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From the Editor-in-Chief

Laurie J. Hauber

As I write this column, the destructive forces of Hurricane Harvey have yet to recede and the extent of its devastating impact will not be known for quite some time. Hurricane Irma has already caused considerable damage in the Caribbean and is moving along Florida's East Coast toward Georgia. These types of events are a reminder of the relevance of this Forum and its important role in the rebuilding efforts in the upcoming months and years. Among its many recovery related activities, the Forum is working with a network of organizations to develop and implement long-term rebuilding strategies. I also have been moved by the expressions of hope for the future shared by so many who have lost their homes. As affordable housing advocates, we have an obligation to make their hopes a reality by ensuring that resources to aid in the recovery are distributed equitably among all races and income levels, as well as to home owners and renters alike.

A common thread woven throughout the broad spectrum of topics covered in this issue is hope—hope for the future of affordable housing and community development, and our ability to make a meaningful impact in addressing our nation's affordable housing crisis. Summarized in the paragraphs below, the articles in this issue cover topics such as a proposed new framework for the FHA to expand sustainable home ownership among African-Americans; city-wide strategies to preserve Section 8 project-based housing; a cooperative housing model that could be a partial solution in certain states in dire need of more affordable housing; efforts to reclaim affordable housing that has been lost in recent years as an unintended consequence of Airbnb's success; new developments in online legal tools that could revolutionize small business development for low-income entrepreneurs; and discussions of future challenges and opportunities at the intersections of community development, housing, and economic justice.

The *Journal's* long-standing "Heard from HUD" column is back, thanks to the ongoing efforts of Sharon Wilson Geno. In this issue, Ms. Wilson Geno presents the content of her interview with Jennifer Ho, HUD's for-

Laurie J. Hauber was Program Director and Managing Attorney of the Community Economic Development Program of Legal Services of Eastern Missouri in St. Louis until she moved to Eugene, Oregon, last summer. She continues to work with the program in a consulting capacity. Laurie welcomes comments from Forum members and other readers and can be reached at hauberyang@gmail.com.

mer Senior Advisor for Housing and Services and HUD's point person on special needs populations. Ms. Ho shares her perspectives on HUD's policies and programs involving special needs populations as well as anticipated future trends. Among her many points, she emphasizes the need for housing practitioners to link housing with health care services in the development of housing for these populations.

Bill Callison has written a compelling review of Richard Rothstein's recent book, *The Color of Law*, framing his review in the context of the connection between housing discrimination and school segregation. Mr. Callison highlights the vast and complex government policies and programs that the book so poignantly lays out as evidence of unconstitutional government-led racial discrimination that requires legislative action to rectify. As with Mr. Rothstein's report, "The Making of Ferguson," that was published in an earlier issue of the *Journal*, this book is another must-read for anyone involved in this field.

This issue features CASA of Oregon, an affordable housing organization that is a leader in the national effort to create resident-owned manufactured housing cooperatives. Based on a description of CASA's work around the state, we learn of the benefits of this approach to affordable housing development—wealth creation, long-term preservation of affordable housing, community stabilization, and significantly lower costs compared to new construction of traditional homes, to name a few.

Under the leadership of the *Journal's* two new associate editors, Sara Silverstein and Emily Blumberg, attorneys at Klein Hornig LLP, this issue includes a digest of ten law review articles, academic reports, and reports from policy institutes. The *Journal's* Editorial Board greatly appreciates the time given by attorneys from Robinson+Cole, Klein Hornig LLP, Holland & Knight, Ballard Spahr LLP, Emmet, Marvin and Martin, LLP, and Faegre Baker Daniels LLP to help put this digest together.

The *Journal* is fortunate to publish a series of short articles by CED law faculty around the country that discuss the shifts in CED practices and strategies over time and the related evolution of CED lawyering to meet these changes. These compelling pieces share insights involving racial and economic justice that are critical to the future practice of law for all of us. I urge all readers to begin by reading the two provocative introductions to these symposium pieces written by Peter Pitegoff, Professor of Law and Former Dean at the University of Maine School of Law, and Scott Cummings, Robert Henigson Professor of Legal Ethics and Professor of Law at UCLA School of Law (and former editor-in-chief of this *Journal*).

The first article in this issue is an extensive report on Philadelphia's Section 8 project-based housing, which concludes that the risk of owners opting out of preserving units as affordable housing is a racial justice issue because it disproportionately impacts low-income African-American residents. As the result of a thorough analysis of every Section 8 property in Philadelphia and based on multiple risk factors, Rita Burns, Sara Mohamed, and Andrew Newstein, the authors of this report, have identi-

fied those properties that are at the greatest risk of the opt-out and therefore should be given high priority by the city. While the study's focus is Philadelphia, the authors' rigorous analysis and methodological approach, along with their synthesis of best practices in other cities, provides an excellent template that can be used by practitioners in cities and counties around the country with Section 8 project based housing.

David Reiss in "The Federal Housing Administration and African-American Homeownership" provides a detailed historical analysis of the impact the FHA's policies and programs have had on African American households through the decades and the FHA's failure to meet its stated mission of expanding minority homeownership. Professor Reiss argues that a central focus of the FHA moving forward should be to institute more rigorous underwriting standards to minimize the rate of default. He supports his position with empirical data that demonstrates that periods when the FHA's underwriting standards were looser led to higher default rates that disproportionately impacted minority households.

James Allen's article, "Disrupting Affordable Housing: Regulating Airbnb and Other Short-Term Rental Hosting in New York City," highlights Airbnb's impact on the affordable rental housing market and its role in New York City's affordability crisis. Following this detailed discussion, Mr. Allen proposes a regulatory scheme for New York City that is based on a patchwork of measures several cities around the country with high housing costs have instituted. His proposed comprehensive framework attempts to balance the needs of local governments to prevent the conversion of affordable housing units to short term rentals, with the significant economic benefits Airbnb has afforded renters and homeowners who struggle financially.

Jeff Thomas, Praveen Kosuri, and Bernice Grant, authors of "Democratizing Entrepreneurship: Online Documents, Tools & Startup Know-How," share a relatively new approach in the legal representation of start-up businesses—online form documents and legal tool kits that entrepreneurs can access directly. While these online platforms initially were created by Silicon Valley law firms for businesses seeking venture capital funding, the application is far broader, providing all types of entrepreneurs from high growth, well-capitalized ventures to smaller community businesses, worker cooperatives, and social enterprises access to highly vetted, high quality start-up foundation documents. This movement could transform the entrepreneurial ecosystem around the country and increase the likelihood of business success, particularly among low-income entrepreneurs who routinely sacrifice legal assistance in starting a business due to limited funding. These entrepreneurs now have the means to access legal resources to create a strong legal foundation at the outset.

In closing, I would like to thank all of you for allowing me to serve as the Forum's Editor-In-Chief for the past two years. Interacting with so many talented authors and leaders in this field has been enriching both

personally and professionally. I also am grateful for the ongoing guidance and support I have received from so many people, including members of the Forum's Governing Committee; Dina Schlossberg and William Callison, past GC chairs; Wendy Smith, the *Journal's* Managing Editor; Brandon Weiss, Associate Editor; and Laura Schwarz, former associate editor. Finally, I would like to introduce the *Journal's* new Editor-in-Chief, Tim Iglesias, Professor at the University of San Francisco School of Law. Tim's leadership presents an exciting opportunity for the *Journal*, given his expertise and scholarship in affordable housing and fair housing law. I look forward to supporting his efforts and seeing the tremendous value he will bring to the *Journal*.

From the Chair

Amy M. McClain

Amy M. McClain

I am honored to take on the role of the Chair of the Forum on Affordable Housing and Community Development Law and am invigorated to continue the long-standing dedication the Forum's past chairs brought to the role. It is one with the good fortune of observing the many ways in which members of this segment of the ABA collaborate and synergize to make the most of scarce resources dedicated to what seems to be an ever-growing need for affordable housing and community investment. With the demands imposed on the widening income gap, the increasing rent burden facing many low-income households, the acute needs triggered by natural disasters and the new administration's ongoing transition at HUD, the IRS and other federal agencies, this looks to be a year that will demand we maximize our collaboration and synergy. The collective skills and experiences Forum members bring to these issues will serve us well and will hopefully pave the way for informing and extending the best of the programs and initiatives to meet the challenges in front of us.



Amy M. McClain

Throughout the 2016 presidential campaign, we heard about the growing income disparity between the wealthiest 1 percent and the poor and middle class in the United States. Since then, more data supports the fact that we are facing stagnate income growth for most of society. A *New York Times* column by David Leonhardt in August put forth a chart generated by researchers Thomas Pickett, Emmanuel Saenz, and Gabriel Zucman, showing the rapid growth in wealth among the most affluent. Compared to 1980, the income growth among the poor and middle class has flattened, a trend that runs in contrast to growth that was realized in the last century following World War II.¹

1. David Leonhardt, *Our Broken Economy, in One Simple Chart*, N.Y. TIMES (Aug. 8, 2017).

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Two days after Leonhardt's column, HUD announced the release of a report showing that the "worst case housing needs" increased in 2015 over 2013. This increase comes after a slight reduction in the needs reported in 2011 that arose out of the fallout from the 2008 mortgage finance crisis. That slight improvement has not been sustained and the increase is again nearing the all-time high set in 2011. "Worst case housing needs" are those faced by households (1) with incomes at or below 50 percent of the area median income; (2) who do not receive governmental housing assistance; and (3) who either pay more than half of their monthly income toward rent or live in substandard housing with physical problems (e.g., poor heating, plumbing, electrical, or maintenance problems).²

Although the economy is growing and has theoretically recovered from the 2008 downturn, it does not seem that this growth is being realized among middle and low-income households. Decent, safe, affordable housing is scarce and household income is stagnant.

We also find ourselves at a point in time that, unfortunately, is familiar. Hurricane Harvey has stretched across a large swath of Texas, resulting in a heart-wrenching loss of life and property, with Hurricane Irma approaching Florida as the strongest storm developing in the Atlantic in history. We have seen this before with Katrina, Ike, Isabel, and Sandy—storms with the names of people you might have as friends, but which were far from friendly, wreaking devastation, and creating the need for massive rebuilding and resiliency efforts. By the time this issue of the *Journal* is published, the rebuilding effort may be significantly greater than we are facing with Harvey.

We know there are tried and true tools to addressing these challenges. We also know that certain approaches could use refinement to achieve efficiencies that result in a better outcomes for low-income residents and emerging and recovering communities. In seeing disasters strike before, we have been called to respond before to rebuild. We must always ask, how can we do this better? What are the strategies and tools we can deploy now to be better prepared the next time a disaster strikes. How do we shift from response to preparedness and prevention?

Support from HUD, the IRS, and state and local governments are essential elements for the effort. The Forum strives to build on our relationships with these agencies to problem solve, create unique approaches, and make progress. We stand ready to continue our work with HUD and IRS leadership as programs are evaluated and assessed. The Forum membership includes representatives from the private sector, non-profit organizations, public agencies, academia, and financial institutions. We have seen deals of every shape and size and have helped conquer problems that may

2. U.S. DEP'T OF HOUSING & URB. DEV., WORST CASE HOUSING NEEDS: 2017 REPORT TO CONGRESS (Aug. 2017), <https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf>.

seem overwhelming. When we have conquered some of the most spectacular of problems, it is thanks to the willingness on the part of our counterparts in government positions to collaborate and think creatively. With the tasks ahead, the Forum's membership stands at the ready to push and pull these efforts forward wherever and whenever needed. We cannot afford to stand by.

Heard from HUD

Serving Special Needs Populations

Sharon Wilson Geno

Developing and managing subsidized housing for persons with special needs has become an increasingly complex enterprise. The Department of Housing and Urban Development (HUD) defines special needs populations as including the frail and non-frail elderly; persons with physical, mental or behavioral disabilities; persons with HIV/AIDS; and persons with alcohol or drug addictions. Many of these individuals are also covered by HUD's definition of homeless, which has expanded in recent years, and some are also veterans who are eligible for other types of services. Attorneys are often called upon to help sort out the differing requirements of various housing and service programs that target special populations, which can vary from state to state. Recent court decisions, legal settlements in certain jurisdictions, and interpretations of the Fair Housing Act have added additional legal requirements that must be considered in housing this growing population.

Jennifer Ho was the Senior Advisor for Housing and Services at HUD between 2013 and 2017 and had been the point of contact for the Department on policies related to housing special needs groups since 2013. Prior to her tenure at HUD, Ms. Ho served as the Deputy Director of the U.S. Interagency Council, following more than ten years as the executive director of a non-profit homeless services organization in her native Minnesota. Prior to her departure, she agreed to provide me with some insights on her work and what she sees as coming trends in the area of special needs housing.

JAHCDL: How has HUD traditionally served special needs populations? How is HUD's role changing?

Ms. Ho: While HUD programs are broadly targeted to individuals and families based upon their income, the Department's mission has always had an important role in meeting the particular needs of those living

Sharon Wilson Geno (swilsongeno@voa.org) is the Senior Vice President of Legal Affairs for Volunteers of America, Inc., one of the nation's largest non-profit providers of affordable housing in the country. This interview was conducted in the fall of 2016 before the change in the administration. As Ms. Ho is no longer with the Department, any opinions or strategies contained in this article do not necessarily reflect the views of the current HUD administration.

with special needs. A significant number of people who live in HUD-assisted housing are older, have a disability, or have experienced homelessness. During this [now the former] administration, we've moved toward building closer relationships with our sister agencies to work beyond our traditional boundaries. Meanwhile, HUD and our housing partners are building bridges to the health care sector to improve the services that folks get, oftentimes through our *Section 811 and 202 Supportive Housing Programs* and the homelessness assistance we award through our *Continuum of Care Program*.

JAHCDL: There has been much recent attention to the "greying" of the baby boom generation, which will increase substantially the number of seniors in the United States in the coming years. How has HUD been preparing for this population shift?

Ms. Ho: There's no escaping the obvious that we're getting older as a nation and we have to be prepared for this shifting demographic. Today, more than 1.2 million persons living in HUD-assisted housing are seniors. That's roughly 25 percent of all the households we help. As existing HUD-assisted households hope to age in place, other seniors with diminishing assets and income will seek HUD assistance. We've worked closely with AARP, the Bi-Partisan Policy Center, Harvard University's Joint Center on Housing Studies, and the Department of Health and Human Services (HHS) to bring needed attention to plan accordingly. We know now that the affordable rental housing crisis presents a challenge for us all, but we have a particular need to produce housing that's accessible *and* affordable for our seniors. We simply need more of this housing that fits into the fabric of age-friendly communities.

JAHCDL: What surprised you the most when you took on your current role at HUD?

Ms. Ho: While HUD's mission is focused on person and place, I was struck by just how much the policies and programs at HUD are driven by data. Time and again, I've seen the discussions around the table center on what the evidence tells us about how well our programs are working for the people and places we're charged with helping.

JAHCDL: In your travels across the country, have you come across models that you think are particularly innovative and effective in serving special needs populations? If so, are there some examples you could share that you think show the most promise to be replicated in other communities?

Ms. Ho: I love the way Louisiana rebuilt after Hurricanes Katrina and Rita. They integrated supportive housing as a small piece of all their new tax credit units and they rebuilt their Medicaid benefit design to pay for supportive services. We've done a lot of work with the *Support and Services at Home (SASH)* Program in Vermont. There, state planners are combining a multi-payer health care financing pool that supports a broad case management model located in HUD-assisted housing and extends that into the

surrounding neighborhood in a really unique and effective way. We're also really proud of the way HUD and HHS worked together on the CMS Home and Community-Based setting regulation. That rule does a great job of defining what "home" is and we're hoping Home and Community-Based Services (HCBS) rule, which was promulgated on January 16, 2014, will make more services available in the community in the long run.

JAHCDL: The passage of the Affordable Care Act has placed renewed focus on the intersection of health care and housing, especially for special needs populations. How has HUD been working with HHS and other federal agencies to make housing and health care work better together for seniors and other special needs populations?

Ms. Ho: This is exactly why I came to Washington and why I came to HUD. There's so much work in this space that wasn't happening eight years ago. We've done data matching with Medicaid, Medicare, and some of the national health surveys. We helped CMS develop the Informational Bulletin¹ it published on Medicaid and "housing-related services." We're implementing the new and improved *Section 811 Supportive Housing for Persons with Disabilities Program*. Finally, we've worked with HHS on the effects of enforcement of the Supreme Court's ruling in *Olmstead*² and the impact that has on HUD-assisted and HUD-insured properties that no longer make sense to states as they turn to more integrated housing models.

JAHCDL: During this administration, the Department has had a particular focus on fair housing. What, if any, impact has this initiative had on the Department's programs or policies for persons with special needs?

Ms. Ho: There's been so much work done in this area during these past eight years—upholding the rights of individuals with service animals; extending the ground-breaking Equal Access to Housing Final Rule³ to people regardless of their sexual orientation, family configuration, or gender identity; and promulgating HUD's regulations on Affirmatively Furthering Fair Housing.⁴ All of these efforts are significant on their own but together they bring more protections and recourse to people and they serve to change the conversation in communities about what it means to be fair.

1. CMCS Informational Bulletin, Coverage of Housing-Related Activities and Services for Individuals with Disabilities, June 26, 2015, <https://www.medicaid.gov/federal-policy-guidance/downloads/cib-06-26-2015.pdf>.

2. *Olmstead v. L.C.*, 527 U.S. 581 (1999) (holding that under the American Disabilities Act, individuals have the right to live in the least restrictive setting subject to the availability of resources and rights of others with mental disabilities (July 16, 2015)).

3. 24 C.F.R. § 5.

4. 80 C.F.R. § 42271.

JAHCDL: Another legal issue that is facing communities across the country is the implementation of the Olmstead decision and its impact on HUD-assisted housing. What are the biggest challenges HUD has faced in this regard? How is HUD addressing those challenges?

Ms. Ho: We have some properties that were built ten or twenty years ago that are more congregate in nature. These developments might be in our 202 or 811 portfolio or have 232 mortgage insurance. We've done a lot of work to make connections between HUD, the Department of Justice, and the Centers for Medicare & Medicaid Services that are involved in *Olmstead* settlements. I've personally traveled to states with settlement agreements to help them develop a housing strategy like those in Illinois, Delaware, New York, North Carolina, and Georgia.

JAHCDL: In your experience, are there particular issues that legal counsel should be sure they are focused on when working on deals that involve subsidized housing for special needs populations?

Ms. Ho: People should have real choice in terms of their housing with all the qualities of your own home.

JAHCDL: How will HUD's programs for housing for people with special needs change in the coming years?

Ms. Ho: A lot of that will be influenced by Congress and the next administration, but we've done some important work on our new 811 demonstration and the even newer seniors and services demonstration. We must continue to build our understanding of how to marry housing and supports and the health and health care spending impacts of doing supportive housing. The aging of America is going to demand not only that we get this right, but that as a society we figure out how to solve for these challenges at scale.

JAHCDL: The Journal very much appreciates Ms. Ho's willingness to provide her insights on this increasingly important and complex area of housing. Additional information regarding the various HUD programs that serve special needs populations can be found on the HUD website.



FROM THE READING ROOM

J. William Callison

The Color of Law

A Forgotten History of How Our Government Segregated America

By Richard Rothstein

Illustrated. 345 pp.

Liveright Publishing. \$27.95.

In a system of corrective justice, defining and understanding the nature and source of harm precedes, and forms the basis for, appropriate and just remedies. As noted by the U.S. Supreme Court, “[t]he controlling principle consistently expounded in our rulings is that the scope of the remedy is determined by the nature and extent of the constitutional violation.”¹ An optimistic, or at a least hopeful, lawyer would agree that although we cannot change past injustice, we can recognize it and deal with it and thereby shape a more just future.

For many years, American courts have defined the problem of housing and neighborhood segregation primarily as one of private choice rather than as one of public policy. Since the racial composition of neighborhood schools is largely based on the racial composition of neighborhoods, an unexamined judicial supposition of “suburban innocence,” i.e., that housing segregation happens² based on private, individual choices, has provided a basis for judicial acceptance of segregated schools. For example, in the Supreme Court’s *Parents Involved* decision, Chief Justice Roberts noted that some proponents of the Seattle school desegregation plan defended it “as necessary to address the consequences of racially identifiable housing patterns.”³ Notwithstanding, Roberts opined that “the sweep of the mandate claimed by [plaintiffs was] contrary to [the Court’s] rulings

1. See *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971).

2. The use of passive voice is entirely intentional.

3. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007).

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that remedying *past societal discrimination* [here, in housing] does not justify race-conscious *government action*."⁴

More than three decades before *Parents Involved*, the Court's decision in *Milliken v. Bradley* affirmatively exempted white suburban areas from the planned desegregation of Detroit schools. The *Milliken* Court ignored the connection between neighborhood segregation and school segregation and grounded its opinion in the constitutional value of autonomous suburban school districts rather than the correction of segregation.⁵ The Court's focus on the actions of particular wrongdoers who had injured particular victims left dangling the question of who the wrongdoers were. From the Court's perspective, there was no proven governmental wrong—instead there was “suburban innocence” in segregative results.⁶

4. *Id. See, e.g., Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996) (“[A]n effort to alleviate the effects of societal discrimination is not a compelling interest.”); *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 288 (1986) (“[A] governmental agency’s interest in remedying ‘societal’ discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster.”).

5. *Milliken v. Bradley*, 418 U.S. 417 (1974).

6. *Id.* at 748. See also Gary Orfield, *Housing and the Justification of School Segregation*, 143 U. PA. L. REV. 1397, 1398 (1995) (“The primary constitutional value became the autonomy of the suburban school districts rather than the correction of unconstitutional segregation. This shift was made possible by a theory of suburban innocence that excluded all discussion of how the Detroit suburbs came to be among the nation’s most rigidly segregated in terms of housing and, therefore, in terms of schools.”). See generally THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* (2008) (discussing desegregation efforts in the United States since the 1920s). The Court’s approach in *Milliken* differed from its approach in prior school desegregation cases, such as *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and *Keyes v. School District No. 1*, 413 U.S. 189 (1973). Both *Swann* and *Keyes* recognized the relationship between housing decisions and school segregation. See *Swann*, 402 U.S. at 20; *Keyes*, 413 U.S. at 201–02. In *Keyes*, the Court stated:

First, it is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating “feeder” schools on the basis of race has the reciprocal effect of keeping other nearby schools predominately white. Similarly, the practice of building a school . . . to a certain size and in a certain location, “with conscious knowledge that it would be a segregated school,” has a substantial reciprocal effect on the racial composition of other nearby schools. So also, the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, *may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools.*

Keyes, 413 U.S. at 201–02 (footnote omitted) (citation omitted) (emphasis added).

From a jurisprudential perspective, defining housing segregation and related school segregation as a matter of private conduct and thereby *de facto* segregation, rather than as a matter of governmental conduct and thereby *de jure* segregation, dictates the absence of constitutional remedy.⁷ Since government is innocent, the courts cannot mandate governmental cures. After all, the Fourteenth Amendment's Equal Protection Clause provides that no state shall deny any person within its jurisdiction the "equal protection of the laws" and does not reach private, non-state actors.⁸

In his important book, *The Color of Law: A Forgotten History of How Our Government Segregated America*, Richard Rothstein goes on a "search and destroy" mission and demolishes the suburban innocence myth.⁹ In numerous topical chapters on public housing, racial zoning, home ownership financing, judicial enforcement of private racial covenants, tax law, local segregative tactics, state-sanctioned racial violence, and income suppression, he describes the legal history of housing discrimination and neighborhood segregation in America. Although one might quibble with his description of this history as "forgotten" (a better word might be "ignored"),¹⁰ it is clear that Rothstein's goal is to trigger a conversation

7. The effects of housing segregation go beyond schools and extend to access to employment, wealth accumulation, and general social acceptance.

8. See *Parents Involved*, 551 U.S. at 736 ("The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations. . . . The dissent elides the distinction between *de jure* and *de facto* segregation . . . [and] thus alters in fundamental ways not only the facts presented here but the established law. . . . Where [racial imbalance] is a product not of state action but of private choices, it does not have constitutional implications.")

9. Rothstein is not a stranger to the *Journal*. See Richard Rothstein, *From Ferguson to Baltimore: The Fruits of Government-Sponsored Segregation*, 24 J. AFFORDABLE HOUSING & CMTY. DEV. L. 205 (2015); Richard Rothstein, *The Making of Ferguson*, 24 J. AFFORDABLE HOUSING & CMTY. DEV. L. 165 (2015).

10. Numerous other authors have made similar arguments. Recently, Ta-Nehisi Coates discussed "racist" housing policy in *The Atlantic*. See *The Case for Reparations*, <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> (June 2016); see also DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004); OWEN FISS, *A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM* (Joshua Cohen et al., eds. 2003); DOLORES HAYDEN, *BUILDING SUBURBIA: GREEN FIELDS AND URBAN GROWTH 1820–2000* (2003); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985); SUGRUE, *supra* note 6, at 200–50; THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (1996); WILLIAM JULIUS WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* 25–61 (2009) (discussing structural forces shaping concentrated poverty and the role of political actions). Arnold Hirsch notes a particular irony in federal housing

that recognizes that “until the last quarter of the twentieth century, racially explicit policies of federal, state and local governments defined where whites and African Americans should live” and that these policies were “so systemic and forceful that [their] effects endure until the present time.” Rothstein links these governmental actions to the Thirteenth Amendment’s prohibition of slavery and its relics. The Supreme Court also did so once in *Jones v. Alfred H. Mayer Co.*, which recognized the validity of the declaration in the 1866 Civil Rights Act that housing discrimination was a residue of slavery that the Thirteenth Amendment empowered Congress to eliminate.¹¹ Rothstein recognizes the difficulty of private litigation to remedy these residual effects of slavery and attempts to lead a charge toward legislative and regulatory remedies for unconstitutional de jure racial discrimination.

Rothstein undertakes his task with an analyst’s deliberate mastery of evidence and a reporter’s flair for telling stories. For example, Chapter 1, “If San Francisco, Then Everywhere,” begins with the story of Frank Stevenson, who moved from Louisiana to Richmond, California, to work in World War II industry. A mass influx of workers caused Richmond’s population to grow from 24,000 to more than 100,000 and its black population to grow from 270 to 14,000. Obviously, this required housing for new workers, and the federal government built public housing. Just as obviously, this housing was segregated, with whites receiving government housing that was well constructed and intended to be permanent and blacks receiving poorly constructed housing that was intended to be temporary. It wasn’t. In addition, a private developer received favorable federal financing to build a new housing development in Richmond’s suburbs, while requiring that none of the houses be sold to blacks. As whites

programs: as *Brown* established a public school desegregation requirement, local governments used federal housing and urban renewal programs to create new segregative housing patterns. ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940–1960* 196–215 (2d ed. 1998); see also Arnold R. Hirsch, “The Last and Most Difficult Barrier”: *Segregation and Federal Housing Policy in the Eisenhower Administration, 1953–1960*, submitted to the Poverty & Race Research Action Council (Mar. 22, 2005) (describing the urban renewal program recommended by President Eisenhower’s Advisory Committee on Housing in 1953). The article discusses the substance and effect of the Eisenhower administration’s housing policy and how it enabled local authorities to adopt housing plans that exacerbated segregation problems.); Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965) (exploring the Constitutional arguments surrounding public schools that are predominantly black due to the geographic distribution of the population). For a discussion of similar issues in different contexts, see generally IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH CENTURY AMERICA* (2005); see also FERGUSON’S FAULT LINES: *THE RACE QUAKE THAT ROCKED A NATION* (Kimberly Jade Norwood, ed.) (2016).

11. 392 U.S. 409 (1968).

left for new suburbs, blacks were left behind in public and other substandard housing. And so forth and so on.

Chapter 3, “Racial Zoning,” and Chapter 5, “Private Agreements, Government Enforcement,” go hand in glove and tell the story of land use restrictions that were designed to keep black families out of white neighborhoods. Beginning with Baltimore in 1910, numerous cities adopted zoning ordinances that, for example, prohibited blacks from buying homes on blocks that were majority white, and vice versa. Although the Supreme Court overturned the Louisville, Kentucky, ordinance in its 1917 *Buchanan v. Warley* decision, Rothstein shows that many border and southern states ignored *Buchanan* by arguing that its holding applied only to ordinances that were identical to Louisville’s, insisting that their rules were different and otherwise taking evasive action purported grounded in law.¹² In addition, local governments turned to “economic zoning,” ultimately validated by the Court in *Village of Euclid v. Amber Realty Co.*, that had clear racially segregative undertones.¹³ Rothstein also addresses the use of zoning laws to site LULUs (Locally Undesirable Land Uses), such as dumps and smelters, in black neighborhoods, thereby deepening the slum conditions in areas that might otherwise be conducive to housing integration.

Although racial zoning may have been rendered more difficult, another method for establishing segregated neighborhoods sprung up in *Buchanan*’s lacuna and avoided its mandate. Private covenants, often coupled with community associations to create an enforcement device, were used to forbid the sale of property to African Americans. Rothstein notes that a survey of 300 developments built between 1935 and 1947 in New York’s Queens, Nassau, and Westchester Counties shows that 56 percent of them (and 85 percent of the larger subdivisions) had racially restrictive covenants; that by 1943 approximately 175 Chicago and 192 Detroit neighborhood associations were enforcing racial covenants; and that the same sort of behavior prevailed in the western United States. Government was implicated in numerous fashions. First, local governments encouraged covenants. Second, agencies such as the FHA recommended covenants as a way to secure higher loan ratings. Third, state courts upheld the practice through specific performance and damages remedies. For example, in Los Angeles in 1947, a judge jailed a black man for refusing to leave a house he had purchased.

In its landmark 1948 *Shelley v. Kraemer* decision, the Supreme Court held that the enforcement of racial covenants by state courts constituted unconstitutional state action.¹⁴ Rothstein narrates the “massive resistance” to *Shelley* and, in particular, documents that much of the resistance emanated from federal agencies such as the FHA. The FHA commissioner

12. *Buchanan v. Warley*, 245 U.S. 60 (1917).

13. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

14. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

brazenly stated that *Shelley* would “in no way affect the programs of this agency” and that the FHA would make “no change in our basic concepts or procedures.” Even when the FHA began to comply with *Shelley* in 1950, it continued to insure properties where the covenant was not explicitly racial, but where it otherwise evaded the Court’s intent by requiring neighbor vote to approve a property sale.

Chapter 4, “Own Your Own Home,” tells the story of racial discrimination in the FHA and VA single-residence housing finance arena. In particular, Rothstein focuses on the familiar story of Levittown, New York, where developer William Levitt built a sprawling 17,500 home suburbia of starter homes, each selling for about \$8,000. While it was touted by *Time Magazine’s* article, “For Sale: A New Way of Life,” Levittown’s many rules and regulations included a provision forbidding homeowners to sell or rent to persons “other than members of the Caucasian race.” Levittown was built on “spec” and therefore required construction financing that could be replaced by permanent owner financing. Low-interest construction financing requires little risk, and this is where the federal government stepped in. The FHA was empowered by Congress to guaranty construction loans and to minimize the need for underwriting on take-out buyer financing. To do so, the FHA needed to review construction plans, the proposed sale price, and residential zoning restrictions. The FHA also required a commitment not to sell to African Americans. Thus, Levittown was by federal design permanently all white. And so forth and so on.

Although not as directly linked to housing policy, Chapter 5, “State-Sanctioned Violence,” discusses systemic police tolerance and promotion of cross burning, vandalism, arson, and other violent acts undertaken with the purpose of maintaining neighborhood segregation. Again, Levittown (this time the Bucks County, Pennsylvania, version) features prominently. Created after *Shelley*, and therefore without racial covenants, it was the scene of demonstrations, rock throwing, cross burning, a community center playing loud music all night, and other violent behavior after a black family acquired a home from white sellers. Police officers stood aside as the melee happened over several months and thereby expressed state policy that violated Fourteenth Amendment protections. Rothstein expands his story of state-approved violence beyond Pennsylvania and discusses particularly rankling actions in Illinois, Michigan, California, and Kentucky. Racial intimidation obviously discourages neighborhood integration, and Rothstein makes a compelling case that state action and inaction played a large part in the intimidation.

Having demolished the notion of suburban innocence in the first ten chapters of his book, Rothstein’s penultimate chapter notes that racial segregation in housing is hard to undo as a result of generational replication of economic status, enormous wealth disparity, housing unaffordability, the dominance of seemingly neutral principles such as the mortgage interest deduction, and a focus on financing affordable housing in already segregated neighborhoods. He concludes that governmental actions in the

housing arena cannot be neutral about segregation since, based on current structural issues, they can either exacerbate or reverse it. Obviously, Rothstein is on the side of reversal.

In his final chapter, Rothstein considers “fixes” and notes that they will have to be both complex and imprecise. He writes, “It is not difficult to conceive of ways to rectify the legacy of de jure segregation.” Although conception and imagination may be easy, it also may be quixotic since it is extremely difficult to develop implementable means to address the vast and complex harms depicted in the rest of Rothstein’s book. Among Rothstein’s possible remedies are governmental acquisition of “Levittown homes” for resale at inflation-adjusted original prices to black families and federal subsidies to black Americans to purchase homes in racially exclusive areas. It seems to this observer that these are non-starters, at least in any political and economic environment that can currently be envisioned. Other remedies suggested by Rothstein, such as bans on exclusionary zoning, embracing inclusionary zoning, fair share requirements, changes to the Section 8 voucher program to permit mobility, and changes to the LIHTC program to encourage desegregation seem more doable. But this begs for policy analysis of effects, costs, downsides, and opposition, and all this takes courageous political leadership that seems to be in short supply. Although the final two chapters of *The Color of Law* may leave the reader dissatisfied, the value of Rothstein’s book is its multi-faceted demonstration of the problem. Creation and implementation of solutions calls for much more work, and *The Color of Law*, which clearly demonstrates governmental complicity in the creation of a massive constitutional problem, screams out that this work must be done.

Organizational Profile

Manufactured Housing Cooperatives: Innovations in Wealth-Building and Permanent Affordability

Chelsea Catto

Across the United States, approximately 50,000 manufactured housing communities are home to nearly 3 million manufactured homes.¹ Yet widespread stigma, pressures to redevelop, and aging infrastructure have put this valuable source of affordable housing in jeopardy. In response, nonprofit affordable housing providers are partnering on an innovative approach to affordable homeownership—resident-owned manufactured housing cooperatives. Attracting homeowners who seek a creative and affordable alternative to stick-built housing, these cooperatives not only offer affordability, stability, and security—they also offer a ready-made community with intrinsic opportunities for wealth creation.

The concept of nonprofit cooperative ownership of manufactured housing communities is not a new one. What originally began as a New Hampshire Community Loan Fund² project in 1984 has now been replicated throughout the United States by ROC USA®, a nonprofit enterprise that offers training, networking, and financing to help owners of manufactured homes gain security through ownership of their communities.³ Paul Bradley, ROC USA's founding president, started the organization to help solve the three basic barriers to resident ownership: the opportunity for residents to purchase, access to expert technical assistance, and financing to help homeowners become buyers when their community is for sale. Launched in 2008, ROC USA trains nonprofit organizations from across the country as Certified Technical Assistance Providers in order to preserve affordable

1. *Housing & Home Ownership*, PROSPERITY NOW, <https://prosperitynow.org/topics/housing-homeownership>.

2. The Community Loan Fund was established in New Hampshire in 1983 and became one of the first Community Development Financial Institutions (CDFIs) in the United States; it is dedicated to providing financing and resources to individuals and families seeking access to affordable housing. New Hampshire Community Loan Fund, www.communityloanfund.org.

3. ROC USA®, www.rocusa.org.

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manufactured housing through resident-owned cooperatives. Nearly ten years later, ROC USA and its nine affiliates have converted 12,800 households in 206 communities across 14 states to resident ownership.⁴

This commentary provides an introduction to manufactured housing cooperatives as affordable housing vehicles and explores an innovative approach that, while not without its challenges and growing pains, has been successfully implemented nationally through a branded approach and in partnership with established nonprofits throughout the country. The discussion and insights in this commentary are based on CASA of Oregon's eleven-year history of work in manufactured housing cooperative development, including nearly ten years as a Certified Technical Assistance Provider with the ROC USA Network.

Oregon Snapshot

Founded in 1988, CASA of Oregon is a nonprofit dedicated to improving the lives of Oregonians in underserved communities by building affordable housing, neighborhood facilities, and programs that increase families' financial security. The organization began its foray into manufactured housing preservation in 2006 at the behest of John Van Landingham, a Eugene legal aid attorney who was searching for a solution to stem the tide of park closures. CASA went on to join the ROC USA Network at its inception in 2008. Since then, CASA has preserved twelve communities across Oregon, representing 790 households, as permanently affordable. The creation of a solid financial and legislative framework and support from key stakeholders at both the state and local level have significantly contributed to CASA's ability to implement this line of business effectively. Without these resources in place, achieving the scale of resident-owned conversions needed for program sustainability would be challenging.

The resident-owned cooperative model, which does not require high amounts of member equity, increases accessibility by allowing traditionally underserved populations to participate. By creating and providing ongoing support for manufactured housing cooperatives in Oregon, CASA focuses on the following goals:

- Make manufactured home buying and home ownership more like single-family residential ownership
- Provide residents with opportunities for appreciation in home values instead of depreciation
- Stabilize communities by securing the land tenure
- Improve the health and safety of manufactured housing communities by providing resources for upgrading or replacing dilapidated infrastructure and homes

4. Telephone Interview with Gary Faucher, National Training Manager, ROC USA Network.

- Long-term preservation of affordable housing
- Empower manufactured homeowners to effectively manage and operate their communities as small businesses
- Facilitate lasting connections and peer networks among resident-owned manufactured housing cooperatives in the region

In 2007, the Oregon Legislature responded to the alarming increase in park closures by passing legislation that allows manufactured housing residents to form manufactured dwelling park nonprofit cooperatives and convert their parks from investor-owned into resident-owned.⁵ Under this designation, resident-owned cooperatives are able to access affordable financing, including Oregon Affordable Housing Tax Credits,⁶ when available. Incentives to sell, such as a state capital gains tax exemption for park owners who sell to nonprofits, housing authorities, or resident-owned cooperatives,⁷ as well as recently improved Opportunity to Purchase legislation,⁸ enable resident cooperatives to compete with private investors. Income and park resale restrictions attached to tax credits and grant resources ensure that the funding is reaching those most in need and will be invested in housing that remains permanently affordable.

Considered one of the most important policy tools for improving the ability of manufactured homeowners to own and operate their manufactured housing parks, Opportunity to Purchase legislation requires manufactured housing park owners to notify residents of an intent to sell or if they receive an unsolicited offer to purchase. Not to be confused with a Right of First Refusal, which gives its holder the contractual right to enter into a business transaction with the owner, Opportunity to Purchase merely gives manufactured housing park residents a chance to compete to purchase the community, provided they follow a strict set of requirements outlined in statute. Before this notice requirement came into effect in Oregon, residents, whose homes are significantly impacted by the affordability and accessibility of the land upon which they sit, were oftentimes the last to know when their park was sold. As a result, they are often in a constant state of worry about a sale or closure and what that might mean for their lives. Yet very few states have Opportunity to Purchase or similar legislation—a situation that organizations like Prosperity Now, based in

5. OR. REV. STAT. §§ 62.800–62.815.

6. Oregon Affordable Housing Tax Credits can be used by lenders to buy down the interest rate offered to manufactured housing cooperative borrowers by 4 percent. *Oregon Affordable Housing Tax Credit Program (OAHTC)*, <http://www.oregon.gov/ohcs/pages/multifamily-housing-tax-credit-oahtc.aspx>.

7. OR. REV. STAT. § 317.401

8. OR. REV. STAT. §§ 90.800–840

Washington, D.C., aim to improve through advocacy campaigns and the dissemination of policy toolkits.⁹

Oregon's 1,073 manufactured home parks,¹⁰ equaling approximately 62,640 spaces, represent a large portion of the state's unsubsidized affordable housing stock.¹¹ True stability cannot be achieved, however, unless residents, through cooperative ownership, also control the land under their homes and have access to the resources to make significant infrastructure improvements. For many manufactured homeowners living in investor-owned parks, the danger of losing their housing asset is real. A significant number of manufactured homes in the communities where CASA of Oregon works cannot be moved on public roads to another location, nor are they structurally sound enough to make the journey. If rents are raised significantly or if the park is closed for redevelopment, homeowners often have no option but to abandon their homes, even if they still hold a loan on the property. This could quickly push them from being homeowners to becoming homeless.

According to Oregon Housing and Community Services data, 104 manufactured housing parks, representing 4,000 spaces and impacting nearly 6,800 people, closed between 2001 and 2015.¹² Andrée Tremoulet, Ph.D. studied manufactured housing communities in Oregon at the height of park closures between 2004 to 2007 and analyzed the trend. She found that park closures were significant, mainly because Oregon had more manufactured housing communities on the fringes of urbanized areas than many other states, and property values were going up dramatically. In the same study, she also mapped manufactured housing parks in Oregon and found that parks inside an urban growth boundary¹³ were more than 5 times as likely to close than those located outside an urban growth boundary after controlling for a county's growth rate.¹⁴ During the housing crisis, the number of closures slowed down. However, as the real

9. *Manufactured Housing Toolkit*, PROSPERITY NOW, <https://prosperitynow.org/manufactured-housing-toolkit>.

10. Oregon Housing and Community Services' Manufactured Communities Resource Center data.

11. While subsidies may be used for the purchase of land and infrastructure, there are no subsidies needed for ongoing operations. Moreover, to qualify for cooperative ownership, residents must own their own homes or be on a path to homeownership.

12. *Manufactured Housing: The Oregon Landscape*, STATE OF OREGON, www.oregon.gov/ohcs/OSHC/docs/HSC.../030317_HSC_Manufactured-Housing.pdf.

13. A land use planning line to control urban expansion onto farm and forest lands. *Urban Growth Boundary*, METRO, <http://www.oregonmetro.gov/urban-growth-boundary>.

14. Andrée Tremoulet, *Policy Responses to the Closure of Manufactured Home Parks in Oregon* (2010) (unpublished Ph.D. dissertation, Portland State University), at 150, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.838.195&rep=rep1&type=pdf>.

estate market continues to gain momentum, particularly in the popular Portland market, park closures for redevelopment are on the rise again.

However, this phenomenon is not unique to Portland, especially when you consider that older manufactured housing parks in urban areas will face similar pressures in cities across the country due to three main factors: they represent lower density housing, which is typically not desirable in cities facing a lack of housing stock; many of them were built in commercial zones as a non-conforming use; and parks with deferred infrastructure maintenance and dilapidated homes are not desirable neighbors. Cooperative members at the West-Side Pines Cooperative in Bend, Oregon, purchased their community in 2012, just as the neighboring college campus looked to expand student housing. Odds are, had residents not successfully completed their purchase when they did, their park would have been closed to make way for campus expansion.¹⁵

Likewise, the Denver Meadows Mobile Home and RV Park, which borders the CU Anschutz Medical Campus and VA Medical Center in north Aurora, Colorado, is slated for closure within a year. The property will likely be snatched up by developers that can afford to pay a premium for land that will ultimately be converted to a highest and best use.¹⁶ Yet, because manufactured housing remains a critical source of affordable homeownership in jurisdictions that are committed to offering a wide range of housing choices, this scenario presents a conundrum: is a balance between low-density affordable manufactured housing homeownership and high-density affordable rental housing plausible? In cases where urban park owners choose to sell to residents or nonprofits, a city will have no choice but to embrace the balance.

Anticipating the likelihood of future park closures in a nearby unincorporated area, the City of Springfield, Oregon, reached out to manufactured housing stakeholders across the state to form a governor-sanctioned working group, Oregon Solutions.¹⁷ Charged with identifying replicable solutions and resources for manufactured housing park residents facing park closures, the collaborative produced a toolkit intended for use by a wide range of jurisdictions and municipalities. Released publicly in 2016, it is still too early to evaluate the effectiveness of the toolkit.

Stabilizing Communities

For Mary Lou Fitzgerald, a resident member of the Green Pastures Senior Cooperative in Redmond, Oregon, a resident-owned manufactured

15. *10-Acre Site Plan*, CASCADES (Oregon State Univ.), <http://osucascades.edu/feature-story/10-acre-site-plan>.

16. *The Denver Metro's Hunger for Housing Is Squeezing Mobile Home Parks*, COLORADO PUBLIC RADIO (May 23, 2017), <http://www.cpr.org/news/story/the-denver-metros-hunger-for-housing-is-squeezing-its-few-mobile-home-parks>.

17. *Springfield Manufactured Home Park Solutions Collaborative*, OREGON SOLUTIONS, <http://orsolutions.org/projects/ManufacturedHomeCollaborative>.

housing cooperative was a perfect option. It represents an ideal environment that is safe, peaceful, and secure. Fitzgerald said she values the sense of community and appreciates that while she can live independently, neighbors are close enough to look out for each other. This sentiment is echoed by many of the homeowners in the cooperatives that CASA and its partners support, particularly in 55-and-older communities.

As cooperative owners of their communities, manufactured housing cooperative members not only benefit from stabilized housing and affordability, they are also able to make significant health and safety improvements to existing infrastructure. Because they are formed as non-profit cooperatives, excess revenue from pad rents¹⁸ is reinvested back into the community. Moreover, the cooperatives are able to hire local contractors, keeping their investments truly local.

The Vida Lea Community Cooperative in Leaburg, Oregon, which was purchased by the resident cooperative in 2012, undertook extensive capital improvements that spanned two years and totaled over \$250,000. Dan Fountain, the Cooperative's first board president, beams with pride when describing their new and improved community. He notes that, upon resident purchase, the infrastructure was old and deteriorated. The resident cooperative replaced a 30-year old water system pump, upgraded the septic system, and added new septic tanks. This situation is all too common in many manufactured housing parks—particularly those built 50 to 60 years ago. Oftentimes, owners decide to sell rather than pay the high costs to upgrade infrastructure. Similarly, as parks age, so do the owners. A number of sales occur because aging owners are no longer able or willing to manage their investment, or because children who have inherited a property have no interest in owning and operating a manufactured housing park.

While the concept of cooperatives, particularly for housing, is more familiar on the East Coast, manufactured housing cooperatives represent an entirely unique approach to affordable housing. Whether in rural areas that face a dearth of housing, or in urban areas that are plagued by increasingly unaffordable housing costs, the preservation of manufactured housing is specifically identified in Oregon's Housing Goals.¹⁹ The creation of reliable affordable housing options through cooperative ownership gives families and individuals, particularly in rural areas, a chance to both live and work in their communities.

18. Since the land and infrastructure are owned cooperatively, cooperative members pay a premium to the cooperative for the manufactured home pad on which their manufactured home sits. They are entitled to this space through a 50-year lease; the premiums are used for operating expenses, reserves, and mortgage payments.

19. Goal 10: Housing, Oregon's Statewide Planning Goals & Guidelines, OR ADMIN. R. 660-015-0000(10).

A Smaller Footprint

Dubbed as naturally occurring retirement communities, manufactured housing parks are particularly important sources of affordable housing for seniors, many of whom live on a fixed-income and who may gravitate to a homeownership option with a smaller footprint and an opportunity to age in place. Typically, a manufactured home is more manageable than a stick-built home for an elderly couple or a senior living alone. Living in a manufactured housing park affords residents the opportunity for homeownership without the additional responsibilities of extensive property upkeep.

For seniors, affordability can be as important a factor as livability when making housing choices. The average cost for an independent living facility in Oregon is \$2,100 a month. In contrast, space rents in resident-owned manufactured housing communities range from \$260 to \$680. And while some manufactured homeowners may also pay a mortgage on their home in addition to space rent, the total cost still adds up to much less. Most importantly, manufactured homeowners are just that—*homeowners*. The opportunity to own a manufactured home in a resident-owned community promotes asset appreciation when homes in a stabilized community become more sought after and can be resold for a higher price.

Furthermore, according to information gathered by Prosperity Now's I'M HOME Program,²⁰ the quality of manufactured housing has improved dramatically since the implementation of the 1976 HUD Code.²¹ Manufactured housing is constructed of the same materials as site-built housing and now has a comparable lifespan. With recent improvements in the production process, manufactured housing is one of the greenest forms of housing available. Compared to a typical HUD Code manufactured home, an Energy Star qualified manufactured home can save homeowners from \$190 to \$246 a year in average energy costs, or 24 percent to 29 percent of total heating and cooling costs.

Taking on the Challenge

For some manufactured homeowners, the idea of operating and managing their own community seems overwhelming. Many times, when residents discuss the idea of purchasing their community, their first reaction is to question their own ability to make it happen. Yet there is a wealth of knowledge and expertise that already exist in many communities, it may just take some guidance and encouragement for residents to realize that they have most of the tools at hand. This is where organizations like CASA play an important role. Much of the nationwide success of this housing model is attributed to the value of ongoing technical assistance

20. *10 Truths about Manufactured Housing*, PROSPERITY NOW, <https://prosperitynow.org/manufactured-housing-toolkit>.

21. National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. §§ 5401–5426.

that nonprofits like CASA of Oregon provide.²² So much so that lenders in Oregon now require technical assistance for the life of the loan as a condition of funding.

While they utilize a Board of Directors and member committees to manage infrastructure, operations, and common areas, resident-owned communities typically outsource much of the property management and the preparation of financial statements to avoid conflicts of interest and ensure operational efficiency. In fact, investments into these manufactured housing cooperatives have shown themselves to be prudent and sound. Not one of the now more than 200 resident-owned communities that received purchase assistance from the ROC USA Network since its founding in 2008 has failed, faced foreclosure, filed for bankruptcy, or sold its community. This is truly an astounding track record for a commercial real estate asset class, particularly one that is owned by low- and moderate-income homeowners operating democratically.²³

With long-term land security through cooperative ownership, manufactured homeowners have access to opportunities for appreciation in home values similar to those for single family residential ownership. A study by the Carsey Institute at the University of New Hampshire²⁴ demonstrated that individual homes in resident-owned communities often appreciate in value, thereby creating wealth-building opportunities for homeowners who are typically the most vulnerable. The twelve manufactured housing cooperative communities that CASA of Oregon supports through long-term technical assistance are experiencing low vacancy rates and have homes on the market for shorter amounts of time. Moreover, homeowners regularly receive offers above asking price due to the desirability of resident-owned cooperative living.

Operating as non-profit small businesses, the cooperatives receive business planning support so that they are able to control their own costs, a benefit that is directly passed on to residents through affordable space premiums and efficient operations. The cooperatives hire local contractors, with a focus on minority- and women-owned businesses, to both maintain their parks' infrastructure as well as carry out large capital improvements. This significant investment back into the community helps to stabilize the local economy. If the cooperatives were to fail, not only would the local economy be affected, but members would also lose their affordable housing options.

22. Nine Certified Technical Assistance Providers working in 21 states. *Network Affiliates*, ROC USA, <https://rocusa.org/about-roc-usa/network-affiliates/>.

23. Telephone Interview with Paul Bradley, President, ROC USA, LLP.

24. Sally Ward, Charlie French & Kelly Giraud, *Resident Ownership in New Hampshire's "Mobile Home Parks": A Report on Economic Outcomes* (Univ. of New Hampshire rev. 2010), <https://carsey.unh.edu/publication/resident-ownership-new-hampshires-mobile-home-parks-report-economic-outcomes-revised>.

The Future of Resident Ownership

For states other than New Hampshire, the manufactured housing resident ownership model is still relatively new and challenges remain. While the manufactured housing industry is evolving and innovative solutions are being developed, lenders have, for the most part, lagged behind, due in part to fallout from the financial crisis. One of the barriers to replacing unsafe or outdated manufactured homes continues to be affordable financing. Traditionally considered to be mobile personal property, manufactured homes often qualify only for high-priced “chattel”²⁵ loans versus real estate loans with more affordable rates. Affordable loans continue to be elusive for all manufactured homeowners, even those who are members of resident-owned communities with cooperative ownership of the land and long-term leases.

