an underestimate, if anything.


20. Sources included urban research think tanks such as the Urban Institute, blogs on urban issues such as City Lab and Next City, blogs on planning such as Planetizen, environmental blogs such as National Resource Defense Council (NRDC) Switchboard, transportation blogs such as The Overheard Wire, Wonkblog from the *Washington Post*, and *New York Times*. The search included articles from January 2014 to the present.


25. In 2014, Mark Hogan estimated development cost at $469,800 for an eight hundred square foot unit, a minimum that does not include construction financing expenses, contingencies, developer’s profit, and other costs; costs today may be significantly higher. See http://www.spur.org/publications/urbanist-article/2014-02-11/real-costs-building-housing. Re ultra-luxury apartments, see http://www.nytimes.com/2016/07/12/realestate/luxury/slow-times-on-billionaires-row-as-the-8-digit-boom-fizzes.html?ref=realestate’.

26. Zuk and Chapple, *Housing Production, Filtering and Displacement*. Moreover, the literature on filtering does not examine luxury apartments; conceivably, filtering may not even occur in this market segment.


**Author Biography**

Karen Chapple, PhD, is a professor of city and regional planning at the University of California, Berkeley. In fall 2015, she launched the Urban Displacement Project, a research portal examining patterns of residential, commercial, and industrial displacement, as well as policy and planning solutions. Her most recent book is titled *Planning Sustainable Cities and Regions: Towards More Equitable Development* (Routledge, 2015).
Forewarned: The Use of Neighborhood Early Warning Systems for Gentrification and Displacement

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Miriam Zuk
University of California, Berkeley

Abstract

The 1980s saw the emergence of neighborhood early warning systems that use indicators to assess patterns of neighborhood change. In more recent years, new systems and analyses are measuring the risk of gentrification and displacement. Using information from a dozen interviews with developers and users and from a survey conducted in one region, we show that policymakers, community residents, and other stakeholders are actively using these early warning systems strategically, tactically, and for empowerment. Although the extent to which the analyses have actually caused policy shifts is unknown, the early warning systems clearly have influenced the urban debate about housing and neighborhood change. The durability of these efforts, however, remains an outstanding question. Cities have not yet sought to develop these tools and strategies for more equitable, inclusive neighborhood change, yet city government is a logical home for early warning systems, especially given new technological capabilities.

Introduction

Neighborhoods change continually because of the movement of people and capital, both private and public. Change is often visible, as newcomers walk the streets or buildings and infrastructure are built and demolished. At the same time, change may be hard to discern, as property transfers and even the arrival of new tenants are not publicized. The process may take decades to unfold and may be nonlinear; change can stall or reverse, and the neighborhood may never fully transform.

As local residents and policymakers struggle to discern the nature and extent of changes, researchers have devised “neighborhood early warning systems” to describe change processes and even
predict future transformation. These toolkits, which take the form of either reports or online
guides, tend to focus on economic and racial/ethnic change at the neighborhood scale via demo-
graphic and property data. The idea of early warning is that, by tracking investment, disinvest-
ment, and population flows at the local level, policymakers can design cost-effective interventions
before the pace of change accelerates and patterns become entrenched (Snow, Pettit, and Turner,
2003). In the case of neighborhood decline, early warning might mean identifying crime hotspots
or abandoned properties. For neighborhoods that are revitalizing, toolkits tend to focus on areas of
housing sales, racial transition, and new amenities, among other factors.

The first generation of toolkits from the 1980s and 1990s has now disappeared, but both the
overheating of the housing market and the planning of new transit systems have led to new interest
in understanding neighborhood change, specifically in the form of gentrification and displacement.
New early warning systems with an online presence have emerged in Portland, Oregon; the San
Francisco Bay Area in California; Chicago, Illinois; and Minneapolis-St. Paul, Minnesota. Many other
regions also have conducted analyses. This new generation of toolkits has the potential to transform
policies to stabilize and/or revitalize neighborhoods, especially if, this time around, they find more
permanent homes. One pathway might be to expand the “smart cities” movement beyond its cur-
rent focus on efficiency to proactive policymaking around inclusion (Pettit and Greene, 2016).

Little is understood, however, about precisely how stakeholders are using the systems and what
impact those systems have on policy. Early warning systems have complex and multiple goals in
contrast with smart cities systems, which primarily attempt to make city systems more responsive
to constituents. To make the case for integrating early warning systems into city operations, it is
important to understand their value. This article describes the intent and use of these toolkits,
assessing their ability to make policy more effective, their potential sustainability, and, for a few,
their predictive capability.

The following section discusses the evolution of urban data capabilities and then describes the first
generation of early warning toolkits. The next section presents a survey of the landscape of current
toolkits, including the Urban Displacement Project tool in the San Francisco Bay Area, which the
authors developed. The next section, using information from a dozen interviews with developers
and users and also from a survey conducted in one region, explores the different ways that toolkits
have been used. The final section lays out next steps for system development, suggesting ways to
increase the relevance of toolkits to the planning and development decisions that elected officials
and communities face.

1 Snow, Pettit, and Turner (2003) profiled four early warning systems: the Chicago Neighborhood Early Warning System,
by the Center for Neighborhood Technology; Neighborhood Knowledge Los Angeles, at the University of California, Los
Angeles Center for Neighborhood Knowledge; the Philadelphia Neighborhood Information System, at the University of
Pennsylvania; and the Minneapolis Neighborhood Information System, at the University of Minnesota. Each has either
disappeared or not been updated in many years.
Perspectives on Smart Cities, Neighborhood Change, and Early Warning Toolkits

The current generation of neighborhood early warning systems dates from the emergence of Geographic Information Systems (GISs). A movement to democratize data resulted in broad experimentation with data portals that characterize neighborhood change. Most recently, the movement has shifted focus to making cities smarter.

The Use of Data and Maps in Cities and Neighborhoods

Shortly after GISs became widely available on personal computers in the early 1990s, a set of intermediaries emerged to create more democratic access to data; many of these intermediaries were part of the Urban Institute’s National Neighborhood Indicators Partnership (NNIP; Treuhaft, 2006). These intermediaries, often community-based organizations working in partnership with universities, gather neighborhood-level data, organize them into a database, and help community actors map and analyze the data by themselves. The focus thus was on empowerment, building trust and capacity in communities that historically had been on the wrong side of the map (for example, through practices such as redlining) (Treuhaft, 2006).

The movement to democratize data has recently morphed into interest in smart cities, which optimize urban systems and service delivery through real-time monitoring and control. The promise of smart cities is that new digital tools that aid in the collection, analysis, and dissemination of data will help cities shift from a compliance mode to a problem-solving mode (Goldsmith and Crawford, 2014). At the same time, it is believed, technology will strengthen civil society as constituents coproduce solutions with government (Goldsmith and Crawford, 2014). Absent, however, from smart cities experiments is the application of technology to more equitable outcomes, particularly in neighborhoods, and also the input from community organizations (Baud et al., 2014; Pettit and Greene, 2016).

Despite the enthusiasm about moving toward smarter cities and more democratic data, questions remain about how the data and maps produced are actually used. Data analysis and maps either remain for internal use in decisionmaking, whether by government agency or community organization, or they are made available to external audiences to garner attention or generate new ideas. Users, particularly community groups, may use maps in a strategic way (for example, to identify needs or target resources), as a tactic to raise awareness or implement solutions, for administration (for example, for service delivery), for organizing or building the capacity of a constituency, or simply for exploration to see if spatial knowledge legitimizes local experience or raises questions about city policy (Craig and Elwood, 1998; Ghose, 2011). Over the long term, GIS analysis and maps are thought to have the potential to transform planning, policy, and programs (Ramasubramanian, 2011)—yet, little systematic evidence supports this thinking.

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2 NNIP, founded in 1996, consists of a loose network of data intermediaries in 30 cities.
The Rise of Neighborhood Early Warning Systems

Scientists and social scientists alike have long coveted the ability to predict the future. As the availability of new data has made it possible to identify the factors predicting or simply has correlated with different phenomena, researchers have tried to use these indicators to predict future change. Thus, early warning systems are now available for crime hotspots and gang homicides (Gorr and Lee, 2015; Sampson, 2011), housing abandonment and foreclosure (Hillier et al., 2003; Williams, Galster, and Verma, 2013), housing price appreciation (Galster and Tatian, 2009), land use change (Waddell, 2002), and even tornados (Oleske, 2009).

The first neighborhood-level early warning system was pioneered beginning in 1984 by the Center for Neighborhood Technology in Chicago. The idea was to create a portal of property data, such as information on tax delinquencies, code violations, and utility shutoffs, which could then be used to monitor neighborhood housing conditions (and thus spur intervention). Because many forms of financial disinvestment are invisible, identifying patterns in a timely manner can be preventative. An early Urban Institute report describing four such systems (in Los Angeles, California; Minneapolis; and Philadelphia, Pennsylvania—in addition to Chicago) found that they all provided indicators of financial disinvestment based on parcel-based data—aggregated in different ways, depending on the issue—obtained from the local government (Snow, Pettit, and Turner, 2003). With an audience of government agencies and community-based organizations, the systems were disseminated on the web and housed at academic or research institutions.

Cities and other stakeholders are interested in monitoring neighborhood decline for immediate reasons—the potential that families will lose their shelter—and for long-term issues—particularly the spiral of decline that can result in a variety of costly impacts for families and cities alike (Wilson, 1987). By contrast, the rationale for monitoring neighborhood revitalization or gentrification is murkier.

Gentrification is a simultaneously spatial and social practice that results in “the transformation of a working-class or vacant area of the central city into middle-class residential or commercial use” (Lees, Slater, and Wyly, 2008: xv)—meaning the influx of both capital (real estate investment) and higher-income or higher-educated residents. Displacement—when households are forced to move out of their neighborhood—can be a negative outcome of gentrification but may also precede it (Marcuse, 1986). Real estate investors, including prospective homebuyers, certainly take an interest in gentrification. For cities, it is important to understand neighborhood upgrading not only to stabilize communities but also to intervene proactively before intervention (for example, mitigating displacement) becomes costly and difficult (Pettit and Greene, 2016).

In one earlier iteration of work predicting gentrification—a presentation by researchers from the Urban Institute (Turner and Snow, 2001)—the researchers characterized the process of gentrification by (1) shift in tenure, (2) increase in downpayment and decrease in FHA financing, (3) influx of households interested in urban living, and (4) increase in high-income-serving amenities such as coffee shops or galleries. Analyzing data for the DC area, they identified the following five predictors of future gentrification (defined as sales prices that are above the DC average) in low-priced areas: (1) adjacency to higher-priced areas, (2) good access to the Metro subway system,
(3) historic architecture, (4) large housing units, and (5) more than 50 percent appreciation in sales prices between 1994 and 2000. Census tracts were scored for each indicator and then ranked according to the sum of indicators, with a maximum value of 5.

In 2009, the Association of Bay Area Governments sponsored an analysis of neighborhood change in the San Francisco Bay Area from 1990 to 2000, which predicted neighborhood susceptibility to gentrification, with a disclaimer that it was not possible to measure resident displacement via this method (Chapple, 2009). Chapple adopted Freeman's (2005) definition of gentrifying neighborhoods as low-income census tracts in central city locations in 1990 that, by 2000, had experienced housing appreciation and increased educational attainment that were higher than the nine-county regional average and then constructed a multivariate statistical model that had gentrification as the dependent variable and a set of 19 socioeconomic, locational, and built environment factors for 1990 as independent variables. When census tracts scored above the regional average for each variable, they received a value of 1; the susceptibility index summed the scores across the variables.

In 2011, Atkinson et al. characterized household vulnerability to displacement from neighborhoods that gentrified between 2001 and 2006 in the Melbourne and Sydney, Australia, greater metropolitan areas. A vulnerability score (from 1 to 13) was measured based on tenure, number of employed people per household, and occupation. Displacement rates were calculated by dividing the number of out-migrants with vulnerability characteristics by the number of households with these characteristics exposed to the likelihood of moving in 2001. Neighborhoods that had higher-than-projected numbers of high-income, owner-occupant, and professional populations were designated gentrified.

Researchers have used myriad indicators and sources of data for characterizing residential gentrification displacement, each with its own set of advantages and disadvantages (exhibit 1). The table in exhibit 1 summarizes quantitative data sources only; however, data on many of the drivers and impacts of gentrification and displacement are not regularly gathered or are difficult to quantify.

**Exhibit 1**

<table>
<thead>
<tr>
<th>Indicator Type</th>
<th>Indicators</th>
<th>Data Sources</th>
</tr>
</thead>
<tbody>
<tr>
<td>Change in property values and rents</td>
<td>Sales value, property value</td>
<td>County tax assessors’ offices, finance departments, data aggregators</td>
</tr>
<tr>
<td></td>
<td>Rent</td>
<td>Data aggregators, apartment operating licenses, craigslist</td>
</tr>
<tr>
<td></td>
<td>Changes in availability of restricted affordable housing</td>
<td>HUD, housing departments</td>
</tr>
</tbody>
</table>
### Exhibit 1

**Indicators and Data Sources for Analyzing Gentrification and Displacement (2 of 2)**

<table>
<thead>
<tr>
<th>Indicator Type</th>
<th>Indicators</th>
<th>Data Sources</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Investment in the neighborhood</strong></td>
<td>Building permits, housing starts, renovation permits, absentee ownership</td>
<td>Jurisdictions’ building or planning departments</td>
</tr>
<tr>
<td><strong>Mortgage lending and characteristics</strong></td>
<td>HMDA and assessors’ data</td>
<td></td>
</tr>
<tr>
<td><strong>Sales (volume and price)</strong></td>
<td>County assessors’ offices, data aggregators</td>
<td></td>
</tr>
<tr>
<td><strong>Condominium conversions</strong></td>
<td>Assessors’ offices, housing departments, public works departments</td>
<td></td>
</tr>
<tr>
<td><strong>Change in community and business organizations</strong></td>
<td>Chambers of Commerce, Dun &amp; Bradstreet, neighborhood or local business associations, and so on</td>
<td></td>
</tr>
<tr>
<td><strong>Public investments</strong></td>
<td>Public works departments, transit agencies, parks and recreation departments, and so on</td>
<td></td>
</tr>
<tr>
<td><strong>Disinvestment</strong></td>
<td>Building conditions, tenant complaints, vacancies, fires, building condemnation</td>
<td>Surveys, censuses, maps, building departments, utility shut-off data, fire departments</td>
</tr>
<tr>
<td><strong>School quality, crime, employment rates, neighborhood opportunity</strong></td>
<td>Departments of education, police departments/crime maps, censuses, Bureau of Labor Statistics</td>
<td></td>
</tr>
<tr>
<td><strong>Neighborhood quality</strong></td>
<td>Local surveys</td>
<td></td>
</tr>
<tr>
<td><strong>Change in tenure and demographic changes</strong></td>
<td>Tenure type, change in tenancy</td>
<td>Building departments, assessors’ offices, censuses</td>
</tr>
<tr>
<td><strong>Evictions</strong></td>
<td>Rent boards, superior courts</td>
<td>HUD, proprietary data sources</td>
</tr>
<tr>
<td><strong>Foreclosure</strong></td>
<td>Censuses, voter registration data, real estate directories, surveys, American Housing Survey, departments of motor vehicles</td>
<td></td>
</tr>
<tr>
<td><strong>Demographics data on in- vs. out-movers</strong></td>
<td>(for example, race, ethnicity, age, income, employment, educational achievement, marital status)</td>
<td></td>
</tr>
<tr>
<td><strong>Investment potential</strong></td>
<td>Neighborhood and building characteristics (for example, age and square footage, improvement-to-land ratio)</td>
<td>Tax assessors, censuses, deeds, and so on</td>
</tr>
<tr>
<td><strong>Neighborhood perceptions</strong></td>
<td>Surveys of residents, realtors, lenders, neighborhood businesses, newspapers, television, blogs, and so on</td>
<td></td>
</tr>
<tr>
<td><strong>Reasons that people move in or out of neighborhood</strong></td>
<td>Reason for move</td>
<td>Surveys of in-movers and out-movers, state housing discrimination complaints database</td>
</tr>
<tr>
<td><strong>Coping strategies and displacement impacts</strong></td>
<td>Crowding or doubling up</td>
<td>Censuses, utility bills, building footprints</td>
</tr>
<tr>
<td><strong>Increased travel distance and time</strong></td>
<td>Censuses</td>
<td></td>
</tr>
</tbody>
</table>

The Future of Neighborhood Early Warning Systems

More than 30 years after the first neighborhood early warning system emerged, those systems arguably have failed to meet their potential. In fact, the first early warning systems for neighborhood decline have not survived the test of time. Although more research would be necessary to determine why, three explanations seem likely: (1) all the systems were housed at nonprofit organizations or universities, where changes in personnel and leadership can change institutional focus (as opposed, for example, to a city, which has a more constant mission); (2) all the systems relied primarily on funding from philanthropy, which changes its focus frequently, and/or the U.S. Department of Housing and Urban Development (HUD), which has experienced repeated budget cuts in the past few decades; and (3) none of the systems developed a broad base of users (beyond community-based organizations).

The first generation of early warning systems innovated new uses of local data and offered considerable promise to shape policymaking (Snow, Pettit, and Turner, 2003). The lack of sustainability in these systems, however, suggests that they failed to convince potential users about the importance of early warning and preventive approaches to neighborhood change. Moreover, three decades after the first research on gentrification and displacement, we continue to struggle to predict which neighborhoods will gentrify and who will benefit (and suffer). Most of the debate about gentrification and displacement has remained in academic spheres, outside of the policy realm—until the recent arrival of warning systems for gentrification and displacement.

The emergence of the smart cities movement suggests the potential of these tools. Research suggests that data on gentrification and displacement underrepresents the most disadvantaged populations and presents a mismatch between data and lived experience (Zuk et al., 2015). This underrepresentation might be overcome by user-generated geographic content, volunteered by residents and posted via interfaces like Flickr (Goodchild, 2007). With better data, prediction might improve, and, with more accessible portals, different stakeholders may coproduce more effective policies. Pettit and Greene (2016) envision the following—

But what if city leaders and community groups could get ahead of these changes and act early to direct neighborhood changes toward more inclusive outcomes? Using big data and predictive analytics, they could develop early warning systems that track key indicators of neighborhood change and predict future trajectories (Pettit and Greene, 2016: 2).

The next section presents an overview of how the next generation of early warning systems is faring.

Neighborhood Early Warning Systems: Surveying the Landscape

To examine further the use of early warning systems for neighborhood change—and gentrification and displacement in particular—we next establish the universe of systems via a web scan. Two starting points were the Urban Institute's NNIP and the Obama administration's open data portal, The Opportunity Project. We also searched the web on terms such as “neighborhood,” “gentrification,” and “displacement” and asked our interviewees for systems we had missed.
We identified three types of websites that explore neighborhood issues: (1) neighborhood indicator maps (typically of development, such as local educational attainment or housing construction, or quality of life, often represented by amenities), (2) opportunity maps, and (3) racial/economic change maps (including gentrification). To narrow our focus, we chose just the sites focusing on gentrification within this last category, which included projects in Chicago, Minneapolis-St. Paul (two projects), Portland, San Francisco, and Washington, DC. We excluded several sites that depict neighborhood change without an explicit focus on gentrification or assessment of risk. We then added projects from several cities—Charlotte, North Carolina; Houston, Texas; Los Angeles; Seattle/Puget Sound, Washington; and St. Louis, Missouri—that had produced recent assessments of gentrification or displacement risk with a report, rather than a web interface, as the final product. Again, we excluded recent gentrification reports that were not framed as risk assessments.

From the 11 projects, we interviewed 9 of the system creators and attended a presentation of 1; the last site is our own. Most of the interviews occurred via telephone and lasted 45 to 60 minutes, using a semistructured format; one interview was by e-mail. The analysis also draws from a survey of users (n = 33) of the University of California, Berkeley’s Urban Displacement Project toolkit.

The projects generally fall into two broad categories: (1) those developed by universities, with online map interfaces, and (2) those developed by cities as reports for internal use (exhibit 2). Perhaps because of the role of city government in many of the projects, most of the analyses examine neighborhood change within city, rather than regional, limits. The most common audience, both intended and actual, is city government and community organizations; others specified regional agencies, community members, and elected officials as their target audience. All the sites rely primarily on U.S. census data at the tract level, typically using the data with standardized census tract boundaries provided by GeoLytics, Inc., or Brown University. Most of the projects span at least two decades (1990 to 2010 or 1990 to 2014), and two projects (Chicago and St. Louis) use 1970 as the starting year. Two sites (Portland and San Francisco) also add parcel-based data on recent home sales, and two (San Francisco and Washington, DC) add data from the U.S. Census Bureau’s Longitudinal Employer-Household Dynamics program on job accessibility and also add a rail transit station layer. One site (San Francisco) also uses data about amenities (parks, transit, walkability), property characteristics (from the tax assessor), and nonprofit organizations.

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3 Our scan identified 24 of these websites, but we suspect that many more exist.
4 These sites include HUD’S Affirmatively Furthering Fair Housing Assessment Tools (https://user.gov/portal/affht_ pt.html#affhassess-tab); Code for Boston’s Ungentry (http://codeforboston.github.io/ungentry/), and sociologist Michael Bader’s racial/ethnic change maps for New York, Los Angeles, Chicago, and Houston (http://mikebader.net/media/neighborhoodtrajectories/map.html?city=newyork).
5 These reports include the 2016 New York University Furman Center for Real Estate and Urban Policy annual report on New York City housing (http://furmancenter.org/research/sonychan) and two reports on Philadelphia by the Federal Reserve Bank (Ding, Hwang, and Divrini, 2015) and the Pew Charitable Trusts (2016).
6 The Urban Displacement Project solicited survey responses from a list of 395 stakeholders in the nine-county Bay Area, including housing policy advocates, planning directors, and elected officials. After two e-mail solicitations, the project received 33 responses (a response rate of 8 percent). The survey asked users 10 questions about how they used the site (maps, case studies, and policy inventory) and also asked how the site could be improved.
### Exhibit 2

#### Neighborhood Early Warning Systems for Gentrification and Displacement (1 of 2)

<table>
<thead>
<tr>
<th>City/Region</th>
<th>Type of Project</th>
<th>Host</th>
<th>Geography</th>
<th>Goal</th>
<th>Users</th>
<th>Format</th>
<th>Policy Influence?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charlotte, North Carolina</td>
<td>Neighborhood change analysis</td>
<td>City of Charlotte</td>
<td>City</td>
<td>Tactical: Understand how to do equitable and inclusive development</td>
<td>City, some community organizations</td>
<td>Internal report</td>
<td>NA</td>
</tr>
<tr>
<td>Chicago, Illinois</td>
<td>Gentrification index</td>
<td>University of Illinois at Chicago</td>
<td>City</td>
<td>Tactical and empowering: Measure change and provide tools</td>
<td>Community organizations</td>
<td>Report and maps on line</td>
<td>Yes</td>
</tr>
<tr>
<td>Houston, Texas</td>
<td>Gentrification index and at-risk indicator</td>
<td>Local Initiatives Support Corporation</td>
<td>City</td>
<td>Strategic, tactical, empowering: Use as advocacy tool for LISC</td>
<td>LISC, community organizations</td>
<td>Internal report</td>
<td>Yes</td>
</tr>
<tr>
<td>Los Angeles, California</td>
<td>Gentrification index</td>
<td>City of Los Angeles</td>
<td>City</td>
<td>Strategic: Help city target initiatives within a large grant program</td>
<td>Mayor's office</td>
<td>Internal report</td>
<td>NA</td>
</tr>
<tr>
<td>Minneapolis, Minnesota</td>
<td>Housing market index</td>
<td>University of Minnesota Twin Cities</td>
<td>Twin Cities</td>
<td>Strategic, tactical, empowering: Start a conversation, inform policymakers and residents</td>
<td>Community organizations, city</td>
<td>Report and maps on line</td>
<td>Yes</td>
</tr>
<tr>
<td>Minneapolis-St. Paul metropolitan area, Minnesota</td>
<td>Gentrification index and at-risk indicator</td>
<td>Minnesota Center for Environmental Advocacy</td>
<td>Region</td>
<td>Strategic, tactical: Spark conversation, implement mitigations, obtain funding</td>
<td>Community organizations</td>
<td>Report and interactive maps on line</td>
<td>No</td>
</tr>
<tr>
<td>Portland, Oregon</td>
<td>Gentrification index and at-risk indicator</td>
<td>Portland State University (hosted by The Oregonian)</td>
<td>City</td>
<td>Tactical, empowering: Show where gentrification is happening in Portland</td>
<td>City, community organizations</td>
<td>Report and maps on line</td>
<td>Yes</td>
</tr>
<tr>
<td>St. Louis, Missouri</td>
<td>Index of &quot;neighborhood vitality&quot;</td>
<td>University of Missouri-St. Louis</td>
<td>City</td>
<td>Tactical and empowering: Show which neighborhoods are &quot;rebounding&quot;</td>
<td>Community organizations</td>
<td>Report on line</td>
<td>Yes</td>
</tr>
<tr>
<td>San Francisco Bay Area, California</td>
<td>Gentrification index and at-risk indicator</td>
<td>University of California, Berkeley</td>
<td>Region</td>
<td>Tactical and empowering: Describe current patterns of neighborhood change and city policies</td>
<td>Local government, community organizations, elected officials</td>
<td>Report and interactive maps on line</td>
<td>Yes</td>
</tr>
</tbody>
</table>
Analyzing Risk

The first generation of reports analyzing gentrification and displacement risk generally all followed the same methodology; that is, run correlations or regressions to identify predictors of gentrification and/or displacement and then assign each factor a value to come up with a susceptibility score (Atkinson et al., 2011; Chapple, 2009; Turner and Snow, 2001). The analyses behind the current set of early warning systems—in Chicago, Houston, Portland, the San Francisco Bay Area, and Seattle/Puget Sound, as described further below—have improved on this methodology by looking at the dimension of time (that is, past and present neighborhood change dynamics in addition to the extent of vulnerability). Many analyses also make a useful analytic distinction between gentrification and displacement, while still analyzing both.

The Chicago gentrification index (Nathalie P. Voorhees Center, 2014) determined relevant factors based on a literature review. It provided a “score” for each “community area” in 1970, 1980, 1990, 2000, and 2010, based on a composite index that compares the community area to the city at large for 13 indicators. Then, a neighborhood change typology (displayed in maps) was constructed not just from these scores but also from their change between 1970 and 2010. A separate toolkit identified housing, land use, and other tools appropriate for each of three stages: (1) before gentrification, (2) midstage gentrification, and (3) late-stage gentrification (Nathalie P. Voorhees Center, 2015).

Building off the same methodology as Chapple (2009), Local Initiatives Support Corporation (LISC) researchers constructed a model predicting gentrification in neighborhoods of Houston, using a slightly narrower definition of gentrifying neighborhoods (Winston and Walker, n.d.). The LISC researchers used the regression coefficients and continuous independent variables in predicting susceptibility to gentrification.

In Portland, Bates (2013) predicted market changes based on vulnerability to displacement, demographic changes, and housing market conditions, a method that was replicated in the Twin Cities gentrification risk assessment performed by the Minnesota Center for Environmental Advocacy. Tracts were vulnerable to displacement in 2010 when they had higher-than-average populations...
of renters and communities of color, few college degrees, and lower incomes. For housing market conditions, Bates defined neighborhood market typologies as (1) adjacent tracts (low/moderate 2010 value, low/moderate appreciation, next to high-value/appreciation tract); (2) accelerating tracts (low/moderate in 2010 with high-appreciation rates); and (3) appreciated tracts (low/moderate 1990 value, high 2010 value, high 1990 to 2010 appreciation). Combining this information with demographic shifts for vulnerability factors between 2000 and 2010, the study identified six neighborhood types ranging from early to mid- to late-stage gentrification. Bates then used these typologies to recommend how to tailor policy approaches to the specific characteristics and needs of neighborhoods.

In the San Francisco Bay Area, the Urban Displacement Project provided a typology analysis that characterizes Bay Area neighborhoods (census tracts) according to their experience of gentrification and risk of displacement. This early warning system was based on a gentrification index that adapts the methodologies of various researchers (for example, Bates, 2013; Freeman, 2005; Maciag, 2015) to characterize places that historically housed vulnerable populations but have since experienced significant demographic shifts and real estate investment.

The loss of low-income households between 2000 and 2013 was used as a proxy for displacement. On average, Bay Area census tracts' low-income population grew by 59 households between 2000 and 2013. The typology therefore assumes that any neighborhood that experienced a net loss of low-income households while stable in overall population is a result of displacement pressures. After constructing regression models to estimate the predictors of both gentrification and loss of low-income households/displacement, the project developed place typologies for risk of either gentrification-related displacement or exclusion-related displacement (which occurs in higher-income neighborhoods). Unlike the other studies, results were vetted via several workshops with a project advisory committee and also via community forums. Based on these interactions, tracts were divided into low-income and moderate- to high-income tracts to capture the displacement pressures occurring in nongentrifying neighborhoods that are also losing low-income households. Exhibit 3 presents the resulting typology. The Urban Displacement Project’s website also includes an inventory of policies available in each jurisdiction (exhibit 4).

The Puget Sound Regional Council project, conducted with the Center for Transit-Oriented Development, used descriptive methods to construct a typology of neighborhoods based on risk factors (the “people profile”) and market strength (the “place profile”), which then formed the basis for suggesting policy responses (PSRC, 2013). For the people profile, one axis consisted of social

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7 This project was a side product of a larger study funded by the California Air Resources Board and the Metropolitan Transportation Commission (via HUD’s Sustainable Communities Initiative) that involved extensive qualitative and quantitative regional analysis to better understand the nature of neighborhood change and displacement in the Bay Area and their relationship to transit.

8 We assume that a tract that lost low-income households during this period underwent some process of displacement when combined with other indicators such as a loss of market-rate affordable units or a decline of the in-migration of low-income population into that tract beyond the regional median. Although the change in low-income households could be because of income mobility (for example, low-income households moving into middle- or upper-income categories, or vice versa), from our analysis of data from the Panel Study of Income Dynamics, we estimate that there would have been a net increase in low-income households in most places likely because of the Great Recession (December 2007 to June 2009); therefore, our estimates of displacement are likely an underestimate.
### Exhibit 3

**Displacement/Gentrification Typologies**

<table>
<thead>
<tr>
<th>Lower-Income Tracts (&gt; 39% of households are considered low income)</th>
<th>Moderate- to High-Income Tracts (&lt; 39% of households are considered low income)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Not losing low-income households or very early stages</strong></td>
<td><strong>Not losing low-income households or very early stages</strong></td>
</tr>
<tr>
<td>• Does not fall within any of the following categories</td>
<td>• Does not fall within any of the following categories</td>
</tr>
<tr>
<td><strong>At risk of gentrification or displacement</strong></td>
<td><strong>At risk of displacement</strong></td>
</tr>
<tr>
<td>• Strong market</td>
<td>• Strong market</td>
</tr>
<tr>
<td>• In TOD</td>
<td>• In TOD</td>
</tr>
<tr>
<td>• Historic housing stock</td>
<td>• Historic housing stock</td>
</tr>
<tr>
<td>• Losing market-rate affordable units</td>
<td>• Losing market-rate affordable units</td>
</tr>
<tr>
<td>• Employment center</td>
<td>• Employment center</td>
</tr>
<tr>
<td><strong>Undergoing displacement</strong></td>
<td><strong>Undergoing displacement</strong></td>
</tr>
<tr>
<td>• Already losing low-income households and naturally affordable units</td>
<td>• Already losing low-income households</td>
</tr>
<tr>
<td>• In-migration of low-income residents has declined</td>
<td>• Either naturally affordable units or in-migration of low-income residents has declined</td>
</tr>
<tr>
<td>• Stable or growing in size</td>
<td>• Stable or growing in size</td>
</tr>
<tr>
<td><strong>Advanced gentrification</strong></td>
<td><strong>Advanced exclusion</strong></td>
</tr>
<tr>
<td>• Gentrified between 1990 and 2000 or between 2000 and 2013 based on—</td>
<td>• Very low proportion of low-income households</td>
</tr>
<tr>
<td>• Neighborhood vulnerability</td>
<td>• Very low in-migration of low-income households</td>
</tr>
<tr>
<td>• Demographic change</td>
<td></td>
</tr>
<tr>
<td>• Real estate investment</td>
<td></td>
</tr>
</tbody>
</table>

*TOD = transit-oriented development.*

*a Tracts with 0 population in 2010 were excluded from the analysis (8 tracts). In addition, tracts where more than 50 percent of the population in 2010 was in college were excluded from the analysis (11 tracts).*

### Exhibit 4

**Policy Inventory on Urban Displacement Project Website**

[Source: http://www.urbandisplacement.org]
infrastructure and access to opportunity. The second axis—change/displacement—measured risk of displacement resulting from recent neighborhood change, current community risk factors, and current and future market pressure. The place profile also consisted of two dimensions: (1) urban form that supports a dense and walkable transit community and (2) the likelihood that the community will change in response to real estate market strength. Combining the people and place typologies, they identified eight general typologies; for each typology, they identified implementation and policy approaches.

Thus, in an attempt to predict change more accurately, early warning systems and related projects are gradually improving in methodology. Notable methodological shifts include the analysis of multiple stages of both gentrification and displacement, building on the approach of Bates (2013); the shift to a regional, rather than municipal, framework; and the mixing of quantitative and qualitative approaches. Conceptualizing gentrification and displacement as a long-term, multistage process, rather than a binary state or on/off switch, has helped build local buy-in into the early warning systems. Looking at many different cities within a region helps localities understand regional housing market dynamics and learn about different policies. Checking results with local residents and key informants helps ensure that the maps represent conditions on the ground.

Methodological problems remain, however, particularly in terms of the predictive ability of the models. Methods are still far from transparent: models are not readily replicable, and the scores can be hard to understand. The next section describes how stakeholders are using the models in practice and also the effectiveness of the new approaches.

The Use and Impact of Neighborhood Early Warning Systems

This section examines the use and impact of these projects, looking at those that assess gentrification and/or risk (in Chicago, Houston, Minneapolis-St. Paul, Portland, San Francisco, St. Louis) and also examines the other neighborhood change reports (in Charlotte, Los Angeles, Minneapolis, and Seattle/Puget Sound). We assess first how internal actors, and then external stakeholders, use early warning systems. We then examine what impact the projects have had on policymaking and how accurate they are at predicting change.

Internal Use

One obvious use for early warning analyses is in strategic planning for housing and neighborhoods. Maps that show how neighborhoods are changing and that anticipate future change can help stakeholders bring attention to imminent problems and target resources. If the map suggests that change is in very early stages, the neighborhood can strategize about actions to take during the long term; for example, the Houston systems architect said, “…in Houston, we are a few years or a decade behind other metropolitan areas in terms of the waves of gentrification and things coming. So what we realized is that by doing research now, we could get ahead of that.” The gentrification analysis showed where change was anticipated yet land was still cheap, so that intermediaries could target land acquisition funds strategically.

Because the Washington, DC site has not yet been launched, it is too early to assess its use and impact.
The Houston project was strategic, not just in terms of timing but also in policy approach and ownership. Before the analysis, stakeholders had expressed some disagreement about how to spend disaster recovery money. Having the data helped advocates to say, “...if we’re doing this investment, let’s also create and preserve affordable housing opportunities in places at risk of gentrification”—but without making enemies by specifically endorsing certain policies within the report itself.

The Houston system creator said—

We had a strategically placed piece of analysis that could help community stakeholders on our side make a point about what policy ought to be. Not a distraction, not something that came out of Washington, DC, saying this is what y’all ought to do. Because that would have been suicidal.

Another strategic, internal use of maps is targeting resources, as with the Housing Market Index (HMI) in Minneapolis, which helps determine the blocks where funds to fix vacant property can be most effectively spent. One developer on the Minneapolis project said, “It has been very, very, very useful.... When you’re involved in politics, and competition for scarce resources, the more facts you can provide, the better you are. The HMI are facts. And that speaks much louder than any political will.”

In Charlotte, where the use of the report remained internal to the city government, the analysis became a tactic to broaden the framework and discussion of neighborhood change. The initial referral from the city council had been to look at gentrification, but instead the city “looked more broadly at neighborhood change and the challenges that can arise in the context of gentrification across all neighborhoods, plus the close ties that this issue has with economic opportunity and the historic patterns of economic and racial segregation in Charlotte—consequently, we looked at a broad range of indicators.”

The analysis in Charlotte ultimately supported the development of a much broader housing strategy than anticipated, with a wide array of tools and strategies to manage neighborhood change.

Once the analysis is in place, it can create its own momentum. In Seattle, the Puget Sound Regional Council analysis established—after considerable debate with advocates—that four neighborhoods in southeast Seattle were at high risk. Years later, planners working on the update to the Seattle Comprehensive Plan used the analysis as a background document to show that the community was at risk. Developers of the gentrification typology in Minneapolis-St. Paul have a similar intent—to create the momentum to fund and implement the mitigations for neighborhood preservation and equitable development in St. Paul’s Central Corridor Development Strategy.

**External Use**

The most common use of early warning indicators and maps is as a tactic to spark a conversation, generate new ideas, or show how to implement solutions. The survey of users of the Urban Displacement Project in the San Francisco Bay Area suggested that this was the primary use of that warning system. Users volunteered that it was a tool to start dialogue: “I’ve used the maps to show policymakers that my neighborhood is at risk of displacement.”
In the Bay Area, the tool also serves to legitimize other work—

My organization provides legal research, advice, education, and advocacy to support communities in developing community-owned economic structures. This data has been useful in better understanding the dynamics of displacement internally, as well as in communicating about the importance of our work to the public.

It also lets advocates know where cities lack antidisplacement policies, so they can push for implementation. A user of the Urban Displacement Project in the Bay Area reported using the site “to assess which areas have been most impacted in order to identify mitigation strategies for nonprofits that lease in those areas.” Users reported using it “to check on what policies have been implemented by Bay Area jurisdictions to produce more housing” and “assessing opportunity for preservation strategies and making the case for funding.” Because the maps are regional, advocates use them to advocate at the regional level: “[We] identify which cities are performing well and which are not. [We] advocate for MTC [Metropolitan Transportation Commission] to use this info to guide funding through OBAG [a regional grant program to encourage density] to incentivize better local policies.”

In St. Louis, the release of the index of “neighborhood vitality” also brought new attention to “rebounding” neighborhoods, helping to spark a conversation about how reinvestment occurs. Researchers at the University of Missouri–St. Louis sponsor a morning panel that highlights “come back” neighborhoods, with a panel of people from the neighborhood that tell the story of what was done to strengthen the community.

Maps of neighborhood change at a regional scale can help bring perspective to communities that had considered themselves immune to affordable housing need. In Seattle, the conversation took a new turn—

Roosevelt community…is ‘Improve Access’ [type]…[it is one of the] station areas that were predominantly white, affluent station areas in a wealthier city. When having conversations about what to do with surplus lands the transit agency will have, I was able to go in and talk about the typology exercise, which highlighted that adopting tools to ensure affordable housing was a central need for places like Roosevelt… [which] helps counter some of the community members who want to use those for parks and open space.

The Twin Cities gentrification typology is also meant to educate the suburbs, developers, and others who do not comprehend the extent of housing pressure on the urban core. The developer said, “It’s like driving down the road using your rearview mirror, and all of this demographic change is in front of you. You’re going to end up in the ditch.”

The maps often serve to validate disenfranchised perspectives. One place where such validation occurred was Portland, where many planners did not understand the issues—

And then there was this big explosion around a bike lane project…historically black part of Portland. That was the first wave of displacement. So it’s on the bike boulevards plan…they were not going to do any of the pedestrian safety stuff that black folks had asked for. Huge conflicts between bike lanes and buses. So all the transportation planners were like, ‘Wait what is this gentrification thing people are talking about?’ so that was one of the first goals was to get people on the same page of what are we talking about.
The maps made the issues more real: “So for the [National] Urban League, and some other black [organizations, it was like]: ‘See this thing we told you was happening, has happened, is real. It’s in the data.’”

When the city sponsors the project, as in Portland, it can help legitimize the entire conversation. The system creator in Portland said, “One of my first conversations with them in talking was, ‘you should all stop saying that you’re trying to gentrify stuff. It’s not going over well.’ They would routinely say that. ‘Oh this area needs gentrification…’ with no comprehension of what they were saying…I think it was really important that there was an acknowledgment on the part of the city that this was not a purely market accident. So that started happening more in the popular conversation.”

Likewise, a creator of the Chicago maps argues that depicting how neighborhoods are changing, even where the gentrification process is just barely starting, is effective because users can recognize themselves—and their own economic struggles—in the maps.

Inequality perpetuates this narrative of gentrification, the fear of gentrification, even if it’s not really happening. When you can’t get into the middle, when you’re middle income and you can’t buy a house, then there are structural forces at work. But you want something to blame, and so the narrative about how gentrification is occurring feels right.

In Chicago, the active dissemination of the index into communities by the University of Illinois at Chicago researchers helped locals shift into action and policy design. As communities looked at the new index, they wanted to deconstruct it and shift into figuring out strategies: “Communities are looking for that sweet spot, where they can prevent excessive development but still get enough to have resources.” Part of this conversation was spurred by media attention, a radio reporter who became interested in the issue because of her own neighborhood, Bronzeville. The interest led the university to add the policy toolkit, which then spurred many new conversations in different communities.

Another way to use data analysis and maps is to organize or empower a constituency. In Portland, the housing advocates formed a new coalition and reframed it around displacement, broadly defined—an umbrella that could include those fighting gentrification, or for renter protections, or to stabilize communities. For the projects being used by community organizations, all the interviewees reported empowerment and capacity building as outcomes. From Minneapolis-St. Paul to the San Francisco Bay Area, community organizations use the maps to organize their constituencies. The data do not show only that “it’s real”; the data provide evidence that advocates point to in meetings with and letters to policymakers.

In St. Louis, the analysis revealed that every rebounding neighborhood had strong civic engagement—

My main surprise is that when we go out to the neighborhoods that we identified as these rebound neighborhoods, that there really is a—groups on the ground that are talking about this. About what they can do to help the neighborhood. And it’s sort of, they find it extremely gratifying to be identified as a neighborhood that’s coming back. There seems to be a very upbeat conversation about these neighborhoods.
Interacting with communities about the early warning maps helped creators realize that locals needed to be equipped to deal with different stages of gentrification. In Chicago: “We quickly realized that we needed to show people how different tools are appropriate for different stages of gentrification.” For instance, when gentrification is late stage, as in East Pilsen, the strategy should be to preserve the diversity and stabilize the community by building coalitions across different groups.

**Policy Impact**

Many of these early warning systems and reports are in the public domain and have become established resources in the ongoing civic conversation about housing. This social context may have aided the process of policy learning, as policy communities construct shared definitions and debate ideas (Bennett and Howlett, 1992). Most of the interviewees can point out different ways that the analyses have shaped the policy conversation, though it is hard to know how pivotal a role they played in the passage of specific policies. Even the cities using their new neighborhood change tools internally, such as Los Angeles and Charlotte, reported shifts in how their governments thought about housing needs and targeting resources.

In St. Louis, the report influenced conversations by the Ferguson Commission about the siting of Low-income Housing Tax Credit housing in poor areas. Also, the report found that no rebounding neighborhoods were in the north of the Delmar area, which helped spur a new conversation about using tax increment financing to fund infrastructure. In Houston, the analysis of gentrification risk “kept the drumbeat going” at city hall and also helped convince Houston Endowment Inc. to provide $1 million for a loan fund in a transitioning neighborhood. In Chicago, the maps likely contributed to the passage of the Single-Room Occupancy Preservation Ordinance. Portland has a new focus on housing policy throughout the civic arena, with the declaration of a housing emergency and many different new policies, such as the redistribution of tax increment finance revenues to affordable housing.

The evidence of policy influence is clearer in the Bay Area, where displacement and gentrification pressures are particularly acute and the Urban Displacement Project has garnered considerable media attention (more than 50 articles). Several policymakers responded to the user survey and said that they use the early warning system to design policy. One local councilmember said, “[I use the site] to assist in writing public policy for the city I represent as a public official. It is very valuable and useful.” Another official said, “For my work with the City of Oakland, I used these to understand how our existing anti-displacement policies could be improved.” San Francisco’s Mission 2016 Interim Zoning Controls requires developers of new projects in the Mission District to write a report on their project’s displacement potential, drawing from the early warning system. City councilmembers in several cities, including San Mateo and San Rafael, California, have referenced the project during council meetings to confirm the city’s displacement risk, show what policies neighboring municipalities have adopted, and justify passing new antidisplacement policies. The Berkeley, California mayor used the policy inventory to identify new policies to incorporate into his comprehensive housing plan. The Metropolitan Transportation Commission is considering incorporating more stringent antidisplacement targets in its next long-range plan. Affordable housing producers have used the maps to target sites for subsidized housing development. Unintended audiences also are using the tools; for example, real estate brokers have reported using the assessment of gentrification risk to identify profitable areas for investment.
It is clear that many users point to the early warning systems to validate their claims that the neighborhood is gentrifying. The tools also seem to be spurring policy changes (though it is impossible to know whether the new policies would have appeared in the absence of the maps). The methodological improvements in the new generation of toolkits have likely helped make policy more effective. By identifying neighborhoods in early stages of gentrification and displacement, they put the issue on the radar of local stakeholders; by extending the analysis to the region, the systems clarify that housing markets operate regionally, affecting peripheral and core areas; and, by incorporating users into the development of the tools, early warning systems have become more accurate—but with limitations, as the next section discusses.

**Using Early Warning Systems for Prediction**

In general, the system developers interviewed did not encourage the use of systems for prediction but found that policymakers and residents were eager to do so. One expert explained, “Either the analysis is not very helpful—it is not revolutionary, like predicting change near the metro—or it is very weak. We can’t predict the [new stadium].” Another pointed to the challenge of accounting for “sites of reserve,” or property that landlords hold for decades in anticipation of future profit. As they lay fallow for decades, warning systems may suggest disinvestment, but locals know better.

One interviewee said that developers would generally prefer that the maps be used as a “wake-up call”—

I did not expect that people—especially people in the city—the planning people—to view it as a predictive model. Or try to keep using it as a predictive model, given that the whole point was to have very minimal data and simple concepts. So that surprised me.

Was their interest in doing that more so than creating and developing the policy part?

Like, how much more studying of data do you need?

Likewise, in Los Angeles, policymakers describe their tool as a first step. Once they identify areas that have the potential to change, they can add more qualitative knowledge of the neighborhood in order to do “prediction”—

We use it as a way to say ‘we can choose between these neighborhoods for the first [project], and between these for the second one; and then within it, we can focus on a sub-area, block, commercial corridor, and then we pull in a lot more information. So it’s definitely not something where you can just enter in some basic search parameter and then it’ll tell you exactly where to do it… every policy item will have different things to consider, different political ramifications, and other factors that go well beyond just describing what’s happened…. And once you have a few good candidates, you have to take in all these additional considerations. Where are different community groups working in this particular space that you could partner with?

Even if the developers advise caution, users are eager for more explicit prediction. One expert explained:

The precise numbers would be valuable in influencing the city. We are now to the point where we’re hearing the city is ready to have a comprehensive housing plan, and cohesive housing policy. So precision in numbers would be useful for that. In terms of how we’re allocating resources.
Few developers have systematically assessed the validity of their gentrification and displacement predictions. The exceptions are Houston and the San Francisco Bay Area. Validating their Houston model using 2007 (2005–2009) American Community Survey data, LISC researchers found 86 percent accuracy for highly susceptible tracts (that is, those that the model predicted were 75 percent likely to gentrify) and 60 percent accuracy for moderate susceptibility (that is, between 50 and 75 percent likelihood). The Urban Displacement Project found that its analysis from 1990 to 2000 correctly predicted 86 percent of the 85 tracts that gentrified from 2000 to 2013 (Chapple et al., 2016). The rate of false positives, however, was extremely high: of the 512 tracts that did not gentrify, the model predicted that 79 percent of the tracts would experience moderate or high gentrification. The analysis of household displacement risk revealed the same pattern: a high degree of accuracy in predicting displacement, but also a high rate of false positives (Chapple et al., 2016).

Both the Chicago and Portland projects used 2010 as the end date for the analysis, so it is possible to validate those models by checking their results against neighborhood change from 2010 to 2014. Looking at Portland, we found that the extent of vulnerability had changed very little, but the number of gentrifying or gentrified tracts doubled, from 15 to 30; the model seems to have underpredicted gentrification, which is occurring very rapidly. In Chicago, we found a near-perfect correlation (0.94) between the risk score from 2000 to 2010 and that from 2010 to 2014. If anything, the extent of gentrification has slowed in Chicago; the original analysis found that 11.7 percent of neighborhoods were gentrifying by 2010, but the 2014 update (using tracts rather than the original neighborhoods) finds just 8.8 percent.

Given that most developers are skeptical of the accuracy of their own risk assessments, the call of Pettit and Greene (2016) for better predictive analytics seems warranted. A disinvested neighborhood that receives a false positive “at risk” categorization may resist new market-rate development or even other forms of revitalization. To the extent that they offer a wake-up call, early warning systems are helpful for community organizing. Without more precision, however, systems may actually hinder efforts to develop appropriate policy responses.

Next Steps

Although the first generation of online neighborhood early warning systems has disappeared, a new set has emerged, now measuring the risk of gentrification and displacement. Policymakers, community residents, and other stakeholders are actively using these early warning systems strategically, tactically, and for empowerment. Although it is unknown the extent to which the analyses have actually caused policy shifts, they clearly have influenced the urban debate about housing and neighborhood change.

The state of predictive analytics is poor, however. Despite methodological advances in the new generation, the systems are not yet reliable enough to use to design for specific policies. For instance, they are not able to predict the displacement impacts of specific developments or to identify which of the many antidisplacement policies is useful in different contexts.

For the most part, the early warning systems studied are not well integrated into the smart cities movement, potentially missing an opportunity for analytic improvement and long-term sustainability.
None incorporate real-time data on neighborhood change or crowd-sourced data. Unlike the smart systems that are improving the efficiency of city operations, neighborhood systems have a potential that is not yet clear—apart from raising awareness and building momentum for policy change. The smart cities movement has not yet fully grappled with issues of inclusion, instead focusing primarily on efficiency (Pettit and Greene, 2016). One expert said, “Getting the open data movement to address equity is like moving a big boat.”

The durability of these efforts remains an outstanding question. Of the projects profiled in this article, a few are planning minor updates, but none have long-term plans to institutionalize this work. The nonprofit organizations and universities that sponsor much of the work have little capacity to continue it without a significant influx of resources, and foundation funders come and go. Although city government is a logical home for early warning systems, especially given new technological capabilities, the case has yet to be made for why cities should pursue tools and strategies for more equitable, inclusive neighborhood change. Likewise, the private sector has not yet engaged in neighborhood change debates. Absent such intervention, these early warning systems will most likely vanish, just as the first generation disappeared.

Acknowledgments

The authors acknowledge comments from two anonymous reviewers and the guest editors and also from many of the interviewees. They also thank Mitch Crispell for stellar research assistance. All errors that remain are our own.