In addition, manufactured homeowners are susceptible to health and safety concerns not only from their own outdated or dilapidated homes, but also when a park’s infrastructure has been neglected. The cost of infrastructure improvements can be exorbitant, leading to high incidents of deferred maintenance in investor-owned parks. When residents purchase their communities, they are required by lenders to not only establish replacement reserves, but also to make all necessary infrastructure improvements, often within the first year of operation. Being able to identify grant resources to make these improvements has a significant impact on lowering acquisition costs, translating into the potential for reduced space premiums.

With the right resources and the right expertise, resident ownership of manufactured housing communities can be a viable and affordable option, particularly for seniors looking for an alternative to traditional, costlier, and sometimes more limiting retirement choices. For affordable housing providers, the primary development expense is centered on land and infrastructure, which results in a preservation cost per space, ranging between \$28,000 and \$72,000 to date in Oregon, that falls far below the cost of traditional new housing construction programs, with the extra-added benefit of homeownership preservation.²⁶ It is no wonder that affordable housing providers, as well as cities and states, across the country that are seeking creative ways to address their affordable housing challenges are becoming increasingly receptive to the idea of resident ownership of manufactured housing communities. A handful of forward thinking states, including Oregon, Washington, Minnesota, and Iowa, among others, have dedicated funding and resources to this non-traditional, yet impactful model. One hopes that it is only a matter of time before other states follow suit.

25. A loan arrangement in which an item of movable personal property is used as security for the loan. Loan rates typically mirror the high interest rates charged on credit cards. See <http://www.investopedia.com/terms/c/chattelmortgage.asp>.

26. Including capital improvements.



DIGEST OF RECENT LITERATURE

Understanding the Small and Medium Multifamily Housing Stock

*Brian An, Raphael W. Bostic, Andrew Jakobovics, Anthony W. Orlando,
and Seva Rodnyansky, Enterprise Community Partners, Inc. (March 2017)*

This article explains that rental rates across the country continue to climb and outpace inflation, and as a consequence, the demand for affordable housing continues to exceed the supply. While some stakeholders seek to develop and finance large multifamily developments, this paper focuses on an alternative approach of concentrating on small and medium multifamily housing (SMMF), which is defined as properties with two to forty-nine units.

Researchers at Enterprise Community Partners, Inc. and the University of Southern California found that SMMF properties provide 54 percent of the country's rental housing stock and comprise the most affordable segment of our nation's housing stock. This study argues that the creation of a greater volume of small and medium housing is a viable solution to the country's affordable housing challenge and focuses on the prevalence of SMMF buildings in the overall supply of housing as well as its affordability, age, and place in the rental and ownership stock.

The report concludes by suggesting that policymakers can help to ease growing housing affordability challenges in the United States by preserving SMMF properties, supporting the development of financial tools used to finance SMMF projects, and reducing barriers to producing new SMMF developments. The researchers also identify unanswered questions and call upon the housing policy community to aid with further exploration and preservation of SMMF buildings to address issues of housing insecurity.

Common Ground: Community-Owned Land as a Platform for Equitable and Sustainable Development

John Emmeus Davis, 51 University of San Francisco Law Review 1 (2017)

This article argues that community land trusts are an especially effective strategy for promoting equitable and sustainable development in residential

Contributors: Katherine C. Bailey, Robinson+Cole LLP; Jody Campbell, Klein Hornig LLP/Georgetown University Law Center; Kathryn N. Mullin, Robinson+Cole LLP; Shanellah Verna, Ballard Spahr LLP; Alec Rubenstein, Robinson+Cole LLP; F. Brooke Dunn, Faegre Baker Daniels LLP; and Theresa A. Omansky, Emmet, Marvoin & Martin, LLP.

neighborhoods. The author makes economic and political arguments for why community land trusts (which he refers to as “common ground”) are powerful tools for developing housing and other community support assets, such as retail establishments, artist spaces, and community facilities. Using examples of the Dudley Street Neighborhood Initiative in Boston and the approach taken in the Tenderloin District of San Francisco, the author also discusses the advantages common ground has in comparison to restrictive covenants for preserving affordability in gentrifying areas, ensuring affordability long-term, and providing stability to affordable housing projects. The article explains that these advantages stem from the close relationship that exists between the ground lessor and the ground tenant in community land trusts. The author concludes by describing the potential for community land trusts to transform the social, economic, and political constructs that have led to the disadvantages that they work to overcome, contending that they are more than another great tool for community development and are “‘really about’ . . . equitably and sustainably replanting the contested ground at the intersection of property, power and place.”

Saving Our Cities: Land Banking in Tennessee

Sohil Shah, 46:4 University of Memphis Law Review 927 (2016)

This article examines land banking as a tool for governments to use to return vacant, abandoned, tax-delinquent, and foreclosed properties, resulting from the Great Recession, to productive use. The author provides a history of land banking as a tool for redevelopment and a history of land banking in Tennessee specifically. The author then analyzes the provisions of Tennessee’s authorizing legislation, which was amended in 2014 to apply across the state, and compares it to model legislation created by Professor Frank Alexander of Emory University in his work for the Center for Community Progress. Lastly, the author discusses the status of land banks in various Tennessee counties, noting that the Oak Ridge Land Bank Corporation not only returned properties to productive use through sales, but also donated properties to a local non-profit organization for the construction of moderate- to low-income housing.

Density, Affordable Housing and Social Inclusion: A Modest Proposal for Cape Town

*Colin Crawford, 1:1 Journal of Comparative Urban Law and Policy,
Article 7 (2017)*

This article draws parallels between the United States and South African histories of discriminatory housing practices, high levels of economic inequality, similarities in coastal geographies, and tensions between rural and urban development efforts. Looking to various cities throughout the United States as models, the author of this article suggests that density-based incentive programs enacted in conjunction with other social engineering efforts may be able to create more racially and socioeconomically

inclusive housing in Cape Town. Generally, density incentive programs permit developers to build more densely than what is normally permissible under the land use regulatory scheme in exchange for promising to fulfill another requirement, such as promoting greater inclusion, increasing the use of green technologies, or incorporating a higher percentage of affordable units. The article explains that the success of density incentive program depends on many factors, including, but not limited to, financial attractiveness to private developers, the dedication of planning staff to promoting inclusionary housing methods, and transparency in the incentive system to avoid corruption.

In highlighting successful density bonus incentives in the United States, the author stresses the importance of not viewing density management suggestions in isolation, but rather as an element of a much broader framework of services and initiatives that promote inclusion, such as transportation access and infrastructure development. Although the author acknowledges the unique challenges of Cape Town's urban development, the article espouses an optimistic view that allowing denser housing plans, coupled with incentive systems, could improve housing affordability and inclusion and also help alleviate environmental and land use concerns.

Public Benefit from Publicly Owned Parcels: Effective Practices in Affordable Housing Development

*Michael A. Spotts, Ahmad Abu-Khalaf and Genevieve Hale-Case,
Enterprise Community Partners, Inc. (June 2017)*

This publication—the product of years of research, interviews across the country with housing practitioners, examination of public parcel solicitation documents, and targeted case study—serves as a guide for developing publicly owned parcels by offering helpful tips and highlighting best practices. The article explains that, when done correctly, the development of publicly owned parcels presents an opportunity to address both affordable housing and broader community needs. Where successful, the long-term public benefits can often exceed the short-term financial benefits of land sales to the highest private bidder.

The guide classifies public parcels into different typologies—small sites, suburban sites, infill sites, and large/master planned sites—and offers unique suggestions for the development of each type of site and highlights successful examples throughout the nation. Among other proposals, the authors recommend focusing on a diverse range of topics, such as establishing agency-wide and site-based development plans, engaging the community during the disposition process and throughout development planning, ensuring efficient solicitation and procurement processes, maximizing site potential by considering public facility needs, educating developers about producing affordable housing on public parcels, coordinating with partner agencies, and retaining flexibility in affordability requirements.

Historic Preservation and Its Even Less Authentic Alternative

Lior Jacob Strahilevitz, *University of Chicago Law School Public Law and Legal Theory Working Papers* (2016)

This essay explores the use of fake history in the residential community known as The Villages in Florida and raises the question as to whether society has a legitimate interest in traditional forms of historic preservation, which, according to the author, preserve buildings at random for the sake of authenticity and fairness, or if future developments will follow the example set by The Villages, which encourages the preservation of selective and obscured facts. The Villages has incorporated architecture, marketing, and design features, such as signs and plaques containing fake history, which are intended to perpetuate a fake history. The author discusses whether The Villages' success, despite the presence and tendency for racial segregation, could become standard, as opposed to more traditional forms of historic preservation. The author argues that The Villages' fictitious narrative attracts white homebuyers; in fact, its residents are predominantly white, with less than one percent of its population composed of African Americans and barely one percent made up of Latino residents, despite the community's close proximity to the diverse city of Orlando.

While acknowledging the difference between fake and authentic history, this essay raises the question of whether compulsive historic preservation should be reexamined. Case law regarding historic preservation supports the idea that there is a legitimate interest in the traditional form of historic preservation, notwithstanding increased property values that often result from construction and development. In *Berman v. Parker*, 358 U.S. 26 (1954), the government was permitted to condemn Berman's Department Store, a historic building with no signs of ruin, as part of a slum-clearance plan in Washington, D.C., for the sake of creating a more aesthetically appealing neighborhood. Twenty-four years later, however, the Supreme Court in the New York case *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), prohibited the development of a skyscraper atop Grand Central in an effort to preserve historic buildings, regardless of the possible aesthetic and value enhancements from the proposed development. It seems even when true history is preserved through architecture, it has not done always been done consistently.

Laying the Foundation: The Private Rental Market and Affordable Housing

Ezra Rosser, *44 Fordham Urban Law Journal* 499 (2017)

This article highlights the experiences of poor individuals who find themselves at the bottom of the private rental market and focuses on the importance of storytelling to promote understanding of the limitations of the private affordable housing market. First, the article examines one of the New York Times' ten best books of 2016, Matthew Desmond's *Evicted: Poverty and Profit in the American City*. *Evicted* paints a picture of the

inequalities of housing through the stories of four struggling tenants and the landlords who evict them. Rosser then connects *Evicted* with Courtney L. Anderson's *You Cannot Afford to Live Here* (44 *Fordham Urban Law Journal* 247 (2017)), an article that explores the substandard private rental market and the costs such living conditions impose on education and children. As described by Rosser, Anderson uses the term "unprotected affordable housing" to describe housing that falls within the income-based criteria of affordable housing, but only because of the substandard condition of the property. Rosser emphasizes that Anderson, like Desmond, describes how the private rental market affects communities in a way that is tangible to readers by connecting housing to student turnover at surrounding public schools. According to Rosser, Anderson's article and Desmond's book demonstrate why the narrative of affordable private rental housing should be focused on people and their stories: to generate the political will necessary to ensure all people have access to decent and stable affordable housing. Shifting away from empirical data in favor of recognizing the humanity of those struggling to find basic shelter, Rosser argues, "is a necessary first step if the country is to recognize the moral demands connected with the shared humanity of poor families."

The Cost of Segregation

*Marisa Novara, Alden Loury, and Amy Khare,
Metropolitan Planning Council (March 2017)*

It is becoming increasingly apparent in communities across the country today, especially in metropolitan areas, that segregation creates barriers and inhibits divided communities' potential for growth and success. This article examines three types of segregation: (1) economic segregation, (2) racial segregation of African American and white residents, and (3) racial segregation of Latino and white residents. Partnering with the Metropolitan Planning Council, the authors and their team analyzed segregation patterns in the 100 largest metropolitan areas in the United States. The effects of such segregation have led to challenges bearing on local public school performance, business investments, and employment, along with the effects segregation has on housing options and affordability.

The article speaks to its theme, "Lost income. Lost lives. Lost potential," as the authors provide data that shows if levels of segregation decreased, income in minority communities would increase, homicide rates would decrease, and the number of individuals receiving bachelor's degrees would increase. Primarily, the article uses the data to juxtapose segregation in the City of Chicago against the median levels of segregation from the nation's 100 largest metropolitan areas, showing the links between the three aforementioned types of segregation with employment, education, and the homicide rate.

The article demonstrates that future analysis and modeling are needed in order to more accurately understand how certain races and economic

subgroups in metropolitan regions and states experience the vast effects of segregation. Further, the authors suggest that cities must become less racially and economically divided by working with neighborhood groups, local advocates, and national advisors to address these issues. "It's no longer an option to do nothing. With lost income, lives and potential on the line, we can't leave change to chance. We need to invest in our future by investing in inclusion."

Does Preservation Accelerate Neighborhood Change? Examining the Impact of Historic Preservation in New York City

Brian J. McCabe and Ingrid Gould Ellen, 82:2 Journal of the American Planning Association 134 (Spring 2016)

This article suggests that historic preservation efforts may lead to increased economic revitalization, while also potentially contributing to a greater risk of decreased accessibility for lower-income residents. The article presents an empirical study based on data following the trajectories of New York City neighborhoods designated as historic districts. Primarily, the study relies on data evaluating population changes that occur after the designation of a historic district. The article avoids positing direct causal links between historic preservation and any of its conclusions, instead offering potential alternative causes. In addition to evaluating districts in Manhattan, the article pulls data from Queens, Brooklyn, the Bronx, and Staten Island, in order to expand the applicability of the study's findings to a larger area.

The study divides its comparative findings into three categories: (1) socioeconomic status, (2) racial composition, and (3) housing market characteristics. With regard to socioeconomic status, the article explains that there was a relative increase in household income and percentage of college educated residents living in an area following the designation of a historic district, acknowledging that this also could have been caused by attracting higher-income and more educated residents, or by the exit of low-income residents. The article notes that the statistical analysis of racial composition does not show sufficient correlation in either a positive or negative direction following historic designation and therefore no firm conclusions could be drawn with respect to racial composition. Finally, with regard to housing market characteristics, the findings indicate an increase in home ownership following the designation as a historic district, while also showing no indication of rising rents relative to neighboring districts without historic status. Ultimately, the article highlights a generally positive impact of designating neighborhoods as historic districts and challenges city planners to balance historic preservation's positive amenities with the negative implications and reality of residential displacement.

Permanent Supportive Housing for Homeless People— Reframing the Debate

*Stefan G. Kertesz, M.D., Travis P. Baggett, M.D., M.P.H.,
James J. O'Connell, M.D., David S. Buck, M.D., M.P.H., and
Margot B. Kushel, M.D., 375 New England Journal of Medicine
2115 (2016)*

This article advocates for viewing the Housing First approach to addressing chronic homelessness by considering the needs of the afflicted community, as opposed to evaluating the program through a purely economic lens. The Housing First approach was endorsed by the U.S. government in 2010 as the preferred solution to chronic homelessness; it prioritizes first providing housing to those in need, without mandating the use of support services as a prerequisite to receiving housing. The article highlights the problems in evaluating the success of the Housing First approach through an economic lens or with a cost-savings outcome metric.

While the article acknowledges that financial analyses of the Housing First model have generally broadened the policy discussion surrounding chronic homelessness, it also highlights the flaws in an overly myopic approach to the debate. First, the authors argue that an insistence on savings devalues the lives of homeless people. Second, they contend that focusing primarily on cost may cloud the overall assessment of the Housing First approach and diminish the value of other metrics. And, finally, very similar to the first contention, the authors explain that an emphasis on cost oversimplifies a complex social situation. The article knowingly concedes that, in general, a widespread implementation of the Housing First approach would not generate net savings. By steering away from short-term economics, however, the article promotes a more holistic discussion that would showcase how Housing First presents “a scientifically sound, economically reasonable, and ethical approach to address chronic homelessness.”

Symposium

Community Development Law, Economic Justice, and the Legal Academy

Peter Pitegoff

It was a reunion, of sorts, but also a cross-generational introduction. In January 2017, law professors and practitioners assembled in San Francisco to explore community development law and economic justice, reflecting on the past several decades in the legal academy and in practice. The occasion was a formal “Discussion Group” program at the annual meeting of the Association of American Law Schools.

The evolution of community economic development over the past several decades has witnessed dramatic growth in scale and complexity. Indeed, new approaches to local development and related lawyering, philosophies underlying these new approaches, and dramatic changes in context challenge us to reimagine the framework of community economic development (CED). One goal of the Discussion Group was to revisit and assess an array of practices, initiatives, and theories fitting for what we might describe as a new CED era.

From the early days of community development corporations to today’s sophisticated tools of finance and organization, this evolution underscores “why law matters” in pursuit of economic justice and opportunity. For example, new approaches to enterprise development have stretched beyond traditional business forms to include experiments with cooperative structures, benefit corporations, and other hybrid entities. Federal tax incentives such as New Markets Tax Credits and Low Income Housing Tax Credits have created robust private sector financing regimes and have given rise to investment of billions of dollars in disadvantaged communities. Impact investing, crowdfunding, and novel grassroots initiatives combine to create a virtual “sharing economy,” while rapid technological change continues to pervade private space, public life, and the economy.

Moreover, the contexts for CED have undergone changes over time. Cities, for instance, have emerged in the last two decades as sites of gentrification and concentrated low-wage work, both of which have shifted

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thinking about CED strategies such as low-wage labor organizing in a world of contingent employment. The 2008 recession and its consequences in urban settings have amplified living wage advocacy, community benefits agreements, and efforts to contain runaway housing markets against a background reality of stressed municipal budgets. Rural poverty demands new strategies as it, too, has been exacerbated by the widespread economic downturn. New Americans face heightened immigration law hurdles, while longstanding racial inequities and tensions persist. The new presidential administration adds a palpable level of uncertainty and anticipated change and challenge.

We have seen a parallel evolution in the legal academy—emergence and maturing of affordable housing and community development clinics, other community engagement initiatives, interdisciplinary programs, and expanded attention in scholarship and teaching. I was among the founders in 1988 of the Affordable Housing and Community Development Law Program and transactional law clinic at the State University of New York (SUNY) at Buffalo. Among just a handful of law school transactional clinics at that time, it foreshadowed comparable development clinics at other law schools. Fast forward to 2017, and numerous law schools today house transactional clinics engaged in affordable housing, small business counseling, or community economic development. Our Discussion Group presented an opportunity to assess an array of new law school initiatives and strategies in the field and to give further definition to “community development law” at a fluid moment in its history.

Recalling comparable gatherings in decades past of legal educators involved in community development, the event brought together legal scholars and activists from across the nation and across generations. From a personal perspective, after serving as Dean of the University of Maine School of Law for ten years, it was an opportunity for me (again now as a professor) to re-engage with longtime colleagues and meet kindred scholars and activists, many of them meeting one another for the first time. In collaboration with co-organizers Professor Rashmi Dyal-Chand of Northeastern University School of Law and Professor Scott Cummings of UCLA School of Law, we invited a dozen core discussants, each of whom contributed an abstract in advance describing a community development initiative or strategy and its fit within the evolution of the field. Nine of these abstracts are published in this volume. Also published is a summary account, presented by Professor Cummings at our January Discussion, of the topics reflected in these contributions and thematic streams among them.

Core participants in the discussion, in addition to the three organizers as moderators, included: Lisa Alexander (Texas A&M University School of Law), Alicia Alvarez (University of Michigan Law School), Michelle Wilde Anderson (Stanford Law School), Alina Ball (University of California, Hastings College of the Law), Susan Bennett (American University Washington College of Law), Patience Crowder (University of Denver Sturm School of Law), Michael Diamond (Georgetown University Law Center), Sheila Foster

(Fordham University School of Law), Sushil Jacob (Tuttle Law Group, San Francisco), Kali Murray (Marquette University Law School), Lisa Pruitt (University of California Davis School of Law), and Brandon Weiss (University of Missouri-Kansas City School of Law). Also attending and participating, among another two dozen people, were Susan Jones (George Washington University Law School), Ted De Barbieri (Albany Law School), Matthew Rossman (Case Western Reserve University School of Law), Mark Aaronson (UC Hastings College of the Law), and others bringing extensive experience in the field.

An explicit outcome of the Discussion Group was to energize and nurture a continuing discussion in the legal academy about community development law and economic justice. Throughout the quarter-century history of the ABA Forum on Affordable Housing and Community Development Law, groups of legal educators in the field have gathered to discuss scholarship, CED work, and best practices in transactional clinical education, often in association with the Forum and in conjunction with the Forum's annual national conference. We appreciate the work of Professor Brandon Weiss and the editors of the *Journal of Affordable Housing & Community Development Law* in providing this venue to chronicle the 2017 San Francisco Discussion Group event and to help sustain a vibrant discussion.

Thematic Overview: Community Development Law and Economic Justice—Why Law Matters

Scott L. Cummings

Thank you for the privilege of reading and commenting on these fascinating papers on community economic development (CED). I personally came away from them thinking that CED law is now less a body of activity or doctrine that can be empirically defined or normatively derived, and more a set of basic questions about the content and control of local struggles for change, the role and responsibility of a democratic government to promote equality and economic security for its people, and the potential of collaboration or conflict to achieve deep and sustained structural reforms. In my comments, I summarize some of the initial themes and questions that emerged most prominently from the papers.

First, *where does—and should—CED happen?* The classic stories of CED are big-city stories, powered by the familiar narrative of post-industrial white-flight, suburbanization, and “inner city” decline. And in these papers, that theme persists: I think particularly of Alvarez’s compelling account of Detroit. But what was most striking to me was the pivot away from the big city paradigm: the exploration of stories of struggle and resistance in different spaces where poor people have always been but perhaps where they have also been increasingly pushed as the U.S. metropolis—New York, Los Angeles, Chicago, San Francisco—becomes a space for the rich. In this regard, we have Anderson’s story of Lawrence, Massachusetts, Ball’s account of the Salinas Valley, Murray’s analysis of Ferguson, and Pruitt’s rich description of Round Mountain, California. Particularly after the 2016 presidential election revealed such stark divisions between big cities and small, between urban and rural, an important question is whether our work should be more focused on what is happening outside the “progressive city” in places of decline and distress often forgotten in our conventional analysis but critically important to holding the fabric of our country together.

Second, *what is the basic set of problems that CED seeks to address?* This is a variation on the familiar question of: “What is community development?” But here I want to frame it in terms of diagnoses and solutions. With respect to diagnoses, I was struck by themes of continuity and change. At some level, distressingly, after all this time and work by so many committed and courageous people, we still confront the intransigent problems of class division, racial discrimination and segregation, and disregard for the

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plight of the most vulnerable members of our society. Looking at these problems, the papers coalesce around a common diagnostic analysis: they tell a story about the withering away of the state as a site of protection and poverty alleviation, and the painful persistence of white supremacy and nativism. In this regard, Anderson's paper emphasizes what happens to communities "When Governments Die"; Bennett's synthetic analysis focuses on the consequences for poor communities of withdrawing the social safety net. In all of the papers, there is an overarching narrative about the exclusion of marginalized people from local decision making and what could be done to help them better access the democratic process.

However, I was also struck by the degree to which these problems are not static. They can get better—or they can get worse. As the papers make clear, inequality is getting much worse, heightening the economic precarity of the poor and undermining the sense of connection between people's lives. The papers provide a range of compelling examples. Gentrification as a fundamentally unequal process in which poor communities of color are displaced as investors snatch up property to be inhabited by affluent whites is a deepening problem, explicit in Detroit, implicit in Lawrence. Revealing the significant backsliding in our social commitment to house the poor, Weiss spotlights the growing withdrawal of housing from the subsidized rental market, while Alvarez describes the massive loss of market-rate housing through tax foreclosure in Detroit. Economic precarity also affects, in a very practical way, the possibility of coming together to fight for improved conditions. Bennett's notion of "untethered" poverty and the volatility it creates in people's lives underscores the challenge of building collective action for change. In a related vein, Diamond suggests that increasing economic vulnerability has made it even more difficult to organize tenants to acquire housing and resist gentrification and displacement in Washington, D.C. Vulnerability based on immigration status plays a prominent role in the stories of Lawrence and Salinas—and forces us to consider how the precarity of immigrants' lives in the new political moment will affect the potential for organizing and reform.

Third, *what are the solutions that CED offers?* The papers offered competing views. Should reform efforts focus on people or place? Should they try to enhance individual capacity or promote collective capacity? For her part, Alexander presents the "tiny homes movement" as fundamentally about making homeless people "stewards" of their community rather than "recipients of services"—about creating novel spaces for self-determination that "challenge the prevailing power structures of urban development." Murray emphasizes the power of collective action and dialogue, focusing on new policing strategies that have the potential for deepening mutual exchange and trust between the police and communities of color.

Fourth, *what are the relevant units of action?* That is, what are the groups or organizational structures that advance change in the CED stories these papers present? Are there some collective formations that are more

effective than others in promoting empowerment and challenging inequality? Should the focus of CED be on building social movement organizations, like the Movement for Black Lives, in Murray's paper, or on supporting groups engaged in critical service provision in underserved communities? If the answer is "both," then what should be the criteria for allocating resources between them? What about the potential of multi-organizational collaborations? Foster's description of a "commons" envisions the locus of change in a collaborative governance structure that must be created and sustained; this resonates with Crowder's idea of "collective impact" as a process for bringing together multiple stakeholders to create a common agenda and set common goals and metrics. To what degree is CED about building organization where none exists—as Pruitt's account of the Hill Country Health and Wellness Center suggests?

Fifth, and related, *what is the role of the government in shaping CED and which level (national, state, local) is best suited to address different sorts of problems?* Weiss highlights how federal decisions about ownership of public housing profoundly affect the possibilities for local housing preservation. Bennett again shines the spotlight back on the dwindling federal safety net and forces us to ask what we can do about it. Alvarez talks about intervening in local government process around foreclosure as a potential lever for communities to preserve housing. For those committed to CED as a bottom-up strategy of social change, which levels of government, if any, should be the locus of advocacy and for which issues? How can advocacy strategies at different levels be combined and coordinated?

Sixth, *what role does law play in CED?* As Alvarez prompted discussants to consider in describing the fundamental inequality at the heart of gentrification in Detroit, "Where is law?" At some level, as Austin Sarat reminded us, "law is all over." Even when poor people are not deploying law as a tool, it is operating on them pervasively in ways that shape the very possibility of thinking about acting collectively. Law is also deployed by those with power to further entrench their position—as Alvarez's description of investment companies gobbling up properties through foreclosure suggests. But law is also pervasive as a tool of resistance. A key and long-standing question in the CED field is whether lawyers should try to build collectivities through private ordering (a transactional approach) or challenge structures of power through legal and political activism (a law reform approach). With respect to the transactional approach, I was particularly intrigued by Dubal and Jacob's idea of a "platform cooperative" as a new legal structure for creating an "online marketplace that is owned and democratically governed by its members"—thus transcending the wage-slave/micro-entrepreneur binary. This type of project, while powerful, also raises the question: can such private solutions make a difference against the backdrop of broader legal and political structures that produce economic insecurity?

Finally, *what is the role of lawyers in CED?* The papers present different views on this question. Some suggest a limited role for conventional

lawyering, instead framing the lawyer's role in relation to supporting organizing and capacity building. In this regard, Ball suggests incorporating community lawyering ideals into the principles of transactional lawyering. Pruitt's account also implicitly questions the importance of lawyers by highlighting the effective self-help strategies of nonlawyers like the health center's founder. But in other cases, lawyers and lawyering seem to matter profoundly to CED's success. Lawyers help imagine new forms of governance and business, they contract for complexity in impact agreements, and they help define strategies and policy reforms that address the underlying causes of poverty and inequality. Of course, in the end, effective CED is always a productive and careful synthesis of law, politics, and grassroots mobilization. The best CED lawyers understand how to use their own professional expertise to complement and build structures of local expertise and power—and how to grow that power to make a difference.

In this moment when we are thinking about what types of local fights matter in the context of national-level struggles that feel so hostile to the basic goals of equality and empowerment, now more than ever I am grateful for the opportunity that these papers provide to think hard about how we can build alliances with local movements for change that will make a difference in this uncertain time.

Tiny Homes for the Homeless: A Return to Politically Engaged Community Economic Development Law?

Lisa T. Alexander

The HGTV show “Tiny House, Big Living” shows the growing popularity of downsized living among middle-class and wealthy Americans.¹ The typical American home is approximately 2,600 square feet,² while market-rate tiny homes typically range from 100–400 square feet. Tiny house living has become an increasing trend, offering more affordable and sustainable housing alternatives for millennials, environmentalists, and others seeking unconventional living.

Homeless individuals, housing advocates, and cities are also creating tiny house villages to address chronic homelessness.³ There are currently at least ten sanctioned and partially developed tiny homes for the homeless villages in places such as Eugene and Portland, Oregon; Ithaca, New York; Dallas and Austin, Texas; Olympia and Seattle, Washington; and Madison, Wisconsin.⁴ These projects are primarily developed and led by the homeless through “sweat-equity,” or by committed non-profit organizations, with the support

1. *Tiny House, Big Living* (HGTV), <http://www.hgtv.com/shows/tiny-house-big-living>.

2. See *What is the Tiny House Movement?*, THE TINY LIFE, <http://thetinylife.com/what-is-the-tiny-house-movement/> (last visited Apr. 26, 2016).

3. See, e.g., ANDREW HEBEN, *TENT CITY URBANISM: FROM SELF-ORGANIZED CAMPS TO TINY HOUSE VILLAGES* (2014); Chris Weller, *Cities Across America are Giving Homeless People Tiny Homes, and it's Working*, BUS. INSIDER (Feb. 11, 2016, 7:00AM), <http://www.businessinsider.com/tiny-homes-give-homeless-people-a-place-to-live-2016-1/#seattles-nickelsville-homeless-encampment-first-began-in-2008-with-just-a-few-tents-1>.

4. See Andrew Heben, *About: Where are these Tiny House Villages?*, TENT CITY URBANISM, <http://www.tentcityurbanism.com/p/about.html>.

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of some local governments. Additionally, approximately twenty-five other projects are under development.⁵

In this discussion paper, I contend that the tiny homes for the homeless movement represents a return to a “politically engaged” approach to housing and community economic development practice. Politically engaged Community Economic Development law (CED), “deploy[s] transactional lawyering in a way that builds organized low-income constituencies that can challenge the distribution of political power.”⁶ The tiny homes for the homeless movement is a rejection of the traditional market-based and professionalized approach to CED that has come to dominate housing and CED practice since the late 1980s.⁷ The advent of the Low-Income Housing Tax Credit, the New Market Tax Credit, and the growing trends of urbanization in the United States has led traditional housing and CED practice to ignore the lowest-income individuals, to gentrify many formerly disinvested inner-city communities,⁸ and render the homeless as recipients, rather than stewards, of complex housing and social services.

The tiny homes for the homeless movement emerged organically as a set of self-help, local interventions to ameliorate an emerging homelessness crisis that local governments failed to solve in the wake of the 2008 housing crisis.⁹ Some of these villages began as tent camps of homeless individuals and activists protesting the lack of adequate alternatives for the homeless or the former criminalization of homelessness.¹⁰ Now, many of these tiny house villages are well-planned and organized communities that restore the dignity, purpose, and connection to others that many formerly homeless individuals had lost. Homeless individuals not only create needed shelter, but with the help of non-profits, lawyers, architects, planners, volunteers, and private fundraising through social media, they also create holistic communities that give real meaning to

5. See *id.*

6. Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 459 (2001).

7. See *id.* The Trump administration’s proposed budget cuts to the U.S. Department of Housing and Urban Development and other housing programs may cause a shift in the neo-liberal approach to housing and community development that has been dominant since the 1980s and redirect the energy of housing advocates toward more politically confrontational approaches. *But see* Jose A. DelReal, *Trump Administration Considers \$6 Billion Cut to HUD Budget*, WASH. POST (Mar. 8, 2017), https://www.washingtonpost.com/politics/trump-administration-considers-6-billion-cut-to-hud-budget/2017/03/08/1757e8e8-03ab-11e7-b1e9-a05d3c21f7cf_story.html?utm_term=.e2cddb5cf18.

8. See generally Cummings, *supra* note 6, at 447–53 (explaining that “market-driven housing programs have not produced clear gains for low-income communities”).

9. See HEBEN, *supra* note 3, at xii.

10. See *id.* at 8–9.

the term “sharing economy.”¹¹ Many of the villages have shared bathrooms, cooking facilities, gardening plots, and woodworking tools.¹²

Other villages create and connect formerly homeless and unemployed individuals to work and microenterprise opportunities, such as woodworking and bee keeping operations.¹³ The Austin-based Community First! Village also hosts an outdoor community cinema in which formerly homeless tiny house, teepee, and RV village residents work with Austin’s iconic Alamo Drafthouse Cinema to show free films to the public and provide concessions served by the formerly homeless residents of the village.¹⁴ Community First! Village also provides Community Inns, which are tiny bed and breakfast facilities where housed individuals can book an overnight stay to visit with the formerly homeless residents, learn about the village, and provide volunteer services.¹⁵ The Community First! Project connects formerly homeless individuals with each other as well as with housed members of surrounding communities. The web and social media enable tiny homes for the homeless villages to connect to one another and to share information. They also connect residents with wealthy and knowledgeable individuals outside of their communities, who provide volunteer legal, planning, construction services, and workforce development assistance.

While these projects are not a panacea to the problem of homelessness, they represent a return to the self-directed and empowering approaches to politically engaged CED that began the CED movement. These projects move organically from protest, to self-help development, to creative social media-driven fundraising, to engagement with local city officials for zoning and land use permits. I contend that this approach represents the possibilities of a new era of CED practice that eschews the neo-liberal approach in favor of a more empowering model that gives the most vulnerable members of the polity a role in shaping the direction of development. This approach also emboldens traditionally marginalized groups to challenge the prevailing power structures of urban development and to determine the goals of their development projects. Through self-help, self-

11. See *id.* at 13; see also Nestor M. Davidson & John J. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 *YALE L. & POL’Y REV.* 215, 216 n.1 (2016) (“The term ‘sharing economy’ is contested, with some commentators questioning whether there is, in fact, any sharing to this new economy and the normative valence of invoking its communal implications.” (citing Orly Lobel, *The Law of the Platform*, 101 *MINN. L. REV.* 87 (2016))).

12. See HEBEN, *supra* note 3, at 174–78.

13. See 2046 E Johnson St. Planned Property Improvements \$80,000 & 1000s of Volunteer Hours, OCCUPY MADISON INC., <https://occupymadisoninc.files.wordpress.com/2014/01/2046-pres0-bkbw-final2.pdf>.

14. See *What We Do: Community Cinema*, MOBILE LOAVES & FISHES, <http://mlf.org/community-cinema/>.

15. See *id.*

determination, and collaboration with other members of civil society, the homeless work to solve local housing problems and to restore their dignity and connection to community and opportunity.

The tiny homes for the homeless movement must be placed in the larger continuum of currently available housing and community economic development options to become a long-term solution to the problem of homelessness. These projects can be initial stepping stones to more stable housing and employment for individuals who previously could not participate in traditional housing or employment markets. These tiny homes for the homeless villages should supplement, not replace, traditional federal, state, and local housing subsidy programs. Yet, local, state, and federal governments, as well as non-profits, fourth sector B Corporations, and other novel funding sources, must support these efforts, if tiny homes villages for the homeless are to become a viable long-term solution to the problem of chronic homelessness. Additionally, lawyers and law will play a central role in legitimating these new innovations to enable them to flourish. Lawyers, planners, and other professionals will need to devise new zoning designations, conditional use permits, maximum density requirements, and dwelling definitions in order to accommodate these local CED variations. How law is employed in these endeavors will determine the success of the tiny home movement over time as well as its responsiveness to community needs. Law school clinics and emerging CED lawyers will need to employ novel approaches to support and legitimate these innovations. Yet, the tiny homes for the homeless movement represents promising possibilities for CED law and practice that direct CED law away from more politically passive and disempowering market-based approaches toward a more politically engaged approach that places the homeless at the center, rather than the margins, of the innovation process.

The Wild, Wild Midwest

Alicia Alvarez

It might seem paradoxical that in a city like Detroit with so much vacant land, few resources are going to preventing vacancy. Of the city's land area of 139 square miles, approximately twenty are vacant.¹ Roughly 80,000 of the city's housing units, amounting to 23 percent of the city's housing, are vacant.² The vacancy rate is similarly high for commercial and industrial properties, with 36 percent of commercial properties standing vacant and 22 percent of industrial properties being vacant.³ Simultaneously, some organizations and individuals in the city are finding it difficult to acquire land, especially for urban agriculture uses. Though there is no explicit policy, in some neighborhoods community members are not able to purchase city-owned land. In many ways, the current story of the city of Detroit is a study of contrasts. After emerging from bankruptcy, one might think that tax collections should be a priority. But not enough is being done to prevent the loss of housing by homeowners due to tax foreclosures.

By many regional and national accounts, the City of Detroit is undergoing a renaissance.⁴ The media accounts highlight the attractiveness of the city to young people, the inexpensive housing, available retail space, the art scene, the demand for local products, and "a gritty, 'can-do' and underdog attitude among Detroit residents."⁵

The city is experiencing extensive private and public investment.⁶ Several companies, including Compuware, Quicken Loans, and Fifth Third Bank, relocated their headquarters to the central business district.⁷ The downtown area is experiencing significant commercial and residential development.

1. GARY SANDS & MARK SKIDMORE, *DETROIT AND THE PROPERTY TAX: STRATEGIES TO IMPROVE EQUITY AND ENHANCE REVENUE* 10, 11, LINCOLN INSTITUTE OF LAND POLICY (2015).

2. *Id.*

3. *Id.*

4. Peter Applebome, *In Detroit's 2-Speed Recovery, Downtown Roars and Neighborhoods Sputter*, N.Y. TIMES, Aug. 12, 2016.

5. Laura A. Reese, et al., "It's safe to come, we've got lattes": *Development Disparities in Detroit*, 60 CITIES 367, 369 (2017).

6. *Id.*

7. *Id.*

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New retail, coffee shops, and restaurants are opening. Residential developments, including “new construction, rehabilitation and adaptive reuse,” are emerging throughout the downtown area.⁸ A new hockey and basketball arena is nearly complete.⁹ As the city emerged from bankruptcy, city services such as lighting, garbage pick-up, snow removal, and police and fire response times began to improve. Certain city services were privatized (lighting, Eastern Market) or regionalized (water and sewer), and the State of Michigan took over the operation of the city’s large riverfront park, Belle Isle.¹⁰ A new light rail line opened in May, 2017.¹¹

In many respects, Detroit is a tale of two cities. In addition to the development happening downtown, Detroit is also the poorest large city in the nation.¹² Over 40 percent of Detroit’s population lives in poverty.¹³ The city has lost more than half its population since 1970.¹⁴ The city currently has fewer than 700,000 residents,¹⁵ a decline from the high of over 1.8 million residents in 1950.¹⁶ The city’s residents are primarily African American (just over 80 percent), and 10 percent are White.¹⁷ The city continues to lose population, though the decline has recently slowed. Transportation to jobs continues to be a major issue. The school system continues to face challenges. There are several signs of the distress experienced by the city’s residents. In 2015, the city shut off water service to over 23,000 homes, approximately one in nine of the city’s residential accounts.¹⁸

Decades of deindustrialization, the decline of the automobile industry and suburban White flight “have severely eroded Detroit’s population, employment, and tax base.”¹⁹ Though the city has been losing population

8. *Id.*

9. Peter Eisinger, *Detroit Futures: Can the City Be Reimagined?*, 14 CITY & CMTY. 106, 110 (2015).

10. Reese et al., *supra* note 5, at 369.

11. Eric D. Lawrence & Robert Allen, *All aboard! Detroit QLINE is open for street-car riders*, DET. FREE PRESS, May 12, 2017.

12. Christine MacDonald & Charles E. Ramirez, *State Gains in Income, Still Below Pre-recession Levels*, DET. NEWS, Sept. 15, 2016.

13. *QuickFacts, Detroit City, Michigan*, U.S. CENSUS, <https://www.census.gov/quickfacts/table/PST045216/2622000,00> (last visited Apr. 24, 2017) [hereinafter *QuickFacts*].

14. Christine MacDonald, *Detroit Population Rank is Lowest Since 1850*, DET. NEWS, May 29, 2016. The city has approximately 677,000 residents and had approximately 1.8 million residents in 1950. *Id.*

15. *Id.*

16. *Id.*

17. *QuickFacts, supra* note 13.

18. Joel Kurth, *Detroit Hits Residents on Water Shut-Offs as Businesses Slide*, DET. NEWS, Mar. 31, 2016.

19. Daniel Clement & Miguel Kanai, *The Detroit Future City: How Pervasive Neo-liberal Urbanism Exacerbates Racialized Spatial Injustice*, 59 AM. BEHAV. SCIENTIST 369, 373 (2015).

for quite some time,²⁰ the recent economic recession exacerbated the problem of housing decline. The city has lost 37 percent of its housing units since 1960.²¹

The Detroit Land Bank Authority controls nearly 100,000 parcels of land in the city²² (over one in city four parcels). Since 2014–2016, the city has demolished over 11,000 properties.²³ The demolitions are slated to continue. Federal Hardest Hit funds provided much of the financing for the demolitions.²⁴ The Land Bank administers several programs to sell homes and vacant land,²⁵ auction homes,²⁶ and sell vacant lots to owners next door.²⁷ Community partners may purchase up to nine lots at a discount and ten or more lots with more oversight.²⁸ Properties continue going into the Land Bank inventory.

One of the reasons for the continuing entry of homes into the Land Bank inventory is the crisis in tax foreclosures in recent years. Between 2005 and 2014, one in three Detroit properties was foreclosed as a result of mortgage or tax default.²⁹ Not surprisingly, over half of the homes

20. See MacDonald, *supra* note 14.

21. Margaret Dewar et al., *Disinvesting in the City: The Role of Tax Foreclosures in Detroit*, 51 URB. AFF. REV. 587, 588 (2015).

22. See Quarterly Report of the Detroit Land Bank Authority to the Detroit City Council, April 14, 2017, <http://www.buildingdetroit.org/wp-content/uploads/2014/08/City-Council-Quarterly-Report-April-2017.-final.pdf> (last visited May 1, 2017).

23. See Detroit Demolition Program, <http://www.detroitmi.gov/demolition> (last visited May 1, 2017).

24. See Detroit Land Bank Authority, Hardest Hit Funds/Demolition Program, <http://www.buildingdetroit.org/our-programs/hardest-hit-funddemolition/> (last visited May 1, 2017).

25. The Land Bank sells homes under two programs. The Own It Now Programs sells homes that are need substantial investment because the homes are not cleared or secured and title may not be clear. See Detroit Land Bank Authority, Own It Now Program, <http://www.buildingdetroit.org/own-it-now/> (last visited May 1, 2017). Under the Rehabbed & Ready Program, the Land Bank sells homes that are move-in-ready. See Detroit Land Bank Authority, Rehabbed & Ready Program, <http://auctions.buildingdetroit.org/RehabbedAndReady/SplashPage> (last visited May 1, 2017).

26. See Detroit Land Bank Authority, Auction Program, <http://www.buildingdetroit.org/our-programs/auction-program/> (last visited May 1, 2017).

27. See Detroit Land Bank Authority, Side Lot Sales Program, <http://www.buildingdetroit.org/our-programs/side-lot-sales/> (last visited May 1, 2017).

28. See Detroit Land Bank Authority, Community Partnership Program, <http://www.buildingdetroit.org/community-partnership-overview/> (last visited May 1, 2017).

29. Joel Kurth & Christine MacDonald, *Volume of Abandoned Homes 'Absolutely Terrifying'*, DET. NEWS, May 14, 2015, <http://www.detroitnews.com/story/news/special-reports/2015/05/14/detroit-abandoned-homes-volume-terrifying/27237787/>. The exact figures are 139,699 of 384,672 properties, or 36 percent. *Id.*

that were in foreclosure became blighted.³⁰ Over three-quarters of the homes on the city's blight list are foreclosures.³¹ Detroit was fourth in mortgage foreclosures during the 2005–2014 period, behind Las Vegas, Phoenix, and Chicago, but it had more tax foreclosures than the other cities.³² In addition, Detroit's housing prices dropped the most, down 73 percent from the peak before the housing market crash.³³ That has meant a devastating loss of wealth to the residents as well as reduced tax collection for the city as a result of the reduction in value, and complete loss of revenue for the properties that are abandoned. Abandoned properties cost the city additional funds when they are demolished. Blighted homes means reduction in the value of nearby homes as well. Many properties "reenter tax delinquency."³⁴

In 2015, over 60,000 properties in the city entered the tax foreclosure process.³⁵ That amounts to one-sixth of the properties in the city. Of the more than 28,000 that went into auction, more than a third were occupied residential properties.³⁶ An enormous effort by many allowed some homeowners to enter into payment plans that permitted some of the homes initially subject to tax foreclosure to be saved (at least temporarily). The mayor worked with the state legislature to reduce penalties and interest for those owing back taxes.³⁷ Several churches, community organizations, and legal services programs sponsored sessions to inform residents of the various programs available to lower their taxes and make partial payments in order to avoid foreclosure. For many, these were temporary fixes. Even with the herculean efforts of many, close to 28,000 properties went to the tax action in 2015.³⁸ More than a third of those properties were occupied.³⁹ The majority of the occupied homes were sold in the auction. Some may have been purchased by the tenants living in them. The vast majority were likely sold to investors.⁴⁰ The list of purchasers

30. *Id.*

31. *Id.*

32. *Id.* Detroit had 100,000 tax foreclosures during that ten-year period. *Id.*

33. *Id.* The decline was the lowest among the fifty largest cities. *Id.*

34. See Dewar et al., *supra* note 21, at 595.

35. Joel Kurth & Christine MacDonald, *Detroit Braces for a Flood of Tax Foreclosures*, DET. NEWS, July 1, 2015, <http://www.detroitnews.com/story/news/special-reports/2015/07/01/detroit-braces-flood-tax-foreclosures/29589915/>.

36. *Id.*

37. Bill Laitner, *Tax-foreclosure Crisis Looming as Lawmakers Set to Act*, DET. FREE PRESS, Nov. 29, 2014.

38. Eric D. Lawrence, *Wayne County Foreclosure Numbers See Big Dip*, DET. FREE PRESS, June 26, 2016.

39. *Id.*

40. See list of bids and winners in 2015 tax foreclosure auction at Loveland Technologies, 2015 Leadershipboard, <https://makeloveland.com/2015/top> (last visited May 1, 2017).

shows many individuals and corporations purchased one property. Five individuals purchased over 100 properties, and one purchased 473.⁴¹ The situation improved in 2016 with a 36 percent decrease (from 2015) in the number of homes entering the county tax foreclosure process but that still meant that approximately 18,000 properties went to auction.⁴²

The reasons for the staggering number of tax foreclosures are varied. The city's poverty rate contributes to people's inability to pay. The County Treasurer's difficult-to-navigate poverty exemption results in many people liable for the full amount of taxes when they might otherwise be eligible for a reduction. Another major contributor to the tax foreclosure crisis has been the over-assessment of properties in the city. Under the Michigan Constitution, a property's assessed value cannot exceed half of its market value.⁴³ The city recognizes that properties in the city are over-assessed and decreased assessment in 2014 and 2015.⁴⁴ In early 2017, the city announced it had completed an individualized reassessment of all properties.⁴⁵ A recent study shows that most properties in the city were over-assessed and that the average assessment ratios declined as the property values increased.⁴⁶ The study finds that on average assessment were 7.3 times higher than market values in 2010 and 2.1 times higher than market values in 2015.⁴⁷ The American Civil Liberties Union and the NAACP Legal Defense and Educational Fund sued the city and county challenging the over-assessment as violations of the Fair Housing Act.⁴⁸ The city responded that the plaintiff's requests for reassessment threatens city services and violates the bankruptcy plan of adjustment.⁴⁹

Mortgage foreclosures contributed to the problems of abandoned homes. Detroit was "an epicenter of subprime lending."⁵⁰ In 2005, eight of the twenty census tracts with the highest rates of subprime lending in the country were in Detroit.⁵¹ Unlike other cities that faced a mortgage

41. *Id.*

42. Lawrence, *supra* note 38.

43. Bernadette Atuahene & Timothy R. Hodge, *Statecraft*, __ S. CAL. L. REV. __ (forthcoming 2018) (citing MICH. CONST. art. IX §211.27(a)(1) (2013)).

44. Matt Helms, *Detroiters to See Property Assessment up to 20% Lower*, DET. FREE PRESS, Jan. 28, 2015.

45. Christine Ferretti, *Property Taxes Going Down for Over Half of Detroiters*, DET. NEWS, Jan. 23, 2017.

46. *Id.*

47. Bernadette Atuahene, Op-Ed., *Detroit's Tax Foreclosures Indefensible*, DET. FREE PRESS, Sept. 1, 2016. *See also* Atuahene & Hodge, *supra* note 43.

48. Christine MacDonald, *ACLU, NAACP Sue to Stop Wayne County Tax Auction*, DET. NEWS, July 13, 2016.

49. *Id.*

50. Christine MacDonald & Joel Kurth, *Detroit Backed off Suing Lenders over Risky Mortgages, Blight*, DET. NEWS, June 25, 2015.

51. *Id.*

foreclosure crisis, Detroit never sued the banks and other lending institutions over predatory lending and the blighted foreclosures. The city was in crisis and did not have the necessary staff.⁵² The city received money from national settlements and used it for blight removal.⁵³ The State of Michigan has also been criticized for not using more of its Hardest Hit Funds in foreclosure prevention.⁵⁴

The foreclosures have real consequences for people as well as the city. Studies show that foreclosures and auctions decrease owner occupancy.⁵⁵ Auctions are responsible for “dumping properties,” offering them at very low prices, as a result lowering the value of nearby properties, and therefore seeding blight.⁵⁶ Many of the purchasers at auction are investors.⁵⁷ More resources need to be used to prevent both mortgage and tax foreclosure. It is both the fiscally right thing to do as well as the morally correct thing to do. Foreclosures have both human and financial consequences for the city and the people involved. When properties go into foreclosure, families lose their home. That has lasting financial consequences since any investment is wiped out. The family has to then look for housing elsewhere. Families may lose their support networks, including schools and care networks for the children. In addition, the city and county have to spend the resources to process the foreclosure and eventually demolish the home.

Detroit is not the blank slate that many may think it is. It has a rich history. It also has a present. Even with its vacancy, the city’s “density remains significantly higher than cities of a comparable territorial size such as Atlanta, Denver, and Portland.”⁵⁸ The city does face substantial challenges, including high rates of unemployment and poverty, violent crime, an educational system needing extensive improvement, and vacant properties. What the future holds depends on the ability to craft more democratic and just approaches to the city’s challenges. The “current recovery discourse is focused on fiscal and physical concerns.”⁵⁹ Missing from much of the planning of the city’s future is a conversation about

52. *Id.*

53. *Id.*

54. Todd Spangler, *Federal Inspectors Criticize Michigan Housing Aid Program*, DET. FREE PRESS, Jan. 11, 2017.

55. Dewar, *supra* note 21, at 600.

56. *Id.* at 601.

57. *Id.* at 600.

58. Clement & Kanai, *supra* note 19, at 374.

59. Gary Sands, *Not Dead Yet: Response to William Tabb’s “If Detroit is Dead, Some Things Need to be Said at the Funeral”*, 37 J. URB. AFF. 13, 15 (2015).

the current residents of the city, "human capital."⁶⁰ "Repairing the city's balance sheet and demolishing abandoned buildings will not . . . ensure the prosperity" of the city's residents.⁶¹ Fairness demands that we attend to the needs of the residents, not merely look to replace them.

60. *Id.*

61. *Id.*

Community Development Law and Economic Justice—Why Law Matters: The Potential Impact of Corporate Law Clinics

Alina Ball

The Social Enterprise & Economic Empowerment Clinic (“the Clinic”),¹ an in-house corporate law clinic at UC Hastings College of the Law, began working in the Salinas Valley with other legal service providers in late 2014 to promote community-driven solutions to access safe drinking water. The Salinas Valley, California, is one of the largest and most productive agricultural regions in the nation.² Agricultural businesses began to flourish in the mid-1900s and continue today to be the region’s major industry. The “green gold” of the Salinas Valley significantly contributes to Monterey County’s \$8 billion agricultural industry, making it the fourth highest producing region in California.³ The Salinas Valley is, however, also home to extreme wealth inequality and the tributaries that flow from its raging waters are not a new topic of discussion in the rural communities. Perhaps no other natural resource exemplifies the disparity within this region more than the access to potable water.⁴

1. For more information on the Clinic, see <http://www.uchastings.edu/academics/clinical-programs/clinics/socialenterpriseandeconomicempowerment/index.php>.

2. JOHN STEINBECK, *OF MICE AND MEN* 57 (1937) (“We could live offa the fatta the lan’.”).

3. See *Economic Contributions*, MONTEREY COUNTY FARM BUREAU, <http://montereycfb.com/index.php?page=economic-contributions> (last visited July 14, 2017) (“‘Monterey County agriculture pumps \$8.12 billion into the local economy and supports more than 76,000 jobs,’ Agricultural Commissioner Eric Lauritzen announced as he released an updated report of a comprehensive economic analysis of the county’s leading industry on June 30, 2015.”).

4. “Some people have a right to more water than others, . . . That’s built into the legal framework of California.” Gov. Jerry Brown on California Water Crisis, ABC News (Apr. 5, 2015), <http://abcnews.go.com/ThisWeek/video/gov-jerry-brown-california-water-crisis-30107922>. *Salad Bowl of the World: At What Cost?*, MONTEREY HERALD (Apr. 18, 2015), <http://www.montereyherald.com/article/NF/20150418/NEWS/150419757> (last visited July 14, 2017) (identifying that the agricultural industry consumes 90% of the water in the Salinas Valley).

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One of the Clinic's clients is a farmworker housing cooperative in the Salinas Valley ("the Cooperative"). The Clinic provides corporate and transactional counsel to the Cooperative and is representing the entity in its quest to own and control its water system. In our corporate lawyering, we seek to honor the sacrifices, ingenuity, and lay lawyering of the many residents of the Cooperative. This representation provides a textured portrayal of corporate lawyering that intentionally integrates the values of community lawyering.⁵ There is a pressing need for private ordering expertise in building institutional power within low-income communities as well as individual access to financial security.⁶ The objective of my comments in this essay is to legitimize and articulate what I describe as "corporate-community lawyering"—the intentional incorporation of community lawyering theory into a distinctly transactional practice.

A. A Community Fortified Through Resistance to Racial Subordination

The following narrative provides a brief history of the establishment of the Cooperative and the development of its leadership as a precursor to describing the Clinic's current representation.⁷ In the late 1960s, a group of farmworkers, who were unionized under the United Farm Workers, organized and operated their own strike against a local strawberry company. The company retaliated against the striking farmworkers by threatening to evict them from their labor camp. The farmworkers did not realize prior to the strike that the company owned the labor camp where most of their homes were located and their families resided. As a means to having the farmworkers removed from the labor camp, the company sold the camp to a new owner who eventually had the police evict the farmworkers. Approximately thirty-two families set up tents, built makeshift cardboard shacks, and converted their cars into sleeping quarters.

5. Karen Tokarz, Nancy L. Cook, Susan Brooks & Brenda Bratton Blom, *Conversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Legal Education*, 28 WASH. U. J.L. & POL'Y 359, 364 ("[C]ommunity lawyering is an approach to the practice of law and to clinical legal education that centers on building and sustaining relationships with clients, over time, in context, as a part of and in conjunction with communities. It incorporates a respect for clients that empowers them and assists them in the larger economic, political, and social contexts of their lives, beyond their immediate legal problems.").

6. Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 108 (2000) ("The goal for community lawyers should include assisting clients to create power and lasting institutions with the ability to influence the clients' environment, rather than solely the creation or enforcement of rights or providing legal remedies to legal wrongs.").

7. Several of the facts and details are withheld to maintain the client's identity.

The evicted farmworkers knew of an abandoned labor camp the county owned⁸ and moved into the barracks of the labor camp after several months on the streets. The city and county officials initially arranged for the families to be temporarily relocated to the camp, but as the families began to consider the possibility of somehow converting the labor camp into permanent homes they could own, there was resistance. The families refused relocation and defied deadline after deadline by the local government agency to move out of the labor camp. The living conditions at the dilapidated camp, however, were harsh. Over time, as the standoff between the farmworker families and the local government agency continued, more and more of the families moved out of the camp but remained active in problem solving around a long-term solution to affordable housing in Salinas Valley. There was well-organized and politically powerful opposition to the families staying at the labor camp that exploited racialized narratives of Latinos⁹ as justification for why the government should not allow these Latino families to permanently live on the property. But the families endured. When only a few families remained, the local government agency sold the labor camp property to a private entrepreneur. One of the primary organizers among the farmworker families negotiated with the new landowner and convinced him to sell the camp to the farmworkers.

B. Community-Led Institution-Building

The farmworker families engaged a local legal services organization to represent them in forming a housing cooperative on their newly acquired land. Membership into the Cooperative would consist of monetary payments as well as hours of community service to help the Cooperative cover the cost of development and rehabilitation of the property. The community service hours payment not only helped keep the Cooperative's development expenses down, but also lowered the cost of entry so that farmworker families that otherwise would not be able to afford homeownership

8. RONALD L. MIZE, *THE INVISIBLE WORKER OF THE U.S.-MEXICO BRACERO PROGRAM: OBREROS OLVIDADOS* 20 (2016) ("One of the key means of securing a high degree of social isolation and racial segregation was the institutionalized practice of housing Braceros in labor camps. The labor camps were often located on growers' private property but there were other means of housing workers away from local communities or nearby small towns. During the Great Depression, labor camps were built and maintained by the federal government under the aegis of the New Deal unemployment-alleviation measure. . . . The federal labor camps housed labor for grower associations or even larger agribusiness entities.").

9. MARIO T. GARCÍA, *MEXICAN AMERICANS: LEADERSHIP, IDEOLOGY, AND IDENTITY, 1930-1960* 94 (1989) ("Most Mexican-Americans lived in de facto segregated tracts, but after World War II many, especially returning veterans attempted to purchase homes in new residential areas. Some realtors and developers, however, refused to . . . negotiate with them, insisting that if [homes were sold] to Mexicans, the Anglo residents of the tract would cancel their contracts and leave.").

could own membership in the Cooperative. The Cooperative would go on to secure federal grants and loans to finance the development of the land. By the end of the 1970s, the Cooperative was officially established and began opening its membership to other farmworker families in the areas. The community of persevering and determined Latino families who had nowhere else to go had blazed a new trail through difficult and sometimes hostile terrain to establish close to 100 permanently affordable housing units.

C. The Role of Corporate Law Clinics in Power Acquisitions

Cooperative members first received notice that something was wrong with their water in the 1990s when reports provided by the private company, which owned the water system, showed that the nitrate level in one of the wells was too high for human consumption. The second of three wells on the Cooperative's property was discovered to have high nitrate levels in the mid-1990s, and the private company owner took it out of commission. The persistent organizing by the Cooperative's residents, as well as lab reports, led the local board of supervisors to approve a temporary filtration system for the last active well in the Cooperative. The county's long-term solution for clean water was to apply for state and federal financing to identify a new location and construct a new well for the Cooperative. With the assistance of federal grants and funds, the county completed drilling a new, deeper well, which cost several million dollars to construct. The Cooperative residents now have access to the safe well water, but the average family pays high monthly water bills.

Recently, the county announced its plan to sell the Cooperative's water system to a private company through a bidding and proposal process. Despite high assessment fees paid by the Cooperative members, the water system does not generate sufficient income to support the county's costs to maintain the system. Given the Clinic's unique experience representing business entities with a social mission and its commitment to community lawyering, several community partners introduced the Cooperative to the Clinic as a potential legal service provider. The Cooperative retained the Clinic to provide corporate counsel as they attempt to acquire ownership of their water system. We are advising the Cooperative on possible entity options to own and operate the water system; corporate governance issues; and counseling on the variety of federal, state, and local regulatory layers the Cooperative must consider in this transaction. By working to obtain control over its water system, the Cooperative is continuing its mission toward self-sufficiency and economic empowerment that led to its establishment.

Even this brief history of the Cooperative makes it clear that lawyers, while necessary along the way, have never been central to this community's quest for dignity and power. This is the context for community lawyering that the Clinic inhabits as legal counsel to the Cooperative. The Cooperative's journey did not start with lawyers, it will not depend solely on lawyers, and yet lawyers have an important role to play in the pursuit of economic justice.

The Cooperative members, and the community organizers before them, identified the problems, engaged in problem-solving, and then sought out support from lawyers based on their identified options and preferences. Lawyers then worked within those parameters to provide support and assistance. While the Cooperative's history is unique, the pressing need of disenfranchised communities across the country to build institutional power is not.

Thus, corporate law clinics similar to the Clinic have a significant role they can play in representing community-based institutions in disenfranchised and low-income communities. Community economic development legal scholarship will undoubtedly serve as a foundation for corporate law clinics if they take on this mantle to intentionally represent community-based institutions in marginalized communities. However, corporate law clinicians will also need to develop their own narratives and theories for corporate-community lawyering. Progressive lawyering models, which to date have focused on individual representation in litigation proceedings, need to contemplate the distinctions of community lawyering within transactional practices to fill gaps in our lawyering theory on the nuances of corporate law in community development practices. With a solid theoretical framing of corporate-community lawyering, corporate law clinics can help community-based institutions effectuate change and achieve economic justice.

Coming of Age on \$2 a Day, Evicted: What CED Has to Say to Today's Untethered Poverty

Susan D. Bennett

*Poverty will not be stopped by people who are not poor. If poverty is stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together.*¹

Fresh looks at extreme poverty in America compel a re-examination of Wexler's declaration and of the anti-poverty capacities of CED. This title is a mash-up of three books: *Coming of Age in the Other America*,² *\$2.00 a Day: Living on Almost Nothing in America*,³ and *Evicted: Poverty and Profit in the American City*.⁴ All emerged from late 2015 into the first half of 2016, a convergence that may be coincidence, or an indication of a singular moment in American poverty and its sociology. *Coming of Age* follows the trajectories of 150 young people whose families moved away from public housing projects in Baltimore. *\$2.00 a Day* documents the fortunes of heads of household who, with the passage of the Personal Responsibility and Welfare Reform Act of 1996 and the passage of time since, lost their income supports. *Evicted* describes the experiences of renters in, and owners of, unsubsidized private sector housing in Milwaukee. The books are page turners, chronicles of desperation that recall Jonathan Kozol's impassioned witness.⁵ Kozol interviewed as a journalist and educator. As sociologists, DeLuca, Edin and Shaefer, and Desmond came to their outrage through personal encounters and quantitative studies.⁶

1. Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970).

2. STEFANIE DeLUCA, SUSAN CLAMPET-LUNDQUIST & KATHRYN EDIN, *COMING OF AGE IN THE OTHER AMERICA* (2016).

3. KATHRYN J. EDIN & H. LUKE SHAEFER, *\$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA* (2015).

4. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016).

5. See, e.g., JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 7-12* (1991) (describing the residue left in parks and playgrounds in East St. Louis from breaks in sewer mains).

6. See DESMOND, *supra* note 3, at 315-34 (describing the influence of the author's own background on his interest in housing insecurity, his process for identifying

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The element that these narratives share is destabilization. Desmond describes the low income renter's bargain: in return for a light glance over credit and rental history and sporadic leniency on rent, the tenant gets a space without expectation of security, safety, repairs, or, sometimes, appliances.⁷ Edin/Shaefer chronicle the sporadic low wage or no wage work for which poor people travel long distances and endure punishing conditions, where shifts change without notice and one slip-up means termination.⁸ While the amount of income matters, the reliability of it matters more. Edin/Shaefer's and Desmond's subjects illustrate what other researchers observe as the phenomenon of volatility: unpredictable fluctuations in income prevent low wage and middle class workers from setting any money aside for emergencies. This contemporary version of "living paycheck to paycheck" leaves workers vulnerable to physical displacement and personal upheaval through eviction or foreclosure.⁹

Public benefits and public housing had their deserved, if self-fulfilling, detractors. But the destabilization narratives highlight the impacts of decades worth of "devolution" of public welfare function, from AFDC, with nominally enforceable standards, to haphazard, lightly regulated private or local support. Freed from constrictions previously imposed by Title IV-A of the old Social Security Act, states spend their federal social services funds not on cash supports, employment, or child care assistance, but on shoring up deficits in child welfare administration, on other budget items, or on the state earned income tax credit.¹⁰ Edin/Shaefer and

subjects for study, and his inevitable involvement in their lives). As Desmond notes, "The hardest feat for any fieldworker is not getting in; it's leaving." *Id.* at 336.

7. DESMOND, *supra* note 3, at 134–38 (describing how owners failed to supply appliances to their low rent properties and relied on tenants and homeless men to make quick, cheap repairs).

8. EDIN & SHAEFER, *supra* note 2, at 35–42 (describing how a mother of two traveled by bus from her family's third homeless shelter in ten months to report by 7 a.m. to her job cleaning vacant, unheated apartment buildings, offices, and foreclosed homes; and how her hours were cut to nothing because illness from exposure to cold and mold forced her to miss work; *id.* at 56–60 (describing how a worker whom Wal-Mart honored twice as "cashier of the month" lost her job the first and only time she missed the beginning of her shift, when she had no cash left after rent and food for gas).

9. See, e.g., Jonathan Morduch & Rachel Schneider, *Is Financial Unsteadiness the New Normal?* SHELTERFORCE (Summer 2016), http://www.shelterforce.org/article/4560/is_financial_unsteadiness_the_new_normal/ (summarizing results of the U.S. Financial Diaries Project, which found that incomes of 235 low- to moderate-income families averaged 25% higher or lower than their annual average for five months out of the year).

10. Liz Schott, LaDonna Pavetti & Ife Floyd, *How States Use Federal and State Funds Under the TANF Block Grant*, CENTER ON BUDGET AND POLICY PRIORITIES, Oct. 15, 2015, <http://www.cbpp.org/research/family-income-support/how-states-use-federal-and-state-funds-under-the-tanf-block-grant> (describing regional

Desmond describe the shift away from spending public money for the benefit of those who are “extremely” poor to those who earn income.¹¹ Plans for “affordable” housing do not reach the poorest¹² or the largest¹³ of families.

To “destabilized,” I add “untethered.” The lives of very poor people are destabilized in part because they are untethered. As a consequence of the elimination of the “safety net,” very poor people have lost ties to an expectation of guaranteed incomes or to a baseline of shelter that minimal incomes will support. Those baselines support not just physical and emotional stability, but productive community. Tenants’ associations—protected in private sector housing, mandated in subsidized and public housing—epitomize the kind of platform for building and protecting community that exists only when people are connected to systems that enable a productive use of place.

Raj Chetty’s body of work on neighborhood effects co-exists with and complicates the destabilization narratives. Chetty’s analysis of data from the Moving to Opportunity projects demonstrates the benefits of early childhood exit from neighborhoods of concentrated poverty.¹⁴ His comparisons of gain or loss of income across generations within and beyond “commuting zones” show that immersion in poor communities can become

variations in expenditures on cash supplements, employment assistance, and child care, with eight states spending less than a quarter of their federal social services block grants on those core categories, five states spending more than 75%, and all states averaging 50%).

11. EDIN & SCHAEFER, *supra* note 2, at xxiii (characterizing post-1996 welfare policy as eliminating the safety net of minimal cash payments for the desperately poor in favor of the safety net of tax credits for the steadily employed).

12. The shortfall in federal, state, and municipal assistance for housing affordable to tenants below half the area median income is well documented. *See, e.g.,* DESMOND, *supra* note 3, at 302 (noting that 67% of all poor renting families in 2013 received no federal rental assistance); *see also* Office of the District of Columbia Auditor, *The District of Columbia Housing Production Trust Fund: Revenues and Expenditures and Five-City Comparison* at 25–26 (June 30, 2016) (noting the continuing failure of the District of Columbia’s dedicated fund for construction and preservation of affordable housing to meet statutory mandates to spend 40% of the fund on units affordable to residents with incomes below 30% of area median income (AMI), and 40% on units affordable to those with incomes between 31% and 50% of AMI).

13. *See, e.g.,* Andrew Giambrone, *Northeast Tenants Sue owner for Alleged Discrimination*, WASH. CITYPAPER (Aug. 25, 2016), <http://www.washingtoncitypaper.com/news/housing-complex/blog/20831721/northeast-tenants-sue-owner-for-alleged-discrimination> (citing owner’s decision to eliminate three- and four-bedroom units from redevelopment plans).

14. Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children*, 106 AMER. ECON. REV. 855 (2016).

permanent.¹⁵ Chetty recommends not abandonment, but enrichment. As his pockets of entrapment are so granular and localized, he proposes that someone (government? the private sector?) double down on resources to create conditions from which, presumably, mobility across percentiles of income will be possible.

Can the “Community” in CED,¹⁶ grounded in place, dedicated to inclusive process and democratic participation, ameliorate untethered poverty? The new insights into extreme poverty provided by Chetty’s work and by the destabilization narratives urgently revive the old debates about “place” or “people.” Edin/Shaefer’s and Desmond’s subjects suffer from mobility and fluidity of the wrong kind: of wages, of work hours, of roommates. In different ways, Chetty and DeLuca conclude that “place”—at least, some place—is for fleeing from. One generation away from the violence and unpredictability of Lafayette Courts or Cherry Hill, DeLuca’s interviewees surpassed their parents in educational attainment and continuous work experience.¹⁷ Even so, they described the “crab in a bucket” syndrome, the crush of family obligations and lack of emotional or financial support for long term educational goals that forced them into “expedited childhoods.” DeLuca describes several of her interviewees as attached to an “identity project,” an intense engagement to an engrossing activity, often prompted by communication with a mentor outside the home. Such attachments have served these young people as both protective and redemptive preoccupations.¹⁸

Louise Howells and co-authors Rashmi Dyal-Chand and James Rowan have noted the inadequacy of social entrepreneurship to address extreme, untethered poverty. (Ironically, Desmond portrays one of the most finely drawn urban entrepreneurial success stories in Shereena Tarver, owner and manager of thirty-six units of housing in distressed single family houses and duplexes on Milwaukee’s North Side.¹⁹) They recommend, instead, an approach that develops individual capacities so that individuals may attain greater financial and personal stability.²⁰ Their insights echo

15. Raj Chetty et al., *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q. J. ECON. 1553 (2014).

16. See ALICIA ALVAREZ & PAUL TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE 312–18 (2013) (summarizing the differences among the “Community,” “Economic,” and “Development” strands of CED).

17. DeLuca et al, *supra* note 1, at 5, 56–58 (noting that seven out of ten youth whose families had moved out of public housing completed high school or the GED, compared to one out of four of their parents; and that over eight out of ten youth not still in school were working or recently working, compared to one in four of their parents).

18. *Id.* at 64–69.

19. DESMOND, *supra* note 3, at 13, 319.

20. See Louise A. Howells, *The Dimensions of Microenterprise: A Critical Look at Microenterprise as a Tool to Alleviate Poverty*, 9 J. AFFORDABLE HOUSING & CMTY. DEV. L. 161, 162 (2000) (questioning whether very poor people, who by definition

those which DeLuca and her team developed through their analysis of identity projects.

We have a diagnosis and a recommendation. To follow through, CED must direct its efforts towards re-tethering: enabling individuals to secure predictable incomes that will enable them to live in predictably affordable, healthy homes in communities that support staying, moving, and participation in decisions about development. If it asks too much of desperately poor people to take charge of the revitalization of their neighborhoods, then it is not too much to consult with them about what of their current situation they want replicated, in whatever place will sustain the formation of nurturing communities.

have limited financial resources, would benefit more from training to become employable than from the inadequate assistance available to individuals starting a small business); Rashmi Dyal-Chand & James V. Rowan, *Developing Capabilities, Not Entrepreneurs: A New Theory for Community Economic Development*, 42 HOFFSTRA L. REV. 839, 842 (2013–14) (noting the absence of a clear connection between the strategy of social entrepreneurship and alleviation of poverty); *id.* at 859–60 (commenting that the instability of poor people's lives makes them less able to tolerate the inevitable risks of entrepreneurship).

Contracting for Complexity: Collective Impact Agreements in Community Economic Development

Patience A. Crowder

The full impact of the 2008 recession will not be known for years; however, its debilitating effect on state and local governments is clear. While the Great Recession materialized differently in different states, state and local governments suffering from financial anemia decimated their community and economic development programs. Compounded by cuts in spending at the federal level, shrinking philanthropic resources and property tax revenue, and dormant housing and construction industries, state and local governments froze or reduced spending on redevelopment projects and economic development programs. In an extreme case, California shuttered its redevelopment agencies. In many instances, private industries behaved similarly. Along with the consequences of the foreclosure crises, these shifts or cessations in spending led to devastating effects on the funding of small business development programs, the availability and new construction of affordable housing, and the operation of job and workforce training programs—all traditional arenas for community economic development (CED) projects. Some state and local governments, however, are beginning to creep out of shell shock to respond to the crisis in innovative ways, and they are not isolated in their efforts because many community advocates are boldly leading the way. Most importantly, however, these advocates are doing so in ways that seek to cure the inequities that have historically run through public programs. As the economy begins to stabilize, the arousing of such programs necessitates a renewed vigilance against inequity through the implementation of novel mechanisms designed to alleviate poverty. While there are myriad ways to approach these outcomes, this presentation focuses on a transactional law approach to poverty alleviation by exploring the potential of collective impact, particularly collective impact agreements, to facilitate economic development throughout metropolitan regions.

Our metropolitan regions are places that house extreme social and economic disparities. The 2008 recession aggravated the existing disparities between central cities and suburbs, and one of its legacies is the deep expansion of poverty beyond the boundaries of urban central cities—increasing the number of suburban poor by as much as 50 percent by some estimates. This changing geography of poverty has triggered a

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different national conversation about class, race, inequity, and economic justice, a conversation that is not limited by inner-city boundaries. As such, anti-poverty advocates (such as community organizers, policy makers, legal advocates, and other supporters) must look for mechanisms that not only address the high tide of suburban poverty but that also work for the poor who remain in our traditional enclaves of poverty: urban centers and rural towns. Just over two years after the 50th anniversary of the “War on Poverty,” this particular time in history presents a unique opportunity to explore innovative approaches to alleviating poverty in our metropolitan communities. Collective impact initiatives and collective impact agreements are such approaches. Collective impact initiatives are cross-sector coalitions collaborating to address the most persistent and pernicious societal ills in communities across the United States. Many of these initiatives are memorialized, to some extent, through what are commonly referred to as collective impact agreements. These agreements are an emerging tool that secures the participation of a diverse group of organizational actors for the purpose of addressing a specific social problem (e.g., public education, public health, or environmental racism and degradation). The successful implementation and execution of collective impact agreements revolve around the following five conditions for “collective success:” (1) a common agenda, (2) shared measurement systems, (3) mutually reinforcing activities, (4) continuous communication, and (5) backbone support organization.¹ As these conditions suggest, collective impact agreements are inherently complex contracts among multiple parties. Like community benefit agreements, collective impact agreements are designed to contract for improvement in underserved neighborhoods. Unlike community benefits agreements and because of their very nature, collective impact agreements to date are agreements that generally do not have clearly identified deliverables or mechanisms for measuring the parties’ accountability. As such, “predetermined solutions can neither be reliably ascertained nor implemented.”² In other words, collective impact agreements appear to be more aspirational than effective because, due to the shared agenda among the parties, the agreements are typically not structured to identify which parties are responsible for which deliverables—an outcome completely counter to fundamentals of contract law. Because these are an emerging type of contract with the support of influential stakeholders, such as certain Federal Reserve banks, it is important to analyze current collective impact contract practices to develop a more efficient form that still speaks to the

1. John Kania & Mark Kramer, *Collective Impact*, STAN. SOCIAL INNOVATION REV. (Winter 2011).

2. See *id.*

goal of achieving a shared agenda while providing mechanisms for accountability to help ensure that the public outcomes of collective impact agreements are more likely to be achieved. To explore the question “why law matters,” this presentation will focus on the ability of private contracts, specifically collective impact agreements, to pursue large-scale economic justice in the “post-CED” era.

Escaping the Wage-Slave/ Micro-entrepreneur Binary: Platforms for Liberating Labor

Veena Dubal and Sushil Jacob

Whether a worker is legally classified as an “employee” or an “independent contractor” determines whether he or she is entitled to any employment and labor law protections. With the innovation and proliferation of business models intended to lower corporate costs by relying on “independent contractor” labor, especially in the “on-demand” or “gig” economy, more workers are working “casually” in positions as contractors, lessees, temporary laborers, and freelancers. These workers, carved out of the web of safety net protections, often live precarious lives, unable to support themselves or their families despite full-time work. Empirical research suggests, however, that despite the instability, many workers prefer contract labor because of the structural freedom and independence that the work sometimes facilitates. A cottage industry of social scientists, legal scholars, and even private firms has emerged to address the gaps between the realities, needs, and desires of workers. This paper contributes to this literature by thinking about how work can be structured so that workers live free and independent work lives, have the power to make real business decisions, and potentially benefit from safety net protections accorded employees.

We propose a new form of labor-owned business organization, “the platform cooperative,” as an opportunity to escape the binary between wage slavery and precarious, unregulated labor. A platform cooperative, by our definition, is an online marketplace that is owned and democratically governed by its members. Through a detailed proposal and analysis, we argue that platform cooperatives, as we define them, have the potential to provide a liberatory alternative to precarity, using technology-coordinated work to put power, capital, and security in the hands of workers.

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Policing in Place: A Community Economic Development Strategy?

Kali Murray

One way Black Lives Matter has built its critique as to the thicket of dispossession that has enmeshed the lives of African-Americans in the twenty-first century is to invoke a litany of places: Ferguson, West Baltimore, Sherman Park. This mournful litany has become a shorthand way to describe how communities and their residents are marginalized from the larger social, legal, and cultural society. Place matters for these communities and individuals and, as Sharon E. Sutton and Susan P. Kemp suggest, because “it is simultaneously a source of inequality and oppression *and* a context of transformation and possibility.”¹ Legal response to place is often divvied up among many different subjects, including property law, environmental law, poverty law, and most fittingly for the topic of this symposium, community economic development law.

William H. Simon² states that the “community economic development” movement can be broadly described as three interlocking goals: “(1) efforts to develop housing, jobs, or business opportunities for low-income people, (2) in which a leading role is played by non-profit, non-governmental organizations, (3) that are accountable to residentially defined communities.”³ Community economic development law consequently has focused primarily on private law concepts as a way to achieve its primary goals.

The urgency, however, of achieving social justice in marginalized communities suggests that we need to reconsider the sharp binary between civil and criminal law in understanding community economic development. Specifically, community economic development law needs to grapple with how “policing,” a broad set of voluntary and coercive practices by which the state, through a designated body of individuals, exercises

1. Sharon E. Sutton & Susan P. Kemp, *Introduction: Place as Marginality and Possibility*, in *THE PARADOX OF URBAN SPACE: INEQUALITY AND TRANSFORMATION IN MARGINALIZED COMMUNITIES* 4 (Sharon Sutton & Susan Kemp, eds. 2011). Marc Poirer defined place as a physical location, such as “a building, a beach, a mall, a highway, or an entire town.” *Same-Sex Marriage, Identity Processes, and the Kulturkampf: Why Federalism is Not the Main Event*, 17 *TEMP. POL. & C.R. L. REV.* 387, 401 (2008).

2. WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS AND THE NEW SOCIAL POLICY* 3 (2001).

3. *Id.*

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authority over a citizen population.⁴ The subject of policing is not often linked to community economic development since policing practices are perceived to be unrelated to the economic sustainability of marginalized communities because policing is nominally directed towards addressing criminal behavior.

A key revelation, however, of current research on the relationship between policing and community is that policing practices can disrupt the economic sustainability of marginalized communities. For instance, policing can harm impoverished communities through the practices such as municipal fee-mining as seen in Ferguson, Missouri, and Milwaukee, Wisconsin,⁵ or by reinforcing spatial segregation experienced by the redlined neighborhoods of Sherman Park, Milwaukee, or West Baltimore, Maryland.⁶ Introducing “policing” into community economic development law is consistent with its interdisciplinary nature.

William Simon notes that community economic development strategies, while diverse in nature, serve three primary functions. First, community economic development strategies serve a relational function by “multiplying the contexts and roles in which people confront one another,” thus allowing neighbors to become “employers and employees, sellers and consumers, property occupiers and property owners, planners and citizens, administrators and service recipients.”⁷ Second, community economic development strategies serve a geographic function because neighborhoods serve as the physical and social focal point of legal advocacy.⁸ Finally, community economic development strategies serve to increase “face to face” relations to achieve an increased social, political, and legal cohesion.⁹

Policing as an authoritative strategy is consistent with these three articulated functions. First, police encounters and reform of such encounters permits neighbors to take on a variety of roles as planners, citizens, and administrators. Second, community conflicts over policing draw their

4. P.A. WADDINGTON, *POLICING CITIZENS: POLICE, POWER AND THE STATE* 30 (2014).

5. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* (Mar. 4, 2015) (outlining the damages); JUSTICE INITIATIVES INSTITUTE, *CITED IN MILWAUKEE: THE COST OF UNPAID MUNICIPAL CITATIONS* 15 (2015), http://dc.uwm.edu/eti_pubs/1/ (assessing municipal court citations and their impact on marginalized socio-economic communities in Milwaukee).

6. Deanna Schmidt, *Urban Triage: Saving the Savable Neighborhoods in Milwaukee*, 26 *PLANNING PERSPECTIVE* 569, 584–85 (2011) (examining failed efforts to preserve Sherman Park in light of intense spatialized segregation in Milwaukee); PATRICIA FERNANDEZ-KELLEY, *HERO'S FIGHT: AFRICAN-AMERICANS IN WEST BALTIMORE AND THE SHADOW OF THE STATE* (2015) (assessing the impact of coercive authority in the place of West Baltimore).

7. SIMON, *supra* note 2.

8. *Id.* at 41–42.

9. *Id.* at 5.

intensity from specific geographic regions that share common cultures of dispossession as demonstrated by recent uprisings in Sherman Park and West Baltimore. Finally, policing involves intense face-to-face encounters that can devolve into significant violence that can undermine economic development. Indeed, much “policing reform” seeks to improve these face-to-face practices within neighborhoods.

Understanding “policing” as a community economic development strategy demonstrates “why law matters” in community economic development law. As an initial matter, dysfunctional “policing” practices can reinforce the systemic economic inequalities that community economic development law seeks to resolve through its reform of property, environmental, business association, and tax law. Understanding policing as a community economic development strategy, therefore, may help to resolve its particular ability to undermine the goals of community economic development.

Moreover, understanding policing as a community economic development strategy may help to more effectively evaluate legal efforts of police and prosecution reform, such as community policing and community prosecution. For instance, the City of Milwaukee has embarked on a new strategy of community prosecution, in which city prosecutors are embedded within specific communities. Such community prosecution teams are usually evaluated in terms of their success in achieving certain types of criminal statistics. Community economic development law, however, offers alternative metrics of success. These alternative metrics of success include examining the impact of such teams on the relational, geographic, and interactive functions of a given community.

Finally, understanding policing as a community economic development strategy would solidify its role in the teaching and scholarship functions of law school. Specifically, understanding policing as a community economic development strategy would strengthen its subject-matter commitment to an inter-disciplinary subject of the neighborhood as a place for legal action. Breaking the binary between criminal law and civil law would prompt significant innovation in how legal doctrine is taught in law school, thus strengthening a claim that “law matters” in serving all of our neighborhoods.

A Case Study in Rural Community Economic Development: Hill Country Health & Wellness Center

Lisa R. Pruitt

Economic development, a leading strategy for addressing poverty, operates on the premise that economic growth will result in benefits to the poor by creating jobs, raising wages, and improving opportunities.¹ Yet community economic development (CED) can be difficult to effectuate in rural communities due to scarce resources, inability to achieve economies of scale, and the spatial dispersion of the population.² Rural areas are typically defined by small and scattered populations, but they also tend to struggle with poverty,³ poor infrastructure, and reduced access to technical assistance.⁴ Although the rural poor are more likely than their urban counterparts to work fulltime, rural residents tend to earn lower wages.⁵

Formally educated human capital tends to be scarcer in rural places and thus fewer available economic development efforts are available.⁶ Most rural areas have disproportionately high percentages of elderly residents because young people who achieve higher levels of education often depart for more densely populated metropolitan areas that offer a wider array of job opportunities.⁷ Rural populations also feature higher percentages of

1. See Gary Paul Green, *The Opportunities and Limits of Economic Growth*, in RURAL POVERTY IN THE UNITED STATES (Ann Tickamyer, Jennifer Sherman & Jennifer Warlick eds., 2017).

2. Steven M. Virgin, *Community Economic Development and Rural America: Strategies for Community-Based Collaborative Development*, 20 J. AFFORDABLE HOUS. & CMTY. DEV. L. 9, 25 (2010).

3. See generally RURAL POVERTY IN THE USA, *supra* note 1. Rural areas have recovered more slowly than urban areas from the Great Recession. USDA ERS, RURAL AMERICA AT A GLANCE, 2016 edition, <https://www.ers.usda.gov/webdocs/publications/80894/eib-162.pdf?v=42684>.

4. Virgin, *supra* note 2, at 25.

5. *Id.* at 14–15.

6. *Id.* at 25.

7. See PATRICK J. CARR & MARIA J. KEFALAS, *HOLLOWING OUT THE MIDDLE: THE RURAL BRAIN DRAIN AND WHAT IT MEANS FOR AMERICA* (2010).

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veterans and disabled.⁸ Further, less public funding is available in rural areas, as illustrated by the fact that between 1994 and 2001, the annual per capita federal spending in rural areas was less than half of what it was in urban communities.⁹ Private philanthropy is also less robust in non-metropolitan areas.¹⁰ Inadequate transportation, energy, and telecommunications infrastructure has a negative effect on employment growth and is an obstacle to rural CED initiatives.¹¹ In addition, CED efforts typically integrate a range of highly technical practices, which often require professional support that is less available in rural areas.¹² Indeed, geographic isolation means that many services, including legal assistance, are less readily available.

The situation in rural northern California exemplifies all of these trends. Legal services are particularly out of reach—spatially and fiscally—for low-income rural residents. Because services, like rural populations themselves, are spatially dispersed over large areas, rural residents may have to travel extensively to reach them.¹³ Access to legal representation is also more challenging because far fewer attorneys per capita practice there. The California Bar district covering the greatest land area (District 3) includes twenty-three of California's fifty-eight counties, all in the state's far northern reaches and nearly all rural. But only 12,854 active attorneys practice in that massive district (including 8,296 in populous Sacramento County alone), compared to 54,809 attorneys practicing in Los Angeles County and 17,858 in San Francisco County.¹⁴ A significant disparity also exists between urban and rural areas in terms of the amount of legal aid funding per poor person. The mean legal aid funding for California's rural counties is \$18.56 per poor person, compared to a mean of \$44.83 per poor person in the state's seven most urban counties, and a more moderate \$26.43 for counties with mixed rural/urban populations.¹⁵

8. Lisa R. Pruitt & Bradley Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 471 (2014).

9. Virgin, *supra* note 2, at 26.

10. *Id.*

11. *Id.*

12. *Id.* at 27.

13. *Id.* at 17; see also April Dembosky, *In a Conservative Corner of California, a Push to Preserve Obamacare*, NPR, July 5, 2017, <http://www.npr.org/sections/health-shots/2017/07/05/535029503/in-a-conservative-corner-of-california-a-push-to-preserve-obamacare>.

14. State Bar of Cal., *Member Demographics*, https://members.calbar.ca.gov/search/demographics_counties.aspx (last visited Apr. 10, 2017).

15. See also Ronald Robie et al., *Improving Civil Justice in Rural California*, CAL. COMM. ON ACCESS TO JUST., 11, Appendix A (Sept. 2010), <http://calbar.ca.gov/LinkClick.aspx?fileticket=wBD9dBjuIm4%3D&tabid=216>. The seven most urban counties in California are Alameda, Contra Costa, Los Angeles, Orange, Sacramento, San Francisco, and Santa Clara. *Id.* at Appendix A. Rural areas for

It is in this rural northern California context that Hill Country Health and Wellness Center, a hugely successful community development project in Shasta County¹⁶ was founded in 1985. Hill Country employs more than 100 people, which is roughly the population of Round Mountain, where it is located, about an hour east of Redding, which is the largest California city north of Sacramento.¹⁷ Round Mountain and neighboring Montgomery Creek are impoverished communities that are home to a significant population of Pit River American Indians.¹⁸

Access to health care is typically quite poor in rural areas like Round Mountain, in part because of the huge obstacles to recruiting and retaining highly educated professionals who generally have little interest in moving to an isolated area where pay is low and cultural amenities are lacking.¹⁹ Hill Country has filled the health care void in Round Mountain and surrounding communities for more than three decades by providing health care services, education, and support to residents.²⁰ When the clinic was founded, it employed one doctor, one nurse practitioner, one registered nurse, and three administrative employees. Its three exam rooms were

these purposes are defined as regions with less than 250 persons per square mile and no population cluster within the region having a population greater than 50,000. *Id.* at 6–7.

16. Shasta Cty. Health & Human Servs. Agency, *Demographics* at 2 (2014), <http://www.co.shasta.ca.us/docs/HHSA/Community-Health-Data/demographics2014.pdf?sfvrsn=0>. The total number of actively practicing attorneys in Shasta County is 354. *See Member Demographics*, *supra* note 14. Those attorneys serve a population spread over 3,775 square miles. *State and County Quick Facts, Shasta County, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/06089,00> (last visited Apr. 16, 2017).

17. City of Redding, *Economic Development*, CityofRedding.com, <http://www.cityofredding.org/departments/economic-development> (last visited Apr. 1, 2017); *see also* U.S. Census Bureau, *Quick Facts Redding City, California*, <https://www.census.gov/quickfacts/table/PST045216/065992> (last visited Apr. 1, 2017) (population 91,582).

18. *See Quick Facts*, *supra* note 17, at 4; *see also* U.S. Dep't of Interior, *2013 American Indian Population and Labor Force Report* at 84–85 (Jan. 16, 2014), <https://www.bia.gov/cs/groups/public/documents/text/idc1-024782.pdf> (reporting an American Indian population of 9,831 in Shasta County, which is home to Redding Rancheria and Pit River populations).

19. David Freed, *Health Care: As Doctors Age with No Successors, Rural Areas Face Dire Shortage*, SFGATE, Jan. 2, 2011, <http://www.sfgate.com/health/article/As-doctors-age-small-towns-face-critical-shortage-2534487.php>; *see also* Kirk Siegler, *Doctor Shortage in Rural Arizona Sparks Another Crisis in 'Forgotten America'*, NPR, July 14, 2017, <http://www.npr.org/sections/health-shots/2017/07/14/535792864/doctor-shortage-in-rural-arizona-sparks-another-crisis-in-forgotten-america> (reporting that according to the “National Rural Health Association, rural areas could be short 45,000 doctors by 2020” and that more than 70 rural hospitals have closed since 2010).

20. Hill Cty. Health & Wellness Ctr., *Philosophy & History*, <http://www.hillcountryclinic.org/philosophy-and-history/> (last visited Apr. 1, 2017).

housed in a double-wide trailer. Initially, all of the employees worked without compensation, while also hosting community fundraisers to support clinic expansion. The clinic eventually was able to add rooms for dental care and counseling services, and it set up residency rotation programs with students at the Redding branch of U.C. Davis Medical School.²¹ The Hill Country Health and Wellness Center, like much of the community infrastructure and many homes, was completely destroyed by a wildfire in 1992, but it re-opened just six months later.²²

In 2004, the clinic sought status as a Federally Qualified Health Center (FQHC). Health centers with this designation from the Bureau of Primary Health Care and the Centers for Medicare and Medicaid Services of the U.S. Department of Health and Human Services receive special reimbursement rates and funding to assist with services. The Hill Country Center was able to obtain this status because of its dedication to patients in underserved areas regardless of their ability to pay. This designation, along with funds from a state bond, a grant from a Redding-based foundation, and various individual donations, allowed the Hill Country Center to expand further. Hill Country now boasts a purpose-built facility with dental and behavioral health departments, a great room for community activities, a library, and a small kitchen for special events and occasional use as a nutrition-grant-funded lunch café. Somewhat ironically, Hill Country has recently established a second location in Redding,²³ the county seat, which one would expect to be adequately served by larger providers.

Hill Country attributes its rapid growth and many successes to an “excellent, responsive staff and devoted commitment to the communities that surround it.” Those successes are also a product of the energy and creativity of founder and CEO Lynn Dorroh, a mental health professional who saw the needs of the community shortly after she moved there some four decades ago. Since that time, Dorroh has built not only Hill Country, but also (along with her husband) two other community non-profits, one a small group home for boys in the foster care system (since closed) and the other a job-training organization for youth and adults.

21. See UC Davis School of Medicine, *Rural-PRIME Sites and Preceptors*, https://www.ucdmc.ucdavis.edu/mdprogram/rural_prime/sites.html (last visited Apr.10, 2017) (describing initiative to prepare medical students to work in rural communities); see also Hannah Haksgaard, *Rural Incentive Programs for Legal and Medical Professionals: A Comparative Analysis*, 59 S.D. L. REV. 585 (2014).

22. Dylan Darling, *Embers to Ashes: Fire's 15th Anniversary Recalls Destruction*, RECORD SEARCHLIGHT (Aug. 20, 2007), <http://archive.redding.com/news/embers-to-ashes-fountain-fires-15th-anniversary-recalls-destruction-ep-378423705-356527331.html>; Hill Cty. Health & Wellness Ctr., *supra* note 20.

23. Hill Cty. Health & Wellness Ctr., *Our Facilities: Redding*, <http://www.hillcountryclinic.org/our-facilities/> (last visited Apr. 1, 2017).

Rarely have any of these organizations had legal assistance. Dorroh herself has completed the necessary forms for forming the non-profits, and even Hill Country has rarely employed an attorney. "There are a couple of lawyers we use in [California] that know FQHCs really well. Not often though," Dorroh reports. In short, she typically relies on self-help when a regulatory issue arises.²⁴

The times when Dorroh has been involved in engaging legal counsel have related less to her non-profit enterprises and more to her other roles within the community. In particular, once during her tenure as a member of the local school board, Dorroh and other school board members hired outside counsel to assist in terminating a teacher convicted of desecrating Pit River Indian relics. Outside counsel was again utilized when a long-time school bus driver was accused of molesting children. Dorroh had provided counseling to one of his early victims, who disclosed the situation. In both cases, the allegations against the employees were divisive within the community: a minority of the members of the school board voted to retain the problematic employees, but a majority (including Dorroh) wished to dismiss them. In each instance, Dorroh was instrumental in engaging private practice lawyers from outside the community (once from Sacramento and once from Marin County) to navigate the situation. Dorroh used her social networks, including those she developed as an undergraduate student at UC Berkeley, to identify lawyers who provided services on either a pro bono or reduced fee basis. In both instances, the employees were dismissed with the public sector equivalent of a "golden handshake." As Dorroh expresses it, "in none of those situations did we accomplish what I thought was optimal, but we got the bad people to go away."

Dorroh describes one other instance in which she worked with lawyers, this time public interest attorneys employed by environmental/conservation organizations. The conflict regarded the use of herbicides by timber interests when forests were being replanted following the devastating 1992 wildfire. While Dorroh and her allies ultimately did not prevent the use of herbicides, they were able to delay their use for a year. Dorroh views this as a limited success, in part because of the signal it sent to powerful, outside interests—here the timber company. Dorroh summarized that message: "Those people in Round Mountain and Montgomery Creek know what they're doing. They can make a big fuss." The suggestion was that Dorroh and her allies flexed some metaphorical muscle on

24. See Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986); Pruitt & Showman, *supra* note 8, at 507, 523 (citing Cal. Comm. on Access to Just., *Improving Civil Justice in Rural California*, at 41–42 (Sept. 2010), <http://calbar.ca.gov/LinkClick.aspx?fileticket=wBD9dBjuIm4%3D&tabid=216>).

behalf of a community that might otherwise not have asserted itself in the face of a wealthy, lawyered-up corporation.

While these instances in which Dorroh engaged legal assistance do not appear to be directly related to her efforts with Hill Country and the other non-profits she has founded and fostered, they do reflect much of the conventional wisdom about the role of law (or lack thereof) in rural communities. One aspect of that conventional wisdom is that rural people are reluctant to engage lawyers. (Recall that Shasta County, home of Hill Country, is where Robert Ellickson famously studied how ranchers resolve disputes without engaging formal legal processes, as documented in *Order without Law* (1991)). By extension, this would make rural residents reluctant to employ or engage lawyers.

Dorroh is a “newcomer” or “outsider” in Round Mountain, in contrast to “old-timers” or multi-generational residents. She therefore might not have shared the aversion to law associated with rural society or rural culture. But she did grow up in rural Calaveras County in the Sierra Nevada foothills and thus may bring the stance of (or at least predisposition to) rural self-sufficiency when encountering conflicts in her endeavors. However, Dorroh also brought to Round Mountain social capital developed during her time at UC Berkeley, and these networks, as well as her enhanced (by formal education) human capital, equipped her to engage law when she found it necessary to do so.

What does all of this have to do with community development and Dorroh’s crown jewel, Hill Country Health and Wellness? In part because of the lack of anonymity that marks rural communities,²⁵ Dorroh’s role as the founder and CEO of Hill Country cannot be neatly severed from her other community roles, e.g., school board member. Thus, Dorroh explains, the profile of her non-profits “was raised by these community conflicts.” Further, the instances when lawyers were hired were “instrumental in creating community confidence and allegiance, especially among the most vulnerable members of the community.” That enhanced confidence was beneficial not only for the local school district and its patrons, for example, but also for Hill Country and Dorroh’s other non-profits. Dorroh concludes that, as a consequence of these uses of law and lawyers, “disenfranchised people in the community gained a greater degree of trust in us [Hill Country].”

25. See William F. Freudenberg, *The Density of Acquaintanceship: An Overlooked Variable in Community Research?*, 92 AM. J. SOCIOLOGY 27 (1986); Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 228–32 (2006).

Narrowly-Tailored Privatization

Brandon M. Weiss

Affordable housing projects in the United States have served as an integral part, and often the backbone, of broader community economic development (CED) initiatives for as long as community development corporations (CDCs) have existed. As the field of CED evolves, and critical thinking about the role of law and lawyers within it continues to develop, it is important that this thinking include a rigorous reevaluation of how affordable housing strategies can best support the broader aims of CED. Evidence from eighty years of significant federal policy intervention in affordable housing, fifty years of experimentation by CDCs, and thirty years of modern Low-Income Housing Tax Credit (LIHTC) financing teaches at least one lesson that will be particularly relevant to CED initiatives in the decades to come: privatization is a tool best used as a scalpel rather than a bludgeon. An example will help flesh out this principle.

In San Francisco, attorneys at the National Housing Law Project (NHLP) have for the last several years engaged in a multi-year advocacy and community education effort around the U.S. Department of Housing & Urban Development's (HUD's) plans to revitalize the nation's subsidized housing stock. By HUD's estimates, public housing in the United States suffers from a \$26 billion capital needs backlog.¹ Leaky roofs, dilapidated elevators, and old plumbing and heating systems threaten the health and safety of residents. HUD's proposed FY2011 budget included a line item for a new program to address this problem: the Transformation of Rental Assistance Program² or, as it colloquially (and regrettably) came to be known, TRAP. Over the ensuing years, the program evolved—first to Preservation, Enhancement, and Transformation of Rental Assistance (PETRA), and then to the Rental Assistance Demonstration (RAD)—but the primary goal remained the same: to leverage private financing to recapitalize and rehabilitate the stock of federal subsidized housing.

RAD authorizes public housing authorities (PHAs) to convert public housing operating and capital funding streams into Project-Based Section 8

1. U.S. DEP'T OF HOUS. & URBAN DEV., CAPITAL NEEDS IN THE PUBLIC HOUSING PROGRAM 23, 41 (2010) (estimating that this figure will increase to \$89 billion over the next twenty years).

2. See U.S. DEP'T OF HOUS. & URBAN DEV., PROMOTING BETTER LOCATIONAL OUTCOMES FOR HOUSEHOLDS RECEIVING RENTAL ASSISTANCE THROUGH TRA FY2011 FUNDING (2010), https://portal.hud.gov/hudportal/documents/huddoc?id=TRA_FY11_50MPublicFinal.pdf.

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assistance³ and, in doing so, allows a given public housing project to enter into the mainstream of modern affordable housing finance. Banks are comfortable lending against the promise of future Section 8 income. The conversion process enables layering LIHTC financing on top of Section 8 rental assistance, paving the way for the infusion of millions of dollars of rehabilitation funds into an aging project.

In order to facilitate access to this financing, however, the RAD conversion process allows for the transfer of public housing ownership from PHAs to private single-asset entities.⁴ This feature of the program raises a number of potential concerns: Will the substantive rights of tenants be affected? Will current tenants be displaced? And, perhaps most alarming from a long-term perspective, what happens if affordability restrictions expire or are terminated, and our public housing stock is now held in private hands?

Recognizing these risks, NHLP began a sustained effort of community engagement with subsidized housing residents and advocacy with HUD—in part, as facilitator of the national Housing Justice Network (HJN). Lawyers involved in HJN submitted letters, commented on and suggested draft programmatic language, and organized meetings between senior HUD officials and residents to voice these concerns.

HUD's final implementation of the program incorporated a response to the issue of long-term public housing control. While PHAs could transfer projects to private entities in order to access LIHTC financing, they could only do so in certain enumerated circumstances, such as where the PHA (or PHA-controlled entity) serves as the sole general partner or managing member of the tax credit entity, or where the PHA retains fee ownership of the project and leases the land to the tax credit entity pursuant to a long-term ground lease.⁵ The program, however, did not go as far as many would have hoped—for example, a catchall provision allows for transfers to private entities by “other means that HUD finds acceptable, in its sole discretion.”⁶

As the program is still in its infancy, we are learning precisely how the conversion process will be structured by PHAs around the country. But the development of RAD already serves as a revealing case study. The history of the federal government's attempts to infuse private market incentives into affordable housing policy has been a story of mismatch—failing to appropriately calibrate that which is being leveraged from the private market with the incentives that are necessary and sufficient to offer in exchange. As a result, the government has often given away too much: the

3. See U.S. DEP'T OF HOUS. & URBAN DEV., PIH No. 2012-32 (HA), REV-2, RENTAL ASSISTANCE DEMONSTRATION—FINAL IMPLEMENTATION (2015).

4. *Id.* at 30–31.

5. *Id.* at 31.

6. *Id.*

assisted housing programs of the 1950s–1980s resulting in massive back-end profits to private owners far out of proportion to their value added; the LIHTC program setting the stage for similarly unnecessary windfall profits starting in 2020 when thirty-year rent restrictions start to expire; and now, in the RAD context, PHAs potentially giving away fee title to our public housing when recapitalization is possible without doing so.

In the case of RAD, NHLP recognized that it is possible to bifurcate the goal of leveraging private capital from the mechanism of transferring control of public housing assets to private interests. Hopefully, thanks to the dedicated lawyering of NHLP and HJN, the limiting language referenced above will create a more nuanced program—one that leverages private capital while not paying the excessive price of sacrificing long-term control.