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*1072  I. Introduction
Alice is a residential tenant living in a low-income neighborhood in Milwaukee, Wisconsin. Like most low-income tenants, Alice did not sign a written lease, and she rents month-to-month. Although Alice's apartment is in relatively good repair, the heater does not work, and several of the windows are broken. The unit is drafty, and her infant son is often sick. After making several unsuccessful complaints to her landlord, Alice contacted the city agency responsible for code enforcement to report her apartment's condition. Within days of making her complaint, Alice's landlord served her with a five-day notice of eviction designed to send a message to her and the other tenants that complaining to the local authorities has consequences.

Nearly 4,000 miles away in Crosby, Liverpool, Debbie faces a similar fate. Debbie lives alone in a rented flat and suffers from *1073 Crohn's disease. The windows in her flat do not close, and the house is often damp. The sole heater-a small electric fireplace does not heat the dwelling sufficiently and is very expensive to run. After Debbie's landlord refused to pay for a new heating unit, she sought help from a local charity, which was in turn able to secure a grant for central gas heating to be installed on the property. However, the landlord declined the grant when contractors advised that he would need to pay 800 to have the meter relocated to comply with local housing regulations. The charity advised Debbie that although she had the right to take action to require her landlord to comply with the law, she risked provoking retaliation by her landlord in the form of an eviction. Debbie decided to do nothing rather than jeopardize her housing.

Although Alice and Debbie face similar challenges, Alice's circumstances may be somewhat less grim. Wisconsin law expressly forbids "retaliatory eviction" in response to a tenant's complaint to a local housing code enforcement agency or to the landlord about the condition of the premises. In fact, municipal law not only prohibits this conduct, but it also presumes that any attempt by a landlord to terminate a tenancy within 12 months after a complaint to the housing authority is retaliatory. Under state and local law, Alice has a valid defense to her landlord's suit for eviction. Provided she pays her rent on time, Alice can be assured that her tenure is secure for at least the next year. Currently in England, however, no such prohibition on landlord retaliation is recognized. Landlords are entitled to evict tenants renting under periodic tenancies for any reason simply by serving proper notice. Thus, Debbie risks losing her home if she makes a complaint to the local authority, no matter how legitimate it may be.

Retaliatory eviction has been the subject of much recent public debate in the United Kingdom. Tenant advocates in England and Wales claim that landlord retaliation is widespread-even rampant-with over 300,000 tenants experiencing some form of landlord retaliation each year. Fear of landlord retribution, it is argued, stymies complaints about housing conditions and in turn leads to hazards and blight. Over half of the private tenant population in England alone endures damp conditions, mold, leaking windows and roofs, electrical hazards, animal infestations, and gas leaks, and as many as one in eight dare not speak up for fear of a landlord's revenge.

In July 2014, public concern about landlord retaliation came to a head when landmark legislation aimed at preventing retaliatory eviction was introduced in England's House of Commons. In substance, the proposed law is simple—it would prevent a landlord from serving an otherwise valid notice to vacate on a tenant who made legitimate complaints about the property's condition. However, despite initial support from the Government, the bill floundered under the pressure of landlord advocates who maintain that this legislation is both unnecessary and rife with the potential for tenant abuse. Although tenant advocates narrowly succeeded in resuscitating the nearly failed bill by appending an amendment to a widely supported deregulation bill, the anti-retaliation law still has staunch opponents, not only in England but also in Wales, where lawmakers have recently introduced anti-retaliation legislation in the National Assembly as part of a much-anticipated comprehensive housing bill.
In their efforts to keep anti-retaliation initiatives in the United Kingdom afloat, tenant advocates point to common law jurisdictions around the world whose landlord-tenant law prohibits retaliatory conduct. New South Wales, Australia, New Zealand, and even the United States provide for these protections—why then should not the United Kingdom? Thus far, comparisons to foreign law have been limited and cursory, pointing only to the presence or absence of anti-retaliation regimes in the law. More comprehensive examination of retaliatory eviction regimes abroad—both in their letter and their application—is lacking. This Article seeks to contribute to the legal-political debate surrounding landlord retaliation in England and Wales by providing a detailed, contextual analysis of retaliatory eviction laws in the United States and their success at home.

Parts II and III of this Article review the ongoing efforts aimed toward prohibiting retaliatory eviction in England and Wales, highlighting the arguments that have led to a stalemate in the progress of law reform in those countries. Part IV then describes in detail the legal regimes that govern landlord retaliation in the United States. As Part IV demonstrates, U.S. anti-retaliation regimes are generally robust, with consensus emerging around strong tenant protections. Part V goes on to examine statistical and anecdotal evidence of tenant evictions that points away from the success of U.S. retaliatory eviction laws. Although this evidence seems to weigh against legal reform in the United Kingdom, Part VI argues that this is not the case. Instead, Part VI provides context for comparisons between the United States and the United Kingdom and concludes that existing legal and non-legal institutions in the United Kingdom will support anti-retaliation regimes in ways not currently possible in this country.

*1076 II. Anti-Retaliation Legislation in England and Wales

A. Legal Background

“Revenge” evictions have historically been regarded as entirely lawful in much of the United Kingdom, at least in the private sector. The overwhelming majority of private tenants in England and Wales rent under contracts known as “assured shorthold tenancies,” which provide tenants with very little security of tenure. Although the landlord cannot regain possession of the property within the first six months of the lease unless the tenant breaches the agreement, after the six-month period has passed, the landlord may regain possession at any time upon giving two months’ notice of termination. The landlord of an assured shorthold tenancy need not establish any fault on the part of the tenant as a prerequisite to regaining possession. Instead, the landlord is entitled to evict for any reason, provided that the statutory requirements for notice are met. Because eviction is an absolute right for landlords of assured shorthold tenancies, no inquiry is required (or even permitted) into a landlord’s motives for choosing to terminate a lease. Courts are not afforded any discretion in granting possession when notice is properly made.

The assured shorthold tenancy was introduced to English law in 1988 as part of a package of deregulatory reforms designed to increase the size of the private rental sector. At that time, the private rental sector had fallen into serious decline, with less than 10% of households in England rented from private landlords. In reaction, conservative policymakers took aim at long-standing security of tenure and rent control requirements that were perceived to discourage private investment in the rental housing market. Recent evidence showing that the private market has risen consistently since the early 1990s demonstrates that efforts at deregulation have proven largely successful. Thus, the freedom provided to landlords by the assured shorthold tenancy is viewed as an essential component to the security of the housing market.
However, laws permitting landlords to evict tenants with impunity are difficult to square with other basic obligations owed by residential landlords. The provision of a safe dwelling maintained in good repair is a basic requirement of all landlords, even under assured shortholds. The obligation to provide decent housing arises from two separate statutory regimes in England and Wales. First, Section 11 of the 1985 Landlord and Tenant Act places a statutory duty on most landlords to carry out repairs to the structure and exterior of the dwelling; to basins, sinks, baths, and other sanitary installations in the dwelling; and to heating and hot water installations. Additionally, the 2004 Housing Act ushered in a new Housing Health and Safety Rating System, which requires landlords to take measures to ensure the safety of their tenants from specific “hazards,” defined generally as any risk to health or safety to an occupier of a dwelling. Tenants concerned about the condition of their homes can request an inspection by a local housing authority environmental health officer, who can then order that the landlord make required repairs to bring the dwelling into compliance with the law.

In particular, the 2004 introduction of the Health and Safety Rating System was designed to address a growing problem of decent housing supply in England. Today, 33% of the private rented stock in that country is classified as “non-decent,” meaning that it fails to meet minimum statutory requirements for housing conditions, that it is in a state of disrepair, or that it lacks reasonably modern facilities. Although its proponents view the Housing Health and Safety Rating System as an important step toward improving the quality of housing stock, skeptics remain concerned that it does not go far enough to incentivize landlords to maintain their properties in good condition. Furthermore, tenant advocates assert that the ongoing legality of retaliatory eviction stifles tenant complaints regarding the condition of rented dwellings, leading to further erosion in the quality of housing.

B. The Impetus for Reform

Indeed, the prevalence of retaliatory eviction has received a great deal of public attention in the last decade. Although there are no official government statistics maintained on evictions, research conducted in part by Shelter UK, a housing charity with a strong presence in England and in Wales, concluded that during 2013-2014 roughly 324,000 private tenants in England were evicted, served with notice, or threatened with eviction after asking for repairs to be carried out or complaining to a local authority's environmental health department about conditions in their homes. In addition, 1 in 12 of the tenants in Shelter's survey reported that they were too scared of losing their home to report a problem or to request improved conditions. Shelter's research directly links tenants' fear of retaliation to the declining condition of housing in the private rented sector. According to the organization, 61% of English tenants surveyed experienced at least one of the following problems in the prior 12 months: mold or damp conditions, leaking roofs or windows, electrical hazards, animal infestations, or gas leaks. In addition, 10% of tenants reported that their health had been affected during the last year because their landlord had failed to address needed repairs or poor conditions on the property, and 9% reported that their children's health had been affected.

Shelter has also studied the occurrence of retaliatory eviction in Wales, though less systematically. Shelter Cymru, the organization's Welsh division, conducted a survey in 2013 of 29 Environmental Health and Tenancy Support Officers, who work closely with tenants and landlords to resolve disputes, especially involving disrepair. Of survey respondents, 100% opined that tenants had been dissuaded from using help offered by environmental health and tenancy support officers because of fears of jeopardizing their tenancy. Over half (55%) stated that there is “definitely” a need for more
security for tenants wishing to exercise their statutory rights to repairs.\textsuperscript{41} Additionally, over one-third (41\%) indicated\textsuperscript{1080} that they would support a campaign to protect tenants from retaliatory eviction.\textsuperscript{42}

Shelter is not the only organization to report on the prevalence of landlord retaliation in the United Kingdom.\textsuperscript{43} The Citizens Advice Bureau, a public assistance charity with offices throughout the United Kingdom,\textsuperscript{44} produced a report in 2007 urging that restrictions should be placed on private landlords' rights to evict tenants who complain about disrepair or health and safety violations.\textsuperscript{45} Citizens Advice cited government statistics included in the 2000 Survey of English Housing showing that although 21\% of private tenants in England were dissatisfied with the way their landlords carried out repairs and maintenance on their property, only one quarter of those said that they had “tried to enforce their right.”\textsuperscript{46} When asked to provide reasons, those who had not taken action reported that they did not want to “cause trouble with their landlord” (21\%), that they “felt their tenancy would be ended” (5\%), or that they “didn't think it was worth the effort” (one third).\textsuperscript{47} Citizens Advice also relied on anecdotal evidence supplied by the organization's employees, noting that “[Citizens Advice Bureau employees] from around the country regularly report” cases of retaliatory conduct by landlords.\textsuperscript{48} The report further revealed that “[i]n some cases landlords have even used their power to evict as a bargaining tool to try to get the tenant to pay for \textsuperscript{1081} the work needed.”\textsuperscript{49} Perhaps the most compelling data produced in the report was a survey of local authority officers tasked with addressing tenant complaints regarding violations of environmental health standards. In a survey of these officers, 48\% reported that tenants were “often” or “always” deterred from accepting help because they were afraid of jeopardizing their tenancy.\textsuperscript{50}

Both Shelter and Citizens Advice have called for an end to retaliatory eviction through legislative reforms.\textsuperscript{51} In turn, legal officials in both England and Wales have also begun to investigate the problem of landlord retaliation. However, until very recently, most governmental inquiries have not resulted in recommendations for the type of legislation proposed by Shelter, Citizens Advice, and other tenant support organizations.

For example, in 2008, the Labour Government commissioned a review of the private rental sector by the Centre for Housing Policy at the University of York.\textsuperscript{52} The authors of the resultant report critiqued the findings of Shelter and Citizens Advice, noting that both organizations maintain policies of advising tenants that exercising their rights might result in the landlord issuing a termination notice.\textsuperscript{53} Thus, the authors concluded, it is “unsurprising” that local authority officers found that tenants showed reluctance to pursue complaints against their landlords.\textsuperscript{54} The authors went on to question the accuracy of conclusions drawn from the “opinions” of local authority officers, noting that the task of calculating the incidence of retaliatory eviction is “complex”:

> It cannot be denied that there will be landlords who evict tenants who complain about property condition; at the same time, it has to be admitted that there are tenants who will claim unfair eviction in the hope that this will improve their chance of getting a social housing tenancy.\textsuperscript{55}

\textsuperscript{1082} The authors ultimately concluded that retaliatory eviction would be best addressed not by limiting the landlord's right to evict but by “ensuring that landlords who would take this action are removed from the sector.”\textsuperscript{56}

Also in 2008, the Law Commission considered the possibility of prohibiting retaliatory eviction, noting that the issue had “attracted a considerable amount of public attention over the last year.”\textsuperscript{57} In its report, the Law Commission concluded
that proposals to limit a landlord's right to evict following a tenant making a complaint about housing conditions suffered from “significant difficulties,” most notably the challenge of proving the landlord's retaliatory motive. The Law Commission report also concluded that because most tenants do not seriously consider pursuing legal proceedings, prohibitions on retaliatory eviction “may be of symbolic importance but be of little practical effect.” The same report expressed concern that anti-retaliation laws could cause “considerable disturbance to the private rented sector by introducing a measure whose impact would be unpredictable and uncertain.”

More recently, in 2013, the Communities and Local Government Select Committee of Parliament initiated an inquiry into the private rented sector that included consideration of retaliatory eviction. Even after receiving evidence from multiple tenant advocacy organizations, the Committee stated it was “not convinced” that a legislative approach to retaliatory eviction would be an effective solution to the problem. In the opinion of the Committee, “[c]hanging the law to limit the issuing of [eviction] notices might be counter-productive and stunt the market.” The Committee surmised instead that moving toward a “culture” where longer tenancies are the norm would give tenants greater security and more confidence to ask for improvements. The Committee also suggested that proactive enforcement of environmental regulations by local authorities would also obviate the need for tenants to take the responsibility of reporting.

Finally, in February 2014, the Government launched its own inquiry into housing conditions in the private rented sector. The main impetus for this project was “to consider what more can be done and how to best tackle bad landlords without negatively impacting on the good ones.” On the topic of retaliatory eviction, the Government called for input on whether restrictions on landlords' rights to evict without cause should be introduced in cases where the property is in need of major improvements or repairs, what the appropriate “trigger point” for introducing such restrictions should be, and how to prevent spurious or vexatious complaints. Responses to the review were accepted up to March 28, 2014, and the Government intends to publish its final report sometime in 2015.

C. Proposed Legislation in England-The Tenancies (Reform) Bill of 2014-15

Despite the uncertainty of Parliamentary and Governmental support for legislative prohibitions on retaliatory eviction, in July 2014, Member of Parliament Sarah Teather introduced the Tenancies (Reform) Bill of 2014-15, aimed primarily at tackling landlord retaliation.

The primary thrust of the bill was to prevent a landlord from serving an otherwise valid notice of eviction in response to tenant complaints about the condition of the dwelling. The bill sought to prevent unlawful eviction in assured shorthold tenancies by rendering “invalid” a notice of eviction made within six months after a local housing authority served a “relevant notice” of needed improvements or repairs on the landlord. Notably, the bill contained a number of exceptions under which the prohibitions on evictions would not apply. For example, the law would not apply where the complained-of condition was caused by the tenant's failure “to use the dwelling-house in a tenant-like manner,” or by the tenant's breach of an express term in the tenancy agreement. Additionally, the law would not apply if a court determined that the tenant's complaint regarding the condition of the housing was “totally without merit.” A landlord would also be permitted to evict following a tenant's complaint so long as he placed the dwelling house “genuinely on the market for sale.” Finally, the proposed law would not apply where the dwelling was subject to a mortgage granted before the beginning of the tenancy, and the mortgagee required possession of the dwelling for the purpose of disposing
of it with vacant possession. No exception was made for complaints made by tenants who are in arrears in the payment of rent.

*1085 III. Reaction and Debate

A. Wavering Support for Reform

Once introduced, the Tenancies (Reform) Bill attracted broad support from local government and tenant representative bodies. Additionally, the Government came out in support of the bill, stating that the bill would “root out a minority of spiteful landlords and ensure that hardworking tenants are not afraid to ask for better standards in their homes.”

The Government's support of the bill was gratifying for tenant advocates, given its past stance that legislation prohibiting retaliatory eviction might prove deleterious for the housing market. However, the Government's support did not provide enough momentum for the bill to advance as its proponents had hoped. At its Second Reading, which took place on November 28, 2014, the bill did not gain enough votes to move forward. Commentators initially declared that the bill would have “no chance of proceeding” after its failure in November.

In light of the conflicting views on the extent of retaliatory eviction and the appropriate means to address it, the All Party Parliamentary Group (APPG) for the Private Rented Sector conducted a short inquiry into retaliatory eviction in late 2014. Written submissions were invited up to November 5, 2014, and the APPG's report, Tackling Retaliatory Eviction, was quickly published on December 15. The APPG stated that the volume of conflicting statistics submitted in connection with the inquiry was “bewildering” and concluded that obtaining objective data on the issue proved to be “impossible.” In light of this conclusion, the APPG cautioned against legislating in the absence of more robust evidence of retaliatory eviction and called upon the Government to collect this data in the English Housing Survey. The group also requested the Council of Mortgage Lenders to provide data regarding the potential impact of the bill on the buy-to-let market.

The APPG additionally recommended other measures that might obviate the need for legislation expressly prohibiting retaliatory eviction. The group recommended that a review of the ability of Environmental Health Officers to carry out their enforcement responsibilities may be warranted. The APPG also recommended a new statutory requirement that tenants be given details about their rights and responsibilities, especially regarding evictions, prior to moving into a property. However, no endorsement for the proposed bill or any version of it was provided.

B. Opponents Speak Out

After its introduction, the Tenancies (Reform) Bill was the recipient of staunch criticism-not only of the proposed law, but of the evidence proffered by tenant advocates that landlord retaliation is a serious problem deserving of legislative attention. The bill's primary opponent was the Residential Landlords Association (RLA), which suggested that the problem of retaliatory eviction is much more limited than has been suggested by organizations like Shelter and Citizens Advice. The RLA also stubbornly maintained that existing law contains sufficient protections for the small number of tenants who experience retaliation at the hands of a “rogue” landlord. The RLA campaigned heavily against the Tenancies (Reform) Bill on both of these grounds during the weeks leading up to its Second Reading in November 2014.
First, the RLA disputed Shelter's estimates of the extent and prevalence of retaliatory conduct, emphasizing that the Government collects no official statistics on eviction-retaliatory or otherwise—and that the data proffered by tenant advocates is largely anecdotal. According to the RLA, “the case [against retaliatory eviction] is being based on anecdotal evidence from Environmental Health Officers . . . on behalf of local authorities and deductions from other statistical evidence, with all the attendant dangers which go with such an approach.”

The RLA has produced its own evidence that it says counters claims that retaliatory eviction is prevalent in the United Kingdom. In a survey of more than 1760 landlords, 56% reported evicting tenants. Of those, almost 90% cited rent arrears as the reason for the eviction. Other commonly cited reasons for eviction were anti-social behavior, damage to property, and drug-related activity. The RLA argues that its survey “demonstrates that the vast majority of landlords only seek to evict when they really need to.” The RLA also cites findings from the 2012-2013 English Housing Survey suggesting that 84% of private sector tenants were “satisfied” with their accommodations.

Additionally, the RLA argues that retaliatory eviction is already illegal and that there is therefore no need to legislate further in this area. The RLA relies in part on the 2008 Unfair Trading Regulations, promulgated under the Consumer Protection Act, which prohibit conduct that “intimidates or exploits” consumers. The RLA notes that the Official Guidance to the Unfair Trading Regulations makes clear that the Regulations apply to landlord-tenant relations. According to the Guidance document: “[t]hreatening the tenant with eviction to dissuade them from exercising rights they have under the tenancy agreement or in law, for example where they wish to make a complaint to a local authority about the condition of the property, or seek damages for disrepair” gives rise to breach of the Unfair Trading Regulations. The RLA acknowledges that tenants cannot bring private actions to enforce the Unfair Trading Regulations but advocates that existing law be expanded to allow tenants to do so.

The RLA further claims that landlord retribution is prohibited by existing criminal law. To be sure, the Protection from Eviction Act 1977, the Criminal Law Act 1977, and the Protection from Harassment Act 1997 all make harassment and illegal eviction criminal offences. The RLA explains further that under the common law defense of illegality, a court cannot assist a landlord in evicting a tenant in retaliation for a complaint about the property because the landlord would be committing a criminal offense by pursuing such a claim. The RLA does not, however, acknowledge that the 1997 Harassment Act requires a “course of conduct” in order for landlord behavior to rise to the level of a criminal offense, making it unlikely that the service of a notice of eviction in reaction to a tenant complaint would qualify as such. The RLA also does not acknowledge that under existing criminal law, the tenant would be required to affirmatively prove the retaliatory conduct of the landlord, whereas proof of retaliatory motive is not required under the proposed legislation.

Finally, the RLA cautions that the proposed legislation will have unintended consequences for landlords and the private rented marketplace generally. The RLA argues strongly that any limitation on the landlord's unfettered right to terminate an assured shorthold tenancy will erode market confidence “at a time when the private rented sector is the only area of growth in rented homes.” Legislation invalidating eviction notices following requests for repairs will, they say, encourage tenants to request repairs or governed inspections in response to any action by landlords to tackle rent arrears or other breaches of the tenancy. Thus, the legislation will merely embolden tenants to file false claims in an effort to avoid otherwise lawful evictions. The Association of Residential Letting Agents, also staunchly opposed to
the bill, conurs: “It is probable that retaliatory eviction is likely to cost landlords more money than merely remedying any problem.”

C. Covert Legislative Response-The Deregulation Bill

Although outward support for anti-retaliation law has waned, tenant advocates have identified another potential route to success. In February, an amendment was proposed with little fanfare to a general deregulation bill. The amendment is substantially similar to the stalled Tenancies (Act). As both houses of Parliament have agreed on the text of the Deregulation Bill 2013-14 to 2014-15, the prohibition of retaliation in England is all but certain.

As under the prior bill, under the pending law a notice of eviction may not be served on a tenant within six months after the service of a “relevant notice” of needed repairs or improvements on the landlord by the local housing authority. The prohibition on eviction following a relevant notice does not apply, however, where the relevant notice has been revoked as a result of having been served in error, quashed, reversed, or suspended as provided by other substantive law.

Also as under the prior bill, the pending law contains a number of additional exceptions. The law does not apply when the complained-of condition was caused by the tenant's failure “to use the dwelling-house in a tenant-like manner,” or by the tenant's breach of an express term in the tenancy agreement. Additionally, a landlord may evict following a tenant's complaint so long as he placed the dwelling house “genuinely on the market for sale.” Finally, the proposed law would not apply where the dwelling was subject to a mortgage granted before the beginning of the tenancy and the mortgagee required possession of the dwelling for the purpose of disposing of it with vacant possession.

Notably, the pending law did not incorporate the exception from prior law for cases in which a court determines that the tenant's complaint regarding the condition of the dwelling was “totally without merit.” Also absent from the pending law is any exception for complaints made by tenants who are in arrears in the payment of rent.

D. A Proposal in Wales-The Renting Homes (Wales) Bill

Tenant advocates have also gained a foothold in the General Assembly of Wales. A long-awaited comprehensive housing law bill introduced there in February 2015 and set to be reviewed in Committee during the summer contains a simple, but potentially formidable, retaliatory eviction provision.

Unlike the complex and detailed anti-retaliation regime introduced in England, the Welsh legislation aims only to provide courts with discretion to refuse to award possession to a landlord who has acted in a retaliatory manner. According to the proposed statute, a possession claim is retaliatory if the tenant has relied on or invoked the landlord's obligations to maintain the premises in a habitable condition and to make required repairs and the court is “satisfied that the landlord has made the possession claim to avoid complying with these obligations.” As of this writing, the bill has been assigned to the Communities, Equality, and Local Government Committee, which has issued a call for evidence on the bill's impact. Once this inquiry closes, the bill will be discussed in Committee for several months before it will be debated by the Assembly. Although the success of the bill is far from certain, the legislation is promising, particularly in light of the imminent adoption of anti-retaliation law in England.
E. Examination of Foreign Experience

The political discussions surrounding retaliatory eviction, its incidence, and the most appropriate means of controlling its occurrence have been largely devoid of comparisons to foreign common law jurisdictions, where robust anti-retaliation regimes are the norm. However, before the debate entered the legislative arena, pro-tenant organizations such as Shelter and Citizens Advice looked to foreign law for inspiration as to how to effectively combat landlord retribution.

In its 2007 report on retaliatory conduct, Citizens Advice observed that in most European jurisdictions, retaliatory eviction is not an issue, as private tenants enjoy strong security of tenure regimes that permit landlords to evict only in narrowly prescribed circumstances, such as rent arrears, damage to property, or, in some countries, if the landlord needs the property for use as his own dwelling. Thus, the best inspiration for a robust anti-retaliation regime is drawn not from European jurisdictions, but from non-European common law jurisdictions where tenants have less security of tenure, such as Australia, New Zealand, and the United States. In all of these countries, landlords can generally terminate tenancies without cause, but are prohibited—either by legislation or case law—from evicting tenants who have taken some action to enforce their rights. Shelter has also conducted extensive research into the anti-retaliation regimes of common law jurisdictions with low security of tenure, including New South Wales, Queensland, South Australia, Victoria, Western Australia, Tasmania, New Zealand, and the United States.

Although Shelter and Citizens Advice urge that a legislative solution to landlord retaliation in the United Kingdom ought to follow the experience of foreign jurisdictions, thus far foreign law has been studied only in its letter, and only facially so. No detailed analysis has been undertaken of the great variation—and attendant strengths and weaknesses—among state and local laws prohibiting landlord retaliation. Moreover, these laws have been studied in their appearance only and not in their application. A comprehensive review of how well anti-retaliation laws interact with existing legal and non-legal institutions for tenant relief must be undertaken and should serve as a lens through which to consider how similar anti-retaliation regimes would function in the United Kingdom. The remainder of this Article seeks to fill this gap and contribute to the ongoing legislative debate by providing a detailed review of U.S. retaliatory eviction laws and their implementation.

IV. American Prohibitions on Landlord Retaliation

The vast majority of jurisdictions in the United States prohibit landlords from taking revenge against tenants who exercise their rights under housing codes or other laws governing tenant rights. Forty states and the District of Columbia have statutes that provide varying degrees of protection from retaliatory conduct. Another four states have recognized the doctrine jurisprudentially. Many individual municipalities have also enacted anti-retaliation ordinances that offer additional protection to local tenants. However, the proliferation of anti-retaliation laws is a relatively new phenomenon in American landlord-tenant law. Before exploring their variety, some examination of their introduction is warranted.

A. Early Prohibitions on Retaliation

As is the case today in the United Kingdom, the American common law was entirely unconcerned with an evicting landlord's motive or purpose in terminating the tenancy. Landlords enjoyed the right to terminate a periodic tenancy or refuse to renew a fixed term lease for any reason, simply through timely service upon the tenant of a notice to quit.
Indeed, it was well established that the landlord could evict “for any legal reason or no reason at all.” During the second half of the last century, however, American courts and legislatures began limiting landlords’ freedom to terminate a lease, particularly when eviction served as retribution against a tenant for complaining about the condition of a residential dwelling.

State laws prohibiting retaliatory conduct by landlords were first fashioned by the judiciary during the landlord-tenant “revolution” of the 1960s and 1970s. During that time, housing policy shifted dramatically, resulting in new laws that sought to ensure safe and habitable housing conditions for residential tenants. A consequence of this trend was the development by courts of rules prohibiting landlords from retaliating against tenants for exercising their newly secured rights. The doctrine of retaliatory eviction was first developed as a defense to the landlord's action for unlawful detainer, on the reasoning that housing and sanitary codes and the emerging implied warranty of habitability would be rendered ineffective if tenants feared retribution by landlords against whom complaints were levied.

In the seminal case of Edwards v. Habib, the D.C. Circuit became the first court to articulate the need for such a doctrine. As famously articulated by the opinion's author, Judge Skelly Wright:

There can be no doubt that the slum dweller, even though this home be marred by housing violations, will pause long before he complains of them if he fears eviction as a consequence. Hence an eviction under the circumstances of this case would not only punish appellant for making a complaint which she had a constitutional right to make . . . but also would stand as a warning to others that they dare not be so bold.

Thus, in Edwards, the court held that a landlord could not refuse to renew a lease in retaliation for a tenant's complaint to a housing code authority. Instead, the tenant was entitled to remain in the premises for as long as the landlord's motive for refusing to renew remained retaliatory. Following the decision in Edwards, numerous other courts employed similar reasoning to recognize the anti-retaliation defense.

State legislatures followed the lead of the courts by enacting retaliatory eviction regimes designed to protect and promote tenants' rights to decent housing. These enactments, and the judicial decisions applying them, further strengthened tenant protections. First, many state statutes expanded protection beyond the prevention of eviction. Whereas in periodic leases, retaliation tended to take the form of termination of the tenancy, other forms of retaliation prevailed in fixed term agreements. A landlord seeking retribution for tenant complaints might instead increase the rent or suspend utility services. State legislatures responded by addressing the gamut of potentially retaliatory conduct by landlords. Additionally, many states sought to prevent landlords from retaliating against tenants for reasons other than merely complaining about housing conditions. For example, landlords were prohibited from evicting in response to tenants' complaints about a landlord's criminal conduct or opposition to a landlord's development plans for the property. Over time, some jurisdictions further extended anti-retaliation laws to also protect tenants' First Amendment rights to free speech and assembly.

B. Uniform Law and the Restatement
Today, most retaliatory eviction laws in the United States are based, at least loosely, on the Uniform Residential Landlord and Tenant Act (URLTA), which was published in 1972. The URLTA protects three types of tenant behavior: (1) reporting housing code violations affecting the tenant's health or safety; (2) complaining to the landlord about the condition or maintenance of the premises; and (3) joining or forming a tenant's union or other tenant's rights advocacy group. Tenants who engage in protected behavior are afforded a defense in eviction proceedings and may also affirmatively claim damages and attorney's fees in response to a landlord's retaliatory conduct. Notably, “retaliatory conduct” by landlords may include not only eviction or the threat of eviction but also the increasing of rent or the decreasing of services to the tenant.

Significantly, proscriptions on retaliatory eviction are designed solely to avoid wrongful termination of a lease, and not merely capricious termination. In the absence of a forbidden motive, landlords remain free to evict a tenant or refuse to renew a lease for any reason. Thus, the key component of any retaliatory eviction claim is proof of the landlord's retaliatory motive. Significantly, the URLTA provides that if the alleged retaliation occurs within one year of the tenant's protected behavior, a presumption exists in the tenant's favor that the landlord's conduct was in fact retaliatory. However, this presumption does not arise if the tenant made the complaint after a notice of a proposed rent increase or diminution of services.

Finally, the URLTA provides that landlords may regain possession of the property even after a tenant has taken protected action under certain circumstances, described as “safe harbors” for the landlord. Thus, the landlord's conduct will not be deemed retaliatory if the tenant caused the damage or code violation of which he complains, if the tenant is in default in rent, or if compliance with the applicable housing code would require some alteration, remodeling, or demolition of the dwelling which would effectively deprive the tenant of his use of the dwelling.

The Restatement (Second) of Property also recognizes the defense of retaliatory eviction, albeit one more limited than that of the URLTA. The relevant provision deems “retaliatory” a landlord's termination of a tenancy by notice or failure to renew a tenancy for a specified term, provided that five criteria are met. These are: (1) there is a protective housing statute in place; (2) the landlord is in the business of renting residential property; (3) the tenant is not materially in default in the performance of his obligations under the lease at the time the landlord acts; (4) the landlord is primarily motivated in acting because the tenant has complained about a violation by the landlord of a protective housing statute; and (5) the tenant's complaint was made in good faith and with reasonable cause. The Restatement's iteration of the anti-retaliation doctrine is far more restrictive than that of the URLTA, in no small part because it applies only to landlords “in the business” of renting and requires affirmative proof of the landlord's retaliatory motive. Although the Restatement approach is not mainstream, some state courts have favored its less expansive reach.

C. Proliferation-States and Municipalities

Wide variation exists among state anti-retaliation laws, with some states and municipalities offering far less protection to tenants than others. The largest disparities exist with respect to five components of retaliatory eviction doctrine: (1) its utility as an affirmative claim for relief in addition to a defense in a suit for eviction; (2) the range of behaviors that are both protected from retaliation and that may be deemed retaliatory; (3) the existence and strength of a presumption of retaliatory motive on the part of the landlord; (4) the scope of relief available to a tenant who successfully proves retaliation; and (5) exceptions.
1. Affirmative and Defensive Claims

In many jurisdictions where anti-retaliation laws exist, tenants may bring an affirmative claim for damages or injunctive relief when a landlord has acted in a retaliatory fashion. In a minority of states, however, a tenant may rely on anti-retaliation law only as a defense to a landlord's action for eviction. The latter approach severely limits the protective effect of an anti-retaliation regime in that it deprives the tenant of any modicum of control over his own claim. If a landlord takes steps short of eviction, such as an increase in rent, a decrease in services, or even a threat of eviction, the tenant has neither access to relief nor leverage in his negotiations with the landlord. Rather, the tenant is forced to wait until the landlord initiates a legal proceeding before he can complain.

2. Coverage of Tenant Activities and Landlord Behaviors

Another area of wide variation among jurisdictions is the scope of anti-retaliation doctrine, both with respect to the tenant activities that are protected and the types of landlord behaviors that are deemed to be retaliatory. Tenant advocates argue that in order to best protect and promote policies implicit within laws requiring safe and habitable housing for tenants, “courts should protect all acts that are within the tenants' rights and intended to promote the habitability of rentals.” Similarly, supporters of tenant rights argue that anti-retaliation regimes must cover the full gamut of landlord retaliation in order to be fully effective. And yet, state laws vary significantly in terms of their scope.

With respect to tenant activities, a majority of states have adopted the approach of the URLTA, which is to protect tenants who have either (1) reported housing code violations affecting health or safety; (2) complained to the landlord about the condition of the premises; or (3) joined or formed a tenants' union or other tenants' rights advocacy group. However, some legislatures have specifically declined to cover the tenant's affiliation with a union or other advocacy organization. Also, some jurisdictions restrict protection to the tenant by requiring that the tenant's complaints to the landlord or to a governmental agency be made in “good faith” or that the landlord have notice or knowledge of the protected activity of the tenant. In contrast, many states have added additional types of activities for which a tenant is protected, including the exercise of a right under the lease, a failure to agree to a new rule or regulation after the tenancy begins, or the exercise of a statutory right to terminate a lease.

Notably, although many states' statutory protections are broad in coverage, judicial interpretation of these statutes can significantly limit their scope. Take, for example, the approach of a Connecticut court in interpreting a statute forbidding a landlord to evict within six months after the tenant “has in good faith requested the landlord to make repairs.” The court limited the term “repairs” to major repairs aimed at preventing urban decay and blight, holding that “repairs required to conform a dwelling unit to basic structural, mechanical[,] and housing code regulations are the type of repairs which were contemplated by the legislature and which raise the presumption of a retaliatory defense.” Thus, the court declined to recognize a request to unclog bathroom plumbing as a request for “repair” under the retaliatory eviction regime. The court cited a floodgate argument as its primary reason for interpreting the statute so narrowly.

State law also varies with respect to the range of landlord conduct that is regulated by anti-retaliation regimes. The URLTA prohibits retaliation in the form of eviction, increases in rent, or decreases in services provided to the tenant. Although most states' retaliatory conduct laws adhere to this narrow range of activities, some states have expanded the list, either by adding other types of specific conduct or by adopting a generalized standard that would encompass a
broader range of actions. Some terms enumerated by these more protective statutes include refusing to renew a lease, termination of a periodic tenancy, increased obligations under the lease, depriving the tenant of use of the premises, materially interfering in bad faith with the tenant's rights under the lease, or substantial alteration of the terms of the tenancy.

3. Proof of Retaliatory Motive

A third area of variation in retaliatory eviction law concerns the tenant's proof of the landlord's retaliatory motive. It is well accepted that a landlord's motive is exceptionally difficult to prove, and many courts and commentators have posited that requiring a tenant to affirmatively prove a landlord's retaliatory motive renders retaliatory eviction laws nearly useless. A majority of states address the difficulty of proof through presumptions of retaliatory intent that favor tenants. According to this approach, when a landlord attempts to evict a tenant or performs other prohibited acts within a certain time period following protected tenant activity, a presumption of retaliation arises and the burden rests on the landlord to present a valid (non-retaliatory) reason for his actions. Unfortunately, however, not all jurisdictions recognize a presumption of retaliation in favor of the tenant. Indeed, other states have gone so far as to adopt a presumption against the tenant and in favor of the landlord.

Even in states where the presumption is recognized, it is not without exceptions. For example, several states have adopted the approach of the URLTA, under which the presumption of retaliatory motive does not apply when a notice of a rent increase or diminution in services predated the tenant's complaint. These exceptions are reasonably premised on the likelihood that a complaint following an unfavorable (though lawful) change in the lease terms may itself be unfairly motivated.

The pro-tenant position favored by many states has itself been criticized on the basis of the time limitations that are placed on presumptions of retaliation. States adopting the approach of the uniform law limit the presumption to one year after the tenant's protected conduct. Thus, any eviction or other regulated behavior by the landlord during the year following a tenant's protected conduct will be presumed retaliatory, and the burden rests on the landlord to establish a non-retaliatory motive. However, most states have enacted much shorter periods, some as short as 90 days. Once the period runs out, the tenant is again left with the nearly insurmountable task of proving the landlord's improper motive.

The strength of the presumption is also relevant. In some jurisdictions, the landlord can rebut the presumption of retaliation by proving that the eviction was initiated for “good cause.” In contrast, other jurisdictions provide much stronger protections by requiring the landlord to prove by clear and convincing evidence that the motive for eviction was not retaliatory. Finally, in other states, landlords can rely only on a predefined list of defenses to the tenant's claim that retaliation has occurred.

Finally, there is some variation in approaches to the problem of a landlord's “mixed motives”-eviction for motives that are both retaliatory and legitimate. The few jurisdictions to address this issue do so with one of three approaches. Some jurisdictions use a “sole motivation” test that requires the tenant to prove that the retaliatory purpose was the sole reason for the eviction. This test essentially insulates landlords with multiple motives from liability provided that at least one of the motives for the landlord's conduct was legitimate. Other states apply an “independent motivation”
test, which is far more favorable to tenants. Here, once the tenant has produced sufficient proof to raise a presumption of retaliation, the landlord must rebut the presumption by showing that “the decision to evict was reached independent of any consideration of the activities of the tenants protected by the statute.” An intermediate approach is the “primary motive test,” which considers whether a retaliatory motive was the primary or predominant reason for the eviction.

4. Remedies

Next, anti-retaliation regimes vary in the forms of relief offered to tenants who successfully prove that their landlords have engaged in prohibited retaliatory conduct. The URLTA again is the touchstone for most states. The uniform law allows the tenant to recover “an amount not more than [three] months' periodic rent or [threefold] the actual damages sustained by him, whichever is greater, and reasonable attorney's fees.” A small number of states provide lesser relief, allowing recovery of actual damages and attorney's fees but not the treble damages allowed under the uniform act. In contrast, two states impose penalties on landlords in addition to actual damages suffered. Understandably, tenant advocates promote anti-retaliation regimes that afford tenants a complete range of coverage, including actual, consequential, and punitive damages; attorney's fees and court costs; and injunctive relief.

5. Exceptions

Finally, a number of states recognize exceptions to retaliatory conduct prohibitions, under which a landlord may evict a tenant notwithstanding a presumed or established retaliatory motive. Most states base their lists of exceptions on the URLTA. Under the uniform law, a tenant may be evicted regardless of the landlord's motive if the condition complained of was caused by the tenant, a member of the tenant's family, or a person on the premises with the tenant's consent; if the tenant is in default in rent; or if compliance with applicable codes would require alterations that would effectively deprive the tenant of the use of the leased premises. Of the states to adopt the URLTA's exceptions, many of them have expanded upon this list with additional exceptions. These may include a tenant's breach of an obligation in the lease other than the obligation to pay rent or the landlord's desire to use the dwelling as his own residence.

D. The Revised Uniform Law

In 2012, the Uniform Law Commission undertook a large-scale revision of the URLTA that, as of this writing, is still underway. The most current draft of the revised uniform law reflects fairly significant changes to the URLTA's retaliatory eviction provisions. First, the scope of tenant behavior protected by the act has been expanded to incorporate the variety of approaches taken by many states since the URLTA was first promulgated. Under the revised URLTA, a tenant would be covered not only for complaints to a government agency or the landlord and for affiliation with a tenants' rights organization or union, but also if he exercised any legal right under the lease or any provision of law or pursued any legal action or administrative remedy against the landlord in court or an administrative proceeding. The range of landlord conduct that may be deemed retaliatory has also been broadened. Where the original act recognized as retaliatory a suit for possession, a decrease in services, or an increase in rent, the revised act also recognizes refusing to renew a tenancy containing an option to renew, terminating a periodic tenancy, and any conduct prohibited by criminal law. Taken together, these reforms reflect a policy of protecting tenants in the exercise of their legal rights.
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of any legal right, and in ensuring that the law contains no loopholes that would allow a landlord to unlawfully evict, whether literally or constructively.

Notably, the Uniform Law Commission drafting committee has taken a balanced approach to reform, expanding not only tenant rights but also landlord protections. Again in an apparent attempt to incorporate the variety of state approaches to landlord retaliation, the Uniform Law Commission has expanded the list of safe harbors for landlords. The existing uniform law permits landlords to regain possession even after a tenant has taken protected action if the tenant caused the damage or code violation at issue, if the tenant was in rent arrears, or if compliance with the applicable code would require some alteration, remodeling, or demolition of the building that would effectively deprive the tenant of its use. The revised law would permit the landlord to evict in all of these cases as well as under additional circumstances. First, the landlord is not liable for retaliation if the tenant's conduct was “in an unreasonable manner or at an unreasonable time, or was repeated in a manner having the effect of harassing the landlord.” Second, retaliatory eviction would not apply when the tenant, a member of his family, or his guest engaged in conduct that presented a threat to the health or safety of another tenant on the premises or in criminal activity. Finally, the landlord could recover possession if he sought to do so based on a notice to terminate the lease and the notice was given to the tenant before the tenant engaged in the protected behavior. These reforms have been introduced with an eye toward preventing tenants from abusing anti-retaliation regimes to the detriment of landlord rights.

Other significant reforms in the revised uniform law involve the presumption of retaliation. First, the Uniform Law Commission responded to the problem of a landlord's “mixed motives” by requiring the landlord's “dominant” purpose in taking action against a tenant to be retaliatory. Here again, the Uniform Law Commission exhibits a moderate approach to revision by choosing the intermediate approach to mixed motives among the several fashioned by the states. The revised act also decreases the time period during which a landlord's motive is presumed to be retaliatory from one year following a tenant's protected conduct to six months following such action.

The revision of the URLTA's retaliatory eviction provisions has not been without some controversy. The National Apartment Association (NAA), for example, has stated that it has “serious concerns” about the proposed revision. The NAA's most significant concern appears to be the potential for tenants to abuse the law by complaining of minor defects in the premises. According to the NAA, “[r]etaliation laws are often abused and extend the evictions process in some cities to six to 10 months as the parties dispute the retaliation claim in court.” To that end, the NAA has recommended that the model act protect only tenants who act in “good faith” and allow landlords to recover a civil penalty of one month's rent plus $500, court costs, and reasonable attorneys' fees from a tenant who acts in “bad faith,” such as by complaining of a defect or housing code violation that does not in fact exist. Tenant advocates have responded to the NAA's complaints by pointing out that the organization has offered no data to substantiate its claim that residential tenants currently abuse retaliatory eviction laws. And, to date, the Uniform Law Commission has not introduced specific penalties for tenants who act in bad faith.

V. The Efficacy of U.S. Retaliation Laws

Through state-by-state experimentation, anti-retaliation regimes in the United States have flourished. Although a great deal of variation exists, most state laws provide robust protections for tenants who seek to hold landlords responsible for their contractual and legal obligations. A clear consensus has emerged among legislators, courts, and academics in favor
of strong protections for tenants, with attendant safeguards for landlords in place. An assessment of American laws “on the books” thus speaks highly in favor of the adoption of anti-retaliation regimes abroad in England and Wales.

However, despite the adoption of strong protections by more than 40 states, many tenants continue to live in fear that their landlords will increase rent, cut services, or even evict those who raise legitimate complaints and demand that landlords provide safe and habitable dwellings. Indeed, jurisprudential, empirical, and anecdotal evidence suggests that prohibitions on retaliatory conduct may not provide tenants with meaningful protection against landlord retribution. In order to determine whether anti-retaliation legislation would be more successful in the United Kingdom than it has been in the United States, it is necessary to explore the reasons why landlord retaliation remains a concern in this country.

A. Empirical Data on Evictions in the United States

1. The Scarcity of Empirical Data

American landlord-tenant scholars have long debated the utility of pro-tenant reforms such as the implied warranty of habitability and prohibitions on retaliatory conduct. However, the functional assessment of landlord-tenant law is extremely difficult, as little-to-no hard evidence exists regarding the use of these doctrines in housing disputes. Statistical evidence on eviction proceedings is extremely scarce. Data is not collected in a systematic way at the national, state, or even local level. The data that has been collected has largely been in the form of small, short-term studies limited both in time and in locale—often to a single housing court in a large municipal area. In addition, a significant volume of the available “evidence” on eviction appears in the form of media—even social media—reports rather than academic analysis.

Moreover, the few published empirical studies documenting court proceedings between landlords and tenants do not contain sufficient detail to determine the frequency with which tenants rely upon retaliatory eviction laws or the success rates of those claims. Additionally, reported decisions in which tenants prevail on retaliatory eviction claims are few and far between, and no reliable record exists of the number of claims raised at the trial level. Also, because many evictions occur informally, either through landlord self-help or agreements entered into between landlords and tenants, it is difficult to know with certainty whether retaliatory eviction laws are, in practice, useful to residential tenants.

2. What the Data Show

Although compelling arguments may be made that anti-retaliation laws ought to be stronger, at least in some jurisdictions, the available data concerning eviction proceedings suggests that reform of anti-retaliation laws will have little practical effect on tenants. This is because both statistical and anecdotal reports suggest that tenants lose nearly all eviction cases, whether or not landlord retaliation is involved. In fact, reports that tenants “always” lose eviction cases, or lose in 95% to 99% of cases, are not unusual.

More to the point, both statistical data and anecdotal evidence suggest that the availability of a legal defense to eviction—such as landlord retaliation—does not significantly affect eviction outcomes. Indeed, even in jurisdictions where anti-retaliation regimes strongly favor tenants, tenants very rarely invoke these laws, whether formally or informally. Thus, the strength or weaknesses of the retaliatory eviction laws in a particular jurisdiction may be largely, if not entirely, irrelevant in most evictions that occur there.
Additionally, despite the existence of laws specifically prohibiting retaliation, at least some landlords continue to evict in retaliation for protected tenant behavior. While it might be expected that some small percentage of unscrupulous landlords will continue to act in flagrant violation of the law, surveys of tenant concerns indicate that the practice may not be limited to a small subset of cases. Multiple sources report that tenants continue to express concerns that if they take any legal action against their landlords, they will be faced with eviction, rent increases, or other forms of harassment.

B. The Institutional Context of Anti-Retaliation Laws

As the above data suggests, evaluating the success of anti-retaliation regimes is complex. Tenants lose eviction cases so quickly and at such high rates not because of the strength or weakness of retaliatory eviction laws or other tenant defenses, but because of broader and more pervasive institutional and structural barriers to tenant success in housing courts. These contextual influences must be factored in to any comparative assessment predicting the success of retaliatory eviction abroad. An evaluation of the full range of legal, financial, and social forces affecting residential tenants in the United States is far beyond the purview of this project. However, four contextual variables account for much of the reason why tenants rarely avail themselves of defenses to eviction with any success.

*1110 1. Legal Representation

First, tenants in the United States very rarely have legal representation at summary eviction proceedings. In fact, some studies show that tenants appear pro se in as many as 95% to 99% of cases. While the data varies from report to report, studies consistently report that landlords have representation in a majority of cases, while tenants do not. The disparity of representation in landlord-tenant disputes has become accepted as fact. One expert recently reported that “[i]n landlord-tenant matters . . . it is typical for ninety percent of tenants to appear pro se while ninety percent of landlords appear with counsel.” Some evidence suggests that the disparity in representation is far less pronounced in cases involving “mom and pop” landlords as opposed to professionals. Even still, in cases where neither side is represented by counsel, landlords tend to receive assistance from agents and other “repeat players” in housing court, whereas tenants are more frequently represented by novices-family members and friends. Thus, whereas landlords generally receive at least some modicum of professional help in court, tenants rarely do.

*1111 With respect to eviction outcomes, representation appears to matter. A recent review of the available literature suggests that tenants prevail twice to ten times as often when assisted by an attorney. One study of evictions in California found that represented tenants won twice as frequently as landlords, whereas landlords won five times more often than unrepresented tenants. Another study of a New York housing court found that evictions occurred in over half of the cases in which tenants were unrepresented, but only one third of the cases in which tenants were assisted by counsel.

Several explanations may be offered as to why tenants win more frequently with legal counsel. Litigants who proceed pro se are forced to navigate complex schemes of substantive and procedural rules. The preparation of pleadings, the conduction of discovery, and even proper court decorum are entirely foreign to untrained litigants and can present substantial roadblocks to success. In eviction cases, lawyers can determine what is actually owed by way of rent, negotiate with landlords for more time to pay, and, when necessary, assist the tenant in articulating legitimate defenses to the landlord's eviction claim. In particular, a lawyer's ability to provide a tenant with knowledge regarding
viable defenses and the confidence to assert those defenses is crucial to the success of anti-retaliation regimes. As plainly articulated by one commentator, “[t]he ability to utilize a rebuttable presumption [of retaliation] is unhelpful where the tenant is unable to state any valid defense because of a lack of legal training.”

2. Housing Courts

Housing courts themselves face many challenges that tend to impede tenant outcomes. First is the “astounding brevity of eviction proceedings” in many housing courts around the country. Eviction cases are often decided in a “matter of minutes” and hearings leave little time for a tenant to assert defenses to the landlord's complaint. A 2003 study of Chicago evictions found that the average hearing lasted a mere 1 minute and 44 seconds: “barely enough time for the parties to reach the bench, identify themselves, and state the nature of the dispute.” A study of Baltimore evictions of the same year found that the average case received “less than 30 seconds of judicial review.” Notably, the length of hearings appears to vary significantly with legal representation. One study found that the average length of a hearing increased when the tenant was represented but decreased below the average when the landlord alone had the benefit of counsel.

The short time devoted to eviction proceedings is a consequence of a larger systemic problem within housing courts—a general lack of resources. Most housing courts are severely underfunded and understaffed. In Baltimore, for example, where over 150,000 eviction suits are filed annually, the state district court assigns only one judge per day to rent court. Baltimore researchers thus surmise that “[t]here are arguably fewer judicial resources and less due process devoted to these cases than any other matters in the court system.” The haste of eviction proceedings undoubtedly results in high numbers of procedural defects. When so little time and attention are paid to tenant claims that even basic due process is lacking, the availability of tenant defenses like retaliatory eviction cannot be expected to have any meaningful effect on outcomes.