Most formulations of the aims of CED as a field include the value of preserving and expanding access to material and social resources in underserved communities as well as prioritizing local control and accountability with respect to those resources. As we think about the future of CED, and the respective role that law and lawyering will play, advocacy for a more narrowly-tailored approach to the infusion of market mechanisms into our affordable housing strategies will be critical to achieving the broader goals of the field.



Danger of the Opt-Out: Strategies for Preserving Section 8 Project-Based Housing in Philadelphia

Rita Burns, Sara Mohamed, and Andrew Newstein

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Rita Burns, Sara Mohamed, and Andrew Newstein are students from Justice Lab, a clinic at the Sheller Center for Social Justice at Temple University Beasley School of Law. The original Danger of the Opt-Out report was created in partnership with Community Legal Services and can be found at <https://clsphila.org/news/danger-opt-out-strategies-preserving-section-8-project-based-housing-philadelphia>. The authors would like to thank Rasheedah Phillips and Rachel Garland for their guidance and support in this report and their ongoing housing advocacy for Philadelphia residents; Jessie Cassella of the National Housing Law Project for her vital help in understanding Section 8 contracts and mortgages; Carolyn Adams, Emeritus Professor of Temple University's Department of Geography and Urban Studies for her help and guidance in policy analysis of housing issues; Heidi Grunwald and Abraham Gutman of the Center for Public Health Law Research, and Jeremy Mennis of Temple University's Department of Geography and Urban Studies for coordinating efforts with us in order to map our data; Amber Bethune for her assistance in graphic design for the creation of this report; and Julia Wolanski, Geographic Information Systems PSM candidate, for her exceptional work in creating the maps used in this report. Finally, we would like to thank Colleen Shanahan, our professor, for her invaluable guidance and assistance in the drafting of this report.

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Executive Summary

Nine thousand Philadelphia families living in subsidized housing are at risk of losing their affordable housing. This is because the law allows owners of Section 8 project-based housing to opt out of preserving their properties as affordable housing for Philadelphians.¹ Like many components of affordable housing, this risk disproportionately affects Philadelphians who are low-income and African American.² This report addresses the risk of opt-out for Philadelphia families by presenting new data analysis and compiling best strategies from other jurisdictions. The report recommends strategies for advocates and policymakers to prevent opt-out, preserve housing, and pursue racial equity in Philadelphia housing.

HUD has recognized the problem of racial inequity in affordable housing by requiring public housing agencies to actively address barriers to fair housing through the 2015 Affirmatively Furthering Fair Housing (AFFH).³ In October 2016, the Philadelphia Housing Authority released its draft Assessment of Fair Housing (AFH) plan.⁴ Like this report, Philadelphia's draft AFH plan recognizes the serious challenges of racial justice and housing. In Philadelphia, African Americans live in project-based housing in disproportionately large numbers, 63% of residents compared with 44% of the city's population. Data show that African Americans in Philadelphia also are disproportionately likely to carry a "severe housing cost burden," a HUD measure based on a resident paying 50% or more of her income for housing costs. The loss of any affordable housing, and particularly the loss of Section 8 project-based housing, will be hardest felt by minority populations already facing severe housing challenges. Thus, the preservation of Section 8 project-based housing is a critical racial equity issue in Philadelphia.

Section 8 project-based housing is owned by private owners who have subsidies and contracts with HUD. As explained in the report, owners can opt out of these contracts in different ways, allowing them to turn the housing units into private, market rate apartments or to sell the properties. There can be powerful economic incentives for private owners to opt out and eliminate these affordable housing units. When this happens, tenants struggle to find affordable replacement housing because the overall number of affordable housing units, both public and private, in Philadelphia is much smaller than the number of people who need these units.

1. See NATIONAL LOW INCOME HOUSING COALITION, PROJECT-BASED RENTAL ASSISTANCE, 2017 ADVOCATES' GUIDE 4-24, http://nlihc.org/sites/default/files/2017_Advocates-Guide.pdf.

2. See *Types of Housing Programs*, MASS LEGAL HELP (Dec. 2009), <http://www.masslegalhelp.org/housing/housing-programs-types>.

3. U.S. Dep't of Housing & Urb. Dev., *Fact Sheet: The Duty to Affirmatively Further Fair Housing*, <https://www.hudexchange.info/resources/documents/AFFH-Fact-Sheet.pdf>.

4. Div. of Housing & Cmty. Dev. & Philadelphia Housing Auth., *Affirmatively Furthering Fair Housing*, <http://www.phila.gov/dhcd/affirmatively-furthering-fair-housing/> (last visited June 7, 2017).

This report collects and analyzes data about Section 8 project-based properties in Philadelphia. The report's analysis and findings are based on research concerning the state of Section 8 project-based properties in Philadelphia and nationally, legislative and other protection among other cities and states, and conversations with local and national housing advocates. The report identifies characteristics of these properties, their owners, and their neighborhoods to estimate the risk that owners will opt out of keeping these properties as affordable housing. Based on this analysis the report identifies 19 properties at highest risk for opt-out. Among these properties, the report identifies properties with the largest number of units to be the focus of advocacy. The report also recommends advocacy priorities based on when HUD contracts are expiring with a focus on the next five years and roughly twenty years from now.

The report analyzes the risk of op-out for 86 Section 8 project-based properties and finds:

- 44 ARE OWNED BY FOR-PROFIT COMPANIES, which have increased incentives to opt out of Section 8 contracts if it is more profitable to do so.
- 18 ARE IN GENTRIFYING CENSUS TRACTS, which are at greater risk of opt-out due to changing neighborhood demographics.
- 24 HAVE AN INSPECTION SCORE OF 89 OR LOWER, which may increase the risk of opt-out because owners try to avoid a contract abatement of foreclosure from HUD if their scores continue to fall or alternatively are waiting to improve the building after they have opted out.

3 properties meet all three heightened risk criteria, and 16 properties meet two of the three.

The report also surveys best practices in advocacy to address the risk of opt-out across the country. While there is no single way to address the problems created by owners opting out of Section 8 project-based housing, there are common approaches that have been successful. These include increasing the amount of notice tenants receive; expanding the parties that receive this notice to include advocates, government agencies and other organizations; and creating a right of first refusal or first purchase for tenants and their advocates.

RECOMMENDATIONS FOR PHILADELPHIA

- Philadelphia should supplement federal law by requiring owners to provide 24 months' notice of opt-out.
- PHA should create and maintain an online database of every pending contract termination or mortgage prepayment.
- Philadelphia should require owners to provide notice to housing advocates, tenant associations, and the City itself.
- PHA should assist displaced residents with controlled rent and requiring owners to help find replacement housing.

When an owner opts out of Section 8 project-based housing, the effects for tenants are long lasting for Philadelphia. Any loss of affordable housing unit is a painful loss in a city with an already insufficient supply of affordable housing, a closed waiting list for public housing, and insufficient funding for existing tenant protections. These losses exacerbate the racial and socioeconomic inequity in our city. This report recommends advocacy priorities and highlights strategies to preserve Section 8 project-based housing as one step in achieving racial justice and preserving affordable housing for Philadelphians.

While this report focuses on housing shortages and inequalities in Philadelphia, the methodologies, strategies, and recommendations identified here could translate to other cities throughout the country. The risk factors highlighted within this report could be applied to the Section 8 project-based properties of other cities to determine what properties may face heightened immediate- or long-term risk of owner opt-out. Further, this report analyzes the policies in place in other cities and states in determining recommendations for heightened tenant protections. This analysis could be applied to other localities based on the policies and needs of each city and/or state.

I. Introduction: Is Philadelphia Opting Out of Affordable Housing?

Philadelphia is one of the poorest large cities in America and it is struggling with a national problem: an insufficient supply of subsidized housing. The Philadelphia Housing Authority's October 2016 Assessment of Fair Housing plan begins to recognize the challenges Philadelphia faces. This report addresses one key part of the challenge of preserving affordable housing: declining supplies of Section 8 project-based housing.

Section 8 project-based housing is at risk of disappearing because private owners can opt out of their contracts with HUD, displace tenants, and diminish the supply of affordable housing. For this report, "opting-out" refers to when an owner chooses not to renew an expiring contract or prepays a mortgage, ending the requirement to maintain the housing as subsidized. The phenomenon of owners opting out of subsidized housing is a crucial challenge for housing advocates in Philadelphia, where more than 9,000 units are at risk of loss. To complicate matters, there are financial incentives for private owners of subsidized housing to convert to non-affordable uses, such as high-rent units or condominiums. And these incentives often get stronger as properties age and neighborhoods gentrify. All of these challenges are intertwined with the core problem of racial inequity in affordable housing.

It is crucial for Philadelphians, the Philadelphia Housing Authority, and housing advocates to understand the risk factors for the loss of affordable housing from owners opting out of Section 8 project-based housing and to think strategically about how to protect tenants. This report begins with a brief explanation of the relevant HUD programs, how affordable

housing is at risk, and how tenants are currently protected. It then uses extensive data to analyze which Section 8 project-based units are at highest risk for loss in Philadelphia and suggests priorities among those units. It next discusses strategies that advocates in other states and cities have used to secure tenant rights and long-term affordability to address the risk of opt-out. It concludes with advocacy solutions for preserving affordable housing in Philadelphia.

II. Racial and Socio-Economic Inequity in the Loss of Section 8 Project-Based Housing

Philadelphia's loss of subsidized housing would be hardest felt among minority populations who already face the worst housing cost burdens. There is clear racial disparity in project-based housing in Philadelphia, which is only one component of the larger issues of the long history of segregation in housing and the newer challenges of gentrification. Regardless of the particular framing, the preservation of Section 8 project-based housing is a critical racial equity issue.

As the chart below demonstrates, minority and ethnic residents of project-based Section 8 housing are disproportionately represented.⁵ Cumulatively, they account for over 80% of residents of all project-based housing in Philadelphia but only 65.5% of the entire city population.⁶ Therefore, the loss of Section 8 project-based housing disproportionately affects the housing security of minority populations. This is most acutely the case for those identifying themselves as black or African American, who are historically a very disenfranchised population within the city.

HUD data supports this perspective. HUD defines households facing "severe housing cost burden" as any household in which more than 50% of the total income is devoted to housing costs.⁷ Non-Hispanic Whites face the lowest percentage of severe housing cost burden, while all other minority populations face a higher percentage. Accordingly, if project-based housing is lost, the populations that already face the highest housing burdens would further disproportionately face increased burdens within the private market.

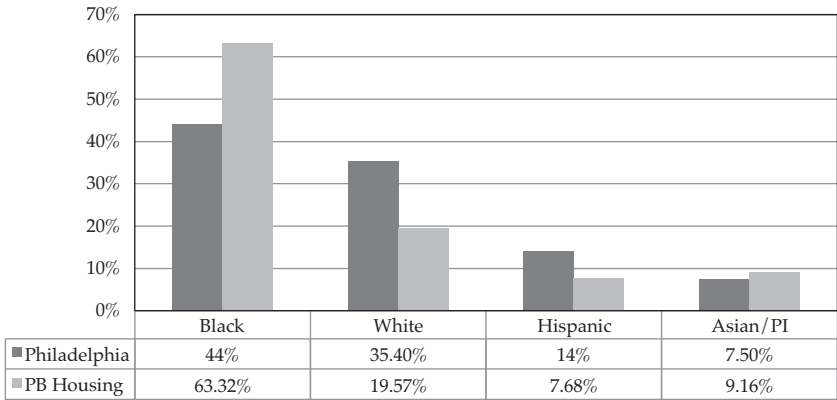
Racial inequity is also tied to socioeconomic inequity in Philadelphia. Data shows the loss of project-based housing disproportionately targets low-income families and individuals. According to national data from the Harvard Joint Center for Housing Studies, 70% to 79% of renters in

5. For the percentages of race/ethnicity residents per project-based Section 8 property in Philadelphia, see U.S. Dep't of Housing & Urb. Dev., *AFFH Data for Map 5, AFFHT Map 5, Philadelphia, PA*, <https://www.hudexchange.info/resource/4845/affh-map-5-data/> (Apr. 2016).

6. *Quick Facts, Philadelphia County, Pennsylvania*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/42101> (last visited June 7, 2017).

7. U.S. Dep't of Housing & Urb. Dev., *CHAS: Background*, https://www.huduser.gov/portal/datasets/cp/CHAS/bg_chas.html (last visited June 7, 2017).

Racial Disparity in Philadelphia Project Based Housing



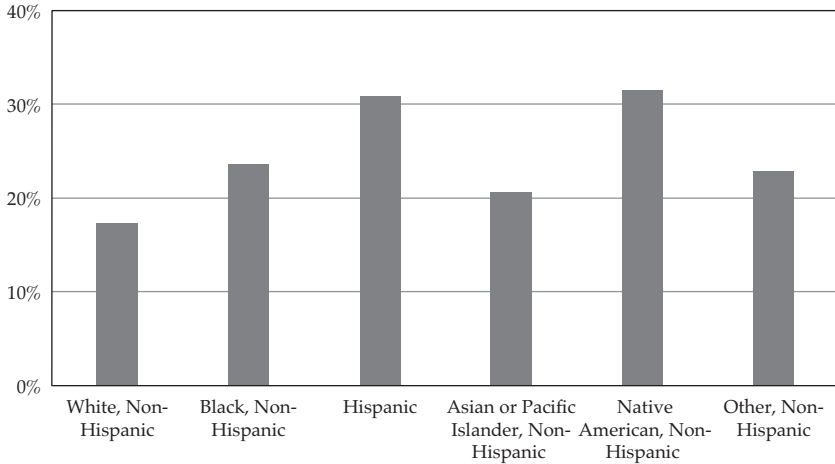
Philadelphia with income under \$15,000 face severe housing cost burdens.⁸ Given Philadelphia’s poverty rate of 26% (defined as an income below \$12,082 for an individual and \$24,257 for a family of four) and a deep poverty rate of 12.9% (defined as an income below \$5,700 for an individual and \$11,700 for a family of four), an alarming number of Philadelphians are in this position.⁹

Clearly, any loss in subsidized housing directly impacts lower income individuals and families because they are, by definition, the tenants living in those units. However, the data shows that losing Section 8 project-based housing is exacerbating the inequity that already exists in Philadelphia housing. Our data analysis in the next section identifies the project-based housing that is at the highest risk for owners opting out. Although we were not able to explicitly include the race of housing residents as a variable in our analysis, the preservation of project-based housing by reducing owner opt-out is necessarily a racial justice issue. Our analysis of

8. *Low-Income Households Face Severe Housing Cost Burdens*, HARVARD JOINT CENTER FOR HOUSING STUDIES, <http://harvard-cga.maps.arcgis.com/apps/MapSeries/index.html?appid=9a24bdf3ae8c4272a58b0309890d5835> (last visited June 7, 2017).

9. For further information about poverty and deep poverty rates in Philadelphia, see Pew Charitable Trusts, *Philadelphia: The State of the City, a 2016 Update* (Mar. 2016), http://www.pewtrusts.org/~media/assets/2016/03/philadelphia_the_state_of_the_city_2016.pdf; Alfred Lubrano, *Of big cities, Phila. worst for people in deep poverty*, PHILLY.COM (Mar. 19, 2013, 3:01 AM), http://www.philly.com/philly/news/20130319_Of_big_cities__Phila__worst_for_people_in_deep_poverty.html; Alfred Lubrano, *Philadelphia Has Worst Poverty Among Major Cities*, GOVERNING (Sept. 30, 2015), <http://www.governing.com/topics/health-human-services/philadelphia-has-worst-poverty-among-major-cities.html>.

Proportion with Severe Cost Burden (HUD data)



these issues allows activists to pursue racial equity in housing in a more focused way.

III. Background: Subsidized Housing Law in Philadelphia

Our data analysis begins with the history of subsidized housing law and particularly Section 8 housing. The looming crisis of affordable housing loss is a direct result of the expiration of contracts in created by the Section 8 program in the 1960s. Congress created this program, but did not plan for its evolution, causing the affordable housing problems the country now faces.

A. Section 8 Project-Based Developments

In the 1960s, Congress created several multifamily subsidized housing programs (MFH). In contrast to traditional public housing, in which a public housing agency owns and operates housing, private landlords or corporations own and operate multifamily subsidized housing.¹⁰ In these programs, the private landlord receives a subsidy from HUD in exchange for providing affordable housing.¹¹ Typically, this entails renting to low-income or moderate-income tenants.¹² Subsidies can be in the form of rental assistance, also known as Section 8 project-based assistance,

10. See *Types of Housing Programs*, supra note 2.

11. See *Differences Between Public and Subsidized Housing*, MASS LEGAL HELP (Dec. 2009), <http://www.masslegalhelp.org/housing/public-subsidized-differences>.

12. *Id.*

or subsidized mortgages.¹³ Some properties have both types of subsidies.¹⁴ However, all multifamily subsidized housing have one thing in common: the subsidy stays with the private owner's property and not with a particular tenant.¹⁵

Section 8 programs are part of the historical evolution of federal affordable housing programs. The oldest program that subsidized financing to private developers was Section 221(d)(3). This program, also called below-market-interest-rate (BMIR), subsidized financing at 3 percent interest rates.¹⁶ Rents to tenants were a flat HUD-approved rate.¹⁷ However, the BMIR subsidized financing was not enough to keep rents affordable because it failed to consider the operating costs of the landlord.¹⁸ This program was replaced with Section 236 in 1968 to provide multifamily housing for low-and moderate-income families.¹⁹ Section 236 remedied this problem by providing market rate interest on mortgages coupled with "interest reduction payments" in order to lower the owner's operating costs.²⁰ In exchange for receiving subsidies on the mortgage, the owner is required to rent to eligible low-income tenants and charge HUD-approved rent.²¹ Also, the owner signs a regulatory agreement and/or a "use and occupancy" restrictions with HUD for the life of the mortgage, typically 40 years, requiring compliance with HUD rules, regulations, and housing quality standards.²² Both the Section 221(d)(3) and 236 programs are no longer offering new mortgages, but buildings already in the program keep their subsidies.²³

The mortgage subsidies in these early programs were not sufficient to lower tenants' rents to traditional public housing rates of 30% of a tenant's income because the programs did not provide operating subsidies to offset operating costs.²⁴ Additionally, many owners encountered financial

13. NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANT'S RIGHTS § 1.2.4 (4th ed. 2012).

14. *Id.*

15. See *What Types of Multifamily Subsidized Housing Programs Are There?*, MASS LEGAL HELP (Dec. 2009), <http://www.masslegalhelp.org/housing/multi-family-subsidized-housing>.

16. See HUD HOUSING PROGRAMS: TENANT'S RIGHTS, *supra* note 13, § 1.2.4.1.

17. See *What Types of Multifamily Subsidized Housing Programs Are There?*, *supra* note 15.

18. See HUD HOUSING PROGRAMS: TENANT'S RIGHTS, *supra* note 13, § 1.2.4.1.

19. *Id.*

20. *Id.*

21. See *What Types of Multifamily Subsidized Housing Programs Are There?*, *supra* note 15.

22. See HUD HOUSING PROGRAMS: TENANT'S RIGHTS, *supra* note 13, § 13.8.1.4.1.

23. See *What Types of Multifamily Subsidized Housing Programs Are There?*, *supra* note 15.

24. See HUD HOUSING PROGRAMS: TENANT'S RIGHTS, *supra* note 13, § 1.2.4.1.

trouble that resulted in mortgage default, HUD acquiring the property, foreclosing, and selling the property to pay off the debts. In response, Congress created such programs as property and utility subsidies and rental assistance. Early forms of rental subsidies that worked to keep mortgage subsidy programs viable include the Section 236 Rental Assistance Program (RAP) and the Rent Supplement Program. Both programs were developed prior to the Section 8 program and made payments on behalf of very low-income tenants unable to pay the standard rent contribution of 30% of their income.²⁵

Because owners were struggling to keep their rents affordable and pay their mortgages, by the mid-1970s, HUD created a new program, project-based Section 8 assistance, to deal with this crisis.²⁶

B. Project-Based Rental Assistance

In 1974, HUD created project-based Section 8 assistance for existing multifamily housing to remain affordable to extremely low or very low-income households. Some programs funded the rehabilitation of deteriorating physical conditions to preserve affordable housing.²⁷ We focus on rental assistance because it is the program in which the opt-out phenomenon occurs.

Many multifamily housing projects are unaffordable to very low-income households because the approved HUD rent is still too high. Project-based Section 8 rental assistance assists these families in obtaining adequate housing by supplementing their rent. This is typically done by providing a subsidy, which is tied to a specific development. Although several HUD programs qualify for project-based Section 8 rental assistance, we will narrow our focus to those programs that are active in Philadelphia.

PROGRAMS RECEIVING PROJECT-BASED ASSISTANCE

- Newly constructed buildings under Section 8
- Buildings that are substantially rehabilitated
- State agency set-aside
- Loan Management Additional Assistance
- Newly constructed buildings under Section 515 (rural rental housing)
- Property disposition programs
- Sections 202/811 Supportive Housing Programs for the elderly or disabled

25. See *What Types of Multifamily Subsidized Housing Programs Are There?*, *supra* note 15; see also 2017 ADVOCATES' GUIDE, *supra* note 1, at 11-9.

26. 2017 ADVOCATES' GUIDE, *supra* note 1, at 11-9.

27. See *What Types of Multifamily Subsidized Housing Programs Are There?*, *supra* note 15.

For owners seeking project-based assistance, the first step is a contract with HUD. HUD enters into a Housing Assistance Payment (HAP) contract with a private owner. Owners can be individuals, non-profit organizations, and/or profit-motivated corporations. Funding for the HAP program is provided annually, however, contracts may be renewed in one-, five-, or twenty-year increments. Typically, tenants pay 30% of their adjusted income for rent and utilities. HAP keeps units affordable by paying the owner the difference between the contract rent and the tenant's portion.²⁸

An additional subset of project-based Section 8 rental assistance is allocated for housing for people with disabilities and seniors. Section 811 provides supportive housing for people with disabilities and Section 202 provides for the elderly. Rental assistance in these programs requires a Project Rental Assistance Contract (PRAC), instead of a HAP contract.²⁹

In 1997, Congress stopped funding affordable housing programs and allowed owners to prepay their mortgages without restrictions. This exception applies to Section 8 project-based properties. When an owner prepays the mortgage or the property approaches the maturity of their mortgage, the regulatory and use restrictions expire, threatening displacement of tenants and a loss of affordable units.³⁰

C. Owners Can Opt Out of Subsidized Housing

For many Philadelphians, the loss of subsidized housing through the “opt-out” problem threatens a basic right to housing. Tenants are facing the possibility of displacement and even homelessness.³¹ Property owners have several ways to take a property out of the affordable stock of multi-family subsidized housing. This report focuses on two ways an owner can “opt out” of affordable housing: choosing not to renew an expiring contract or prepaying a mortgage, ending the requirement to maintain the housing under HUD use restrictions. Both of these options share a common characteristic: the decision to effectively remove these properties from the affordable housing stock remains in the property owner's hands.

Owners face economic incentives to opt out and convert to non-affordable uses, such as higher market rent units or condominiums. Properties are aging, and maintaining subsidized housing to HUD standards is costly. Similarly, many of these properties increase in value due to gentrification of their surrounding neighborhoods. For many owners, “opting

28. See 2017 ADVOCATES' GUIDE, *supra* note 1, at 4-23.

29. See HUD HOUSING PROGRAMS: TENANT'S RIGHTS, *supra* note 13, § 1.2.4.3.

30. *Id.*

31. See NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY & LOS ANGELES COMMUNITY ACTION NETWORK, RACIAL DISCRIMINATION IN HOUSING AND HOMELESSNESS IN THE UNITED STATES: A REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (July 3, 2014), https://www.nlchp.org/CERD_Housing_Report_2014.pdf.

out” is the more profitable choice.³² Additionally, owners may opt out because they prefer the “flexibility of lesser-regulated market rate operation.”³³ Because no new units are being constructed, keeping this type of subsidized housing within the affordable stock is a challenge for housing advocates in Philadelphia and nationally.³⁴

1. Contract Renewal

The affordability of subsidized housing is limited to the specific term of a contract or duration of a mortgage loan, typically 20 years. When a contract expires, private owners may opt out of the affordability stock by choosing not to renew the contract. Developments with a project-based Section 8 contract are obligated to rent to low-income tenants only for the term of the contract.³⁵ When an assistance contract expires, neither HUD nor the property owner has an obligation to renew. Owners face a choice to “opt in” by renewing the contract or “opt out” by not renewing an expiring contract.

2. Mortgage Maturity or Prepayment

Where the subsidy is in the form of a mortgage, use restrictions on rent levels and tenant eligibility are tied to the loan. The maturity of the loan or a prepayment triggers the end of the use restrictions.³⁶ As a result, rents are raised to market level and become unaffordable to most tenants. Both of these phenomena threaten displacement of tenants and the loss of affordable housing. Although most BMIR mortgages had an original 40-year term, HUD allows owners to prepay the mortgage after 20 years. Prepayment allows owners to terminate the income and rent restrictions and Section 8 subsidies. Like prepayment, when a HUD-subsidized mortgage matures, it brings the expiration of the regulatory and use restrictions.³⁷

3. Other Renewal Options

There are options other than opting out or renewing under current Section 8 contract terms: mark-up-to-market or mark-to-market. Both of these programs provide incentives to owners to renew—with the goal of preserving affordable housing.

Some properties with both a subsidized mortgage and rental assistance have rents that exceed market rent. In this scenario, HUD is required to

32. See POLICYLINK, *EQUITABLE DEVELOPMENT TOOLKIT: EXPIRING USE: RETENTION OF SUBSIDIZED HOUSING* 101 (Aug. 2002), <http://www.policylink.org/sites/default/files/expiring-use.pdf>.

33. See *id.*

34. See Staff of the National Housing Trust, *Project-Based Rental Assistance, 2016 Advocates' Guide, National Low Income Housing Coalition*, http://nlihc.org/sites/default/files/2016AG_Chapter_4-6.pdf.

35. See HUD HOUSING PROGRAMS: TENANT'S RIGHTS, *supra* note 13, at § 1.2.5.5.

36. See *EQUITABLE DEVELOPMENT TOOLKIT*, *supra* note 32.

37. See HUD HOUSING PROGRAMS: TENANT'S RIGHTS, *supra* note 13, § 1.2.4.

reduce rents to market level upon renewal.³⁸ Because this puts FHA insured mortgages at risk of default, HUD created a mark-to-market program to discourage owners from opting out of contract renewals. Owners may apply for the mark-to-market program, but are not guaranteed acceptance. In this program, an owner can restructure a HUD mortgage to be able to afford operating a property with lower market rents. This option is conditioned on accepting subsidies for an additional 30-year term. The mark-to-market program also offers a short-term alternative: decline the mortgage restructuring and renew the contract for an additional year.³⁹ Additionally, participation in mortgage restructuring may require a conversion from a project-based subsidy that stays with the development to tenant based vouchers (TPVs), which are not connected to any specific property. The allocation of TPVs is further conditioned on HUD's determination of vacancy rates in the area.⁴⁰

On the other hand, properties that have below market rents may be eligible to raise rents to market level through the mark-up-to-market program upon renewal. Owners of eligible properties may choose to participate in this program if their developments are in high-cost, gentrifying neighborhoods. This program provides an incentive to remain in the Section 8 program instead of opting out. Additionally, this raise in rents is conditioned on a renewal of the contract for a term of five years.⁴¹

There are several other ways for affordable housing units to disappear, but these are dependent on HUD action rather than owner opt-out. If renewal funding is inadequate, HUD may shortchange owners and require tenants to pay higher rents. HUD may even refuse to renew the Section 8 contract.⁴² HUD may also terminate the contract and end the subsidy due to subpar physical condition of the property. Also, HUD may foreclose upon a BMIR mortgage. Lastly, HUD and the owner have the right to terminate the contract subject to the terms of the rental assistance contract.

D. Existing Tenant Protections When an Owner Optes Out

There are some legal protections for tenants when an owner of a Section 8 property opts out of a contract or mortgage. We describe these existing protections because they are important context for the additional protections that we recommend Philadelphia housing advocates pursue.

1. One-Year Notice of Non-Renewal

Federal law requires that all private owners of Section 8 properties provide both HUD and tenants with one-year notice prior to the termination

38. *Id.*, § 1.2.4.1.

39. *Id.*

40. *See id.*, § 12.4.4.

41. *Id.*

42. *See id.*

or expiration of the contract.⁴³ This notice must provide the owner's intentions to either renew or opt out of the contract.⁴⁴ It must also state that in the event of opt-out, HUD will provide tenant-based rental assistance to eligible tenants.⁴⁵ This notice must be hand delivered or mailed to each unit (taping on the door is not sufficient).⁴⁶ Owners are encouraged but not required to provide notice in the tenants' language if they speak anything other than English.⁴⁷

Owners may not evict tenants or increase rents until notice has been given and one year has passed.⁴⁸ HUD has the discretion to renew expiring contracts for whatever period of time is needed in order to ensure that tenants receive notice at least one full year in advance of opt-out.⁴⁹ If an owner initially intends to renew but later decides to opt-out, a new one-year notice must be provided.⁵⁰

REQUIREMENTS FOR ONE-YEAR NOTICE OF CONTRACT NON-RENEWAL

- Specifies opt-out or renewal intention
- States that HUD may provide tenant base vouchers
- Service directly to each unit or mailed to each tenant
- Language provided in HUD samples must be followed in notice
- Statement that owner will honor tenants' rights to remain if property continues to be offered for rental housing, the public housing authority finds the rent reasonable, and there is no cause for eviction

Encouraged but Not Required

- In tenant's language if other than English
- That owner provides as much information as possible about opting out and reasoning for doing so

In contrast to contract non-renewal where tenants receive a year of advance notice, owners are required to give tenants only 150 days' advance notice of their intention to prepay. However, upon prepayment, tenants are eligible for tenant protection vouchers (TPVs) or an enhanced voucher that allows a tenant to remain in the property or find new affordable housing. Unlike prepayment scenarios, tenants living in a development with

43. See 42 U.S.C. § 1437f(c)(8) (2012).

44. See U.S. HOUSING & URB. DEV. OFFICE OF HOUSING, SECTION 8 RENEWAL POLICY GUIDE BOOK, at App. 11-1 (Dec. 9, 2010), <http://www.hud.gov/offices/hsg/mfh/exp/guide/s8renew.pdf>.

45. *Id.*

46. See *id.* at 11-5.

47. See *id.*

48. *Id.* at 11-6.

49. *Id.*

50. See *id.*

affordability protections but without rental assistance do not qualify for enhanced vouchers when the mortgage expires.

2. Enhanced Vouchers

In certain circumstances, HUD may provide tenants with enhanced vouchers in the event of contract expiration or mortgage prepayment. This voucher is tied to the specific property, allows the tenants to remain there, and covers any increase in rent that may occur as long as the public housing authority determines that the rent is reasonable.⁵¹ If a tenant with an enhanced voucher moves away from the property, the enhanced voucher is eliminated and that unit is removed from project-based housing stock.⁵² The tenant still is eligible for a housing choice voucher at that point, but that is tenant-based and distinct from any property.⁵³ However, the availability of enhanced vouchers depends on HUD funding and is often limited to tenants who live in low-vacancy areas, which HUD defines as counties that have a moderate to tight rental market for low-income tenants.⁵⁴ For the year 2016, Philadelphia is not listed as a low-vacancy county, making it harder to obtain an enhanced voucher.⁵⁵

3. Tenant Protection Vouchers

Regular tenant protection vouchers are similar to housing choice vouchers and do not provide the enhanced feature of covering increase rent that enhanced vouchers have.⁵⁶ Instead of allowing tenants to stay at a specific property, this voucher allows them to find other affordable housing.⁵⁷ Tenant protection vouchers are provided to residents to find other affordable housing in the following situations:

- When public housing is demolished, sold, or otherwise converted;
- When private project-based contracts are terminated or not renewed by HUD (as opposed to the owner) due to owner's breach of the contract or otherwise not fulfilling the requirements;
- When private housing with a HUD-subsidized mortgage forecloses;

51. 2017 ADVOCATES' GUIDE, *supra* note 1, at 4-23.

52. *See id.*

53. *See id.*

54. *See* U.S. Dep't of Housing & Urb. Dev., Notice PIH 2016-12, 2-3 (Aug. 18, 2016), <http://portal.hud.gov/hudportal/documents/huddoc?id=PIH-2016-12andH2016-07.pdf>.

55. *See id.* at 57-58 (of the Pennsylvania counties, Philadelphia is not listed).

56. *See* 2017 ADVOCATES' GUIDE, *supra* note 1, at 4-50.

57. *See id.*; *see also* U.S. Dep't of Housing & Urb. Dev. Office of Multifamily Housing Programs, *Tenant Protection Vouchers* (Aug. 26, 2015), <https://www.hudexchange.info/course-content/hud-multifamily-affordable-housing-preservation-clinics/Preservation-Clinic-Tenant-Protection-Vouchers.pdf>.

- When certain program (Rent Supplement Payments Program or Rental Assistance Payment Program) contracts expire, are terminated, or their underlying mortgages are prepaid;
- When certain Section 202 loans are prepaid.⁵⁸

IV. Data Analysis: The Risk of Losing Philadelphia's Section 8 Project-Based Contracts

Because Section 8 project-based housing relies on private owners, it is crucial for housing advocates to predict when an owner might opt out of Section 8 by not continuing a contract or mortgage. One way to do this is to identify the properties that are most at risk for opt-out, so as to prioritize advocacy to preserve affordable, project-based housing in Philadelphia.

This section of the report analyzes HUD data to identify properties that are most in danger of opt-out. This analysis gives housing advocates the ability to prioritize advocacy based on the risk of opt-out and also the impact of preservation of units on the City. We considered variables including the expiration date of the contract, the profit status of the owner, the property's Census tract, the physical inspection score of the property, the length of the contract term, and the number of units in the property. By cross-referencing these factors among properties, we highlighted those that have the greatest risk of disappearing due to owner opt-out. Although we do not have specific racial or socioeconomic data for each property, our analysis shows that properties that are at high risk for opt-out are in areas that are either historically the object of underinvestment and high minority populations, or that are currently gentrifying and are at risk of exacerbating racial inequity in Philadelphia.

A. Methodology

Our analysis is based on a collection of data from disparate HUD and PHA sources. This is because neither HUD nor PHA maintains a comprehensive, unified source of information about Section 8 project-based properties. The HUD sources include the Multifamily Assistance and Section 8 Contracts Database⁵⁹ and Multifamily Portfolio Datasets—Contract Renewal Information—All Contracts.⁶⁰ The HUD datasets were last updated on September 29, 2016. We also cross-referenced our data with PHA's

58. See 2017 ADVOCATES' GUIDE, *supra* note 1, at 4-50.

59. Download the Multifamily Assistance and Section 8 Contracts Database, U.S. DEP'T OF HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/exp/mfhdiscl (updated as of Oct. 26, 2016).

60. Multifamily Portfolio Datasets, U.S. DEP'T OF HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/presrv/mfhpreservation (updated as of Oct. 26, 2016).

listing of HUD Section 8 subsidized units in Philadelphia.⁶¹ PHA gives no indication of when its list was last updated but the URL to the list implies that it was posted on October 3, 2013, so we relied more heavily on the HUD datasets, using the PHA list only to provide additional information that was not provided on the HUD datasets. All of our gentrification data was pulled from *Governing's* Philadelphia Gentrification Maps and Data.⁶² *Governing's* analysis is based on 2009–2013 American Community Survey⁶³ and US 2010 Longitudinal Tract Data Base.⁶⁴

Our compiled data set from these sources resulted in a list of 151 properties in Philadelphia that HUD broadly determines are under Section 8 contracts. The contracts are largely identified as Housing Assistant Payments (HAP) contracts and Payment Rental Assistance Contracts (PRACs). PRACs concern capital advances and are granted by HUD only on a yearly basis, based on the availability of allocated funding. HUD did not include any PRAC analysis in its analysis of characteristics of contracts in which owners are more likely to opt in or out.⁶⁵ PRAC contracts are so dissimilar to multi-year HAP contracts that we have not included them in our analysis and have only focused on HAP contracts. HAP contracts represent 86 properties and 9,177 housing units in Philadelphia, while PRAC contracts represent 65 properties and 2,679 units. Thus, HAP contracts represent a larger share of housing stock in the city.

We made several assumptions in the analysis of our data. First, in determining the expiration date for HAP contracts, we operated under the assumption that the HUD field “tracs_overall_expiration_date” represented the final expiration date of contracts in place for any particular property.⁶⁶ This is important because, although the data suggests it is the expiration date, it could signify a possible extension date or other interim step.

61. *HUD Section 8 Subsidized Units in Philadelphia*, PHILADELPHIA HOUSING AUTH., http://www.pha.phila.gov/media/101285/hud_section_8_subsidized_units_in_philadelphia_10_3_13.pdf (last visited June 7, 2017).

62. *Philadelphia Gentrification Maps and Data*, GOVERNING, <http://www.governing.com/gov-data/philadelphia-gentrification-maps-demographic-data.html> (last visited June 7, 2017).

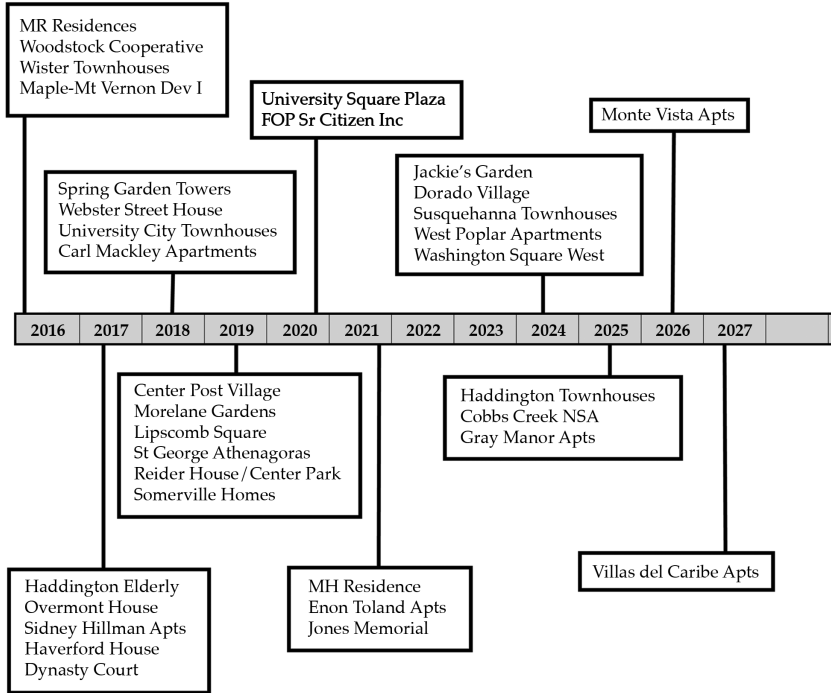
63. *American Community Survey 5-Year Data (2009–2014)*, U.S. CENSUS (Sept. 15, 2016), <http://www.census.gov/data/developers/data-sets/acs-5year.2013.html>.

64. John Logan et al., *Census geography: Bridging data for Census tracts across time*, DIVERSITY AND DISPARITIES (last visited June 7, 2017), <https://s4.ad.brown.edu/Projects/Diversity/Researcher/Bridging.htm>.

65. See U.S. DEP'T OF HOUSING & URB. DEV. OFFICE OF POLICY DEV. & RESEARCH, *MULTIFAMILY PROPERTIES: OPTING IN, OPTING OUT AND REMAINING AFFORDABLE* (2006), https://www.huduser.gov/Publications/pdf/opting_in.pdf [hereinafter HUD Study 1]; U.S. DEP'T OF HOUSING & URB. DEV. OFFICE OF POLICY DEV. & RESEARCH, *OPTING IN, OPTING OUT A DECADE LATER* (2015), https://www.huduser.gov/portal/sites/default/files/pdf/508_MDRT_Opting%20In_Opting%20Out.pdf [hereinafter HUD Study 2].

66. See *Multifamily Assistance and Section 8 Contracts Database*, *supra* note 59.

Timeline of Contract Expiration Dates

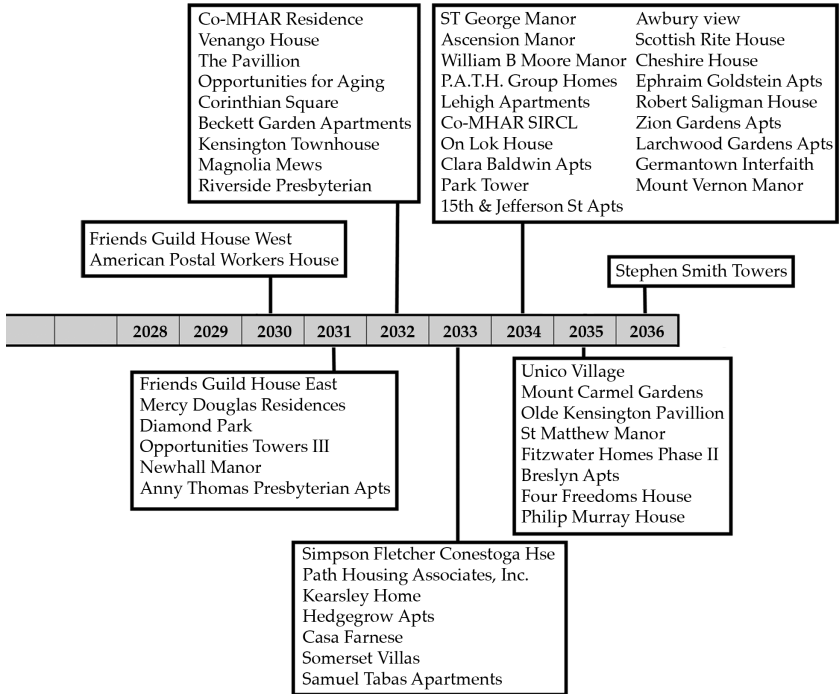


Nonetheless, we considered it a reasonable assumption that this date signifies when the loss of housing is likely to occur. Second, in determining the relevant contracted units per property, we used the HUD field "maximum_contract_unit_count."⁶⁷ While this represents the maximum amount of units under contract, it does not necessarily mean that it is the number of units currently available or occupied through Section 8.

B. Location of Public Housing in Philadelphia

There are 86 properties in the City of Philadelphia that are under HAP contracts with HUD. These properties represent 9,177 housing units under Section 8 contracts. Eleven properties are in the Center City region of the city (the downtown business epicenter of Philadelphia). Forty-two properties are in the North and Northwest regions of the city, which include various low-income neighborhoods and some gentrifying sections. Twenty-five properties are scattered through West Philadelphia, a region separated

67. *Id.*



by the Schuylkill River and which includes major universities and a mix of high- to low-income neighborhoods. Finally, seven properties are in the Northeast region of the city, a more suburban area of the city that is not as easily accessible by public transportation as are other sections.

C. Upcoming Contract Expirations

Because the year these contracts expire dictates how immediate the danger of opt-out is, we looked at the range of contract expiration dates. The expiration dates of the HAP contracts for these properties span a range from 2016 to 2036. See above for a complete timeline of the expiration dates of all of the current HAP contracts in Philadelphia.

We then divided the expiration dates into five-year increments, 2016–2020, 2021–2025, 2026–2030, and 2031–2036. A pattern emerges in which a significant majority of contracts are expiring either in the earliest range, 2016 until 2020 (21 properties) or in the latest range, 2031 and beyond (50 properties). Eleven contracts are expiring between 2021 and 2025 and four between 2016 and 2030. This may be because of a cyclical effect starting with the boom in public housing in the 1960s, so many of

the contracts have followed the same twenty- to thirty-year cycle that has come to a peak again in this decade. As such, many contracts have been renewed for a new twenty-year cycle in the past few years, and those expiring in the shortest term are a part of that same expiration cycle. This pattern suggests that affordable housing advocates first face the challenge of preserving the most immediate housing set to expire in the next few years and then have the opportunity to create a long-term strategy for preserving contracts expiring beyond 2030, while working on targeted properties in the interim years.

D. Gentrifying Census Tracts

As we analyzed the location of Section 8 project-based properties, we wondered whether the properties were located in neighborhoods that are considered to be gentrifying within Philadelphia. This is an important question because affordable housing preservation and racial equity are inextricably linked, and the phenomenon of gentrification is intertwined with racial equity. Underscoring the importance of this question, Philadelphia's draft AFH—released shortly before publication of this report—demonstrates a clear concern about gentrification and its effects on low-income residents, who are largely people of color.⁶⁸

While there have been various studies on the effects of gentrification for low-income residents, the results vary, most likely in part because gentrification is difficult to quantify.⁶⁹ Project-based Section 8 housing may be particularly sensitive to gentrification because it involves private owners participating in a government funded system that is contracted for twenty-year terms. Not only have neighborhoods experienced significant change in the last twenty years, owners also may be reluctant to renew for long periods of time as neighborhoods continue to change. The property location within a gentrifying tract can indicate whether it may be more profitable for the owner to enter the private market or alternatively harder to sustain affordable housing due to increased property taxes or external pressures. HUD studies also suggest that properties with a low rent compared to the surrounding fair market rent are more likely to opt out.

We used *Governing Magazine's* analysis of gentrification in Philadelphia as the basis of our own analysis. *Governing's* definition of gentrifying Census tracts are lower-income tracts that have showed substantial growth in

68. CITY OF PHILADELPHIA & PHILADELPHIA HOUSING AUTH., ASSESSMENT OF FAIR HOUSING (Oct. 27, 2016), http://www.pha.phila.gov/media/170834/assessment_of_fair_housing_2016-web.pdf.

69. For a sample of gentrification studies, see Justin Feldman, *Gentrification, Urban Displacement and Affordable Housing: Overview and Research Roundup*, JOURNALIST'S RESOURCE (Aug. 15, 2014), <http://journalistsresource.org/studies/economics/real-estate/gentrification-urban-displacement-affordable-housing-overview-research-roundup>.

home values and adult residents with bachelor's degrees.⁷⁰ We believe these properties are at a higher risk of opt-out because owners will have an increased incentive to switch to the private market due to the increased property values and changing demographics in the area. This theory is comparable to a HUD study that has recommended looking into small area fair market rents by zip code in the future to accommodate fluctuating values.⁷¹ We found that using Census tracts provides for even greater specificity.

Our choice to use *Governing's* definition of gentrification:

There is no universal measure of gentrification. Philadelphia and PHA's AFH uses Pew Charitable Trust's recent study, *Philadelphia's Changing Neighborhoods*. The Pew Charitable Trust uses an income-based model to define gentrification. As that study explains, this model does not capture the changing neighborhoods around universities in the city because students living in these areas report limited or no income. The Pew model rejects using property valuables in its definition of gentrification. Because our report is concerned with a property owner's choice to enter the private rental market, property values are highly relevant to our analysis. As a result, we have chosen to use *Governing's* measure of gentrification, which includes these values.

Based on the *Governing* model, 84 out of the 383 Census tracts in Philadelphia were gentrifying from 2000 to 2013. Of the 86 Section 8 project-based properties on our list, 18 properties fall within one of these gentrifying Census tracts. This equates to about 21% of the total properties and 26% of the total contracted units of housing.

Five of these properties are a few blocks from Temple University in North Philadelphia. An additional two properties are near the University of Pennsylvania/Drexel University. As such, seven out of the 18 properties are in university neighborhoods. The demand for both university-provided and private student housing may function differently than standard private housing in other neighborhoods so the future of these properties may diverge from the rest of the market and may require different advocacy strategies.

The rest of the properties in gentrifying Census tracts are generally in parts of northern Philadelphia, West Philadelphia, and Center City, with one property each in the farther northeast and southwest portions of the city.

70. See *Philadelphia Gentrification Maps and Data*, *supra* note 62.

71. See HUD Study 2, *supra* note 65, at App. 3.

These properties located in gentrifying tracts present heightened challenges to affordable housing advocates because private (particularly, but not necessarily limited to, for-profit) owners have increased incentives to rent or sell on the private market.

E. Nonprofit vs. For-Profit Status of Owners

While the gentrifying nature of a Census tract suggests external profit motives for an owner, we were also interested in characteristics of owners that might provide insight into that owner's likelihood to opt out of a Section 8 project-based contract. According to a HUD study from 2005, properties owned by for-profit entities were six times more likely to opt out than nonprofit entities.⁷² A 2015 HUD follow-up study found the same result, although to a lesser degree, finding that for-profit owners were twice as likely to opt out.⁷³ Based on this analysis, we used our data to identify the nonprofit or for-profit status of the owner of each property.

We found that 44 of our list of 86 HAP properties are owned by entities that are for profit in some way—labeled as either profit-motivated or limited dividend in HUD data. A total of 41 properties are owned by nonprofit entities. (We were unable to identify the status of the owner of one property on our list). Despite the relatively even split among properties, the for-profit properties represent 5,921 units while the nonprofit properties represent only 3,256 units. As the HUD study notes, this suggests that a majority of units in Philadelphia are at higher risk of opt-out due to the owner's for-profit status. This compounds our gentrification analysis because, in addition to a for-profit owner's general profit motivation, the external factor of gentrification increases the likelihood of an owner opting out of a Section 8 project-based contract. Profit-motivated owners are far more likely to opt out when they are able to obtain higher rents on the private market.

F. Real Estate Assessment Center (REAC) Inspection Scores

In addition to characteristics of the property owner and neighborhood, we also wondered whether characteristics of the property itself increased the risk of opt-out. HUD properties are inspected and receive a score based on the physical condition of the property. An inspection score could indicate that owners are having trouble affording the maintenance of a property or have chosen to let maintenance and repairs lapse because they already

72. See HUD Study 1 and HUD Study 2, *supra* note 65. The HUD studies reference whether owner is for profit or nonprofit and inspection scores as contributing factors to owner opt-out probability. Other factors provided in the HUD studies were not included here due to limited available data. See HUD Study 2, *supra* note 65, at 25–26 (explaining the distinction between the original study and the follow-up study).

73. See HUD Study 1 and HUD Study 2, *supra* note 65.

intend to enter the private market. We analyzed these property inspection scores to determine which property owners may be more likely to opt out at the end of their contract terms.

The Real Estate Assessment Center (REAC) provides physical inspections of all HUD housing, whether owned, insured, or subsidized by HUD.⁷⁴ REAC Inspection scores range from 1-100. REAC divides the properties into three levels: (1) a score of 90 or higher requires inspection every three years, (2) a score of 80–89 requires inspection every two years, and (3) a score of 79 or below requires an inspection every year.⁷⁵ A score of 59 and below is considered failing by HUD and may be subject to any number of remedies if it continues, such as civil penalties, abatement of the HAP contract, transfer to a new owner, or certain judicial enforcement.⁷⁶

The 2015 HUD study found that owners with lower REAC inspection scores were more likely to opt out as compared to owners with higher scores.⁷⁷ The study theorized that owners with lower scores may preemptively opt out rather than face the risk of abatement of HUD subsidies. Further, owners who are already intending to opt out in the future may be waiting to invest any physical improvements into the property until after opting out.⁷⁸

We created a measurement for properties within Philadelphia, hypothesizing that a score of 89 or lower may create an increased opt-out risk based partially on the findings of the HUD study.⁷⁹ Of the properties that opted out of the contract or prepaid the mortgage, the HUD study found that 66% had a score of 89 or lower, while 44% had a score of 90 or higher.⁸⁰ Further, the median score of opt-out or prepayments was 88.⁸¹ Finally, a score of 89 or lower is the first signal that a property has moved below an optimum level because as noted above, it requires inspections every one to two years rather than every three years (as a score of 90 or higher would).

74. U.S. Dep't of Housing & Urb. Dev., *Physical Inspection Scores*, HUD.GOV, http://portal.hud.gov/hudportal/HUD?src=/topics/physical_inspection_scores (last visited Nov. 19, 2016).

75. See 24 C.F.R. § 200.857.

76. Press Release, National Low Income Housing Coalition, Multifamily Notice Highlights Appropriation Acts Changes to Failing REAC Scores Procedures (Mar. 9, 2015), <http://nlihc.org/article/multifamily-notice-highlights-appropriation-acts-changes-failing-reac-scores-procedures>.

77. See HUD Study 2, *supra* note 65, at 26.

78. *Id.*

79. *Id.*

80. *Id.* at 13.

81. *Id.*

Based on this, we used 89 as the cut-off for our own data. Using the REAC inspection scores provided by HUD,⁸² we found the following.

- 3 properties had a failing score of 59 or below
- 24 properties had a score of 89 or below
- 61 properties had a score of 90 or higher
- 1 property (Ephraim Goldstein Apartments) was not listed in HUD's data for REAC scores

Three of the properties had a failing score of 59 or lower, which means that these properties may be subject to HUD penalties. 24 properties had a score of 89 or lower, indicating an increased frequency of inspections from HUD. And 61 properties had a score of 90 or higher, which is in HUD's optimal range. Finally, we were unable to locate the score for one property.

G. Philadelphia's Most At-Risk Properties

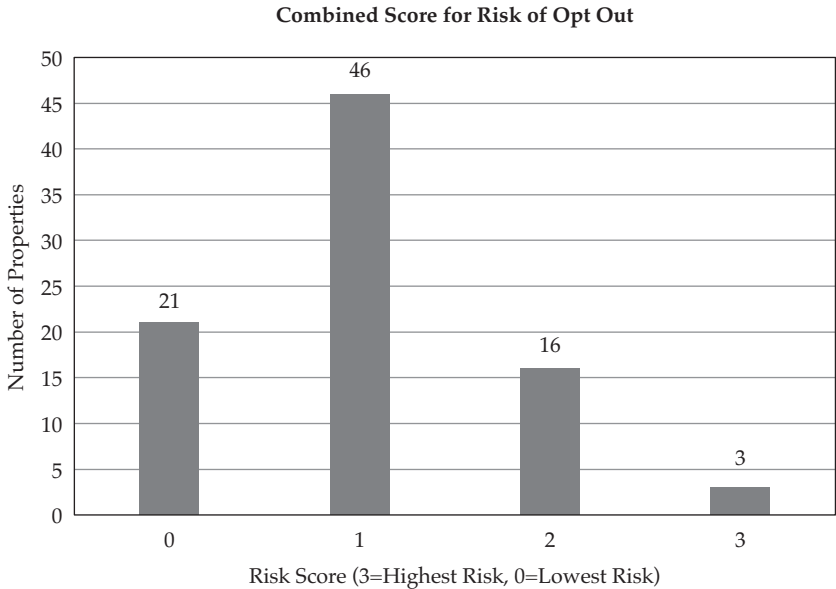
Having investigated three key variables—gentrifying Census tract, for-profit ownership, and inspection score—that are related to a property's risk of opting out, we attempted to combine these variables to identify the highest risk properties. In combination, these factors paint a picture of a for-profit owner motivated to sell or rent in the private market due to higher demands in the neighborhood and who is either unable to afford the upkeep of the building or has actively chosen not to invest in it.

We created a score for each property that measured how many of these risk variables applied to each property. A property received one point each for having a for-profit owner, being in a gentrifying Census tract, and having a REAC inspection score under 90. We consider the properties with a score of three are at the highest risk of opt-out, those with a score of two at an intermediate risk, those with a score of one at a lower risk, and those with a score of zero at the lowest risk. We found three at the highest risk, 16 properties at intermediate risk, 46 properties at lower risk, and 21 properties at lowest risk of opt-out.

We believe this analysis reveals a prioritization for housing advocates: the three properties with a score of three and the 16 properties with a score of two should be the object of heightened advocacy to preserve these units as affordable, subsidized housing because they are at the highest risk of opt-out.

Table 1 below lists the details for each of the 19 properties in the high and intermediate risk categories, listed from highest to lowest risk. These 19 properties represent roughly 24% of all of the units under HAP contract

82. U.S. Dep't of Housing & Urb. Dev., *Physical Inspection Scores by State*, HUD.GOV (Sept. 15, 2016), http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rem/s/reminspescscores/remspyspescscores.



in Philadelphia. While these tables are sorted by risk scores, contract expiration is also a crucial variable: the sooner a contract is expiring, the sooner advocacy needs to begin.

H. Additional Factors

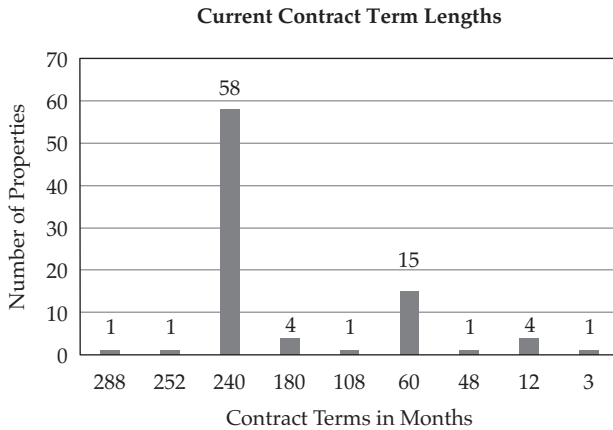
There are other factors that are relevant to prioritizing advocacy. Some of these factors are not explicitly included in our risk scores, yet are still important for advocates to consider. For other factors, we could not access reliable data. This underscores the importance for HUD and especially PHA to maintain and make public reliable, current, and thorough data about public housing in Philadelphia. For other factors, we did not have the analytic sophistication to create reliable models for analysis. Finally, for some factors, we recognize that our assumptions and perspective are only one of many. This section describes some of these specific areas for future analysis.

1. Length of Contract Term

HAP contract terms are most often for 240 months (20 years) or longer. Of the 86 properties on our list, 60 properties have contract terms for 20 years or longer. One indicator of a high risk of opt-out may be a shortened contract term. Owners may agree to a new contract of only one year in order to provide the statutory one-year notice of opt-out.

Similarly, we believe that owners with contracts of 60 months (5 years) or less may be at higher risk of opting out. Our theory is that owners may be using shorter contracts as a way to bide time to opt out at a time that

Property Name	Street Address	Zip	Units	Owner Type	Contract Expiration Date	Contract Term In Months	Reac Score	Gentrified Tract?	Risk Score
Spring Garden Towers	1818 Spring Garden	19107	208	Profit Motivated	2/20/2018	60	85	Y	3
University Square Plaza	3901 Market St	19104	440	Profit Motivated	2/15/2020	108	66	Y	3
Larchwood Gardens Apts	2820 S 81st St	19153	179	Profit Motivated	12/31/2034	240	79	Y	3
Haverford House	3416 Haverford Ave	19104	32	Profit Motivated	9/30/2017	60	60	N	2
Webster Street House	5205 Webster St	19143	7	Non-Profit	4/19/2018	60	81	Y	2
Center Post Village	55 N 40th St	19104	82	Profit Motivated	2/28/2019	60	90	Y	2
Morelane Gardens	185 E Walnut Ln	19144	22	Profit Motivated	5/31/2019	60	88	N	2
Jackie's Garden	1821 N. 20th Street	19121	134	Profit Motivated	6/30/2024	180	89	N	2
Susquehanna Townhouses	2233 N 20th St	19132	36	Limited Dividend	9/30/2024	240	88	N	2
West Poplar Apartments	12th & Wallace Streets	19123	138	Profit Motivated	10/31/2024	180	92	Y	2
Haddington Townhouses	5437 Wyalusing Ave	19131	125	Profit Motivated	5/31/2025	180	73	N	2
Cobbs Creek NSA	5256 Larchwood St	19143	85	Profit Motivated	7/31/2025	240	94	Y	2
Friends Guild House East	711 Spring Garden St	19123	89	Profit Motivated	3/31/2031	240	92	Y	2
Beckett Garden Apartments	1400 N 16th St	19121	131	Profit Motivated	11/13/2032	240	99	Y	2
Samuel Tabas Apartments	2101 Strahle St	19152	300	Profit Motivated	12/5/2033	240	99	Y	2
CO-MHAR SIRCL	2201 E York St	19125	8	Non-Profit	6/30/2034	240	87	Y	2
15th & Jefferson Street Apts.	1418 N. 15th St.	19121	38	Profit Motivated	10/31/2034	240	94	Y	2
Zion Gardens Apts	1101 W Girard Ave	19123	89	Profit Motivated	12/22/2034	240	76	N	2
Olde Kensington Pavillion	1250 N 3rd St	19122	103	Profit Motivated	7/21/2035	240	94	Y	2



maximizes profit, whether it is waiting for better private market rates, finding a viable buyer, a shifting financing situation, or other similar reasons. This is only a hypothesis at this stage so we only note here that, of the 19 properties we identify as highest risk, 9 have contract terms for periods shorter than 20 years.

2. Number of Units in a Property

The number of units per building was not factored into our risk analysis. Like contract expiration dates and terms, this factor may be an important part of prioritizing advocacy. A property with fewer than ten units opting out would not represent the same loss to Philadelphia’s affordable housing stock as a property with several hundred units opting out.⁸³ This may argue in some cases for prioritizing advocacy to preserve some properties over others.

3. Future Data Analysis

There are two specific issues that are excluded from this report. First, while we note the specific REAC inspection score of each property, we group all inspection scores under 90 as at risk, without differentiating among them. As a result, our analysis treats a property with a score of 59 the same as a property with a score of 89. This is an imprecise measure that likely does not capture the intensity of risk based on the physical condition of properties. Future analysis could address more finely graded

83. For example, one of the Section 8 properties, known as University Square Plaza, meets the three factors of heightened risk and also represents the largest number of units of any one property—440 units—in Philadelphia. Thus, proactive advocacy around University Square’s 2020 contract expiration date should be a high priority due to the number of units at risk.

differences in property inspection scores to create more specific findings. A second area of analysis concerns our composite risk score, in which all three factors are weighed equally. In a future analysis, exact probabilities could be noted of each factor and weighed against each other to rank factors in order of the probability of opt-out or prepayment.

Finally, we analyzed the factors that were possible from the available data. Better data is likely to lead to more robust indicators of risk. This is illustrated by one property, Overmont House, that has already provided the one-year notice to tenants that the owner will be opting out, yet does not match any of the three factors we measured. If HUD and PHA maintained and made available better and more comprehensive data, more precise analysis would be possible.

V. Best Practices for Preserving Affordable Housing

Our analysis reveals potential priorities for preserving Section 8 project-based housing in Philadelphia. The next step is to understand potential strategies for achieving this goal. To answer this question, we look to how other cities and states have tried to preserve affordable housing. We report our results in three categories: expanded notice, rights of refusal, and creative or ad hoc practices.

A. *Advanced Notice Requirements*

HUD requires that one-year notice be given to tenants when public housing is being eliminated. Philadelphia follows this requirement, but unlike other jurisdictions, has not gone further. At least ten states and eight cities have recognized that this notice is insufficient to preserve public housing. Each of these jurisdictions has created a regulatory process to protect citizens during the expiration process by requiring a longer notice period, expanding who receives notice, or both. The requirements are summarized here with citations to the specific statutes or regulations in the footnotes.

1. California

California has a statewide policy that requires notice to tenant associations as well as specified qualified entities: certain local and national nonprofits, public agencies, and some profit-motivated organizations.⁸⁴ California cities also have additional protections.

Sacramento requires owners to submit notice to tenants and the Sacramento Housing and Redevelopment Agency (SHRA) at twelve- and six-month intervals in order to terminate, opt out, or prepay. In addition, owners may not evict tenants except for good cause for 180 days after the expiration of rental restrictions if the SHRA has arranged to take over the subsidy payments.⁸⁵

84. CAL. GOV'T CODE §§ 65863.10, 65863.11, 65863.13.

85. SACRAMENTO, CAL., CODE §§ 5.148.010–.100.

San Francisco requires owners to provide 18 months' notice to tenants and the director of housing. Information about tenants' rights must be available for any interested parties no less than 14 days prior to a mandatory public hearing, which is held no later than 45 days after the owner gives notice of their intent to prepay or terminate.⁸⁶

Santa Cruz owners must give 12 months' notice to the city director of planning and development. Within 14 days of receiving this notice, the director may send a written "request for information and access," which the owner has 21 days to respond to, certifying that the owner consents to a walk-through and an inspection of the property.⁸⁷

2. Colorado

Colorado "encourages" owners to submit notice to the state 120 days before converting publicly assisted rental housing.⁸⁸ Denver has gone further and mandates notice to tenants and the city. Twelve months are given for expiring Section 8 contracts, 210 days' notice are provided for intent to opt out of long-term contracts, and 150 days for intent to opt out of one-year contract extensions. The code also requires a 90-day notice any time an owner "takes action which will make the affordable housing no longer affordable." It also prevents owners from taking any action during the required notice period that would "preclude the city or its designee from succeeding to the contract or negotiating with the owner for purchase." Finally, it calls for an unspecified civil penalty for failure to comply with its provisions with all fines payable into a housing replacement fund established and run by the city.⁸⁹

3. Connecticut

Connecticut provides 12 months' notice to tenants as well as state and local governments. Additionally, the state-level agency must post the notice on its website within ten days and send an email notification to a list of persons who have registered to receive such notice via written request.⁹⁰

4. Illinois

Illinois gives 12 months' notice to tenants, the relevant local government, local public housing agency, and the state housing authority.⁹¹ Chicago expands the Illinois 12 months' notice to include the city department of housing, which is triggered by prepayment, termination, or an intended disposition of the property.⁹²

86. SAN FRANCISCO, CAL., ADMIN. CODE §§ 60.1–14.

87. SANTA CRUZ, CAL., MUN. CODE §§ 21.05.010–.090.

88. COLO. REV. STAT. §§ 24-32-701 to 24-32-721.

89. DENVER, COLO., MUN. CODE §§ 27-45–27-52.

90. CONN. GEN. STAT. § 8-68c.

91. 310 ILL. COMP. STAT. 60/1–60/10.1.

92. CHICAGO, ILL. MUN. CODE § 2-44-111.

5. Maine

In Maine, owners must give 90 days' notice to the tenants, the state housing authority, and the local public housing agency.⁹³

6. Minnesota

Minnesota gives tenants 12 months' notice of an intended mortgage prepayment, the termination or non-renewal of Section 8 contracts or mortgages, or the termination of other housing subsidy programs.⁹⁴ The owner must also submit a statement of impact to tenants; the state; and, if within the Twin Cities metropolitan area, the Metropolitan Council. The impact statement must identify the number of units that will no longer be subject to rent restrictions, the estimated non-restricted rents, and "actions the owner will take to assist displaced tenants in obtaining other housing."

7. Portland, Oregon

Portland has adopted similar provisions to those of Denver, in that it requires owners to provide to the city and tenants a one-year notice of pending Section 8 contract expirations, 210 days' notice of intent to opt out of a long-term contract, and 150 days' notice of intent to opt out of one-year contract extensions.⁹⁵ The ordinance applies to a variety of HUD programs, including properties with project-based rental assistance. It also prevents owners from taking any action during the required notice period that would "preclude the city or its designee from succeeding to the contract or negotiating with the owner for purchase."

8. Texas

In Texas, owners must follow HUD requirements by giving notice 12 months in advance of any proposed sale or other action that would terminate the subsidy. Where Texas differs is that owners must also notify the state housing department. Additionally, the statute ambiguously allows for time to be used by the housing department in an "attempt to locate a buyer who will conform to the development restrictions." There is no accompanying purchase right.⁹⁶

9. Washington

The State of Washington mandates 12 months' notice to each tenant, local government, public housing agency, and the state when an owner intends to prepay or otherwise allow rent-assisted housing to expire.⁹⁷

93. ME. REV. STAT. tit. 30-A, §§ 4971-4978.

94. MINN. STAT. §§ 471.9997, 504B.255.

95. PORTLAND, ORE., CODE §§ 30.01.010-.110.

96. TEX. GOV'T CODE § 2306.185.

97. WASH. REV. CODE §§ 59.28.010-902.

10. Washington, D.C.

The District of Columbia requires owners who intend to discontinue participation in a federal assistance program to give 12 months' notice to tenants, the mayor, the director of the Department of Housing and Community Development, the director of the Department of Consumer and Regulatory Affairs, and the executive director of the District of Columbia Housing Authority.⁹⁸

B. Longer Advanced Notice

1. Massachusetts

Massachusetts requires 24 and 12 months' notices to tenants, tenant organization, municipalities, the state technical finance corporation, and the state housing department.⁹⁹

2. Rhode Island

Rhode Island owners must give 24 months' notice of any intent to sell, lease, otherwise dispose of, or prepay the mortgage on any covered subsidized property to the tenant association, state housing agency, local public housing authority, and the municipality.¹⁰⁰ For terminations of Section 8 assistance, owners must give the same amount of notice, but only to the state agency, which must then promptly post it on the grounds of the property and provide it to the tenant association.

RECOMMENDATION FOR PHILADELPHIA: EXPAND NOTICE REQUIREMENT

- Owners should be required to notify city officials, housing advocate organizations, and tenant organizations.
- Owners should be required to provide 24 months' notice of opting out.

C. Right of First Refusal or Purchase

In some instances, an owner who chooses to opt out is looking to sell the property, rather than convert to a private market rental and maintain ownership. In this situation, other jurisdictions have created a right of first refusal or right of first purchase for tenants or other parties.

A right of first refusal gives the tenants or other parties the option of buying the property from the owner before the owner sells to a third party. In many states, this right of first refusal is triggered when a third party has been identified and a contingent agreement has been reached with the owner.

98. D.C. CODE §§ 42-2851.01-08.

99. MASS. GEN. LAWS. ANN. Ch. 40T, §§ 1-10.

100. R.I. GEN. LAWS §§ 34-45-1 to 34-45-12.

A right of first purchase, on the other hand, allows the holder to make an offer of purchase before the owner can solicit an offer from a third party. In the context of subsidized housing, many states extend these rights to tenant associations, nonprofits, related public agencies, or any combination of these. An organization is then given the opportunity to make an offer to buy the building and continue its rent-assisted status. As the list below reveals, different states and cities create these rights in different ways.

1. California

California state law creates a right of first purchase to qualified entities, including tenant associations, nonprofits, and public agencies.¹⁰¹ Under this statute, when an owner of subsidized housing decides to take any action that would terminate federal assistance or when federal, state, or local restrictions lapse, the right is triggered. In any of these situations, in addition to the notice of intent to terminate, the owner must send tenants and the qualified entities a separate notice of their right to make a purchase offer. Any entity that makes an offer must agree to maintain low-income use at the property for at least 30 years. To facilitate these offers, owners must provide upon request information about the project's rent rolls, vacancy rates, operating expenses, capital improvements, project reserves, and financial and physical inspection reports.

Sacramento reinforces the state's right of first purchase requirement.¹⁰² In the first six months after an owner sends the initial one-year notice, it may not sell to or solicit offers from non-qualified entities. During a second six-month period, an owner is permitted to negotiate with any potential purchaser, but any sales agreement is made contingent upon this right of first refusal. If such a contingent agreement is made, it must be immediately provided to the Sacramento Housing and Redevelopment Agency, which in turn must make it available to qualified entities. The entities are given 60 days to make an offer that is substantially economically identical to the private buyer. If they do not make this offer, the owner is free to sell the property to the private buyer. Finally, the law states that any person aggrieved by the potential termination is empowered to enforce this provision.

San Francisco has an ordinance that gives the city, tenant associations, and affiliated nonprofit groups the equivalent of a right of first refusal when an owner proposes to sell or transfer any HUD-subsidized housing.¹⁰³ The ordinance reaches a "fair return price" that is not to exceed the appraised value of the property based on its highest and best use and also creates civil remedies for violations, while mandating that owners pay relocation fees of up to \$5,250 to low-to-moderate income tenants affected by the conversion.

101. CAL. GOV'T CODE §§ 65863.10, 65863.11, 65863.13.

102. SACRAMENTO, CAL., CODE §§ 5.148.010–.100.

103. SAN FRANCISCO, CAL., ADMIN. CODE §§ 60.1–.14.

Santa Cruz requires owners to give notice to the director of planning and development three months prior to offering to sell their property to anyone. If an owner receives an offer from a qualified entity under California state law during this three-month period, the owner must make a reasonable effort to negotiate and must allow the qualified entity a reasonable amount of time to obtain necessary financing and government approvals. Within 12 months of an offer by a qualified entity, an owner may not accept an offer that is equal to it or less, provided the offer remains valid.¹⁰⁴

2. Illinois

The State of Illinois extends the right to tenant associations and, if chosen, their non-profit or private partners.¹⁰⁵ Tenants are given 60 days from their 12 months' notice to notify the owner that they have formed a tenant association, which triggers another 60-day period in which the owner must submit a bona fide offer to sell. This offer must include the essential terms of the sale, and the tenant association has 90 days to respond with a written notice of intent to purchase. If parties are unable to agree on a price, each is permitted to hire an independent appraiser. Should these appraisers not agree, the parties can take the average of each estimation or jointly hire a third, binding appraiser. Once an agreement is struck, the tenants have 90 days from the signing of the purchase contract to close. Finally, similar to California, owners must be able to provide on request access to the project's rent rolls, vacancy rates, operating expenses, capital improvements, project reserves, and financial and physical inspection reports.

In Chicago, if a tenant association has not exercised its purchase rights under the state law, owners must still give qualified entities the right of first refusal prior to sale of the property to a non-qualified entity, unless an affordability preservation agreement has been entered into extending for a period of at least ten years.¹⁰⁶ This works by having owners enter into contingent sales agreements when dealing with a non-qualified entity that must be submitted to the city housing commissioner. The commissioner must then make this agreement available to all qualified entities, which are given 120 days to make a bona fide offer of purchase on substantially identical economic terms as the contingent agreement. If they are able to close on the sale within 120 days, the owner must sell to them and enter into an affordability preservation agreement. If a bona fide offer is not made, or if closing does not occur within 120 days, the owner may sell to the buyer identified in the contingent sales agreement under terms that do not substantially differ from the original arrangement.

104. SANTA CRUZ, CAL., MUN. CODE §§ 21.05.010–.090.

105. 310 ILL. COMP. STAT. 60/1–60/10.1.

106. CHICAGO, ILL. MUN. CODE § 2-44-111.

3. Maine

Maine gives a right of first refusal to purchase to the Maine State Housing Authority.¹⁰⁷ The scope of this law covers certain properties that are both subject to federal or state income eligibility restrictions and where the rents within the projects are controlled, regulated, or assisted by a federal or state agency pursuant to a regulatory or rental assistance agreement. Despite its name, the trigger for exercising this right is “the sale, transfer, or other action that would result in termination of the financial assistance,” and therefore a private buyer or contingent sales agreement is not necessary for the housing authority to act. The housing authority has 90 days from the initial notice to respond in writing that it wishes to invoke this right, which gives it an additional 90 days to buy or produce a buyer for the property. If an owner fails to give proper notice before selling or converting their subsidized property, the state may impose a civil penalty of at least \$2,500.

4. Maryland

Maryland takes an expansive approach. Local housing authorities, local jurisdictions, state-registered groups representing tenants, registered non-profit low-income developers, and other registered persons with low-income housing experience that are unrelated to an owner are all permitted to use a right of first purchase.¹⁰⁸ This is triggered only by a proposed sale or transfer of subsidized property; however, notice rights and other procedural protections are more broadly triggered by a proposed prepayment or other termination as well. A potential buyer under this right must commit the property to specified extended use terms equal to the original use restrictions for at least the greater of 20 years or the remaining term of the mortgage or rental assistance agreement. The property must be appraised at fair market value, but if a buyer other than the above groups makes a bona fide offer higher than this appraisal, then the qualified buyer must match the higher price.

5. Massachusetts

Massachusetts grants the state housing department or its designee an opportunity to submit an offer to first purchase as well as a right of first refusal.¹⁰⁹ Owners must notify the department prior to a sale, at which point the department has 90 days to submit a purchase offer, although the owner is under no obligation to sell. If an offer is not made within 90 days, the owner has up to two years from the original notice to the department to execute a purchase contract with a third party. However, within seven days of execution, the owner must submit the third-

107. ME. REV. STAT. tit. 30-A, §§ 4971–4978.

108. MD. CODE, HOUS. & CMTY. DEV. §§ 7-101–7-501.

109. MASS. GEN. LAWS. ANN. Ch. 40T, §§ 1–10.

party purchase contract, along with a separate proposed purchase contract to the department, containing substantially the same terms and conditions, which the department has 30 days to accept. Both the opportunity to submit an offer and the right of first refusal are exempt from certain situations, including sales of project-based Section 8 properties where the buyer agrees in a regulatory agreement to renew in whole all such contracts or successor program.

Furthermore, Massachusetts provides that for three years following a termination, the rent charged to a low-income tenant who does not receive an enhanced voucher may be increased annually by no more than the consumer price index plus three percent. For the same three-year period, any tenant who resided in the housing as of the termination date may not be evicted except for good cause.

6. Rhode Island

Rhode Island's Affordable Housing Preservation Act creates purchase rights for tenant associations, the state housing agency, the local housing agency, and the local municipality (in that order of priority) in any instance where an owner seeks to terminate assistance or restrictions on certain federally insured or assisted housing.¹¹⁰ Mirroring HUD requirements, an offer of sale with detailed terms must be provided to these organizations at minimum of 12 months before the termination of a Section 8 contract. For prepayments or the sale of the building, notice must still be provided but the statute is silent as to the amount. In the offer, the owner may charge no more than fair market value as determined by the average of two independent appraisals with the state agency allowed to choose one from a set list.

7. Washington, D.C.

Washington, D.C., provides a general right of first purchase for tenants, triggered by a proposed sale or transfer of interest by the owner.¹¹¹ This appears to apply to all units, subsidized or not. The code requires that each offer of sale include a summary of the tenants' rights and sources of technical assistance, as published by the city. This notice must also state that the owner will promptly provide a floor plan of the building, an itemized list of monthly operating expenses, utility consumption rates, capital expenditures for each of the two preceding calendar years, the most recent rent roll, list of tenants, and list of vacant apartments.¹¹² A portion of the city's code extends this right to the city itself where subsidized housing is concerned, but the city may not exercise this power

110. R.I. GEN. LAWS §§ 34-45-1 to 34-45-12.

111. *Washington, D.C. Tenant Survival Guide*, HARRISON INST. FOR PUBLIC LAW, GEORGETOWN UNIVERSITY LAW CENTER (Dec. 2006), <https://www.thelpa.com/Washington-DC-TenantGuide.pdf>.

112. D.C. CODE §§ 42-3404.01–.013.

unless planned sale would result in the end of the assistance program or the termination of any low-income residency requirements.¹¹³

RECOMMENDATION FOR PHILADELPHIA: CREATE A RIGHT OF FIRST REFUSAL

- Require owners intending to sell their properties to first allow tenants, the city, and advocacy organizations the opportunity to make an offer.
- Prevent owners from accepting an outside offer that is substantially identical.
- Use a longer (24 month) notice period to allow tenants to organize or seek representation.

D. Creative Subsidized Housing Preservation Strategies

The measures included in this section are not necessarily similar to one another, but are listed together because they all seek to address the loss of habitable subsidized housing outside of a notice or purchase framework. These ideas include:

- Rent control
- Prepayment of mortgages
- State-level databases
- Housing condition requirements
- Displacement assistance
- General preservation measures

1. California

In California, an owner is prohibited from selling the property within five years of being eligible to prepay or end participation in a federal, state, or local subsidy program without having extended the right of first refusal.¹¹⁴ Additionally, local governments are required to produce a housing report that analyzes the local assisted housing stock and identifies resources available to help preserve the affordability of the housing.¹¹⁵

San Francisco has a rent ordinance that limits annual increases and provides eviction protections.¹¹⁶ The ordinance does not generally apply to subsidized units or units regulated by a government agency/authority, but when a Section 8 project-based contract expires or terminates, those

113. *Id.*

114. CAL. GOV'T CODE §§ 65863.10, 65863.11, 65863.13.

115. CAL. GOV'T CODE §§ 65580-65589.8.

116. SAN FRANCISCO, CAL., ADMIN. CODE §§ 37.1-.15.

units fall under the scope and are subject to rent control at the same rate as the contract. Similarly, if prepayment or expiration of a HUD-insured mortgage should occur, the units become subject to the ordinance and the base rent is set at the contract rate.

Los Angeles has tried and failed to pass any notice or right of refusal ordinances, but a working group has made recommendations to the city for future action. These recommendations include extending state preservation provisions to the much broader set of properties covered under the local rent control ordinance, requiring relocation payments to tenants displaced by a conversion event, requiring the acceptance of any Section 8 or successor form of rental assistance if it provided a reasonable rent equivalent to the other non-subsidized units, instituting a series of graduated rent increases for tenants not receiving further federal rental assistance, imposing fines for flagrant violations of the ordinance, granting standing to housing advocates to enforce the law against non-compliant owners, and issuing required form notices with multilingual addendums. Whether or not the city adopts any of these recommendations, housing advocates continue to rely on the LA Rent Stabilization Ordinance.¹¹⁷

2. Colorado

Colorado requires the state to maintain a database of properties filing notice and authorizes it to “explore options for preserving the affordable housing resources.”¹¹⁸

3. Illinois

Illinois has addressed the issue of mortgage prepayment.¹¹⁹ In order to prepay their mortgages, owners may enter into an agreement with the state housing authority to extend the affordability restrictions to the full term of the original mortgage or to create a comparable number of new low-income units. However, if the owner declines to enter into such an agreement, the law prohibits the authority from accepting a prepayment prior to the owner giving the tenants nine months’ notice as well as extending to the tenants a right to purchase the housing that is similar to that of the Illinois Federally Assisted Housing Preservation Act.

4. Ohio

An Ohio law seeks to address inadequate conditions by authorizing cities, neighbors, tenants, and nonprofit corporations to bring an action alleging that a federally subsidized building is a public nuisance and seeking relief in the form of an injunction and, if necessary, the appointment of a receiver.¹²⁰ This statute applies to properties receiving rental assistance

117. LOS ANGELES, CAL., MUN. CODE §§ 151.00–151.29.

118. CONN. GEN. STAT. § 8-68c.

119. 20 ILL. COMP. STAT. 3805/8.1.

120. OHIO REV. CODE § 3767.41.

under a variety of federal project-based programs. Prior to commencement of such an action, the opposing party must give the owner 60 days' notice of the defective conditions that constitute a public nuisance.¹²¹ If the nuisance is not abated within that period, a judge may find that the building constitutes a public nuisance and may issue an injunction requiring the owner to abate the nuisance within 30 days.

Alternatively, if the judge determines that the owner already has been afforded a "reasonable opportunity" to abate the nuisance and has failed to do so, the judge is required to offer any mortgagee, lienholder, or other interested party (in order of priority of interest in title) the opportunity to abate the nuisance. If no interested party is willing or able to do this, then the judge may appoint a receiver, potentially including a nonprofit that originally brought the action, to take possession and control of the building. The receiver must receive judicial approval of an abatement plan and the judge may empower the receiver to, among other things, manage the building, establish and collect rents, lease units and evict tenants, pay all operating expenses, enter into contracts, obtain financing necessary for the abatement of the property, and collect a receiver's fees.

5. Seattle

In addition to HUD requirements, Seattle also entitles tenants to 90 days' notice in the event of displacement caused by demolition, change of use, substantial rehabilitation, or removal of a use restriction. In addition, low-income tenants are eligible for a relocation assistance payment of \$2,000, paid in equal halves by the landlord and the city. This notably excludes properties and units owned by the Seattle Housing Authority, condominium conversions, or cases where tenants are entitled to other relocation payments under federal, state, or other law.¹²²

6. Texas

Texas created a housing preservation incentives program to provide loans, loan guarantees, and grants for the acquisition and rehabilitation of certain affordable multifamily housing developments.¹²³

121. Public nuisance is defined as housing that fails to meet standards set forth in relevant federal rules. OHIO REV. CODE § 3767.41(A)(2)(a). The law provides that in no case will nuisance be found where HUD's real estate assessment center has issued a score of seventy-five or higher within the last 12 months and there has been no significant change in the property's condition. OHIO REV. CODE § 3767.41(B)(2)(c).

122. SEATTLE, WASH., MUN. CODE §§ 22.210.010–.180.

123. TEX. GOV'T CODE § 2306.805.

**RECOMMENDATION FOR PHILADELPHIA: GET CREATIVE WITH
PRESERVATION**

- Provide rent control to units after termination of a federal subsidy.
- Require owners to assist tenants who are displaced through their decision to opt out. This could take the form of financial benefits, communication with housing advocates, or any other resources tenants may need.
- Maintain the length of the subsidy at its original contracted length even if the owner wishes to repay the mortgage.
- Prevent owners from selling their property within a year of prepayment.
- Mandate notice of the intent to prepay well in advance.

**VI. Conclusion: Philadelphia Can Opt in to Long Term
Affordable Housing**

Philadelphia needs preemptive advocacy strategies to preserve its project-based Section 8 housing. As it stands, owners must provide notice of their intent to terminate the subsidy only to HUD and tenants themselves. This does not allow enough time for effective preservation measures that seek to prevent owners from terminating in the first place. This report's analysis identifies trends in Philadelphia housing to identify properties that are at high risk for opt-out. While Philadelphia is the focus of this report, advocates could utilize the methods detailed here to identify properties with the greatest risk in other jurisdictions. These high-risk properties must be priorities in advocacy to preserve affordable housing. To address these priorities, Philadelphia can draw on the best practices summarized in the report. Other cities can also adapt the tenant protections surveyed here to address their particular needs and limitations.

Housing advocates must demand that Philadelphia not lose its already limited supply of affordable housing. Philadelphia's leaders must bolster the protections afforded to tenants, include housing advocates in the opt-out process, and develop real solutions when opt-out cannot be avoided. With these steps, Philadelphia can opt in to long-term affordable housing.

* * * *

*Justice Lab at the Sheller Center for Social Justice, Temple University
Beasley School of Law*

Justice Lab is a clinic at the Sheller Center for Social Justice at Temple University Beasley School of Law. Justice Lab represents client organizations (including community groups, nonprofit organizations, and governmental agencies) in a range of systemic advocacy matters. Students develop and advance policy campaigns, design and pilot legal services

and access to justice programs, draft legislation and provide legislative advocacy tools, and act as problem solvers and strategic planners. Through this social justice advocacy, Justice Lab students develop expertise in finding creative solutions to legal problems; reflect on the complex social and political aspects of legal problems; and develop strengths in interviewing; research and information gathering; policy, legislative, and strategic analysis; written and oral advocacy; collaboration; project planning and management; professional ethics; negotiation; and media advocacy skills.

The Sheller Center for Social Justice at Temple University Beasley School of Law, created in 2013 by a generous gift from Stephen and Sandy Sheller, is a hub for social justice inquiry and advocacy. The Center's faculty, staff, and affiliated faculty work with law students, the Law School's other legal clinics and experiential programs, others at the University, community organizations, and external partners to seek justice for disadvantaged populations in Philadelphia and across Pennsylvania

Community Legal Services

Founded in 1966 by the Philadelphia Bar Association, Community Legal Services (CLS) has provided free civil legal assistance to more than one million low-income Philadelphians. Approximately 10,000 clients were represented by CLS in the past year. CLS assists clients when they face the threat of losing their homes, incomes, health care, and even their families. CLS attorneys and other staff provide a full range of legal services, from individual representation to administrative advocacy to class action litigation, as well as community education and social work. CLS is nationally recognized as a model legal services program.

CLS's Housing Unit represents private, public, and subsidized housing tenants in matters involving eviction, illegal lockouts, and substandard housing. The unit also uses systems advocacy and litigation to address issues ranging from lead paint elimination, to federal housing policy changes, to tenant eviction laws.

The Federal Housing Administration and African-American Homeownership

David Reiss

The United States Federal Housing Administration (FHA) has been a versatile tool of government since it was created during the Great Depression. It achieved success with some of its goals and had a terrible record with others. Its impact on African-American households falls, in many ways, into the latter category. The FHA began redlining African-American communities at its very beginning. Its later days have been marred by high default and foreclosure rates in those same communities.

At the same time, the FHA's overall impact on the housing market has been immense. Over its lifetime, it has insured more than 40 million mortgages, helping to make home ownership available to a broad swath of American households. And indeed, the FHA mortgage was central to America's transformation from a nation of renters to homeowners. The early FHA really created the modern American housing finance system, as well as the look and feel of post-World War II suburban communities.

Recently, the FHA has come under attack for the poor execution of some of its policies to expand homeownership, particularly minority homeownership. Leading commentators have called for the federal government to stop employing the FHA to do anything other than provide liquidity to the low end of the mortgage market. These critics' arguments rely on a couple of examples of programs that were clearly failures, but they fail to address the FHA's long history of undertaking comparable initiatives. This Article takes the long view and demonstrates that the FHA has a history of successfully undertaking new homeownership programs. At the same time, the Article identifies flaws in the FHA model that should be addressed in order to prevent them from occurring if the FHA were to undertake similar initiatives to expand homeownership opportunities in the future, particularly for African-American households.

Part I of this Article provides a basic introduction to the FHA and mortgage insurance more generally. Part II provides a more textured history of the FHA, with a particular emphasis on its impact on African-American communities. Part III describes the divide between two camps of academics,

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whom I divvy up into “Policy Scholars” and “Historians.” More particularly, this Article is the first to synthesize the economics literature regarding the role that down payments play in the appropriate underwriting of mortgages, on the one hand, and the scholarly literature regarding the history of race and housing policy, on the other, in order to give a more detailed picture of the federal government’s role in housing finance for African-American households. The article concludes that the FHA can responsibly promote homeownership in low- and moderate-income communities, notwithstanding past failures in African-American communities. It ultimately proposes that FHA homeownership goals should be more explicitly tied to a rational underwriting process, one that is designed to make sure that borrowers can afford their mortgages over the long term.

I. The Functions of the FHA

Mortgage insurance is a product that is paid for by the *homeowner* but protects the *lender* if the homeowner defaults on the mortgage. The insurer pays the lender for the losses that it suffers from any default and foreclosure by the homeowner. The FHA provides insurance guaranteed by the federal government for mortgage loans for single-family homes and multi-family buildings. Like much of the federal housing infrastructure, the FHA has its roots in the Great Depression. It was meant to replace the private mortgage insurance (PMI) industry, which was obliterated in the early 1930s. The PMI industry did not begin to revive until the 1950s.

The FHA’s first full year of operation was 1935. The FHA’s primary goals for insuring residential mortgages were to make “a sounder investment for the lender” and to extend “the practicable range of borrowers and of home-mortgage loans.”¹ The FHA had many other missions during the Great Depression as well, ranging from providing liquidity to the mortgage market, to supporting industries relating to housing, to consumer protection.

Over time, Congress gave the FHA a variety of additional policy mandates that were intended to help the federal government achieve other policy goals. These goals ranged from supporting the war effort during World War II to increasing the number of minority homeowners during the early 2000s. Beginning in the 1950s, the FHA’s role changed from serving the entire mortgage market to focusing on certain segments of it. This changed mission had a major impact on everything the FHA did, including how it underwrote mortgage insurance and for whom it did so. The FHA’s patchwork legacy matches its motley history. The next section demonstrates just how mottled the FHA’s mandate has been.

1. FED. HOUS. ADMIN., SECOND ANNUAL REPORT OF THE FEDERAL HOUSING ADMINISTRATION 3 (1936) [hereinafter SECOND ANNUAL REPORT].

II. The FHA's Changing Missions

Congress added and discontinued many missions to the FHA since it was created in the Great Depression. Depending on the political winds, it targeted different types of buyers and different types of residences. Some programs were very successful, and some were abject failures. These initiatives, and other important FHA developments from its eighty-plus year history, are reviewed below.

A. *The 1930s: Creation and Execution*

Compared to contemporary housing finance reforms, the FHA was set up fast, efficiently, and with a broad base of support throughout the country—the very model of a New Deal program.

The FHA Administrator noted after its first full year of operation that in “most districts of the country, mortgage money frozen almost solid a year ago, is now generally available to home owners on the most attractive terms in the history of the Nation.”² The next year, the FHA Administrator found that the freeze had lifted and replaced with the “free flow of mortgage money from centers of supply into communities where funds are normally scarce.”³

The FHA helped American housing markets to rise from their bottom by providing more easily accessible credit on terms that were more attractive than those offered by the private sector. The FHA replaced the private mortgage insurance companies that had failed in the early 1930s, but it went far beyond their role in many, many ways.

As told by Kenneth Jackson in his classic book *Crabgrass Frontier*, the FHA also had a major negative impact on central cities and minority communities from its very beginning.⁴ Its impact on the former was unintentional. Because the FHA made financing available for so much new housing, massive numbers of white working-class families fled the cities to the newly built suburbs.

But the impact on minority households was quite intentional: the FHA reflected the widely held prejudices and discriminatory practices already endemic in the all-white housing and mortgage-lending industries. One of the main such practices was the imposition of restrictive covenants that excluded African-Americans and other minorities from white communities. The FHA also drew red lines on its underwriting maps to cordon off blocks in which even a single non-white family lived. Such “redlined” blocks were not eligible for FHA-insured mortgages. The end result of such redlining was massive disinvestment in cities with large black populations. Older cities of the Northeast, like Camden, New Jersey, were

2. *Id.* at vii.

3. *Id.* at vi.

4. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 203–18 (1985).

particularly hard hit.⁵ The link between bureaucratic redlining and the decline of cities was not fully made until the 1960s, at which point many of the affected cities had become shadows of their former selves.⁶

By 1937, the FHA “participated in 45% of all housing starts in the United States. From 1935 to 1939, FHA-insured loans accounted for 23% of all single-family mortgage lending, including refinance loans.”⁷ Conservative underwriting meant that in 1940, lenders had foreclosed on less than four-tenths of 1% of those FHA-insured mortgages originated in the 1930s. The FHA’s first few years seemed to be an unvarnished success as a government response to the liquidity crisis in the mortgage market brought about by the Great Depression, although its corrosive effects on cities and African-American communities were just getting started.

B. The 1940s: War Housing

The FHA, as with the rest of the nation, transitioned from responding to the Great Depression to responding to the exigencies imposed by World War II. For the FHA, this meant helping to house defense industry workers and their families.⁸ At the same time, the FHA sought to “encourage production of new homes for families in income classifications which were not considered as feasible markets for new homes under the previous systems of home financing.”⁹ FHA market share increased to 45% by 1944. As World War II ended, the FHA turned its attention from war mobilization to the needs of returning veterans and their families.

The VA mortgage-guarantee program was created in 1944 as part of the “GI Bill.” The VA did not require down payments “on the theory that soldiers weren’t paid enough to accumulate savings.”¹⁰ The VA market share peaked in 1947 at almost 28%,¹¹ and this peak was matched by a decline in the FHA market share.¹²

In 1948, the FHA made an important change that is now integral to our notion of the American mortgage: it increased the maximum term for an

5. *Id.* at 213.

6. *Id.* at 214–15.

7. Dan Immergluck, *From Minor to Major Player: The Geography of FHA Lending During the U.S. Mortgage Crisis*, 33 J. URB. AFF. 1, 4 (2011).

8. FED. HOUS. ADMIN., EIGHTH ANNUAL REPORT OF THE FEDERAL HOUSING ADMINISTRATION 3 (1942), <http://babel.hathitrust.org/cgi/pt?id=mdp.39015005860161>.

9. FED. HOUS. ADMIN., SEVENTH ANNUAL REPORT OF THE FEDERAL HOUSING ADMINISTRATION 17 (1941), <http://babel.hathitrust.org/cgi/pt?id=mdp.39015005860161>.

10. Michael S. Carliner, *Development of Federal Homeownership “Policy,”* 9 HOUS. POL’Y DEBATE 299, 308 (1998).

11. Dwight M. Jaffee & John M. Quigley, *Housing Policy, Mortgage Policy, and the Federal Housing Administration*, MEASURING AND MANAGING FEDERAL FINANCIAL RISK 106 (Deborah Lucas ed., 2010).

12. Immergluck, *supra* note 7, at 1, 6.

FHA mortgage to thirty years.¹³ Extraordinarily, nearly one-third of “new nonfarm residential construction (including rental housing as well as small homes)” received financing through the FHA’s war housing insurance program by 1948.¹⁴

Prior to 1948, legally enforceable restrictions based on race, ethnicity, and religion were common among private property owners. Even more, the federal government actively encouraged such restrictions through a variety of methods, including underwriting decisions of the FHA.¹⁵ The Supreme Court rejected this form of discrimination in the landmark case of *Shelley v. Kraemer* in 1948.¹⁶ Soon after *Shelley*, the FHA amended its rules to bar insurance for homes for which covenants “restricting the use or occupancy of the property on the basis of race, creed, or color” were to be recorded prior to the recordation of the FHA-insured mortgage.¹⁷ Notwithstanding this clear statement of the law, the FHA continued to informally support the use of racially restrictive covenants for years after *Shelley* was decided. This support was true even though the Truman administration revised the FHA’s Underwriting Manual in 1949 to include equal opportunity standards because very little actually changed in practice.¹⁸

The FHA continued in its role as a mainstay in the single-family housing market. The FHA had more than a third of the mortgage market at the beginning of the 1950s, and the VA had an additional 13%.¹⁹ Its underwriting remained conservative: 0.04% of mortgages in 1950 were in process of foreclosure in the FHA’s primary one-to-four family program (the Section 203 program).²⁰

13. Richard K. Green & Susan M. Wachter, *The American Mortgage in Historical and International Context*, 19 J. ECON. PERSP. 93, 96 (2005).

14. FED. HOUS. ADMIN., FOURTEENTH ANNUAL REPORT OF THE FEDERAL HOUSING ADMINISTRATION 11 (1947), <http://babel.hathitrust.org/cgi/pt?seq=349;id=mdp.39015082064752;page=root;view=1up;size=100;orient=0;17;num=117>.

15. See, e.g., FED. HOUS. ADMIN., UNDERWRITING MANUAL para. 980(3)g (1938) (“Recommended restrictions should include provision for the following: . . . Probation of the occupancy of properties except by the race for which they are intended.”).

16. 334 U.S. 1 (1948).

17. FED. HOUS. ADMIN., SIXTEENTH ANNUAL REPORT OF THE FEDERAL HOUSING ADMINISTRATION 3 (1949), <http://babel.hathitrust.org/cgi/pt?seq=647;id=mdp.39015082064752;page=root;view=1up;size=100;orient=0;num=11> (stating that the ban applied to covenants recorded after February 15, 1950).

18. FED. HOUS. ADMIN., UNDERWRITING MANUAL para. 242 (1955).

19. Immergluck, *supra* note 7, at 6.

20. DEP’T OF HOUS. & URBAN DEV., 1968 HUD STATISTICAL YEARBOOK 117 (1968), <http://babel.hathitrust.org/cgi/pt?id=uc1.32106016148535;view=1up;seq=7>.

C. *The 1950s: The Maturation of the American Mortgage*

Like an episode of *Mad Men*, the FHA offered a glittery, new world to whites and a gritty and impoverished one to blacks. The quality of housing for white households improved dramatically in the 1950s. Black households, however, continued to suffer from a variety of discriminatory policies, including redlining by the FHA.

FHA mortgages in the 1950s began to look very much like FHA mortgages that would later be offered in the 2000s. For instance in 1950, Congress allowed some loans to have lower down payments than previously authorized, as little as 5%.²¹ In 1957, the minimum down payment was lowered to 3% in some cases.²²

The 1950s also brought another significant change to the housing sector. States, with the memory of the failures of the Great Depression growing dim, began passing laws to allow private mortgage insurance companies to form. However, this private alternative remained a small competitor to the FHA until the 1980s.

The FHA began to loosen underwriting requirements in the middle of the 1950s, and defaults increased as well. This loosening was reflected in part by the amendment to the Housing Act of 1954, which replaced “economic soundness” as the guideline for the FHA’s main insurance fund to “acceptable risk.”²³ This amendment was a harbinger of even looser underwriting standards to come. These looser standards would have an outsized impact on the housing stock in older cities.

The FHA’s performance reflected the changes in its underwriting policies. Default rates for the primary single-family insurance program, Section 203, were 0.83% of the mortgages in force in 1960. Foreclosure rates

21. Housing Act of 1950, Pub. L. No. 81-475, § 104(a), 64 Stat. 48, 51–52 (amended 1950).

22. Housing Act of 1957, Pub. L. No. 85-104, §101, 71 Stat. 294, 295 (amending section 203(b) of the National Housing Act of 1934) (also setting higher maximum loan amounts for three and four family homes).

23. See FED. HOUS. ADMIN., UNDERWRITING MANUAL para. 101 (1936) (noting that the National Housing Act provided “that no mortgage shall be accepted for insurance unless it is economically sound”). The Housing Act of 1954 introduced the concept of “acceptable risk.” Pub. L. No. 83–560, 68 Stat. 590 § 110 (amending section 203 of the National Housing Act such that if the FHA Commissioner “finds that the project with respect to which the mortgage is executed is an acceptable risk, giving consideration to the need for providing adequate housing for families of low and moderate income particularly in suburban and outlying areas or small communities,” the Commissioner may insure mortgages that otherwise comply with the FHA requirements).

for the Section 203 program by 1960 were 0.23% of mortgages in force, roughly triple the previous decade.²⁴ Change was afoot.

D. *The 1960s: Housing in the Urban Core*

Over its first thirty years of operation, the FHA helped to finance about a fifth of all newly constructed housing, most of it in the suburbs. However, as of 1967, only 3% of all new homes were sold to African-Americans.²⁵ But as with the rest of society, the ferment over segregation, civil rights, and economic inequality were the major historical themes of the 1960s for the FHA too. Each of these themes was clearly reflected in the FHA's operations and its role in the housing markets, for both good and ill.

Beginning in the 1950s and continuing into the 1960s, Congress added a number of innovative insurance programs to the FHA's stable. They included insurance programs for urban renewal, new forms of homeownership like condominiums and cooperatives, and housing for seniors and the disabled.²⁶ In 1962, President Kennedy reversed the FHA's redlining policy that had been in effect since its inception,²⁷ and the FHA began to embark on a change of focus to supporting low- and moderate-income homeownership as well as minority homeownership. In 1965, the FHA became a part of the Department of Housing and Urban Development (HUD) Office of Housing.

Notwithstanding the addition of these new programs, FHA market share declined in the 1960s. By 1964, PMI provider Mortgage Guaranty Insurance Corporation had eleven competitors. As PMI was growing, the FHA was also acknowledging significant operating difficulties, such as delays in processing applications.

In response to the civil unrest of the mid-1960s, President Johnson appointed the National Advisory Commission on Civil Disorders, popularly known as the Kerner Commission. The Kerner Commission found that residential segregation and unequal housing opportunities were a major cause of civil unrest in cities. In particular, it found that

Federal programs have been able to do comparatively little to provide housing for the disadvantaged. In the 31-year history of subsidized Federal housing, only about 800,000 units have been constructed, with recent production averaging about 50,000 units a year. By comparison, over a period

24. DEP'T OF HOUS. & URBAN DEV., 1977 HUD STATISTICAL YEARBOOK 95 tbl.19 (1977), <http://babel.hathitrust.org/cgi/pt?id=uc1.32106016648039;num=121;seq=121;view=1up>.

25. WENDELL E. PRITCHETT, ROBERT CLIFTON WEAVER AND THE AMERICAN CITY: THE LIFE AND TIMES OF AN URBAN REFORMER 312 (2008).