Because most suits for eviction are filed in response to a tenant's failure to pay rent, the likelihood that procedural defects affect tenant outcomes is arguably low. However, even if the lack of time and attention devoted to proceedings by eviction courts does not always affect outcomes, it comes at an expressive cost. Indifference sends a message to tenants that contesting the claim is futile. To tenants, judges seem impatient and biased toward landlords. The appearance of landlord preference has meaningful philosophical effects, to be sure. As one group of researchers cautioned, “[a]n illegitimate process that comes with the imprimatur of the state may ultimately inflict more dignitary harm than landlord self-help.” More practically speaking, a tenant is not likely to raise a defense to eviction if she feels that doing so would be fruitless.

Lamentably, the problem of bias is not merely a problem of perception. Many housing court judges exhibit a clear bias toward landlords. For example, in one study only 60% of cases were dismissed when the landlord failed to appear despite clear legal rules requiring dismissal for want of prosecution in such cases. In that same study, landlords were often not required to specifically establish the elements of a prima facie case; instead, judges seemed to presume that they had been met. Researchers also observed that “important court procedures” were frequently omitted in eviction proceedings: the parties were sworn to tell the truth only 8% of the time, and judges examined the eviction notice presented to the tenant in only 65% of cases.
Some evidence suggests that this type of judicial bias exists in other jurisdictions as well. The bad behavior of one Indiana judge was recently highlighted when the state supreme court overruled an eviction order on due process grounds in Morton v. Ivacic. In that case, the small claims court refused to allow the tenant to present testimonial or documentary evidence in his favor, remarking: “Ultimately, [the landlord's] going to get possession of the property. . . . [S]ir, where there's smoke there's fire . . . I mean he isn't making this up. He's a substantial citizen. Evidently, you owe him something.” Though the state supreme court's rebuke of the trial court judge may be gratifying for tenant advocates, it does little for the untold numbers of tenants who face similar treatment and lack the knowledge and resources to lodge an appeal.

Finally, judicial behavior can have profound effects on the tenant's ability to articulate a defense to eviction. One study determined that tenants raised defenses in only 9% of cases when they were not prompted by a judge to do so, compared to 55% of the time when the judge asked the tenant for a defense. Disappointingly, that same study observed that judges asked tenants if they had a defense in only 27% of cases, although they were “solicitous in helping landlords establish their prima facie cases.” This data, if generalizable to the experience of tenants in other housing courts, has profound implications for the success of anti-retaliation regimes.

3. Reporting of Evictions

Market forces may also undermine the success of anti-retaliation regimes. In recent years, numerous reporting services have surfaced that offer to provide background information about potential tenants to prospective landlords. Understandably, most landlords do not wish to rent to a tenant with a record of a past eviction. In many cases, even a dismissed eviction is a black mark that will impede a tenant's ability to rent in the future. Thus, tenants with histories of eviction have difficulty finding desirable housing. Recently evicted tenants also have problems qualifying for affordable housing programs. It is not surprising that a tenant would therefore endure poor living conditions without complaint in order to avoid the possibility of an eviction filing, even one that is not legally justified and might ultimately be dismissed.

Additionally, prohibitions on retaliatory conduct do nothing to protect tenants who have asserted their rights against past landlords from being blacklisted from future rentals. This difficulty is exacerbated by the fact that credit bureaus and renter screening companies routinely review court records to identify filings. By law, the tenant has the right to have the court record show that the judgment has been satisfied. In practice, however, this almost never occurs. As a result, the tenant is left with the burden of attempting to explain an incomplete court record to subsequent landlords and lenders.

4. Financial and Informational Concerns

Finally, financial and informational obstacles significantly affect the success of anti-retaliation regimes. For many tenants, the inability to pay rent is the largest impediment to a valid defense. Anti-retaliation regimes generally do not protect tenants who are in arrears with respect to rent payments. Since most eviction actions involve the tenant's failure to pay rent, it is hardly surprising that defenses to eviction, including retaliatory eviction, are rarely successfully invoked.
Even where tenants can afford to pay rent on time, the high cost of legal counsel and court proceedings may deter many tenants from bringing affirmative retaliatory eviction claims or from appearing to defend an eviction suit in housing court. Although some jurisdictions have successfully implemented low-cost procedures for adjudicating landlord-tenant claims, court costs in many jurisdictions are unreasonably high for most tenants. The cost of an attorney is also prohibitive for most tenants. Legal advocates for the poor have long argued for a legal right to counsel in housing courts, similar to the right that exists in criminal cases, on grounds that it would ensure due process of law and procedural safeguards in an area of vital interest for tenants and their families. Unfortunately, those pleas have failed to produce any constitutionally or statutorily guaranteed rights to counsel in housing cases. Thus, tenants who cannot afford counsel on their own must rely on either federally funded legal aid or local pro bono services providers. However, federally funded legal aid serves only the very poor, and even then it is severely underfunded and understaffed. According to the most recent data, there is only one Legal Aid lawyer for every 6,415 eligible individuals.

Further impeding tenants' success in housing court is the fact that housing law in the United States is notoriously complex. Private landlord-tenant regimes vary not only by state but also by municipality. The law applicable to a tenant's case may be in the form of state statutes, local administrative rules, and the corresponding case law. Those tenants who are most likely to have meritorious retaliatory eviction claims are likely to be unsophisticated, even illiterate. It is unsurprising then that researchers studying eviction routinely observe that tenants are poorly informed about their rights as tenants, the mechanics of eviction, and the means of defending an eviction proceeding.

Although some community centers and legal services organizations provide basic information to tenants about eviction proceedings, the availability and quality of assistance varies widely by locale. Some communities have highly visible and reputable services that assist tenants in their dealings with landlords. However, in other communities, these services are either less reliable or non-existent. And, in all cases, only those organizations made up of legal professionals can offer meaningful legal advice to the public, as non-lawyers are generally prohibited by law from providing legal services. Without even a basic understanding of their legal rights or the mechanisms for enforcing them, tenants have little chance of successfully invoking anti-retaliation laws, even when a landlord's conduct is egregious.

VI. Lessons for the United Kingdom

The foregoing assessment demonstrates that although anti-retaliation regimes in the United States are generally robust, offering stringent protections for tenants against retributive landlords, they are largely underutilized by tenants who lack the institutional resources to marshal effective defenses against eviction in housing court. Thus, the success of these regimes in the United States is mixed. Doctrinally and philosophically, anti-retaliation regimes are uncontroversial, even favored. Practically, however, they have had limited effects on the lives of tenants. It follows then that the lessons to be drawn for law reform in the United Kingdom are of two types: doctrinal and contextual. With respect to doctrine, a review of American law reveals the prohibitions introduced in the English and Welsh proposals are modest, even conservative, in comparison. And, with respect to context, a review of the legal and non-legal institutions for tenant support in the United Kingdom suggests that anti-retaliation law will thrive in a manner not currently possible in the United States.

A. Doctrine
In comparison to American law, the proposed approach to landlord retaliation in the English House of Commons is relatively modest. First, whereas most American jurisdictions permit tenants to bring an affirmative claim for damages or injunctive relief against landlords who act in a retaliatory fashion, both the English and Welsh legislation provide only a defense to an action for possession.²⁸⁴ Indeed, the proposed laws provide no remedies at all to the tenant other than the invalidity of a notice to quit.²⁸⁵ Although tenants in the United States may enjoy attorney fees and damages, often expressed as a multiplier of monthly rent, victorious tenants in England and Wales would be awarded no more than ongoing possession of the property in question.

Additionally, the scope of the proposed legislation is exceptionally narrow compared to the variation in the United States. Regimes in the United States tend to prohibit retaliation in many forms, including not only eviction, but also increases in rent and decreases in services.²⁸⁶ State consensus, expressed most recently through the revised URLTA, would also penalize landlords for refusing to renew a fixed term tenancy or terminating a periodic tenancy with a retaliatory motive.²⁸⁷ In contrast, proposed law in the United Kingdom seeks to combat a narrow subset of landlord behavior—termination of a periodic tenancy through notice.²⁸⁸ Other landlord behaviors simply are not addressed. The range of tenant behavior that would be protected under the proposed law in England and Wales is also far more limited than that of most regimes in the United States. The proposed law speaks only to a tenant making complaints regarding the condition of the premises and not to other types of conduct such as the pursuit of other legal claims against the landlord unrelated to the tenancy.²⁸⁹

*¹¹¹⁹ One noteworthy feature of the English House of Commons proposal is that it does not require any proof by the tenant that the landlord had a retaliatory motive in serving the tenant with notice to vacate.²⁹⁰ The mere service of a notice to vacate within six months after a tenant has made a valid complaint to the landlord or a local housing authority regarding the condition of the premises is deemed “invalid.”²⁹¹ This formulation wisely avoids the requirement of affirmative proof of the landlord's retaliatory motive. In the United States, it is agreed nearly universally that a presumption of retaliatory motive is essential to the success of a retaliatory eviction regime.²⁹² Without the presumption, it would be almost impossible for a tenant to prove the subjective mindset of the landlord in his or her decision to evict.²⁹³ The requirement of affirmative proof would thus undermine the regime entirely.

Indeed, the English and Welsh proposals are more narrow and landlord-friendly than American law in almost every respect except one: the exceptions to its application. To be sure, the proposed law in England would not apply where the complained-of condition was caused by the tenant's own fault.²⁹⁴ Further, English law would not apply to those cases in which the landlord sought to place the dwelling on the market for sale.²⁹⁵ However, no express exception is named in either the English or Welsh provisions for cases in which the tenant is in arrears in the payment of rent.²⁹⁶ This exception is nearly universal in the United States, and understandably so. American landlords would stridently protest any law foreclosing their inability to terminate a lease on the ground of nonpayment. The introduction of a similar exception to the proposals in England and Wales may provide the necessary assurance to landlords that their basic right to the payment of rent will not be affected by this protective measure. In addition, in some American jurisdictions, tenants are not afforded the benefit of a presumption of retaliation when a tenant complains of housing conditions only after receiving a notice of rent increase or diminution in services.²⁹⁷ These *¹¹²⁰ exceptions are designed to combat the possibility that a tenant's complaint is itself retaliatory in nature.²⁹⁸ The introduction of a similar limitation in the proposed legislation may alleviate some of the concerns of the RLA, which has expressed a rational fear that tenants will abuse the system.
B. Context

On its face, the anti-retaliation legislation currently pending in the United Kingdom appears promising. In comparison to the complexity and variation of American law, its formulation is simple and its ambitions are few. However, questions remain regarding whether the law, if enacted, would be effective. In the United States, where landlord protections are often far more robust than those proposed in the United Kingdom, landlord retaliation remains a substantial threat. Would retaliatory eviction laws similarly founder abroad?

In the United Kingdom, a robust system of both legal and non-legal institutions provide tenants with access both to information about the law and to legal services. Perhaps most obviously significant is that legal aid is available to much of the population through a so-called “Judicare system.” Persons eligible for aid receive government vouchers that permit litigants to procure legal assistance from the private bar. Importantly, for most of the system’s history, the range of persons eligible for aid has not been limited to the very poor but has included a majority of the population, even the middle class. In contrast, legal aid in the United States is far less accessible. No right to counsel is recognized in civil cases such as landlord-tenant disputes, and therefore tenants in need of legal support must rely on pro bono organizations for aid. And, although the availability of legal aid and legal services is uniform across the United Kingdom, assistance in the United States varies significantly by geography.

In addition, unlike the United States, the United Kingdom has numerous non-legal institutions to which tenants may turn for assistance in their interactions with landlords. Some of these are government-sponsored, such as regulatory agencies and government ombudsmen. The Housing Ombudsman, for example, can deal with some, though not all, disputes between tenants and private landlords. Moreover, residents of the United Kingdom enjoy access to a set of reputable advice providers, including the Citizens Advice Bureau, Shelter, the Law Centres Network, and AdviceNow. Shelter, for example, provides a wealth of information on tenancy agreements, the rights and obligations of landlords and tenants, and basic advice regarding landlord-tenant disputes directly on their website. In addition, Shelter claims that its advisors are available 365 days a year to provide advice to tenants in person, over the telephone, or online. Similarly, Citizens Advice Bureau assists tenants with housing disputes either in person at over 3,000 local venues or remotely, by telephone or over the Internet. These organizations are highly visible to the public, in part because official government websites concerning housing and legal aid both inform readers about the existence of these organizations and provide direct links to their websites. The availability of these services and their prominence both on the Internet generally and on easy-to-navigate government websites stands in stark contrast to the United States.

Finally, the key strength of advice organizations in the United Kingdom is that they have the power to dispense legal advice, much as a legal professional would do, but at little to no cost to the tenant. In the United States, on the other hand, stringent prohibitions on the unauthorized practice of law prevent non-lawyers from dispensing legal advice. Thus, the average tenant in the United Kingdom is equipped in ways that American tenants are not—with funding, information, and support.

VII. Conclusion
In the United States, the law has long disfavored retaliation by landlords against residential tenants who assert their rights to safe and habitable housing. Most states prohibit landlords from taking revenge against tenants either through targeted legislation or case law. The primary purpose of these statutes and rulings is to provide tenants with the freedom and confidence to insist that landlords provide housing of the quality that is required by law. On paper, the protections guaranteed to tenants by most retaliatory eviction regimes are quite robust. In many states, a tenant who complains of indecent housing—whether to a landlord, to government authorities, or by way of community action—is protected against eviction, increases in rent, and other unfavorable lease modifications.

Regrettably, however, the practical success of most retaliatory eviction regimes in the United States is highly questionable. Reported cases in which tenants prevail on retaliatory eviction claims are scarce, as are statistical data on the successful use of the defense in housing and small claims courts. Additionally, although little statistical evidence exists on the incidence of retaliatory action by landlords, the available evidence suggests that retaliatory eviction laws do little to improve the position of residential tenants in eviction suits. Despite the existence of anti-retaliation laws “on the books,” many tenants in the United States continue to endure substandard living conditions without complaint out of fear of retaliation.

However, the failure of United States anti-retaliation regimes should not discourage legal reformers in the United Kingdom. The approaches to retaliatory eviction laws in the United States are many and varied, as individual states experiment with the appropriate balance between landlord freedom and tenant protection. Although political and academic debates exist at the margins, widespread agreement exists on the necessity of these regimes. Moreover, although tenants continue to face landlord retribution, structural and contextual barriers to tenant success are likely to blame, rather than doctrinal shortcomings. In the United States, the primary impediment to tenant success in evictions is a lack of institutional support. Without adequate representation or even access to information, American tenants are constrained from asserting viable defenses to eviction suits. In the United Kingdom, where legal and non-legal institutions of tenant-aid abound, prohibitions on landlord revenge are much more likely to survive, and thrive.

Footnotes

1
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1 This hypothetical is adapted from a case study reported in the empirical and observational work of Matthew A. Desmond in Eviction and the Reproduction of Urban Poverty, 118 Am. J. Sociology 88 (2012).


Milwaukee, Wis., Code of Ordinances § 200-21-8 (2009) (“It shall be presumed that any attempt to terminate the tenancy, or to increase charges, or to reduce services or to refuse to renew a rental agreement, or to otherwise harass or retaliate against such occupant or to reduce the level of services being rendered to such occupant during the period from the first complaint to the commissioner to 12 months after complete reimbursement to the city for the costs incurred by it in acting under this section is done in retaliation and is void and subject to a forfeiture of not less than $100 nor more than $2,000 for each such attempt.”).

Housing Act, 1988, c. 2, § 21(1)(b) (Eng.). See also infra Part II.A. Unlike a tenancy for a fixed term, a periodic tenancy continues indefinitely, usually on a month-to-month basis.

This paper focuses on landlord retaliation in England and Wales. Although neither Scotland nor Northern Ireland is addressed herein, the moniker “United Kingdom” is used throughout as a convenient shorthand reference.

Hannah Gousy, Shelter, Safe and Decent Homes: Solutions for a Better Private Rented Sector 7 (2014), available at http://England.shelter.org.uk/_data/assets/pdf_file/0003/1039530/FINAL.Safe_and_Decent.Homes_Report_USE_FOR_LAUNCH.pdf, archived at http://perma.cc/BYX6-QDSG. Shelter estimates that each year 3% of tenants are served with notice, or threatened with eviction because they complain to their local council or their landlord about a problem in their home. Id. See also infra Parts II.B, III.B (discussing Shelter's estimates of landlord retaliation and debates regarding their accuracy).

Gousy, supra note 7, at 7. See also infra Part II.B.

Gousy, supra note 7, at 25. See also infra Part II.B.


See infra Parts III.B, III.C.


See infra Parts II-III.


Housing Act, 1988, c. 2, § 21(1)(b) (Eng.). See also Andrew Arden & Andrew Dymond, Manual of Housing Law 113-14 (9th ed. 2012). If the tenancy is fixed, then notice may be given two months prior to the end of the fixed term. If notice is not provided, then at the end of the fixed term the lease becomes periodic. See Housing Act, 1988, c. 2, § 21(2) (Eng.). Periodic assured shorthold tenancies may be terminated by giving notice at least two months prior to the date of desired termination, which must be the last day of a period. See id. § 21(4)(a) (Eng.).

Arden & Dymond, supra note 19, at 113-14.


Landlord & Tenant Act, 1985, c. 70, § 11-14 (Eng.). Leases of longer than seven years are exempted from these requirements. Id.


Housing Act, 2004, c. 34, §§ 5-7 (Eng.).

English Housing Survey 2012-13, supra note 25.


See Gousy, supra note 7, at 25.

Id.


Other tenants’ rights organizations have done similar research. For example, the Tenants’ Voice, an online “tenants community,” found in a survey of over 2,000 tenants from their Facebook community that 32% of tenants who had been evicted or threatened with eviction were put in that position after complaining to their landlord about the condition of their property. Additionally, the survey found that 71% of tenants had paid for repairs themselves rather than asking their landlord to make them, and 61% were wary of complaining to their landlords about poor conditions. Of note, 86% of respondents had never heard of the term “retaliatory eviction,” suggesting that the practice is underreported. See A Third of Tenants Have Been Evicted or Threatened with Eviction After Complaining to Their Landlords, The Tenants’ Voice (Oct. 14, 2003), www.thetenantsvoice.co.uk/your_home/a-third-of-tenants-have-been-evicted-or-threatened-with-eviction-after-complaining-to-their-landlords/, archived at http://perma.cc/V5XA-2HUG. Additionally, in a 2012 report on the private rented sector in Wales, the organization Consumer Focus Wales identified isolated occurrences of retaliation and fear of retaliation reported by private tenants. Consumer Focus Wales, Their House, Your Home: The Private Rented Sector in Wales 39-40 (2012).


Id. at ¶ 6.99.

Id.

Id.


Id.

Id.

Id.


Id. at 10.


Id. § 2(1).

Id. § 2(2).

Id. § 2(3). The bill makes clear that a dwelling-house is not “genuinely on the market for sale” if the landlord intends to sell his interest in the dwelling-house to a person associated with the landlord or a business partner. Id. § 2(4)-(6).

Id. § 2(8)-(9).

For a comparison of this point to American law, see infra Part VI.A.
See Retaliatory Eviction in the Private Sector, supra note 67, at 15.


All Party Parliamentary Groups are informal groups of Members of both Houses with a common interest in particular issues. APPG reports are therefore not official publications of either the House of Commons or the House of Lords, or of any of its committees. See All Party Parliamentary Group for the Private Rented Sector, Tackling Retaliatory Evictions-Report and Oral Evidence (2014), available at http://www.rla.org.uk/documents/download.shtml?pid=2735, archived at http://perma.cc/S65R-WWNM.

Retaliatory Eviction in the Private Sector, supra note 67, at 7-8 (citing All Party Parliamentary Group for the Private Rented Sector, supra note 79).

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.


See Retaliatory Eviction in the Private Sector, supra note 67, at 4-5 (citing Retaliatory Eviction-Case Against Regulatory Intervention, Residential Landlords Ass'n (June 21, 2013), http://news.rla.org.uk/retaliatory-evictions-case-against-regulatory-intervention/, archived at http://perma.cc/FL7B-MPZC (“We strongly refute the suggestion that retaliatory eviction is a widespread practice and there is no evidence (properly so called) in support of the campaigners' claims.”)).

Id.


Id.

Id.
94 Id.
95 See English Housing Survey 2012-13, supra note 25.
98 Id.
99 Id. at 3.
100 Id. at 2-3.
101 Id. at 3.
102 Retaliatory Eviction in the Private Sector, supra note 67, at 15.
103 The RLA also fails to address the fact that criminal cases under these statutes are fairly rare, as neither police nor prosecutors are sufficiently incentivized or resourced to carry out prosecutions against landlords. See Lonegrass, supra note 18, at 955.
105 Id.
109 Id.
110 Id. § 34(1).
111 Id. § 34(2). The bill makes clear that a dwelling-house is not “genuinely on the market for sale” if the landlord intends to sell his interest in the dwelling-house to a person associated with the landlord or a business partner. Id. § 34(3).
112 Id. § 2(8)-(9).
113 Id. § 2(2).
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120 Crew, supra note 2, at 12 & app. 2.

121 Id. at 12 app. 1.


124 Id.

125 Id.


128 Id. at 539-40.


130 Glendon, supra note 127, at 540.

131 5 Thompson on Real Property § 43.06(a) (2d ed. 2007).

132 Glendon, supra note 127, at 521.

133 Id.

134 Id. at 540.

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136  Id. at 701. See also 5 Thompson on Real Property § 43.06(a) (2d ed. 2007) (“Landlord-tenant reforms are of little utility if a landlord can evict or otherwise punish tenants for asserting their rights.”).

137  Edwards, 397 F.2d at 701.

138  Id.


140  See Glendon, supra note 127, at 542 (“Legislation, rather than judicial decisions, predominates in this area.”).


143  Id.

144  Rabin, supra note 141, at 534.


147  Id. § 5.101(b).

148  Id. § 5.101(a).

149  5 Thompson on Real Property § 43.06(a) (2d ed. 2007) (“The purpose of retaliatory conduct statutes is to prohibit retaliatory actions by landlords. Accordingly, the statutes do not prohibit particular conduct of the landlord in all instances, but only if the conduct has a retaliatory motive behind it.”).

150  Unif. Residential Landlord & Tenant Act § 5.101(b) (1972). The act goes on to say that the term “[p]resumption’ means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.” Id.

151  Id. § 5.101(b).

152  Id. § 5.101(c).


154  Id.

155  Id. According to the Restatement comments, the determination of whether a landlord is “in the business” of renting depends upon “whether the landlord's rental activities are only an aspect of providing himself with housing, or primarily involve providing others with housing,” concluding that “in the latter case, the landlord is in the business of renting property.” Id. cmt. d. Thus, for example, the owner of a large multi-unit apartment building is “in the business” of renting, even if he occupies one of the units in the building. Id.

Id.

Id.

See Aweeka v. Bonds, 97 Cal. Rptr. 650, 652 (Cal. Ct. App. 1971) (“We can discern no rational basis for allowing such a substantive defense while denying an affirmative cause of action. It would be unfair and unreasonable to require a tenant, subjected to a retaliatory rent increase by the landlord, to wait and raise the matter as a defense only, after he is confronted with an unlawful detainer action and a possible lien on his personal property.”).


Id. at 1343. Even at its broadest, the doctrine has limits. At its core, retaliatory eviction is much more limited than “good cause” eviction regimes and therefore may prohibit only vindictive or presumptively vindictive, and not merely capricious, eviction. See Paul Sullivan, Note, Security of Tenure for the Residential Tenant: An Analysis and Recommendations, 21 Vt. L. Rev. 1015, 1049 (1997) (citing Blumberg & Robins, supra note 160, at 44).

See Noble-Allgire Memorandum, supra note 123, at 4.

Id. at 4-5.

“Good faith” is required by 17 states. Some states have gone further by allowing a landlord to recover damages from a tenant for claims made in bad faith. Id. at 4.

A knowledge requirement has been adopted by nine states. Id.

Id. at 5. Some states even protect activities that are not necessarily related to the lease, including the pursuit of any legal action against the landlord, testifying against the landlord in court, or exercising rights and remedies under any state law. See id. at 6.


Id. at 22.

Id.

Id. (“To allow the presumption to be raised by a request that a bathtub drain be unclogged would open the floodgates for a multitude of requests for repairs. In Hartford alone there exist in excess of 12,000 substandard dwelling units requiring repairs of both a major and minor nature. There is scarcely a dwelling unit in this jurisdiction beyond the pale of requiring repair. The necessity for repairs is applicable to nearly all existing dwelling units.”).


Noble-Allgire Memorandum, supra note 123, at 3.

Id. at 3-4.

See, e.g., Chester W. Hartman, Housing and Social Policy 77 (1975) (“Motivation . . . is difficult to prove, and . . . at the end of the statutory period-usually three to six months-the tenant is again exposed to retaliatory eviction, which vitiations most of the value of the protections.”); Casserly, supra note 161, at 1343 (citing Gokey v. Bessette, 580 A.2d 488, 491 (Vt.
1990) (“A subjective test would effectively establish such a high burden of proof for tenants that the benefit the Legislature intended to confer would be an illusion.”)).

Noble-Allgire Memorandum, supra note 123, at 6. See also Blumberg & Robins, supra note 160, at 16.

Noble-Allgire Memorandum, supra note 123, at 6.

Eleven states have omitted this presumption. Id.


Noble-Allgire Memorandum, supra note 123, at 7.


Reasonable though these exceptions may be, they have been adopted in only six states. See Noble-Allgire Memorandum, supra note 123, at 7.


Even the longest presumptions of retaliation may have the effect of merely postponing retaliatory conduct on the part of landlords. See Blumberg & Robins, supra note 160, at 16. And yet, the provision of time-to plan for the future, garner resources, and secure alternative housing-is often benefit enough to a tenant faced with the possibility of immediate eviction.


See infra Part IV.C.5 (addressing exceptions to anti-retaliation laws).

Noble-Allgire Memorandum, supra note 123, at 10.

Iowa and Connecticut rely on this approach. Id.

Id.

Id.


Michigan and Virginia have adopted this approach. See Noble-Allgire Memorandum, supra note 123, at 10. This is also the approach endorsed by the Restatement. See Restatement (Second) of Prop.: Landlord and Tenant § 14.8 (1977).


Noble-Allgire Memorandum, supra note 123, at 13.


Casserly, supra note 161, at 1342-43. Notably, a small minority of states have adopted rules that allow landlords to recover damages from tenants who make claims in bad faith. Noble-Allgire Memorandum, supra note 123, at 14.

See 5 Thompson on Real Property § 43.06(a) (2d ed. 2007)
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200  Noble-Allgire Memorandum, supra note 123, at 7.

201  Id. at 7-10. See also Restatement (Second) of Prop.: Landlord & Tenant § 14.8 cmt. f (1977). States vary as to whether they state exceptions as exceptions to the doctrine entirely or exceptions to the presumption of retaliation. See Noble-Allgire Memorandum, supra note 123, at 7.


204  Id. § 901(a).

205  See id.

206  See id. § 901(b).


209  See id. § 901(c)(4).

210  See id. § 901(c)(5).

211  See id. § 901(c)(6).

212  See id. § 902(a).

213  See infra Part IV.C.3.


217  Id.

Letter from Lawrence McDonough to Hon. Joan Zeldon, Chair of the Drafting Comm. to Revise the Uniform Residential Landlord and Tenant Act (Nov. 3, 2014) (containing comments on issues to be discussed by Drafting Committee at November 2014 meeting), available at http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/2014nov3_RUTLTA_Comments_McDonough.pdf, archived at http://perma.cc/Z8U6-LCLA. McDonough also notes that “[t]o the extent that tenants or landlords engage in frivolous litigation, most states have laws and rules that authorize the imposition of sanctions. Also, the Act already includes a requirement that both parties act in good faith in Section 105.” Id.

See Chester Hartman & David Robinson, Evictions: The Hidden Housing Problem, 14 Housing Pol'y Debate 461, 461 (2003) (“Each year, an untold number of Americans are evicted or otherwise forced to leave their homes involuntarily. The number is likely in the many millions, but we have no way of gauging even a modestly precise figure for renters, because such data are simply not collected on a national basis or in any systematic way in most localities where evictions take place.” (internal citations omitted)); Desmond, supra note 1, at 90 (“Eviction is perhaps the most understudied process affecting the lives of the urban poor.”).

See Hartman & Robinson, supra note 220, at 461.


Of the numerous eviction and housing court studies reviewed by the author of this Article and cited herein, most did not contain any discussion of retaliatory eviction or any statistics regarding the use of anti-retaliation laws.

A Westlaw search for the term “retaliatory eviction” reveals approximately 1,000 cases reported in the 47 years since the landmark decision of Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), slightly more than 20 per year nationwide. The number of cases in which a tenant's retaliatory eviction claim was actually considered by the court is far smaller, as are those involving successful claims.

Desmond supra note 1, at 95 (providing an anecdotal account of a landlord who paid tenants $200 each to leave instead of taking them to eviction court, and who estimated that he initiated 10 such informal evictions for every formal eviction proceeding that he filed).

See supra Part IV.C (discussing state-by-state and local variation on anti-retaliation regimes). Some commentators have argued for doctrinal reforms to strengthen anti-retaliation law. See, e.g., Lindsey, supra note 126.

See, e.g., Branscomb & Sierra, supra note 223, at A1 (95% of pro se tenants lose their cases); Lawyers' Comm. For Better Hous., supra note 222, at 17 (observing that Chicago tenants “always lost on the merits”); Cal. Apartment Law Info. Found., Unlawful Detainer Study 1991, at 26, 38 (finding that landlords prevail in over 99% of cases).

See Lawyers' Comm. For Better Hous., supra note 222, at 16-18 (concluding that “[i]n all cases in which a defense was raised, the tenant lost”); Barbara Bezdek, Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process, 20 Hofstra L. Rev. 533, 558 (1992) (“The[ ] formal availability [of defenses], however, appears to have little effect on case outcomes.”); see also Lynn E. Cunningham, Legal Needs for Low-Income Population in Washington, DC, 5 Univ.
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D.C. L. Rev. 21, 37 (2000) (noting that although the District of Columbia has some of the strongest tenant protections of any jurisdiction in the country, tenants are still disadvantaged).

230 See Thomas, Part I, supra note 223 (“In downstate Illinois, a law aimed at protecting tenants from landlords who might retaliate against them for calling in a building inspector is almost never used.”). In fact, some evidence suggests that tenants rarely invoke defenses of any kind in eviction suits. Lawyers' Comm. For Better Hous., supra note 222, at 16 (noting that defenses were raised in only 30% of cases).

231 See Desmond, supra note 1, at 115-16 (describing an action of eviction in retaliation for the tenant's call to the Department of Neighborhood Services to report code violations in Milwaukee, where retaliatory eviction is forbidden by law).

232 See, e.g., Bezdek, supra note 229, at 563 & n.106; Lindsey, supra note 126, at 106-07 (relying on news reports of retaliatory eviction to argue that retaliatory conduct by landlords is a significant problem “[d]espite the lack of definite statistics” on its frequency).

233 Lawyers' Comm. For Better Hous., supra note 222, at 13 (tenants were represented in 5.3% of cases); Cunningham, supra note 229 (less than 1% of cases involved an attorney representing a client).

234 See, e.g., Desmond, supra note 1, at 123 (citing Seedco Policy Ctr., Housing Help Program, South Bronx, NYC (2009)) (estimating that tenants were unrepresented in over 70% of cases); Rebecca Hall, Berkeley Cmty. Law Ctr., Eviction Prevention as Homelessness Prevention 9-11 (1991) (landlords were represented in over 80% of eviction cases, whereas tenants were represented in only 20% of evictions); Lawyers' Comm. For Better Hous., supra note 222, at 13-14 (53% of landlords represented, compared to 5.3% of tenants); Comm. to Improve the Availability of Legal Servs., Final Report to the Chief Judge of the State of New York (1989), in 19 Hofstra L. Rev. 775, 773 (1989) (landlords were represented in 80% to 90% of cases while tenants were represented in no more than 10% to 15%); Citywide Task Force on Hous. Court, 5 Minute Justice: “Ain't Nothing Going on But the Rent!”, A Report of the Monitoring Subcommittee of the Citywide Taskforce on Housing Court §§ 4.2-.3 (1986) (21% of tenants were represented compared to 78% of landlords); Cmty. Training & Res Ctr. & City-Wide Task Force on Hous. Court, Inc., Housing Court, Evictions, and Homelessness: The Costs and Benefits of Establishing a Right to Counsel (1993) (tenants represented in 12% of cases compared to 98% of landlords).

235 Jessica K. Steinberg, Demand Side Reform in the Poor People's Court, 47 Conn. L. Rev. 741, 750 (2015).

236 Bezdek, supra note 229, at 556-57.


238 Bezdek, supra note 229, at 562.

239 Steinberg, supra note 235, at 757.

240 Hall, supra note 234, at 11.

241 Carroll Seron et al., The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment, 35 L. & Soc'y Rev. 419, 427 (2001) (judgments issued in 32% of cases where tenants were represented, compared to 52% of cases where tenants were not represented).

The data is not entirely consistent on this point. Some studies have not concluded that representation improves tenant outcomes. For example, a 2004 Chicago study found that although represented tenants were more successful in obtaining continuances, their cases resulted in judgments for eviction just as frequently as those involving unrepresented tenants. Lawyers' Comm. For Better Hous., supra note 222, at 17-18. However, it must be remembered that it is difficult to assess the effect of attorney representation on tenant outcomes, as most cases in which the tenant is represented are resolved pursuant to agreed orders, the terms of which cannot be adequately monitored to produce reliable data. See id. at 10; Randy G. Gerchick, Comment, No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help, 41 UCLA L. Rev. 759, 794-95 (1994). Gerchick also notes another reason why represented tenants tend to win more often: “tenant attorneys may not take cases that they do not believe that they can win, except in the unusual case in
which the tenant will be able to pay the attorney's legal fees out of his own pocket rather than relying upon the court to award fees.” Gerchick, supra, at 795.
Finally, a growing body of new research is forming outcomes measures for “limited” or “unbundled” legal services, or the provision of basic legal information or services from an attorney at the outset of litigation rather than full service representation. See, e.g., Steinberg, supra note 235 (finding that tenant outcomes were not improved by unbundled representation); Bos. Bar Ass'n Task Force, supra note 222, at 32 (concluding that full representation of tenants by counsel is essential for the protection of their rights); see also Steinberg, supra note 235, at 745 (collecting other research in this area).

Steinberg, supra note 235, at 755.

Id.

Seron et al., supra note 241, at 431.

Lindsey, supra note 126, at 119.

Id. at 117.


Lawyers' Comm. For Better Hous., supra note 222, at 11-12.

A System in Collapse: Baltimore City Suffers from an Overwhelmingly High Caseload of Tenant Evictions. Hurt in the Process are Tenants, Landlords, the City of Baltimore, and its Neighborhoods, Abell Rep. (The Abell Found., Balt., Md.), Mar. 2003, at 1, 2. The number of cases in Baltimore Rent Court in 2003 was 1,050 per day. Id.

Lawyers' Comm. For Better Hous., supra note 222, at 11 (noting that if only the landlord was represented and the tenant was not, the case lasted an average of 1 minute and 38 seconds).

A System in Collapse, supra note 249, at 1, 2.

Id.


Id. at 5.

Id. at 19.

Id. at 5.

Id. at 4.

Id. at 14-15.


Id.

264 Desmond, supra note 1, at 118.
265 Id. at 119.
266 Id.
268 A System in Collapse, supra note 249, at 1, 5.
269 Id. at 5.
270 Id.
271 See infra Part V.B.4.
272 See Lawyers’ Comm. For Better Hous., supra note 222, at 6; see also Lindsey, supra note 126, at 133.
273 For example, the filing fee in a summary eviction in Baltimore, Maryland was $9 in 2003 and $23 in the District of Columbia in 2003. A System in Collapse, supra note 249, at 1, 6.
274 See Steinberg, supra note 235, at 761 (discussing resurgence of the advocacy for a right to counsel in civil cases).
275 Id. at 770-71.
277 Seron et al., supra note 241.
279 Desmond, supra note 1, at 94; Lawyers’ Comm. for Better Hous., supra note 222, at 22 (“There is a small but significant number of tenants who . . . probably could have asserted effective habitability defenses had they known how to do so correctly before the eviction process was initiated . . . . [T]enants seemed to believe that the only way to make the landlord provide habitable housing was to completely withhold rent and that if they could only ‘tell their side of the story’ in eviction court, things would work out. Yet by the time tenants have failed to give notice . . . and appeared in court, it is too late.”).
282 Sandefur, supra note 280, at 967.
283 Id. at 967.
ELIMINATING LANDLORD RETALIATION IN ENGLAND AND..., 75 La. L. Rev. 1071


285  Id.

286  See supra Part IV.C.2.

287  See id.


290  See id.

291  See supra Part IV.C.3.

292  See supra Part IV.C.3.

293  Compare Parts II.C, and III.C, with Part IV.C.5.

294  Tenancies (Reform) Bill, 2014-15, H.C. Bill [19] cl. 2(3) (Eng.). An exception is also made for lawful mortgage foreclosure. See infra Parts II.C, III.C.


296  See supra Part IV.C.3.

297  See supra Part IV.C.3.

298  See supra Part IV.C.3.

299  Sandelur, supra note 280, at 955. See also Alan Paterson, Legal Aid at a Crossroads, 10 Civ. Just. Q. 124, 126-29 (1991) (describing the primary features of the system).

300  Sandelur, supra note 280, at 963.

301  Id. at 955. However, the availability of legal aid does not necessarily translate to its use. A recent survey found that people took only 10% of “difficult to solve” legal problems involving money or housing to lawyers, courts, or tribunals. Id. (citing Pascoe Pleasence, Causes of Action: Civil Law and Social Justice (Legal Servs. Comm’n 2004)).

302  Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C., 452 U.S. 18 (1981) (declining to extend constitutional right to counsel to civil cases). The United States Congress has established a Legal Services Corporation, but this organization is limited both in its reach and resources. See Lua Kamal Yille, No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe, 42 Colum. J. Transnat'l L. 863, 872-78 (2004); see also Deborah L. Rhode, Access to Justice: A Roadmap for Reform, 41 Fordham Urb. L.J. 1227, 1228 (2014) (noting that in 2009, there was only one legal aid lawyer per 6,425 low income individuals in the United States).

303  Rhode, supra note 302, at 1230 (“[G]eography is destiny: the services available to people from eligible populations who face civil justice problems are determined not by what their problems are or the kinds of services they may need, but rather by where they happen to live.” (quoting Rebecca Sandelur & Aaron C. Smyth, Access Across America: First Report of the Civil Justice Infrastructure Mapping Project v (2011))).
304 See generally Rhode, supra note 302 (critiquing legal and non-legal institutions for legal aid in the United States); Sandefur, supra note 280 (providing a comparison of legal and non-legal paths to legal assistance in the United States and the United Kingdom).

305 Sandefur, supra note 280, at 964.


313 Sandefur, supra note 280, at 964.

314 See Rhode, supra note 302, at 1232-38 (discussing United States restrictions on the unauthorized practice of law); see also Richard Moorhead, et al., Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales, 37 Law & Soc'y Rev. 765, 785-86 (2003) (concluding in a study of low-income clients in the United Kingdom, in matters such as housing non-lawyers generally outperformed lawyers in terms of both outcomes and clients satisfaction).

315 Sandefur, supra note 280, at 966. Sandefur describes the contrast between the United States and the United Kingdom as “stark.” Id.

316 See 5 Thompson on Real Property § 43.06(a) (2d ed. 2007).

317 Id. § 43.06(a).

318 See Lindsey, supra note 126, at 110-11. Lindsey notes that anti-retaliation laws promote multiple state policies, including: “(1) improving public health, housing, and living conditions; (2) promoting social stability; and (3) reducing the cost of eviction to governments.” Id. at 110-13.

319 See Lawrence R. McDonough, Still Crazy After All These Years: Landlords and Tenants and the Law of Torts, 33 Wm. Mitchell L. Rev. 427, 429 (2006) (citing Minnesota's anti-retaliation laws to support the proposition that "the law clearly favors tenants").
SUSTAINABLE AFFORDABLE HOUSING

Andrea J. Boyack*

INTRODUCTION

Sustainable real estate development is an essential component of intergenerational justice,1 in part because the real estate sector creates more than 20% of the world’s carbon emissions.2 Governments, recognizing that environmentally sustainable real estate development involves higher upfront costs, have encouraged green building by offering publicly funded incentives such as tax credits, grants, reduced approval fees, and streamlined permitting.3 Using market measurement innovations such as the Dow Jones Sustainability Index, investors can promote environmentally sustainable development by prioritizing real estate developers that embrace environmentally conscious practices.4 Even though real estate in general still underperforms in many other sectors in terms of its environmental sustainability, trends are encouraging.5 Commercial real estate has embraced green building as a concept, and the World Economic Forum predicts that approximately 55% of all new commercial properties in 2020 will be “built green.”6

* Professor of Law, Washburn University School of Law. This project owes much to the team of housing law professors with whom I presented thoughts on sustainable housing and markets at Arizona State University School of Law’s Sustainability Conference in 2017: David Reiss, Patricia McCoy, and Kristen Barnes. I am also indebted to my husband, Eric Boyack, who wrangled our four children while I wrote this piece.

2. Real estate use is responsible for broad economic impacts, including waste production, pollution, use of water and consumption of other natural resources. "Real estate is central to urban development, consumes physical resources and is a significant source of emissions. Equally, it is central to the goal of creating an environmentally sustainable future." WORLD ECON. FORUM, INDUS. AGENDA COUNCIL ON THE FUTURE OF REAL ESTATE & URBANIZATION, ENVIRONMENTAL SUSTAINABILITY PRINCIPLES FOR THE REAL ESTATE INDUSTRY 5 (2016) [hereinafter WORLD ECON. FORUM], http://www3.weforum.org/docs/GAC16/CRE_Sustainability.pdf.
5. WORLD ECON. FORUM, supra note 2, at 5.
6. Id. at 7.
The affordable housing sector, however, needs more than marginal governmental carrots and sticks to be able to implement sustainability practices. Environmental sustainability will elude affordable housing as long as it remains in its current, financially unsustainable state.\(^7\) Government housing assistance programs are unpredictable, underfunded, and may to some extent perpetuate rather than solve the problem of housing need.\(^8\) The nation’s supply of affordable housing is rapidly declining in quality as well as quantity,\(^9\) and rising housing costs and stagnant incomes mean that an ever-increasing number of lower-income households must devote an unsustainably high percentage of their income toward housing costs.\(^10\) Our affordable housing system cannot go green until the system stops operating in the red. Properly conceived, affordable sustainability of housing and sustainable affordability of housing are mutually enforcing concepts. Successful housing laws and policy must therefore find a way to achieve both.

This article addresses the specific issue of how housing affordability can be made more sustainable, both in terms of sustainable financial structures and sustainable tenure for residents. Sustainable affordability requires a flexible housing supply system that can be responsive to demands as well as a method to keep housing costs (purchase prices or rental rates) steady and reasonable. Environmental sustainability and housing affordability are overlapping issues in housing law, and similar policies and programs can be employed to promote both. Part I of this article discusses the unsustainable housing affordability gap and explains why effective solutions to housing unaffordability must be tailored to address particular market deficiencies in a given locality. Part II explains the impact that local laws can have on housing supply and highlights how supply-side initiatives can grow the number of affordable sustainable homes. Part III focuses on public policies and

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7. See infra notes 15–18 and accompanying text.

8. See infra notes 11–14 and accompanying text.


10. HUD’s most recent report to Congress on housing indicated that 8.3 million households have “worst-case housing needs,” meaning they are very low-income renters who receive no government housing assistance and pay more than half of their income for rent, live in severely inadequate conditions, or both. The number of households with worst-case housing needs has increased from 7.72 million in 2013. OFFICE OF HOUS. POLICY DEV. & RESEARCH, U.S. DEP’T OF HOUS. & URBAN DEV., WORST CASE HOUSING NEEDS: 2017 REPORT TO CONGRESS, at ix–xi, 1–3 (2017), https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf; see JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., THE STATE OF THE NATION’S HOUSING 1–6 (2016), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs_2016_state_of_the_nations_housing_lowres.pdf.
programs that provide financial support to households and concludes that current subsidies can be made more equitable and economically sustainable. The funding obstacles for environmentally sound and affordably priced housing are similar, and coordinated ownership, incentives, and financing approaches may be able to overcome both.

I. THE HOUSING AFFORDABILITY GAP

Our housing system is unsustainable at least in part because housing is so widely unaffordable. Although ostensibly private, a panoply of owner-occupancy-focused tax incentives and capital market supports provides financial benefits to market-rate and above-market-rate housing. Government financial support of below-market housing is more apparent, but reliance on public funding makes housing costs precarious. Only about one quarter of qualifying lower-income households receive public housing assistance, and it is likely the country lacks sufficient political will to continue to fund even this insufficient level of assistance indefinitely.

11. See infra notes 99, 133–135 and accompanying text.


majority of lower-income households struggle to cover housing costs without public aid, and the gap between monthly income and such costs makes it impossible for many families to consistently afford both housing and basic non-housing needs.

As a nation, we both pay too much and pay too little toward housing. Because we have not invested enough upfront to establish a stable systemic foundation for housing, we individually and collectively bear unsustainable expenses over time. The high operating costs of dilapidated and antiquated homes create economic inefficiencies, as do the high public costs of homelessness and extreme, chronic poverty. Housing's systemic instability is not only unsustainable, it is worsening as the gap between housing costs and residents' ability to pay grows and the political willingness to make up the difference shrinks.14

A. Minding the Gap

Housing costs can be broken down into several components.15 Initial housing development involves the cost to acquire land, regulatory and legal expenses to obtain permission for development, and the hard costs of construction labor and the associated “bricks and sticks.”16 Economists who measure housing affordability speak in terms of its costs (rather than residents' ability to pay) and typically focus on these upfront inputs.17 The true cost of a home also includes its maintenance and operating costs, however, and green building advocates are quick to point out that greater initial expenses may be recouped by relatively lower operating costs over

16. Glaeser and Gyourko define the three components of housing supply cost as (1) the cost of the land (L) on which the housing unit sits, (2) construction costs (CC) associated with putting up the physical improvements, and (3) the entrepreneurial profit (EP) needed to compensate the home builder for taking on development risk. Id. at 6. They defined the “Minimum Profitable Production Cost (MPPC) of a unit of housing” as: MPPC = (L + CC)*EP. Id.
17. See id. at 9–11.
time. Thus, although environmentally sustainable housing may be inherently less affordable from the get-go, it may be more sustainably affordable in the long run.

The government and the housing industry use a different approach to measure housing affordability. The U.S. Department of Housing and Urban Development (HUD) judges housing to be affordable if total housing costs (rent, utilities, upkeep, etc.) are no more than 30% of a household’s gross income. HUD recognizes that unaffordability of housing exists on a spectrum: Households spending more than 30% of their income on housing are “cost burdened,” and those spending more than 50% of income on housing are “severely cost burdened.” Although this metric is broadly accepted in the real estate industry, it is overly simplistic to conclude that spending more than 30% of household income on housing is inherently unaffordable.


19. Although they note that this conventional approach to measuring housing affordability may have “social merits,” Glaeser and Gyourko contend that this approach “is defective from an economic perspective because it conflates poverty and income inequality issues with a malfunctioning of the supply of housing units.” Glaeser & Gyourko, supra note 15, at 6.

20. Office of Policy Dev. & Research, CHAS: Background, U.S. DEP’T HOUSING & URB. DEV., https://www.huduser.gov/portal/datasets/cp/CHAS/bg Chas.html (last visited Mar. 14, 2018) [hereinafter CHAS: Background]. The 30% figure evolved from an amendment to the 1934 Housing Act proposed in 1969 by Senator Edward Brooke, the first popularly elected African-American senator and co-author of the 1968 Fair Housing Act. The Brooke Amendment responded to complaints that rents in public housing were going up by capping the rent charged in public housing at 25% of a tenant’s household income. Congress raised this cap to 30% in 1981, and that percentage has remained the industry standard for whether housing costs are considered “affordable.” Housing and Urban Development Act of 1969 (Brooke Amendment), Pub. L. No. 91-152, § 213, 83 Stat. 379, 389 (codified as amended at 12 U.S.C. § 1715z-1 (2012)).

21. BELSKY ET AL., supra note 14, at ii.

22. Id. Different affordable housing advocacy groups use slightly different variations of the 30% affordability threshold. Some compare the number of households with incomes at or below a certain level (say 50% area median income) to the number of housing units with costs that are 30% or less of that income level and then express the affordability gap in terms of regional supply deficiencies (a lack of “affordable units”) for given income categories. Id. The National Low Income Housing Coalition (NLIHC) takes a slightly different approach, calculating the income
Calculations of affordability usually measure market costs and area median incomes (AMI), both of which necessarily turn on the defined geographic scope. Although housing costs vary widely by state, region, and even within a given city, other non-housing expenses (food, clothing, medicine, and transportation), are much more geographically consistent. This means that even if incomes and housing costs moved in lockstep, the impact of unaffordable housing would be significantly different for households in different income categories. For example, imagine A, who earns $178,000, lives in San Francisco and spends 30% of her income on housing ($4,450/month is San Francisco’s median rent), and B, who earns $31,000, lives in Topeka, Kansas, and spends 30% of his income on housing (the median rent in Topeka is only $775/month). Each month, subtracting housing costs from pre-tax income leaves A with $10,266 and leaves B with only $1,867. According to HUD metrics, A and B are equally housing cost burdened, yet B is financially worse off than A and will have more difficulty affording food, clothing, and medicine. Percentage income allocated to housing is therefore not a perfect measure of the economic impact of housing costs.

Furthermore, although median incomes do tend to be higher in places with higher housing costs, this is not universally true, nor does it indicate that the increased incomes are universally (or even on average) sufficient to cover increased housing costs. In addition, regional variations among incomes are

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26. Area median incomes (AMI) vary widely based on location and these various measures are available through the Census Bureau. GLORIA G. GUZMAN, U.S. CENSUS BUREAU, HOUSEHOLD INCOME 2016: AMERICAN COMMUNITY SURVEY BRIEFS 2–3 (2017), https://www.census.gov/content/dam/Census/library/publications/2017/acs/acsbr16-02.pdf. For example, AMI in Mississippi in 2016 was $41,754, and in Maryland was $78,945. Id. at 2.
more extreme for some professions than for others. AMI calculations are in themselves somewhat misleading because they state income medians

nationally or regionally, and incomes and housing costs are very localized. Neighborhood-level household income medians can vary by a factor of ten or more within a single metropolitan area.  