26. Anthony Pennington-Cross & Anthony M. Yezer, *The Federal Housing Administration in the New Millennium*, 11 J. HOUS. RES. 357, 359 (2000).

27. Carliner, *supra* note 10, at 299, 307.

only 3 years longer, FHA insurance guarantees have made possible the construction of over 10 million middle and upper income units.²⁸

In response to this historical inequity, Congress determined that many of the FHA's new programs would have a very different underwriting model than the traditional one. These newer programs typically targeted "underserved borrowers," such as households of color.²⁹ They were also subsidized by the federal government. The FHA's core single-family Section 203(b) program, in contrast, had lower-risk homeowners cross-subsidize higher-risk homeowners.

One such initiative that Congress enacted in 1968, the Section 235 homeownership program, was seen at the time as giving the FHA "an opportunity to overcome its image as an anti-poor, anti-minority Government agency."³⁰ The program was also seen as having great potential by a wide variety of groups, including those "representing business as well as social welfare concerns."³¹ This move away from conservative underwriting led to rapidly increasing foreclosure rates and ultimately wreaked much havoc in the early 1970s. This havoc is embodied in the poorly executed Section 235 program, described in greater detail below.

Defaults and foreclosures rose again during the 1960s. Total defaults for Section 203 in 1970 were 1.69% of mortgages in force.³² Foreclosures in process for Section 203 in 1970 were 0.52% of mortgages in force, more than doubling the rate of the previous decade.³³ These were significant increases from the 1950s.

E. The 1970s: Spectacular Failure

By the early 1970s, the dreams of the 60s were replaced with the hangovers induced by the Vietnam War, inflation, recession, and continuous civil rights struggles. By this time, the FHA "acquired a deserved reputation for confining its service mostly to white, middle class, suburban home buyers."³⁴ Notwithstanding this failing, the American homeownership rate increased from roughly 44% in 1940 to about 63% in 1970, and the FHA was partially responsible for this increase.³⁵ The FHA's mortgage

28. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 13 (1968).

29. PRESIDENT'S COMM'N ON HOUS., THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING 163-64 (1982), <http://huduser.org/portal//Publications/pdf/HUD-2460.pdf>.

30. COMM'N ON CIVIL RIGHTS, HOME OWNERSHIP FOR LOWER INCOME FAMILIES A REPORT ON THE RACIAL AND ETHNIC IMPACT OF THE SECTION 235 PROGRAM 77 (1971).

31. *Id.* at 7.

32. DEP'T OF HOUS. & URBAN DEV., 1979 HUD STATISTICAL YEARBOOK 113 tbl.21, <http://babel.hathitrust.org/cgi/pt?id=uc1.32106006213851;seq=133;view=1up;num=113>.

33. DEP'T OF HOUS. & URBAN DEV., *supra* note 24, at 95 tbl.19.

34. COMM'N ON CIVIL RIGHTS, *supra* note 30, at 77.

35. LAWRENCE L. THOMPSON, A HISTORY OF HUD 3 (2006).

origination share (by dollar volume) reached a new high in 1970, at about a quarter of the market. This share accounted for nearly 30% of all single-family loans.³⁶ This large share was due to a variety of factors, including the acceleration of the new Section 235 program with its subsidized interest rates at the same time that unsubsidized interest rates were reaching new highs. In its first four years, the Section 235 program helped to finance homes for about 400,000 low- and moderate-income families.³⁷ Section 235 homebuyers had to make only tiny down payments.

In 1973, the Section 235 program was suspended because so many of its mortgages were going into default and foreclosure. The program was terminated a few years later.³⁸ Moreover, many of the homes sold through the program were sold by predators who covered up structural problems with sheetrock and paint and sold them to unsophisticated low- and moderate-income buyers.³⁹ Once the structural problems surfaced, many of these households could not afford to repair them, and the homes went into default. Entire blocks in some cities were lined with boarded-up homes that had been financed pursuant to Section 235.⁴⁰

Section 235 represented a low point for the FHA with more than 200 people convicted for abuses arising from the program.⁴¹ The federal government lost over \$2 billion on mortgages that ended up in foreclosure during this period.⁴² The Section 235 fiasco “was one of the major reasons for the moratorium on subsidized housing programs declared in 1973.”⁴³

If the broader dreams of equality of the 1960s were dashed in the 1970s, so were the dreams of an effective FHA. At the same time the Section 235 fiasco was unfolding, the FHA was rocked by a series of scandals.⁴⁴

36. Immergluck, *supra* note 7, at 6.

37. Carliner, *supra* note 10, at 313.

38. BRENT D. RYAN, *DESIGN AFTER DECLINE: HOW AMERICA REBUILDS SHRINKING CITIES* 92 (2012).

39. ROBERT VAN ORDER & ANTHONY YEZER, GEORGE WASHINGTON UNIVERSITY CTR. FOR REAL ESTATE & URBAN ANALYSIS, *FHA ASSESSMENT REPORT: THE ROLE OF THE FEDERAL HOUSING ADMINISTRATION IN A RECOVERING U.S. HOUSING MARKET* 9 (2011), <http://business.gwu.edu/files/fha-assessment-report-06-2011.pdf>.

40. THOMPSON, *supra* note 35, at 3.

41. RYAN, *supra* note 38. *See also* KEVIN FOX, *GOHAM, RACE, REAL ESTATE, AND UNEVEN DEVELOPMENT: THE KANSAS CITY EXPERIENCE, 1990-2000* 145 (2002) (noting that private real estate brokers, home builders, mortgage lenders, and FHA appraisers were convicted for abusing the FHA program).

42. RYAN, *supra* note 38, at 93.

43. VAN ORDER & YEZER, *supra* note 39.

44. *See, e.g.*, John Herbers, *U.S. Report Finds Fraud in Housing*, N.Y. TIMES, Jan. 6, 1971, at 1, http://www.nytimes.com/1971/01/06/archives/us-report-finds-fraud-in-housing-cites-wide-abuse-in-federal-home.html?_r=0 (reporting on a study by the House Banking and Currency Committee that found the FHA “allowed speculators to make huge profits at the expense of the poor in what amounted to ‘sheer fraud’”); *Former FHA Chief in Philadelphia Named in 2 U.S.*

Indeed, HUD Secretary George Romney called for the FHA to be privatized in 1972, in part because of problems in the agency and in part because of the return of the PMI industry.

During the early 1970s, the mortgage insurance sector was subject to big swings in market share between the FHA and private mortgage insurers. Fannie Mae and Freddie Mac set the stage for a revival of the PMI industry in the early 1970s as they sought to purchase high-LTV (loan-to-value) mortgages. Because their charters required that the high-LTV mortgages have mortgage insurance, private mortgage insurers had a steady stream of business.

Underwriting stabilized toward the end of the 1970s. In 1978, default rates for the Section 203 program had lowered to 0.89% of mortgages in force, from 1.69% of mortgages in force in 1970.⁴⁵ Foreclosures in process by 1978 for the Section 203 program were 0.30% of mortgages in force, a meaningful decline from the rate at the end of the previous decade.⁴⁶

F. The 1980s: PMI Is Back!

Even before Gordon Gekko pronounced that greed is good,⁴⁷ skepticism for that government instrumentality, the FHA, blossomed during the Reagan years. At the beginning of the decade, the FHA and VA had about 20% of the market (by dollar amount) for new mortgages, and the PMI industry had about the same market share.⁴⁸ The FHA's express mission also changed from its original one of serving a broad swath of homeowners to one of particularly serving lower-income households.⁴⁹ This transition was not untroubled, as FHA loans continued to be at the root of big problems in urban communities.

Although the FHA had turned away from its history of racial discrimination, its record of success in communities of color was decidedly mixed. In many ways, this disconnect was a problem of underwriting. FHA underwriting went from being prejudicially restrictive for households of color in its early years to being irrationally loose in its later years. The FHA had still not come up with any sort of approach to its underwriting that balanced access to credit and sustainability of credit. This failure

Indictments, WALL ST. J., May 12, 1972, at 2 (reporting that the former director of the Philadelphia FHA had been indicted on multiple counts of taking bribes and tax evasions); Monroe W. Karmen, *Restoring Cities After the Scandals*, WALL ST. J., July 5, 1972, at 8 (describing the failure of programs in urban areas).

45. DEP'T OF HOUS. & URBAN DEV., 1979 HUD STATISTICAL YEARBOOK 113 tbl.21, <http://babel.hathitrust.org/cgi/pt?id=uc1.32106006213851;seq=133;view=1up;num=113>.

46. *Id.*

47. Stanley Weiser & Oliver Stone, *Wall Street* (1987).

48. PRESIDENT'S COMM'N ON HOUS., *supra* note 29, at 163.

49. See Jaffee & Quigley, *supra* note 11, at 108 (describing the shift towards lower-income borrowers).

continued to plague the FHA and the communities it served decades after it rejected its early discriminatory practices.

The FHA faced something of an identity crisis in the early 1980s. President Reagan created a Commission on Housing to study the FHA and other aspects of the housing sector. The Commission believed that the FHA should cede much of its market to the PMI industry, which had recovered by then. By 1980, the PMI industry had grown to fourteen firms, which had insured 31% of the entire mortgage market.⁵⁰ The industry was arguing that FHA had become unnecessary. Indeed, the Reagan Administration even batted around a proposal to privatize it.⁵¹ At the same time, the FHA's market share began falling to very low levels, as low as 5% by the mid-1980s.⁵²

The late 1980s told a completely different story as the PMI industry faced heavy losses from riskier products such as adjustable-rate mortgages (ARMs) and from depressed housing prices in the Farm Belt and the Southwest.⁵³ Some PMI companies merged with better-capitalized ones. One of the fourteen was not even able to fully repay its policyholders.⁵⁴ By the late 1980s, the FHA (as well as the VA) came roaring back, with a roughly 60% market share of insured loans, leaving the PMI industry with 40%.⁵⁵ Much like the Terminator, played by Arnold Schwarzenegger in the Reagan-era movie, the private mortgage insurance industry was already prepared to say, "I'll be back!"⁵⁶

During the late 1980s, the FHA's delinquency and foreclosure rates were about twice those for conventional loans. Reflecting its changing mission, the FHA began keeping statistics on the number of mortgages going to first-time homebuyers. By 1991, 58% of FHA single-family insured mortgages went to first-time homebuyers.⁵⁷

50. BRUCE E. FOOTE & PAMELA HAIRSTON, CONG. RESEARCH SERV., 98-421, RAISING THE FHA MORTGAGE LIMIT: ISSUES AND OPTIONS 7 (1998), http://www.cq.com/graphics/crsreports/98-421_1998-11-03.pdf.

51. Robert Pear, *Reagan Proposes Selling off F.H.A. to Private Bidder*, N.Y. TIMES, Dec. 14, 1985, <http://www.nytimes.com/1985/12/14/us/reagan-proposes-selling-off-fha-to-private-bidder.html>.

52. Immergluck, *supra* note 7, at 6.

53. Eric N. Berg, *Upheaval at Mortgage Insurers*, N.Y. TIMES, Mar. 3, 1988, <http://www.nytimes.com/1988/03/03/business/upheaval-at-mortgage-insurers.html>.

54. PROMONTORY FIN. GRP., LLC., THE ROLE OF PRIVATE MORTGAGE INSURANCE IN THE U.S. HOUSING FINANCE SYSTEM 4, <http://usmi.org/wp-content/uploads/2014/03/622-Genworth-Study-I-Role-of-PMI.pdf>.

55. Berg, *supra* note 53.

56. James Cameron, et al., *The Terminator* (1984).

57. DEP'T OF HOUS. & URBAN DEV., FHA ANNUAL MANAGEMENT REPORT FISCAL YEAR 1992, at 39 (1992).

G. The 1990s: The FHA Goes Down with a Whimper

As the Soviet Union collapsed in the face of triumphant capitalism, the FHA looked as if it would collapse in the face of a resurgent PMI industry. The FHA arrived in the 1990s with the legacy of high default rates and a variety of other problems. The Cranston-Gonzalez National Affordable Housing Act of 1990⁵⁸ mandated more conservative underwriting standards for mortgages and the FHA's insurance funds. The FHA's share of the mortgage market continued to face serious competition from the PMI industry. Over much of the decade, the FHA and the PMI industry each had a share of the total mortgage market that was measured in the teens.

By the late 1990s, the nine remaining private mortgage insurers insured about the same number of mortgages as the FHA and the VA combined and more than twice the dollar amount of mortgage debt than the FHA and the other government insurance programs combined. And it looked as though the PMI industry had nowhere to go but up: the U.S. Government Accountability Office (GAO) found that a third of the FHA's 1995 portfolio would have been eligible for PMI.⁵⁹

During the late 1990s, the FHA's delinquency and foreclosure rates were often more, and sometimes much more, than three times as high as those for conventional loans.⁶⁰ In 2000, the principal amount of FHA mortgages was about three-fourths the size of that of PMI mortgages. These differences reflected the market segmentation of the two, with the FHA having a bigger share of low- and moderate-income households.

Starting in the late 1990s, subprime mortgage lenders offered terms that appeared better than those offered by FHA lenders. As a result, many households left the FHA market and entered into the subprime market. Subprime mortgages turned out to be much worse for homeowners than they seemed at the time. For instance, borrowers were given low interest rates that lasted for short periods of a couple of years or even a few months before shooting up so much that payments became unaffordable. This would have a big negative impact on homeowners, particularly those in African-American communities, in the 2000s.

H. The 2000s: The FHA Goes Boom!

Good times in the booming financial markets of the early 2000s meant lean times for the FHA. While the mortgage market was heating up overall, the FHA's share of mortgage originations by dollar volume fell from its

58. Pub. L. No. 101-625, § 332, 104 Stat. 4079 (1990).

59. GEN. ACCOUNTING OFFICE, GAO/RCED-96-123, HOMEOWNERSHIP: FHA'S ROLE IN HELPING PEOPLE OBTAIN HOME MORTGAGES 4 (1996), <http://www.goa.gov/archive/1996/rc96123.pdf>.

60. MARSHALL W. DENNIS & THOMAS J. PINKOWISH, RESIDENTIAL MORTGAGE LENDING: PRINCIPLES AND PRACTICES 156, tbl. 8-1 (5th ed. 2004).

1970 peak of roughly 25% to its 2006 trough of less than 2%.⁶¹ This long-term decline had begun in earnest in 1996 and was most pronounced among minority borrowers who were moving over to the private-label subprime market that was dramatically loosening its underwriting standards and offering extremely attractive teaser rates as well.⁶² Before this subprime boom, the FHA's low-down-payment mortgages and less stringent credit score requirements had meant that the FHA had a larger market share in those communities that had been underrepresented among homeowners. During this same period, the FHA decided to originate loans with down payments funded by sellers that were channeled through various not-for-profit organizations.⁶³ Such loans were no-down-payment loans by another name, as the third party paid the down payment, leaving the borrower with no skin in the game. These loans, unsurprisingly, defaulted at very high rates.

The national homeownership rate peaked in the mid-2000s at about 69%.⁶⁴ The FHA was part of that dramatic expansion. For instance, about 80% of FHA-insured purchases were first-time homebuyers in 2001.⁶⁵ But

61. Jaffee & Quigley, *supra* note 11, at 106.

62. See David Reiss, *Subprime Standardization: How Rating Agencies Allow Predatory Lending to Flourish in the Secondary Mortgage Market*, 33 FLA. ST. U. L. REV. 997 (2006) ("Communities of color have been disproportionately represented in the subprime market in contrast to their representation in the prime market. African-Americans and Hispanics combined made up less than 8% of the prime home purchase mortgage market in 1998, but such borrowers made up nearly 20% of subprime home purchase mortgage market in that same year. Similarly, African-American and Hispanic borrowers together make up about 6% of all prime conventional refinance mortgages and 17% of subprime refinance mortgages. And more than half of all loans in predominantly African-American communities are subprime, compared to only 9% of loans in predominantly white communities.").

63. DEP'T OF HOUS. & URBAN DEV., ANNUAL REPORT TO CONGRESS REGARDING THE FINANCIAL STATUS OF THE FHA MUTUAL MORTGAGE INSURANCE FUND 11 (2009), http://www.hud.gov/offices/hsg/rmra/oe/rpts/actr/2009actr_subltr.pdf. With a typical seller-funded down payment transaction, the seller gives a third party an amount equal to the buyer's down payment. The third party then gives the funds to the buyer who uses it for a down payment. This structure allowed the parties to avoid legal limitations on seller-paid down payments. See generally GOV'T ACCOUNTABILITY OFFICE, GAO-06-24, MORTGAGE FINANCING: ADDITIONAL ACTION NEEDED TO MANAGE RISKS OF FHA-INSURED LOANS WITH DOWN PAYMENT ASSISTANCE 3-6 (2005) (noting that HUD does not monitor the use of seller-funded down payment loans and recommending more routine monitoring). Unsurprisingly, the purchase price typically accounted for the seller-funded down payment by selling for 2% to 3% more than similar homes sold without seller-funded down payments. GOV'T ACCOUNTABILITY OFFICE, GAO-07-1033T, MORTGAGE FINANCING: SELLER-FUNDED DOWN-PAYMENT ASSISTANCE CHANGES THE STRUCTURE OF THE PURCHASE TRANSACTION AND NEGATIVELY AFFECTS LOAN PERFORMANCE 3 (2007).

64. THOMPSON, *supra* note 35, at 14 fig.1.6.

65. DEP'T OF HOUS. & URBAN DEV., FHA ANNUAL MANAGEMENT REPORT FISCAL YEAR 2001, at 7 (2001).

the FHA's success with communities of color, since the rejection of its explicitly discriminatory practices, remained decidedly mixed. Although African-American homeownership had increased significantly since the FHA's creation, it was stuck about twenty percentage points behind the national rate in 2006, as was the rate for Hispanic households.

The FHA's competitors were themselves lowering down payment requirements to as little as zero. The FHA responded by in some cases offering insurance for financing of nearly 100% of the sales price.⁶⁶ PMI had 62% of the mortgage insurance market by the mid-2000s.⁶⁷ At the same time, subprime lenders pushed the envelope, offering mortgages with flexible payment and variable interest options that were particularly attractive to purchasers in areas with rapidly rising prices. Some mortgage insurers were going so far as to underwrite loans with LTVs of 100% and even 103%, in order to cover closing costs too.⁶⁸

In response to changes in the industry, and to further expand homeownership, Congress enacted the American Dream Downpayment Act of 2003.⁶⁹ This new program gave first-time homeowners up to \$10,000 as a down payment. This program, like the 1970s' Section 235 program, was an unmitigated failure for homeowners and a financial catastrophe for the FHA. Once again, a no-down-payment loan program failed.⁷⁰ That being said, "with the exception of the years during the subprime boom," the 203(b) program, the FHA's primary mortgage insurance program for single family homes, "served as the major source of mortgage financing for first-time, low-income and minority homebuyers."⁷¹

HUD continued to scramble to respond to the changes in the market, proposing to Congress a variety of long-due reforms in 2006. Echoing the FHA's consumer protection goals from the Great Depression, Congress passed the Expanding Homeownership Act of 2007 to help FHA modernize, "to make government-insured loan products competitive with the private sector and make available affordable housing to more Americans. . . ."⁷² In particular, this modernized FHA was intended to

66. GOV'T ACCOUNTABILITY OFFICE, GAO-07-708, FEDERAL HOUSING ADMINISTRATION: MODERNIZATION PROPOSALS WOULD HAVE PROGRAM AND BUDGET IMPLICATIONS AND REQUIRE CONTINUED IMPROVEMENTS IN RISK MANAGEMENT 9, 20-21, 27 (2007), <http://www.gao.gov/new.items/d07708.pdf>.

67. DENNIS & PINKOWISH, *supra* note 60, at 178.

68. *Id.*

69. American Dream Downpayment Act, Pub. L. No. 108-186, 117 Stat. 2685 (2003).

70. VAN ORDER & YEZER, *supra* note 39, at 8.

71. ROBERTO G. QUERCIA ET AL., UNC CTR. FOR CMTY. CAPITAL AND CTR. FOR RESPONSIBLE LENDING RESEARCH 2012, BALANCING RISK AND ACCESS: UNDERWRITING STANDARDS FOR QUALIFIED RESIDENTIAL MORTGAGES 6.

72. GINNIE MAE, REPORT TO CONGRESS FISCAL YEAR 2007, at 11, http://www.ginniemae.gov/about/ann_rep/ReportToCongress07.pdf.

“provide a safe, fair, and affordable FHA alternative to the subprime market.”⁷³ Not incidentally, the legislation also allowed the FHA to reduce the minimum 3% down payment requirement. These efforts to compete with the private sector on its terms turned out to be a big mistake.

Events soon overtook Congress as the FHA’s dramatic loss of market share was soon to be matched by an equally dramatic rise. Once the subprime crisis hit, government-insured mortgages absorbed an extraordinary level of demand for mortgages as the private-label (non-conforming subprime and jumbo) sector shriveled to next to nothing.

By 2008, the FHA and the VA had a market share of all mortgage originations of more than 20%. Congress significantly raised the loan limits that the FHA could insure to provide liquidity to a wider swath of the mortgage market. The FHA’s market share continued to explode as capital from other sources in the residential mortgage market dried up. By 2010, it was 30% overall and nearly 40% for home purchases. The FHA’s role in home purchases for minorities during this period was even greater: 60% of all African-American and Latino purchasers had FHA-insured mortgages. This homeownership rate was nearly an exponential increase from 2005 and 2006 where 10% of African-American and just 6% of Hispanic purchasers had FHA loans. More broadly, the FHA had “become the primary lender to borrowers with down payments of less than 20 percent, lifting its share of mortgage originations to nearly 20 percent” in 2010.⁷⁴ The FHA had filled the gap left by the implosion of the subprime industry.

This dramatic increase in market share was soon followed by an equally dramatic increase in defaults and foreclosures on FHA mortgages. This poor performance resulted from ill-conceived programs, such as the American Dream Downpayment initiative, as well as from the general meltdown of the housing markets in the late 2000s. As a result, it was expected that the FHA’s massive fund that ensured Section 203 mortgages was “unlikely to meet its statutory capital requirements by the end of” the 2009 fiscal year.⁷⁵ It soon appeared that the fund was in great distress, with “[a]ll of the annual books-of-business from 2000 through 2008 are expected to result in net losses over the life of the loan guarantees, but the largest losses will be from the 2004–2008 books.”⁷⁶ The FHA ultimately

73. *Id.*

74. JOINT CTR. FOR HOUS. STUDIES, HARV. UNIV., *THE STATE OF THE NATION’S HOUSING 2013*, at 10 (2013).

75. Michael Goldberg & Ann Schnare, *An Update on the Capital Adequacy of the FHA Single Family Insurance Program 1* (2009), <http://ssrn.com/abstract=1510387>.

76. DEP’T OF HOUS. & URBAN DEV., *ANNUAL REPORT TO CONGRESS REGARDING THE FINANCIAL STATUS OF THE FHA MUTUAL MORTGAGE INSURANCE FUND FISCAL YEAR 2010*, at 23 (2010), http://www.hud.gov/offices/hsg/rmra/oe/rpts/actr/2010actr_subltr.pdf.

recovered because of an improving housing market, higher premiums, and better underwriting, but the FHA was now at a new low.

While the FHA was riding this rollercoaster, the PMI industry was on one of its own. The industry peaked in 2003 and then shrank dramatically as a result of the subprime crisis. As the housing markets recovered, so did the PMI industry, but it was not able to support the housing market during the crisis in the way that the government-backed FHA was able to.

The Housing and Economic Recovery Act of 2008 barred the FHA from insuring mortgages in transactions involving seller-financed down payment assistance, which was at the root of so much of the FHA's massive losses in the 2000s.⁷⁷ It also increased the minimum down payment to 3.5%.⁷⁸ And it began tightening its underwriting. Finally, Congress authorized the FHA in 2010 to raise its premiums, which also helped to stabilize its financial health.

For the years 2006–2012, the FHA's losses as a percent of its total debt outstanding was 17.3%, much higher than Fannie and Freddie's 3.9%, but a bit lower than the private-label MBS sector's 20.3%.⁷⁹ The FHA continued to serve first-time and lower-income homebuyers, consistent with its change in focus in its later years. In fiscal year 2011, "75 percent of FHA purchase-loan endorsements were first-time homebuyers, which [was] a 5 percent decline from fiscal year 2010."⁸⁰ And in 2011, 59.2% of its insured borrowers were classified as low/moderate income, again reflecting the mission of the modern FHA.

I. The 2010s: The Reckoning

As the financial crisis recedes from memory, the FHA is hailed in heroic terms for expanding so rapidly in the face of the retreat of private capital from the mortgage market. It is also pilloried so mightily for the massive losses it suffered because of its loose underwriting in the early 2000s. These losses resulted in the FHA's first bailout in its eighty-year history.

The FHA began to tighten its underwriting standards after its defaults began to rise. Because of its poor financial position, the FHA also raised its premiums. The financial condition of the FHA's fund that insured Section 203 program mortgages had been poor since 2009, when it failed to meet its required 2% minimum capital ratio.

PMI began to make a comeback in 2010 when it insured 4.3% of all new mortgages. By 2013, its market share grew to 11.3%. The FHA continued

77. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2113, 122 Stat. 2654 (2008) (amending section 203(b)(9) of the National Housing Act).

78. *Id.*

79. Jonathan R. Laing, *Fannie, Freddie: On Borrowed Time*, BARRON'S, July 29, 2013.

80. DEP'T OF HOUS. & URBAN DEV., *FHA ANNUAL MANAGEMENT REPORT FISCAL YEAR 2011*, at 8 (2011), <http://portal.hud.gov/hudportal/documents/huddoc?id=fhafy11annualmgmntprt.pdf>.

to focus on first-time homebuyers. In 2012, about 78% of its loans went to that population and about 32% went to households of color.

* * *

This history of the FHA accomplishes a number of goals. First, it demonstrates, contrary to conventional wisdom, that the FHA's mission was actually many missions from its very start. Second, it demonstrates, again contrary to conventional wisdom, that the FHA added and shed missions over the years, some of which were big successes while others were big failures. Thus, critics' calls for a return to the FHA's "original" mission misread its history. Third, it demonstrates the FHA's ability to respond rapidly to systemic failure in the housing finance market, particularly when compared with the PMI industry. Fourth, it documents the FHA's very troubled history of discrimination as well as misguided attempts to remedy past discrimination. Finally, it demonstrates the importance of responsible underwriting to the FHA's success, however one chooses to measure it.

The FHA has an important part to play in the mortgage market, but that part is not so clear, given its history. It is clear, though, that the PMI industry is not capable of assuming all of the roles played by the FHA. The next section addresses the scholarly debate over the future of the FHA and demonstrates that, in large part, the debate is over the FHA's mixed legacy in African-American communities and what we can learn from that legacy.

III. The Scholarly Debate Regarding the FHA's Legacy

The FHA is an understudied topic despite having a massive impact on the built environment of the United States. This lack of scholarship is particularly unfortunate because the FHA has had some serious failures that mar its long history of success as a provider of liquidity, stability, and access to the residential mortgage market. Because of those failures, the leading contemporary commentators on the FHA have panned its initiatives to encourage homeownership. The absence of a vibrant scholarly exchange regarding the FHA stands in the way of responsibly charting its future course.

The scholarly literature that does exist can be roughly divided into two camps. I will refer to the first camp as the "Policy Scholars." The Policy Scholars, with backgrounds in economics, finance, and accounting, are mostly concerned with the future direction of the FHA. I will refer to the second camp as the "Historians." The Historians have backgrounds in history and sociology. They are generally concerned with the FHA's track record.

Both groups find a lot to criticize about the FHA. After reviewing their findings, I will take a middle way that accounts for both critiques but charts a way forward for the FHA that can produce good policy results.

A. The Policy Scholars

Mostly writing after the Great Recession, the Policy Scholars have highlighted the harms that the FHA has suffered as a result of loose underwriting standards. Indeed, these harms had to be measured in the billions of dollars as the FHA absorbed the biggest losses in its history. Following these losses, the Policy Scholars would impose some stark changes on the FHA, changes that would reduce the risk of big losses but also reduce the FHA's ability to expand the rate of homeownership going forward.

Robert Van Order and Anthony Yezer, the authors of the FHA Assessment Report, write that "the lesson that we should take away from" the FHA's recent history of looser underwriting standards is that the "FHA, as currently organized, should not be used as an *experimental* program to encourage homeownership."⁸¹ However, they further note that this approach is nonetheless unavoidable because "there are powerful political forces willing to push FHA to allow very unsound lending practices."⁸² Given that Yezer is the co-author of one of the handful of comprehensive studies of the FHA, this is a damning assessment indeed.⁸³ Housing economist Joseph Gyourko is more succinct, but equally pessimistic: the FHA "has failed by any reasonable metric."⁸⁴

The few policy analysts who make a close study of the FHA agree in the main with Yezer and the other scholars who have given the FHA their sustained attention. The American Enterprise Institute's Edward Pinto, the author of the *FHA Watch*,⁸⁵ writes that "[g]overnment insurance programs suffer from three fundamental flaws: (1) the government cannot successfully price for risk; (2) government backing distorts prices, resource allocation, and competition; and (3) political pressure and congressional demands for a *quid pro quo* inevitably arise, politicizing the programs."⁸⁶

Much data exists to support these characterizations of the FHA, but the Policy Scholars cherry-pick from the historical record to make their case, focusing on disastrous policies of the early 1970s and the 2000s. By failing to address the FHA's other initiatives over its eighty years of operation, they fail to make a convincing case that the FHA's history is a tale of failed government action.

The Policy Scholars all advocate a return to the more conservative underwriting that characterized the FHA's early years. They do not

81. VAN ORDER & YEZER, *supra* note 39, at 9.

82. *Id.*

83. Pennington-Cross & Yezer, *supra* note 26, at 357358.

84. JOSEPH GYOURKO, AM. ENTER. INST., RETHINKING THE FHA iii (2013).

85. EDWARD J. PINTO, *FHA WATCH*, <https://www.aei.org/tag/fha-watch/>.

86. EDWARD J. PINTO, AM. ENTER. INST., TRUTH IN GOVERNMENT LENDING IS LONG OVERDUE (Mar. 20, 2012), <http://www.aei.org/article/economics/financial-services/housing-finance/truth-in-government-lending-is-long-overdue/>.

explicitly address how this conservative underwriting will impact minority homeownership. It seems, however, that they believe that the negative impacts of excessively loose underwriting outweigh the gains that would be made in the homeownership rates for African-American and Hispanic households.

B. The Historians

The Historians have focused on the FHA's track record in African-American communities while it implemented systemically racist policies. They identify how the FHA's history of discrimination and neglect are part and parcel of that track record. Implicit in this critique is that the FHA could do better once those flaws are remedied.

The Historians' main focus on the FHA is from the 1940s through the 1960s when the gap between its service to white and black communities was most egregious. The Historians convincingly argue that these past discriminatory policies and practices continue to affect African-American communities today.⁸⁷ At the same time, the Historians also see the big positive effect that the FHA had for white households and they argue that the FHA can do the same for black households.

The Historians include the authors of three classics: *Crabgrass Frontier* by historian Kenneth Jackson,⁸⁸ *American Apartheid: Segregation and the Making of the Underclass* by sociologists Douglas Massey and Nancy Denton,⁸⁹ and *Black Wealth/White Wealth: A New Perspective on Racial Inequality* by sociologists Melvin Oliver and Thomas Shapiro.⁹⁰

After reviewing the history of FHA policies in the mid-20th century, Jackson concluded that the "lasting damage done by the national government was that it put its seal of approval on ethnic and racial discrimination and developed policies which had the result of the practical abandonment of large sections of older, industrial cities."⁹¹ He also concludes that the FHA's attempts to address its past practices had the opposite effect. The shift in the 1960s to increasing mortgage credit in the urban core had the main effect of making "it easier for white families to finance

87. Ta-Nehisi Coates makes the case that the federal government's mid-20th century housing policies is one of the justifications for reparations for African-Americans. *The Case for Reparations*, THE ATLANTIC (June 2014), available at <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

88. KENNETH JACKSON, *CRABGRASS FRONTIER* (2d ed. 2005).

89. DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

90. MELVIN OLIVER & THOMAS SHAPIRO, *BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (2d ed. 2006). Many others, of course, have contributed to this body of scholarship. For a recent example, see RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

91. JACKSON, *supra* note 88, at 217.

their escape from areas experiencing racial change."⁹² This looser credit for black applicants also meant that home improvement companies could buy properties at low cost, make cosmetic improvements, and sell the renovated home at inflated prices approved by the FHA. Many of the minority purchasers could not afford the cost of maintenance, and the FHA had to repossess thousands of homes. The final result was to increase the speed with which areas went through racial transformation and to victimize those it was designed to help.⁹³

Massey and Denton also document the separate-but-equal housing finance system for whites and blacks. They conclude that for "at least fifty years, from 1940 through 1990, African-Americans were subject to a system of institutionalized housing discrimination."⁹⁴ And Oliver and Shapiro note that in addition to incentivizing de facto segregation, the FHA's actions have had a lasting impact on the wealth portfolios of black Americans. Locked out of the greatest mass-based opportunity for wealth accumulation in American history, African-Americans who desired and were able to afford home ownership found themselves consigned to central city communities where their investments were affected by the "self-fulfilling prophecies" of the FHA appraisers: cut off from sources of new investment, their homes and communities deteriorated and lost value in comparison to those homes and communities FHA appraisers deemed desirable.⁹⁵

The Historians document just how deeply the FHA was involved in processes of white flight, de facto segregation, and wealth creation in white communities as well as the lack thereof in black communities. Their work addresses broad aspects of the FHA's operations that the Policy Scholars just touch on. But the Historians, not being policy wonks by the nature of their disciplines, fail to offer up much by way of solutions to the problems created by the FHA.

C. The Middle Way

During the Great Recession, the FHA stated that its mission was to serve borrowers that the conventional mortgage market did not serve effectively: "[f]irst-time homebuyers, minorities, low-income families and residents of underserved communities."⁹⁶ More concretely, it set performance goals of increasing homeownership opportunities and strengthening communities. For instance, to achieve these goals, the FHA set and exceeded a goal of insuring over 1.4 million single-family mortgages in fiscal year 2009, set and exceeded a goal of having 73% of its single-family

92. *Id.* at 215.

93. *Id.*

94. MASSEY & DENTON, *supra* note 89, at 212.

95. OLIVER & SHAPIRO, *supra* note 90, at 18.

96. FED. HOUS. ADMIN., ANNUAL MANAGEMENT REPORT FISCAL YEAR 2010, at 3 (2010), <http://www.hud.gov/offices/hsg/fhfy10annualmanagementreport.pdf>.

mortgages go to first-time homebuyers, set and almost achieved its goal of having 33% of its single-family mortgages go to minority households, and set and achieved a goal of having 35% of its single-family mortgages be in underserved communities.⁹⁷

Sadly, it does not seem that the FHA got it, even in the aftermath of the financial crisis. By having homeownership goals drive its underwriting, it is bound to repeat the fiscal calamities of the past. What is needed—what all of the commentators agree upon—is for appropriate underwriting to drive the FHA. This position is not to say that promoting homeownership for various groups is not a legitimate goal. But rather it can do more harm than good to the FHA itself and the homeowners it serves if it is not done in a way that avoids frequent default and foreclosure.

A key element of appropriate underwriting is the down payment requirement, as expressed in the LTV ratio. Indeed, as seen above, there is a strong correlation between LTV and default rates over the FHA's eighty-year history. From an underwriting perspective, a 20% down payment is great. It keeps defaults very low. But it is very hard for low- and moderate-income families to save enough money in a reasonable amount of time to put together a 20% down payment. The median household income in 2013 was \$51,939. The median house price in 2013 for existing homes was about \$198,000 at the end of 2013. It would take quite some time for that median household to save the roughly \$40,000 necessary to have a 20% down payment on that median house. High down payment requirements would also have a disproportionate effect on communities of color, which tend to have lower income and less wealth than white households. As seen above, there have been periodic pushes to decrease down payment requirements in order to increase homeownership rates, but those pushes have not been accompanied by an evaluation of the sustainability of the increase based on such a strategy.

Advocates for low-income communities, lenders, and proponents of an "ownership society" have all pushed for much lower down payment requirements, particularly for first-time homeowners. This has occurred, most notably, in the late 1960s and late 1990s, but also as veterans returned from World War II. Some of these pushes are accompanied by little thought as to the impact that low down payments have on the likelihood that a household will keep its home over the long term. Others are more thoughtful and are based on empirical research. Let us dismiss the first set out of hand, for there have been a number of low- or no-down payment initiatives that have been unmitigated failures.

Let us begin by addressing the criticisms of low down payment initiatives. The flaws with the FHA that commentators such as Van Order & Yezer and Pinto have identified are almost completely flaws of ultra-

97. FED. HOUS. ADMIN., ANNUAL MANAGEMENT REPORT FISCAL YEAR 2009, at 18-20 (2009), <http://www.hud.gov/offices/hsg/fhfy09/annualmanagementreport.pdf>.

low or no-down payment initiatives. Their prescription is to end innovative homeownership programs. Instead, the focus should be on the predictors of default, and in particular, the scholarly literature regarding the relationship between low down payments and default. It is clear that the FHA (and the VA) have had success with relatively small down payments at times, as have other entities such as the Self-Help Credit Union, a mission-driven financial institution.⁹⁸

Much of the down payment literature is focused on how lowering down payment requirements increases homeownership rates. But there is also a substantial body of literature that indicates that no-down payment and low-down payment mortgages are much more likely to default than mortgages with larger down payments. One article by Austin Kelly stands out for studying mortgage default rates where the borrower has made no down payment. It confirms what seems intuitive: “[b]orrowers who provide even modest downpayments from their own resources have substantially lower default propensities than do borrowers whose downpayments come from relatives, government agencies, or nonprofits.”⁹⁹ This finding—that “skin in the game” reduces defaults—implies that borrowers will assess the risk of purchasing a home more carefully if their own capital is at risk and will fight harder to keep their homes in order to protect that capital investment.

The question, of course, is what is the socially optimal level for down payments? No one has answered this question in the context of the FHA, but a body of research about down payments has sprung up as various parties have attempted to influence the rulemakings that define “Qualified Mortgages” (QM) and “Qualified Residential Mortgages” (QRM) pursuant to Dodd-Frank.

The Center for Responsible Lending, an advocate for low- and moderate-income borrowers that also engages in serious research on lending issues, has looked at the question of whether very low down payments are unacceptably risky. It starts out by noting that “it would take the typical family 22 years to save for a 10% down payment, and 14 years for a 5% down

98. See, e.g., *supra* text accompanying note 22 (noting that Congress lowered down payment to 3% in some cases in the 1950s); UNC CTR. FOR CMTY. CAPITAL, SETTING THE RECORD STRAIGHT ON HOMEOWNERSHIP 1–4 (Policy Brief, undated), <http://ccc.sites.unc.edu/files/2013/02/Setting-Record-StraightHO.pdf> (studying Self Help Credit Union Community Advantage Program portfolio of 46,000 home-purchase mortgages over a ten year period); Roberto G. Quercia et al., *Regaining the Dream: How to Renew the Promise of Homeownership for America’s Working Families* 26–33 (2011) (discussing the success of the Self-Help Community Advantage Program).

99. Austin Kelly, “Skin in the Game”: Zero Downpayment Mortgage Default, 17 J. HOUS. RES. 75, 75 (2008).

payment."¹⁰⁰ In a study of its affiliate-lender's record of borrower defaults, researchers found that "72% of borrowers made a down payment of less than 5 percent," but they were delinquent less than a quarter of the rate of subprime ARM borrowers.¹⁰¹

Some evidence exists that there is a down payment sweet spot of around 5% at which default rates are within an acceptable range.¹⁰² The Coalition for a Sensible Housing Policy, a coalition of lenders and consumer advocates, argues that:

once you apply the strong underwriting standards in the sample QRM definition, moving from a 5 percent to a 10 percent down payment requirement reduces the overall default experience by an average of only two- to three-tenths of one percent for each cohort year. However, the increase in the minimum down payment from 5 percent to 10 percent would eliminate from 4 to 7 percent of borrowers from qualifying for a lower rate QRM loan.¹⁰³

The higher requirements would also have a strongly disproportionate effect on communities of color.

Quercia et al. have looked at the trade-offs between safe underwriting and access to credit in the context of the QRM rules.¹⁰⁴ They have also developed a useful metric, which they refer to as a "benefit ratio." The benefit ratio compares "the percent reduction in the number of defaults to the percent reduction in the number of borrowers who would have access to QRM mortgages."¹⁰⁵ A metric of this sort would go a long way to ensuring that there is transparency for both homeowners and policymakers as to the likelihood that homeowners can pay their mortgages and keep their homes.

They would push the optimal down payment size even lower, arguing that "LTVs of 97 percent result in a better benefit ratio, suggesting that a small down payment requirement may have an important protective effect against default risk while still providing broad access to mortgage credit."¹⁰⁶ They conclude that "restricting the origination of risky loan

100. CTR. FOR RESPONSIBLE LENDING, GOVERNMENT-MANDATED DOWN PAYMENT STANDARDS WOULD HARM THE ECONOMY, DENY HOMEOWNERSHIP TO CREDIT-WORTHY FAMILIES 1 (2013), <http://www.responsiblelending.org/mortgage-lending/policy-legislation/congress/CRL-Down-Payment-Mandates-Would-Harm-the-Economy-Credit-Worthy-Families-August-13-2013.pdf> (emphasis omitted).

101. QUERCIA ET AL., *supra* note 71, at 1.

102. See COAL. FOR SENSIBLE HOUS. POLICY, PROPOSED QUALIFIED RESIDENTIAL MORTGAGE DEFINITION HARMS CREDITWORTHY BORROWERS WHILE FRUSTRATING HOUSING RECOVERY 6 (2011), <http://www.responsiblelending.org/mortgage-lending/policy-legislation/regulators/Coalition-QRM-White-Paper-1.pdf>.

103. *Id.*

104. QUERCIA ET AL., *supra* note 71, at 20.

105. *Id.* (emphasis omitted).

106. *Id.* at 33.

features and underwriting a loan with a consideration of a borrower's ability to repay has the largest benefit in terms of reducing default risk without limiting access to credit."¹⁰⁷

The goal of ensuring that borrowers do not default in high numbers is less of a constant than one might suppose. The policy of the FHA was surely to err on the side of low defaults from the 1930s through the 1950s. But starting in the 1960s, this approach was relaxed, and at times it was implicitly rejected or ignored. This relaxation of standards was seen with the Section 235 fiasco of the 1970s as well as the American Dream Downpayment Act debacle of the 2000s. It appears that households and communities of color are most harmed by such thoughtlessly loose underwriting criteria because they were disproportionately represented among homeowners impacted by the defaults and foreclosures from those failed programs.

History teaches us that the goal of sustainable homeownership should not have been ignored. It should be pursued for the sake of the FHA's viability. It should also be pursued to for the sake of FHA-insured borrowers who should be able to rely on FHA underwriting as a signal that they will likely be able to afford their housing payments and keep their homes.¹⁰⁸

There will always be some percentage of FHA mortgagors who will default on their loans. The key policy question is what the acceptable range of default should be over the long term. If the rate is too low, it would imply that some were not given the opportunity to benefit from homeownership. If the rate is too high, it would likely imply that an FHA mortgage was reducing household net worth and having too many negative social impacts on households as families deal with the effects of default, foreclosure, and eviction.

There is no objective way to identify the most ideal default rate for FHA mortgages. One might, however, look at the alternatives available to households. Because FHA-eligible households have the option of renting, the benefits and drawbacks of an FHA mortgage to a household should be compared to renting as well as to other mortgage products that might be available to them. Researchers at the UNC Center for Community Capital argue that homeownership beats renting in a number of ways, although their study is drawn from a very limited number of homeowners with mortgages from a particular loan program, the Community Advantage Program (CAP).¹⁰⁹

107. *Id.* at 4.

108. See Andrew Caplin et al., *Is the FHA Creating Sustainable Homeownership?*, 43 REAL EST. ECON. 957 (2015) (finding high delinquency rates for "the 2007-2009 vintages of FHA borrowers" with negative implications for the FHA and the borrowers alike).

109. UNC CTR. FOR CMTY. CAPITAL, *supra* note 95, at 1-4 (Policy Brief, undated), <http://ccc.sites.unc.edu/files/2013/02/Setting-Record-StraightHO.pdf> (studying

The UNC researchers found that ownership provides a greater financial cushion than renting for low-income families. Most important for our purposes, they found that the loans in their study were “notable for their high loan-to-value ratios: 97 percent is the typical maximum loan-to-value ratio, though some programs issue loans all the way up to 103 percent of house value.”¹¹⁰ They concluded that “having received assistance toward one’s down payment and closing costs has no significant effect whatsoever on CAP homeowners’ mortgage performance.”¹¹¹ The authors of the study noted some “important caveats” in their findings that severely limit their generalizability.¹¹²

I am cautious of assuming that the FHA’s results with low down payments would be the same as CAP’s given the significant differences between the two programs. But CAP’s results do, at least, suggest that we do not yet know how low down payments can go while still maintaining an acceptable level of mortgage defaults.

Combining the UNC study with the benefit ratio of Quercia et al. (also affiliated with UNC) discussed above, we can reasonably identify a range of 3% to 5% down payments as a starting point for FHA underwriting and assume that future performance data could push that range lower over time. We can also imagine that a more sophisticated underwriting process could allow for trade-offs among LTV, credit score, and debt-to-income (DTI) that could push that range even lower for select borrowers.

This all seems straightforward enough, but there has been a long history of politicizing mortgage underwriting in federal programs. Congress has shown itself to put politics ahead of responsible underwriting to disastrous effect. The commentators who have lost faith in the FHA’s ability to stay the course of responsible underwriting thus have good reasons. But given the long history of the FHA, it seems they are, perhaps, too pessimistic. Indeed, their aversion to policy experimentation by the FHA is consistent with a broader aversion to government social policy

Self Help Credit Union Community Advantage Program portfolio of 46,000 home-purchase mortgages over a ten-year period).

110. *Id.* at 3.

111. *Id.* at 4.

112. *Id.* (“First, not all owners fared equally well. Some owners who bought late in the cycle in more volatile markets have lost wealth. Second, the experience of the CAP homeowners cannot be generalized to all lower-income borrowers over this same period because the type of financing used is a key determinant of the financial trajectory of investing in a home. All of the owners in the CAP portfolio received fixed-rate, fixed-payment, standardized, competitively priced, long-term mortgages. It is largely due to the durability of their affordable mortgages that CAP’s owners have enjoyed the benefits traditionally associated with homeownership, even against a backdrop of economic upheaval. Borrowers who used costlier, riskier products were not as fortunate and many have lost their homes as a result.”).

expenditures, an aversion that reverberates in just about every federal election throughout the country in recent years. All social policy can be done irresponsibly. All of it can lose or waste money or have unintended consequences. In my eyes, though, there is nothing about the FHA that is particularly flawed as an instrument of government action.

This is not to say that we have nothing to learn from the FHA's critics. The FHA should be constrained from repeating the errors of its past. Congress could commit itself to a strong underwriting standard by returning to the "economic soundness" standard of the pre-1950s FHA.

Congress could also mandate that the FHA implement an appropriate benefit ratio through a rulemaking process. The rulemaking would protect the FHA from loose underwriting. There is, of course, always the risk that Congress would reverse itself, but—hey—that's democracy.

And if Congress finds that there are categories of households that are still not adequately accessing the mortgage markets, it would need to increase the cross-subsidy elements of the FHA insurance premium or allocate funds to subsidize them directly. Although increasing direct subsidies through congressional action may be infeasible in the current political environment, increasing cross-subsidies may be done administratively.

The more sophisticated approach to underwriting, which looks at the layering of risks such as credit score, loan-to-value ratio, debt-to-income ratio, and other factors, may—in theory—result in a more socially optimal level of lending. Our worries do not disappear, however, merely because we undertake a rulemaking initiative that implements a dynamic underwriting standard.

Notwithstanding all of the benefits of a dynamic approach, a measured political analysis might suggest that there is good reason to stick with an easy-to-understand heuristic like a mandatory 3% to 5% down payment requirement. Such a requirement, in contrast to the dynamic rule, would be harder for homeowners, lenders, and politicians seeking to be "pro-homeowner" to manipulate. That dynamic rule is always going to be subject to pressures from lenders looking to increase market share and politicians who put pressure on regulated financial institutions to expand access to credit for a variety of politically expedient reasons.

IV. Conclusion

The FHA has been a versatile tool of government since it was created in the 1930s, achieving a variety of social purposes through its mortgage insurance programs. However, it can stumble when the goals to which it is put are muddled. There is no doubt that today's FHA suffered from many of the same unrealistic underwriting assumptions that have derailed so many subprime lenders, as well as Fannie and Freddie. It had also been harmed, like other lenders, by a housing market as bad as any seen since the Great Depression.

The Policy Scholars have rightly brought attention to the risks of FHA programs that fail to underwrite its products appropriately. They are right

that the FHA needed to be bailed out because of this failed underwriting practice. They have therefore concluded that the FHA is not particularly good at achieving its social policy objectives. They call for a more limited role for the FHA, one that focuses on liquidity and stability and leaves innovative approaches to expanding homeownership behind.

The Policy Scholars do not, however, fully appreciate the extent to which modest down payment requirements and responsible underwriting can drive the success of new FHA initiatives. Central to any analysis of the FHA's role is an understanding of its policies relating to down payment size. Much of the FHA's performance is driven by its down payment requirements, which have trended ever downward so that homeowners were able at times to get loans for 100% of the value of the house in recent years. But as is obvious to all, the larger the down payment, the safer the loan, if everything else is equal.

What has been less obvious to policy makers is that tiny or nonexistent down payments are unacceptably risky. Given that the FHA insures 100% of the losses on its mortgages, the down payment requirement is a key driver of its performance. Empirical researchers should continue to study how low down payment requirements can go while still maintaining an acceptable benefit ratio for FHA mortgages. At this point, a down payment in the range of 3% to 5% seems appropriate, but one could contemplate that number being responsibly pushed lower over time, within a rulemaking context. One could also contemplate a sophisticated approach that might allow for lower down payments for those with stronger credit histories or other strengths in their underwriting profiles. This approach would require an underwriting system that was relatively insulated from politics.

It seems too simple to conclude by saying that although it is important to make residential credit broadly available, the FHA will not be doing borrowers any favors if their loans are not sustainable and they end up in default or foreclosure. But simply put, in the past the FHA has not always balanced the goal of access to credit with the goal of sustainable credit. It should, however, plan on always keeping that balance in mind going forward. In that way, it can make homeownership available to households who could reasonably expect to maintain it over the long term. This is true for all FHA borrowers, but particularly true for African-American households that have been disproportionately hurt by FHA underwriting practices over its eighty-year history.

The FHA can be used to make homeownership more accessible generally and for African-American homeowners in particular.

Disrupting Affordable Housing: Regulating Airbnb and Other Short- Term Rental Hosting in New York City

James A. Allen

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Use of Airbnb and other short-term rental (STR) hosting platforms has been increasing. These platforms have provided entrepreneurial New Yorkers with an opportunity to alleviate their rising costs of rent and have brought tourists into less traditionally visited neighborhoods—arguably offering a more genuine “New York” experience. However, the rapid expansion of these platforms has had an adverse impact on the New York City rental vacancy rate, has impacted the City’s affordable housing stock, and has the potential to negatively impact some of the City’s most vulnerable communities. Current STR regulations in New York are inadequate in addressing how to balance these competing concerns. Without comprehensive legislation addressing short-term rentals, the New York City permanent resident rental stock is at risk of being further depleted.

Introduction

Airbnb was founded in 2007 by Brian Cheskey and Joe Gebbia.¹ Living as roommates in San Francisco, Cheskey and Gebbia received a notice from their landlord that their rent would increase by 25 percent that month.² Unemployed, strapped for cash, and worried they would not be able to pay their living expenses, they were determined to “design their way out” of their situation.³ Coincidentally, at that time, Gebbia noticed that San Francisco was experiencing an influx of people visiting for a design conference and that the majority of the city’s hotel rooms had been sold out.⁴ Gebbia was reminded of a time in college when he let a passerby sleep on his couch for a night and believed he and Cheskey could use their unfortunate situation as an opportunity to offer a similar accommodation to conference attendees through a web-based platform.⁵ That is the story of how AirBedandBreakfast.com or, “Airbnb,” was created.⁶

Airbnb is a short-term rental (STR) hosting platform.⁷ Platforms such as Airbnb allow hosts with a home or other property to offer it as a short-term rental by electronically posting its description, location, photos, and rental price to a web-based exchange.⁸ Travelers use the platform to connect with hosts as well as to book and pay for travel.⁹ Airbnb profits by collecting a percentage of the total travel fee from both host and traveler.¹⁰ Hosts have

1. *How I Built This With Guy Raz: Airbnb: Joe Gebbia*, NATIONAL PUBLIC RADIO (Oct. 16, 2016) (downloaded using iTunes).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Airbnb.com, <https://www.airbnb.com/>.

8. *Local Destinations for a Global Society*, Airbnb.com, <https://www.airbnb.com/how-it-works> (last visited Feb. 28, 2017).

9. *Id.*

10. See *Airbnb Help Center: What are host service fees?*, AIRBNB.COM, <https://www.airbnb.com/help/article/63/what-are-host-service-fees> (last visited Feb. 28, 2017);

the option to offer their property for one night or year-round¹¹ and offer a range of accommodations from luxurious to austere.¹²

The flexibility for hosts and variety for guests has added to the attraction and success of Airbnb. In its first week, during the 2008 Democratic National Convention, Airbnb went from 0 to 800 rooms.¹³ While the company originally struggled to find its footing,¹⁴ Airbnb now has more rooms listed on its site than the biggest hotel chain and is valued at \$30 billion, a valuation greater than Hyatt or Wyndham Worldwide.¹⁵ On-demand, short-term rentals are now more popular than ever¹⁶ and Airbnb is by far the leader of the industry.¹⁷ As Airbnb and other STR platforms continue to grow, cities and states have had varying regulatory reactions.¹⁸ The variety of regulation is partly caused by the plethora of policy concerns raised by STRs and the web-based platforms that facilitate such rentals.¹⁹

These innovative platforms have disrupted issues across the policy spectrum. For example, platform users have accused hosts of discrimination

Airbnb Help Center: What are guest service fees?, AIRBNB.COM, <https://www.airbnb.com/help/article/104/what-are-guest-service-fees> (last visited Feb. 28, 2017).

11. Hugo Martin, *Big Chunk of Airbnb's Revenue Comes from Year-Round Rentals, Study Finds*, L.A. TIMES (Jan. 20, 2016), <http://www.latimes.com/business/la-fi-airbnb-hotels-20160120-story.html>.

12. Olivia Zaleski & Gerrit De Vynck, *Airbnb Acquires Luxury Retreats, Beating Out Expedia, Accor*, BLOOMBERG.COM (Feb. 16, 2017), <https://www.bloomberg.com/news/articles/2017-02-16/airbnb-buys-vacation-home-management-company-luxury-retreats>; see also Sam Biddie, *The Worst Airbnb in the Universe: 22 Beds in One Apartment*, VALLEYWAG BLOG, GAWKER.COM (Sept. 3, 2014), <http://valleywag.gawker.com/the-worst-airbnb-in-the-universe-22-beds-in-one-apartm-1630029953>.

13. *How I Built This With Guy Raz*, *supra* note 1.

14. Michael Carney, *Brian Chesky: I Lived on Cap'n McCain's and Obama O's got AirBnB Out of Debt*, PANDO.COM (Jan. 10, 2013), <https://pando.com/2013/01/10/brian-chesky-i-lived-on-capn-mccains-and-obama-os-got-airbnb-out-of-debt/>.

15. *How I Built This With Guy Raz*, *supra* note 1; see also PriceWaterhouse Coopers, *Consumer Intelligence Series: The Sharing Economy*, at 23, <http://www.pwc.com/us/en/industry/entertainment-media/publications/consumer-intelligence-series/sharing-economy.html>.

16. *The Sharing Economy*, *supra* note 15, at 13.

17. C.J. Arlotta, *Airbnb Continues to Dominate Short-Term Rental Market*, HOTEL BUSINESS.COM (Feb. 3, 2017), <http://www.hotelbusiness.com/Other/Airbnb-Continues-to-Dominate-Short-Term-Rental-Market/56245>.

18. Lori Weisberg, *Airbnb: Opportunity or Nuisance?*, San Diego Union Trib. (June 10, 2016), <http://www.sandiegouniontribune.com/business/tourism/sdut-airbnb-opportunity-or-nuisance-2016jun10-story.html>.

19. For an in-depth look regarding property rights and municipal regulation of STRs, see Emily M. Speier, Note, *Embracing Airbnb: How Cities Can Champion Private Property Rights Without Compromising the Health and Welfare of the Community*, 44 PEPP. LAW REV. 387 (2017).

based on race or ethnicity²⁰ and academic studies have shown that hosts with traditionally non-white names earn less than those with traditionally white names who offer similar properties.²¹ Furthermore, concerns have been raised regarding the health and safety of guests as well as hosts.²² Additionally, there is the issue of liability for damages that occur while visiting an short-term rental, with horror stories that range from properties serving as a venue for sexual exhibitionism to the death of a family member.²³ Amid other issues, there have also been numerous claims and studies discussing the adverse impact of short-term rentals on their surrounding housing economy, particularly for municipalities with historically problematic housing circumstances, such as long periods of low rental vacancy rates and challenges in affordable housing availability.²⁴ As discussed in this

20. Kristen Clarke, *Does Airbnb Enable Racism?*, N.Y. TIMES (Aug. 23, 2016), <https://www.nytimes.com/2016/08/23/opinion/how-airbnb-can-fight-racial-discrimination.html>; see also Katie Benner, *Airbnb Adopts Rules to Fight Discrimination by Hosts*, N.Y. TIMES (Sept. 8, 2016), <https://www.nytimes.com/2016/09/09/technology/airbnb-anti-discrimination-rules.html>.

21. Emily Deruy, *Asian Hosts Earn Less Than Whites on Airbnb*, ATLANTIC (Nov. 2, 2015), <https://www.theatlantic.com/politics/archive/2015/11/asian-hosts-earn-less-than-whites-on-airbnb/433299/>; see also Benjamin Edleman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* (Harvard Bus. Sch. Working Paper Jan. 10, 2014), <http://hbswk.hbs.edu/item/digital-discrimination-the-case-of-airbnb-com>.

22. Short Term Rental Zoning Restrictions, NOLA.GOV (last visited Mar. 3, 2017), <http://www.nola.gov/short-term-rentals/str-zoning-restrictions/>; see also Harriet Aird & Georgie Burgess, *Tasmania eases Airbnb regulations for renting out rooms in sharing economy*, ABC.NET.AU (Feb. 3, 2017), <http://www.abc.net.au/news/2017-02-03/tasmanian-government-lifts-red-tape-on-airbnb-rentals/8239486>.

23. Michael Kaplan, *Orgies, Drugs, Arrests: Airbnb Users' Real-life Nightmares*, N.Y. POST.COM (July 15, 2016), <http://nypost.com/2016/07/15/orgies-drugs-arrests-airbnb-users-real-life-nightmares/>; see also Zak Stone, *Living and Dying on Airbnb*, MEDIUM.COM (Nov. 8, 2015), <https://medium.com/matter/living-and-dying-on-airbnb-6bff8d600c04#.2uolfgzev>; see also Sage Larrazo, *Airbnb Bribes Host With Cash Under NDA After 200 Partiers Destroy Apartment Complex*, OBSERVER.COM (Mar. 29, 2017), <http://observer.com/2017/03/airbnb-nda-damage-in-london-after-drug-party/> (exploring how Airbnb has offered monetary amounts in exchange for hosts non-disclosure of some of the more unconventional stays).

24. For an analysis by Airbnb of nineteen jurisdictions, see *Airbnb Policy Tool Chest* (2016), <https://www.airnbccitizen.com/airbnb-policy-tool-chest/>; see also American Hotel & Lodging Ass'n, *From Air Mattresses to Unregulated Business: An Analysis of the Other Side of Airbnb* (Sept. 2016), https://www.ahla.com/sites/default/files/Airbnb_Analysis_September_2016_0.pdf; Dayne Lee, *How Airbnb Short-Term Rentals Exacerbate Los Angeles's Affordable Housing Crisis: Analysis and Policy Recommendations*, 10 HARVARD L. & POL'Y REV. 229 (2016). But see Gideon Yaffe, *Activists say Airbnb drives up rents. But is that actually true? L.A. needs to find out*, L.A. TIMES.COM (May 13, 2016),

Note, due to the varying housing priorities across jurisdictions, regulatory solutions regarding how to deal with short-term rentals have been diverse.²⁵

This Note discusses how Airbnb and similar short-term rental platforms impact New York City housing, arguing that the current regulations are inadequate in addressing the increasing popularity of short-term rental use. This Note also suggests numerous policy proposals to address the proliferation of STRs. The Note progresses in three Parts.

Part I begins with a brief introduction to the New York City capacity problem and affordable housing landscape. Part I.A provides a short history of New York City affordable housing and Part I.B explores New York's attempt to accommodate residents and an increasing tourist industry. This part will conclude by concentrating on why short-term rental concerns are crucial to New York City residents and why New York legislators have a responsibility to protect every unit of available housing. Part I.C explores Airbnb's history in New York. This part will address how various users of Airbnb have benefitted from its innovative qualities while also discussing how "bad actors" have taken advantage of the platform.

Part II will analyze what New York has done to regulate short-term rentals and platforms such as Airbnb, detailing why existing policies are inadequate in facing the current and growing short-term rental dilemma. Part II will attempt to summarize policy solutions considered in New York and will conclude by reviewing considerations and solutions of other cities dealing with the rise of short-term rentals.

Finally, Part III discusses how comprehensive legislation can combat the disruption of "on demand" housing. This part explores methods proposed by Airbnb and its advocates regarding how to work with jurisdictions facing "historical housing problems." This part will include a discussion of policy suggestions and actions taken by other jurisdictions outside of New York and observes how New York can use these measures to curb short-term rental abuse by "bad actors." Part III will conclude by examining the short-term rental legislation introduced in New York in 2017 and will provide policy suggestions intended to more adequately regulate the impact of Airbnb in New York City.

oe-0513-yaffe-airbnb-ordinance-la-20160513-story.html (arguing that Lee's report is based on skewed data); Rachel Monroe, *More Guests, Empty Houses*, SLATE.COM (Feb. 13, 2014), http://www.slate.com/articles/business/moneybox/2014/02/airbnb_gentrification_how_the_sharing_economy_drives_up_housing_prices.html; Dessi Mia Carbajal, *The Impact of Short Term Rentals on Affordable Housing in Oakland: A Report and Recommendations* (Dec. 2015), <http://www.naceda.org/assets/EBHO%20Short%20Term%20Rental%20Impact%20Report.pdf> (prepared for Community Economics, Inc. & East Bay Housing Organizations).

25. *Airbnb Policy Tool Chest*, *supra* note 24, at 3 ("[E]ach city and country is economically, geographically, and demographically unique.").

I. The New York City Capacity Problem

To understand the importance of Airbnb in New York, one must first understand New York City's attempt to balance housing affordability with its rise in tourism. For decades, the New York State legislature and judiciary have recognized the adverse impact of the City's low rental vacancy rate. Congestion, or a lack of available rental housing, creates a lack of housing supply;²⁶ a lack of housing supply increases the cost of rent.²⁷ As rents increase, developers and their investors are less likely to develop new housing with affordable or low-income units.²⁸ Rising rents have contributed to a lack of affordable housing and have "priced out" many New Yorkers.²⁹

Attempting to "prevent[] exactions of oppressive rents and the forestalling of profiteering and other disruptive practices,"³⁰ the New York legislature adopted pioneering housing practices in an attempt to provide an affordable housing market.³¹ While innovative, these practices have

26. *Congestion and Its Social Effects*, 13:4 CANADIAN J. OF PUB. HEALTH 177-79 (1922).

27. Editorial Board, *Airbnb's Affordable Housing*, N.Y. POST (Jan. 21, 2015), <http://nypost.com/2015/01/21/airbnbs-affordable-housing/>.

28. *The Cost of Affordable Housing: Does It Pencil Out?*, URB. INST. <http://apps.urban.org/features/cost-of-affordable-housing/> (describing why developers and their investors have incentives to develop and rent units at market rate); Patrick Clark, *Why is it So Hard to Build Affordable Housing: It's Not Affordable*, BLOOMBERG (July 26, 2016), <https://www.bloomberg.com/news/articles/2016-07-26/why-it-s-so-hard-to-build-affordable-housing-it-s-not-affordable>.

29. *Airbnb's Affordable Housing*, *supra* note 27; *The Bright Side of Being Priced Out of New York*, BLOOMBERG (Aug. 23, 2016), <https://www.bloomberg.com/view/articles/2016-08-23/the-bright-side-of-being-priced-out-of-new-york>; *see also* Michael Greenberg, *Tenants Under Siege: Inside New York City's Housing Crisis*, LXIV:13 N.Y. REV. BOOKS 75-81 (Aug. 17, 2017), <http://www.nybooks.com/articles/2017/08/17/tenants-under-siege-inside-new-york-city-housing-crisis/> (exploring New York City's issues regarding housing, homeless, and affordability).

30. *In Re Hotel Ass'n v. Weaver*, 144 N.E.2d 14 (N.Y. 1957).

31. According to the Furman Center for Real Estate and Urban Policy,

[t]he city had the nation's first tenement laws, its first comprehensive zoning ordinance, and its first public housing project. Its present policies continue to set New York City apart. Practically nowhere else has rent regulation persisted so long, or do public housing projects successfully house so many residents, or does the government spend so much money to house the poor, the homeless, and the middle class. The homelessness budget of the City of New York, for instance, almost matches the federal government's spending on homelessness nationwide. The city's capital expenditures for housing, meanwhile, amounted to more than three times the housing expenditures of the next 32 largest cities combined during the late 1980s and 1990s.)

had residual adverse effects.³² The burdens of these practices have been suffered most harshly by the population they were intended to serve.³³ Thus, affordable housing was developed, but often at the expense of the principles of “livability.”³⁴

Additionally burdensome is the ever-increasing rise in New York City tourism. Tourism numbers are reaching record highs and New York renters are now offering tourists the opportunity for a more “New York experience” by listing their apartments on platforms such as Airbnb.³⁵ These rentals vary in accommodation from couches, to bedrooms, to full apartments. As the success of renting becomes more profitable, New Yorkers are beginning to take apartments off of the market for the purpose of renting them

Housing Policy in New York City: A Brief History, FURMAN CENTER FOR REAL ESTATE AND URBAN POLICY, http://furmancenter.org/files/publications/AHistoryofHousingPolicycombined0601_000.pdf.

32. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 270–71 (1961) (describing urban renewal. Ms. Jacobs says, “[o]ur present urban renewal laws are an attempt to break [the linkage that creates slums] by forthrightly wiping away slums and their populations, and replacing them with projects intended to produce higher tax yields, or to lure back easier populations with less expensive public requirements. The method fails. At best, it merely shifts slums from here to there, adding its own tincture of extra hardship and disruption. At worst, it destroys neighborhoods where constructive and improving communities exist and where the situation calls for encouragement rather than destruction.”).

33. Anthony Paletta, *A Brief History of Affordable Housing in New York*, METROPOLIS, <http://www.metropolismag.com/cities/can-affordable-housing-overcome-the-odds-once-again-in-new-york/> (describing the mass construction of public housing in New York as a “process [that] indisputably delivered better housing units to many New Yorkers; [but] also dramatically altered many neighborhoods for the worse. East Harlem, the Lower East Side, and Brownsville saw local character replaced by ‘NYCHA Modernism,’ defined by the sprawling landscape of cruciform brick towers set away from the street. Developments rendered in this ‘style’ tended to destroy the vast majority of businesses in their path and, paradoxically, often drove out neighborhood residents who would have gained from the new units. Even Robert Moses complained about their ‘monotonous sameness and institutional character.’”; Greg B. Smith, *NYCHA Tenant Lives in ‘Deplorable Conditions’ With No Sink or Bath as Agency Stalls on Repairs*, N.Y. DAILY NEWS (Apr. 17, 2017), <http://www.nydailynews.com/new-york/nycha-tenant-lives-deplorable-conditions-repairs-stall-article-1.3063345> (describing present-day horrid conditions in NYCHA buildings).

34. *What is Livability?*, PARTNERS FOR LIVABLE COMMUNITIES, <http://livable.org/about-us/what-is-livability> (describing livable circumstances as those which provide a healthy environment, close to work, and with educational, cultural, and recreational opportunities).

35. Zoe Rosenberg, *Airbnb Launches Local-led Experiences Neighborhood Tours in NYC*, CURBED.COM (Mar. 20, 2017), <https://ny.curbed.com/2017/3/20/14981224/airbnb-harlem-tours-experiences/>.

through a short-term rental platform or platforms. These “private listings” directly impact the New York City housing stock and place a potential burden on the City’s affordable housing.

This Part provides a brief historical overview of New York City housing and discusses how the increase of short-term rentals impacts the market for affordable housing. “Affordable housing” is used broadly to include income restricted units, rent stabilized and rent controlled units, units of households paying no more than 30 percent of their income, as well as units available and created through public programs.

A. A Brief History of Housing in New York

In the 1930s and the decades that followed, coping with post-World War and Depression Era market conditions, the federal government passed a series of laws intended to promote affordable housing for moderate and low-income families.³⁶ Even before the federal government introduced policies such as the United States Housing Act of 1937, the Emergency Price Control Act of 1942, and the Housing Act of 1949,³⁷ New York led the effort among states and municipalities that recognized the importance of housing.³⁸ For example, New York in 1879 was the first state to adopt tenement housing laws addressing tenement building health and safety conditions.³⁹ New York was also an early adopter of rent control and rent stabilization.⁴⁰

Responding to population increases caused by World War I, New York enacted the Emergency Rent Laws of 1920.⁴¹ Under these laws, landlords had to base increases in rent on reasonableness.⁴² The 1920 laws also provided tax incentives for developers to nudge construction of new

36. TIM IGLESIAS & ROCHELLE E. LENTO, *THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT* 4–5 (2d ed. 2011).

37. These laws allowed the federal government to control rents and grant subsidies in an attempt to spur public and affordable housing development. See U.S. Housing Act of 1937, Pub. L. No. 75-412; Emergency Price Control Act of 1942, 50 U.S.C.A. § 961 (2010); Housing Act of 1949, 42 U.S.C.A. § 1441 (2005);

38. *Housing Policy in New York City: A Brief History*, *supra* note 31.

39. Sarah Bean Apmann, *Tenement House Act of 1901*, GREENWICH VILL. SOC’Y FOR HISTORIC PRESERVATION (Apr. 11, 2016), <http://gvshp.org/blog/2016/04/11/tenement-house-act-of-1901/>.

40. *Housing Policy in New York City: A Brief History*, *supra* note 31; *Rent Stabilization/Control*, N.Y. STATE HOMES & COMMUNITY RENEWAL BD., <http://www.nyshcr.org/Rent/>; *Rent Regulation Prior to the Establishment of the Board*, N.Y. STATE HOMES & COMMUNITY RENEWAL BD., <http://www.nycrgb.org/html/about/intro%20PDF/historyoftheboard.pdf>

41. Steve Cohen, *Rent Stabilization: Preserving Low and Moderate-Income Housing*, CITYLAW (Sept. 24, 2015), <http://www.citylandnyc.org/rent-stabilization-preserving-low-and-middle-income-housing/>.

42. *Id.*

housing.⁴³ In 1929, these emergency measures were dropped as the city's vacancy rate went from 1 percent to 8 percent.⁴⁴

After World War II, some federal policies expired as conditions in the national market normalized. Recognizing federal relief would become sparser, the New York legislature chose to solidify the federal housing tools by passing similar state laws addressing rent control and rent stabilization.⁴⁵ Stemming from these laws, such protective measures included the Local Emergency House Control Act of 1962 and the Emergency Tenant Protection Act of 1974.⁴⁶ The Acts granted local municipalities the authority to declare a statutory emergency if the municipality's rental vacancy rate dropped below 5 percent and allowed localities to enact rent stabilization measures in an attempt to control rent during "abnormal market conditions."⁴⁷

Since the passage of the 1974 Emergency Tenant Protection Act, New York City has declared a statutory emergency.⁴⁸ The current New York City rental vacancy rate is 3.45 percent;⁴⁹ it has been below 5 percent since 1960. This has created a capacity problem in New York City that has been exacerbated by the growing popularity of short-term rentals.⁵⁰

43. *Id.*

44. *Id.*

45. *Id.*

46. N.Y. Unconsol. Laws § 8621 (McKinney 1974) (establishing the Emergency Tenant Protection Act (EPTA)).

47. EPTA § 8623 (Local determination of emergency; end of emergency). Like the Federal Price Control Act, the purpose of the 1979 Act was enacted "to prevent exaction of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare." N.Y. Unconsol. Laws § 8622 (McKinney 1979). The declaration of a statutory emergency is a discretionary act by a local legislative body. It is unclear whether a local body must declare the state of emergency over once the rental vacancy rate rises above 5 percent. *See, e.g.,* Garden v. Vill. of Roslyn, 593 N.Y.S.2d 301, 302–03 (N.Y. App. Div. 1993). Examples of "abnormal market conditions" include "speculative, unwarranted, and abnormal increases in rents and speculative and other disruptive practices caused by congestion." N.Y. Unconsol. Laws § 8621.

48. *See* TIMOTHY L. COLLINS, AN INTRODUCTION TO THE NEW YORK CITY RENT GUIDELINES BOARD AND THE RENT STABILIZATION SYSTEM 1, 4 (2016).

49. Elyzabeth Gaumer & Sheree West, *Selected Initial Findings of the 2014 New York City Housing and Vacancy Survey* (Feb. 9, 2015), <http://www1.nyc.gov/assets/hpd/downloads/pdf/2014-HVS-initial-Findings.pdf>.

50. Office of N.Y. State Att'y Gen., *Airbnb in the City*, at 3 (Oct. 2014), <https://ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf> (reporting that Airbnb alone accounted for the displacement of long-term housing options, served as illegal hotels or hostels, and generated the most revenue in "gentrified or rapidly gentrifying neighborhoods"); *see also* Aric Jenkins, *Airbnb Host Rented Out Rooms That Were Illegally Built on the Roof, Officials Say*, FORTUNE (May 18, 2017), <http://fortune.com/2017/05/18/new-york-city-airbnb-dumbo-roof/>.

B. *The New York City Capacity Problem:
Balancing Affordability with the "Tourist Economy"*

The scarcity of available rental units creates an intensely competitive housing market and has increased the cost of New York City rent. Under these statutory emergencies, the City has been able to introduce rent stabilization laws and New York State has enacted legislation to subsidize rents and encourage development of affordable housing.⁵¹ The New York City government considers an apartment to be affordable "when a household spends no more than 30% of its income on rent."⁵² In 2010, approximately 49 percent of New York households exceeded that standard and in 2016, it was reported that the average New York City resident spends more than two-thirds of his or her annual income on rent.⁵³

1. Addressing Affordable Housing in New York City

While New York legislators have largely championed innovative affordable housing practices that have provided residents with an ability to afford rent,⁵⁴ New York City still sees many residents displaced or homeless because of increasing costs for housing.⁵⁵ In the affordable housing arena, New York has attempted to accommodate residents by offering a number of programs, which unfortunately are unable to meet the demand of thousands of applicants who apply each year. For example, New York City has introduced a structure of affordable housing program availability that is based on different tiers for household area median income (AMI). This tiered structure makes applying to available affordable

51. N.Y. Unconsol. Laws § 8626 (McKinney).

52. *Affordable Housing*, NYC.gov, <http://www1.nyc.gov/site/hpd/about/what-is-affordable-housing.page>).

53. N.Y.C. Comptroller, *Rents Through the Roof! A Statistical Analysis of Unaffordable Rents in New York City* at 3 (Sept. 2012), <https://comptroller.nyc.gov/wp-content/uploads/documents/Rents-through-the-Roof.pdf>; Emily Nonko, *New Yorkers Will Spend Two-Thirds of Their Income on Rent In 2016*, CURBED.COM (Apr. 21, 2016), <https://ny.curbed.com/2016/4/21/11477788/this-year-new-yorkers-will-spend-two-thirds-of-their-income-on-rent>

54. N.Y.C. Rent Guidelines Bd., *2015 Housing Supply Report* (updated July 20, 2015) (discussing how New York has attempted to combat a lack of affordable housing with programs such as rent-control and stabilization, city-sponsored housing construction, affordable housing tax incentives, and administratively enacted freezes on increases to rent).

55. Peter Marcuse, *Gentrification, Abandonment, and Displacement: Connections, Causes, and Policy Responses in New York City*, 28 WASH. U. J. URB. & CONTEMP. L. 195, 201 (1985); Michael N. Grynbaum & Nikita Stewart, *Mayor de Blasio, Facing Homelessness Crisis, Issues Plan to Fight It*, N.Y. TIMES (Dec. 17, 2015), <https://www.nytimes.com/2015/12/18/nyregion/mayor-de-blasio-unveils-plan-to-track-homeless-population.html?src=un&feedurl=https%3A%2F%2Fstatic01.nyt.com%2Fpages%2Fnyregion%2Findex.jsonp>.

housing units accessible to the largest possible population by adjusting rents to the household's tier.⁵⁶ Making affordable housing units available to the largest possible population is important to New York because these units are highly coveted.

An example of New York's tiered approach and its affordable housing popularity is the recent housing lottery at Essex Crossing. At Essex Crossing, a multi-use development in the lower east side of Manhattan, 104 of the first 211 units were designated as affordable.⁵⁷ The lottery for the 104 units opened to a range of prospective tenants "making 40 percent of the area median income to those making 165 percent of the AMI. [M]ost units [were] available for those making 60 percent of the AMI, or between \$30,069 and \$63,060 per year (depending on family size)."⁵⁸ Demonstrating the demand for such subsidized housing, the first Essex Crossing lottery drew in over 93,000 applicants for the available 104 units.⁵⁹

New York's support for affordable housing can also be exhibited in the shape of tax incentives. For instance, in 1971 as the City began to experience a rare decrease in population, the legislature introduced the controversial "421-a Tax Program." The 421-a Tax program provided incentives to developers for developing affordable, multi-unit residential buildings on vacant or mostly vacant city land.⁶⁰

More recently, Mayor Bill De Blasio has introduced an ambitious and praiseworthy plan to create 200,000 units of affordable housing.⁶¹ De Blasio's ten-year plan intends to construct 80,000 new units of affordable housing and preserve another 120,000.⁶² Noble in its attempt, the plan has yielded slow

56. *Income Eligibility*, N.Y.C. HOUSING DEV. CORP., <http://www.nychdc.com/pages/Income-Eligibility.html>.

57. Amy Plitt, *Essex Crossing's First Affordable Housing Lottery Has Launched*, CURBED.COM (Mar. 2, 2017), <https://ny.curbed.com/2017/3/2/14786292/lower-east-side-affordable-housing-essex-crossing>.

58. *See id.* (stating studios listed at \$519 a month and \$3,424 a month three-bedrooms).

59. Tanya Warkerkar, *Essex Crossing's First Affordable Housing Lottery Nets Over 93,000 Applicants*, CURBED.COM (June 8, 2017), <https://ny.curbed.com/2017/6/8/15761716/essex-crossing-affordable-housing-applications>

60. Evan Bindelglass, *Everything You Need to Know About NYC's 421-a Tax Program, Poised to Expire Today*, CURBED.COM (Jan. 15, 2016), <https://ny.curbed.com/2016/1/15/10846176/everything-you-need-to-know-about-nycs-421-a-tax-program-poised-to>; Charles V. Bagli, *Affordable Housing Program Gives City Tax Break to Developers*, N.Y. TIMES (Apr. 10, 2017), https://www.nytimes.com/2017/04/10/nyregion/affordable-housing-city-tax-break-developers.html?_r=0.

61. Nonko, *supra* note 53.

62. Jessica Dailey, *De Blasio Unveils 10-Year, \$41B Affordable Housing Plan*, CURBED.COM (May 5, 2014), <https://ny.curbed.com/2014/5/5/10103592/de-blasio-unveils-10-year-41b-affordable-housing-plan>.

results so far.⁶³ One hurdle the mayor suffered was temporary: between 2014 and 2016, the 421-a Tax break was repealed and developers dragged their feet while they waited to see if Governor Cuomo would reinstate the program.⁶⁴

Another hurdle to the creation of affordable housing is more substantial. Developing affordable housing is difficult in overly competitive markets such as New York City because many tenants are able to pay higher rents.⁶⁵ As high-income earners move into New York City, the AMI continues to increase and “affordable” rent becomes less and less obtainable.⁶⁶ While Mayor De Blasio’s program stalls, long-time New Yorkers are finding themselves unable to pay the rising cost of rent and are being priced out of their neighborhoods. Low- and moderate-income New Yorkers are being displaced by high-income earners for whom developers are constructing buildings.⁶⁷

2. Tourism in New York

This capacity problem has been compounded by New York City’s rise in tourism. In 2016, the City set a tourism record by surpassing 60 million visitors in a year.⁶⁸ The attraction of New York as a tourist destination has benefitted the New York City economy by sustaining more than 375,000 jobs and by increasing the City’s work force; 15,000 new employees were hired in 2016 alone.⁶⁹ A key beneficiary of the increase in visitors has been the travel industry, including both hoteliers and short-term rental websites.

For example, in 2016, New York City saw an increase of hotel room bookings by 1.2 million across the five boroughs.⁷⁰ To accommodate this influx of tourists, the mayor’s office has indicated that the City will construct

63. Brad Sylvester, *Housing New York is Making Slow and Steady Progress*, CITY & STATE (June 21, 2017), <http://cityandstateny.com/articles/policy/housing/housing-new-york-progress-so-far.html#.WWwa9tPytE4>.

64. Bagli, *supra* note 60.

65. Alan Ehrenhart, *Why Affordable Housing is Hard to Build*, GOVERNING.COM (June 2016), <http://www.governing.com/columns/assessments/gov-affordable-housing.html>.

66. Nonko, *supra* note 53.

67. Alexandra Schwartz, *The “Poor Door” and the Glossy Reconfiguration of City Life*, NEW YORKER (Jan. 22, 2017), <http://www.newyorker.com/culture/cultural-comment/the-poor-door-and-the-glossy-reconfiguration-of-city-life>.

68. Press Release, Office of N.Y.C. Mayor, Mayor de Blasio Announces Total NYC Visitors Surpasses 60 Million for First Time (Dec. 19, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/963-16/mayor-de-blasio-total-nyc-visitors-surpasses-60-million-first-time>.

69. *Id.* (accounting for growth from varying sectors providing services to the tourism industry).

70. *Id.*

an estimated 29,000 hotel rooms by 2019.⁷¹ Further accommodating these guests were STR hosts, with Airbnb leading the way in booking a record number of trips in the City.⁷² Additionally, visits to the “outer boroughs” have been touted because 2016 saw more than 565,000 tourists hosted by short-term rentals in Brooklyn and more than 22,000 hosted by short-term rentals in the Bronx.⁷³

Recognizing a threat to their market, hotels have fought back against the rise of short-term rentals.⁷⁴ Hotels have also tried to adapt to their popularity and have incorporated themes progressed by short-term rentals.⁷⁵ A result of this adaptation has been the proliferation of boutique hotels.⁷⁶ Attempting to attract hip millennials, hotels across the boroughs are now being developed to have a homier feel.⁷⁷ Conversely, Airbnb is attempting to mature to become a more inclusive travel company, incorporating many themes of traditional hotels.⁷⁸ Hotel developments are progressing as developments for affordable housing are stagnant; as short-

71. *Id.*

72. Jennifer Fermino, *NYC Sees More New Year's Eve Airbnb Rentals Than Any Other City*, NYDAILYNEWS.COM (Dec. 30, 2016), <http://www.nydailynews.com/new-york/nyc-sees-new-year-eve-airbnb-rentals-city-article-1.2928926>; Julie Samuels, *It's Time for New York to Open its Doors to Home Sharing*, CITY & STATE (June 8, 2017), <http://cityandstateny.com/articles/opinion/new-york-airbnb-home-sharing.html>.

73. *New data: more than 565,000 tourists visited Brooklyn on Airbnb in 2016*, BROOKLYN DAILY EAGLE (Mar. 1, 2017), <http://www.brooklyneagle.com/articles/2017/3/1/new-data-more-565000-tourists-visited-brooklyn-airbnb-2016> (reporting a 27% increase in visiting from 2015 to 2016 and \$146 million in hosting income); see also Robert Christie, *Airbnb Hosts 22,000 In Bronx in 2016*, BRONX TIMES (Feb. 26, 2017), <http://www.bxtimes.com/stories/2017/8/08-airbnb-2017-02-24-bx.html> (reporting a 107% increase in visiting from 2015 to 2016 and \$3.5 million in hosting income, a 75% yearly increase).

74. Jillian Jorgensen, *NYC Hotel Workers Union to Fund Primary Elections Backing City Council Candidates*, N.Y. DAILY NEWS (July 26, 2017), <http://www.nydailynews.com/news/politics/nyc-hotel-workers-union-fund-elections-backing-council-runners-article-1.3355617>.

75. Liz Moyer, *Hotels, Feeling the Pinch of Airbnb, Promote Local Experiences*, N.Y. TIMES (May 29, 2017), <https://www.nytimes.com/2017/05/29/travel/hotels-feeling-the-pinch-of-airbnb-promote-local-experiences.html>.

76. Leigh Gallagher, *How Hotels Are Starting to Imitate Airbnb*, FORTUNE.COM (Dec. 22, 2016), <http://fortune.com/2016/12/22/hotels-imitate-airbnb/>.

77. Sarah Schmalbruch, *Meet the Hotels That Want to Look Like Airbnb Rentals*, SLATE.COM (Aug. 21, 2015), http://www.slate.com/blogs/business_insider/2015/08/21/extended_stay_hotels_try_to_compete_with_airbnb_by_adding_luxury_livability.html.

78. Katie Benner, *Airbnb Tries to Behave More Like a Hotel*, N.Y. TIMES (June 17, 2017), <https://www.nytimes.com/2017/06/17/technology/airbnbs-hosts-professional-hotels.html>

term rental and hotel advocates debate, housing advocates are often absent from the conversation.⁷⁹

Tourism should be touted for its support to the New York City economy and as a method of improving United States diplomacy but city and state legislators must also recognize and address New York becoming a “tourist city” and how that impacts the City’s most vulnerable residents. For example, displaced residents are now dealing with harsh public transit options as subway cars and platforms are becoming more expensive, outdated, and over-capacity.⁸⁰ Additionally, disruptions in ride-sharing platforms have raised concerns regarding workers’ rights, an increase of traffic congestion, and an increase in air pollution.⁸¹

As hurdles in developing affordable housing persist and as tourism expands across the City,⁸² elected officials must attempt to tackle a sustainable level of affordability balanced against the attractions and symptoms of a “tourist city.”⁸³ City planners are dealing with pedestrian, commuter,

79. Lucinda Shen, *The Hotel Industry Is Striking Back at Airbnb*, FORTUNE.COM (Apr. 17, 2017), <http://fortune.com/2017/04/17/airbnb-hotel-research/>; Ali Breland, *Airbnb Fires Back at Hotel Industry*, THEHILL.COM (Apr. 19, 2017), <http://thehill.com/policy/technology/329571-airbnb-fires-back-at-hotel-industry>.

80. See Charles E. Schumer, Kristen Gillibrand, Robert Mendez & Cory Booker, *Think New York Transit is Bad? Just Wait*, N.Y. TIMES (Apr. 11, 2017), <https://www.nytimes.com/2017/04/11/opinion/think-new-york-transit-is-bad-just-wait.html>; see also Emma G. Fitzsimmons, *Surge in Ridership Pushes New York Subway to Limit*, N.Y. TIMES (May 6, 2016), <https://www.nytimes.com/2016/05/04/nyregion/surge-in-ridership-pushes-new-york-subway-to-limit.html>; Dan Rivoli, *NYC Council Proposes Millions for Discount MetroCards for Poor, Citi Bike Expansion*, DAILYNEWS.COM (Apr. 4, 2017), <http://www.nydailynews.com/new-york/nyc-council-proposes-millions-discount-metrocards-citi-bikes-article-1.3019098>; Sara Amri, *Fighting for Fair Fares in New York City Through Civil Society Enforcement of Title VI*, BROOK. J. L. & POL’Y [forthcoming Spring 2018].

81. Nomin Ujijediin, *New York City Considers Expanding Brooklyn Bridge Pathways*, WNYC.ORG (Aug. 8, 2016), <http://www.wnyc.org/story/new-york-city-considers-expanding-brooklyn-bridge-pathways/>; Stephen Nessen, *Ride Sharing Apps Are Contributing to Congestion in the City, New Report Finds*, WNYC.ORG (Feb. 27, 2017), <http://www.wnyc.org/story/ride-sharing-apps-are-contributing-congestion-city-new-report-finds>.

82. Greg David, *New Hotels and Euro Safety Fears Could Make 2017 Another Record Year for NYC Tourism*, CRAINSNEWYORK.COM (Dec. 22, 2016), <http://www.crainsnewyork.com/article/20161221/BLOGS01/161229980/can-new-york-citys-tourism-boom-continue-in-2017-against-all-odds-while-nyc-is-where-to-go-for-tourists-coming-from-china-brazil-england-and-more>.

83. K. Sabeel Rahman, *Shape of Things to Come: The On-Demand Economy and the Normative Stakes of Regulating 21st-Century Capitalism*, EUROPEAN JOURNAL OF RISK REGULATION [forthcoming], <https://ssrn.com/abstract=2875883>. For example, city funds are being directed toward efforts to deal with pedestrian, commuter, and tourism over-crowding on the Brooklyn Bridge. Additionally, there are reports of increased traffic congestion and pollution due to a rise in ride hailing applications. Finally,

and tourist overcrowding in innovative ways and should apply innovative thinking to their treatment of short-term rentals. As short-term rental use increases, there have been growing reports detailing their adverse impact on the City's rental market and housing ecosystem; these reports have raised concerns that lawmakers must address and Airbnb would like to swiftly extinguish.⁸⁴

*C. The Impact of Short-Term Rentals on New York City
Affordable Housing*

Increasingly popular, short-term rental units are important to address because they have the direct potential of further decreasing the rental vacancy rate and raising New York City's area median income. With regards to the rental vacancy rate, a 2015 report estimated that if the private short-term rentals on Airbnb alone were relinquished back to the year-round housing market, "the number of vacant rental units citywide would increase by 10 percent and the vacancy rate would rise to 4.0 percent."⁸⁵ If those rental units were returned to the market, they would increase the available rental supply, nudging the rental market toward a normal level.

Additionally, a 2014 report from the New York Attorney General's office—discussed further below—found that many STRs are in gentrifying or rapidly gentrifying neighborhoods.⁸⁶ The Attorney General's report indicates that renters are occupying rentals for the sole purpose of renting them to transient visitors for profit.⁸⁷ The potential impact of this is two-fold: not only are these rentals depleting the market of available

an estimated construction of 29,000 hotel rooms is anticipated by 2019, an increase that may eat into the city's housing stock. Nomin Ujijediin, *New York City Considers Expanding Brooklyn Bridge Pathways*, WNYC.ORG (Aug. 8, 2016), <http://www.wnyc.org/story/new-york-city-considers-expanding-brooklyn-bridge-pathways/>; Stephen Nessen, *Ride Sharing Apps Are Contributing to Congestion in the City, New Report Finds*, WNYC.ORG (Feb. 27, 2017), <http://www.wnyc.org/story/ride-sharing-apps-are-contributing-congestion-city-new-report-finds>; Press Release, *supra* note 68.

84. Frank Shafroth, *Airbnb Creates an Affordable Housing Dilemma for Cities*, GOVERNING.COM (Sept. 2016), <http://www.governing.com/columns/public-money/gov-airbnb-affordable-housing.html>; Rosa Goldensohn, *Friends and Foes of Airbnb Ask City to Focus on 'Bad Actors'*, CRAIN'S N.Y. BUS. (Dec. 19, 2016).

85. BJH Advisors LLC, Housing Conservation Coordinators Inc. & MFY Legal Services Inc., *Shortchanging New York City: The Impact of Airbnb on New York City's Housing Market* at 6 (June 2016). Because the rental vacancy rate would remain below five percent, the city would still be able to enact rent control measures but more apartments would be available on the New York City rental market.

86. Office of N.Y. State Att'y Gen., *Airbnb in the City*, *supra* note 50, at 3.

87. *Id.* at 15–17.

units but they are also potentially raising the area median income (in turn potentially impacting tiers for affordable housing eligibility).⁸⁸

While it was Airbnb's intention to start as a means of bringing together a community and offering a supplemental income, some units on Airbnb in New York have morphed into full-fledged businesses.⁸⁹ While Airbnb may bring tourists into new neighborhoods and provide New Yorkers with a means of paying rising rent, these reports are juxtaposed to claims that Airbnb is disrupting New York's housing ecosystem. For example, some stories corroborate the Attorney General's finding that short-term rentals are most prominent in rapidly gentrifying neighborhoods.⁹⁰ Other reports have found that white hosts in "traditional neighborhoods of color" typically earn more than their African-American neighbors.⁹¹ These are important concerns that New York City must diligently address and concerns Airbnb and other STR platforms should be eager to cooperate on.

1. The Early History of Airbnb in New York

New York City has always been important to Airbnb's growth. In its early stages, New York hosts provided the Airbnb founders with crucial feedback about how to improve the platform operationally.⁹² Moreover,

88. For example, if a high-income earner rents an apartment in Manhattan in which she lives and an apartment in Brooklyn which she rents as an STR, she is actively occupying two rental units and could raise the area-media-income assuming she makes more than the median income in either of her respective areas.

89. Megan Barber, *Airbnb vs. the City*, CURBED.COM (Nov. 10, 2016), <https://www.curbed.com/2016/11/10/13582982/airbnb-laws-us-cities>; Tomio Geron, 'Couch-Surfing' Takes Off with Airbnb, WALL ST. J. (Nov. 11, 2010), <https://blogs.wsj.com/venturecapital/2010/11/11/couch-surfing-takes-off-with-airbnb/> (stating "[t]he service took off after it changed its policy from a "bed and breakfast" idea where the person who rents out the space has to be there when lodgers stay, to one where people can rent out the spaces while the owner is away.").

90. Katie Benner, *A Brooklyn Neighborhood Where Airbnb Is Being Put to the Test*, NYTIMES.COM (July 4, 2016), https://www.nytimes.com/2016/07/04/technology/a-brooklyn-neighborhood-where-airbnb-is-being-put-to-the-test.html?_r=2; Gwynn Hogan, *No Landlords Fined in Airbnb Hot Spot Since City Crackdown Began*, DNAINFO.COM (May 12, 2017), <https://www.dnainfo.com/new-york/20170512/east-williamsburg/landlords-airbnb-illegal-hotel-legislation>.

91. Erin Durkin, *Most Airbnb hosts in black neighborhoods are white, study shows*, N.Y. DAILY NEWS (Mar. 1, 2017); <http://www.nydailynews.com/new-york/airbnb-hosts-black-neighborhoods-white-study-shows-article-1.2985069>; Feliks Garcia, *Airbnb is 'Ravaging' Black Neighbourhoods in New York City and Trying to Hide it, Officials Say*, INDEPENDENT (Apr. 25, 2016), <http://www.independent.co.uk/news/world/americas/airbnb-ravaging-black-communities-new-york-city-a7000761.html>; Office of N.Y. State Att'y Gen., *Airbnb in the City*, *supra* note 50, at 3 (describing how most profits from Airbnb STRs are in gentrifying or rapidly gentrifying areas of NYC).

92. *How I Built This With Guy Raz*, *supra* note 1.

because New York is visited by so many international tourists each year, by converting those visitors into hosts, New York has also been a major contributor to the growth of Airbnb in other countries and cities.⁹³ The growth of hosts in New York should not come as much of a surprise; the platform encourages the entrepreneurial spirit embodied by so many New Yorkers and is often a tool used to alleviate the rising costs of rent.⁹⁴

The popularity and entrepreneurial nature of hosting in New York has also resulted in a variety of rental listings.⁹⁵ For example, some hosts choose to rent out a spare room or allow guests to sleep on a couch.⁹⁶ These types of rentals are aligned with Airbnb's general message to support the "home-sharing" community and foster an environment that encourages hosts to make suggestions about the surrounding area in an effort to promote local businesses.⁹⁷ However, these rentals are often less profitable for hosts because either they are renting infrequently or guests are less likely to book with hosts who stay in the unit during the rental. Other listings offer full apartments and earn more from their guests. The potential to earn more from a unit by offering it as a short-term rental has led to the alleged increase in private short-term rentals and "illegal hotels."⁹⁸

A full apartment unit, or a "private short-term rental," can be listed on a short-term rental platform with different intentions. For example, hosts may list a full apartment because they are out of town and would like to cover the cost of their trip. Other listings of full units may be made available for pecuniary purposes where hosts rent an apartment solely for earning rental income. While the former rental seems innocent and the latter nefarious, both are violations of New York's multiple dwelling law.

93. *Id.*

94. See Laretta Charlton, *Is Airbnb Good for the Black Middle Class?*, *NEW YORKER* (Oct. 5, 2016), <http://www.newyorker.com/tech/elements/is-airbnb-good-for-the-black-middle-class>; see also Ben Chapman, *That's a roof with a view*, *NYDAILYNEWS.COM* (July 21, 2009), <http://www.nydailynews.com/life-style/real-estate/website-airbnb-lets-users-sublet-couches-roofs-odd-spaces-article-1.429969>.

95. See Office of N.Y. State Att'y Gen., *Airbnb in the City*, *supra* note 50, at 2 n.1. Airbnb hosts can offer (1) a "shared room," where the host remains present during the stay, (2) an "entire home/apartment," where the host is not present, or (3) a "private room," where the host may or may not remain present during the stay.

96. *From Air Mattresses to Unregulated Business*, *supra* note 24.

97. See *Who We Are, What We Stand For*, *AIRBNB BLOG*, <http://blog.airbnb.com/who-we-are/>.

98. Julie Bort, *107 New York Airbnb Hosts May Be Breaking The Law*, *BUSINESSINSIDER.COM* (Sept. 3, 2014), <http://www.businessinsider.com/ny-ag-examines-107-airbnb-host-records-2014-9>.

The New York Multiple Dwelling Law (MDL) prohibits renting an entire apartment for less than thirty days if the lessee is unattended by a permanent resident.⁹⁹ Those in favor of the MDL argue that it prohibits the rise of housing units being taken off the market solely for use as a short-term rental.¹⁰⁰ Those in opposition argue that it is too restrictive and draconian.¹⁰¹ Concerns over short-term rentals in New York have played out in public over the last few years as politicians and Airbnb advocates as well as opponents grapple with how to live with one another. A central concern for lawmakers has been how to balance the economic interests gained by Airbnb with the impact of short-term rentals on the housing economy and how to prevent “bad actors” from taking advantage of short-term rental platforms.¹⁰²

While proponents of Airbnb and other short-term rental platforms argue that hosting boosts local economic activity, those arguments often fail to mention the impact that hosting has on the city’s rise of gentrification and the depletion of the city’s rental vacancy rate.¹⁰³ This precarious relationship has been a topic of debate ever since Airbnb transformed from a couch-surfing site¹⁰⁴ to a platform that allows hosts to list private short-term rentals.¹⁰⁵ Today, “[t]he majority of Airbnb consumers choose

99. N.Y. Multiple Dwelling Law art. 1, § 4(8)a; N.Y.C. ADMIN. CODE § 27-2004(a) (8)(a) (amended in 2011 to include § 2.62, “Short term rental of apartments or rooms by tenants or owners”).

100. *Fact vs. Fiction: The Truth on New York Legislation*, SHAREBETTER.ORG, <http://www.sharebetter.org/factsvsfiction/>.

101. Katie Benner, *Airbnb Sues Over New Law Regulating New York Rentals*, N.Y. TIMES (Oct. 21, 2016), https://www.nytimes.com/2016/10/22/technology/new-york-passes-law-airbnb.html?_r=0.

102. Rosa Goldensohn, *De Blasio Ramps Up Airbnb Enforcement*, CRAIN’S N.Y. BUS. (Apr. 26, 2017), http://www.crainsnewyork.com/article/20170426/REAL_ESTATE/170429915/mayor-bill-de-blasio-budgets-1-6-million-to-crack-down-on-airbnb.

103. *New Study: Airbnb Generated \$632 Million in Economic Activity in New York*, AIRBNB.COM (Oct. 22, 2013), https://www.airbnb.com/press/news/new-study-airbnb-generated-632-million-in-economic-activity-in-new-york?show_survey=0 (but other estimates have hosts earning more); see also Rich Bockmann, *Airbnb Revenue in Black Neighborhoods Mostly Goes to White Hosts: Study*, THEREALDEAL.COM (Feb. 24, 2017), <https://therealdeal.com/2017/02/24/airbnb-revenue-in-black-neighborhoods-mostly-goes-to-white-hosts-study/>.

104. Matt Gross, *Going Deep for the Cheap in New York*, N.Y. TIMES BLOG (Dec. 9, 2009 12:01 AM), <https://frugaltraveler.blogs.nytimes.com/2009/12/09/going-deep-for-the-cheap-in-new-york/>.

105. Tom Acitelli, *Airbnb Sees Blue Skies in NYC*, THEREALDEAL.COM (Oct. 31, 2011), https://therealdeal.com/issues_articles/airbnb-sees-blue-skies-in-nyc/; see also Eli Rosenberg, *Welcome, Airbnb Guest! Your Neighbors Are the Trumps*, NYTIMES.COM (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/nyregion/airbnb-trump-tower.html>.

to rent the entire place, rather than sharing quarters or a meal with the owner.”¹⁰⁶ However, the renting of an entire apartment as an STR often means that the housing unit is taken off the market for a potential permanent resident.¹⁰⁷

2. New York’s Regulation of Short-Term Rentals

Permanent resident housing concerns over short-term rentals is not a new topic. In 1929, attempting to combat landlords who were reaping a greater profit by converting residential property units into “illegal hotels,” the New York legislature enacted the Multiple Dwelling Law.¹⁰⁸ The Multiple Dwelling Law is meant to protect tenants from housing conditions that are “a menace to the health, safety, morals, welfare, and reasonable comfort of the citizens of the state.”¹⁰⁹ The MDL echoes the old tenement laws in its attempt to provide a certain livable standard.

In the late aughts, an effort to modernize the MDL was advanced as Mayor Bloomberg’s administration received over 2,500 complaints of “illegal hotels” to the non-emergency (311) line.¹¹⁰ According to complaints, landlords were dodging the restrictions of the law because the term “permanent residence purposes” as used in the MDL was loosely defined.¹¹¹ This led New York legislators to introduce an amendment to the MDL, reading in pertinent part: “A class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this definition, ‘permanent residence purposes’ shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more.”¹¹²

The MDL provides an exception that allows for guest occupancy for less than 30 consecutive days if a permanent resident is present.¹¹³ The

106. *The Sharing Economy*, *supra* note 15, at 16, <https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf>.