B. Unsustainable Social and Economic Volatility

"Having a decent, stable, affordable home" is "at the core of strong, vibrant, and healthy families and communities," but affordable housing today is socially and economically unstable in several ways. First, the gap between housing costs and people’s ability to pay for housing means that millions of people cannot afford the basic necessities of life. Second, housing unaffordability leads to instability of tenure and the harms caused by home loss and involuntary relocations. Third, housing unaffordability creates a barrier to entry for the country’s booming centers of economic opportunity, necessarily constraining economic growth. Fourth, incomplete efforts to chip away at the affordability gap have concentrated poverty and created political volatility. Homes and housing costs are neither sustainable nor affordable, and they must be both.


28. State medians fail to take into account huge local variations. For example, the median income in Census Tract 6056, San Mateo County, California is $233,125, and the median income in Census Tract 4088, Alameda County, California, just thirty-five miles away, is only $23,704. The median income in Census Tract 36.04, Shawnee County, Kansas was $103,836, but in Tract 40 of the same county (just seven miles away), the median income was a mere $13,750. The median income in Arlington, Virginia, (Tract 1004) was $206,058, and eight miles away in Anacostia, D.C., (Tract 75.04) the median income was only $17,372. Census Explorer, U.S. CENSUS BUREAU, https://www.census.gov/censusexplorer/censusexplorer.html (last visited June 10, 2018); see GUZMAN, supra note 26, at 1–3.

Unaffordable housing undermines individual health, wealth, and economic progress.\textsuperscript{30} Excessive housing costs limits consumer spending,\textsuperscript{31} encourages excessive debt,\textsuperscript{32} and leads to other social ills ranging from household economic fragility to homelessness. A community’s economic health derives from the financial capacity of its members, so household-level financial distress can undermine neighborhood commercial prosperity. Financially precarious households are also more likely to incur debts they cannot repay, and discharged or uncollectible consumer debts (including medical and other local debts involuntarily incurred) impose costs on creditors and their paying customers.

Excessive housing costs relative to income increase tenure instability, which is not only a symptom of poverty, but is one of its causes.\textsuperscript{33} Without stable housing, “everything else falls apart.”\textsuperscript{34} At its worst, tenure instability leads to homelessness and the myriad of social and public costs associated therewith, such as petty theft, vagrancy, drug use, and safety concerns in public spaces.\textsuperscript{35} But even if cost burdened households remain housed, unaffordable housing costs likely lead to frequent relocations. People suffer


\textsuperscript{31} “For lowest-income households, high housing costs mean skimping on other basic needs to the detriment of their health and well-being. Cost-burdened households with even modest incomes spend less on vital needs, although there are some notable differences in where they make cutbacks. At the same time, limited spending on non-housing items by these households has significant implications for large segments of the economy, including the transportation, apparel, and entertainment sectors.” JOINT CTR. FOR HOUS. STUDIES, HARVARD UNIV., AMERICA’S RENTAL HOUSING: EVOLVING MARKETS AND NEEDS: RENTAL HOUSING AFFORDABILITY 32 (2013) [hereinafter AMERICA’S RENTAL HOUSING], http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/ahr2013_05-affordability.pdf.

\textsuperscript{32} John Eggum, Katherine Porter & Tara Twomey, Saving Homes in Bankruptcy: Housing Affordability and Loan Modification, 2008 UTAH L. REV. 1123, 1135–38 (calculating how household bankruptcy risk increases as housing costs become increasingly unaffordable).

\textsuperscript{33} See generally DESMOND, supra note 30.

\textsuperscript{34} Badger, supra note 30 (citing DESMOND, supra note 30).

greatly from a lack of a stable home—a place they can reside, feel secure, raise a family, and enjoy rights of privacy. Housing instability for families and for children creates harms that last for years, even if affordability challenges are eventually solved. Time and money spent seeking shelter reduces the human capital and consumer spending inputs that house-poor members of society could be contributing to the economy. School changes are disruptive for children, and frequent moves drain household wealth and threaten income stability.

If housing costs are unpredictable or unmanageable, household wealth cannot grow. Stable and affordable housing costs (particularly home ownership costs), on the other hand, increase household wealth, particularly in higher quality neighborhoods. Local land use laws in higher opportunity neighborhoods, however, often exclude affordable housing, and such exclusion not only means that low-income households cannot access the economic opportunities such communities afford, but also prevents robust economies from realizing their full economic potential. Excluding

39. Investment in housing in low-opportunity areas is not a short-term endeavor; people stuck in impoverished communities often fail to become economically self-sufficient, and reliance on public housing assistance ends up creating a perpetual dependency that is, by its very nature, unsustainable. Boyack, supra note 12, at 436–37.
40. Glaeser & Gyourko, supra note 15, at 7–9 (pointing out that many of the locations with the most localized economic growth have the strictest exclusionary laws and the most unaffordable housing); see also Chang-Tai Hsieh & Enrico Moretti, Why Do Cities Matter? Local Growth and Aggregate Growth 34–35 (Nat’l Bureau of Econ. Research, Working Paper No. 21154, 2015), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1045&context=housing_law_and_policy. A sustainable community is one that supports the inclusion of a range of housing options, including affordable housing, as it recognizes the value of providing opportunities for a diversity of people to live in, and contribute to, the local area. See GAVIN WOOD ET AL., AUSTL. Hous. & URBAN RESEARCH INST., HOUSING AFFORDABILITY DYNAMICS: NEW INSIGHTS FROM THE LAST DECADE 39–40 (2014),
affordable housing from more economically vibrant neighborhoods also means that poverty is clustered, and concentrated poverty perpetuates costly social ills such as high-crime neighborhoods and low quality public schools.41

The Foreclosure Crisis showed how unpredictable and excessive housing costs can create systemic threats to local, national, and even international financial systems.42 Disparate opportunities, segregated neighborhoods, and clustered economic harms undermine the fabric of society and can lead to political unrest.43 The housing affordability gap perpetuates income, racial, and ethnic segregation and undermines the country’s foundational premise of equality of opportunity.44 The positive externalities that a stable housing system creates therefore justify public funding of sustainably affordable housing.

Examining both economic and socio-political approaches to and impacts of housing affordability is critical to designing the right level of public support in the affordable housing sector. Affordability solutions must be geographically tailored to match the particular locality’s specific housing deficits.45 Where the market price of housing is “too expensive” relative to its


41. Boyack, supra note 12, at 462–63. Development of affordable housing in these low-income areas, however, has been shown to create a significant economic improvement in those neighborhoods from increased economic activity, increased property values, and lower crime rates. Rebecca Diamond & Tim McQuade, Who Wants Affordable Housing in Their Backyard? An Equilibrium Analysis of Low Income Property Development 2 (Nat’l Bureau of Econ. Research, Working Paper No. 22204, 2016), http://www.nber.org/papers/w22204.pdf.


43. As incomes stagnate and the wealth gap in this country grows, housing cost relative to income has steadily increased. AMERICA’S RENTAL HOUSING, supra note 31, at 28–29.


45. The 30% affordable housing metric ignores multiple other complicated, important problems related to housing, and the measurement is conclusory with respect to other critical housing issues, such as substandard homes, unsafe neighborhoods, and transportation challenges. Many questions remain.

Should households with moderate incomes who spend so much on housing that they have too little leftover to save and invest be viewed as having an affordability problem? Should a low- or moderate-income household that spends a large share of their income on housing to live in an affluent neighborhood be viewed as having an affordability problem or as having just made a choice to spend more on housing? Indeed, distinguishing between who is allocating large shares of income to housing or taking long commutes out of choice and who is doing so out of necessity is a bedeviling task.
production costs, laws and policies should encourage the natural market response: an increase of supply which will drive down the cost of housing.\textsuperscript{46} If housing supply costs push prices above households' ability to pay, however, then reducing housing costs requires decreasing the costs of production, perhaps through streamlining regulatory approval or using government incentives and subsidies to lower land, regulatory, and construction costs.\textsuperscript{47} If supply costs cannot be further reduced, then government rent subsidies may be necessary to make up the difference between minimum required rents and ability to pay.\textsuperscript{48} Decreasing the costs of production and increasing the ability to pay will both positively impact housing affordability, but to discern what combination of efforts is preferable in a particular geographic area, potential policies, programs, and laws should be assessed according to how effective the solution will be at solving localized unaffordability problems.

II. SUPPLY: AFFORDABLE HOUSING CREATION

A. Limitations on Supply and Density

Local governments prop up home prices through zoning regulations that artificially limit the supply of homes.\textsuperscript{49} Exclusive zoning schemes and anti-density provisions mandate both environmentally irresponsible and financially wasteful housing development.\textsuperscript{50} Zoning law is under the control of local governments, and homeowners employ zoning laws (at least in part) to increase property values, thereby protecting their lopsided investment in their homes.\textsuperscript{51} Much of exclusionary zoning has focused on limiting quantity and types of homes and curtailing residential density. For example, minimum

\textsuperscript{46} Boyack, \textit{supra} note 38, at 469 (describing how land use regulations impose costs on housing production that inhibit supply); Michael Lewyn, \textit{Deny, Deny, Deny}, 44 REAL EST. L.J. 558, 558 (2016) (describing how limitations on supply in housing markets drive up prices).

\textsuperscript{47} Glaeser & Gyourko, \textit{supra} note 15, at 8–9 (noting that land use restrictions and regulatory burdens increase the housing supply cost by making land more expensive).

\textsuperscript{48} James J. Hartnett, \textit{Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration}, 68 N.Y.U. L. REV. 89, 97 (1993) ("[O]verregulation directly increases housing development costs both through lengthy and expensive approval processes and the imposition of high permit fees—costs that are passed on to homebuyers and renters.").

\textsuperscript{49} Fischel, \textit{supra} note 38, at 230; Boyack, \textit{supra} note 38, at 469–70.

\textsuperscript{50} Boyack, \textit{supra} note 12, at 472–73.

\textsuperscript{51} Fischel, \textit{supra} note 38, at 230.
lot sizes and maximum home sizes keep developers and owners from choosing smaller, more ecologically friendly and less expensive homes.52 Exclusive zoning separates property according to its “use,” and courts have allowed single-family neighborhoods to bar multifamily developments in their neighborhoods.53 Multifamily housing and smaller-sized homes create residential options that are both more affordable and more sustainable.54 Local homeowner resistance to increased density may stymie efforts to increase neighborhood affordability and sustainability, however.55

Segregation by housing type means segregation by income and by race.56 Persistently segregated housing patterns create social problems, including heightened racial tensions,57 more concentrated poverty,58 secession of the successful,59 and lack of public funding in certain neighborhoods for public needs and amenities, such as parks, libraries, and even schools.60 Unless regional or state oversight provides a fair and effective check, local exclusive zoning schemes are prone to create such negative externalities.61

B. Rental Supply; Rental Demand

The supply of affordable rental units has not kept pace with the sharp uptick in demand.62 Simultaneously, stagnant income levels have severely limited many renters’ ability to pay.63 The affordability gap in rental housing

55. FISCHEL, supra note 38, at 230.
56. Boyack, supra note 12, at 462.
60. Boyack, supra note 37, at 604; see Edsall, supra note 13.
61. Hills, supra note 58, at 15–18.
62. AMERICA’S RENTAL HOUSING, supra note 31, at 31–32.
63. Id. at 28–30.
has been at a “crisis” level for more than fifty years now.64 Recently, the affordability gap has grown larger than ever, and while it persists, unaffordable housing imposes economic costs on communities and the country as a whole.65 Public recognition of the affordable housing crisis, however, has so far failed to mobilize support for a comprehensive solution, and incomplete and incremental efforts to mitigate the harms of unaffordable housing have, in some cases, perversely fueled unaffordability. An effective, sustainable solution must focus primarily on the supply of affordable rentals and access to homeownership and only secondarily on owner and tenant subsidies.

Housing policy often centers on the question of homeownership and mortgage affordability, but rental affordability is an ever-increasing problem. According to the Pew Research Center, there were 43.3 million renter households in July 2017, meaning that there are more renters today than ever before, in both absolute and relative terms.66 The increasing population of renters reflects demographic shifts in society and the economic realities of the early twenty-first century.67 The population of the United States has grown by 7.6 million since 2006, but “over the same period, the number of households headed by owners remained relatively flat, in part because of the lingering effects of the housing crisis.”68 The percentage of the population renting rather than owning their home has increased among all age, race,
Renters are an incredibly diverse group in terms of age, race, national origin, and income, but in the aggregate, renter households are smaller, younger, and more non-white than owner households. The demographics of the country are trending more diverse along the lines of the demographic makeup of rental households.

A large number of rental households are low-income, and a majority of all renter households cannot afford to pay for housing. In many geographic areas, unaffordability is driven primarily by lack of supply. In nine of the nation’s eleven largest cities, rental demand has grown by double-digits, and the production of new rental units has been much slower and concentrated at the high-end of the market. Luxury rentals keep pace with demand, but the

69. Cilluffo, Geiger & Fry, supra note 66.
71. Boyack, supra note 67, at 116; Joel Kotkin, Ready, Set, Grow: The Changing Demographics of America, SMITHSONIAN MAG. (Aug. 2010), http://www.smithsonianmag.com/40th-anniversary/the-changindemographics-of-america-538284/?no-ist (“The U.S. minority population, currently 30 percent, is expected to exceed 50 percent before 2050. No other advanced, populous country will see such diversity.”).
72. Average renter income levels have recently increased, but this statistic is misleading because income-level analysis shows that income increase has occurred only among the highest income levels. The average multifamily-dwelling renter household whose income was over $50,000 per year increased by more than 5% over the one-year period from 2015 to 2016; but over that same period, the average income for the average multifamily-dwelling household earning less than $50,000 decreased approximately by 1.5%. See NAT’L MULTIFAMILY HOUSING COUNCIL, supra note 66 (according to statistics updated as of October 2017 based on Census Bureau figures).
affordable unit shortfall is ever-increasing.\textsuperscript{74} Demand for high-end units is robust, vacancy rates are at record lows, particularly in cities such as San Francisco, but demand for affordable units throughout the country is even more extreme.\textsuperscript{75}

Lack of affordable rental options is exacerbated by the aging affordable housing stock.\textsuperscript{76} When multifamily buildings are renovated, they are frequently converted to condominium ownership to allow construction costs to be quickly recouped. Since 2001, 12.8\% of low-income housing supply has been lost due to conversion, demolition, or obsolescence.\textsuperscript{77} In 2000, 62\% of the country’s rental units were affordable to lower-income households, but just twelve years later, only 41\% of rental units in the housing supply were affordable.\textsuperscript{78} The tight rental housing supply has predictably led to an increase in rental rates throughout the country.

\textbf{C. Public Housing Supply: Past, Present, and Future}

The United States Housing Act of 1937 created a program to construct and operate federally funded public housing.\textsuperscript{79} The program was initially conceived as a jobs program to encourage employment in the construction sector as well as a way to provide housing for working class families rendered “temporarily destitute” during the Great Depression.\textsuperscript{80} In the eight decades since its inception, the public housing program has faced numerous challenges, including a shortage of affordable housing.


\textsuperscript{75} Glaeser & Gyourko, \textit{supra} note 15, at 2.


\textsuperscript{80} Paul S. Grogan & Tony Proscio, \textit{The Fall (and Rise) of Public Housing} 12 (Joint Ctr. for Hous. Studies, Harvard Univ., Working Paper No. W00-7, 2000),
since its creation, the public housing system has fundamentally changed in scope, application, and public perception. What had originally been intended to be a financially self-sustaining program establishing a stop-gap measure for working-class families eventually became a permanently funded welfare program primarily serving extremely-low-income households, including a large percentage of elderly and disabled individuals. In the 1990s, the federal government halted the construction of new public housing units and began underfunding the operation and maintenance costs of existing public housing. Decades of neglect have led to a massive decline in both the number and the quality of public housing units. An average of 10,000 public housing units are lost every year to disrepair and obsolescence. Nearly 1.2 million affordable public housing units still remain in operation, owned and operated by some 3,300 local housing authorities. It would take $26 billion to repair and rehabilitate these units (and the amount needed to preserve


82. Charles L. Edson, Affordable Housing: An Intimate History, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 3, 5 (Tim Iglesias & Rochelle E. Lento eds., 2d ed. 2011); Peter Marcuse, Mainstreaming Public Housing: A Proposal for a Comprehensive Approach to Housing Policy, in NEW DIRECTIONS IN URBAN PUBLIC HOUSING 23, 26–29 (David P. Varady et al. eds., 1998). Initially, public housing rents were uncapped, but in 1969, the Housing Act was amended to provide that rents in public housing could not exceed 25% of household income (later adjusted to 30%). Housing and Urban Development Act of 1969 (Brooke Amendment), Pub. L. No. 91-152, § 213, 83 Stat. 379, 389 (codified as amended at 12 U.S.C. § 1715z-1 (2012)).


The public housing model as currently constituted is economically unsustainable. Because of income-based affordability limits, tenant rents only cover approximately 40% of the maintenance costs for public housing. Desperate for a source of sufficient operating capital for public housing, in 2014, the Obama administration established the Rental Assistance Demonstration program (RAD). The program was reauthorized in 2017 for at least another three years. Under RAD, the federal government permits hundreds of thousands of public housing units to be transformed into privately held housing units, funded by a combination of public subsidies, tax credits, and private mortgage debt. RAD establishes a way to privatize and therefore finally fund the operation of a significant number of the nation’s public housing units, but the program has been criticized for allowing these units to be used as security for private debt and thereby render the affordable units vulnerable to default and foreclosure. In spite of this potential risk, leveraging maintenance and operating costs through private/public financing structures does enable sustainability focused improvements to public housing units.

For decades, public housing has seemed on its way out; however, units owned and operated by a public or non-profit agency may be a necessary part

87. Finkel et al., supra note 9, at v–vi; Smetak, supra note 81, at 3.
88. Smetak, supra note 81, at 3 (stating that “the existing public housing funding structure is not sustainable”).
89. Cavanaugh, supra note 80, at 231; Smetak, supra note 81, at 9.
90. RAD is only the latest in a series of initiatives that focused on rehabilitating and, to a large extent, destroying public housing units. One of the most infamous initiatives was the HOPE VI program (1993–2007), which allowed public housing developments to be destroyed or completely renovated into mixed-income developments, even though renovation projects invariably meant a net loss of public affordable housing units (some 45% of the units lost under HOPE VI are not being replaced). See Peter W. Salisch, Jr., Does America Need Public Housing?, 19 GEO. MASON L. REV. 689, 705–30 (2012); see also Alexis Stephens, Risks vs. Rewards: Inside HUD’s Favorite New Program, NEXT CITY (Oct. 9, 2014), https://nextcity.org/daily/entry/public-housing-privatized-hud-rad-section-8.
91. The 2014 version of RAD established a 185,000-unit cap on the number of housing units that could be converted under RAD. Rental Assistance Demonstration (RAD), supra note 85. In re-authorizing RAD in 2017, Congress increased the cap to 225,000 units. RAD must be continued or terminated by the end of 2020. Id.
92. The initial RAD program was both popular and perceived by HUD to be successful, leveraging $250 million of federal funds to obtain $2.5 billion in capital investment in public housing. Id.
93. Smetak, supra note 81, at 11–15.
of a sustainably affordable housing system. Private funding for affordable housing allows public funds to be leveraged to make capital improvements, but the long-term sustainability of this affordability model is unproven.94 Recently, scholars and policy advisors have begun to look critically at what happens after the sunset of affordability mandates that have accompanied private affordable housing subsidies.95 Private capital creates a broader source of funding for upfront costs, but this structure may prove unsustainable in the long term. Because of this, private funding incentives are likely a better solution to problems that arise from lack of housing supply rather than housing problems that are, essentially, symptoms of extreme poverty. The majority of public housing inhabitants today are elderly or disabled (or both).96 These public housing residents lack the ability to compete in a more privatized housing market, even using vouchers, and their poverty is so extreme as to justify permanent public housing assistance. In addition, many such residents require housing that provides supportive services (like medical care and counseling), not just shelter and utilities.97 Privatization of public housing is, to some extent, an answer to the problematic lack of public upkeep funds and the politicized concern about over-dependence on government handouts, but for some populations, housing in publicly held units may still make the most sense.

D. Tax Incentives for Private Ownership, Mortgage Borrowing, and Greening

The federal government’s housing and tax policies impact the demand for home ownership, the costs of housing, the availability of mortgage credit, and the ability of lower-income people to access housing. Tax subsidies support sustainable real estate development and the creation and rehabilitation of affordable units.98 But far greater tax subsidies support private (and semi-
private) mortgage borrowing and home-purchasing. The home mortgage interest deduction is by far the largest housing subsidy, and this deduction not only primarily benefits the highest-income households, but also has a minimal effect on growing the homeownership rate. The only demonstrable effect of the mortgage interest deduction (beyond transferring public funds to the highest-income households) is to encourage anti-sustainable housing trends such as a demand for bigger mortgage loans and larger and more expensive homes.

Tax provisions supporting the development of affordable rental housing are far more defensible. The most useful tax tool for growing affordable housing supply is the Low Income Housing Tax Credit program (LIHTC).


99. Homeowners enjoy multiple tax benefits, ranging from being able to deduct mortgage interest and property taxes from ordinary income to not having to declare imputed rental value of one's owned home. Owners are also shielded from capital gains taxes. Edward L. Glaeser & Jesse M. Shapiro, The Benefits of the Home Mortgage Interest Deduction, 17 TAX POL'Y & ECON. 37, 47-50 (2003); Patric H. Hendershott & Michael White, The Rise and Fall of Housing's Favored Status, 11 J. HOUSING RES. 257, 257-61 (2000); Apgar, supra note 70, at 11-12.

100. The Millennial Housing Commission calculated that federal tax benefits for homeowners ($121.2 billion in 2001) far outweigh modest federal funding of affordable rental housing through HUD (a mere $33.6 billion during the same period). Apgar, supra note 70, at 12.


102. The MID has been blamed for distorting home-buying and mortgage borrowing decisions, leading homeowners "to buy more expensive homes than they otherwise would (i.e., an inefficient allocation of resources)." Hemel & Rozema, supra note 101, at 672-73; see Glaeser & Shapiro, supra note 99, at 57-58. There are some other federal programs that provide down-payment funding, counseling, and other home-buying assistance for first-time low-income home buyers (the largest of which are discussed infra Section III.B).

The LIHTC, together with a variety of public grant and bond-financing programs, help defray the cost of production for low-income rental units. By defraying development costs, these programs help channel private funds toward below-market rental units. The LIHTC program has great potential to help grow the supply of affordable housing units and should therefore be expanded in markets where lack of supply drives the affordability gap.

With the decline of public housing, affordable housing supply has come to depend more and more on private construction of affordable units. Without market intervention, private development of rental units tends to target the top of the market. Focusing on higher-end rental units makes good business sense because the costs of production are similar for lower- and higher-rent units. According to one estimate, development costs would have to be reduced by 28% in order to make it profitable for the private sector to create affordable housing without government intervention and incentives. The government helps fund the profitability gap by subsidizing affordable housing projects through tax benefits and grants.

The LIHTC provides for a ten-year tax credit for an affordable housing development. The LIHTC is a popular tool for affordable housing development, but LIHTCs are limited in supply. HUD allocates a certain amount of tax credits to each state annually based on population, and the


105. The Tax Reform Act of 1986 established the LIHTC. HUD LIHTC, supra note 103.


108. Development costs for above- and below-market housing units are almost the same. BRADSHAW ET AL., * supra* note 54, at 24. Costs include the land costs, the expense of obtaining necessary approvals, and materials and labor to build and finish improvements. “[G]reen building in the commercial and institutional sectors show that green buildings often cost 2–3% more in total up-front development costs, but that the present value of operating savings over the life of the building more than offset the incremental capital costs.” *Id.*


110. ADVOCATES’ GUIDE, * supra* note 85, at 5-30; Cadik, * supra* note 104; HUD LIHTC, * supra* note 103.
credits are locally distributed by state entities. State housing finance agencies award tax credits to certain projects, choosing among proposals for construction or rehabilitation of low-income rental housing. To qualify for LIHTC allocation, a project must comply with income-based limits on tenant occupancy for fifteen years.

Rental rates in LIHTC projects must be affordable to 60% AMI households, but because LIHTC projects use a uniform pricing scheme for rents, the 60% AMI affordability requirement does not necessarily mean that the rental rates are affordable to all tenants. Some residents may be paying less than 30% of their income on housing costs, but other tenants with lower incomes end up paying much, much more. In fact, more than 40% of LIHTC housing residents pay more than 30% of their income in housing costs, and 16% pay more than 50%. Some of these residents may make up the affordability gap with vouchers, but others may not have any additional housing assistance.

LIHTC benefits fund only a portion of the affordable housing projects to which they apply, and developers fund the rest through debt (often low-interest loans, and bond-financing) or equity (including grants). In addition to the tax credits, public funds incentivize production of affordable rental housing through tax-exempt bond financing.

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111. See HUD LIHTC, supra note 103.
112. Id.
113. To be eligible, a project must ensure that 20% or more of its tenants earn less than half of the area median income (AMI) or, alternately, that 40% or more of its tenants earn below 60% AMI. Both these income levels are slightly above the poverty line, which is approximately 39% AMI. In reality, most LIHTC projects contain ONLY low-income units (with half of the tenants in LIHTC projects earning below 30% AMI). ADVOCATES' GUIDE, supra note 85, at 5-30 to -31.
114. See id. at 5-30 to -35.
115. Id.
116. Vouchers are discussed infra Section III.B.
117. ADVOCATES' GUIDE, supra note 85, at 5-30. The debt/equity split in affordable housing developments is typically much different than the debt/equity division in market-rate housing. Most real estate developments are 60–90% debt financed, but only 10–30% of affordable housing costs are financed by hard debt, the rest coming from equity investment and soft debt. BUILDING AFFORDABLE HOUSING, supra note 109, at 8–9.
118. Tax-exempt bonds help finance 40% of LIHTC developments. Boyack, supra note 67, at 143. They are particularly used in building affordable supportive housing (like senior housing). Id. Of course, the government caps availability. Id. The bonds are issued by the state housing finance agency or city housing agency. Id. at 144.
Partnership grants, Community Development Block Grants, and similar programs. Tax-exempt bond financing and grant programs are limited in amount and are subject to budgetary pressures (for example, available funding fell 44% after 2011). One way to maximize the impact of such supply-side affordable housing supports is to streamline approvals and reduce regulatory costs for such projects.

Raising capital for affordable housing projects is notoriously complex; it is common to see individual apartment buildings funded by a mix of any of the following: public grants, federal tax credits syndicated through private lenders, interest-free debt from community lenders and municipalities, mortgage debt from commercial lenders and private equity.

Anything that can shorten and simplify the “long and convoluted process” of marshalling public financial support for affordable housing projects can lead to the production of additional affordable units and/or decreased need for public funding in this sector.

Since its inception, the LIHTC program has leveraged approximately $100 billion in private investment capital and has helped create three million affordable rental units. There is a robust demand for LIHTCs, and some legislators believe that if more tax credits were made available, even more


120. The Community Development Block Grant (CDBG) program focuses on developing neighborhoods that were the hardest hit by the foreclosure crisis and other types of disasters. The CDBG program works with the Neighborhood Stabilization Program and focuses on metropolitan areas that contain more than 50,000 people. Community Development Block Grant Program—CDBG, U.S. DEP’T HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs (last visited Mar. 14, 2018).

121. BUILDING AFFORDABLE HOUSING, supra note 109, at 13. For a discussion of federal funding gaps, insufficiencies, and the effects of insufficient housing assistance, see generally RICE & SARO, supra note 84; SARO & RICE, supra note 44.


123. Id.

affordable rental units would be created, helping to meet the ever-increasing demand.\textsuperscript{125} For the past several years, for example, Senator Maria Cantwell has annually proposed increasing the number of LIHTCs available by 50% as a way to grow the supply of affordable housing units, particularly in certain regions where affordable housing supply is the tightest.\textsuperscript{126} The 2017 version of her proposal is co-sponsored by Senator Orrin Hatch and would provide for the creation of “at least 400,000 additional affordable affordable units over the next decade.”\textsuperscript{127}

Because the demand for LIHTCs (and various grants) far outpace their supply, state agencies must pick and choose among various possible projects. Selection criteria for awarding LIHTC and grants, therefore, is key. The Tax Reform Act mandates preference of developments in lower-income tracts, but the Fair Housing Act arguably mandates that state housing agencies “affirmatively further fair housing” by selecting affordable housing projects that racially integrate populations rather than those that continue established patterns of residential segregation.\textsuperscript{128} This makes selection and siting of LIHTC projects tricky, as housing authorities must walk the line between investment into impoverished neighborhoods and avoidance of poverty clustering.\textsuperscript{129}

Another deficiency of governmental incentive programs is that they tend to favor large projects and developers over small ones.\textsuperscript{130} Although allocations to large projects may be economically justified in terms of scale (and “bang for the buck”), this creates a disparate treatment of developers and property owners based on their size. Individuals and smaller companies that wish to invest in, develop, and rent out affordable units typically must do this

\begin{flushleft}
\textsuperscript{125} Demand for LIHTCs is currently more than twice the credits available, and if credit availability was increased even just by 50%, approximately 400,000 more affordable units would become available over the next decade. \textit{Id.}.

\textsuperscript{126} \textit{Id.} at 2 (pointing out that “we face a nationwide shortage of 7.4 million affordable rental homes available to the most vulnerable, extremely low-income citizens” and that this amount “is a 60 percent increase from 2000”).

\textsuperscript{127} \textit{Id.}; see also Cantwell & Hatch Reintroduce Affordable Housing Credit Improvement Act with Support of Over 2,000 Businesses and Organizations, AFFORDABLE RENTAL HOUSING A.C.T.I.O.N.: BLOG (Mar. 7, 2017), http://rentalhousingaction.org/blog/2017/3/7/sens-cantwell-hatch-reintroduce-affordable-housing-credit-improvement-act-with-support-of-over-2000-businesses-and-organizations. A similar bill, H.R. 1661, has been proposed in the House by Patrick Tiberi. Although these bills both enjoy broad, bipartisan and industry support, neither has moved out of committee for a vote. See H.R. 1661, 115th Cong. (2017).


\textsuperscript{130} Boyack, \textit{supra} note 67, at 146–47.
\end{flushleft}
on their own, without government incentives, and this increases the costs and decreases the availability of financing for such developments. Smaller-sized projects, very many of which house low-income tenants, therefore bear relatively higher development costs, and these costs are then passed on to the lower-income tenants.\textsuperscript{131} Lack of public support for smaller-scale developers and landlords puts them at a comparative disadvantage, creates anti-competitive effects in the rental housing market, and drives up rents for everyone.\textsuperscript{132}

Fannie Mae and Freddie Mac (collectively, the "GSEs") also contribute to growing the supply of rental housing by enhancing mortgage market liquidity, but the GSEs focus on market-rate rather than below-market rate rental projects.\textsuperscript{133} The GSEs provide a significant amount of mortgage capital for market-rate multifamily rental housing developments, and although such market liquidity does not directly impact housing affordable to lower-income renters, it does help grow rental supply which puts downward pressure on rental prices.\textsuperscript{134} The GSEs' capital support lowers production costs for multifamily housing and therefore contributes to general housing affordability. Unlike the politically contentious involvement of the GSEs in encouraging residential home mortgage lending by owner occupants, GSE guaranties of multifamily loans have involved little taxpayer risk: less than 1% of the GSE-guaranteed multifamily loans have defaulted.\textsuperscript{135}

\begin{itemize}
\item \textsuperscript{131} See id. at 147.
\item \textsuperscript{132} See id. at 146–47.
\item \textsuperscript{133} Liquidity in residential mortgage markets is provided by the Federal Housing Administration, Fannie Mae, Freddie Mac (collectively, the GSEs), and the Federal Home Loan Banks. Andrea J. Boyack, \textit{Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac}, 60 Am. U. L. Rev. 1489, 1495 (2011). The GSEs currently have a portfolio containing more than $286 billion of non-securitized loans on multifamily developments. For the most part, this amount does not represent a government subsidy, but rather is a government-structured channeling of private investment capital into multifamily development. Ninety percent of rental units financed through GSE structures have been tax and budget neutral. Boyack, \textit{supra} note 67, at 150. The primary function of the GSEs involvement in the multifamily housing market is to increase the supply of capital or market liquidity (much like the role the GSEs play for market-rate home purchases). \textit{Id.} at 127–28.
\item \textsuperscript{134} The GSEs' total market share in multifamily residential mortgage lending has fluctuated post-2008 from as high as 70% to as low as 30%. Karan Kaul, \textit{Urban Inst., The GSEs' Shrinking Role in the Multifamily Market} 4 (2015), https://www.urban.org/sites/default/files/publication/48986/2000174-The-GSEs-Shrinking-Role-in-the-Multifamily-Market.pdf.
GSE capital support is limited to “multifamily” (five-plus unit) rental projects, and the GSEs prefer to acquire mortgages on larger (fifty-plus unit) multifamily buildings because it is more cost-effective to resell or securitize larger loans. Once again, preference for fewer, larger loans results in a comparative advantage for larger projects. In many communities, however, smaller multifamily buildings and duplexes, triplexes and quadplexes are the most affordable housing options for low- and moderate-income families. These are the very sorts of developments that must compete in the market without GSE-channeled capital (and likely without the benefits of tax credit financing). It thus may be beneficial for the government to establish more targeted capital channeling with respect to smaller, more affordable rental housing.

Government involvement in subsidizing housing development allows the government to help shape housing’s future. Tax incentives, grants, and public funding can mandate outcomes with positive externalities. For example, public financial support can require the creation of more affordable and more sustainable housing units. Allocation criteria or qualification requirements can explicitly require projects to accomplish such public purposes. Leveraging public and private funds for the upfront creation of sustainably located, integrated, affordable, and green housing options will ultimately reduce such housing’s long-term operating costs, making it more likely that the projects can eventually become fairly self-sustaining (economically as well as environmentally). In terms of affordability, neighborhood quality, and environmental efficiency, the increased initial inputs (by the government and private developers) will create lower costs over time, making the entire system more sustainable.

Affordable housing offers opportunities for public-private partnerships, community and mission lending, securitization, and other innovative financial structures. Government support should encourage such financial innovations in order to maximize the flow of funds and create more

136. This preference for larger over smaller rental operations, however, does impact the market. Smaller multifamily (five- to forty-nine-unit range) have “particular challenges” because they are less likely to have predictable financing. Less than 45% of small multifamily projects have fixed rate loans (70% of fifty-plus unit property projects do). See CTR. FOR CMTY. LENDING, FINANCING SMALL MULTIFAMILY RENTAL HOUSING 20 (2015), http://centercommunitylending.org/wp-content/uploads/2015/06/Financing-Small-Multifamily-Rental-HousingCCL.pdf; A RESPONSIBLE MARKET, supra note 135, at 34–36.


138. Boyack, supra note 12, at 456; see Boyack, supra note 67, at 135.
affordable and environmentally sustainable housing units. Regulation should be constantly re-examined to ensure it rewards and promotes, rather than inhibits, financial innovation and experimentation.

In a similar vein, federal funding must work hand-in-hand with supportive local zoning that permits the creation of inclusive, sustainable neighborhoods containing a variety of housing types.139 To the extent that local homevoters resist efforts to grow housing affordability, state or federal oversight should prevail to ensure a broader, more economically sustainable approach. Emphasizing community economic benefits and environmental sustainability gains resulting from affordability initiatives may increase community support.

III. DEMAND: HOUSING COST AFFORDABILITY

For the vast majority of renters, incomes have not kept pace with rapidly rising rents. Increasing the supply of housing units may not be sufficient to make housing affordable for all households, particularly in certain geographic areas where the affordability gap is the most extreme. In such cases, housing affordability must be addressed from the perspective of ability-to-pay, and not just with respect to cost-to-produce.

Today, 52% of all renters are cost burdened, paying over 30% of their gross income for housing, and half of these pay more than 50% of their gross income for housing.140 Approximately eleven million renter households (27% of all renter households) spend more than half their monthly income on rent.141 Rental unaffordability is a nationwide problem, even though the size of the gap and the degree of rent burdens vary by location.142 In no state, however, does a minimum wage full-time worker earn enough to pay fair market rent on a one-bedroom apartment using no more than 30% of income.143 To afford a two-bedroom rental unit at the national average rent of

139. Boyack, supra note 38, at 477–78.
140. See generally BUILDING AFFORDABLE HOUSING, supra note 109, at 4.
141. OUT OF REACH 2017, supra note 74, at 1.
142. Generally, rents are more unaffordable in the west and the south. San Francisco, New York, and Honolulu have long struggled with rental unaffordability, but over the past few years, rental rate increases have actually been most dramatic in mid-sized metropolitan areas like Denver, Kansas City, Nashville, and Portland. See generally, e.g., Olga Baranoff, Housing Affordability and Income Inequality: The Impact of Demographic Characteristics on Housing Prices in San Francisco (Apr. 10, 2016) (unpublished B.A. thesis, Johns Hopkins University) (on file with the John Hopkins University Economics Department).
143. OUT OF REACH 2017, supra note 74, at 14.
$892 per month, an individual would need to earn $21.21 per hour for a forty-hour week. In sixteen states and the District of Columbia, the housing wage (the hourly rate that would make a fair market rental unit affordable) is more than $20 per hour.

The affordability gap is most acute for the nation’s most impoverished households, and among the lowest-income quintiles, the gap is growing. Each year, more than 400,000 new renter households enter the housing market, the majority of which are low-income. More than 75% of households earning less than $15,000 annually are severely rent burdened, an increase of 49% since 2003. Rental increases have doubled over the past twenty years, but incomes over the same time have remained fairly stagnant.

For decades, the federal government has subsidized tenants’ and low-income owners’ ability to pay for housing through a variety of programs. The biggest support for affordable homeownership is the FHA’s mortgage insurance program. The largest and most well-known rental subsidy is the Section 8 tenant-based voucher program. Critics claim that public demand-side assistance of these sorts create unsustainable permanent entitlements (in terms of rental assistance) or unstable homeownership (in terms of FHA insured low-down-payment loans).


147. EXPANDING LIHTC, supra note 77, at 1.


149. Rental rates are higher than ever before across the country. On average, during the five-year period from 2009 to 2014, rental rates went up 15.2%. Boyack, supra note 67, at 117. The median asking rate for rents has nearly doubled in the past twenty years. See OUT OF REACH 2017, supra note 74, at 2. Although the average income in the United States has increased, when incomes are broken into quintiles, it is apparent that this economic growth is clustered at the high end of the income spectrum. For low-income and extremely low-income households, rents have stayed the same or even decreased. LAWRENCE MISHEL ET AL., ECON. POLICY INST., WAGE STAGNATION IN NINE CHARTS 6 (2015), http://www.epi.org/files/2013/wage-stagnation-in-nine-charts.pdf.

150. Reiss, supra note 36, at 1022–23.
self-sufficiency are more economically sustainable, and economic sustainability may be further aided by incorporating green building initiatives into upfront supply-side funding assistance in order to reduce operating costs in the long term.

A. Purchase Prices and Mortgage Capital

The recent foreclosure crisis revealed that purchasing a home is a riskier investment than was previously recognized. Even though the crisis somewhat tainted the American Dream of homeownership, most economists still promote homeownership as a sound wealth-building strategy.151 For many households, however, the purchase of a home is financially impossible, so stability and equity appreciation that may come with ownership are financially out of reach. Although homeownership is not always the most financially prudent choice for a given household, making home-buying accessible to a broader swath of the population is still a critical way to address the racial wealth gap and wealth inequality in our society.152

Homeownership can be economically difficult for one (or more) of three reasons: high home prices make monthly mortgage payments unaffordable, bad credit makes mortgage loans unattainable, and lack of cash on hand makes a substantial down payment virtually impossible. Prior to 2008, private lenders (i) lowered initial monthly payments, by offering interest-only and teaser-rate loans, (ii) made subprime loans to borrowers with unproven credit or bad credit, and (iii) reduced the need for cash down payment at closing by making loans at or near 100% loan-to-value.153 These private market "solutions" ultimately destroyed the homeownership dream for many of these borrowers, and the collective failures of risky residential mortgage lending caused systemic financial collapse.154

Attempts by government and quasi-government entities to make housing more accessible have supported American homeownership for several


decades since the New Deal, but there have been costly and inequitable missteps along the way.\textsuperscript{155} The FHA's mortgage insurance profoundly affected homeownership by making home acquisition more affordable. For one thing, the FHA introduced the thirty-year, self-amortizing, fixed-rate residential mortgage loan as the primary lending tool for prime mortgage loans.\textsuperscript{156} This new type of mortgage loan was much more affordable for homebuyers, and access to cheap capital boosted homeownership. In addition, the FHA offered mortgage insurance to low-income, first-time homebuyers, including those with poorer credit scores, allowing these borrowers to obtain a mortgage with a relatively small amount of money down.\textsuperscript{157} Such mortgage lending innovations grew the homeownership rate and forever changed the country's residential geography.\textsuperscript{158} Although FHA support increased homeownership, support was initially channeled exclusively to white homebuyers. The FHA's redlining policies and practices continued for decades, but their socially harmful impacts have persisted even longer—for generations. By systemically denying mortgage insurance to borrowers and communities of color, the government prescribed, orchestrated, and enshrined the racially segregated residential housing system that plagues the country to this day.\textsuperscript{159}

Overall, slow and steady growth in American homeownership soared to record levels in the first few years of the twenty-first century, but these homeownership gains turned out to be unsustainable. Approximately 4.5 million families lost their homes to foreclosure between September 2008 and August 2013.\textsuperscript{160} In 2016, the homeownership rate fell to 62.9%, the lowest

\begin{itemize}
\item \textsuperscript{155} Fannie and Freddie increased liquidity in mortgage markets through establishing a secondary market for prime mortgage loans. For more information on the role of Fannie Mae and Freddie Mac in the context of increasing homeownership and in the context of systemic instability and bailout costs, see generally Boyack, supra note 133, and David Reiss, \textit{Fannie Mae and Freddie Mac and the Future of Federal Housing Finance Policy: A Study of Regulatory Privilege}, 61 \textit{Ala. L. Rev.} 907 (2010).
\item \textsuperscript{157} Historically, this amount varied from less than 0% to 20% of the purchase price, and today is around 3.5%. Reiss, supra note 36, at 1073.
\item \textsuperscript{158} \textit{Kenneth Jackson}, \textit{Crabgrass Frontier} 190–91 (1985). See generally Reiss, supra note 36, at 1034–75, for an in-depth explanation of FHA mortgage insurance and its role in mortgage lending.
\item \textsuperscript{159} See \textit{Richard R.W. Brooks & Carol M. Rose, Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms} 109 (2013).
\end{itemize}
rate since the Census Bureau began tracking it in 1965. Reacting to this foreclosure crisis and the broader financial distress that followed in its wake, private market players pulled out of the subprime mortgage business, and the government tightened its mortgage lending underwriting requirements. In the decade since the 2007 subprime crisis, obtaining a home mortgage loan has become much more difficult. Recently, the housing market in many areas has rallied, and in 2017, average home prices in the United States reached an “all-time record high,” exceeding prices at the peak of the Housing Boom. Tight credit combined with record high home prices makes home-buying today more unaffordable than ever.

B. Gap Funding for Rental Costs

Purchasing a home is out of reach for most low-income households, and stable rental housing is elusive as well. In 1974, the federal government established voucher programs through HUD to fund the affordability gap for low-income rental households. Under Section 8 of the Housing Act of 1937, Congress authorized HUD to provide gap funding in the form of portable vouchers issued to low-income tenants who could present the


162. McCoy, supra note 152, at 2.


vouchers to landlords in partial payment of monthly rent.\textsuperscript{165} Tenants using these Housing Choice Vouchers pay 30\% of their income toward rent, and the government pays the rest up to a fair market rent cap.\textsuperscript{166} Section 8 vouchers are an absolutely essential support for millions of renters who rely upon these subsidies.\textsuperscript{167} But for two reasons, the subsidy program as currently constituted is unsustainable. First, the number of qualified low-income households far, far exceeds the number of rental subsidies provided by the government. This necessitates some sort of limited resource allocation


\textsuperscript{166} Housing choice vouchers provide that tenants pay 30\% of their income as rent and the federal government, working through local housing agencies and non-profit associations, pays the difference between the 30\% amount and the rent up to a specified maximum payment standard for the geographic area. See POLICY BASICS, supra note 165, at 1. The specific maximum payment standard is calculated at 90–110\% of the “fair market rent” in a metropolitan area or a non-metropolitan county, with “fair market rent” equaling the rental rate for units at the fortieth to fiftieth percentile of rents. FINKEL ET AL., U.S. DEP’T OF HOUS. & URBAN DEV., SMALL AREA FAIR MARKET RENT DEMONSTRATION EVALUATION, at v (2017), https://www.huduser.gov/portal/sites/default/files/pdf/SAFMR-Interim-Report.pdf; see 24 C.F.R. §§ 888.113, 982.503 (2018). Housing units rented must meet the quality and size standards set by HUD in order to qualify for the voucher-provided subsidy. Housing Choice Vouchers Fact Sheet, supra note 164. Federal law does not require landlords to accept Section 8 vouchers, but local law in thirteen states and several localities specifically prohibits landlords from discriminating against voucher holders. HUD uses larger areas (metropolitan areas or counties outside of metro areas) to define local market rents, but rental rates hugely vary within a single metropolitan area (often by a factor of five to ten). In Washington, D.C., a two-bedroom apartment in the 20003 zip code is listed at a monthly rate of $10,074. ZILLOW, http://zillow.com (search in search bar for “20003”; then select “For Rent” in dropdown tool; then select “2+ Beds” in dropdown tool) (last visited June 26, 2018). Just 1.5 miles away in the 20020 zip code, a two-bedroom apartment is listed at a monthly rate of $1,025, almost one-tenth of the price of the 20003 apartment. ZILLOW, http://zillow.com (search in search bar for “20020”; then select “For Rent” in dropdown tool; then select “2+ Beds” in dropdown tool) (last visited June 26, 2018). In Kansas City, Missouri, a three-bedroom home in the 64102 zip code is listed at a monthly rate of $5,218. ZILLOW, http://zillow.com (search in search bar for “64102”; then select “For Rent” in dropdown tool; then select “3+ Beds” in dropdown tool) (last visited June 26, 2018). Just two miles away in the 64109 zip code, a three-bedroom home is listed at a monthly rate of $600, 11\% of the price of the more expensive home. ZILLOW, http://zillow.com (search in search bar for “64109”; then select “For Rent” in dropdown tool; then select “3+ Beds” in dropdown tool) (last visited June 26, 2018). See also Collection Financial Standards, supra note 23. This approach means that within a single metropolitan area, the only neighborhoods that are affordable even to recipients of Section 8 vouchers are typically concentrated in the lowest-income neighborhoods.

\textsuperscript{167} Vouchers currently help pay for the housing costs of more than five million people in approximately 2.2 million low-income households. POLICY BASICS, supra note 165, at 1.
scheme and means that the majority of qualified households do not receive public housing aid. Second, subsidy dollars feed and prop up rental rate increases, and, freed from income-based restraints on ability to pay, rental rates in high-demand areas can continue to climb, increasing the affordability gap.

Only one in four eligible households receive public housing assistance of any type. This means that 75% of low-income households are at the mercy of the public market when it comes to finding money to pay the rent. For the lucky one-fourth, vouchers and other assistance provide a crucial source of relief and way to stay in a home. Because there are significantly fewer government subsidies available than the number of qualified tenant households seeking government aid, distributors of the subsidy must make difficult allocation decisions. Housing vouchers are allocated unevenly, to only a fraction of the eligible households, based on a first-in-time model using waiting lists or on a luck-of-the-draw model using lotteries, with an overlay of politically driven prioritization categories.

Uneven allocation of public funds among the neediest households is destabilizing and unsustainable, but Congress has never shown the political will to fully fund the affordability gap in housing. Unequal distribution of public housing assistance drives low-income households to desperately compete for a limited number of vouchers and affordable apartments. In Boston, for example, more than 10,000 people applied for just seventy-three additional vouchers that were issued in November 2014.

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schemes, out of every 100 extremely low-income households, sixty-nine do not obtain rental assistance or placement in an affordable unit.\footnote{172}

Given limited taxpayer funding, every additional dollar spent for a given subsidy reduces the number of households served by the government subsidy program. This creates a built-in preference for locating subsidy recipients in the lowest-rental-rate housing possible in a given metropolitan area, leading to poverty concentration and racial segregation, which in itself runs counter to the mission of HUD and the purposes of the Fair Housing Act.\footnote{173} Recognizing the problems of poverty concentration left unsolved by current approaches to rental subsidization, HUD has begun experimenting with allowing local housing authorities to set market rents at the zip code level rather than regionally (although only a handful of housing authorities are currently doing this).\footnote{174} This approach, what HUD calls “Small Area Fair Market Rents” would increase the maximum voucher subsidy in high-rent neighborhoods and lower the maximum subsidy in low-rent neighborhoods, and this small area fair market rent pricing approach will theoretically allow subsidy recipients to locate in higher opportunity areas (supposedly with little net cost to the government). If recipients mostly prefer less impoverished neighborhoods, however, this method of calculating fair rents will make vouchers more expensive, necessarily reducing the number of households that can be served with the same number of public assistance dollars.

In 2016, Congress passed the Housing Opportunity Through Modernization Act (HOTMA), the most important affordable housing legislation in decades.\footnote{175} HOTMA was an effort to improve sustainability of federal housing assistance through reducing regulatory costs associated with the use of vouchers, delaying rent increases when household incomes rise, improving low-income households’ access to low-poverty neighborhoods, and giving local housing agencies more flexibility to apply housing funds

\footnote{172. “Extremely low-income” refers to households that earn less than the poverty level or 30% of AMI. OUT OF REACH 2017, supra note 74, at 1.}
\footnote{173. Boyack, supra note 12, at 445–47.}
toward necessary renovations for public housing units. This legislation represents an encouraging first step toward more flexible and sustainable use of housing assistance, but is insufficient to address the gap in supply of affordable rental units and the gap between low-income renters’ ability to pay and fair market rental prices.

Housing Choice vouchers are the government’s go-to response to the increasingly inadequate supply of affordable housing units. When public housing units disappear, whether deliberately through project conversion (for example through HOPE VI or RAD) or through attrition or natural disaster, the government typically attempts to replace at least some of the lost supply with increased support for demand in the form of additional Section 8 vouchers. Theoretically, if a one-to-one replacement is provided, former public housing tenants who receive Housing Choice Vouchers in lieu of placement in affordable units are financially unharmed because their rents remain basically the same as before. In practice, however, vouchers are not always available for every public housing unit lost, and even when vouchers are provided, recipients still may find affordable housing elusive. One problem is the “rampant discrimination from private landlords” against voucher recipients.

The Section 8 voucher program may also be problematic because it may, ironically, contribute to increasing rental rates. Subsidizing rental costs makes more money available for rental payments, and because tenant ability to pay has increased, landlords are able to charge higher rents. HUD’s fair

176. See generally id.; see also Barbara Sard, Congress Unanimously Approves Bill to Improve Housing Programs, CTR. ON BUDGET & POL’Y PRIORITIES: OFF THE CHARTS (July 15, 2016, 1:15 PM), https://www.cbpp.org/blog/congress-unanimously-approves-bill-to-improve-housing-programs.

177. ADVOCATES’ GUIDE, supra note 85, at 4-10, 4-17.

178. Failure to provide a voucher replacement for destroyed public housing has been legally problematic under past HUD initiatives, such as HOPE VI. See, e.g., Cabrini-Green Local Advisory Council v. Chi. Hous. Auth., No. 96 C 6949, 1997 WL 31002, at *2 (N.D. Ill. Jan. 22, 1997).


Only a handful of states explicitly prohibit private landlords from discriminating against voucher recipients in their tenant selection, and landlords frequently deny tenancy to voucher holders. In the aftermath of Hurricane Katrina, for example, Pres Kabacoff, CEO of one of the biggest multifamily developers in New Orleans, was asked about renting to very low-income former public housing tenants who had been provided with vouchers. Kabacoff infamously advised landlords: “You just don’t take them, or you evict them. Just get them out of there.” Id. Kabacoff claims that he was speaking only about “the criminal element” and indicated that more support for affordable housing unit construction is necessary. Id.
market rent caps on vouchers slows down this process, but vouchers still have a gradual market inflationary effect. Rental rates are economically justified if they reflect increasing tenant incomes and/or landlord expenses, but when subsidies increase the demand for market-rate rental units, the market will respond by creating more of these higher-priced units rather than creatively meeting unmet demands for lower-priced units. Basically, the availability of vouchers, while absolutely essential in the short term to provide impoverished households with basic shelter needs, may ultimately increase rental costs, unaffordability, and dependence on public gap funding. This cycle is inherently unsustainable, creating an ever-expanding need for public housing assistance.

C. Bridging the Owner—Renter Divide

One unsustainable aspect of our housing system is the clear divide between owners and renters and the inequitable support given to renters. Every homeowner household can deduct mortgage interest, every homeowner can defer capital gains when selling her primary residence, and every mortgage borrower benefits (directly or indirectly) from the GSEs' role in making mortgage capital more broadly available. Many low-income homebuyers benefit from FHA mortgage insurance and the various home-buying assistance programs that HUD and local agencies have made available. The vast majority of renters, on the other hand, receive no public support with respect to their housing costs. Only one-fourth of the neediest renters receive any rental subsidy, and these subsidies in practice limit tenant choice with respect to where they can live. Some tenants reside in


182. See supra note 155 and accompanying text.

183. See Reiss, supra note 36, at 1043–44.

184. OUT OF REACH 2017, supra note 74, at 6.

185. Jenna Bernstein, Section 8, Source of Income Discrimination, and Federal Preemption: Setting the Record Straight, 31 CARDOZO L. REV. 1407, 1412 (2010). Landlord resistance to having Section 8 tenants may be racially motivated, and at the least likely causes a disparate
public housing, but Congress is increasingly underfunding the maintenance of these units. Other tenants compete for access to designated privately owned affordable units, but there are not enough of these to go around. Only a quarter of qualifying low-income rental households obtain voucher-based assistance. A majority of renters are unable to avail themselves of any government rental subsidy, leaving such households in an unsustainably fragile financial state.  

Unlike homeowners, renters typically lack the opportunity to capture any tax or wealth gains through their monthly housing payments. In addition, unless specifically protected in their tenure, renters face the constant risk of having to move out upon termination of the lease.

An economically sustainable approach to affordable housing will engage with and address the inequity between renter and owner housing supports and, ideally, provide more viable ways for renters to move gradually into the status of homeowner, both in terms of equity investment and in terms of tenure protection. Recent hybrid homeownership proposals have started the conversation about structural changes that could protect renter tenure and pave an alternate path to property-based wealth-building. Although historically private rent-to-own models have often been predatory, victimizing rather than empowering participating tenants, a publicly run or closely overseen rent-to-own model might offer financial and tenure stability rather than serve as a tool for oppression.
Some federal voucher programs run by housing agencies attempt to bridge the renter-owner divide as well. The Family Self-Sufficiency Voucher Program does this by allocating all rent paid by the tenant above a certain base amount to an escrow fund that can potentially be used by the tenant for a down payment. Federal funds also support non-profits that assist low-income families in building their own homes on land they acquire at below-market rates.

A non-traditional path to homeownership could involve the more than three million households who live on leased land in manufactured/mobile homes that they own. Transforming the ground lease arrangement in this sort of situation into a rent-to-own model would pave the way to eventual homeownership. Condominium units are another more affordable housing options for low-income, first-time home-buyers. Government programs should prioritize support given to such lower-priced home-buying options. The HOTMA, for example, increases access to ownership with respect to condominium units and lots on which tenant-purchased manufactured homes sit. The FHA will insure mortgages on condominium units in qualifying transactions, see generally Contract Buyers League v. F & F Investment, 300 F. Supp. 210 (N.D. Ill. 1969), aff’d on other grounds, 420 F.2d 1192 (7th Cir. 1970).


191. For example, the Self-Help Homeownership Opportunity Program provides competitive grants to fund land acquisition and pre-construction development in order to make it easier for low-income renters to become homeowners by building their own homes. Advocates’ Guide, supra note 85, at 5-42 to -43.


194. Previously, housing assistance voucher recipients could use vouchers to rent manufactured homes, but they could only apply the full value of vouchers toward the purchase of a manufactured home if they also bought the land on which it was situated. Will Fischer, Ctr. on Budget & Pol’y Priorities, Housing Bill Unanimously Passed by House Would Build on Effectiveness of Rental Assistance 10 (2016), https://www.cbpp.org/sites/default/files/atoms/files/2-1-16hous.pdf. Under HOTMA, however, the voucher subsidy can
projects, and the HOTMA endeavors to broaden the availability of such insurance by reducing the costs for condominium projects to qualify for FHA-insured financing.\footnote{195 See Boughtin, supra note 193. HOTMA would streamline the FHA’s recertification process, lowering compliance costs, and lower the FHA’s current owner-occupancy requirement for a project from 50% to 35%, enabling more diverse condominium projects to take advantage of FHA qualification. See FHA to Lower Owner-Occupancy Requirement for Certain Condominium Developments, U.S. DEP’T HOUSING & URB. DEV. (Oct. 26, 2016), https://archives.hud.gov/news/2016/prl6-162.cfm. It also streamlines the process of getting an exemption to FHA’s basic requirement that qualifying projects have no more than 25% of space dedicating to commercial use, allowing a qualifying condominium to be more mixed use. Boughtin, supra note 193.}

Equity appreciation rental models may involve payment in kind rather than additional tenant cash outlays. Shifting operating and maintenance responsibilities onto tenants in exchange for tenant equity building could simultaneously channel resident investment toward eventual homeownership and relieve overburdened landlords from unforeseeable operating costs. Allocating operating cost responsibility with the party who resides in a home is attractive from an efficiency perspective and likely encourages sustainable stewardship of the real property. This sort of self-service rental model would work better in the context of single-family (one to four unit) rentals than in the context of larger multifamily projects, but a large number of the lowest-income tenants already reside in these types of housing units.

Incorporation of environmentally sustainable practices would enhance these affordable homeownership and equity building rental models, particularly if initial input costs were paid by the government. Public funding of greening costs would increase long-term affordability of housing units through reduced maintenance costs. Tenants may be able to afford higher rents and mortgage payments if utility and other home operating costs are reduced. More affordable operating costs of green housing would thus increase tenure stability and reduce the financial burden of homeownership in addition to creating an environmental benefit.

In addition to creating new pathways to homeownership, legal and policy changes could promote better financial outcomes for tenants, primarily through supporting an adequate supply of affordable housing options. One’s residential space is the key to establishing a sphere of personal independence and civic engagement, it is the place in which one connects with community amenities and public goods such as education, transportation, and
employment, and it is a way to grow wealth over time. 196 A resident need not be a homeowner to achieve these benefits. 197 Changes in our legal tenure system (perhaps incorporating shared equity models), landlord-tenant law, and expansions in the range in housing options available in communities could enable the renting population to take advantage of some of the benefits that a homeownership traditionally offers. 198

D. More Sustainable Approaches to Assisting Demand

Vouchers and public housing have been essential to providing shelter to lowest-income households, but such housing assistance programs are costly and have downsides. Public housing and subsidized affordable housing creation have historically led to ghettoization, inequitable aid distributions, neighborhood decline, and a perception (and perhaps reality) of ever-growing fiscal drain. 199 Increasing tenants’ ability to pay removes an anchor on housing prices and possibly allows greater rental inflation. 200 Even putting aside the woeful inadequacy of the aid provided (in terms of assisting only a quarter of eligible households), tenant subsidies alone do little to solve the underlying affordability challenges: They treat the symptom, not the disease.

Tenant subsidies and/or publicly provided housing must be preserved with respect to the neediest segments of the population: the most extremely low-income households and, in particular, disabled and elderly residents. 201 With respect to households whose income is unlikely to ever improve, the public assistance model is a humane and socially responsible solution. But for other households, tenant subsidies should be tailored to encourage gradual self-sufficiency. Some of this can occur through employing vouchers as a method

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196. Boyack, supra note 67, at 126.


198. See Apgar, supra note 70, at 1–2; see also Rick Jacobus & David M. Abromowitz, A Path to Homeownership: Building a More Sustainable Strategy for Expanding Homeownership, 19 J. Affordable Housing & Community Dev. L. 313, 315 (2010).


200. See supra note 179.

201. See supra notes 96–97 and accompanying text.
to create more accessible paths to homeownership. Additionally, efforts to reduce operating costs through publicly funded environmental improvements, for example, may help reduce rents to a more economically sustainable level. Public funds spent today should, to the extent possible, be allocated strategically as an investment in long-term housing affordability rather than as a recurring payment into an economic black hole.

Finally, in crafting tailored community responses to affordable housing needs, communities may wish to re-assess the HUD affordability standards and their adequacy and application in the local housing market. Although the 30% of gross income threshold has been long and widely accepted as the measure of housing affordability, to some extent this number is just a random guesstimate. Perhaps public housing aid in certain contexts would have a more economically sustainable benefit if allocated differently. For example, instead of fully funding all housing costs over 30% of gross income for a mere 25% of eligible tenants, a community might create better outcomes for more households by funding housing costs over 50% for 45 or 50% of eligible tenants.

Ideally, housing aid should be available to all qualified tenants and be focused on creating a path to self-sufficiency. This likely will mean a larger public investment in affordable housing, at least in the short term. There is a simple way to free up funds necessary to achieve that effort. The home mortgage interest deduction (MID) should be capped, and 100% of the savings from capping the MID should be invested into sustainable affordable housing. The Trump administration’s current tax proposal embraces the idea of capping the mortgage interest deduction, setting the maximum eligible mortgage loan amount at $500,000 rather than $1 million, but fails to mandate reinvestment of the recaptured public funds into affordable housing. Tax analysts claim that capping the mortgage interest deduction in this way will

202. See discussion supra Section III.C.
203. KATS ET AL., GREEN BUILDINGS, supra note 18, at 55, 107.
204. See discussion supra Section I.A.
206. See Boyack, supra note 12, at 444–45 (exploring whether housing assistance would be more equitably allocated if all renters in a given priority category were treated equitably and shared the available public funding according to a system of correlative rights).
free up $241 billion in federal funds, and that would be enough to create a significantly more sustainable affordable housing system.208

CONCLUSION

Just as environmentally unsustainable housing misallocates energy resources, financially unsustainable housing misallocates monetary resources. In both cases, failure to establish a stable allocation model today foreordains an eventual systemic fiasco. Intergenerational fairness justifies government funding of some of the initial costs of green building so that real estate consumes energy resources more evenly as measured over time.209 Similarly, funding outlays that invest in establishing a sustainably affordable housing system will pay economic and social dividends far into the future. Sustainable affordable housing will meet "the needs of the present without compromising the ability of future generations to meet their needs."210

Regressive, sporadic, and incomplete government housing aid allocation is wasteful. Providing grossly insufficient funding for affordable housing is a bit like trying to extinguish a house on fire with a half-hearted trickle from a hose. If we flood the problem with well-aimed financial support, however, we may be able to snuff out the conflagration of financial distress or at least establish a way to perpetually contain it. It is worth a significant upfront investment today to create a sustainable affordable housing system in the future.

208. ADVOCATES’ GUIDE, supra note 85, at 3-19 to -20 (arguing that capping the mortgage eligible for the MID at $500,000 would generate $241 billion in savings that could be more equitably allocated in housing support, relative to the MID which currently benefits only one-fourth of taxpayers). Another way to reform the tax code to make housing subsidies more equitable as between renters and owners would be to add a renters’ tax credit. See ADVOCATES’ GUIDE, supra note 85, at 4-54 to -56; see also CAROL GALANTE, CAROLINA REID & NATHANIEL DECKER, UNIV. OF CAL. BERKELEY, TERNER CTR. FOR HOUS. INNOVATION, THE FAIR TAX CREDIT: A PROPOSAL FOR A FEDERAL ASSISTANCE IN RENTAL CREDIT TO SUPPORT LOW-INCOME RENTERS 11 (2016), http://termcenter.berkeley.edu/uploads/FAIR_Credit.pdf.


6-1-2009

A Civil Right to Counsel: Closer to Reality

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Recommended Citation
Available at: https://digitalcommons.lmu.edu/lr/vol42/iss4/7
This is a promising time for an expansion of the right to counsel in civil cases. The bench and the bar concur that there is a need for greater access to counsel; some states have even created pilot projects to provide legal assistance in certain civil proceedings to litigants who could not otherwise afford it. Recent state legislation and state-court rulings have also supported the right to counsel in certain civil proceedings. Despite some setbacks, there is growing momentum for expanding the right to counsel in civil cases, and it is imperative that advocates of this right strategically build on the important progress that has already been made. Advocates should seize the moment and press legislatively for greater access to counsel, especially during the current foreclosure crisis. Media exposure and the amicus participation of judges can highlight the inequity that unrepresented litigants face in court and bolster the need for counsel. Although advocates for a "civil Gideon" should be attentive to systemic constraints and competing interests that could threaten access to justice, now is the time to strive to make it unthinkable for indigent litigants to be denied counsel in civil cases where critical rights or basic needs are at stake.

INTRODUCTION

By any measure, now is a time of great ferment on the issue of whether publicly funded counsel should be more widely available to litigants in civil cases who cannot afford to hire attorneys. As discussed below, scholarship, conferences, bar association resolutions, test cases, empirical research, legislative proposals, and other initiatives supporting an expanded right to counsel have
proliferated in recent years. In this Article, I propose to explain why I believe an expansion of the right to counsel in civil cases looks more promising now than at perhaps any time since just before the Supreme Court's dreadful Lassiter v. Department of Social Service decision in 1981. I describe a few strategies that could usefully be employed now to press for an expanded right to counsel and sound two cautionary notes about the implementation of a broader right to counsel.

Given the title of this Symposium ("Access to Justice: It's Not for Everyone"), I must note the robust and important debate about whether "access to justice" should be defined merely as the right to a lawyer (or some other assistance) when a problem reaches a legal forum, or as something much broader that involves access to the political and judicial processes that shape our conceptions and enforcement of rights and duties, and that encompasses assistance before problems become framed as legal disputes and reach adversarial forums. Deborah Rhode’s and Gary Blasi’s articles in this Symposium, like others published elsewhere, make compelling arguments for a much broader conception of justice than mere access to attorneys. By focusing here on developments in the quest for a right to counsel in civil legal disputes, I do not in any way mean to imply that providing lawyers is always either necessary or sufficient to achieve access to justice. The issue is similar to the perennial legal services debate over whether resources should be concentrated on impact work or individual client "service" work. Just as we must

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assist individual clients with their legal problems and simultaneously work for systemic reform, we must work for an expanded right to counsel in legal proceedings as they are traditionally defined while simultaneously pressing for a broader conception of justice.

I. RECENT DEVELOPMENTS IN THE MOVEMENT FOR A CIVIL RIGHT TO COUNSEL

This is indisputably a time of great attention to the need for greater access to counsel in civil cases for those who cannot afford counsel. Scholarship proposing doctrinal, empirical, and strategic arguments for a right to counsel has blossomed in recent years, with at least four major symposia held at law schools, and many important articles published just in the last five years.6 Well over one hundred advocates now regularly participate in the National Coalition for a Civil Right to Counsel, founded in 2004.7 The American Bar Association ("ABA") unanimously passed a historic resolution in 2006 endorsing the provision of "counsel as a matter of right at public expense to low income persons in . . . adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody . . . ."8 Numerous state and local bar associations have endorsed the ABA resolution.9 In addition to lending whatever weight or prestige the ABA brings to


9. According to the National Coalition for a Civil Right to Counsel, the ABA's resolution has been adopted by the bar associations of, inter alia, Colorado, Connecticut, the District of Columbia, Maine, Massachusetts, Minnesota, New York, Washington, Boston, Chicago, New York City, Philadelphia, King County (Washington), and Los Angeles County. National Coalition for a Civil Right to Counsel, http://www.civilrighttocounsel.org/resources/bar_resolutions (last visited Mar. 12, 2009).
the public and legislative debates, the ABA's resolution also provides the necessary predicate for the nation's most influential group of lawyers to file amicus briefs in appropriate cases, as it did recently in Office of Public Advocacy v. Alaska Court System, an important right to counsel case recently heard by the Alaska Supreme Court.\(^{10}\) State and local bar associations have likewise joined the call for greater access to counsel as of right. The New York State and Boston bar associations have recently issued substantial reports analyzing the need and potential for expansion of the right to counsel in their states.\(^{11}\) The Boston bar is also spearheading a pilot project to provide counsel to certain tenants in eviction proceedings in two Boston-area courts.\(^{12}\)

Encouraging legislative developments have occurred as well. As Laura K. Abel\(^\text{13}\) discusses in this Symposium, seven states have recently enacted laws expanding the right to counsel in certain civil cases. A bill is currently pending before the New York City Council to provide counsel as of right to low-income seniors facing eviction or foreclosure,\(^{14}\) and a separate effort is underway in the New York State Assembly to provide counsel more broadly to homeowners facing mortgage foreclosures.\(^{15}\) In October 2009, California enacted the Sargent Shriver Civil Counsel Act, establishing a six-year pilot program (to begin in 2011), funded at approximately $11 million per year, to test the effects and feasibility of expanding access to counsel

\(^{10}\) See infra notes 21–23 and accompanying text.


in cases involving housing, domestic violence and other harassment, conservatorships and guardianships, elder abuse, and child custody.\textsuperscript{16}

Likewise, there have been some successes in the courts. Several state courts have held that when a state statute requires appointment of counsel for parents in state-initiated proceedings to terminate parental rights, equal protection requires such appointments in privately-initiated termination cases.\textsuperscript{17} More recently, in January 2009, the Washington State Court of Appeals held unanimously in \textit{Bellevue School District v. E.S.} that children have a due process right to counsel in truancy proceedings.\textsuperscript{18} While the court decided only that due process requires counsel in truancy proceedings, its language suggests an opportunity to apply the decision in other contexts: “For purposes of due process, the issue is whether the party has the mental capacity to represent his or her interests before the court.”\textsuperscript{19} This framing certainly also implicates due process concerns for litigants whose mental capacity precludes effective self-representation even if they are not juveniles.\textsuperscript{20} In 2007, building on prior state case law holding that an indigent in a custody dispute is entitled to counsel when facing an opponent with a publicly funded

\textsuperscript{16} CAL. GOV. CODE § 68650 et seq. Pilot programs must be collaborative efforts between a court, a lead legal services agency, and other legal services providers in each jurisdiction which successfully competes for pilot funds. \textit{Id.} § 68651(b)(4). In its legislative findings, the new statute draws heavily upon the work of a multi-year task force which I co-chaired, and which was charged by California’s Access to Justice Commission with drafting a model statute establishing a civil right to counsel. See Clare Pastore, \textit{The California Model Statute Task Force}, 40 CLEARINGHOUSE REV. 176 (2006), for more information about the process and the model statutes.

\textsuperscript{17} See \textit{Zockert v. Fanning}, 800 P.2d 773 777-778 (Or. 1990); In re S.A.J.B., 679 N.W.2d 645, 650 (Iowa 2004); In re Adoption of K.L.P., 763 N.E.2d 741, 751 (Ill. 2002); Matter of Adoption of K.A.S., 499 N.W.2d 558, 565 (N.D. 2004); see also In re K.L.J., 813 P.2d 276, 279 (Alaska 1991) (finding that due process requires appointment of counsel in private termination cases).

\textsuperscript{18} 199 P.3d 1010, 1017 (Wash. 2009) (finding that because “[a] child’s interests in her liberty, privacy, and right to education are in jeopardy at an initial truancy hearing, and she is unable to protect these interests herself,” due process requires the appointment of counsel). The case is now pending before the Washington Supreme Court. 210 P.3d 1019 (2009) (table) (granting review).

\textsuperscript{19} \textit{Bellevue}, 199 P.3d. at 1015.

\textsuperscript{20} Indeed, even prior to \textit{Bellevue School District}, a lower court in Washington reached the conclusion that counsel was necessary in a truancy proceeding for a student with disabilities, based on the reasonable accommodation requirements of Washington’s court rule implementing the Americans with Disabilities Act. \textit{In re Truancy of H.P.}, No. 00-7-02872-1 (Wash. Sup. Ct. Mar. 28, 2008); see also Lisa Brodoff et al., \textit{The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon}, 2 SEATTLE J. SOC. JUST. 609 (2004) (discussing arguments for the appointment of counsel as a reasonable accommodation for litigants with disabilities).
lawyer,21 an Alaska trial court held that there is also a state constitutional right to counsel for a parent in a custody action when the other parent is represented by private counsel.22 The case was appealed to the Alaska Supreme Court, where briefs supporting the appointment of counsel were filed by the ABA and retired Alaska judges, among others.23

Of course, the landscape includes setbacks as well, most notably perhaps the failure of the 2007 test case King v. King24 in Washington, in which the state supreme court rejected claims for counsel in a child custody proceeding based on state constitutional guarantees of due process, equal protection, and open courts.25 Other test cases have resulted in courts refusing to address arguments for counsel.26

Despite the uneven landscape, there is undeniably growing momentum on this issue. Some of the most important progress so far is progress of the imagination, but more must be made: just as it is now unthinkable to imagine the criminal process without attorneys

23. The briefs are available on the National Coalition for a Civil Right to Counsel’s Web site at http://www.civilrighttocounsel.org/advocacy/litigation/ (last visited Mar. 21, 2009) (click on the links under “Office of Public Advocacy v. Alaska Court System” to access the briefs). In August 2009, the Alaska Supreme Court dismissed the appeal as moot. Office of Public Advocacy v. Washington Court System, No. S-12999, Order Dismissing Appeal (August 20, 2009). The Supreme Court noted that neither the court system nor the Office of Public Advocacy, which had been ordered to and did provide representation to the indigent litigant, had appealed the finding that due process requires representation, although the Office of Public Advocacy (“OPA”) sought to contest whether it should have been the entity required to provide that representation. Id.
24. 174 P.3d 659 (Wash. 2007).
25. Id. at 668–69.
for both sides, so must it become unthinkable for indigent litigants to be denied counsel in civil cases where critical rights or basic needs are at stake. The legislative and judicial successes we have seen so far do much to encourage that change of attitude about what is and is not acceptable. Therefore, in a spirit of optimism, and in an effort to help push the debate forward, I offer the following thoughts on strategies.

II. STRATEGIES TO ADVANCE THE RIGHT TO COUNSEL IN CIVIL CASES

A. Seize the Moment

At this moment, the nation’s attention is focused intently on the economic crisis, and in particular, on the rising tide of home foreclosures. At the same time, many have called for holding the new administration to its promises of greater adherence to the rule of law and principles of fairness. While the crisis may seem to bode ill for any new expenditures, it and the President’s promises of greater fairness also offer opportunities to illustrate the need for, and press legislatively for, greater access to counsel. Surely many Americans can relate to the unfairness, difficulty, and complexity of defending against a foreclosure or illegal foreclosure-driven eviction without counsel. A recent study by the Brennan Center for Justice found that between 60 percent and 92 percent of foreclosure defendants in certain jurisdictions were unrepresented. New York State’s pending bill to provide counsel in certain mortgage foreclosures is one example of a legislative initiative addressing this high-profile, newsworthy problem.
Other events in the public eye may offer similar opportunities. For instance, the media periodically expose the practices of some managed healthcare companies of canceling or denying coverage in outrageous circumstances. One example is the controversy in California in 2006 over disclosures that Blue Shield of California and Kaiser Permanente had retroactively denied coverage to patients after they became seriously ill. Advocates can use these types of examples to highlight the power imbalance in court between an ordinary person and a large, well-funded private interest, to demonstrate the connection between procedural fairness and the rule of law, and to press legislatively for an incremental increase in the availability of counsel.

B. Use the Increasingly Sophisticated and Persuasive Body of Research Regarding the Effects of Counsel or Its Absence

Rarely is there a call for a civil right to counsel that does not quote Justice Black's stirring language in *Gideon v. Wainwright*: "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth." Today, however, the proposition that an unrepresented litigant is unlikely to secure a fair trial is not only obvious but is supported by an ever-greater empirical showing that the outcomes for those with and without access to counsel are far from equal, and a related body of entitlement or right to such assistance. Housing and Economic Recovery Act of 2008, 110 P.L. 289 § 2305 (allocating $30 million to hire attorneys to assist homeowners who have legal issues directly related to the homeowner's foreclosure, delinquency or short sale). See also Press Release, Corp. for Nat'l and Cmty. Serv., National Service Agency Announces 10,000 New Americorps Positions Funded by Recovery Act (May 14, 2009), available at http://www.nationalservice.gov/about/newsroom/releases_detail.asp?tbl_pr_id=1341 (noting $1.2 million grant to Equal Justice Works to assist victims of foreclosure crisis in five states).


32. Id. at 344.

research regarding the extensive judicial resources required for cases in which one or both parties are pro se.\textsuperscript{34} These studies should be central to any advocacy efforts on right to counsel issues, and further empirical work should be encouraged.

Empirical data regarding the economic and social benefits of providing counsel, as well as the costs of failing to do so, is another important piece of the strategic puzzle. The National Legal Aid and Defender Association has collected more than a dozen studies including cost-savings and economic-benefit analyses from Florida, Massachusetts, Minnesota, Nebraska, New Hampshire, New York, and Wisconsin.\textsuperscript{35} A recent study from Texas concluded that for every dollar spent on indigent civil legal services, the state economy gained \$7.42.\textsuperscript{36} Likewise, the New York City Department of Social Services concluded in 1990 that “every dollar spent on indigent representation in eviction proceedings saves four dollars in costs related to homelessness.”\textsuperscript{37} Homelessness and health advocacy organizations have likewise documented the costs to the public of homelessness or lack of health care.\textsuperscript{38} Such studies have obvious

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\textsuperscript{37} Leber, supra note 29, at 5 (citing NEW YORK CITY DEP’T. OF SOCIAL SERVICES, THE HOMELESSNESS PREVENTION PROGRAM: OUTCOMES AND EFFECTIVENESS (1990)).

\textsuperscript{38} For example, the National Alliance to End Homelessness collects and summarizes numerous studies documenting the lengthier hospital stays and consequently greater costs typically incurred by homeless patients than by housed ones and the losses in future educational achievement incurred by homeless children. See National Alliance to End Homelessness, The Cost of Homelessness, available at http://www.endhomelessness.org/section/tools/tenyearplan/cost (last visited Mar. 31, 2009). The Los Angeles County Homeless Services Authority and the Economic Roundtable’s recent Homeless Cost Avoidance Study finds that the average public cost for impaired homeless adults decreases 79 percent when housed, from a monthly average of \$2897 to \$605, with most savings coming from reduced healthcare expenditures, especially hospital and emergency room usage. Where We Sleep: Costs When Homeless and Housed in Los Angeles (November 2009), available at http://www.lahsa.org/docs/Cost-Avoidance-Study/Where-We-Sleep-Final-Report.pdf. For a
implications for arguments about the cost-effectiveness of providing legal assistance to avoid homelessness.

C. Cultivate New Allies, Especially Among the Judiciary

The advocacy effort for an expanded civil right to counsel depends heavily, and appropriately, on the "usual suspects": legal services attorneys and directors, private bar pro bono leaders, access to justice commissions, academic commentators, clients whose stories reach legislators and judges, and advocates in substantive areas such as health care or housing whose clients need attorneys. And certainly a small number of judges have been calling for a "civil Gideon" for decades, while a much larger number regularly call for greater pro bono efforts by the private bar. Some, such as California's Chief Justice Ronald George, have supported legislative efforts to expand the availability of counsel as a right in certain cases.

However, an unusual and promising new development in some of the recent litigation over a right to counsel in civil cases is the amicus participation of retired—and in some cases sitting—judges. Sixteen retired Washington state court judges filed an amicus brief


40. See, e.g., Robert A. Katzmann, Themes in Context, in THE LAW FIRM AND THE PUBLIC GOOD 1, 2 (1995) (printing excerpts from Justice Sandra Day O'Connor, Pro Bono Work—Good News and Bad News, Remarks at Pro Bono Awards Assembly Luncheon of the ABA in Atlanta, Georgia (Aug. 12, 1991) ("While lawyers have much we can be proud of, we also have a great deal to be ashamed of in terms of how we are responding to the needs of peoples who can't afford to pay our services.")�)

supporting the arguments for counsel in the Washington test case of *King v. King*, as did eleven sitting or retired Wisconsin circuit court judges in *Kelly v. Warpinski*. Ten retired Alaska judges (identified in the brief as having "more than 90 collective years of distinguished service on the bench") filed a brief in the recent Alaska litigation supporting the trial judge's ruling that an indigent litigant was constitutionally entitled to counsel in custody proceedings when the other side was represented. These judicial officers are uniquely qualified to bear witness and draw judicial and public attention to the plight of unrepresented litigants, the burdens they pose on courts, and the threat to equal justice that is posed by lack of representation.

The retired judges' brief in Washington State's *King* case employed two of the types of empirical data discussed above, reviewing studies supporting the argument that unrepresented litigants receive less favorable outcomes and briefly noting the effects of custody determinations and parent-child relations on children's school achievement and life outcomes. The retired judges' brief in the recent *Office of Public Advocacy* litigation in Alaska focused on several effects of pro se litigation in contested custody cases including the unfavorable outcomes for the litigants, the difficulties faced by judges presiding over such cases, the costs in time and efficiency to the judicial system, and the deleterious effects on public confidence in the integrity of the system. The *Warpinski* judges' brief focused on the effects of pro se litigants on the courts. Judges should be encouraged to speak out even more about the deleterious effects of the lack of representation on justice, and to lend their amicus participation when their unique perspective is relevant to a court's assessment of the need for counsel.

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43. Brief for Eleven County Judges, *supra* note 34.
47. Brief for Eleven County Judges, *supra* note 34.
D. Consider Arguments Based on the Court’s Inherent Power to Do Justice

The increasing and welcome involvement of judges in saying out loud that justice is rarely achieved when one side is unrepresented also suggests an additional legal argument for appointed counsel, one based on the court’s inherent power and duty to do justice. Advocates have worked tirelessly and creatively to develop doctrinal arguments for a right to counsel derived from sources other than the federal constitutional provisions rejected in *Lassiter*, including state constitutional due process, equal protection, and open courts provisions. As I have suggested elsewhere, a potentially fruitful additional area for research and advocacy is the scope of a court’s inherent powers. Many courts have held, or have noted in passing, that they inherently possess the power to appoint counsel where necessary to fulfill the function of dispensing justice, although actual appointments are admittedly rare. A few courts have flirted with state constitutional provisions or statutes granting all necessary powers to courts in aid of jurisdiction, or with the court’s inherent “duty to ensure judicial proceedings remain truly


50. E.g., *Vick v. Dep’t of Corr.*, 1986 WL 8003, at *2 (Del. Super. Ct. Apr. 14, 1986) (finding that the court has inherent power to appoint counsel, but denying appointment to prisoner because no showing that meaningful access to court in that instance was denied without counsel); *Cox v. Slama*, 355 N.W.2d 401, 402 (Minn. 1984) (holding that the court’s supervisory powers to ensure fair administration of justice allow for appointment of counsel for indigent facing child support contempt action, but only when incarceration is a real possibility); *In re Smiley*, 330 N.E.2d 53, 90 (N.Y. 1975) (holding that courts have authority to appoint but not to compensate counsel); *Caron v. Betit*, 300 A.2d 618, 619 (Vt. 1972) (stating that the court has inherent “power to require attorneys to serve and protect vital interests of uncounselled litigants where circumstances demand it”); *Piper v. Popp*, 482 N.W.2d 353 (Wis. 1992) (explaining that although under *Lassiter* there is no right to counsel for a prisoner in a tort case, the court has inherent authority to appoint counsel in civil cases in order to ensure meaningful opportunity to be heard).

adversary”52 as possible justification for appointing or paying counsel. But, again courts rarely choose to exercise the power they proclaim.

One of the strongest and most detailed discussions of the court’s inherent power to appoint counsel came from the Wisconsin Supreme Court in 1996, in a case overturning a state law that prohibited the appointment of counsel for parents in child neglect proceedings.53 The state high court held that the statute violated the separation of powers principle inherent in the state constitution, because it intruded on the judiciary’s inherent power to “appoint counsel in furtherance of the court’s need for the orderly and fair presentation of a case.”54 The court noted that such a case might arise when a parent is “poorly educated, frightened, and unable to fully understand and participate in the judicial process, thus . . . obviously [in need of] assistance of counsel to ensure the integrity of the [neglect] proceeding.”55

The retired judges also urged consideration of an inherent powers argument in the recent Alaska litigation. In a section titled “The Court Has the Authority and Responsibility to Determine Whether the Proper Administration of Justice Requires Appointment of Counsel in Certain Cases,” the judges outlined the court’s duty to assure that litigants receive a fair trial, and linked that duty to cases in which the court has invalidated funding restrictions that threatened the independence or functioning of the court.56 Likewise, advocates

52. Travelers Indem. Co. of Conn. v. Mayfield, 923 S.W.2d 590, 594 (Tex. 1996). Here, the Texas Supreme Court noted:

[W]e have never held that a civil litigant must be represented by counsel in order for a court to carry on its essential, constitutional function. Indeed, thousands of cases each year are prosecuted by pro se litigants. Nevertheless, we recognize that in some exceptional cases, the public and private interests at stake are such that the administration of justice may best be served by appointing a lawyer to represent an indigent civil litigant.

Id. (internal citations omitted).

While several Texas cases cite this standard, only one reported case has actually used it to appoint counsel, only to be reversed on appeal. Tolbert v. Gibson, 67 S.W.3d 368, 372–73 (Tex. App. 2001), rev’d, 102 S.W.3d 710 (Tex. 2003).


54. Id. at 414.

55. Id. at 414–15. The court went on to hold the statute unconstitutional under the Federal Constitution as well, because it precluded the appointment of counsel even when due process as construed in Lassiter required it. Id. at 415–16.

56. Brief for Retired Alaska Judges, supra note 34, at 23.
in *Frase v. Barnhart* argued that the separation of powers provision of Article 8 of the Maryland Declaration of Rights, which had previously been construed to encompass the judiciary’s inherent right and obligation in the administration of the judicial process, supported the court’s power to appoint counsel where necessary. A similar argument was advanced in the Wisconsin case *Kelly v. Warpinski*. Further development of this line of argument is surely warranted.

**E. Do More with Lassiter**

My final strategic suggestion may seem counterintuitive to those committed to establishing a broad and categorical right to counsel, and indeed may be controversial among right to counsel advocates. The suggestion is to embrace the Supreme Court’s direction in *Lassiter v. Department of Social Services* that the need for counsel be evaluated on a case-by-case basis, and use it to seek appointment of counsel in individual cases.

Advocates and scholars typically, and rightly, view the Supreme Court’s 1981 decision in *Lassiter* as a terrible blow to the effort to achieve a broad right to counsel in civil cases under a federal due process framework. In *Lassiter*, applying the familiar three-part test for due process enunciated in *Mathews v. Eldridge*, the Court held that the Constitution does not require appointment of counsel as a matter of right in state-initiated proceedings to terminate parental rights. Worse, the Court announced a “presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.”

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60. 424 U.S. 319, 335 (1976). The *Mathews* factors are (1) the private interests at stake; (2) the risk of erroneous deprivation through the procedures used and probable value of the safeguards sought; and (3) the government’s interest, including fiscal and administrative burdens. *Id.*


62. *Id.* at 26–27.
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Notably, however, the Court did not hold in \textit{Lassiter} that due process \textit{never} requires the appointment of counsel when parental rights may be terminated. Instead, it held that due process does not \textit{always} require it. The Court noted that "the complexity of the proceeding and the incapacity of the uncounseled parent \textit{could be}, but would not always be, great enough to make the risk of an erroneous deprivation of the parent’s rights insupportably high." \textsuperscript{63} Thus, the Justices specifically declined to "formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements," \textsuperscript{64} and instead left the appropriateness of appointment in any individual case "to be answered in the first instance by the trial court, subject, of course, to appellate review." \textsuperscript{65}

It is remarkable that almost no published decisions show lower courts actually taking up that challenge. In 2006, Paul Marvy of the Northwest Justice Project and I read every one of the approximately 500 published state court decisions citing \textit{Lassiter} and dealing with requests for counsel. \textsuperscript{66} Strikingly, only in Tennessee do the courts seem to have taken seriously \textit{Lassiter}'s invitation to determine on a case-by-case basis the need for counsel. \textsuperscript{67} After discussing the \textit{Mathews} factors, the Tennessee Court of Appeals held in 1990 that in termination of parental rights ("TPR") cases, "the chance that the failure to appoint counsel will result in an erroneous decision becomes the main consideration." \textsuperscript{68} The court listed seven factors that bear on the question of whether counsel is necessary in any individual TPR case:

(1) whether expert medical and/or psychiatric testimony is presented at the hearing; (2) whether the parents have had uncommon difficulty in dealing with life and life situations; (3) whether the parents are thrust into a distressing and

\textsuperscript{63} Id. at 31 (emphasis added).
\textsuperscript{64} Id. at 32 (internal quotation omitted).
\textsuperscript{65} Id.
\textsuperscript{66} A full account of our analysis is found at Clare Pastore, \textit{Life After Lassiter: An Overview of State Court Right-to-Counsel Decisions}, 40 CLEARINGHOUSE REV. 186 (2006).
\textsuperscript{67} The infrequency of \textit{Lassiter} hearings in termination of parental rights proceedings in most states has been noted in William Wesley Patton, \textit{Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases}, 27 LOY. U. CHI. L.J. 195, 201–02 (1996).
\textsuperscript{68} Tennessee v. Min, 802 S.W.2d 625, 626–27 (Tenn. Ct. App. 1990).
disorienting situation at the hearing; (4) the difficulty and complexity of the issues and procedures; (5) the possibility of criminal self-incrimination; (6) the educational background of the parents; and (7) the permanency of potential deprivation of the child in question. 69

Rigorous application of these factors would certainly seem to suggest that counsel should be granted in many if not all TPR cases, and indeed, several Tennessee appellate courts have reversed or remanded TPR decisions where there is no record of the trial court's consideration of these factors, or where the trial court did not advise indigent parents of their right to request counsel, even while describing facts that make the termination of rights seem a foregone conclusion. 70

There is no apparent reason why advocates elsewhere cannot secure the same serious application of the Lassiter requirements as Tennessee courts have required. 71 A strategy, perhaps implemented by special appearances of counsel arguing only the appointment issue, could aim at actually forcing courts to hold hearings, develop a list of factors to consider, and make determinations of whether Lassiter requires counsel in any given individual case. While it would not establish a categorical right to counsel (and for this reason is controversial among right to counsel advocates), this strategy could secure counsel for many litigants who are currently

69. Id. at 627.


71. Texas advocates recently tried just such a strategy, seeking certiorari at the U.S. Supreme Court for a case alleging that due process was violated by, inter alia, a Texas state court's failure to conduct a Lassiter inquiry into the need for appointment of counsel in one parental rights termination case. Rhine v. Deaton, 2009 WL 1866256 (June 25, 2009). The petition for certiorari was denied. 2010 WL 250544 (Jan. 25, 2010).
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unrepresented, would likely create a body of cases documenting the difficulties that pro se litigants face which could be useful both for litigation and legislation, and might enlighten judges and the public as to the quality of justice to be expected by unrepresented litigants. Moreover, if advocates explored a strategy of entering limited appearances for the sole purpose of seeking appointment of counsel, courts of appeals might one day face the “innumerable post verdict challenges to the fairness of particular trials” that helped persuade the Court to overturn Betts v. Brady’s case-by-case approach to the need for counsel in criminal cases in favor of Gideon v. Wainwright’s categorical approach.  

III. TWO CAUTIONARY NOTES

While the flood of recent legislative, advocacy, scholarly, and court developments regarding the civil right to counsel is encouraging, some caution is also in order. One cautionary note is prompted by the phrase “civil Gideon” itself, the other by the wariness of some legal services advocates about civil right to counsel initiatives.

A. Be Careful What We Wish For

To advocates contemplating the current landscape of spotty and unpredictable availability of civil counsel and the wide “justice gap” between the legal needs of the poor and the resources available to address those needs, the criminal defense model holds a certain appeal. Yet the use of the term “civil Gideon,” with its implicit adoption of the public defender model as an aspirational goal, masks some deep flaws in the public defender system. Advocates for a civil right to counsel must be attentive to systemic constraints that threaten access to justice in the criminal defense system, and take

72. It is important to note that this strategy is not without risks. As Justice Blackmun’s dissent in Lassiter discusses, an uncounseled parent is unlikely to be able to make the sort of evidentiary record of entitlement to counsel under the case-by-case standard that would require reversal on appeal if a trial judge denies counsel. Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 50–51 (1981) (Blackmun, J., dissenting).

73. Id. at 51 (Blackmun, J., dissenting) (citing Betts v. Brady, 316 U.S. 455 (1942) and Gideon v. Wainwright, 372 U.S. 335 (1963)).

care not to replicate them on the civil side. Perhaps the most significant of these constraints is caseloads that are sometimes too high to allow adequate representation, a subject of frequent lamentation, study, and even litigation.75 Funding, manner of appointing counsel, delivery system, and minimum standards of competence are all critical factors in determining the success of publicly funded counsel.76 Collaboration between "civil Gideon" advocates and experienced public defenders, judges, and bar leaders is essential to avoid some of the problems plaguing the public criminal defense system.

B. Be Attentive to the Potential for Conflicting Interests Among Access to Justice Advocates

The prospect of increased representation for the indigent is certainly a welcome one for advocates, clients, and judges. Yet the actual implementation of a broader right to counsel is complicated. For example, many judges, especially those who preside over family law dockets clogged with pro se litigants,77 are eager for a place where they can refer these litigants for assistance, without necessarily distinguishing between cases where both parties are unrepresented and those where one side has an attorney, or

75. See Erik Eckholm, Citing Workload, Public Lawyers Reject New Cases, N.Y. TIMES, Nov. 9, 2008, at A1 (describing litigation and advocacy in Arizona, Florida, Kentucky, Maryland, Minnesota, New York, and Tennessee over public defender caseloads). In September 2008, a Florida judge ruled that Miami-Dade County public defenders could refuse new lesser felony cases so that the attorneys could competently handle the cases already on their docket. Order Granting in Part and Denying in Part Public Defender's Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases, In re Reassignment and Consolidation of Public Defender's Motions to Appoint Other Counsel in Unappointed Noncapital Felony Cases, No. 3D08-2272 (11th Cir. Sept. 3, 2008), available at http://www.pdmiami.com/Order_on_motion_to_appoint_other_counsel.pdf. The order is now before the Florida Supreme Court. Most recently, a Michigan court allowed a similar case to proceed. Duncan v. State, 774 N.W.2d 89 (2009). The decision is now under review at the state supreme court. 775 N.W.2d 745 (Mich. 2009).

76. For a thoughtful discussion of the cautions that Gideon may hold for a civil right to counsel, see Laura K. Abel, A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 538 (2006). Deborah Rhode's piece in this Symposium issue also catalogs the criticisms. Rhode, supra note 2, at 879-80.

77. Recent estimates in California put the pro per rate of family law litigants at 72 percent in large counties and 67 percent in small counties. JUDICIAL COUNCIL OF CALIFORNIA, STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS 11 (2003), available at http://www.courthinfo.ca.gov/programs/cfcc/pdffiles/Ful l_Report_comment_chart.pdf. In 2005, New York's Office of Court Administration estimated that 75 percent of litigants in New York City Family Court and 90 percent in Housing Court appeared without an attorney. Leber, supra note 29, at 5.
prioritizing cases in which the presence of an attorney is likely to make a great difference in the outcome. However, legal services programs may not consider streamlining the judicial process or relieving the burden on the courts, especially in cases where neither side is represented, as their top priority. In part, this is because many legal services programs have missions that go well beyond simply handling individual legal disputes, even though that function is critical. For example, the stated mission of one of California's largest legal services programs is to "provide[] quality legal services that empower the poor to identify and defeat the causes and effects of poverty." Mission statements from other legal services programs often contain a similar focus on alleviating poverty or empowering clients, not just assisting in the litigation of disputes.

Related to this anti-poverty mission is the ability of local legal services programs to set their own priorities and determine locally whether and when to adopt an impact strategy, even if it means turning down some individual cases. Local priority setting is required for programs receiving federal funds from the Legal Services Corporation, and the ability to do impact work is often a highly valued part of a program's portfolio. Thus, advocates sometimes fear that a legislative or court-ordered mandate to serve all indigent clients in a particular subject area (for example, child custody or evictions), will swamp these important law reform areas.

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79. See, e.g., Legal Aid Society of Greater Cincinnati, Mission Statement, http://www.lasnet.org/lasgc%20statement.htm (last visited Feb. 22, 2009) ("The Legal Aid Society of Greater Cincinnati is a nonprofit law firm dedicated to reducing poverty and ensuring family stability through legal assistance."); Legal Aid Society of San Diego, Inc., Mission Statement, http://www.lassd.org/mission%20statement.htm (last visited Feb. 22, 2009) ("The Legal Aid Society of San Diego, Inc. is . . . dedicated to providing equal access to justice for poor people through aggressive, quality legal services. As legal advocates we will redress our clients' legal problems, empower our clients to access and effectively participate with the legal, governmental and social system and encourage self-empowerment in the fight against poverty and injustice."); Coast to Coast Legal Aid of South Florida, Mission Statement, http://www.legalaid.org/coasttocoast/ (last visited Feb. 22, 2009) ("The mission of Coast to Coast Legal Aid of South Florida is to improve the lives of low income persons in our community through advocacy, education, representation and empowerment."); Legal Aid of North Carolina, Mission Statement, https://www.legalaidnc.org/Public/Learn/about_us/Mission_Statement_LANC_Dec_12_03.aspx (last visited Feb. 22, 2009) ("Legal Aid of North Carolina is a statewide, nonprofit law firm that provides free legal services in civil matters to low-income people in order to ensure equal access to justice and to remove legal barriers to economic opportunity.").

functions, or will threaten or eliminate resources for areas of law where the right does not exist. The concern is especially acute if a mandate seems unlikely to be accompanied by the substantial funding needed to staff all cases of a particular type.

California’s 2007 experience with a proposed pilot project to expand representation in certain civil cases provides an illustration of the potential for this type of tension among access to justice players.81 The pilot (proposed by Governor Schwarzenegger) would have provided $5 million per year to fund representation as of right for indigent litigants in certain civil cases in three counties.82 Many judges, especially some who sit in family court, enthusiastically supported the pilot proposal. However, some legal services directors were much more cautious. Indeed, the executive director of one of California’s largest programs spoke emphatically at a national meeting about his disinclination to apply for funds under the pilot program precisely because a mandate to serve so many new clients might jeopardize the program’s ability to conduct impact advocacy and respond to local priorities, and might threaten the program’s ability to choose categories of clients based on other social justice concerns,83 such as a desire to represent only alleged victims and not alleged perpetrators of domestic violence, or only tenants but not landlords. Another director expressed to me privately his concern that the pilot program was too focused on the concerns of judges and not enough on the goal of service providers to alleviate poverty and meet the needs of their clients.84 The postponement of California’s

81. These observations are drawn from my experience and notes as a member of the Joint Advisory Task Force on the Legal Representation Pilot Program (sponsored by the Judicial Council of California, the California Commission on Access to Justice, and the Legal Aid Association of California), as a participant in a panel on civil right to counsel at a Directors of Litigation meeting sponsored by the National Legal Aid and Defender Association in San Francisco on June 23, 2008, as the facilitator of a right to counsel session at a California Commission on Access to Justice event in April 2008, and at similar events since 2006. Some of the Joint Task Force’s recommendations are available at California Commission on Access to Justice, Joint Advisory Task Force on the Legal Representation Pilot Program: Recommendations, April 30, 2007, http://www.calegaladvocates.org/library/attachment.103963.


83. Ramon Arias, Executive Dir., Bay Area Legal Aid, Remarks at the National Legal Aid & Defender Association Litigation Directors Conference: Implementation of a Civil Right to Counsel Workshop (June 23, 2008) (on file with author).

84. Id.
pilot program until 2011 has offered the access to justice community a new opportunity to make sure that working groups and strategists heed these concerns, and to think more carefully about how the right to counsel fits into the relationship between procedural and substantive justice. 85

CONCLUSION

This is a promising time for advances who seek the availability of counsel as of right to low-income litigants. I am convinced that just as we now look back at the pre-Gideon landscape—less than fifty years ago—and are astonished that a criminal defendant could have been, in the not-very-distant past, charged, tried, convicted, and sent to prison without ever receiving assistance from a lawyer, we will before long look back at today and wonder how a person could lose her children, her home, her job, her subsistence income, or her health insurance without the aid of counsel. What is today routine injustice must become unthinkable, and symposia like this one are valuable steps on the way to achieving that new reality.

85. Cf. Rhode, supra note 2, at 872–74 (discussing procedural and substantive justice concerns).
Behind New York’s Housing Crisis: Weakened Laws and Fragmented Regulation

Affordable housing is vanishing as landlords exploit a broken system, pushing out rent-regulated tenants and catapulting apartments into the free market.

By KIM BARKER  MAY 20, 2018

The assault began shortly after a new owner bought the building at 25 Grove Street in June 2015. Surveillance cameras arrived first, pointed at the doors to rent-regulated apartments. Then came the construction workers, who gutted empty units and sent a dust cocktail of lead-based paint, brick and who knows what else throughout the building.

Worried, a pregnant woman and her husband left, dooming their apartment to the demolition derby. Violations were issued; violations were dismissed. And on a Friday morning in early August 2016, Temma Tainow, who had lived in the West Village building for 34 years, was jarred awake by what sounded like an explosion. She stumbled into her kitchen and screamed. A leg dangled from a hole punched through her ceiling.

“I think it is imprinted on my brain forever: looking up and seeing five men staring down through the hole,” recalled Ms. Tainow, 70, a tiny therapist with a halo of reddish-brown hair who speaks deliberately and walks with a slow limp. “It’s been awful. It’s been a nightmare. It’s exactly what the owner wants.”

UNSHeltered

Articles in this series examine New York’s broken system for protecting tenants and affordable apartments.

Part 1: The Vanishing Affordable Apartment

Part 2: The Eviction Machine
Part 3: 69,000 Housing Crises

What You Need to Know as a New York Tenant

Across much of New York City, construction scenes like these play out regularly at buildings with rent-regulated apartments — the city’s largest stock of affordable housing, where rents are set at a prescribed level and are supposed to increase only a small amount each year.

These apartments — seen as the scourge of landlords and the salvation of struggling New Yorkers — are at the center of a housing crisis that has swelled the ranks of the homeless and threatens to squeeze all but the affluent from ever-wider swaths of the city. But even as Mayor Bill de Blasio has made adding more affordable housing a signature pledge of his administration, the system that protects the city’s roughly one million regulated apartments is profoundly broken, a New York Times investigation has found.

In neighborhoods already gentrified or in the throes of gentrifying, a relatively new class of mega-landlords has driven up rents by exploiting enforcement gaps in a web of city and state agencies. By churning through enough tenants and claiming enough renovations, landlords can raise the rent enough — beyond $2,733.75 a month — to wrest an apartment from regulation’s grip and into the free market.

What You Need to Know as a Tenant

New York’s housing system can be complicated to navigate. Here’s a quick primer on what your rights are and how to exercise them.

New York is among the global boomtowns, like London, Los Angeles and San Francisco, where skyrocketing rents — and the struggle to shelter those who can’t afford them — have struck a deep political chord. But New York grapples with its own peculiar contradictions.

It has the nation’s largest rent-regulation system. On paper at least, it still has some of the most robust tenant protections, bolstered by new city laws
designed to fight tenant harassment and give poor tenants free legal representation in housing court.

(Read about how landlords have commandeered the housing court system to push apartments into the free market, in Part 2 of this series.)

Yet without more fundamental change — especially in the basic laws governing rent increases — regulated apartments in New York are in danger of vanishing, one by one.

It is happening already: Since city and state lawmakers started gutting the rent laws in 1993, the city has lost over 152,000 regulated apartments because landlords have pushed the rent too high. At least 130,000 more have disappeared because of co-op and condo conversions, expiring tax breaks and other factors. And while government officials say the losses have slowed, even regulated apartments are becoming increasingly unaffordable.

In some ways, this is an age-old story: New York has been in some form of housing crisis for a century. Landlords and tenants have battled for at least that long. But over the last 25 years, the balance of power has been reordered by a confluence of factors: that progressive weakening of the rent laws, an immensely profitable free market driven by a surging local economy, and the evolution of the rental real estate business, with mom-and-pop operations increasingly subsumed by Landlord Inc.

In the face of these changes, the regulators are simply overmatched.

The regulatory apparatus is fractionalized, divided among three city and state agencies. It is also essentially passive, The Times found. So state regulators, relying on outdated technology, do not systematically check whether a landlord found to have overcharged one tenant regularly does the same to others. City regulators do not investigate whether an owner who has illegally gutted apartments in one building might be doing the same elsewhere. And if building inspectors fail twice to get inside to investigate complaints of illegal construction, they don’t return a third time; the complaint is tossed out.
At the same time, the city’s housing court, mired in chaos, cannot reliably weed out frivolous and abusive lawsuits.

(Go inside Brooklyn’s housing court, last stop on the road to eviction, in Part 3.)

The Times interviewed more than 200 tenants, housing activists and government employees; reviewed thousands of pages of court records and building permits; and examined several government databases. In place of regulatory muscle, The Times found, the system relies on trust: trust that landlords do the right thing, trust that architects and engineers submit accurate permit applications, trust that landlords report rental histories correctly, trust that eviction suits are legitimate.

It also places the burden of investigation on tenants. They must ask for their apartments’ rental histories and determine their accuracy, complain about building permits, and sue over harassment. Holding on to an affordable apartment can turn into a part-time job, not to mention a full-time obsession.

Agencies rarely take action unless someone complains, and it can take time. In 2015, tenants who filed rent-overcharge complaints waited nearly two years on average for a resolution.

Landlords are hardly all bad, and smaller ones often struggle to pay their bills. But the new corporate landlords scoop up buildings with rent-regulated tenants, aiming to “unlock value” promised by the free market. In advertisements, brokers describe buildings with phrases like “significant upside” and “great potential for increase.” One developer, Icon Realty Management, displayed a neon art piece for a time that preached, “Don’t make sense make dollars.”

To breach the $2,733.75 threshold, mega-landlords and aspiring ones tend to follow the same playbook: After buying a building, they try to get tenants in regulated apartments to leave, often offering buyouts or harassing them with poor services or eviction suits. Once an apartment is empty, they tack on allowed vacancy increases. They often also perform renovations, enabling them to raise the rent even further while annoying the remaining neighbors, sometimes to the point of prompting them to leave.
Some landlords willfully flout the rules, The Times found. Applying for construction permits, they say buildings have no occupied apartments when they do. They inflate the cost of renovations or claim the work will be only minor when it is major. Or they falsely claim to have performed renovations, knowing that the state asks for proof only when a new tenant complains. If regulators catch on to one trick, landlords find another. It’s like a giant game of Whac-a-Mole. Punishment, if there is any, is seen as the cost of doing business, often a minor fine in the course of a multimillion-dollar development deal.

In 2007, a developer named Ben Shaoul and his partners, private equity firms, bought 17 East Village buildings for $97.5 million. They then included false statements on almost every building permit application, enabling them to skirt tenant-protection requirements.

In about six years, Mr. Shaoul, nicknamed “The Sledgehammer” by a real estate blog after he was photographed with a sledgehammer-wielding construction crew, cut the number of the most common kind of regulated apartments to 54 from 157, tax bills show. Nothing ever happened to him or his partners, even though lying on an application is a crime.

In an interview, Mr. Shaoul said his company renovated buildings left untouched for decades and deregulated them properly.

“The idea was to increase rents,” Mr. Shaoul said, adding that his company no longer purchased buildings with regulated apartments. “That was the business plan. That was the intent. It’s America.”

In 2013, Mr. Shaoul and his partners sold the buildings for $130.2 million, making a tidy profit. The buyer was a joint venture involving companies controlled by Jared Kushner, President Trump’s son-in-law and now White House adviser.

The Sunset of Regulation

In late 1992, Steven Croman, only 26, bought his first tenement building, a five-story walk-up at 221 Mott Street.
The block was a slice of old, but ever-evolving, New York. Though still considered part of Little Italy, the neighborhood was by then largely Chinese. Eighteen of its 36 buildings had rent-regulated apartments, 261 units in all.

Beginning in the 1920s, New York experimented with regulation to battle a chronically low vacancy rate. Advocates argued that regulation maintained a stable housing stock and limited runaway rents. Landlords countered that regulation increased rents of unregulated apartments, restricted building upkeep and discouraged new construction.

By the 1980s, the city had two types of regulated apartments: rent-controlled and rent-stabilized. Rent-controlled apartments, with strict rules and extremely low rents, were being phased out, so most regulated apartments were stabilized, with annual increases set by a board and a menu of tenant protections. Many were stabilized according to the traditional criteria: built before 1974, with six or more units. Others, stabilized through tax-benefit programs, often had much higher initial rents and could be deregulated after a certain time.

There had always been landlords who tried to drive tenants out of regulated apartments. In the 1980s, a few moved in drug dealers and prostitutes to harass tenants. One landlord couple legendarily roamed the halls with snarling pit bulls. Several earned tabloid nicknames: Dracula Landlord, Reptile Landlord.

But these were generally small landlords, limited in what they could legally accomplish.

Mr. Croman had good timing. New York was emerging from the dark days of the 1970s and ’80s, when boarded-up buildings pockmarked many neighborhoods. Rents climbed with demand.

Within a year of Mr. Croman’s first big purchase, the rent-stabilization laws started crumbling, largely through the efforts of a well-organized real estate lobby and a group of sympathetic politicians, many of whom benefited from the industry’s campaign contributions.
They were led by one of the state’s most powerful men, Joseph L. Bruno, an upstate Republican senator who would compare the effects of rent control to the devastation of an atom bomb. A narrative of the undeserving tenant took hold, encapsulated in the not entirely mythical $400-a-month four-bedroom on Central Park West.

Previously, the only legal way to significantly increase the rent of a regulated apartment had been to pass on the cost of renovations. In the 1990s, though, landlords won concession after concession in Albany.

If renters’ incomes passed a certain threshold, their apartments could be deregulated. When a tenant left, the landlords could increase the rent by about 20 percent. Rent overcharge complaints had to be filed within four years of the increase. And most crucially, if the rent was pushed high enough — initially $2,000 a month — the apartment could be deregulated forever.

Mr. Croman recruited a certain kind of tenant: college students, young Wall Street workers, people who cycled through quickly, enabling repeated vacancy increases. Mr. Croman pressured longtime tenants, first offering minimal buyouts, then bringing frivolous eviction suits and harassing them with nerve-racking construction, according to tenants and advocates. Once empty, the apartments moved through the renovation mill, emerging as glass-and-exposed-brick confections, often with cramped bedrooms, primed for more roommates and higher rents. In 1998, The Village Voice named him to its 10 worst landlords list.

He bought more buildings. Almost organically, a similar class of landlords rose up, always looking for buildings with regulated apartments.

Some were family businesses that preferred to hold on to their buildings, banking on a return over time.

Others had a more corporate face, along with investors. Some got mortgages based not on a building’s current rent roll but on its potential earnings. Some flipped buildings quickly, emptying and renovating as many regulated apartments as possible before selling to the next company, remaking neighborhoods from the inside out.
One fairly recent example: In June 2013, BCB Property Management bought 1059 Union Street, in the fast-gentrifying Brooklyn neighborhood of Crown Heights, for $8.2 million. Twenty-eight of the 32 apartments were rent-stabilized, tax bills show.

In January 2015, BCB sold the building for $13.2 million to Sugar Hill Capital Partners, which 14 months later sold it to Sterling Equities for $17.9 million. Only 15 stabilized apartments remained.

Across the city — ever deeper into Brooklyn and Queens and more recently into the Bronx — buildings have been transformed. The city has grown more crowded and more expensive. About 8.6 million people now live in New York, 1.3 million more than when Mr. Croman bought his first building. Yet the number of rental units has increased only slightly, mostly on the expensive end, while the median rent has jumped significantly. More than half of New Yorkers pay over 30 percent of their income in rent, meaning they are considered “rent-burdened” under federal guidelines.

And while the raw number of regulated apartments has stayed roughly even, that figure hides a particular churn. Traditional regulated apartments pushed into the free market have been replaced by apartments added through tax-break programs, which are often much more expensive. In 2016, the median legal rent of newly registered stabilized apartments was $2,750 — roughly the median asking rent for all New York apartments on the rental website StreetEasy. In Brooklyn, the median rent of a newly stabilized apartment was almost $3,300.

On the block of Mott Street where Mr. Croman started out — now part of the neighborhood rebranded NoLIta — a three-story parking garage has given way to condominiums priced as high as $21 million. An Italian funeral home has been reborn as a Japanese boutique. And where 261 traditional rent-regulated apartments once stood, only 91 remain. Six buildings have shed all their rent-regulated apartments.

Mr. Croman’s building, which once had 11 apartments, all regulated, now has 18 apartments, only two of them regulated. A studio goes for north of $3,000 a month.
How to Remake a Building

Frieda Taplitz bought 25 Grove Street for $52,500 in 1957. The building — red brick, tenement-style, built in 1886 — was a family investment: A Taplitz always lived there. Repairs and modest improvements, such as a new chimney and a new stairway enclosure, were done. Major renovations weren’t. Rents remained low. Tenants like Temma Tainow stayed for decades, and for the most part, the tenants and the Taplitzes got along. Only three complaints were recorded, all in the mid-1990s.

But in 2015, the family decided to sell. An advertisement said the 19-unit building had 14 rent-regulated apartments with an average rent less than half of market rate. Two apartments were vacant. There was, in other words, a lot of value to be unlocked at 25 Grove Street.

On June 11, 2015, the building was bought for $15.2 million by a limited liability company named 25 Grove Street. The company’s public face was Abraham Sanieoff, who had married into the family that ran the Sabet Group, a developer with a history of wrestling apartments out of regulation.

In the fall, construction crews arrived.

Protecting tenants is supposed to be the job of the city’s Department of Housing Preservation and Development. But construction is regulated by a separate agency, the Department of Buildings, and tenants are not its primary concern. In fact, no agency complaint category even mentions the word “tenant.”

For a landlord seeking to free apartments from regulation, that bureaucratic limbo makes it easier to do rent-enhancing renovations hidden from city inspectors’ scrutiny.

So landlords may lie on permit applications, saying that major construction is only cosmetic work, which demands far gentler oversight. They may begin work without obtaining permits at all. Whatever the violation, the median building fine between 2013 and 2017 was $800, pocket change for developers. The city’s finance department does little to ensure that fines are
collected. The buildings department does little to ensure that violations are fixed.

Most permit applications for apartment renovations get only a cursory review. That is because architects and engineers are allowed to “self-certify” that they follow the rules, letting them quickly obtain permits for what they say is minor work. A self-certified permit is often approved within days. Applications that are actually reviewed — those for more extensive work — can take months.

A buildings department spokesman, Joseph Soldevere, said self-certification helped make construction easier, faster and cheaper. Adding more red tape would simply drive illegal work further underground, he said, adding that the agency routinely audited self-certified applications, about one in every six last year.

But a comparison of building permits, violations and apartment listings indicates how willfully some owners flout the rules.

At 165 Avenue A, one of the East Village buildings purchased in part by Mr. Shaoul’s company, two architects submitted eight self-certified permits for apartment renovations between 2007 and 2011. Both claimed the work would not change occupancy. One, Ken Hudes, whose firm, Atelier New York Architecture, has become a favorite of mega-landlords, said his work would involve only minor partition changes.

But the work was considerable: Apartments were gutted and converted from one- and two-bedrooms to four-bedrooms.

Mr. Hudes denied any wrongdoing. In an email, he said his team turned nonfunctioning apartments into beautiful homes, adding, “Tenants and landlords love our work.”

Just as permits are easily granted, complaints are often closed for the most basic reason: Inspectors are allowed to dismiss them if they fail twice to get inside. With regulated apartments, that has led to the dismissal of almost 3,000 complaints a year — even allegations of tenant harassment. Without other evidence, Mr. Soldevere said, the buildings department has little
choice but to close complaints when inspectors are refused entry or when a building is locked.

Yet even when the buildings department does get inside and orders landlords to fix problems, often no one seems to follow up. About a year after Mr. Kushner’s joint venture bought 165 Avenue A — long after most work was done, and after a ninth complaint that apartments were being illegally converted — inspectors finally got in. The company was fined $2,000 and told to restore three apartments to two bedrooms from four.

The fine was paid. But the apartments are still marketed as having four bedrooms. In November, Apartment 8 was advertised for $5,500 a month. A spokeswoman for Kushner Companies declined to comment.

After the sale of 25 Grove Street, the complaints piled up. In October 2015, a tenant reported apartments being gutted without permits. The building, in fact, had no permits whatsoever.

In short order, the architect, Mr. Hudes’s partner, Jonathan Miller, submitted two self-certified permits, saying workers would do only minor work in four units. Within hours, each permit was rubber-stamped. City inspectors then responded to the initial complaint, dismissing it.

Landlords are often tipped off to potential problems by complaints automatically logged on a public website. Only then do they file permit applications — akin to getting a driver’s license after being accused of speeding.

“I’m not even as angry at the landlord as I am at the city,” said Collette Stallone, 63, a tenant. “They’re allowing this.”

Mr. Sanieoff declined to comment. His lawyer, Joseph Buckley, denied any wrongdoing.

Tenants soon complained of excessive dust, of illegal construction, of sloppy work. A drill punctured Ms. Tainow’s ceiling. A saw came through another tenant’s floor.
Photographs showed a thick layer of dust inside apartments. Ms. Tainow developed a raspy cough.

“I was wearing a mask all the time, even when I was sleeping,” said Humberto Torres, 56, who has asthma and lives across the hall.

Photographs later documented that the work was hardly minor: entire apartments taken down to the studs; one-bedroom units altered to have two.

On Jan. 13, 2016, the owner and contractors were hit with four violations. Three of them — for working without permits and lying on one application — led to fines of $4,000. The fourth — for excessive dust in Mr. Torres’s apartment — was deemed “immediately hazardous.”

Violation hearings are usually cozy affairs, with a city hearing officer, a buildings department lawyer and a representative of the building or construction firm. Tenants are not invited. Landlords routinely get the benefit of the doubt.

At the dust-violation hearing, Abe Sicker, representing the construction company, argued that the violation’s class should be reduced. “It is annoying, the dust,” he conceded. “But an immediately hazardous violation?”

The hearing officer agreed — and then some. She dismissed the violation altogether.

The Cut-and-Paste Protection Plan

In March 2015, a landlord named Asher Sussman told the buildings department that he wanted to transform his new “amazing investment opportunity” in the Crown Heights section of Brooklyn from seven apartments into 10.

“All he was seeing was dollar signs,” said Cynthia Wilkie, 62, who lived in one of the two occupied apartments at 632 Sterling Place.
What happened next shows the flimsiness of the rules and paperwork designed to protect tenants in regulated apartments during construction.

On the application, Mr. Sussman needed to check “yes” or “no” on two boxes: Was the building occupied? Did it have rent-regulated units? He checked “no” on both.

Contradicting the first false statement, Mr. Sussman’s architect submitted a “tenant-protection plan.” The plan itself was a word-for-word recitation of the city building code’s definition of a tenant protection plan. Separately, under “tenant safety notes,” the architect said construction would not “create dust, dirt, or other inconveniences.”

Mr. Soldevere said examiners had determined that the protection planned for tenants was appropriate for the proposed construction.

As with lying about the extent of construction, lying about occupancy or regulatory status is a crime and may mean that owners are compromising safety. If a building has tenants, a tenant protection plan is required to safeguard them.

“It’s not just a bureaucratic check-the-box, not-check-the-box thing,” said Brandon Kielbasa, a tenant organizer with the Cooper Square Committee. “The consequences are that tenants are put in really dangerous situations or psychologically harassed out of their homes.”

Yet as at 632 Sterling Place, many architects and engineers submitted tenant-protection plans with few protections, often simply cut and pasted from the building code. And falsified permits are not uncommon, a review of thousands of permits shows. Hundreds of owners lied about both occupancy and regulated apartments.

Until recently, the review showed, the city largely ignored the boxes altogether. It didn’t track whether an owner lied about occupancy or whether a building had regulated apartments, considering tax bills unreliable because they were self-reported. Only in December 2016 did the state agency that monitors regulated apartments agree to tell the buildings department whether a building had any.
Architects and engineers are rarely held responsible for falsified permits. They are licensed by the state, which seldom punishes anyone. Those disciplined by the city often voluntarily surrender self-certification privileges to avoid more formal punishment. The reasons are never made public.

Their firms can easily bounce back. Take Atelier. In March 2015, Mr. Hudes voluntarily surrendered his self-certification privileges. His partner, Mr. Miller, took over. Then on Aug. 8, Mr. Miller voluntarily surrendered his privileges, making way for a new architect, Anatole Plotkin. Mr. Hudes recovered his privileges in November.

The only criminal charge that The Times identified for a licensed contractor working on a regulated building involved Pirooz Soltanizadeh, an engineer indicted in June 2015 on felony charges of falsely reporting that no one lived at 1578 Union Street in Brooklyn. The arrests of Mr. Soltanizadeh and the owner, Daniel Melamed, were highly publicized, the first by a new city-state task force fighting tenant harassment. The building was illegally gutted around three families; construction dust contained 88 times the allowed lead level.

In December, Mr. Soltanizadeh, who had faced up to four years in prison, pleaded guilty to disorderly conduct — the equivalent of a ticket. He is still licensed, although he gave up his self-certification privileges a year ago.

His lawyer, Paul Greenfield, said Mr. Melamed, who spent 20 days in jail and paid $200,000 in restitution, was to blame for the falsehoods.

At 632 Sterling Place, after agreeing to buy the building in late 2014, Mr. Sussman had pushed tenants to leave, eventually offering buyouts. Two tenants agreed to move, including a woman with dementia. The other woman said she never received any money.

But moving made no sense to Ms. Wilkie, who had lived there for 22 years and paid about $850 a month for the three-bedroom apartment she shared with her brother, daughter and two grandchildren. Ms. Wilkie had diabetes and had undergone double-bypass heart surgery. Her daughter, Wendy, 33, was blind and in a wheelchair because of childhood brain cancer. Ms. Wilkie’s brother had lost his right leg to diabetes.
Her neighbor, Arnold Brathwaite, 68, a retired veteran, also wanted to stay.

By early 2016, the building started coming down around them, despite the cookie-cutter protection plan. The heat was turned off. The second and third floors were gutted. A staircase was removed. A hole was cut into the roof. Debris was piled in corners, against walls. Dust was everywhere.

On Aug. 10, 2016, inspectors issued 10 major building violations. Still, that meant only $23,250 in fines. Neither Mr. Sussman nor the architect was fined for lying.

Mr. Sussman, the managing member of the limited liability company 632 Sterling L.L.C., did not respond to requests for comment.

Because the building was so unsafe, the city moved the tenants to a Days Inn in Queens, filled mainly with other refugees from damaged apartments, their rent now paid by taxpayers. Ms. Wilkie, her daughter and granddaughter shared a cramped room with two queen-size beds. The hotel’s single, shared microwave became their kitchen.

With help from the Legal Aid Society, Ms. Wilkie and Mr. Brathwaite sued to fix the building on Sterling Place.

That case will take years. Mr. Brathwaite eventually settled, accepting another apartment from Mr. Sussman. Ms. Wilkie decided to fight.

Her family stayed at the Days Inn for more than a year, until the city tried to move her to a homeless shelter in November. To avoid that, she temporarily rented an apartment in Brownsville, a Brooklyn neighborhood still ungentrified, with a bathroom too small for Wendy’s wheelchair. The monthly rent is $2,110, almost triple what she paid before.

**Mythical Closets**

There is one more line of defense: the state’s Division of Housing and Community Renewal, designated overseer of the rent laws, watchdog against rent fraud, guardian of the $2,733.75 threshold for traditional regulated apartments.
Many housing advocates argue that rent fraud is rampant in New York. How widespread such overcharges are, though, is impossible to judge, because the state agency doesn’t collect much of the necessary information. When it does, it is barred from making the data public.

Yet it is clear that the agency is often helpless in the face of the myriad subterfuges that some landlords deploy to manipulate rent system guidelines.

The agency, for example, requires landlords to report all regulated rents annually, along with vacancy increases and money spent on apartment improvements. But it does not require proof of that spending, unless a tenant files an overcharge complaint, which is rare. Nor does the agency check for a building permit when a landlord claims a rent increase for improvements. A missing permit could indicate that work was illegal, minor or never done.

So just as they may lie about the extent — or even existence — of improvements to avoid oversight, landlords may claim whatever type and quantity of work is needed to free an apartment from regulation.

If the state agency consistently comes up short, it is, perhaps unintentionally, frank about its limitations.

On rental histories, the agency admits that it does not “attest to the truthfulness of the owner’s statements or the legality of the rents reported in this document.” On some rental histories, it misspells its own name: “Communtiy,” instead of “Community.”

For an agency created to protect tenants, it often ends up sheltering landlords. In the name of protecting tenants’ privacy, the agency is barred from releasing rental histories, except to the tenant. It is even barred from reporting how many regulated apartments are in a building.

In an attempt to quantify rent-rule violations, at least in microcosm, lawyers at the Northern Manhattan Improvement Corporation, an advocacy group, investigated the rental histories of the 92 apartments at 560 Audubon Avenue. The study, part of a pending 2016 lawsuit alleging rent overcharges, found unexplained rent jumps in 58 apartments and
registered rents that didn’t match leases in 33. Thirteen tenants signed riders certifying that their apartments had been “completely renovated in a good workmanlike manner.” No renovations had been completed.

In court filings, the owner, Hayco Corporation, denied overcharging tenants.

The state housing agency is hamstrung, too, by archaic technology. So if a tenant wins an overcharge case, the agency’s 1980s computer system cannot automatically review the landlord’s other apartments for possible violations. In fact, the agency does not look for overcharges, even in the same building.

“It’s like prescribing a Tylenol to a patient that has brain cancer,” said Aaron Carr, founder of the Housing Rights Initiative, which investigates rent overcharges for possible class-action lawsuits.

The agency has had to do more with less: In 2017, only 27 examiners looked at overcharge complaints. In 2007, there were 37.

Gov. Andrew M. Cuomo has still claimed successes, including a plan in January 2016 to re-regulate up to 50,000 illegally deregulated apartments. So far, only 1,900 have been returned to the rent rolls.

In 2012, Mr. Cuomo also set up a Tenant Protection Unit, which undertook the first-ever audits of owners who had reported significant increases for apartment improvements, recovering $4.5 million for tenants. The unit says it has returned 67,000 apartments to the regulated rolls.

But tenant advocates called that figure illusory, saying owners were merely allowed to register their apartments as stabilized, but at their current higher rents, without penalties, “ratifying their earlier fraud,” said Edward Josephson, litigation director for Legal Services NYC.

The state refused to give any information about those apartments, which in any event would barely stem losses. The city now has 6,500 fewer stabilized apartments than in 2011, according to state numbers.

The tenant protection unit has enemies. Real estate industry groups sued, challenging its existence. Though the suit was dismissed, they have
appealed. State lawmakers, who still rely heavily on industry donations, have consistently denied the unit’s budget request. The state housing agency funds it. Its commissioner, RuthAnne Visnauskas, said she hoped lawmakers would increase the unit’s funding “so that we can do even more.”

Recently the unit audited 560 Audubon, looking at three apartments and ordering rent reductions after no proof of improvements was provided. Investigators neither fined the landlord nor examined other apartments there.

“I was gobsmacked,” said Matthew Chachere, a lawyer with Northern Manhattan.

In 2016, the state started requiring landlords to give new rent-regulated tenants explanations of their rent, and to provide more proof of apartment improvements. But tenants rarely check explanations, and the government rarely investigates the authenticity of landlords’ proof.

Christopher Leahy, a landlord and contractor who has testified as an expert witness for tenants, believes some landlords claim improvements and then fabricate evidence if tenants file overcharge complaints.

The landlords “keep doing it because they so often get away with it,” he said. “Most tenants don’t complain.”

Matt Pavoni did. The 37-year-old actor filed a complaint last year after seeing a huge jump in his rental history at 600 Lincoln Place in Crown Heights. In response, the landlord, a limited liability company under the umbrella of the Watermark Capital Group, claimed about $42,500 worth of improvements in 2013 — just enough to push the rent above the then-$2,500 threshold, into the free market.

The proof was riddled with problems. The check copies were so tiny as to be illegible. One company, Pinpoint Builders, claimed to have done $20,000 of the work. But the address on its letterhead — 5041 16th Avenue in Brooklyn — did not exist. The new bathroom tiles it claimed to have installed were cracking.
Another company, Yankels Demolition and Rubbish Removal, charged $4,000 for “rubbish removal” but classified it as an apartment improvement, yielding a $100 monthly rent increase. The company also claimed to have redone the closets. The apartment has no closets.

“That really upset me,” Mr. Pavoni said.

Watermark defends the rent increase. The company said Pinpoint was now based out of another office and blamed tenants for the cracked bathroom tiles. As for the closets, Watermark said they were included in the original work order, then omitted.

In January, the state housing agency ruled in Watermark’s favor, saying it had never received Mr. Pavoni’s mailed response. He has appealed.

Hardly a Blip

The vanishing affordable apartment is having an extended political moment.

In the brewing race for governor, Mr. Cuomo’s challenger, Cynthia Nixon, has proposed overhauling state rent laws to make it harder to deregulate apartments.

And last August, the city adopted a package of measures to fight tenant harassment, establishing a tenant advocate, slightly increasing some penalties and beefing up requirements for tenant protection plans.

But the buildings department will be the primary enforcer, and its commitment is unclear.

In March, department officials told a City Council committee that new employees would not be hired for the advocate’s office. The commissioner, Rick Chandler, said the department had long advocated successfully for tenants. “I’m very disheartened,” Councilwoman Helen Rosenthal, who pushed for the new office, told The Times in April.
Last week, after questioning by The Times, the department appeared to have changed its mind: Mr. Soldevere said funding had been requested for two new employees for the advocate’s office. In addition, he said that because of the new laws, the agency planned to hire more than 70 new employees to focus on tenant protection and set up a quick-response unit for complaints of work without permits.

“We won’t tolerate landlords who use construction to harass tenants,” he said, adding that since September, the department had issued 547 violations for lying about occupancy and regulation on permits.

The Times identified 370 that had been resolved. Out of $1.8 million in fines, about $280,000 has been paid; the median fine was $2,400.

With the new scrutiny, some large landlords have stopped lying on permit applications, a review of hundreds of applications shows. They have amended their playbook.

But while they are now more likely to check the boxes saying that buildings are occupied with regulated apartments, their tenant protection plans are still pro forma and vague. In the first three months of 2018, Mr. Plotkin of Atelier filed at least 55 identical plans — 475-word statements that used phrases from the building code and garbled statements like, “Noise will kept to a minimum during working while ongoing construction is taking place.”

Since harassing a rent-regulated tenant became a crime in the state in 1997, no landlord has been convicted. The few landlords successfully prosecuted for crimes like reckless endangerment have faced relatively small fines and little jail time.

The exception is Mr. Croman, accused in 2016 of intimidating tenants with a private investigator and turning buildings into hazardous construction sites. Those were civil charges, brought by the state attorney general. An accompanying criminal case charged him not with harassment but with 20 felonies, stemming, in part, from allegations that might have sprung from a developer’s magical thinking: To secure loans, prosecutors charged, he claimed that stabilized apartments were actually renting at market rate.
Eventually, Mr. Croman pleaded guilty to three felonies and settled the civil case. He agreed to pay a $5 million tax settlement and set up an $8 million restitution fund. And while he was sentenced to only a year in jail — he had faced up to 25 — he was supposed to go to the crowded and dangerous Rikers Island jail complex.

Mr. Croman did not go to Rikers. Instead, he ended up at the Manhattan Detention Complex in Chinatown — more convenient for family and friends.

He is to be released next month. His company still owns its buildings, though the state monitors them, as part of his settlement. And his buildings and contractors have continued to rack up violations; as of April, they owed almost $875,000, records show. Since his arrest, 123 of 139 permit applications identified by The Times were self-certified.

A spokesman for his company, Sam Spokony, declined to answer questions but said the company was “diligently implementing” the settlement, “in line with our ongoing focus on using best practices to provide quality housing for our residents.”

At 25 Grove Street, a few regulated tenants eventually sued, winning a temporary rent reduction. After the worker fell through Ms. Tainow’s ceiling in August 2016, the hole was immediately patched. A few hours later, as Ms. Tainow sat at her computer, workers punched another hole, this time in her living room ceiling, sending another large chunk of drywall onto the floor. Ms. Tainow started screaming. Neighbors called an ambulance: Her blood pressure had shot up to a dangerous 190/130.

Despite the two cave-ins, a building inspector wrote up only one Class 1 violation, the most serious kind, for a “localized collapse of ceiling” in the living room and cracks in Mr. Torres’s apartment across the hall.

At the hearing, Mr. Sicker, again representing the construction company, argued that the violation class should be reduced. An engineer’s report about the living room, he said, showed “there was nothing really there.”

No photographs were provided. Vivian Currie, the buildings department’s lawyer, described the two ceiling collapses as “a small localized area,”
explaining that he had hesitated calling the building inspector to testify because it would have taken time. “Yeah, I mean, to avoid getting the inspector, you know, we will move to amend.”

Ms. Tainow was not mentioned. Mr. Sicker won his reduction. The fine was halved, to $5,000.

January 2017 brought another complaint about illegal construction. After learning about the complaint, Mr. Sanieoff, the landlord, texted the rental agent, Alice Bahar, blaming Ms. Tainow and describing her as “a piece of garbage!”

The complaint was closed because inspectors failed twice to get inside.

In June 2017, the apartment above Ms. Tainow’s finally hit the market: The former one-bedroom was now the “BEST TRUE 3 BEDROOM apartment in the West Village area,” according to the StreetEasy listing. The rent: $6,500.

For all its problems, 25 Grove is hardly a blip in the world of rent regulation. Tenants complained to their local officials, with little response. Their lawyer wrote to the attorney general’s bureau investigating landlords, which sent back a form letter: “Because of the volume of complaints, the limits of our resources, and the constraints of our jurisdiction, the bureau cannot act on or otherwise investigate every complaint.”

Even after Mr. Sussman practically dismantled Ms. Wilkie’s building, the attorney general’s office declined the case. “I’m pretty upset that the office didn’t think there was a basis for prosecuting him,” said Stephen Myers, Ms. Wilkie’s lawyer.

On May 4, the buildings department decided the landlord could continue renovations. “O.K. to work,” said the order, posted out front. After questioning from The Times, the department on Thursday stopped work.

Mr. Sanieoff has expanded. His companies bought two more properties, including 37 King Street, a half-mile from 25 Grove, purchased in November for $17.5 million. The advertisement for the building proclaimed, “Tremendous value can be captured through the
destabilization and renovation of the residential units that remain untouched for years.”

Jessica Silver-Greenberg, Grace Ashford, Sarah Cohen, Agustin Armendariz and John Krauss contributed reporting. Susan Beachy contributed research.

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**NEXT, THE 2013 SPECIAL ISSUE**

Volume 47, Numbers 3-4
July–August 2013

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California’s Sargent Shriver Civil Counsel Act Tests Impact of More Assistance for Low-Income Litigants

[Editor’s Note: This article is adapted from a longer article to be published in the University of the District of Columbia Law Review as part of its symposium issue commemorating the fiftieth anniversary of Gideon v. Wainwright. The author and Clearinghouse Review thank the editors of the law review for permission to publish this version.]

By Clare Pastore

The civil-right-to-counsel movement has recently become interested in pilot programs to test the effectiveness and cost of increasing the availability of counsel to low-income civil litigants. Interest in pilot programs also coincides with the civil-right-to-counsel movement’s increased strategic focus on measures that are short of an across-the-board right to counsel and that instead focus on particularly important areas of law, particularly vulnerable litigants, or types of cases particularly susceptible to power imbalances between the parties.1

A privately funded housing counsel pilot in two Boston courts recently concluded (a follow-up pilot is about to begin), and elsewhere several pilots are ongoing or in late stages of development. The most ambitious pilot to date is the multiyear, multicounty pilot project under way in California pursuant to the Sargent Shriver Civil Right to Counsel Act of 2009.2

I. The Sargent Shriver Civil Counsel Pilots

California’s Shriver Act allocates an estimated $9 million to $10 million per year for the six-year life of the pilots.3 Its four central provisions set out legislative findings; a scheme for development, selection, and operation of the pilots; a mandate for evaluation; and a funding mechanism. The Act’s goals are to (1) provide representation for low-income persons in specified areas of the law, (2) establish best practices in court procedures and practices to ensure meaningful access to justice, (3) "gather information on the outcomes associated with providing those services," and (4) "address the

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substantial inequities in timely and effective access to justice that often give rise to an undue risk of erroneous decision ....”\(^4\)

A. Legislative Findings

The Shriver Act opens with fourteen remarkable paragraphs—nearly two thousand words—of legislative findings.\(^5\) The themes of the findings include the recognition of the size and extent of the “justice gap” and the recognition that the inability of many litigants to afford representation causes injustice in some cases, threatens courts’ ability to dispense justice in others, undermines public confidence in the courts, imposes avoidable costs on the courts and society, and is inconsistent with the requirements of a democratic society. The findings embrace the concept of state responsibility for addressing the imbalance in access to justice but explicitly disavow any notion that doing so requires providing counsel in all cases.\(^6\)

B. Pilot Requirements

Despite media reports to the contrary, the Shriver Act does not create any rights or guarantee counsel to anyone. Instead it identifies six areas of law (housing, domestic violence and restraining orders, elder abuse, guardianship of the person, probate conservatorship, and child custody) and establishes a structure under which legal services agencies, courts, other service providers, and pro bono attorneys can partner to experiment with increased representation, innovations in court procedures, improved self-help, and other practices to improve service to indigent litigants with cases in those fields, and to measure the impact.\(^7\)

Nonetheless, providing more attorneys for low-income litigants is clearly the statute’s centerpiece. Each pilot is to be a partnership among a court, a “lead legal services agency” that is a qualified California IOLTA (interest on lawyers’ trust accounts) program, and other legal services providers, with the use of pro bono services encouraged. Innovation in court procedures is also required.\(^8\) The lead legal services agency is to serve as the “hub for all referrals, and the point at which decisions are made about which referrals will be served and by whom.”\(^9\)

The statute directs the lead legal services agency to use specific criteria in determining when to provide representation, and to target scarce resources at cases where representation is likely to make the greatest difference or avoid the most injustice. In assessing whether to accept a particular case, the lead legal services agency must determine the litigant’s need for representation, considering

- case complexity;
- whether the other party is represented;
- the adversarial nature of the proceeding;
- the availability and effectiveness of other types of services, such as self-help, in light of the potential client and the nature of the case;
- language issues;
- disability access issues;
- literacy issues;
- merits of the case;
- nature and severity of potential consequences for the client without representation;

\(^6\)Compare id. § 1(j) (“Because in many civil cases lawyers are as essential as judges and courts to the proper functioning of the justice system, the state has just as great a responsibility to ensure adequate counsel is available to both parties in those cases as it does to supply judges, courthouses, and other forums for the hearing of those cases”) with id. § 1(k) (“There are some forums in which it may be possible for most parties to have fair and equal access if they have the benefit of representation by qualified nonlawyer advocates, and other forums where the parties can represent themselves if they receive self-help assistance.”).
\(^7\)Cal. Bus. & Prof. Code § 68651(b)(1).
\(^8\)Id. § 68651(b)(4).
\(^9\)Id. § 68651(b)(7).
whether legal services may eliminate or reduce the need for and cost of public social services for the potential client and others in the household. The statute also sets the financial eligibility limit at 200 percent of the federal poverty level. 

C. Evaluation Requirement

The Shriver Act requires California’s Judicial Council, the courts’ policymaking arm, to study “the effectiveness and continued need for the pilot program” and, by January 31, 2016, to report its findings and recommendations to the legislature, including “data on the impact of counsel on equal access to justice and the effect on court administration and efficiency ….” Portland-based NPC Research Inc. was awarded the evaluation contract after a competitive bid process.

The scope of information that pilots must collect is impressively broad, covering dozens of measures such as client demographics, case outcomes, court appearances and continuances, Shriver services provided, client goals and satisfaction, and judicial officers involved. If actually captured on all or most Shriver cases, this information will yield a wealth of data for analysis.

II. The Selected Pilots

The Judicial Council approved, in April 2011, Shriver funding for seven lead legal services agencies that proposed ten pilots in seven counties—six housing, three custody, and one probate guardianship pilot—with a projected collective budget of $9.5 million and individual grants ranging from $350,000 to $2.8 million. (Each grant is per year for three years.) The pilots cover a wide swath of the state, from Yolo County (population 200,000) north of Sacramento, down to San Diego, and encompassing San Francisco, Sacramento, Santa Barbara, Kern, and Los Angeles Counties. Programs began providing services in early 2012.

More than fifty attorneys, known in most counties as “Shriver Counsel,” as well as paralegals, interpreters, and coordinators within the lead legal services agencies and their partners, have been funded so far, along with court personnel in most of the pilot courts: a dedicated clerk to handle eviction cases in Los Angeles, housing investigators or inspectors in Yolo and Sacramento, and a probate guardianship facilitator in Santa Barbara. Some of the Shriver-funded court personnel have been controversial because of the drastic cuts and attendant layoffs of personnel that the California courts are facing.

Below I briefly describe each pilot; the dollar amounts specified are the sum of funds to lead and partner agencies and the court partner.

A. Housing Pilots

Housing pilots are under way in six locations.

1. Los Angeles

Los Angeles is home to the largest housing pilot, with a grant of $2.8 million. The lead legal services agency, Neighborhood Legal Services of Los Angeles County, coordinates a team of lawyers and other advocates from the Legal Aid Foundation of Los Angeles, Public Counsel, and the Inner City Law Center. Twenty-one Shriver counsel have been funded: three to four who screen clients for eligibility, thirteen who regularly represent tenants in court, and four supervisors. The program operates in downtown Los Angeles, where more than 17,000 eviction actions—20 percent of the total in Los Angeles County—are filed each year.

A central innovation is the project’s Eviction Assistance Center, staffed daily

10 Id. § 68651(b)(7)(A)–(J).
11 Id. § 68651(b)(1).
12 Id. §68651(c).
13 These descriptions draw from the Sargent Shriver Civil Right to Counsel Act applications and monthly reports from each program and from my interviews with advocates in each program.
in the downtown courthouse by at least four Shriver counsel. Neighborhood Legal Services anticipated that the project’s resources would allow full representation to two thousand litigants annually, about 40 percent of those eligible based on income and a represented opponent, and limited scope services to another three thousand. The program reported meeting its goal of two thousand full-scope cases in approximately the first year of operation.

Every party to an eviction action at the courthouse can be evaluated for Shriver eligibility by going to the Eviction Assistance Center. Those not eligible (because they are over the income limit or face an unrepresented opponent) are referred elsewhere. Those potentially eligible for Shriver services meet (generally the same day) with an Eviction Assistance Center attorney who determines whether to offer full- or limited-scope assistance (help with filing and serving an answer and filing a fee waiver request, brief advice and counsel, and referral to online video and in-person self-help workshops). Those offered full-scope representation receive an immediate appointment (next day if possible) with one of the three Shriver provider agencies, assigned on a random basis, to represent them through settlement or trial.

The partner agencies devoted a great deal of thought and discussion to the instrument used to determine who is offered full-scope representation. Eviction Assistance Center attorneys rate such factors as the presence of legal or technical defenses (e.g., defective notice); factual defenses (e.g., cure, waiver, estoppel, retaliation, breach of lease term, or habitability); and vulnerability of the client (e.g., whether elderly, disabled, likely to become homeless, or has income under half of the area median; or, if a tenant, whether eviction would jeopardize long-term tenancy in a rent-stabilized unit or a Section 8 voucher). The form also allows for indicating factors such as whether the landlord seems to be targeting the tenant or appears abusive, or the eviction appears pretextual or raises a new legal issue that would benefit from litigation. However, one advocate notes that prioritization has been a “moving target” that has changed over time, partly due to different priorities or philosophies among the partner programs.

The project has also created a “Shriver Corps” of pro bono attorneys from prominent firms; the pro bono attorneys are recruited, trained, supported, and mentored by the participating legal services programs’ attorneys who have taken on full-scope representation cases. A project goal is that eventually these pro bono attorneys will staff an attorney-of-the-day program for litigants who were initially offered only limited representation.

A project-funded court clerk handles all Shriver eviction cases, allows for rapid location and assessment of files, gives a copy of the complaint to the tenant if necessary, and weeds out ineligible clients (such as those who have already defaulted).

Like all the Shriver housing projects, the Los Angeles project also assists landlords who meet the income and represented-opponent criteria. According to the Shriver coordinator, a handful of landlords have been served in the first year, through placement with pro bono attorneys.

A website (www.shriverhousingla.org) geared toward volunteers and pro bono attorneys invites visitors to “be involved in the largest and most dramatic experiment in legal services since the 1970s” via a “groundbreaking effort to provide legal representation to low-income families and individuals facing eviction, [and] help us fight homelessness on a large scale ….”

2. San Diego

San Diego, the state’s third-largest county with nearly three million residents, is home to the second-largest Shriver housing project. With a housing grant of just under $1.9 million per year, the Legal Aid Society of San Diego County has eleven Shriver housing attorneys and a housing investigator. The application set a goal of full- or limited-scope representation for all income-eligible tenants who faced a represented party and
contacted the project; the application estimated a maximum of 4,500 cases per year (of 17,000 in the county), including those requiring advice only or dispositive motions and settlements. As of December 31, 2012, eleven months after the project began, approximately 770 full-representation cases had been opened.

The court innovation proposed was modest: a Shriver project telephone contact number was added to the packet that the court sends to all parties in unlawful detainer cases. Notices are also posted on the court’s website, and the court began an early settlement conference program in which parties are encouraged but not required to participate. Advocates have expressed frustration at the court’s unwillingness to require settlement conference participation or to increase the prominence of the Shriver information in the packets that parties receive. As of April 2013, however, at the beginning of the project’s second year, advocates reported success in persuading the court to order the parties to a settlement conference in one case (though only after an ex parte request, a resource-intensive method which is obviously impractical on a large scale), after which the case did settle.

Clients connect with the Shriver project primarily by calling the central Legal Aid Society intake line listed on the court’s form. With regard to evaluation, the Legal Aid Society anticipates a small randomized assignment component and then tracking results through court records and follow-up interviews.

3. Sacramento

Legal Services of Northern California, a large program covering twenty-three counties, won two Shriver contracts to run housing pilot programs, one in Sacramento and the other in neighboring Yolo County.

In Sacramento, the state capital with half a million residents, funding for a supervising attorney, four staff attorneys, and an administrative support clerk comes to $1.1 million. Referrals come through a combination of regular Legal Services of Northern California intake and inclusion of information about its services in the packet sent to parties in eviction actions. The proposal anticipated representing tenants in 720 trials and 288 dispositive motions per year, and providing self-help advocacy in 300 cases. As of April 2013, just over a year into the program, over 700 clients had received full- or limited-scope services. The program informally estimates that 90–95 percent of the cases settle, about the same as its pre-Shriver caseload, with settlements much more favorable to represented tenants, and that it wins about half of the small number of cases that go to trial.

An interesting innovation is the Sacramento housing pilot’s partnership with the Mediation Clinic of the McGeorge School of Law in Sacramento. This voluntary mediation program predominantly handles disputes that have not yet reached litigation; the program identifies participants through robust community outreach and diversion of tenants with thirty-day notices. The lack of postfiling mediation was not anticipated, and Legal Services of Northern California theorizes that the problem is that such meetings challenge the landlord bar’s business model of minimizing court appearances and meetings.

Another innovation has been expanded electronic filing options. Previously e-filing was unavailable to parties who proceed under a fee waiver, even when represented by legal aid. As a practical matter e-filing was unavailable to parties not in the know since a private company administered it at a cost and the option

14Cal. CIV. PROC. § 1161.2(c) (West 2013) requires court clerks, between twenty-eight and forty-eight hours after an eviction action is filed, to mail to each defendant a notice that includes the name and telephone number of a legal services provider in the county.

15Legal Aid Society of San Diego County’s advocates also noted that the court’s settlement judge recently noted that at least one settlement conference per week had been scheduled in recent weeks, perhaps a sign that change was coming, however slowly (E-mail from Greg Knoll, Executive Director/Chief Counsel, Legal Aid Society of San Diego, to me (May 2, 2013)).
was not publicly advertised or mentioned on the court’s website. This system not only imposed lengthy waits in the clerk’s office on those attempting to file answers or other documents but also gave e-filers the potentially significant advantage of filing documents even when the clerk’s office was closed. Now both parties have equal access to the filing system.

Legal Services of Northern California does not plan to assign clients at random to a control or treatment group as part of an evaluation, although court records for represented and unrepresented tenants will be compared. This pilot is like others that aim to serve, at some level if not fully, all eligible clients who contact the agency, and thus the Shriver supervising attorney in Sacramento expressed discomfort with turning away, solely for purposes of evaluation, eligible, needy clients whom the program had the capacity to assist.

4. Yolo County

Legal Services of Northern California’s Yolo County pilot is similar to its Sacramento project, albeit less ambitious in that it is a smaller office, has significantly fewer eviction actions, and lacks a mediation partner. Yolo is a mixed urban and rural county of two hundred thousand. According to court records, before Shriver, tenants were unrepresented in 88 percent and landlords in 12 percent of eviction cases. The organization sampled twenty-five cases from 2010 (3 percent of eviction cases for a three-week period) and discovered that the landlord prevailed in every case that proceeded without the organization’s involvement.

The Shriver grant of $336,000 has funded two attorneys and interpreter services, a part-time mediator, a part-time self-help attorney who aids both landlords and tenants, and, through a contract with the County Health Department’s Division of Environmental Sciences, a registered environmental health specialist who serves as a housing inspector in cases where habitability is at issue. The managing attorney reports that this latter measure is quite successful; Shriver attorneys can request inspections and receive reports within forty-eight hours, and the registered health specialist is a highly credible witness at trial.

Shriver mediation services are available even before filing through an outreach program, but most mediations occur on the day of trial and in cases where the tenant is unrepresented, apparently because landlords’ attorneys regularly decline to mediate early or when the tenant is represented.

The application estimated that 337 tenants per year would qualify for Shriver services; of those tenants some 200 would receive full representation and 100 limited assistance (with pleadings, court forms, discovery, and advice). Informal results suggest that while the overall number served is consistent with the estimate, the pilot has provided less direct (full) representation and more limited-scope assistance than anticipated—a trend the managing attorney attributes largely to more settlements achieved.

Randomized evaluation is unlikely since the pool of clients is so small. In addition to the standardized data elements all Shriver housing projects are gathering, the program is considering ways to gather data on the Shriver pilot’s effect, including on the habitability of local housing, on the community.

5. Kern County

Greater Bakersfield Legal Assistance serves Kern County, a largely rural and heavily agricultural Central Valley county of 840,000 with one of the state’s fastest-growing populations and extremely high poverty and unemployment rates. In partnership with the Volunteer Attorney Program of Kern County, the organization received, for its Shriver housing project, $560,000, with which it hired three full-time Shriver attorneys, a bilingual paralegal, and a social worker. The project also funds interpreters and a court-employed unlawful detainer advisor. Referrals come from the assessment attorney at the Shriver-funded Landlord-Tenant Assistance Center in the courthouse; the assessment attorney screens for eligibility and conflicts.
The project gives priority in full-scope representation to cases where the opposing party is represented by counsel, the client is especially vulnerable, the case is unusually complex, or valuable precedent might result; others receive help with answers, drafting motions, general information about the process, and mediation through the existing program. As with several other Shriver housing projects, Greater Bakersfield Legal Assistance’s proposal also contained a mediation component intended to get the parties into settlement discussions much earlier than the day of trial, but this component has proved difficult to implement because of an unforeseen shortage of qualified mediators and landlords’ and some tenants’ resistance to mediation.

The Kern County pilot includes a social service coordinator who links clients to services intended to help keep tenants in their homes—for example, job placement and employment services, health and mental health services, substance abuse treatment or counseling, money management, and conflict resolution. Every income-eligible client who reaches the Landlord-Tenant Assistance Center is referred either to “advanced self-help” with the unlawful detainer advisor or to a Shriver attorney for representation, with the presence of an attorney on the other side primarily determining which form of assistance is offered. At the end of the first year, approximately 900 clients had received advanced self-help and 183 had received direct representation.

6. Santa Barbara County

The Legal Aid Foundation of Santa Barbara County received $465,000, the smallest Shriver housing grant. Santa Barbara County’s population of 423,000 includes some of the wealthiest census tracts in California as well as very poor and rural areas. The Shriver grant funds three attorneys who share probate guardianship and housing duties; translators in the Santa Maria office, where many clients are monolingual Spanish speakers; and an intake paralegal. The principal court innovation element is mandatory settlement conferences conducted at least forty-eight hours before trial by a Shriver-funded settlement master in Lompoc and Santa Maria.

All Shriver intake is handled by the project’s paralegal. Eligible clients then consult a Shriver attorney by telephone to allow the attorney to evaluate the case’s complexity, merits, and the nature and severity of the consequences if representation is not provided.

B. Custody Pilots

The statute permits the use of Shriver funds in cases where a parent seeks “sole legal or physical custody,” a relatively narrow slice of family law matters, especially in a state where joint custody is statutorily favored.16 Such cases tend to involve unusual factors such as domestic violence, mental or physical disability of one or both of the parents, or very high conflict between parents. Three custody projects have been funded.

1. San Francisco

The Justice and Diversity Center (formerly Volunteer Legal Services Program) of the Bar Association of San Francisco received $350,000, the smallest Shriver grant to custody projects; the expectation was to represent some 100 clients per year and give legal information to another 350 self-represented litigants. In its application the project set a goal of representing every low-income San Francisco resident seeking or responding to a request for sole physical or legal custody where the other party is represented by counsel. The project funds a part-time project coordinator and one attorney who handles the cases in which a Shriver attorney represents clients. Another Shriver attorney at the courthouse helps with “preage”—a Justice and Diversity Center coinage (spun off “triage”), meaning identifying clients and giving legal information to litigants not eligible for representation. The court supplies office space and computers. Referrals come from the court’s Family Law Self-Help Center (where all pro per litigants must go before filing custody motions

under local rules), project staffers who speak with potentially eligible litigants who appear for the readiness calendar (where mediation and hearing dates are set), the private bar, and other legal services organizations. The Shriver attorney at the court identifies pro se self-help center clients who are income-eligible and face a represented opponent; within a day the attorney contacts clients to set an appointment and determine whether to offer full- or limited-scope assistance. Appropriate cases are referred to a pro bono family law project. Anecdotally, the project reports that more cases are being resolved by stipulation and order than hearings or judgments—a desirable result from the standpoint of judicial and attorney resources.

The San Francisco custody pilot evaluation is using a control group of sorts. For the first three months after the program began, but before Shriver representation was in place, Shriver staff identified some twenty-five cases where representation would have been offered had the project been fully operating. Staff interviewed the unrepresented parties after custody hearings. The project’s supervising attorney noted that, even with a dozen years of family law experience, he was surprised at the difficulty unrepresented litigants face in navigating the system. Of the twenty-five cases flagged, only one had settled, and that with the aid of the court’s facilitator.17

2. San Diego

The San Diego custody pilot is run by the San Diego Volunteer Lawyer Program, which received approximately $450,000, although the Legal Aid Society of San Diego is the lead legal services agency. Staffed by three Volunteer Lawyer Program attorneys, the project’s core innovation is to strive for early resolution of custody cases on a “fast track.” Shriver counsel can stipulate to a bench officer’s early neutral evaluation within thirty days of a request for sole custody, to an expedited Family Court Services counseling session within the subsequent two weeks, and to an expedited hearing to determine the custody issues within the subsequent two weeks. Thus the entire custody determination could be resolved within approximately sixty days of filing, compared to the usual four to seven months. Additional court staffing, funded by Shriver, makes this fast track possible.

The application anticipated handling 120 to 180 cases per year, or 10 to 15 new cases per month per attorney, with pro bono representation for additional clients. However, program staff reports that, while mediations with a settlement judge have been extremely effective, the number of eligible clients has been dramatically smaller than expected. Although the need for assistance is no less acute than projected, imbalance of representation in custody cases appears to be less common than anticipated. The pilot’s Shriver plan was to assist those whose cases did not settle through the court’s preexisting “workshop” (whereby both parents meet with a family court mediator), but program protocols ruled out high-conflict cases because those cases generally contain issues such as domestic violence or child protective services involvement that are beyond the capacity of the mediators to handle. Project staff also mentioned that the statutory requirement that the lead legal services agency perform all screening is cumbersome since it means that cases are screened by the Legal Aid Society’s heavily used preexisting system rather than by Volunteer Lawyer Program specialists. Some clients have rejected Shriver offers upon learning that they would be represented only on custody issues and not the entire family law case.

Because the first year’s experience did not match expectations, the Volunteer Lawyer Program and the superior court, seeking to modify the pilot to serve more clients, established a clinic inside the courthouse three mornings each week, where staff and pro bono attorneys assist clients even before knowing whether the other side is represented. Like all of the custody pilot staffers interviewed, Volunteer Lawyer Program staffers mentioned the “fluidity” of representation in

17Telephone Interview with Javier Bastidas, Attorney, Justice and Diversity Center (May 9, 2013).
family law and how often representation status changes, for example, as previously unrepresented parties secure counsel for certain but not all aspects of the case, and the consequent difficulty in determining whether a case meets the Shriver criterion of representation on the other side.

Whether randomized assignment will be used in the San Diego assessment has not yet been determined, and Volunteer Lawyer Program attorneys, like those whose projects target small populations elsewhere, expressed concern about the ethics of turning away eligible clients in order to create a control group.

3. Los Angeles

The Los Angeles Center for Law and Justice received a Shriver grant of $850,000 to provide representation, specialized mediation, and support services, in cases involving domestic violence, to a total of 450 self-represented litigants annually. After approximately one year, the pilot had received about 230 referrals, reflecting perhaps the same difficulty the other custody projects have identified with separating custody issues from complex family law disputes, as well as the exceedingly lengthy and complex nature of high-conflict cases where domestic violence, child abuse or neglect, child protective services involvement, mental health issues, or substance abuse may also be present. Asymmetrical representation in domestic violence cases is common, in part because the alleged perpetrator often faces criminal charges and so prioritizes the need for an attorney even for the family law matter. The goal of representation or assistance in each case is to get the case to judgment, something that the project attorney whom I interviewed stressed could differ among the Shriver family law projects—some prioritize stabilizing the case with interim or temporary orders, for example. Because of this focus, the time that cases remain open is lengthy.

The Los Angeles Center for Law and Justice partnered with a private law firm with a sliding-scale business model geared for low-income litigants. The project also offers parenting classes, developed by the Center for Divorce Education, that focus on high-conflict custody disputes. A proposed case management component to the pilot was discontinued due to low client take-up, a result one project attorney attributes to low-income parents’ inability, when in crisis, to prioritize these services over other urgent needs.

Three Shriver attorneys work on the project. Referrals were intended to come from judicial officers, but concerns about judicial neutrality led to a slightly altered system under which referrals come from family court mediators and evaluators, the court’s self-help center staff attorneys, and the county bar’s court-based domestic violence assistance program. Court cutbacks have eliminated the planned specialized calendar for this subset of custody cases.

Like other custody projects, Los Angeles has struggled with the contracted evaluator to conceptualize and agree upon a workable evaluation system. A randomized control group is not planned.

C. Probate Guardianship Pilot

The sole Shriver guardianship pilot is in Santa Barbara County; the pilot is coordinated by the Legal Aid Foundation of Santa Barbara and funded at $483,000. The pilot primarily helps unrepresented litigants, often monolingual Spanish speakers from rural parts of the county, secure guardianships over children in their care. (The program anticipated handling conservatorships over adults as well, but referrals for these have been far fewer than expected.) The typical case is a grandparent who is caring for grandchildren when parents are incarcerated, addicted to drugs, or absent and who needs the guardianship to secure medical care for the children, enroll them in school, or for similar reasons. Unlike other pilots, which aim to level the playing field between litigants with attorneys and those without and to some degree to change the culture of courts, the probate pilot’s coordinator has described it as more of a “pure access project,” tackling not an imbalance in representation but the sheer difficulty many unsophisti-
cated or non-English-speaking litigants have in obtaining basic services from the court, even when they face no opposition. The Legal Aid Foundation’s review of court files before the pilot began revealed ample need for such assistance: self-represented litigants visited the court’s legal resource centers seeking guardianships 146 times in 2009, with twenty-two litigants visiting between 2 and 9 times each. Each self-represented litigant required one to thirteen continuances. In conservatorships of the person and estate, as many as twenty continuances have been required. Among the reasons for pro per s’ inability to secure guardianships were difficulty in understanding service requirements and which forms to file, and inability to check online tentative rulings and respond correctly.

Shriver funds were used to hire three attorneys who divide their time between housing and probate matters, and a probate facilitator, employed by the court, who helps pro per litigants negotiate the process. The concept is that the Legal Aid Foundation represents persons whose guardianship petitions are complex or contested, or those who are non-English speakers; others can access the process through the court-based facilitator.

D. Early Lessons and Observations

Although it is far too early for formal Shriver data or conclusions, informal observations abound. Some relate to the nature of conducting a pilot. Without exception, each advocate interviewed—at least one in each Shriver lead legal services agency—mentioned the difficulty of beginning the pilot without full clarity about evaluation methodology or precisely what data would be collected. Several mentioned the frustration of seeing substantial time and funding resources going to prove what they felt was obvious—that providing counsel to indigent clients makes a difference. Quite a few observed that greater coordination with the evaluation designers and evaluators would have made the process smoother and lamented the substantial time required to input the several dozen pieces of information in the evaluation protocol. Concerned that the protocol does not capture all relevant information, some programs are collecting additional data. For example, the Legal Aid Foundation of Santa Barbara, the sole guardianship project, is keeping a narrative record of results of securing of guardianships, such as noting that the guardianship secured over a severely ill child allowed grandparents to seek out-of-area medical care and to get the child a passport that would enable travel through the Make a Wish Foundation. Several advocates expressed regret at the lack of even anecdotal data about how the courts functioned before Shriver. Several programs reported their local courts’ displeasure at a perceived lack of consultation or coordination with them regarding evaluation.

Whether to assign clients randomly to receive services or not, in order to compare outcomes, has been controversial. While some researchers are convinced that random assignment is the “gold standard” of evaluation, many advocates doubt the ethics of denying services in the name of research, especially in projects (as in some of the Shriver pilots) that have the capacity to serve all or virtually all eligible clients. Even where a program cannot come close to filling the need, many advocates balk at turning away clients who have already been screened for need and eligibility, or for whom the advocate can readily discern a strong legal argument. Others, however, acknowledge that the only difference between such a process and normal intake limits is that the clients who have made their way into the Shriver system are therefore “present” in a way that those who cannot get through the phone system are not. Aside from the randomization debate, Los Angeles advocates noted the difficulty of agreeing upon a prioritization protocol among partner agencies with different philosophies and approaches, and noted that addressing this in advance would have been helpful.

Several family law advocates reported their own and clients’ frustration with the perception that the Shriver statute’s limitation of family law representation to cases where sole custody is at issue means providing assistance only on the custody issues and not other issues in the family law case, such as child support,
property division, or divorce itself. The statute does clearly limit Shriver family law services to cases where sole custody is at issue, but it does not explicitly preclude Shriver funds from being used to resolve the client’s entire matter once this criterion is met. Although apparently not compelled by the Administrative Office of the Courts’ interpretation of the statute, the limitation does seem to have influenced the design of several Shriver programs; some pilots have limited services to custody matters, and this can force a client to shuttle back and forth between a legal provider and the self-help center. One advocate reported frustration with the lack of legal information or brief advice available to alleged batterers at restraining order hearings because the results of those proceedings can bear so heavily on the eventual custody decision. But the advocate also noted the difficulty in obtaining funding for those services and potential political challenges in representing alleged perpetrators in an area where most programs, if they tread at all, serve survivors of domestic violence.

Likewise, that Shriver funds may be used to represent only clients who face represented opponents is sometimes a problem in the family law context. (By contrast, one advocate noted that this criterion is helpful in avoiding conflicts in the housing context.) While providing representation only where it would balance representation on the other side is certainly consistent with some of the norms of fairness that underlie the Shriver pilots, and certainly seems a wise use of resources in most instances, no statutory language explicitly bars assisting clients who do not face a represented opponent, and one section appears to contemplate it. This representation might make sense where, for example, initially represented opponents dismiss their attorney along the way.

One of the family law pilots expressed surprise at the high number of noncustodial parents who sought Shriver services. The custody pilots also raised serious concerns with the evaluator about data collection; the pilots were worried that information about mental health, substance abuse, or domestic violence could find its way into databases available in discovery to opponents. After several custody pilots consulted with outside ethics counsel, some changes in the data collection protocol resolved the matter.

All of the housing pilots in which settlement conferences prior to the day of trial are voluntary, not mandatory, reported frustration at the landlord bar’s reluctance to participate and noted that the “business model” of much of that bar depended on reducing the amount of time spent on each case and consequently the number of court visits. Conversely, most private family law practitioners apparently bill hourly and so lack any built-in impediment—and perhaps even have an incentive—to participate in such voluntary activities. Greater Bakersfield Legal Assistance notes that reluctance to mediate is not limited to landlords but tends to manifest on the part of the party that had no contact with the Shriver project.

The pilots located at courthouses report that the courthouse-location model seems quite successful, while at least one housing pilot reports that the location of the legal services office several miles from the courthouse is a significant disadvantage; some clients simply disappear between their initial (often telephonic) contact and their scheduled office visit. Other replicable court innovations that seem to be paying off even at this early stage are the dedicated court clerk for unlawful detainer actions in Los Angeles, the environmental health specialist in Yolo County, the partnership with a law school mediation clinic in Sacramento, the unlawful detainer advisor in Kern County, the expansion of electronic filing options in Sacramento, and the probate facilitator in Santa Barbara. While not a court innovation per se, the expanded availability of landlord-tenant clinics to help pro per litigants has helped reduce lines and delays at the clerk’s office filing window in Yolo County, benefitting all litigants. Reports to the Adminis-

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18See Cal. Bus. & Prof. Cott § 68651(b)(2) (“In light of the significant percentage of parties who are unrepresented in family law matters, proposals to provide counsel in child custody cases should be considered among the highest priorities for funding, particularly when one side is represented and the other is not.” (emphasis added)).
Director advocates with some of the pilots report encouraging culture change. Several cited the readiness (even eagerness) of Shriver counsel to go to trial as a valuable incentive for settlement. Los Angeles Shriver attorneys report a palpably different “feel” in the master calendar courtroom where eviction matters are handled. It has long been a sort of insiders’ club for the repeat-player landlord lawyers, but Shriver lawyers are now also in court daily, familiar to the judges and clerks and literally sitting inside the bar. All of the housing pilots (and some judges) report a trend of settlements more favorable to represented tenants than to pro per.

At least one program reports that the Shriver pilot is furthering its law reform goals. Greater Bakersfield Legal Aid included among its pilot goals “identifying impediments to equal access to justice and speedy, affordable resolution of housing-related problems.” Advocates report identifying at least one such problem, involving public housing evictions they believe are systematically premature; with Shriver resources they expect to resolve it through negotiation or litigation.

Others report more mixed experiences. In San Diego, for example, the program’s executive director is disappointed that the court declined to make early settlement conferences mandatory (a frustration several programs shared) or to make the “You May Be Eligible for Free Assistance” information more prominent in the information that litigants receive. He confirms that the landlord bar has been unwilling to take advantage of early settlement opportunities. By contrast, the San Diego pilot, like the other housing pilots, reports that the experience of both Shriver attorneys and judges is that settlements in Shriver-represented cases are much more favorable to tenants than previously, in such areas as time to move, forgoing adverse credit reporting, and forbearance of rent before an agreed-upon move-out date.

Several housing pilots reported a very small number of cases going to trial—no jury trials at all in San Diego’s first year, for example, and only five trials in Kern County. Los Angeles reports a much lower rate of jury trials in Shriver cases than in pro per cases. In terms of conserving scarce court resources, these results, like the reduction in court appearances for guardianship or conservatorship seekers in Santa Barbara County, certainly seem encouraging.

A final note: the difficulty of implementing change at the level the Shriver Act seeks, when courts and advocacy agencies alike are undergoing budget cutbacks, has been a significant, though likely unavoidable, barrier to smooth implementation in some of the pilot counties.

Pilot programs are clearly here to stay. As they test new types of service delivery and assess the costs and benefits of changes and existing systems, the programs will challenge business as usual in the courts and among advocates. While data produced will not end the discussion about how to close the justice gap, the Shriver Civil Counsel Act pilots offer a wealth of provocative innovations and observations that will inform that debate for years to come, in California and elsewhere.

Author’s Acknowledgments
I thank California Administrative Office of the Courts’ Bonnie Hough, who coordinates the Shriver projects, and the Shriver attorneys and program directors whom I interviewed within each program, for their generous assistance.
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Tenants should have the right to legal representation before eviction | Opinion

Updated Apr 3, 2018;
Posted Apr 3, 2018

By Star-Ledger Guest Columnist

By Paula A. Franzese

Our State's courts have become inundated with eviction actions, as tenants struggle to make ends meet. In Newark alone, tenant evictions affect 30,000 residents annually, destabilizing families and neighborhoods, targeting the most vulnerable and compounding the crisis in homelessness.

A safe place to call home is a human right. When a tenant is displaced, a parade of horribles follows in the form of economic loss, trauma, illness, physical and emotional stress and, most tragically, homelessness.
Homelessness comes at a high cost to already strapped government budgets. It costs more to provide temporary shelter than it does to subsidize sustainable affordable housing and prevent wrongful evictions in the first place.

With so much at stake, it defies conscience and common sense that the vast preponderance of vulnerable tenant households named in eviction actions are without access to counsel. While their landlords are typically well represented, low and moderate income tenants without a lawyer are without the mechanisms to assert their statutory rights to safe and habitable premises along with their right to be free from eviction unless the landlord can show cause. Indeed, in our study of the 40,000 eviction actions brought in Essex County in one year alone, my colleagues and I found that only 80 of those cases (0.002 percent) had tenants asserting habitability defenses, this notwithstanding the effects of gentrification's contributions to wrongful evictions and the documented instances of rentals in Newark and beyond that are grossly substandard.

Against that bleak landscape, I applaud Newark Mayor Ras Baraka's commitment to bring to fruition a right to counsel for Newark tenants most at risk of eviction - the disabled, the elderly, and those with incomes no more than two times the federal poverty level. The city's initiative will give voice to tenants otherwise silenced by a system that too often is stacked against them. It is a major step on
behalf of fundamental fairness and equal access to justice and should serve as a model for State-wide implementation.

The right to counsel must be supported by just landlord-tenant laws. New Jersey's rent posting requirement impedes an aggrieved tenant's right to a hearing on claims that the premises are uninhabitable. It provides that a tenant named in an eviction action for nonpayment of rent cannot be heard on her defense that the premises are unsafe and unsound unless she first remits to the court any rent amounts claimed due by the landlord, without consideration of whether those amounts are actually owed in view of the rental unit's defects.

Further, the requirement fails to take into account the fact that in the face of landlord inaction tenants can and do apply withheld rent to self-help remediation (such as hiring an exterminator when the premises are roach or rodent infested or purchasing a space heater when the apartment is without heat).

Worse yet, there are a proliferating number of private reporting agencies that comb court records for eviction filings which they then sell to landlords for profit. Tenants whose names appear on these "blacklists" often find themselves denied future renting opportunities, stigmatized and excluded from the promise of fair housing. What is more, the specter of being blacklisted chills an aggrieved tenant's willingness to rock the boat,
lest she endure the banishment that can attach because she fought for her rights or, more simply, fell upon hard times.

The Senate has before it two important bills introduced by Senators Codey and Rice. The first, S805, relieves aggrieved tenants of the rent deposit requirement pending a hearing on the premises' habitability. That bill brings NJ in line with the majority of states that do not require a tenant to post rent claimed due by the landlord in order to get a hearing on the tenant's habitability claim.

The second, S806, keeps court filing records in eviction proceedings confidential and unavailable to the public for at least sixty days after an action is filed to allow time for the case to proceed. Thereafter, those records would be discoverable only if the given matter did not result in a resolution favorable to the tenant. At the federal level, U.S. Sen. Cory Booker, D-NJ, has introduced a national bill to reform unfair tenant screening practices and reporting procedures. These initiatives deserve passage.

We have reached a tipping point in this nation as unprecedented income inequality puts the plight of the most vulnerable into sharper focus. We can allay and also prevent the suffering wrought by housing displacement. In the process, let us seek for others the same basic assurances that we wish for ourselves.

Paula A. Franzese is Peter W. Rodino Professor of Law at Seton Hall Law School.
When Neri Carranza went to see the apartment on West 109th Street in Manhattan, she folded money into the pocket of her blue jacket, just in case she liked the place. This would be the first apartment she had ever looked at, the first time she could make a home of her own, paid for with the earnings from her first job, at a glass factory. And the apartment was exactly as her friend from church had described it: small but comfortable.

So on a freezing Sunday in 1956, Ms. Carranza, then 32, with a crown of black hair and a fierce desire for independence, moved into the narrow two-bedroom apartment. She made it her own, cleaning and decorating every Sunday, planting yellow roses and hot-pink geraniums in window boxes, painting the walls white when they needed a new coat. As landlords came and went, Ms. Carranza stayed, becoming a fixture in the largely Latino neighborhood.

“I had everything I ever wanted,” Ms. Carranza said.
But one day in 2010, when she was 87, Ms. Carranza learned that her new landlord wanted to evict her for what seemed like the most nonsensical reason: She supposedly didn’t live in her own beloved home.

She was hardly the only tenant facing eviction by the owners, the Orbach Group, a New Jersey-based company that had recently paid about $76 million for her building and 21 others nearby, a Monopoly move that effectively snapped up most of the residential real estate along a block of West 109th Street. Orbach had filed eviction suits in housing court against scores of her neighbors in rent-regulated apartments.

What happened to Ms. Carranza and the others shows how New York City’s housing court system, created in part to shelter tenants from dangerous conditions, has instead become a tool for landlords to push them out and wrest a most precious civic commodity — affordable housing — out of regulation and into the free market.

What You Need to Know as a Tenant

New York’s housing system can be complicated to navigate. Here’s a quick primer on what your rights are and how to exercise them.

Rent-regulated apartments, often the only homes in New York that people of modest means can afford, are vanishing as gentrification surges inexorably through the city’s neighborhoods. Mayor Bill de Blasio, now in his second term, has staked much of his legacy on alleviating this crisis of disappearing affordable housing and rising homelessness.

Yet the city’s efforts to create new affordable housing are locked in a duel with a countervailing force: powerful incentives for landlords to do everything possible to take existing affordable apartments away.

It’s not just that the city’s booming population and economy have spawned a wildly lucrative free market. The entire structure of tenant protections — while probably still the nation’s strongest, at least on paper — has been steadily eroded by landlord-friendly laws adopted in Albany and haphazard regulation.
Landlords, especially the corporate owners who control an increasing share of the market, follow a standard playbook to push tenants out. That is often the first step toward raising the rent enough — beyond $2,733.75 a month, under current rules — to break the shackles of regulation. Owners may offer tenants buyouts to leave. They may harass them with poor services and constant construction. And, sometimes on the flimsiest of evidence, they may sue them in housing court.

(Read about how landlords have exploited weakened laws and fragmented bureaucracy to remake buildings and neighborhoods, in Part 1 of this series.)

It is impossible to say how many evictions are unjust. Many people sued for eviction do owe some back rent, and some tenants certainly abuse the court system, remaining in their apartments for months without paying. For small landlords, such tenants can mean fiscal ruin.

But an investigation by The New York Times illustrates how the Orbach Group and other mega-landlords exploit a broken and overburdened system. In one of the busiest courts in the nation, errors often go uncaught and dubious allegations go unquestioned. Lawsuits are easy to file but onerous to fight. Landlords have lawyers. Tenants usually don’t, despite a new law that aims to provide free counsel to low-income New Yorkers.

Landlords rely on what amounts to an eviction machine. A cadre of lawyers handles tens of thousands of cases a year, making money off volume and sometimes manipulating gaps in enforcement to bring questionable cases. Punishable conduct is rarely punished.

Process servers, required to notify tenants that they are being sued, sometimes violate the law. Among tenants whom servers had supposedly talked to in person, The Times found several who were abroad at the time. One had been dead for years.

Judges sometimes unwittingly ordered the eviction of tenants who had no idea they had been sued.

“When they sent the marshal, they never gave us no notice,” said Zanden Alzanden, a Yemeni immigrant who was evicted from his home in the
historic Dunbar Apartments in Harlem when he was in the hospital in January 2017. “Nothing on door, ever. Only that day, the marshal coming in, my son and an old guy sitting in there: ‘Boom boom, get the hell out of here.’”

To see what happens when vulnerable New Yorkers are cast into this eviction bureaucracy, The Times analyzed a database of more than a million housing court cases filed between 2011 and mid-2016. The Times also interviewed hundreds of tenants, lawyers and tenant organizers and examined in detail more than a thousand housing court cases from the past decade. It looked especially closely at two places: the Orbach buildings on 109th Street and the Dunbar Apartments two miles uptown.

What emerged were often-overlapping modes of harassment: by landlords’ fraudulent or exaggerated claims, by disrepair and by overall court dysfunction.

About 232,000 cases were filed last year against tenants, roughly one for every 10 city rentals. Most tenants were accused of owing back rent. But in many cases, tenants were sued for rent they did not owe. Sometimes they had paid, only to have landlords claim that the checks mistakenly remained uncashed or had been lost in the mail; sometimes they were sued for money owed by a government program. Sometimes, tenants withheld rent only because much-needed repairs had never been done.

In recent years, landlords have also increasingly turned to a different kind of eviction suit, like the one against Ms. Carranza. Known as holdovers, these cases involve purported lease violations. Often the violations are minuscule. Sometimes they are simply fabricated. Even as the overall number of eviction lawsuits has fallen over the last decade, the proportion of holdovers has grown, particularly in Brooklyn and Queens, epicenters of gentrification. A decade ago in Queens, about one in six lawsuits was a holdover. Last year, roughly one in four was.

Even if a case is shown to be baseless, just being sued can hurt a tenant’s ability to rent a new apartment. Screening companies tell landlords whether a prospective tenant has been sued for eviction, without necessarily saying how the case was resolved. Attempts to abolish this “tenant blacklist” have so far failed.
The dislocations from housing court can echo for years. Although evictions are relatively rare — there were about 21,100 last year — many tenants, tired of battling, decide to leave on their own. Some end up doubled up with relatives or in homeless shelters. At the Dunbar, more than a quarter of the tenants sued since 2013 have left.

Fallou Diop, whose family lived a few doors down from Ms. Carranza on 109th Street, was sued twice by Orbach: in 2009 for falling behind on his $1,144-a-month rent, and in 2011 for allegedly subletting rooms in his apartment. He paid his back rent. The “subletters” were relatives who had lived with him for 19 years. But about two years after winning the second case, Mr. Diop agreed to leave.

“I was sick of fighting with them and sick of the harassment,” said Mr. Diop, a retired baker who said he took a $50,000 buyout, a seeming fortune at the time. He then rented an apartment in the Bronx for $2,700 a month.

In June 2016, Orbach advertised Mr. Diop’s old apartment, urging prospective tenants, in capital letters, to “call today to view this beauty.” The monthly rent would be $4,200.

The deal did not work out so well for Mr. Diop. The buyout money ran out. At 65, he sleeps on his ex-girlfriend’s couch.

A Court System Hijacked

With a monthly rent of about $300, Ms. Carranza’s apartment was a prime target.

In July 2010, the Orbach Group filed its holdover suit against Ms. Carranza, charging that she was illegally using her apartment as a storage unit while living with a nearby friend. Court documents called the apartment “inaccessible and uninhabitable,” packed with newspapers and trash.
Photos taken five months earlier by Ms. Carranza’s niece showed her sitting in the apartment, watching TV. It was crowded with furniture but well kept, with no newspapers, no trash.

But mold covered the walls. Light fixtures and kitchen cabinets had rusted out. Parts of the floor had come up. The kitchen ceiling sagged.

Housing court was not supposed to be used this way, as a cudgel against tenants in decrepit housing. The system was created in 1973 with a very different mission: to foster the repair and preservation of New York’s aging housing stock. It also aimed to provide a single forum for landlord-tenant disputes, which had overwhelmed civil courts.

Within a few years, it was in trouble. A scathing 1979 city comptroller’s audit said the courts had failed to crack down on bad landlords. In 1986, a task force of tenant advocates and lawyers described a system in chaos. Their report quoted one judge saying, “I don’t have time to breathe, I go from one case to another.”

(Go inside Brooklyn’s housing court, last stop on the road to eviction, in Part 3.)

The court soon crashed headlong into a business opportunity.

After years of suburban flight, urban malaise and fiscal crisis, New York in the early 1990s was a city on the rebound. Neighborhoods previously considered off-limits to the upwardly mobile began to gentrify.

At the same time, state lawmakers gutted protections for tenants in rent-regulated apartments. Large companies scooped up buildings, trying to flip affordable apartments into luxury rentals or convert them to co-ops or condominiums.

A company called the Pinnacle Group helped turn housing court into a weapon. In 2004, Pinnacle started buying hundreds of buildings around the city, often with partners. In August 2005 alone, Pinnacle and Praedium Group, a private-equity firm, bought 104 buildings, including Ms. Carranza’s building and the Dunbar. By 2006, Pinnacle had filed about 5,000 eviction lawsuits, almost one for every four apartments.
Pinnacle was so large and aggressive that it ran into problems, including an attorney general’s investigation and a tenant class action, both of which settled. Prompted in part by Pinnacle’s tactics, the City Council passed a law in 2008 letting tenants sue for harassment, although it would prove largely ineffective.

Around the same time, Pinnacle advertised its 22 buildings on 109th Street. It wanted a single buyer.

The Orbach Group was a relatively new player in New York. Meyer Orbach, who grew up in his family’s real estate business, had formed the company about six years earlier, focusing on commercial and high-end residential properties. But as the 2008 financial crisis hit, the Orbach Group entered the regulated game, buying 13 buildings on West 49th Street. In May 2009, Orbach bought Pinnacle’s buildings on West 109th.

Orbach also adopted Pinnacle’s business model. Between 2008 and 2010, it sued 182 tenants, targeting roughly one in three apartments, court records show. Orbach also relied heavily on holdover lawsuits. One in three Orbach eviction cases was a holdover, compared with one in 10 citywide.

Holdover lawsuits have a distinct advantage for aggressive landlords: They can be filed with little proof, yet they can require tenants to go to court repeatedly and turn over years of personal information.

“They are fishing expeditions,” said Michael Grinthal, a supervising lawyer with the Community Development Project at the Urban Justice Center.

Bringing a holdover case requires so little evidence, Mr. Grinthal said, that one Brooklyn landlord filed 23 identical lawsuits, accusing tenants of “smoking and/or drinking and/or gambling and/or loitering.” Shaken, some tenants moved, Mr. Grinthal said.

In response to questions about its use of housing court, an Orbach spokeswoman, Sandra Kittel, said the company was “deeply committed to affordable housing” and had kept thousands of apartments affordable.

To prove that Ms. Carranza was living with a friend, Harry Tawil, the manager of most Orbach buildings in New York, said “a database search” revealed that she had not used her address to apply for credit in almost five
years. He also swore that “Neri Carranza admits that she does not reside in
the subject premises.”

Ms. Carranza and her friend said this was not true.

Lawyers for Orbach asked Ms. Carranza for documents stretching back
almost five years, including hospital bills, bank statements, electric bills,
W-2 and 1099 forms, and tax returns. Also any wills and codicils, passport,
driver’s license, social security card and birth certificate.

Ms. Carranza, who speaks only Spanish, considered every court document,
written in English and slipped under her door, an insult. She was lucky
enough to get a lawyer working pro bono, and ultimately she won. But the
case stretched for more than three years. In the meantime, repairs were
ordered but not done. Punitive damages were sought but not awarded. Still,
the papers kept arriving. Ms. Carranza kept going to court.

“When I’d see those papers on the floor, I would say to myself, ‘Those sons
of their mothers!’” said Ms. Carranza, who holds a black belt in karate and
prefers Lancôme perfume to all others. “I would shake from the anger,” she
added. “It was an injustice.”

‘Throwing a Spitball’

The Dunbar Apartments began as one of America’s grandest experiments
in housing reform. Built by John D. Rockefeller Jr. in the 1920s and named
for the black poet Paul Laurence Dunbar, the complex was the nation’s first
large housing cooperative for African-Americans.

With six brick buildings overlooking a central garden, the Dunbar is a
microcosm of Harlem history in a single city block, at the corner of 149th
Street and Frederick Douglass Boulevard. In its early days, the Dunbar was
home to the likes of the civil rights leader and sociologist W. E. B. Du Bois
and the entertainer Bill (Bojangles) Robinson. It is a city landmark, on the
National Register of Historic Places.
Eventually, though, the co-ops became rentals, and the Dunbar slid through a series of owners and stages of disrepair. The current landlord is a limited liability company formed by a Brooklyn company, E&M Associates, which bought the complex in 2013 after a foreclosure on Pinnacle’s mortgage. And with Harlem a real estate hot zone, E&M has worked to remake the Dunbar, pushing out longtime tenants, remodeling vacant apartments and charging far higher rents.

The churn and renovation have left the Dunbar in turmoil, divided between old tenants and new, and sometimes between black and white. To some longtime residents, the fresh paint and gleaming appliances installed next door signify that the landlord is letting their own homes decay to drive them out.

“I’m gonna put it to you straight: They want the black folks to move out,” said Lynette Williams, 80, who has lived in the Dunbar for 21 years. “Because the white people can come in and pay more.”

Through a web of limited liability companies, E&M has an ownership interest in at least 90 New York buildings with regulated apartments, property records show. Until recently, a section of its website aimed at investors boasted that E&M approached every property “from an investor’s point of view, seeking to understand the underlying intrinsic value of the property, as well as the steps that must be taken to unlock that value.” A link to the section for residents was broken.

(After The Times reached out to the company, it took down its website. In response to questions, E&M also said it had “had no involvement with Dunbar Apartments” since mid-2017, although property records show no sale. The company did not respond to requests for an explanation.)

Housing court has helped E&M unlock value. In less than five years of ownership, records show, the landlord has sued at least 250 rent-regulated tenants — almost half the Dunbar — some multiple times. There have been more than 500 lawsuits in all.

Housing court records show only six successful evictions. But 15 more tenants may have been evicted: Records show that eviction warrants were
issued, and those people are no longer in their apartments. Eleven other tenants agreed to leave to settle their cases.

But that tells only part of the story: Dozens of others left after being sued. Many said they were tired of going to housing court to fight over repairs. All told, 67 of the tenants who were sued — more than one in four — are no longer living in the Dunbar.

Most Dunbar cases examined by The Times were brought over back rent, as are most eviction suits citywide. And many tenants did owe money.

But roughly a third of the cases either were discontinued because the rent had been paid or were simply dropped, indicating that the case had been filed by mistake, or that the tenant had paid after being sued or had simply moved. That raises questions about whether such suits are aimed at harassing tenants.

In another third of cases, tenants admitted that they had stopped paying rent but also said their apartments needed repairs. By law, tenants may withhold rent to secure repairs.

Several tenants said the only way to get problems fixed was to stop paying rent, be sued and then tell a judge.

“When they took me to court I was frustrated and upset, so I was withholding my money,” said Katrina Stanley, 51, who lives in the apartment her great-grandmother moved into in the 1920s. “They sent an unlicensed person to fix my ceiling. And just as quick as he fixed it, the ceiling fell again.”

Many tenants complained of leaks. One apartment needed so much work, it failed an inspection for federal rent subsidies. One woman was awarded a major rent reduction after complaining of mold, cockroaches and the improper disposal of a corpse in a nearby apartment.

Idrissa Sidibe, 54, a truck driver, moved into the Dunbar in 2001. Over the years, he said, he complained repeatedly about a loose hot-water tap in his bathtub.
Last July, the Dunbar sued Mr. Sidibe for almost $2,600 in back rent, which Mr. Sidibe disputed. Three days before the first court hearing, Mr. Sidibe tried to add hot water to a lukewarm bath when the running water blasted scalding hot. Shocked by the pain, Mr. Sidibe struggled out of the tub, then collapsed onto the floor.

His closest friend found him and called an ambulance. Photographs showed layers of skin peeling off his right foot and burns on his legs. Mr. Sidibe required skin grafts and spent more than seven weeks at Harlem Hospital Center. While he was there, his kidneys nearly failed — and the judge approved his eviction.

“I was in the hospital thinking, ‘How am I going to get out of here and make a payment?’” said Mr. Sidibe, who staved off eviction and sued the landlord for his injuries. That case is pending.

In response to questions, E&M said through its lawyers that because of neglect by previous owners, the Dunbar required vast work to meet the company’s safety, cleanliness and security standards. The lawyers said they could not comment on individual cases but questioned whether tenants had actually left over the lack of repairs or fatigue at going to housing court.

“We believe it reasonable to assume they left without paying rent that was owed and/or to avoid eviction,” wrote Renee Digrugilliers, a lawyer with the firm Horing Welikson & Rosen.

Ms. Digrugilliers said many tenants filed “bogus repair claims” and often made it difficult to do repairs by refusing to allow workers into their apartments. The owner, she said, sued only tenants who did not pay rent or otherwise broke the rules.

Even when cases are quickly abandoned — as in a fifth of eviction suits citywide — there can be significant repercussions.

Laurie Weisman says she was not behind in her rent when she was sued by the Dunbar in March 2017. So she was shocked when a reporter informed her of the lawsuit. (Ms. Digrugilliers said her firm had been given ledgers showing Ms. Weisman behind in rent.)
“It’s almost as if they’re throwing a spitball and seeing if it sticks,” Ms. Weisman said.

Though that case and another filed nine months later were dropped, Ms. Weisman hopes to move soon. But the tenant blacklist makes finding a new apartment difficult.

“I feel cornered,” Ms. Weisman said. “I don’t want to stay here, but I can’t leave.”

Lawsuit Mills

On April 11, 2017, the law firm Green & Cohen sued three rent-regulated tenants in a building on West 111th Street.

One case was filed and dropped. The tenants in another hired a lawyer, who got Green & Cohen to agree that the lawsuit had been filed in error.

In the third case, the tenant, Carolyn Opalisky, a retired jazz club owner, didn’t hire a lawyer. She signed an agreement known as a stipulation, affirming that she owed about $1,325. The next day, Green & Cohen filed eviction papers, though her first payment wasn’t due for more than a month.

“I did comply!!” Ms. Opalisky wrote in a court response. “So why eviction???”

The judge sided with Ms. Opalisky.

Because few lawyers are ever sanctioned, the system creates an incentive to file as many cases as possible, regardless of merit.

Volume is central to the business model of many law firms that represent landlords in New York. One firm, Gutman, Mintz, Baker & Sonnenfeldt, brought almost 110,000 eviction cases over five years, more than 10 percent of all cases for privately owned buildings.
Some firms, The Times found, repeatedly sued tenants even after being told that they owed no rent. Sometimes rent ledgers were wrong. Sometimes lawyers sued for money owed by government programs, usually not allowed.

Firms often file cookie-cutter suits, filling in rent numbers and landlord names on documents that otherwise remain the same, without verifying landlords’ information. The filings echo abuses committed during the foreclosure crisis, when banks churned through hundreds of documents without reviewing them for accuracy.

And with the barrier to filing a housing court case so low — a $45 fee — the volume is such that each of the 50 judges hears as many as 90 cases every morning, making it easy for errors and even outright lies to slip through. In January, a commission of lawyers and judges issued a highly critical report on housing court, calling the number of judges “grossly inadequate” and saying that at least 10 more were “not simply requested, but mandated.”

Most tenants do not have lawyers, even as big landlords keep lawyers on retainer. At the Dunbar, tenants had lawyers in fewer than 10 percent of the cases reviewed by The Times. Landlord lawyers go from courtroom to courtroom, pulling tenants into hallways to agree to stipulations before they ever see a judge. Tenants who do not speak English face particular problems: In Queens, more than 160 languages are spoken, but the court has staff interpreters for just three, the commission reported. Some tenants said they felt pressured to agree to deals they did not understand.

“They go in there with their fancy lawyers, and don’t let tenants speak,” said Pandora Holt, who has lived at the Dunbar for 22 years and has been sued four times by E&M.

Although a new law aims to provide free lawyers to poor tenants within five years, advocates worry that the city funding for the project is insufficient, and that a heavier caseload could stretch pro bono lawyers and judges too thin.

Judges are hard-pressed to tell if certain landlords are filing inordinate numbers of eviction suits. Housing cases, unlike those brought in other courts, are not available digitally, and often lawsuits identify only the
limited liability company listed as landlord, not the underlying owner. Judges can’t even get a full picture of what is happening in one building. On Feb. 5, Horing, Welikson & Rosen sued 38 tenants at the Dunbar. Those cases — among 60 suits that a single lawyer filed that day against tenants in 18 buildings — were parcelled out to at least six judges.

Ms. Digrugilliers said Horing, Welikson & Rosen, which also represented Pinnacle when it was investigated by the attorney general, was “as cautious as possible” in bringing lawsuits, and that neither the firm nor its clients intentionally filed meritless lawsuits.

Green & Cohen is considerably smaller than other firms but has represented large landlords like E&M and Orbach. (Orbach appears to have recently stopped using the firm.)

An analysis of hundreds of Green & Cohen’s cases revealed sloppy paperwork in many. The firm sued tenants for money due from government agencies, misstated rents and misspelled names. It submitted erroneous rent ledgers and documents that belonged in different cases.

In 2015, a federal class-action lawsuit against Green & Cohen said that the firm had seemingly used “the same template for all the hundreds of cases that they filed against tenants within the State of New York within the past year,” and that it had determined that meaningfully reviewing cases before filing was “not as lucrative as the filing of pleadings and motions” without review. The case was confidentially settled.

Green & Cohen did not respond to repeated requests for comment.

Even lawyers who engage in misconduct are unlikely to face penalties. Between 2011 and 2016, landlords or their lawyers were sanctioned or cited for contempt in housing court fewer than 50 times. The court doesn’t even track lawyers or landlords who get in trouble.

Housing court judges rarely impose sanctions unless lawyers request them. But more than two dozen tenant lawyers said they feared seeking sanctions.

In October 2016, for instance, Orbach sued Margarita Galvez, saying she owed more than $12,000 on her Upper West Side apartment. Green & Cohen pursued that lawsuit even though Ms. Galvez’s lawyer, Rachel
Hannaford, insisted that the rent had been paid. The rent ledger itself showed a $138.50 credit.

Ms. Hannaford asked for sanctions, but only against Orbach. “I knew that my little lawsuit wasn’t going to get Green & Cohen sanctioned, and didn’t think it was worth the risk and the harm to future clients,” she said.

Ultimately, as part of a stipulation, she dropped that request. Ms. Galvez had not wanted to drag out the case.

Ms. Carranza also ran afoul of Green & Cohen. In July 2014, almost a year after the last court date in her first case, Orbach sued her again, saying she owed about $5,500, more than half her annual income.

“The neighbors would tell me, ‘The landlord is saying you owe a lot of money,’” Ms. Carranza recalled. “Can you imagine? I was so embarrassed.”

It took her lawyers almost seven months to prove that whatever rent was missing was owed by a city program.

**Poorly Served**

Wesley Moise is a process server, charged with notifying tenants that they face possible eviction. Judging from entries in court records, he also appears to have acquired some of the salient skills of a mountain goat.

On March 24, 2017, Mr. Moise reported, he delivered notices to six Dunbar tenants in 12 minutes.

The Dunbar has 44 stairwells and 536 apartments. Each stairwell has its own front door. There are no elevators.

Yet Mr. Moise claimed that, in those 12 minutes, he raced from the third floor of one stairwell to the fourth floor of another stairwell, to the sixth floor of a third stairwell, to the third floor of a fourth stairwell, to the third floor of a fifth stairwell and finally back to the fifth floor of the fourth stairwell. Each time, he needed to ring a doorbell and be let inside the building.
“I know this building,” said Julio Almonte, who lives in the fourth apartment Mr. Moise claimed to have visited that morning. “Even if I wanted to, there’s no way I could go to six different apartments in 12 minutes.” Mr. Moise, he insisted, did not show up at his door.

A process server’s job may sound mundane, but it is crucial: A tenant who does not appear in court can end up evicted after a default judgment. “You have to get notice and be able to defend yourself,” explained housing court’s supervising judge, Jean T. Schneider.

The Times examined hundreds of cases involving an agency that contracts with Mr. Moise, Howard Belfer Inc., which is routinely hired by law firms representing Orbach and E&M. A range of problems emerged: improbable routes, hard-to-recreate travel times, signatures by one notary public on top of another’s typed name, and in-person encounters that tenants say never happened.

In an eviction case, a landlord must try to notify a tenant in person on two separate occasions, with two separate documents. Each time, a process server should knock and wait several minutes, returning another day if no one answers, according to case law. If there is still no response, the server must leave a notice on or under the door.

There is one further opportunity to alert a tenant in person. The landlord is supposed to verify that the tenant is not in the military or dependent on a service member, a federal requirement protecting military families from eviction.

But the courts depend on process servers and those who file nonmilitary affidavits to do what they say. Servers must keep GPS tracking data, which is notoriously fuzzy, and log books, but audits are rare.

About 33,000 tenants last year faced judgments for failing to appear in court. It’s not clear how often bad service leads to such default judgments. But tenants who first learn about a case from subsequent eviction notices look like scofflaws in court.

Mr. Alzanden, the Dunbar tenant evicted while hospitalized, had to pay more than $4,200 to recover his apartment — for rent he said he didn’t
owe, as well as marshal and legal fees and storage of his belongings. “We had no choice,” he said.

A judge can order a hearing when service is disputed; about 800 are held every year. Service agencies are supposed to report them to the city’s Department of Consumer Affairs. Not all comply.

Most violations result in modest fines and consent orders. Instead of revoking licenses, the city usually opts to deny license renewals.

Since 2014, only one agency, JDG Investigations, and five servers have been denied for enforcement reasons. Regulators claimed that JDG, based in Queens, had hired unlicensed people to serve court papers at least 1,800 times.

Others have kept their licenses despite numerous violations. In August 2016, Nationwide Court Services, based on Long Island, settled 287 violations.

Mr. Belfer, who runs the agency bearing his name, has been in and out of trouble for almost as long as he has been licensed. In 1987, a civil court judge found that affidavits from Mr. Belfer and another server “are suspect and are not to be granted simple credence.”

In 2012, his agency’s license was suspended for a month. In 2013 Mr. Belfer paid a $60,000 fine and agreed to monitor servers.

Yet his servers continued to have problems. Camera footage showed that one Belfer contractor, Dwayne Thomas, had not appeared when he claimed to have served a legal notice in May 2015, a federal lawsuit says. In 2016, the city denied a license renewal to another server, Hakeem Jamal, in part because he claimed to have served a woman at Vincent Yeats’s apartment in the Dunbar one minute before serving someone 17 miles away in Queens.

“It was total malarkey,” said Mr. Yeats, who lived alone and found out about the case days before a possible eviction. “I had such hassle from them, I just gave up and moved.”

Mr. Jamal, who also worked for Nationwide, said it had fabricated the service in Queens. Nationwide disputed that, saying it had been “duped by
an unscrupulous server.”

Mr. Thomas and Mr. Moise did not respond to requests for comment.

Ms. Digrugilliers, the lawyer for E&M, said Mr. Belfer’s company was one of several used by her firm. She said the firm was not aware of any fine against Mr. Belfer’s company, and disputed tenants’ claims of being improperly served.

Last fall, The Times requested public records on Mr. Belfer’s company from the Department of Consumer Affairs. In late February, after months of extensions to gather documents, the agency denied much of the request, citing an investigation into Mr. Belfer.

At the Dunbar, Mr. Belfer handled many of the nonmilitary affidavits himself. He reported speaking with 15 tenants in 2016 and 2017, one twice.

But all 15 tenants told The Times they had never met Mr. Belfer. Two were out of the country when he said he visited them. Five had moved out.

Mr. Belfer also claimed to have spoken to another tenant, Edward Robinson, on Dec. 5, 2015. Mr. Robinson had died — 22 years earlier.

There was significant fallout: Since 2015, six tenants whom Mr. Belfer claimed to have spoken to were locked out. Three had to pay legal and marshal fees to recover their apartments.

When a reporter visited his Long Island office, Mr. Belfer said he did not want to discuss his business. But when asked about nonmilitary affidavits at the Dunbar, he responded: “These people do not pay their rent. They will say anything to anybody.”

A Neighborhood Changed

The Orbach Group’s buildings on 109th Street illustrate how a landlord can alter a neighborhood. Once an apartment empties out, workers chop it into smaller rooms and install new fixtures, all catering to students at nearby Columbia University.
Orbach even markets the neighborhood as “CoSo,” for Columbia South, and has advertised on the university’s internal housing site.

College students don’t complain much, don’t know much about rent regulation and don’t stay long. Every new tenant means an opportunity for a higher regulated rent, until the apartment hits the free market.

The plan is working. In 2009, when Orbach arrived on 109th Street, 285 of the 381 apartments were rent-stabilized, the most common kind of regulation, tax bills show. But by 2016, the most recent data available, only 121 were.

Orbach’s aggressive use of housing court attracted the attention of the state attorney general’s office, which in 2015 informed tenants that Orbach was under investigation, in part for “frivolous eviction proceedings.” By then, Orbach was filing far fewer lawsuits, though it still relied extensively on holdovers. That investigation continues.

Orbach now owns about 75 buildings near Columbia. Meyer Orbach has branched out, buying into the Minnesota Timberwolves N.B.A. team and guiding his company into a new market: buildings that depend on federal subsidies for the poor.

In November 2014, at age 91, Ms. Carranza was living on about $830 a month in what her lawyers described as “horrendous conditions.” She had been through 19 court dates.

That month, a judge ordered Orbach to fix the apartment. Because the work would be so extensive, Ms. Carranaza’s belongings were moved into storage. She went to stay with her niece, Melinda Torres in Carlisle, Pa. The family regularly visited the empty apartment to check on repairs. Nothing much was done.

By June 2015, the apartment had no running water and was infested with roaches. Ms. Carranza sued the Orbach subsidiary that owned her building in housing court to force repairs. Separately, she sued the Orbach subsidiary; Mr. Tawil, the building manager; and Green & Cohen in federal court for violating the law prohibiting unfair or abusive debt-collection practices.
But by spring 2016, tired and worn down, her apartment still in disrepair, Ms. Carranza decided to settle, for about $100,000.

Ms. Kittel of the Orbach Group said Ms. Carranza had consistently demanded a six-figure payment to relinquish her apartment, despite the fact that she was living in Pennsylvania. “We believe that Ms. Carranza truly demonstrates how broken the system is,” she said.

Ms. Carranza now lives with the Torreses, near cornfields, barns and woods. There is no church with services in Spanish. No grocery catering to Latinos. No old friends to visit. There are not even any sidewalks.

She spends her days inside, mostly alone. She cooks for herself on a hot plate, fried chicken legs and potatoes.

“I lost everything,” she said. “I feel so bitter inside, and I don’t like it.”

Every month or so, her relatives drive her back to New York, back to her neighborhood. It is always bittersweet. A yoga studio has replaced her karate school. Where a 99-cent store once stood, Orbach has set up a real estate office: “CoSo,” a sign announces in big blue letters.

Last fall, Ms. Carranza returned to close her bank account. She stood in front of her building, surrounded by friends, telling them that there were no Latinos in all of Pennsylvania.

“There’s no one to talk to,” she said. “You can talk to the trees.”

Her name was still on the buzzer at 247 West 109th Street. After a tenant invited her inside, Ms. Carranza ran her hand along the hallway as she walked, pointing out her apartment — No. 2 — and her mailbox.

After years of failed requests for the most basic repairs, her apartment had been completely remodeled — illegally, as no building permit was ever filed, buildings department records show. Two Columbia students paid about $3,500 a month to live there.

Ms. Carranza walked through the home she could no longer recognize, running her hand along the new kitchen counter, touching the new sink, remembering where she used to keep her French dining set, where she used
to sleep. A stairway had been added, leading to new basement rooms. She
gave one tenant a sideways glance.

“Do you think he’ll leave?” Ms. Carranza asked her niece. She paused,
thinking. “What if they’d give me my apartment back?”

She would sit on the stoop again, and she would invite people over for
dinner again, and she would fry chicken again. What happiness she would
have, she said, if only she again had her home.

Isvett Verde, Sean Piccoli, John Krauss and Paul Moon contributed reporting. Susan Beachy
contributed research.

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UNSHeltered

Where Brooklyn Tenants Plead the Case for Keeping Their Homes

Settlements are pushed in chaotic hallways, emergency loans are held up as cure-alls and delays are seemingly endless. Welcome to housing court. Take a number.

By N. R. Kleinfield  May 20, 2018

Outside, shuddering in the cold, they waited. For regulars, the ones flung repeatedly into this quizzical place, they knew it was going to be a long, sour wait, for the line looped back and wiggled around the corner and touched the Lane Bryant store. The Lane Bryant store usually meant upward of an hour’s wait.

This was the line to get into 141 Livingston Street in Downtown Brooklyn, premises of Brooklyn Housing Court. Its business is deciding whether to evict people. It was this way in rain and howling wind and snow. Under the gray slab that was the sky, a gangly man slid down the line, barking out his spiel, offering cards for a free program to pay moving expenses, modest consolation if things went badly inside.

An abundant woman with a hurting look was stammering into her glowing cellphone: “I don’t know what to do. I’m not going to go live on the street. I’ve got a son. How do I tell my son we’re living on the street?”

UNSheltered

Articles in this series examine New York’s broken system for protecting tenants and affordable apartments.

Part 1: The Vanishing Affordable Apartment

Part 2: The Eviction Machine

Part 3: 69,000 Housing Crises

What You Need to Know as a New York Tenant
Farther along, a man fingering his beard, his eyes narrowed to slits, said into his phone: “I’m waiting in line, seeing if I got a home. I’m a broken homeboy.”

Sullen people with derailed lives being reset to zero, inching toward the unknown. The waiting added to the stress. It added to the humiliation.

In Brooklyn, you waited in line to get evicted.

**What You Need to Know as a Tenant**

New York’s housing system can be complicated to navigate. Here’s a quick primer on what your rights are and how to exercise them.

On the second floor, first-timers took numbers and sat until called over the loudspeakers to a clerk’s window to learn their next court dates. Like bakery numbers. Bingo numbers. Yellow Ticket 71, Window 3. White Ticket 50, Window 7. Yellow Ticket 72, Window 3.

At the help desk in the waiting room run by Housing Court Answers, a research and advocacy group, a man said loudly: “Seven times the landlord has tried to evict me. The lawyer calls me a Gypsy. I’m not a Gypsy. I’m not a thief. You can call the F.B.I., anyone, I’m not wanted, I’m not a thief. I’m a grandfather. Their lawyer wanted to beat me up, too.”

Next to him, a man with a prosthetic leg explained that he had missed a court date while in the hospital to fix his heart, and now his landlord was evicting him. “They got a bunch of trumped-up things because they want someone else in there,” he said. “They don’t want the ones that make sense.”

*(Read about how landlords have exploited weakened laws and fragmented bureaucracy to remake buildings and neighborhoods, in Part 1 of this series.)*
Nearby, a young man sat at a folding table, entering cases into a computer for the tenant-screening services that offer blacklists — compilations that landlords can buy to identify tenants who have been in housing court, people they’ll avoid renting to. You can win your case, yet you still make the list, still depart wearing the taint of housing court.

A Lopsided Court

New York City’s housing crisis doesn’t start in housing court. But it ends here, the last stop on the road to eviction. It’s the system’s busiest court.

Each borough has a housing court, but Brooklyn’s stands apart. It isn’t a courthouse, but a repurposed commercial building whose better days have long been forgotten. There’s inadequate space. Balky elevators. Grimy bathrooms. No privacy. Judges squeeze into the same elevators as everyone else, sometimes skipping a car if a litigant they’ve ruled against is inside. One judge remembers being tailed to the bank. A precaution whispered by seasoned courtgoers is to wash your clothes when you get home. Bedbugs. The court is due to move to more appropriate accommodations in the municipal building, but it never seems to happen.

Almost no one is pleased with the court’s tortured workings. Plodding and confusing, the court often seems diffident in dealing with the homes of human beings. Landlords complain that the court tilts toward tenants, that it commonly takes three to six months to evict someone, whereas in some other states it can take mere days. But while New York is considered to have strong tenant protections, bewildered tenants still routinely find themselves outfoxed by landlords. They battle for their homes largely unrepresented by lawyers, making housing court the most lopsided court in the system.

“It has always been the single defining thing about housing court since it was created, to try to create justice when most of the people on one side were represented and one side was not,” said Judge Jean T. Schneider, the citywide supervising judge for housing court.
New York’s housing court was created in 1973, with the main objective of making sure apartments stayed in good repair. Today the bulk of its work is eviction proceedings. Little of its activity has to do with getting repairs done, something it is notably ineffective at doing.

Last year brought a blur of nearly 69,000 filings in Brooklyn, second only to the Bronx. Only about 6 percent were so-called HP cases (for Housing Part), in which tenants bring actions against landlords for offenses like lack of heat, broken fixtures or vermin. Virtually all the rest were eviction actions, mainly over tenants’ falling behind on the rent.

But with landlords keen to empty apartments to raise rents, a number of cases have been brought over lagging rent payments that are hair-splittingly minimal. And there has been aggressive use of another species of eviction proceeding, known as a holdover, that can involve minute — and sometimes fabricated — violations of a tenant’s lease. In Brooklyn, about 17 percent of eviction cases last year were holdovers: One tenant had no right to a lease and wouldn’t move; another kept an unauthorized washing machine; a child, as claimed in one case, was throwing rice out the window.

(Read more about how landlords have commandeered the housing court system in Part 2.)

Yet while housing court is increasingly used as a tool to wrest apartments from the shackles of regulation, it is a lot more complicated than that. Inside its courtrooms are the textbook bad landlords, but also plenty of dishonorable tenants. Mostly, there are hurting families fighting to keep a basic human necessity — a home — at a time when tenant protections have eroded and gentrification is shoving ever deeper into Brooklyn and the city’s other boroughs.

The steady stream of people trickling into this maze of courtrooms gives the impression that an entire small town is perpetually being cleared of its citizens. The pace of evictions has slowed recently, as legal services for tenants have expanded and government payments for arrears have increased, but it remains high. Last year, there were 21,074 across the city. Of those, 5,984 took place in Brooklyn. In other words, every day an average of 16 families lost their homes.
Settling in the Hallway

The hallways were jam-packed. People pushing babies in strollers, people sucking on asthma inhalers, people trailed by wheeled oxygen tanks. Most tenants were black or Hispanic. Most were women.

A majority were on public assistance, but many were working- or middle-class, as housing cases have climbed the economic ladder.

The place to understand housing court is the hallways. They are the court’s war zone. A vast majority of cases end in settlements. Otherwise the court would implode, because it hasn’t the resources to conduct many trials. The emphasis is to settle now, settle always.

Unwritten protocol is that tenants wait inside a courtroom, often for hours, until landlords’ lawyers bustle in, bellow their names and beckon them to step out to talk.

Settlement discussions occur in the hallways, within earshot of everyone, because there is no other space for them. Since there is little seating, these conversations usually happen standing up. It’s hard to think clearly when you can’t even sit down. A report on the court years ago said it resembled a hospital waiting room, and that seems about right. The hallways, though, feel like a bustling bazaar. Negotiations deal not with textiles or pottery, but with homes. Litigants trade money for time, until there is no more money and therefore no more time. And therefore no more home.

Once an agreement is reached, the distilled terms — 30 days to pay $2,304.83, or 45 days to pay $1,922.16, or 15 days to get out — are normally handwritten by the landlord’s lawyer on a sheet known as a stipulation, or stip. Stips are the currency of housing court. Once signed, they are presented for approval in lightning-fast appearances before a judge who knows little, if anything, of their back story.

The experience of James Caple speaks for many. For 12 years, he had lived in a Crown Heights apartment plagued by leaks and other shortcomings. To little avail, he complained about mold and the stink of garbage outside his
windows. He lived with his girlfriend, two dogs and two cats. The apartment was rent-stabilized, $1,175 a month.

He is 62. His biography of a dwindling life includes the facts that he was a mechanic and worked in housekeeping at a nursing home in California, became H.I.V. positive, lived on Long Island with his aunt until she died, slept in a shelter for six months.

One day, his girlfriend’s brother stopped by. When he left, the police arrested him outside and found drugs on him. They knocked on Mr. Caple’s apartment and asked to look around. He let them in, and they discovered nothing of interest.

Several weeks later, he received notice that the landlord was seeking to evict him because he was a drug dealer. He didn’t understand, thinking he was simply accused of being a nuisance. He knew he was a complainer. He said he never sold drugs, didn’t use drugs.

At court, in February 2015, the landlord’s lawyer pulled him into the hallway and offered a paltry $5,000 to clear out. He said no. At the next court date, pressed again, he signed a stipulation to leave. Why? “Because the landlord’s lawyer said it was in my best interest,” Mr. Caple said. “Said I couldn’t win. I was shook up. I didn’t know anything. I’m just me.”

The agreement omitted the $5,000. The judge approved it.

Tenants wind up signing all sorts of dubious stips. Because they’re scared. Or bewildered. Or ashamed. Or have children to pick up from school. Or can’t skip another day of work. Or think they’re speaking to an impartial court official when it’s actually the landlord’s lawyer.

Court lawyers and judges review stips, but in many instances those are inadequate safeguards. Judges routinely face 40, 50, 60 cases a day. One judge had 83 on a recent day. Another had 92. They say they would like to have half as many, a third as many, to be able to consider them more thoughtfully.

Mr. Caple feared he would wind up homeless again. A tenant in a nearby building told him that landlords were squeezing people out of the neighborhood and that Brooklyn Legal Services would represent him pro
bono. The lawyer got the stip vacated, and finally, nearly two years after the case began, the landlord discontinued it.

Mr. Caple’s apartment still needed repairs. His health wavered. On good days, he hunted for discarded cans to redeem, to help cover the expenses of his pets.

‘I’m So Ashamed’

In a corner courtroom, Judge Jeannine Baer Kuzniewski shushed the room and addressed the tenants who filled the pews, saying that they had to check in by 10:30 a.m. or risk being defaulted. “Unless my administrative judge tells me the elevators aren’t working, which happens fairly frequently, then this may delay defaults,” she said.

Then the judge addressed a 74-year-old man about to be evicted, with nothing left to avert that end. She spoke tenderly. He was from Baltimore. She was from Baltimore. She dwelled on that commonality. “Baltimore is a nice place,” she said. She asked if he had children. He had seven. She asked if he had told them of his plight. He had not.

She said: “Should I presume when your children were young you did everything for them? Wouldn’t they want to help you if they knew? Think about it. It’s up to you. It’s your call. If it were my father, it would hurt me to know my father didn’t turn to me.”

Blank-faced, he said nothing. She granted him until the end of the month to leave. She finished up, 50 more cases beckoning. “Sir, do you have any questions?” she asked. “Do you understand this?”

He stared with flat affect. He understood.

In the hallway, his voice was shy and hesitant. His name was Ulrick Alcindor. He used to have a construction business. His marriage had ended. Seven months before, he had left for New York, a city he had never seen, banking on its mythic infinity of possibilities.
He arranged to work as the maintenance man in a building in East Flatbush in exchange for a dank basement apartment. He gave out his card at Home Depot to solicit jobs for income. Calls were scant. Six weeks earlier, as he was leaving for church, the landlord announced that he had to leave.

He said he needed to get to church. When he returned, the locks had been changed. This was illegal. The police made the landlord give him keys. Two days later, he received a notice summoning him to housing court.

He had no lease and no standing. A lawyer told him she couldn’t help. So he returned alone for this final verdict.

He had been trying to find a place, scouring ads on the computer at the library. At best, he could afford $500. That went nowhere in today’s Brooklyn. His savings totaled $400.

His voice thinned. He began to cry. He said he had nothing. He had put belongings in a storage unit in Baltimore but fell behind on the rental fee. “I came here with two pairs of shoes,” he said. “Two pairs.”

“I’m ashamed,” he said. “I’m so ashamed.”

In succeeding weeks, time slipping away, he retreated to Baltimore, to temporarily occupy his old house that his wife was selling. Late last year, he returned to a Brooklyn room that cost $600 a month. One of his eyes yielded to glaucoma, and he couldn’t work. His Social Security left him without enough money for food. He needed someplace cheaper, but had no idea where it could be found.

Swapping Stories

Amid the patter and the corrosive exchanges in the hallways, tenants told stories, the grotesqueries that overtook them, stories that gained legs and got retold as revelations. It was the way conversation was made in housing court.
Two women were talking on the fifth floor. Four roommates shared an apartment. One day they found a young Italian woman setting up house on the foldout couch in the living room. The landlord had rented out the couch. They tried to glean some understanding from the Italian woman, but she spoke essentially no English. For all they knew, she thought such were the eccentricities of New York life.

They protested to the landlord. His response: Tough. One of the roommates, a restaurant hostess, put up with the weirdness for a month and a half before moving out. The Italian woman took her room.

Then this: a couple with an autistic son, mushrooms growing on their bathroom walls, rats the size of their cat. The woman said the ceiling fell on her while she was showering. When they complained, the landlord slapped an eviction notice on their door, ordering them out in three days. At court, they found out the notice was a fake that he had printed up.

And: a man with a Crown Heights apartment, the rent a controlled $235. A new owner offered him $50,000 to leave. He moved. He deposited the check. The landlord had put a stop on it. When he called the landlord, the response was unsympathetic. He received a new check that did clear: $2,500.

One-Shot Deals

Outside the one-shot room on the fourth floor, people piled up. They pulled numbered tickets from the dispenser on the wall, then stood in the hallway burble until motioned in to plead for money. About 55 tenants a day came calling.

The one-shot room is where the Human Resources Administration, the city’s social-services agency, processes emergency payments to extinguish the arrears of tenants facing eviction. The payments, called one-shot deals, are talked about all day, every day. They’re the magic elixir of housing court. In a single wondrous act, a one-shot vanishes that $2,351 in debt, that $6,802, that $4,013.
Under Mayor Bill de Blasio’s administration, significantly more money has been paid out as the program has been marketed more aggressively and caseworkers have been told to stress averting homelessness when they weigh applications. In Brooklyn, $62.6 million was spent on one-shots in fiscal 2017, up from $35.2 million three years earlier, the individual amounts averaging $3,800.

The rental assistance staff members in the one-shot room have the authority to approve infusions of up to $15,000 on the spot. Higher-ups have granted one-shots topping $30,000.

But often the figures are shockingly small. “I’ve seen one-shots for $200 or $300,” said Mayra Infante, a former supervisor for the Brooklyn unit. “I’ve seen cases where someone was being evicted for $50.”

In they marched. No. 29. No. 30. No. 31.

A 68-year-old woman with glittering eyes, $1,800 behind on rent for her apartment of 38 years, had been sick with cancer. Her granddaughter lived with her and had lost her job but had just been hired at H&M. Approved for a one-shot, her mood ascendant, the woman said: “Thank you. Thank you, Jesus. I was worried to death.”

A woman with wobbly finances had paid her daughter’s college tuition instead of the rent. The agency considers such choices misguided money management, a common failing cited in the one-shot room. The caseworker scribbled down a referral for a financial counselor. Approved.

In their questioning, the caseworkers must ask what led to the arrears. Usually it’s loss of income. Family emergencies. A relative’s death. But there are outliers. A few years ago, a woman admitted that she’d fallen behind because she had gone to the Dominican Republic for liposuction. A retired police officer told how he had met a woman online who visited for the weekend and departed with $7,000 of his money. Both were approved for one-shots.

Among all the agency’s offices citywide, the approval rate is 67 percent. But in this office, it is close to 99 percent. “These are people about to be evicted,” Ms. Infante said. “Some of them are hours away.”
Technically, one-shots are loans. But older New Yorkers and people collecting Social Security disability don’t have to repay one-shots. Others on public assistance are expected to repay between 5 and 10 percent. The rest, who are a minority, get repayment schedules that can stretch for years. According to the social services agency, about 80 percent of people are behind on repaying the loans.

To get a one-shot, you must show pay stubs, prove your income, your rent. A popular rule of thumb is that people should spend no more than a third of their income on rent, but that’s a fantasy in the one-shot room. Half is pretty much the norm, and many are paying 75 or 80 percent.

The city’s expectation is that no one should get multiple one-shots in a year. Yet some people collect two or three.

Lawyers and even judges dart into the one-shot room to check on applications. A landlord’s lawyer whisked in, saying, “Where’s it stand? I’m having a stroke here, a ministroke.”

Do one-shots permanently solve these crises? Hard to know. For a tenant who has missed the rent because of one of life’s occasional calamities, a one-shot can mend things, perhaps for good.

Many in housing court, though, know of manipulative tenants. One tenants’ rights advocate acknowledged that she knew people who, upon receiving a one-shot, ceased paying rent. Numerous people live on income insufficient to keep the marshal away for long in a changing Brooklyn. They cycle in and out of court and get two, three, four one-shots before being denied. Landlords’ lawyers deal with regulars they see every year or two. They inquire about one another’s children, like old friends catching up.

“The service we provide is a prevention tool,” Ms. Infante said. “It’s not a solution.”

No. 69. No. 70. No. 71.

No Trading Down in Brooklyn

To the question of where the evicted of Brooklyn went, these were some answers. A lot of housing court ends in geography.

Woman going to Puerto Rico. To stay where? Mom’s. Woman going to Jersey City, over the river. To stay where? No idea. Woman going to Indiana. To stay where? Her son, carries the mail, keeps a parakeet.

It used to be that people moved farther into Brooklyn as their lives went askew, to the next neighborhood or the next. Traded down. Now Brooklyn offered no down.

These were, in a number of instances, people working fundamental jobs. A UPS driver. A nanny. A gravedigger. Part of the human infrastructure of the city. The well-housed want their packages delivered, their children minded, their graves dug. But where do these workers live?

A woman ousted from her apartment with her daughter and grandson had searched endlessly, but Brooklyn’s economics no longer intersected with hers. “These rents are like a bad stomachache,” she said. So on to Albany. A three-bedroom there for $1,000 would renovate her disappointed life. “I’ve got to bleed Brooklyn out of me,” she said. “Get an Albany vibe.”

“My best to you in the Snow Belt,” the judge said. “You know Albany gets a lot of snow.”

Triage at Legal Aid

Now it was Thursday and the weekly case review meeting at the Brooklyn offices of the Legal Aid Society, just down the block from housing court.

Legal Aid keeps an office at the court, where a paralegal hears tenants seeking free representation. The demand is too great — around 120 visitors a week — so people are prioritized. Some earn too much to qualify. Some need cheaper housing or more income, not a lawyer. Inability to be helped is a big category.
From this weekly rush, the paralegal grants appointments with a staff lawyer to two dozen or so people. The lawyers gather details and then, on Thursday afternoons, assemble to chew over the tenants’ circumstances and determine whether to accept their cases. This day’s agenda listed 21 cases.

It’s striking how many eligible tenants don’t even consider a lawyer. They assume it’s not an option or don’t trust lawyers. They think little of a paid lawyer, less of a free one. One morning at housing court a woman was told she could walk down two floors and apply for a lawyer. She waved it off. “It’s not worth the trouble,” she said.

Studies used to show that as few as 1 percent of tenants in housing court had lawyers, compared with more than 90 percent of landlords. A survey in 2016, after the city allotted tens of millions of dollars for legal help for tenants, found that 27 percent of tenants had lawyers, against 99 percent of landlords. Last year, the city announced that it would phase in far greater funding for lawyers for the poor, and tenant representation has been climbing significantly. Tenant lawyers, however, have been scrambling to meet the heavier caseloads and finding themselves unable to devote as much time to individual cases.

Some of this day’s cases were straightforward: A woman with developmental disabilities was behind on her rent, which equaled half her monthly income. Another woman had had a cracked floor that the landlord wouldn’t fix. She had it repaired and subtracted the cost from her rent. He was moving to evict her for nonpayment.

Now a peculiar one. A man responded to an apartment listing on Craigslist, was given a tour and took the place. He paid the rent by money orders he slid into a box in the lobby. After nine months, he received notice that he was being evicted. He learned that the tenant of record lived in Alaska and was apparently in arrears, and thus he and anyone else occupying the apartment were being thrown out.

“He literally has no idea who showed him the apartment and was renting it to him,” said the woman presenting the case.
The lawyers found the case interesting but beyond their help. It seemed the tenant had been swindled.

Next: a 61-year-old woman being evicted on the grounds that she had refused to allow an exterminator to rid the apartment of bedbugs. Huh? Who would risk their home out of affection for bedbugs?

The case had lingered since July 2015. Facts were fuzzy. The woman maintained that she had let the exterminator in but he had done nothing. The landlord said she hadn’t prepared appropriately. Seemed a solvable problem, yet the case was lined up for trial.

Stephen Myers, a supervising lawyer in the office, suspected that bedbugs were the landlord’s pretext to dispense with the woman. She occupied a $737-a-month rent-stabilized apartment in what had become a co-op building.

Next: a landlord alleging that a woman had allowed her sinks to overflow three times, damaging the apartment beneath her. The tenant below had been the woman’s best friend but no longer was.

“Client has not the best memory,” the lawyer said. “The first time she forgot to turn off the bathroom faucet and went to bed. Another time she was washing dishes and overfilled the sink. Then her granddaughter flushed her doll down the toilet and stuffed it up.”

The afternoon was gone. Of 21 cases, two were rejected outright: the Craigslist con and a woman with no capacity to pay the rent. Eight were “reps,” meaning they would be taken on, and 11 needed further research.

‘Your Attitude Is Off the Wall’

There’s often a good show in Judge Marc Finkelstein’s courtroom. He is known for theatrics and a certain grumpiness, an egalitarian grumpiness directed at one side as much as the other. At times, he pulls out a prop. For instance, he will confess that a case is giving him a headache, display a large bottle of aspirin and ask the litigants, “Do you need one of these?”
Here was a middle-aged woman he knew too well — in the midst of a divorce, evicted from her apartment but not fully moved out, given extension after extension — and his patience with her had faded.

JUDGE FINKELSTEIN: You’ve appeared in front of me umpteen times. I’ve given you umpteen opportunities. You’ve brought another order to show cause. You’re to move your stuff by June 14. What’s the problem now?

She said she needed a man to help.

JUDGE FINKELSTEIN: You tell me that you can’t do it without a man helping you. What am I supposed to do about that?

WOMAN: I need to work.

JUDGE FINKELSTEIN: I don’t care.

She wanted two more weeks. She showed him pictures of her furniture, how strong arms were needed to move it.

JUDGE FINKELSTEIN: So get a man. What do you want from me?

She said she had found her books from college dumped in the garbage, had donned a face mask to try to dig them out, and some were missing. She began to choke up.

JUDGE FINKELSTEIN: Now we go into the crying thing. This happens every time. You come in here with a smile like I’m your buddy, and when you don’t get what you want you start crying.

WOMAN: Maybe you can find my books.

JUDGE FINKELSTEIN: I’m a judge. I’m not the Sanitation Department.

He granted her six more days.
Another day, there was Ruth Jeanniton, a 46-year-old hairstylist with a modest income and a 6-year-old daughter. She was being evicted from an apartment in East Flatbush. A new owner was carving the place into multiple units. While she had previously agreed to leave in two weeks in return for $3,000, now she was asking for more time to find a new place. She mentioned to the judge that she didn’t have heat or hot water.

The landlord lawyer said: “This is just a shakedown. I don’t believe there is no heat or hot water. But if there was, to move her stuff out she could get a pair of gloves.”

That got the judge’s back up. “That comment is outrageous,” he said. “I could turn off your heat and tell you to get gloves.”

The lawyer continued to dispute the claim. The woman said the city had inspected the apartment and confirmed an absence of heat and hot water. The judge checked on the computer. The city had.

Judge Finkelstein told the lawyer, “Your attitude is off the wall,” and then, “When it’s time to fold your tent, it’s time to fold your tent.”

The lawyer couldn’t restrain himself: “If she’s freezing, she shouldn’t be there.”

“You can’t quit,” the judge said. “That’s your answer — if it’s freezing, she shouldn’t be there?”

The judge gave her another month. Turning to the lawyer, he said, “If I could, I would sentence you to live in this apartment.”

**Bad Economics**

Charles Wasserman motored through the hallways. A housing court regular, he mainly represents landlords. In his load of cases, he was puzzled by one against a tenant who owed $45,000, having not paid rent in 27 months. His colleague said, “That’s the gestation period of an elephant.” Mr. Wasserman learned that the building management somehow hadn’t noticed that the tenant had ceased paying rent.
Then he had Shane Peters, 36, who had bought his first house in Canarsie. It contained three rental units, and relatives of his would occupy the extra two. The previous owner’s husband had died and the existing tenants had stopped paying rent. Unable to afford to take them to court, she sold the building. Now one tenant refused to leave. Hence housing court.

“Some tenants I see once a year,” Mr. Wasserman said. “Some have known me since I’ve had children. That’s 15 years. Some of them do it to themselves or sometimes the system doesn’t help them get out of the way.”

Another lawyer, also a regular, said: “I’ve seen too many people who make the rent back-burner. Behind school uniforms, Christmas presents, graduation presents.” He recalled one evicted tenant who showed up in court with the iPhone that had just been released.

James Kasdon, a veteran landlord lawyer, said: “I’ve sued some people a dozen times. I sued one person 15 times. Same building. They’re gaming the landlord.” He said, “At the end of the day, the landlord is not the social safety net.”

One afternoon, in chambers, Judge Gary F. Marton reflected on the challenges of deciding cases: “I’ve had any number of instances when I’m presented with a stipulation and it has something in there that doesn’t really make sense, and I’ll ask the tenant, ‘Why did you sign this?’ And they don’t have an effective response.” He added: “Tenants will agree to paying all the rent in three months, and they know they need six months. A lot of people are counting on miracles.”

He knows the court befuddles tenants: “I’ve often had this discussion with tenants: ‘How much rent do you owe?’ They say four months. I say, ‘How much is that?’ And they can’t do it. The rent is $1,200 a month. They can’t ballpark it.”

Are landlords right to complain that evictions take too long? “In certain cases, yes,” he said. “In most cases, I’d say no. If you’re a landlord and you don’t know the process you’re getting into, then that’s on you. If you’re
going to be a landlord and you think you’ll never have a tenant who doesn’t pay the rent, you’re naïve.”

Judges recognize that there are bad landlords and bad tenants, but many cases boil down to bad economics. “I’d say most cases are unfortunate circumstances,” said Judge Eleanora Ofshtein. “I’ve said from the bench that both of you could end up in a shelter. ‘This person has a mortgage to pay, and you have rent to pay.’”

It frustrates her to see so many tenants who don’t budget well, “so few people who have a Plan B.”

And she has presided over many actions by landlords that infuriated her. “They want to evict over $10?” she said. “Really? I’ve seen $18. I’ve seen $36.”

**Don’t Have Guests in the Winter**

Abigael Puritz and Kate Klenfner could often be found at housing court. They were subsumed into it four years ago and couldn’t escape.

They occupied separate apartments in a building in Bedford-Stuyvesant. Ms. Klenfner, 39, is on disability. Ms. Puritz, 26, is an artist and student.

They contended that their rents had been improperly raised in the rent-stabilized building, and that their landlord wouldn’t fix things. Ms. Puritz said she had had no working toilet for five months and was using the bathroom in the park across the street.

Ms. Klenfner said: “In the winter we can see our breath inside. I have fibromyalgia and I’m cold like an 80-year-old woman.”

She avoided the bathroom sink. Sewer gas came up. She stuffed it with baking soda and put steel wool over the drain. She brushed her teeth in the kitchen sink. Once, she turned the kitchen faucet on and roaches poured out. She kept her dishes and toothpaste in the refrigerator.
Mr. Klenfner said: “I’m from New York. I expect a few rodents. They were coming under the door, ‘Hey, what’s up, what’s for dinner?’ I found a dead mouse in my bed.”

City inspectors identified 218 violations. The women stopped paying rent until the landlord resolved the issues.

Their landlord, Abdus Shahid, lives in the building. He said they had damaged their own apartments, including breaking the toilet on purpose. He has brought multiple actions to evict them. Experienced in these proceedings, he would lose one case and begin a new one. Ms. Puritz and Ms. Klenfner got Legal Aid to represent them in 15 separate cases.

Like many housing court proceedings, these didn’t follow a straight line, but zigged and zagged and retreated back to where they had begun.

One case brought by Legal Aid sought a court-appointed administrator to manage the building, as had happened with another of Mr. Shahid’s buildings. A trio of eviction cases were dismissed by a judge when Legal Aid pointed out that Mr. Shahid had filed documents that appeared to have been notarized by someone who was dead.

Ms. Klenfner showed texts from the landlord. One read: “You’re a stupid girl. You’re a foolish girl. I don’t like foolish girls.” Another: “My building is bad, I don’t want somebody will stay in bad building.” When she complained about the lack of heat, he advised her to go down the street, where blankets cost $20. Well, what if she had guests over? Don’t have guests in the winter, he told her.

Mr. Shahid has gone through five lawyers. The court, he complains, conspires against him. “I’m from Bangladesh,” he said. “In Bangladesh, I’ve never seen a court like this. It is no good.”

Ms. Puritz said: “This has taken its toll. I wasn’t in therapy before. Now I’m in therapy.”

Why do they stay? “I don’t have the money to move,” Ms. Puritz said. “And it’s too important to let him win. I’m the sort of person who, when they see something wrong, just gets stuck on it.”
Ms. Klenfner said: “I feel it’s sort of like Frodo and ‘Lord of the Rings.’ I feel we can do this.”

Fearful of the electrical wiring, Ms. Puritz slept with a fire extinguisher beside the bed. Once, she found an extension cord on fire. Ms. Klenfner often slept with a light on, hoping it would dissuade the mice and roaches. Some nights, as further deterrence, she slid an ammonia-soaked rag beneath the bed.

In October, the court agreed to turn the building over to an administrator. The judge declared the living conditions there dangerous and found Mr. Shahid guilty of harassment.

At the end of February, the Brooklyn district attorney filed charges of forgery and related offenses against Mr. Shahid, stemming from the allegations that he had used a dead notary’s stamp and signature on court filings to evict tenants.

At his arraignment, Mr. Shadid pleaded not guilty.

Going to Trial

Part Ex, on the fifth floor, was at a standstill. It was the waiting room for the fraction of cases actually destined for trial. “Ex” is for expediter, a term with hollow meaning in housing court.

When you report here, it does not mean you will have your trial. When you first come to Part Ex, you receive a number. Then you sit with the other new arrivals to see if there is a trial judge available. “It’s one level of Dante’s ‘Inferno’ — I’m not sure which,” one lawyer said of Part Ex.

For those whose numbers aren’t called, lawyers who know the drill will pick a new date far enough in the future — a month or so — to secure a low number next time.

A woman named Gloria waited with her son, holding No. 6. Her case had dragged on for many months. Her son has schizoaffective disorder. He hears voices. He lives in a studio apartment in Midwood. She had pictures:
A hole near the radiator, emitting a foul sewage smell. Windows falling apart. Leaks. No electricity in the bedroom or bathroom. “I would call management and they would actually insult me,” she said.

Thus rent was withheld. An eviction action began. A year ago, her son showed up in court alone. He couldn’t understand the goings-on. The landlord’s lawyer persuaded him to sign a stipulation agreeing to be evicted. The judge approved it.

When Gloria found out, she got it reversed. She told the lawyer: “You’re a vulture. I’ll bet you do this to a lot of people. How dare you!”

An agreement was reached that arrears would be paid and repairs done. But she wanted a partial abatement for what her son had endured. “His life has been diminished enough by his disease that he shouldn’t be shortchanged this way too,” she said.

She would take $1,000. Her son needed a new bed. The landlord refused even a penny.

The landlord’s lawyer strolled in now and asked the clerk, “Anything go on yet?”

Told no, he said, “Zippo, huh?” and marched out. He wouldn’t look at Gloria.

The clock ticked. People worked their phones. Slept. Snored.

A lawyer popped in, saying: “I’ve done bedbugs before. This is maggots.” He had a trial over an abatement for sharing quarters with maggots.

Settled by the window was a small landlord, 85, who owned two rent-stabilized apartments in a building that had been converted to condominiums. The woman living in one of his units had died and her daughter wished to establish tenancy. He wanted her gone.

He hated housing court. He described himself as “a victim of society.” He believed that many tenants were “getting away with thievery.”

The landlord had No. 2. He nodded at his lawyer slumped across from him, whose wife was pregnant. “His wife will have the baby before we’re called,”
the landlord said.

At 3:30 the case was finally called. The trial began, then was postponed when the lawyer’s wife phoned. She was feeling it might be time.

No other numbers were called. Gloria and her son got a return date a month away.

“What a spectacle,” she said. “What a disgrace.”

‘That’s How I Live’

In the end, housing court disappoints pretty much everyone, because its resources are inadequate and the core problem it finds is beyond the power of 141 Livingston Street. The court doesn’t build housing. It doesn’t create jobs. It stamps stipulations and wishes everyone a good day.

As a judge wrapped up a case involving a woman who had been given four months to move, the tenant added that a drunken neighbor had the habit of bursting into her apartment in his underwear. “I’m just a lowly Housing Court judge,” the judge said. “I have no jurisdiction over people who come into your apartment in their underwear.”

And then Princess Codwell. She saw a lot of housing court. Her arrears case had begun in July 2015. The judge had signed 13 extensions and now was signing a 14th. By her latest tally, she owed $5,023 in rent, plus legal fees. A week earlier, she had been evicted. She wound up in a homeless shelter and wanted her apartment back.

She was 44, a home health aide. She said she had one primary patient, and whenever that person entered the hospital — which had been happening recently — she didn’t have work. Her rent was $1,300, and she didn’t earn much beyond that.

“You know how I live?” she said. “I buy 25-cent bags of peanuts and I wash the salt off because I have high blood pressure. Sometimes I go and beg at the restaurant once they’re done for the day, at 10 at night, and they give me leftovers. That’s how I live.”
Already she had been granted two one-shot deals and was heading to the one-shot room to get a third. It would put her back in her apartment until the next crisis.

The judge was exasperated (“I’ve given you umpteen times to take care of this”). The landlord’s lawyer was churlish (“This is abuse of the system”). One could see their point. And one could see hers. She was doing a job that needed doing but that didn’t pay the rent. And so she had a life that didn’t square in today’s Brooklyn. Housing court was a place to come but not to find salvation.

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The scandals surrounding the New York City Housing Authority have focused, appropriately, on the terrible physical conditions in the nation’s largest public-housing system. The fact that housing built to replace slums has become among the city’s most dangerous and dilapidated has led to federal intervention and calls for funds to address the estimated $32 billion repair bill for the 334 NYCHA developments.

More money may help — but it’s far from the only or even the best answer to what ails NYCHA. It needs radical reform.

NYCHA’s federal monitor, once named, should consider creative approaches for the system, which was originally expected to be self-supporting. Here are a few that should be on the table:

**Commercial development:**

In contrast to private affordable-housing such as Co-op City, New York’s public housing includes little or no retail development — a choice made in the 1940s
by super-planner Robert Moses who thought the NYCHA “campuses” should be like parks. But some 180 of NYCHA’s properties are located in areas classified by the city as “underserved” (i.e., having less than 3 square feet of supermarket floor space per capita), with some large NYCHA properties located more than half a mile from the nearest supermarket.

New commercial space on NYCHA properties could improve access to fresh food for low-income residents and bring in new revenue. New streets on what are now dangerous open spaces would improve public safety.

**Tenant buyouts:**

According to the feds, 26 percent of all NYCHA tenants are actually “overhoused” — meaning they have more bedrooms than they need. Often this means older tenants have become empty-nesters but continue to live alone. That’s because the average NYCHA tenant has lived in her apartment for just under 19 years, which means that those trying to get into the system face a long waiting list (averaging almost four years) while many of the city’s new poor are locked out; there are far fewer Asians in the system than their poverty rates would predict.

“More money may help — but it’s far from the only or even the best answer to what ails NYCHA. It needs radical reform.

NYCHA needs to push for turnover — and could do so by offering longtime tenants cash payments to move out — based on how long someone has lived in a unit. Just as empty-nesters in private homes downsize to save on property
taxes, NYCHA tenants would pocket some cash — and make room for newcomers. Those newcomers, in turn, should sign a time-limited lease so the same situation is not repeated.

Changing the culture of NYCHA to one of up-and-out would be a change for the better, as well.

Public-private competition:

The looming NYCHA maintenance bill is so high not just because conditions are so poor; its union labor contracts inflate costs, too. NYCHA can reduce costs by asking union labor to bid against private construction contractors for the same jobs. If union labor is better and cheaper, it will keep the work.

This isn’t a fanciful approach. It’s been tried and proven elsewhere — notably in Indianapolis, where former Mayor Steve Goldsmith (later deputy mayor to Michael Bloomberg) used just such an approach for that city’s public-works projects.

Selective building sales:

Many of NYCHA’s properties are located in areas far from jobs and transit and where land values are consequently low. But many other public-housing projects — on Manhattan’s West Side and near the Brooklyn waterfront — stand on what has become valuable real estate.

NYCHA could sell such properties to private developers for hundreds of millions of dollars, and use the funds to create a public-housing trust fund to help repair a still-vast system. Again, tenants could receive a cash buyout to help them make the transition, just as private developers do with rent-stabilized tenants in buildings they plan to redevelop.
Some will find some of these ideas acceptable and others beyond the pale. But the broader point is this: The original idea of public housing — which was for it to depend on rents to maintain the buildings — has failed. We’re long past time for tinkering with the system. The time for bold action is here.

This piece originally appeared at the New York Post

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The Stuyvesant Town and Peter Cooper Village complexes in Manhattan still have rent-stabilized apartments. Opened in 1947, their original mission was to provide affordable housing to returning veterans. // Mary Altaffer/AP

PERSPECTIVE

How Low Turnover Fuels New York City’s Affordable Housing Crisis

American Community Survey data shows that New Yorkers stay in apartments, including rent-regulated ones, for longer than most, leaving little room for newcomers.

DEC 18, 2018

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We are accustomed to gauging the housing health of cities through some familiar data points: vacancy rates, new building permits, affordability. But there’s another, under-appreciated measure which explains a great deal about a city’s housing market and, specifically, provides an insight into the ongoing housing “crisis” that plagues some of America’s most prosperous cities, especially New York. Let’s call it churn. You might also call it turnover—the rate at which one household moves out and a new one moves in.

At first glance, a high churn rate might not seem to be a positive. Stable communities and households with deep roots in communities are, in many ways, desirable. But when too many residents stay put for too long, problems arise. For one, housing can be under-utilized—and that poses a problem for potential newcomers. Among the reasons that New York City’s vast public housing system has such a long waiting list—HUD data shows it takes, on average, 99 months before an applicant gets an apartment—is its estimated 25 percent rate of “over-occupancy.” These are chiefly older residents whose children have moved out, living alone in units with multiple bedrooms.

The same is true for New York’s 1.1 million rent-regulated apartments, where, according to a New York University report “about 23 percent of households in stabilized units have lived in their unit for 20 years or more in 2011, compared with only seven percent of households living in market-rate units.” Just as in public housing, empty nesters with no incentive to downsize stand in the way of newcomers. In a city such as New York that has long been a magnet for the young and talented, these newcomers may have to live, dorm-style, with two or more roommates—or give up and return to Cleveland (no disrespect; it’s my home town).

We don’t just have to guess about churn rate based on indirect measures. The American Community Survey regularly asks whether a householder has moved into a unit within the past year, and reports the three-year average of such responses. It turns out that there is great variation among major U.S. cities. New York, indeed, has the lowest churn rate: Housing in the Big Apple turns over nearly twice as slowly as it does, for instance, in Dallas or Atlanta.
What steps should cities take to ensure a steady turnover in their housing? They can start by not copying New York. Rent regulation, public housing without any time limit, and low residential property taxes (in favor of high commercial taxes) all inhibit churn. (Empty-nesters in suburbs often decide to move when property taxes go up and their incomes remain fixed.) Elsewhere, as I’ve written about San Jose, zoning gets in the way of the new construction needed to meet demand: The majority of San Jose is zoned for single-family housing and large parts of the city are off-limits to any development at all.

More construction-friendly zoning need not mean high-rises in low-rise neighborhoods; it can just as well enable two- to four-unit, owner-occupied structures which have historically been part of the ladder of upward mobility for working-class families. In Boston, a city with a relatively high churn rate compared to New York, the city’s most typical housing type is the New England “three-decker,” often occupied by an owner-occupant on one floor with rent-paying tenants on the others, helping to pay the mortgage. It makes sense if the owner, able to save money over time, then turns over the unit to one of the tenants, who have learned to follow a good example. As long ago as 1907, pioneer Boston sociologists Robert Woods and Albert Kennedy praised such housing as the foundation of what they termed a “zone of emergence” for the aspiring poor. Currently, Minneapolis officials are pushing for just this sort of increase in smaller, multi-family buildings in single-family districts. They deserve support—but are encountering NIMBY-ism.

Housing markets in cities with low churn rates such as New York are characterized by residents who, once they get what they consider to be a good deal, have every incentive to cling to it. As the New York housing search website nakedapartments.com has put it: “Rent stabilized apartments are very common but nearly impossible to find because once you land a rent-stabilized apartment, you don’t leave it … With rent-stabilized apartments priced cheaper … it’s understandable why renters don’t leave them. … This limited turnover in the rent-stabilized market puts more price pressure on all other apartments.”
Put another way: Stabilization locks in victory for those lucky enough to have won a game of musical chairs in which the music stops, but doesn’t start again. Notably, New York City’s churn rate has actually been markedly decreasing, falling from 11.43 percent in 2011 to the most recently reported rate of just 7.9 percent.

There’s a larger point to be inferred from discussing housing churn. To thrive, cities, especially older cities, must be friendly to new uses for land and buildings. When old industrial buildings became homes to new start-ups, when former public housing sites become home to Amazon centers, when abandoned train trestles become an overhead park—such are the marks of the living city. As Jane Jacobs wrote, new ideas need old buildings. The opposite is what can be called the frozen city—where housing is designated as “permanently affordable,” where zoning is locked in a previous era, where public housing is inviolate—even if its land could be put to a higher and better use in ways that would create employment for those of low income.
To be sure, embracing churn and change does not mean tenants should be without protection from eviction or that historic buildings or districts should be mindlessly swept away. But if cities expect to avoid and address housing crises, they have to resist regulations that, inadvertently but undoubtedly, discourage turnover. It’s good news, in other words, that California’s state-wide ballot measure that would have potentially expanded rent controls to additional cities and newer housing was defeated in November.

New York City has more public, rent-regulated and otherwise subsidized housing than any other American city, either in absolute numbers or as a percentage of its overall housing, and yet it finds itself in a perennial housing affordability crisis. It doesn’t need to build yet more of the same but, rather, to take its churn out of the freezer.

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**About the Author**

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CityLab is committed to telling the story of the world’s cities: how they work, the challenges they face, and the solutions they need.
It’s even worse than we knew.

The complaint and consent decree filed Monday by US Attorney Geoffrey Berman makes clear that the failures of the New York City Housing Authority, by far the nation’s largest, went well beyond the notorious lack of heat and hot water experienced by 300,000-plus tenants this past winter.

The complaint shows that there was not only incompetence but malice. The decision to lie about conducting lead paint inspections was, we learn, part of a pattern: turning off water rather than fixing leaks; posting danger signs to keep away federal inspectors.

“If NYCHA managers were private landlords, they’d have been perp-walked in front of the federal courthouse.”
The housing authority once held up as the exception to more notorious projects, such as those in Chicago, has been shown to be in a corrupt league of its own. Tenants’ welfare was clearly no priority for a unionized workforce asked to perform what should’ve been straightforward services: keeping the heat and lights on, picking up the garbage, making sure the front-door buzzers work.

You have to defer — and screw up — a lot of projects for the system itself to find an estimated capital-project backlog of anywhere from $18 to $26 billion. But, as any homeowner knows, if the roof goes unrepaired, all sorts of damage can follow.

If NYCHA managers were private landlords, they’d have been perp-walked in front of the federal courthouse. Small maintenance failures have big consequences — as in the case of Akai Gurley, shot to death in 2014 by NYPD Officer Peter Liang in what news accounts referred to as the “darkened public housing project stairwell” at Brooklyn’s Pink Houses. Memo to NYCHA: Stairwells don’t have to be dark.

Mayor Bill de Blasio and Gov. Andrew Cuomo are quick to blame what they call “federal disinvestment” for NYCHA’s ills. They apparently are unfamiliar with the fact that, when it was established by Franklin Roosevelt, public housing was expected — after being built with government financing — to cover its own maintenance costs, with a combination of rents from tenants and retail uses in the projects. Liberals pushed through a cap on rents, starving NYCHA of funds, and New York planners kept supermarkets and drug stores out of the projects, isolating tenants and foregoing revenue.

De Blasio ignores the fact, too, that this year, HUD has actually increased both its capital assistance and operating subsidies for NYCHA — by 46 percent in
capital funds and 3 percent overall, to nearly $1 billion.

He also ignores that, during his administration, NYCHA failed to apply soon enough for the most important new source of federal funds made available in decades. The Rental Assistance Demonstration program — designed by former New York housing commissioner Shaun Donovan when he became HUD secretary — uses tax credits to bring in a gusher of private repair funds.

In exchange, the projects are turned over to private owners, however — with a deal that units will be maintained as low-rent for a fixed period of years.

The fear of the “p” word — privatization — kept NYCHA from applying for a program that was tailor-made for it, while dozens of housing authorities around the country leapt at the chance.

Indeed, while being so quick to blame so many others, the administration has failed to seize a wealth of opportunities. The Bloomberg administration left behind blueprints for new privately financed developments to be built on the underused parking lots ubiquitous in the projects.

"The fear of the “p” word — privatization — kept NYCHA from applying for a program that was tailor-made for it..."

As the Industrial Areas Foundation has been pointing out in City Hall demonstrations, these new apartments would allow NYCHA’s thousands of elderly apartment dwellers to move out of multi-bedroom units into new studios — making way for the thousands of families either on waiting lists or in shelters,
whose number de Blasio is so keen to increase.

That’s another NYCHA failure: At least a quarter of its tenants are “overhoused,” which means they have one or more empty bedrooms. NYCHA hasn’t been able to figure out how to match them with the kind of units they need.

Sadly, $2 billion in city funding is unlikely to do much to repair NYCHA — not when its costs are bloated by a unionized labor force, even when the city abounds with private contractors who can do the job better and more cheaply. What’s needed is a rethinking of the whole idea of public housing — a failed 1930s-era experiment in socialist housing that has left its tenants in the cold and dark.

This piece originally appeared at the New York Post

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| Photo: U.S. Attorney Geoffrey S. Berman (by Erik Thomas via NY Post)
There’s a new problem facing low-income individuals seeking affordable housing: Even if they have a housing choice voucher to subsidize rents in the private market, landlords do not want to accept voucher tenants. A recent Urban Institute study of five cities—Los Angeles, Fort Worth, Philadelphia, Washington DC, and Newark—found that landlords consistently rejected the applications of voucher tenants. The New York Times story about the study focused specifically on Philadelphia, which linked the phenomenon to “rent increases even in poor and working-class neighborhoods.” In other words, landlords can charge more in rent in the private market than they can get from voucher holders—so voucher holders are being turned away.

Expect there to be pressure on HUD Secretary Ben Carson to push landlords to accept voucher tenants, as well as to increase the value of the vouchers. There will likely, too, be calls to build more low-income housing. These efforts should all be resisted. A sounder approach is to make better use of the low-income housing we already have, including existing public housing projects. In the process, we should address some of the ways in which low-income housing creates a dependency trap.
Take, for instance, Philadelphia, the focus of the Times article. HUD data does indeed show that not all voucher holders are able to use their vouchers. According to figures from HUD, only 89 percent of some 34,000 potential voucher units are occupied—and given the finding of the Urban Institute study, it’s likely that voucher holders are being turned away because the value of the voucher is inadequate or because landlords would rather not deal with HUD’s red tape or rent to low-income individuals.

The question is—what should be done about this? One solution is turning to existing public housing. Consider the fact that 10 percent of the city’s public housing units are vacant. That means that the Philadelphia Housing Authority should have at least 1,300 apartments available for the city’s poorest citizens. What’s more, some 32 percent of tenants in the occupied units are “over-housed”—which means they live in units with empty bedrooms. Philadelphia is not atypical. Nationally, HUD data shows that 50,000 of the 1 million public housing units in the nation are vacant and that 15 percent have bedrooms not being used.

These facts suggest another approach that Secretary Carson should consider: call on housing authorities to make all empty units available to voucher holders who can’t find private housing. Nor should change stop there. In order to
encourage turnover and economic upward mobility, non-elderly voucher holders should not be granted a lifetime, open-ended subsidy. Rather, they should agree to time-limited assistance, perhaps the same five-year limit attached to cash welfare. (In fact, the Philadelphia Housing Authority has a HUD waiver to allow it to experiment with such limits and has indicated that it may do so.)

Additionally, to help tenants save money, their rents should no longer be linked to income, as is currently the case. Instead of paying a higher rent if their income increases, all subsidized tenants should be given fixed-rent leases, meaning a normal private sector-type lease with a set rent for a specific time period. Why would we continue an income-based rent policy that discourages work and marriage among the poorest Americans? Yet our current policy does just that by increasing rents when the household income grows.

“HUD should press to make all empty units available to voucher holders who can't find private housing.”

Steps should be taken, as well, to make available the apartments now characterized by “over-housing.” Housing authorities should consider offering cash to tenants in such units in exchange for an agreement to move out—or they can be required to move to smaller units.

In the deep background of all of these housing policy issues is the demographic reality of who lives in voucher units and public housing: apart from the elderly poor, the largest group is single mothers and their children. Public and
subsidized housing was originally envisioned, in the New Deal era, as a benefit for the working class. But today, it is a poorhouse that accommodates and rewards those who have children out of wedlock, which only perpetuates the cycle of poverty.

We should make better use of our public housing—but do so in a way that does not lead to dependency and ongoing poverty. So rather than forcing landlords to accept voucher tenants or raising the rents on subsidized units, we should structure low-income housing policy to encourage short-term assistance and long-term upward mobility.

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