107. *Shortchanging New York City*, *supra* note 85, at 26; Office of N.Y. State Att’y Gen., *Airbnb in the City*, *supra* note 50, at 3.

108. Harold Riegelman, *1932 Amendments to Dwelling Law*, 4 N.Y. ST. BAR ASS’N BULL. 288, 288–90 (1932).

109. N.Y. Multiple Dwelling Law art.1, § 2, “Legislative Findings.”

110. Memorandum in Opposition to Airbnb, Inc.’s Motion to Quash and In Support of the Attorney General’s Cross-Motion to Compel Responses to an Investigatory Subpoena at 8, *Airbnb Inc. v. Eric T. Schneiderman* 2014 N.Y. Slip Op. 24129 Index No.: 5593-13 (Nov. 8, 2015) (hereinafter *Schneiderman Opposition to Airbnb Petition*).

111. Deanna Ting, *Airbnb vs. New York City: The Complete Battle Up to Now*, SKIFT.COM (Oct. 25, 2016), <https://skift.com/2016/10/25/airbnb-vs-new-york-city-the-complete-battle-up-to-now/>.

112. N.Y. Multiple Dwelling Law art. 1, § 4.a.8(a); N.Y.C. ADMIN. CODE, tit. 27, ch. 2, art. 1 § 27-2004.8(A) (1980).

113. N.Y. Multiple Dwelling Law § 304.

purpose of the amendment was to clarify and strengthen the statute to more explicitly oppose the influx of sites such as Airbnb.¹¹⁴ The MDL is strengthened by the New York City Code, which states,

It shall be unlawful for any person or entity who owns or occupies a multiple dwelling or dwelling unit classified for permanent residence purposes to use or occupy, offer or permit the use or occupancy or to convert for use or occupancy [a] multiple dwelling or dwelling unit for other than permanent residence purposes.¹¹⁵

While Airbnb and others submitted testimony opposing the amendment,¹¹⁶ it found enough votes to pass and the MDL was changed effective May 1, 2011.¹¹⁷

Under the revised law, New York first challenged the legality of an Airbnb listing in 2012 when the New York City Environmental Control Board levied fines on a landlord and tenant. The Control Board claimed that the tenant was operating his apartment for “illegal use in [a] residential neighborhood.”¹¹⁸ The tenant, Nigel Warren, was renting his East Village apartment for \$100 per night *while his roommate remained in the apartment*.¹¹⁹ Although Airbnb’s terms and conditions relinquished them from any potential liability,¹²⁰ they provided legal support and ultimately helped win an appeal striking Nigel’s fines.¹²¹ Although his case only challenged the

114. “Prior to May 1, 2011, enforcement often proved difficult because the law did not define a threshold for permanent or transient occupancy, with time periods ranging from 30 to 90 days. Residents had been complaining to local leaders for year [sic] about illegal units and conversions, so the city worked with State Senators and Assemblymen to streamline the law to make both compliance and enforcement simple.” Jason Clampit, *Airbnb’s growing pains mirrored in New York City, where half its listings are illegal rentals*, SKIFT.COM (Jan. 7, 2013), <https://skift.com/2013/01/07/airbnbs-growing-pains-mirrored-in-new-york-city-where-half-its-listings-are-illegal-rentals/>.

115. N.Y.C. Admin. Code § 28-210.3.

116. N.Y. Bill Jacket, 2010 S.B. 6873-B, Ch. 225 at 96–98.

117. Clampit, *supra* note 114.

118. Ron Lieber, *A Warning for Hosts of Airbnb Travelers*, N.Y. TIMES (Nov. 30, 2012), <http://www.nytimes.com/2012/12/01/your-money/a-warning-for-airbnb-hosts-who-may-be-breaking-the-law.html>.

119. See Tomio Geron, *Airbnb Wins New York City Appeal on Short-Term Rentals*, FORTUNE.COM (Sept. 27, 2013), <https://www.forbes.com/sites/tomiogeron/2013/09/27/airbnb-wins-new-york-city-appeal-on-short-term-rentals/#76c178e6fabf>.

120. *Terms of Service*, AIRBNB.COM (last updated Oct. 27, 2016), <https://www.airbnb.com/terms/>.

121. *Huge Victory in New York for Nigel Warren and Our Host Community*, AIRBNBCITIZEN.COM (Sept. 27, 2013), <https://www.airbnbcitizen.com/huge-victory-in-new-york-for-nigel-warren-and-our-host-community/>.

legitimacy of renting a room while another lessee remained in the apartment, Airbnb touted the win as a victory for home-sharing.¹²²

After the victory, Airbnb began to go on the offensive. Working with a pro-sharing economy affiliate, Peers.org, Airbnb and its hosts began an effort to repeal the Multiple Dwelling Law in New York.¹²³ Hosts began to visit legislative offices and Peers published targeted advertisements in popular New York political outlets such as *City & State*.¹²⁴ Airbnb also promoted a study that found it generated over \$630 million in economic activity in New York.¹²⁵

Then, in 2013, New York Attorney General Eric Schneiderman subpoenaed Airbnb for information on 225,000 in-state users.¹²⁶ The Attorney General requested the material as a method of cracking down on landlords who were evicting tenants in order to convert units into Airbnb rentals and also to identify tenants who are gone most of the year and using their apartments to generate income.¹²⁷ In another publicity win for Airbnb, after refusing to turn over the information on privacy grounds, a judge quashed the subpoena, declaring it to be overbroad and unduly burdensome.¹²⁸

Unrelenting, the Attorney General issued a new, refined subpoena and days later Airbnb and the Attorney General reached an agreement that required Airbnb to provide data on more than 100 hosts.¹²⁹ In the same

122. See Marcus Wohlsen, *Airbnb Vows to Fight NYC Ruling Against Room Sharing*, WIRED.COM (June 5, 2013), <https://www.wired.com/2013/06/airbnb-fights-nyc/>; see also *Huge Victory in New York for Nigel Warren and Our Host Community*, *supra* note 121.

123. Katie Brennan, *Airbnb Hosts Campaign Against New York Subpoena*, N.Y. TIMES INTRANSIT BLOG (Oct. 18, 2013), <https://intransit.blogs.nytimes.com/2013/10/18/airbnb-hosts-campaign-against-new-york-subpoena/>; see also *Save Airbnb in New York: Legalize Sharing*, PEERS.ORG (2013), <http://action.peers.org/page/s/legalize-sharing-ny> (a petition started in 2013 that has since garnered over 240,000 signatures).

124. Jason Clampet, *New York Legislator Explains What a Legal Rental Is to Airbnb Lobbyists*, SKIFT.COM (Dec. 17, 2013), <https://skift.com/2013/12/17/ny-state-senator-responds-to-airbnb-lobbying-group-with-primer-on-legal-rentals/>.

125. *New Study: Airbnb Generated \$632 Million in Economic Activity in New York*, *supra* note 103.

126. See Ryan Tate, *NY Attorney General Subpoenas Airbnb for Info on 225K Users*, WIRED.COM (Oct. 7, 2013), <https://www.wired.com/2013/10/airbnb-ny/>.

127. Schneiderman Opposition to Airbnb Petition, *supra* note 110, at 3.

128. See *Airbnb Inc. v. Eric T. Schneiderman*, 2014 N.Y. Slip Op. 24129, Index No.: 5593-13 (Nov. 8, 2015).

129. Associated Press, *Schneiderman to Issue New Airbnb Subpoena*, CRAIN'S N.Y. BUS. (May 13, 2014), <http://www.craainsnewyork.com/article/20140513/TECHNOLOGY/140519964/schneiderman-to-issue-new-airbnb-subpoena>.

week, Airbnb removed over 2,000 New York hosts who they claimed were “bad actors providing a low-quality experience.”¹³⁰

In 2014, the Attorney General’s office issued a report detailing findings regarding Airbnb rentals.¹³¹ The report found that most Airbnb rentals in New York violated the Multiple Dwelling Law.¹³² The report also found that “commercial users” accounted for a disproportionate share of “private short-term rentals”¹³³ and that private short-term rentals displaced thousands of apartments that would otherwise be available for permanent residents.¹³⁴ By this time, the Attorney General had been joined by other politicians in opposing the rapid rise of short-term rentals¹³⁵ and third parties were also beginning to study the impact of Airbnb on the city’s rental market.¹³⁶ For example, in a 2016 report disputed by Airbnb, one third-party study claimed that there were 51,397 total New York City Airbnb listings.¹³⁷ Of those, the report identified 8,058 units as “Impact Listings,” listings that are apartments likely removed from the market for the sole purpose of serving as a short-term rental.¹³⁸

Attempting to curb such rentals, state and city legislators began considering how to best crackdown on “bad actors” and how to appropriately enforce the MDL.¹³⁹ As a possible solution, the New York State Assembly

130. Bort, *supra* note 98. Shortly thereafter, New York City reached a \$1 million settlement with Smart Apartments, LLC, one of Airbnb’s most infamous bad actors. Drew Grant, *Infamous Airbnb Hotelier Toshi to Pay \$1 Million to NYC*, OBSERVER.COM (Nov. 20, 2013), <http://observer.com/2013/11/infamous-airbnb-hotelier-toshi-to-pay-1-million-to-nyc/>.

131. Office of N.Y. State Att’y Gen., *Airbnb in the City*, *supra* note 50.

132. *Id.* at 2.

133. The AG’s report defines “private STRs” as Airbnb rentals that are listed as “entire home/apartment” (where the host leaves during the stay) and “private room” (where the host may or may not remain during the stay). *Id.* at 2–3.

134. *Id.* at 2 n.1.

135. John Santore, *Illegal Airbnb Rentals Could See New Fines Under Proposed Legislation*, DNAINFO.COM (Dec. 23, 2015), <https://www.dnainfo.com/new-york/20151223/new-york-city/illegal-airbnb-rentals-could-see-new-fines-under-proposed-legislation>; see also Tess Hofman, *Stringer Aims Concerns About Airbnb Before Council Hearing*, THEREALDEAL.COM (Jan. 19, 2015), <https://therealdeal.com/2015/01/19/stringer-aims-concerns-about-airbnb-before-hearing/>.

136. See Jaron Benjamin & Jonathan Westin, *Airbnb’s Threat to Affordable Housing*, NYDAILYNEWS.COM (Aug. 9, 2014), <http://www.nydailynews.com/opinion/airbnb-threat-affordable-housing-article-1.1897375>; see also Rachel Monroe, *More Guests, Empty Houses*, SLATE.COM (Feb. 13, 2014); *The Impact of Short Term Rentals on Affordable Housing*, *supra* note 24.

137. *Shortchanging New York City*, *supra* note 85, at 26.

138. *Id.* at 27.

139. Jennifer Fermino, *New York City will spend \$10M to crack down on illegal hotels*, NYDAILYNEWS.COM (Nov. 16, 2015), <http://www.nydailynews.com/new-york/nyc-spend-10m-crack-illegal-hotels-article-1.2436047>.

in late 2015 proposed an amendment that introduced an escalating fine—beginning at \$1,000 and going up to \$7,500—per violation of the MDL.¹⁴⁰ The legislation also made it illegal to publicly advertise rentals in violation of the MDL on platforms such as Airbnb.¹⁴¹ In 2016, Governor Cuomo signed the proposed amendment into law.¹⁴²

Airbnb initially attempted to combat the legislation in court.¹⁴³ This suit was a shift away from Airbnb's typical community messaging and focused less on repealing the law and more on Airbnb avoiding liability for the fine.¹⁴⁴ Airbnb dropped the lawsuit after reaching a settlement agreement with New York that ensured all fines would be imposed on the hosts and not Airbnb.¹⁴⁵ However, the newly implemented fine and the outcome of the settlement has left guests wondering if they are renting illegal units and has caused an uproar among Airbnb hosts.¹⁴⁶

II. Living with Airbnb

Aside from public opposition, another complication with the law is determining how many people are breaking it. One obvious problem of regulating short-term rentals in New York has been a lack of clear data.¹⁴⁷ Airbnb itself has disputed third-party reports and has claimed that

140. Santore, *supra* note 135.

141. N.Y.S. Assembly Bill 8704-C (Jan. 13, 2016).

142. Associated Press, *Cuomo signs bill authorizing fines for illegal Airbnb listings*, CRAIN'S N.Y. BUS. (Oct. 21, 2016), <http://www.crainsnewyork.com/article/20161021/TECHNOLOGY/161029968>; Mike Vilensky, *Albany Approves Airbnb Penalties*, WALL ST. J. (June 17, 2016), <https://www.wsj.com/articles/albany-approves-airbnb-penalties-1466206171>.

143. Complaint to Declare Invalid and Enjoin Enforcement of Multiple Dwelling Law Section 121 & New York City Administrative Code Section 27-287.1, *Airbnb, Inc. v. Schneiderman, et al.*, Case No. 16-cv-8239 (Oct. 21, 2016); *see also* Joel Stashenko, *Airbnb Files Lawsuit After Cuomo Signs Deal Imposing Fines for Ads*, N.Y. L.J. (Oct. 21, 2016), <http://www.newyorklawjournal.com/id=1202770471578/Airbnb-Files-Lawsuit-After-Cuomo-Signs-Bill-Imposing-Fines-for-Ads?mcode=1202619332324&curindex=3&slreturn=20170205162150>.

144. Memorandum of Law in Support of Application of Airbnb, Inc. For a Temporary Restraining Order And Preliminary Injunction at 3, *Airbnb, Inc. v. Schneiderman et al.*, Case No. 16-cv-8239 (Oct. 26, 2016) [hereinafter Memorandum of Law in Support of Airbnb].

145. NY Stipulation of Settlement and Dismissal, *Airbnb, Inc. v. Schneiderman, et al.*, Case No. 16-cv-8239 (Dec. 5, 2016) [hereinafter 2016 Settlement].

146. Kristina Conley, *Half of NYC's Airbnb listings are illegal under new law*, NYPOST.COM (Oct. 28, 2016), <http://nypost.com/2016/10/28/half-of-nycs-airbnb-listings-are-illegal-under-new-law/>.

147. *Sleeping Around: Short-Term Rentals and Housing in New York City* at 18, CITIZENS HOUSING & PLANNING COUNCIL (Mar. 2017), <http://chpcny.org/2017/03/sleeping-around-short-term-rentals-housing-new-york-city/> (describing a lack of "reliable, objective, and useful data").

despite some bad actors, its platform has a net-positive impact for New Yorkers.¹⁴⁸ Although it has proffered internal studies that place it in a positive light, Airbnb has added to the opacity of the short-term rental dilemma by its reluctance to release data.¹⁴⁹ This lack of transparency has led to an inability to understand just how pervasive an issue short-term rentals may be; two recent reports have pegged listings in New York City at 46,000 and 51,397, a margin of 5,397 listings.¹⁵⁰

An additional result of this lack of transparency is the inability to know how the newly implemented fine will fare against those it is intended to prohibit or how it may impact those wishing to rent casually. Thus, the newly implemented fine is a prohibition on the influx of “illegal hotels” but it is also prohibitive on others who may wish to rent their space infrequently and as a way to stay in their costly New York apartment.¹⁵¹

In reaction, Airbnb hosts in New York have advocated for the service as a means of remaining a “permanent resident” in a city that is becoming increasingly more expensive.¹⁵² For instance, according to Airbnb, “there are approximately 46,000 hosts [in New York and the] typical New York host rents a unit for 36 nights a year . . . earning approximately \$5,300 in income. Among Airbnb hosts in New York, 78% are low-, moderate-, or middle-income, and 72% of these hosts use the money they earn sharing their space to stay in their homes.”¹⁵³

Additionally, outlets have praised Airbnb for bringing tourists into boroughs and neighborhoods that do not typically attract the tourist economy.¹⁵⁴ Further arguments in favor of short-term rentals have centered

148. *Airbnb Generated \$632 Million in Economic Activity in New York*, *supra* note 103 (but other estimates have hosts earning more).

149. Additionally, much of the attention has been given to just Airbnb and not the other short-term rental platforms.

150. See Memorandum of Law in Support of Airbnb, *supra* note 144, at 5; *but see Shortchanging New York City*, *supra* note 85, at 26 (citing 51,397 “listings”).

151. Joanna Walters, *There’s something in the Airbnb: Hosts Anxious as New York Begins Crackdown*, THEGUARDIAN.COM (Feb. 12, 2017), <https://www.theguardian.com/technology/2017/feb/12/airbnb-hosts-new-york-fines-government-illegal>; Michael Garafalo, *How Williamsburg Airbnb Hosts Are Dealing With the New Law Against Home Sharing*, BEDFORDANDBOWERY.COM (Oct. 27, 2016), <http://bedfordandbowery.com/2016/10/how-are-williamsburg-airbnb-hosts-dealing-with-the-new-law-against-home-sharing/>.

152. Evelyn Badia, *How Airbnb Saved My House*, N.Y. POST (Dec. 8, 2013), <http://nypost.com/2013/12/08/how-airbnb-saved-my-house/>; *see also* Evelyn Badia, *Making a Living With Aibnb*, NYTIMES.COM (Apr. 7, 2017), 3.

153. See Memorandum of Law in Support of Airbnb, *supra* note 144, at 5.

154. *New data: more than 565,000 tourists visited Brooklyn on Airbnb in 2016*, *supra* note 73 (reporting a 27% increase in visiting from 2015 to 2016 and \$146 million in hosting income); *see also Airbnb Hosts 22,000 In Bronx in 2016*, *supra* note 73 (reporting a 107% increase in visiting from 2015 to 2016 and \$3.5 million in hosting income, a 75% yearly increase).

around home-sharing as a beacon of sustainability and progressivism.¹⁵⁵ For example, short-term rentals in New York City have spawned a micro-economy, creating jobs for cleaners, freelance photographers, and technicians.¹⁵⁶ Airbnb—ever the public relations enthusiast—has even publicized a study that declares home-sharing is a “greener” way of traveling.¹⁵⁷

To quell hosts’ concerns, New York legislators have indicated that the MDL is not meant to be a bar on the casual renter.¹⁵⁸ However, regardless of how the city chooses to enforce the current law, the city’s solution does not resolve the issue of how difficult it is to track short-term rentals. Additionally, casual hosts do not appear to be fully informed of how New York intends to enforce the law.¹⁵⁹ These concerns and their potential consequences on affordable housing require a more comprehensive solution.

A. Proposals Within New York

Airbnb has recently addressed the adverse impact of short-term rentals in New York by recently committing to a “One Host, One Home” policy, which would limit Airbnb hosts to one rental property per jurisdiction.¹⁶⁰ The “One Host, One Home” policy is part of Airbnb’s “Community Compact”¹⁶¹ effort, an attempt to work with cities like New York that have, according to Airbnb, “historical housing challenges.”¹⁶²

155. Nathan Heller, *Is the Gig Economy Working?*, NEW YORKER (May 15, 2017), <http://www.newyorker.com/magazine/2017/05/15/is-the-gig-economy-working> (discussing a panel at the Democratic National Convention that suggested home-sharing was sustainable and aligned with progressive values).

156. See e.g., *id.* (describing a company called Happy Host that acts exclusively as a management company for STRs). These micro-economies have also been impacted by the new crackdown in New York. Abby Ellin, *New York’s Housecleaners Become Collateral Damage in Airbnb Crackdown*, FORTUNE.COM (May 17, 2017), <http://fortune.com/2017/05/17/airbnb-regulation-new-york-housecleaners/>.

157. *New Study Reveals A Greener Way to Travel: Airbnb Community Shows Environmental Benefits of Home Sharing*, AIRBNB (July 31, 2014), <https://www.airbnb.com/press/news/new-study-reveals-a-greener-way-to-travel-airbnb-community-shows-environmental-benefits-of-home-sharing>.

158. Hogan, *supra* note 91 (discussing the mayor’s office’s intent to crackdown on commercial and dangerous landlords).

159. Walters, *supra* note 151.

160. 2016 Settlement, *supra* note 145, at 1; see also *One Host, One Home: New York City*, AIRBNBCITIZEN.COM (July 2016), <https://www.airbnbaction.com/wp-content/uploads/2016/07/OneHostOneHomeNewYorkCity-1.pdf>.

161. *The Airbnb Community Compact*, AIRBNB ACTION.COM (2015), <https://www.airbnbaction.com/wp-content/uploads/2015/11/Airbnb-Community-Compact.pdf>.

162. See Memorandum of Law in Support of Airbnb, *supra* note 144, at 5. Airbnb does not define “historic housing challenges” in its memorandum. However, Airbnb’s *Policy Tool Chest* New York as facing “affordable housing challenges” because of the city’s previous poor decision making: “[New York City is] facing

Attempting to add to New York's long history of policy and land use decisions, New York State Senator Martin Golden introduced legislation to cope with short-term rentals. Senator Golden's proposal introduced an amendment to the Multiple Dwelling Law that aimed to balance the interests of the casual renter while providing a means of prohibiting the "bad actor." In 2013, he circulated a draft amendment that would provide a carve-out for a "specific class of good actors."¹⁶³ The bill proposed

a registration process where individuals would pay the Buildings Department \$200 per apartment to register as a short-term rental unit. [Single Room Occupancies (SROs)], rent-stabilized and rent-controlled units would not be eligible. No individual could have more than 30 short-term rental registrations under his or her name, and hotel taxes would be required, as well as smoke detectors and evacuation diagrams.¹⁶⁴

In essence, the Golden proposal would have implemented both a hotel tax and a permitting process, requiring all short-term rentals to be registered with the Buildings Department. The Golden proposal would have been at odds with the current "One Host, One Home" policy by allowing up to thirty short-term rentals under one host and would have restricted who could host by preventing hosting in rent-controlled units.¹⁶⁵

The Golden proposal never made it out of committee; however, the proposal serves as an early model for an Airbnb permitting process and hotel tax, both of which have been solutions developed and implemented by other municipalities outside of New York. New York's residential and tourist populations distinguish it from other cities, but New York can learn from the experiences and solutions of other localities.

B. Solutions from Other Cities

Outside of New York, cities have faced their own dilemmas in dealing with how to adapt to the rise of Airbnb. Cities such as New Orleans, Nashville, Oakland, San Diego—and even Airbnb's hometown of San Francisco—have faced growing pains and have proposed varying solutions. Cause for concern has not just impacted U.S. cities but has been addressed by international municipalities, such as Barcelona, London, and even Tasmania. The proposed solutions from these cities have ranged from potential ballot initiatives—which provided voters with an opportunity to address

affordable housing challenges that are rooted in policy and land use decisions made long before the internet or Airbnb were created. For example, housing prices in New York increased by 250 percent from 1974 to 2006." *Airbnb Policy Tool Chest*, *supra* note 24, at 8.

163. Annie Karni, *Airbnb: Hugely popular, still illegal*, *CRAIN'S N.Y. BUS.* (May 12, 2013).

164. *Id.*

165. N.Y.S. Assembly Bill 4263-A (Mar. 25, 2011), http://assembly.state.ny.us/leg/?default_fld=&bn=S04263&term=2011&Summary=Y&Actions=Y&Text=Y&Votes=Y.

short-term rentals directly—to legislatively enacted moratoriums on STRs in certain cities or municipal zones.¹⁶⁶ These solutions vary in degree of regulatory burden, such as simply collecting a tax to introducing a comprehensive permitting program.

Below is a brief description of some of the solutions used by other cities and how they may be compared to the Airbnb dilemma in the New York City.

1. A Moratorium

A few jurisdictions have gone to the extreme of issuing moratoriums on short-term rentals. Notably, municipalities that have issued or considered a moratorium are typically driven by tourist economies. These cities include Anaheim, Amsterdam, Duluth, Laguna Beach, Nashville, New Orleans, Palm Springs, Port Townsend, and San Diego.¹⁶⁷ Moratoriums are often issued for a specified period and provide lawmakers with an opportunity to consider the appropriate implementation of short-term rentals into the local housing ecosystem. Understandably, because the imposition

166. Rebecca Bowe, *S.F. Voters to Decide on Airbnb Rentals, Mission Moratorium and Other Housing Measure*, KQED NEWS (Sept. 30, 2015), <https://www.kqed.org/news/2015/09/30/s-f-voters-to-decide-on-airbnb-rentals-mission-moratorium-and-other-housing-measures/>.

167. Joseph Pimentel, *Anaheim Extends Moratorium on Short Term Rentals*, OCRREGISTER.COM (Apr. 13, 2016), <http://www.ocregister.com/articles/short-711996-city-term.html>; Gavin Haines, *Amsterdam has Become 'Unlivable' as Residents Fight Back to Stop 'Disneyfication' of City*, TELEGRAPH.CO.UK (Dec. 2, 2016), <http://www.telegraph.co.uk/travel/destinations/europe/netherlands/amsterdam/articles/how-amsterdam-is-tackling-disneyfication/>; Peter Passi, *Duluth Places Moratorium on Vacation Rental Permits*, DULUTH NEWS TRIB. (June 15, 2015), <http://www.duluthnewstribune.com/news/3767107-duluth-places-moratorium-vacation-rental-permits>; Bryce Alderton, *New Rules in Laguna Beach Target Airbnb and Other Short-Term Housing*, LATIMES.COM (Sept. 10, 2016), <http://www.latimes.com/local/lanow/la-me-laguna-short-term-housing-20160909-snap-story.html>; Eric Snyder, *Metro Council to Consider Moratorium on Airbnb Properties*, NASHVILLE BUS. J. (Jan. 9, 2017), <http://www.bizjournals.com/nashville/news/2017/01/09/metro-council-to-consider-moratorium-on-airbnb.html>; Jeff Adelson, *City Council Approves New Short-term Rental Rules*, NEW ORLEANS ADVOCATE (Oct. 20, 2016), http://www.theadvocate.com/new_orleans/news/politics/article_315b13fc-971b-11e6-8898-ef43f90825c4.html; Katherine Rosman, *Palm Springs Is Hot. The Old Guard Is Hot Under the Collar*, NEWYORKTIMES.COM (Mar. 4, 2017), https://www.nytimes.com/2017/03/04/style/palm-springs-hotels-airbnb-vacation-rental-homes.html?_r=0; Cyndey Mcfarland, *Port Townsend City Council Approves Moratorium on Tourism Homes*, PENINSULA DAILY NEWS (Mar. 24, 2017), <http://www.peninsuladailynews.com/news/port-townsend-city-council-approves-moratorium-on-tourism-homes/>; Phil Diehl, *Del Mar Places Moratorium on New Short-term Rentals*, SAN DIEGO UNION TRIB. (Apr. 16, 2016), <http://www.sandiegouniontribune.com/sdut-del-mar-places-moratorium-on-short-term-rentals-2016apr06-story.html>.

of a moratorium has an immediate adverse impact on multiple parties, moratoriums have been met with hostility by Airbnb advocates. Hosts may not legally offer short-term rentals and guests may not book them. The result is a loss in revenue for hosts as well as intermediary platforms such as Airbnb.¹⁶⁸ Localities also decrease their number of potential rental options for would-be visitors.

While the above-mentioned cities have serious housing concerns, they are all much smaller than New York. Additionally, their concerns with regulating short-term rental platforms trend more toward conflict within the local tourism industry than conflict regarding resident affordability and livability.¹⁶⁹ Furthermore, although criticism of Airbnb in New York has called for a proactive crackdown on listings that are in violation of the MDL, there has not yet been a push for a moratorium. A moratorium on all short-term rentals in New York would be difficult to enforce and would likely cause political backlash.

2. A Tax

A policy measure that appears more popular than the moratorium—particularly for larger municipalities—is the introduction of a tax. Airbnb first implemented a hotel tax in 2014.¹⁷⁰ The tax was piloted in Portland, Oregon, and San Francisco earned \$5 million total between those localities in less than a year.¹⁷¹ Airbnb argues that hotel taxes are archaic and should not apply to short-term rentals. However, recognizing that a tax would be a reasonable concession to operate, Airbnb created a voluntary collection agreement, which allows it to collect and remit the local tax.¹⁷²

168. *Airbnb Policy Tool Chest*, *supra* note 24, at 5, https://www.airbnbucitizen.com/wp-content/uploads/2016/12/National_PublicPolicyTool-ChestReport-v3.pdf (stating, “the California Coastal Commission (CCC) went on record in support of sensible short-term vacation rental policies, convinced that home sharing provides a more affordable way for many travelers, including groups and families, to visit expensive beach communities. The CCC has found that prohibiting such rentals in some cases would limit lodging opportunities for coastal visitors and ultimately discourage public access to beaches.”).

169. Eric Snyder, *Nashville’s Top Tourism Chief Backs Airbnb Moratorium*, NASHVILLE BUS. J. (Feb. 2, 2017), <https://www.bizjournals.com/nashville/news/2017/02/02/nashvilles-top-tourism-chief-backs-airbnb.html>; Matt McKinney, *As Airbnb Takes Off, Duluth and Other Cities Wrestle with Rules*, STAR TRIBUNE (July 5, 2015), <http://www.startribune.com/as-airbnb-takes-off-cities-wrestle-with-rules/311651521/>; Weisberg, *supra* note 18.

170. Emily Badger, *Airbnb is About to Start Collecting Hotel Taxes in More Major Cities, Including Washington*, WASH. POST (Jan. 29, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/01/29/airbnb-is-about-to-start-collecting-hotel-taxes-in-more-major-cities-including-washington/?utm_term=.e1439fa7be76.

171. *Id.*

172. *Airbnb Policy Tool Chest*, *supra* note 24, at 4 (stating, “When a jurisdiction signs a VCA with Airbnb, we collect and remit appropriate local taxes from guests

Since 2014, the hotel tax has been expanded to cities such as Amsterdam, the District of Columbia, London, and dozens of others.¹⁷³ As Airbnb usage expands, revenue from a hotel tax is likely to increase.¹⁷⁴ For example, in 2015, when Airbnb first proposed collecting a hotel tax in New York, it estimated the raised revenue would be \$21 million annually; the estimated amount in 2017 was a predicted \$90 million per annum.¹⁷⁵

As discussed above, Airbnb prefers this solution because the burden to pay the tax rests with the host and the guest.¹⁷⁶ Furthermore, the tax—often ranging between 5 percent and 14.5 percent—is not so great that it is a deterrent for potential Airbnb users. However, and understandably, Airbnb has resisted proposed tax remedies when they appear to be too burdensome on its users.¹⁷⁷ For example, in London, the city chose to go beyond a simple hotel tax, introducing a more comprehensive tax plan for STRs that provided those who rented their spare rooms with certain tax incentives.¹⁷⁸ However, with the UK now considering a repeal of the so-called “rent-a-room tax break,” Airbnb has pushed back against a repeal of the favorable law because users have raised concerns about tax compliance burdens and the implementation of the U.K. collecting the tax.¹⁷⁹

Other criticisms for and against the tax remedy has come from outside of Airbnb and its advocates. For instance, a 2017 *Financial Times* report suggests that Airbnb has a distinct advantage over hoteliers in the U.K.

as part of their booking transactions and remit the tax revenue directly to the proper tax administrator on behalf of hosts”).

173. Badger, *supra* note 170; Amelia Murray, *Budget 2017: Up to 50,000 Airbnb Hosts Could Pay Between £400 and £3,300 More Tax*, TELEGRAPH.CO.UK (Mar. 11, 2017), <http://www.telegraph.co.uk/tax/income-tax/budget-2017-50000-airbnb-hosts-could-pay-400-3300-tax/>.

174. Tessa Love & Allen Young, *Airbnb Says it Made \$175M for Local Municipalities in 2016—and Would Have Made More if They’d Cooperated*, SACRAMENTO BUS. J. (Jan. 17, 2017), <http://www.bizjournals.com/sacramento/news/2017/01/17/airbnb-sf-taxes-regulations-tot.html>.

175. Samantha Shankman, *Airbnb’s Newest Plan for Gaining Legitimacy in New York City: Pay \$21 Million in Taxes*, SKIFT.COM (Mar. 28, 2014), <https://skift.com/2014/03/28/airbnbs-newest-plan-for-gaining-legitimacy-in-new-york-city-pay-21-million-in-taxes/>; see also Tom Precious, *Airbnb Offers to Pay Collect Taxes on Customers in New York*, BUFFALONEWS.COM (Oct. 19, 2016).

176. *Airbnb Policy Tool Chest*, *supra* note 24, at 4.

177. Leslie Hook, *Airbnb Faces \$400m Lost Bookings in London Crackdown*, FT.COM (Jan. 2, 2017), <https://www.ft.com/content/3bedf28e-c63d-11e6-8f29-9445cac8966f>.

178. *Rent a Room in Your Home: The Rent Room Scheme*, GOV.UK, <https://www.gov.uk/rent-room-in-your-home/the-rent-a-room-scheme>.

179. Murray, *supra* note 173 (hosts are doubtful of a bookkeeping burden and computer oversight program that they claim is overbearing).

because of the current tax structure.¹⁸⁰ The report suggests that the current tax structure disproportionately favors small businesses and residents sharing a room.¹⁸¹ The *Financial Times* suggests that a more analogous tax plan to that of London's hotels would seem to even the now disparate competitive advantage.¹⁸² Airbnb counters this argument by declaring that the service they provide is disparate and distinct from the service a large hotel provides.¹⁸³

Other constituents outside of the Airbnb circle have expressed contradicting opinions regarding a tax.¹⁸⁴ For example, some New York hotel advocates have been strictly opposed to the hotel tax, arguing that the collection of the tax is Airbnb's attempt to "legitimize what [the hotel association] see[s] as an illegal business."¹⁸⁵ In contrast, after years of refusing to legitimize Airbnb through avoiding its offer to collect a hotel tax,¹⁸⁶ the New York Attorney General finally declared that hosts should be liable for the "hotel room occupancy tax."¹⁸⁷ However, due in part to a lack of comprehensive legislation, the responsibility to pay the tax is still in question. Additionally, tax implementation and compliance oversight measures also remain unclear.¹⁸⁸

3. A Comprehensive Approach

Approaches that deal with this lack of clarity often do so by means of more comprehensive legislation, introducing statutory rules or amendments to address and regulate short-term rentals. While providing clearness, opponents to these approaches have argued that they often introduce a greater regulatory burden on hosts and, subsequently, hosting platforms.¹⁸⁹ Examples of these approaches have ranged from restricting public

180. Vanessa Houlder, *Airbnb's Edge on Room Prices Depends on Tax Advantages*, FT.COM (Jan. 2, 2017), <https://www.ft.com/content/73102c20-c60e-11e6-9043-7e34c07b46ef>.

181. *Id.*

182. *Id.*

183. *Id.*

184. Airbnb, *New York Hotel Lobbyists Flip-Flop on Taxes*, AIRBNBCITIZEN.COM (Apr. 17, 2017), <https://www.airbnbcitizen.com/new-york-hotel-lobbyists-flip-flop-on-taxes/>.

185. Kaja Whitehouse, *Airbnb Aims to Start Taxing Renters by July 1*, NYPOST.COM (Apr. 14, 2014), <http://nypost.com/2014/04/14/airbnb-aims-to-start-taxing-renters-by-july-1/>.

186. Dara Kerr, *Airbnb: Let us Pay Hotel Taxes in New York*, CNET.COM (Apr. 15, 2015), <https://www.cnet.com/news/airbnb-let-us-pay-hotel-taxes-in-new-york/>.

187. See Office of N.Y. State Att'y Gen., *Airbnb in the City*, *supra* note 50, at 9; see also Hotel Room Occupancy Tax, N.Y.C. Dep't of Finance, <http://www1.nyc.gov/site/finance/taxes/business-hotel-room-occupancy-tax.page>.

188. REVENUE ACTIONS AND STAR: FY 2018 EXECUTIVE BUDGET BRIEFING BOOK 13 (2017); see also Speier, *supra* note 19.

189. Murray, *supra* note 173.

advertising of STRs to requiring a special permitting process. Localities that have introduced or have considered more stringent requirements include: Amsterdam, Austin, Barcelona, Berlin, Denver, Kansas City, London, Los Angeles, New Orleans, Oklahoma City, Portland, and a growing number of others.¹⁹⁰ These cities trend more toward addressing historical housing complications and are more analogous to New York City than the traditional tourist cities mentioned above. Responses in these cities should be used by New York lawmakers to inform how to appropriately address Airbnb and other short-term rental hosting platforms as they integrate into the New York City housing ecosystem.

Some of these jurisdictions are like that of New York—and have legislation that is similar to the MDL—but have been more proactive in their administration of the law. For example, Berlin has outlawed the short-term rental of entire apartment unit without a permit and Barcelona has placed a moratorium on short-term rental hosting registrations.¹⁹¹ To enforce the law, both Berlin and Barcelona have implemented large fines and encouraged people to anonymously report neighbors they suspect are renting units illegally.¹⁹² Such enforcement has been rallied against by

190. Nicky Woolf, *Airbnb Regulation Deal with London and Amsterdam Marks Dramatic Policy Shift*, *THEGUARDIAN.COM* (Dec. 3, 2016), <https://www.theguardian.com/technology/2016/dec/03/airbnb-regulation-london-amsterdam-housing>; Austin Code Department: Vacation Rental Listing, *AUSTINTEXAS.GOV*, <https://www.austintexas.gov/str>; Natasha Lomas, *Airbnb Faces Fresh Crackdown in Barcelona as City Council Asks Residents to Report Illegal Rentals*, *TECHCRUNCH.COM* (Sept. 19, 2016), <https://techcrunch.com/2016/09/19/airbnb-faces-fresh-crackdown-in-barcelona-as-city-council-asks-residents-to-report-illegal-rentals/>; Business Licensing Center: Short-Term Rental Regulations & Licensing in Denver, *DENVERGOV.ORG*, <http://www.denvergov.org/content/denvergov/en/denver-business-licensing-center/business-licenses/short-term-rentals.html>; Diane Stafford, *Kansas City proposes an ordinance to require permit fees from Airbnb hosts*, *KANSAS CITY STAR* (Feb. 13 2017), <http://www.kansascity.com/news/local/article132421899.html>; Hillel Aron, *L.A. Is Poised to Enact Strict Airbnb Regulations*, *LAWEEKLY.COM* (June 23, 2016), <http://www.laweekly.com/news/la-is-poised-to-enact-strict-airbnb-regulations-7056105>; City of New Orleans: Short Term Rental Administration, *NOLA.GOV*, <http://www.nola.gov/short-term-rentals/>; Oklahoma City: Home Sharing Requirements, *OKC.GOV*, <https://www.okc.gov/departments/finance/taxes/home-sharing-requirements>; Portland Development Services—Accessory Short-Term Rental Permits, <https://www.portlandoregon.gov/bds/65603>.

191. Lomas, *supra* note 190; Agence France-Presse, *Berlin's Government Legislates Against Airbnb*, *THEGUARDIAN.COM* (May 1, 2016), <https://www.theguardian.com/technology/2016/may/01/berlin-authorities-taking-stand-against-airbnb-rental-boom>.

192. Lomas, *supra* note 190; *Berlin's Government Legislates Against Airbnb*, *supra* note 191. Barcelona has provided guests with a method of clarity by providing a

residents but the proactive nature and clarity in the law has at least established clear guidelines for renters and visitors.

Other cities have been stricter than New York in addressing short-term rentals. Like Barcelona, these municipalities often require a license or a permit to serve as a host of a short-term rental. These registrations have provided outlets for the casual renter by allowing permit or license holders to rent their units for a designated number of days per year.¹⁹³ For example, in late 2016—as New York was settling a deal with Airbnb that would ensure liability for a fine to rest with its hosts—Amsterdam and London introduced legislation that would make Airbnb responsible for policing the number of days non-registered units were rented through their website.¹⁹⁴ Under the deal, listings were to be removed after a host rented the unit for a specified number of days per year, sixty in Amsterdam and ninety in London.¹⁹⁵

Similar registration requirements have been introduced in the United States. In 2016, the County of Los Angeles introduced legislation that required short-term rental hosts to register with the county, pay a small registration fee, and pay both a business tax and a “bed tax,” which L.A. hotels must also pay.¹⁹⁶ Among other restrictions, the law prohibits residents from renting short-term rentals for more than 180 days per year and requires landlord consent to operate, and hosts are restricted to only one listing.¹⁹⁷ Also in 2016, and similar to the MDL, the City of Santa Monica narrowed the county legislation by enacting legislation that prohibits residential rentals for less than thirty days without a permanent resident present.¹⁹⁸ Santa Monica went a step further than the MDL, requiring all residents obtain a business license and pay a 14 percent tax on all rentals.¹⁹⁹

Although less like the MDL, recent New Orleans legislation perhaps provides the best model for New York.²⁰⁰ In 2017, like the municipalities

website which allows guests to check whether a short-term rental is illegal before booking.

193. Woolf, *supra* note 190.

194. *Id.*

195. *Id.*

196. Aron, *supra* note 190.

197. Department of City Planning: Recommendation Report City Planning Commission (June 23, 2016), <http://planning.lacity.org/ordinances/docs/HomeSharing/StaffRept.pdf>.

198. Ivan Penn, *Airbnb Sues Santa Monica over Short-term Rental Ban*, LATIMES.COM (Sept. 2, 2016), <http://www.latimes.com/business/la-fi-airbnb-lawsuit-santa-monica-20160903-snap-story.html>.

199. *Id.*

200. Katie Benner, *New Orleans Becomes New Model for Airbnb to Work With Cities*, NYTIMES.COM (Dec. 7, 2016), <https://www.nytimes.com/2016/12/07/technology/new-orleans-airbnb-model.html>; Kevin Litten, *Airbnb: New Orleans Will Become Nationwide Model for Short-term Rental Enforcement*, NOLA.COM

above, New Orleans introduced regulations that would require all short-term rental hosts to obtain a permit, pay taxes, and cap the number of days per year a resident could rent his entire apartment;²⁰¹ the regulation also implemented a ban on short-term rentals in certain districts, such as the French Quarter.²⁰² In New Orleans, Airbnb worked more collaboratively with regulators and administrators than in other cities in the past. For example, Airbnb made rare concessions in data sharing; an issue the company has been previously reluctant to negotiate.²⁰³ Airbnb also worked with New Orleans by streamlining the permit registration process and “adopt[ing] a pass through registration system that would allow the platform to submit a registration to the City on the Host’s behalf.”²⁰⁴ While New Orleans has a considerably smaller population, New York can learn from its regulatory goals and procedures²⁰⁵ and build upon the New Orleans and Los Angeles models.

III. Policy Projections

Recently, both Airbnb policy personnel and New York lawmakers have indicated that they are open to a more comprehensive approach. For example, in 2016, as the New Orleans legislation was being introduced, Airbnb released a *Policy Tool Chest* (PTC), which addressed the need to “work with local governments to craft progressive, fair rules for home sharing.”²⁰⁶ The PTC is a follow-up report to the Airbnb Community Compact and offers policy considerations from lessons learned in jurisdictions across the world.²⁰⁷ The principle suggestions of the PTC included:

- *Tax collection* through a tool developed by Airbnb called the “Voluntary Collection Agreement” (VCA), which ensures the appropriate taxes are collected and remitted;

(Nov. 30, 2016), http://www.nola.com/politics/index.ssf/2016/11/airbnb_new_orleans_model.html.

201. Benner, *supra* note 200.

202. A concession Airbnb made partly to appease hotel industry advocates. *Id.*

203. *Id.*; see also Penn, *supra* note 198 (Santa Monica was the third city sued by Airbnb over a law that mandated it share user data); Robert McClendon, *In Push for Legalization, Airbnb Releases New Orleans Data for the First Time*, NOLA.COM (Nov. 17, 2015), http://www.nola.com/politics/index.ssf/2015/11/in_push_for_legalization_airbn.html. *Contra Airbnb Policy Tool Chest*, *supra* note 24, at 2 (Airbnb stating that data has been released in 19 jurisdictions).

204. City of New Orleans, Short Term Rental Zoning Amendments & Enforcement Regulations at 10 (2016), <https://assets.documentcloud.org/documents/3181618/STR-Presentation-Final-102016.pdf>; see also *Airbnb Policy Tool Chest*, *supra* note 24, at 9 (describing three preferred methods of registration).

205. City of New Orleans, Short Term Rental Zoning Amendments & Enforcement Regulations at 3.

206. *Airbnb Policy Tool Chest*, *supra* note 24, at 2.

207. *Id.* at 3.

- Being “*Good Neighbors*” through the implementation of policies such as the “*Friendly Buildings Program*,” which “brings building owners and landlords to the table with their tenants, and with [Airbnb], to enable home sharing on their properties under rules they help create”;
- *Accountability* through measures such as limits to the number or nights per year, rules for rent-stabilized and social housing, and regulations on the number of listings; and
- *Transparency and Privacy* through mechanisms such as annual reports and anonymous data sharing.²⁰⁸

The PTC specifically suggests New York enact some of these measures and elsewhere cites New York as an example of positive short-term rental policies.²⁰⁹ It appears New York lawmakers have heeded some of these suggestions. In April 2017, Assembly Members Joseph Lentol and James Skoufis introduced proposed MDL amendments (Lentol proposal) that included components from the PTC, the New Orleans legislation, and other jurisdictions previously mentioned. Providing a carve out for the occasional host, the Lentol proposal would:

- Institute a hotel *tax collection* on all STRs to be administered through a VCA with hosting platforms;
- Implement a *registration process* to be administered by the Division of Housing and Community Renewal. Hosting platforms would be able to implement a “pass through registration” allowing hosts to register with the Division directly through their platform;
- Require *safety standards*, such as distinct posting of evacuation diagrams and emergency phone numbers as well as require *insurance* to protect against third-party claims; and
- Place a *limit on the number of STRs a host can operate* to one “class A multiple dwelling unit,” an attempt at codifying the “One Host, One Home” policy.²¹⁰

Although the Lentol proposal received criticism for plagiarizing language used by Airbnb, his proposal does include regulations not expressed in the Airbnb PTC,²¹¹ i.e., amendments such as limits on generated rent in rent controlled units, requirements of hosts and hosting platforms to maintain records related to guests and rentals, data sharing

208. *Id.* at 1–3.

209. *Id.* at 4.

210. N.Y.S. ASSEMBLY PROPOSAL A7520 (Apr. 28, 2017), http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A07520&term=2017&Summary=Y&Actions=Y&Memo=Y&Text=Y.

211. Gwynne Hogan, *Assemblyman’s Pro-Airbnb Legislation Plagiarizes Lingo From Company’s Memo*, DNAInfo.com (May 3, 2017), <https://www.dnainfo.com/new-york/20170503/williamsburg/joseph-lentol-airbnb-affordable-housing>.

and reporting by hosting platforms, the mandatory creation of a 24-hour complaint platform administered by the hosting platforms, requirements to notify hosts about permit registration, and regulations such as escalating fines or repayment of earned income received in violation of the MDL.²¹²

While offering a comprehensive approach, notably absent are some of the restrictions that were implemented by other cities to protect affordable housing for permanent residents. For example, the Lentol proposal was mute in addressing a cap on the number of days a full apartment can be rented per year and restrictions on short-term rentals in certain municipal zones. Additionally, while the Lentol proposal establishes reporting requirements, it appears they would be inadequate in addressing how to appropriately measure and monitor the impact of short-term rentals.

While noble in its attempt to force collaboration with municipalities, the insertion of catch-all provisions leads the Lentol proposal to be self-defeating, leaving the City unable to identify “bad actors.”²¹³ Furthermore, because the amended definition of a “short-term rental host” does not restrict the definition to an individual person, individuals could theoretically establish separate legal entities as “owners” to skirt the “One Host, One Home” amendment. Even if the amendment were revised to restrict individuals specifically to one listing, the Lentol proposal would not restrict the proliferation of private short-term rentals—individuals would still be able to take housing units off of the market for potential permanent residents for the sole purpose of using them as short-term rentals.

Understandably, these proposals were met with vehement opposition by other elected officials because they were not strong enough to prohibit the adverse impact of short-term rentals on the already debilitated stock of affordable housing.²¹⁴ As exhibited by these lawmakers and—as displayed by the rise in short-term rental use by New Yorkers—New York has a responsibility to deal with these issues in a more proactive manner and such a plan appears to be on the horizon. Policy discussions have consistently progressed since the embattled disputes between 2012 and 2015, and serious concessions have been made by both Airbnb and New York

212. N.Y.S. ASSEMBLY PROPOSAL A7520, *supra* note 210.

213. Under Section 209(2)(b)(ii), “Requirements of hosting platforms,” the final sentence of the subsection reads: “Hosting platforms shall not have the obligation to disclose any listing or host-level information if the disclosure could reasonably lead to the identification of a specific property or short-term rental host.” *Id.*

214. Mike Vilensky, *Battle Over Airbnb Legislation Heats Up in Albany*, WSJ.COM (May 4, 2017), <https://www.wsj.com/articles/battle-over-airbnb-legislation-heats-up-in-albany-1493936838>; Mike Vilensky, *New York Lawmaker Introduces Airbnb Bill*, WSJ.COM (Apr. 30, 2017), <https://www.wsj.com/articles/new-york-lawmaker-introduces-airbnb-bill-1493590614>; Kadia Goba, *Lentol, Mosley Lock Horns Over Airbnb Legislation*, KINGSCOUNTYPOLITICS.COM (May 3, 2017), <http://www.kingscountypolitics.com/lentol-mosley-lock-horns-airbnb-legislation/>.

lawmakers.²¹⁵ Additionally, there appears to be solid support for comprehensive reform, beginning with the introduction of the Golden proposal in 2012 to the Lentol proposal in 2017. However, New York needs to deal with this matter in a more communal manner, introducing further steps to adequately regulate the impact of short-term rentals on the New York City housing ecosystem.

In attempting to balance the competing interests, New York lawmakers should take a similar approach to New Orleans and Los Angeles, amending the Multiple Dwelling Law to introduce comprehensive legislation that provides a more proactive attitude toward the regulation of short-term rentals. To adequately address the rise of short-term rentals, New York should take the following steps: (1) require all hosts to have a permit to operate a short-term rental, (2) limit hosts to one listing, (3) require short-term rental platforms to share certain user data, (4) limit the number of nights per year an entire apartment may be listed as available for rent, (5) ban and cap short-term rentals in certain municipal zones, (6) require collection of a tax, and (7) consider creating a government agency or division to administer and oversee short-term rentals. This type of comprehensive legislation would provide for the occasional renter to benefit from platforms such as Airbnb while also providing clear guidelines that curb the adverse impact STRs have on the New York City housing ecosystem.

A. A New York City Short-Term Rental Permit Process

A permit requirement is a core tenet of adequate short-term rental regulation. As mentioned, current opacity makes it difficult to identify the impact of short-term rentals. Through the implementation of a permit

215. Despite persistent allegations of constituents and elected officials fighting a proxy war for special interests. See, e.g., Annie Karni, *Controller Scott Stringer voices concerns over Airbnb ahead of City Council hearing*, NYDAILYNEWS.COM (Jan. 19, 2015), <http://www.nydailynews.com/blogs/dailypolitics/controller-scott-stringer-voices-concerns-airbnb-blog-entry-1.2084026> (tying Stringer to the hotel trades union who endorsed Stringer in his bid for NYC Comptroller and oppose Airbnb); *Stringer airs concerns about Airbnb before Council hearing*, REAL DEAL (Jan. 19, 2015, 5:07 PM), <https://therealdeal.com/2015/01/19/stringer-airs-concerns-about-airbnb-before-hearing/>; Josh Dawsey, *Union Financed Fight to Block Airbnb in New York City*, WALL ST. J. (May 9, 2016), <https://www.wsj.com/articles/union-financed-fight-to-block-airbnb-in-new-york-city-1462842763> (discussing the Hotel Trades Council creation of a political organization called Share Better to introduce legislation and arrange meetings with policy makers); Jason Clampet, *Airbnb Is Fighting to Make Sharing Legal in New York, But It Already Is*, SKIFT.COM (Oct. 16, 2013), <https://skift.com/2013/10/16/airbnb-is-fighting-to-make-sharing-legal-in-new-york-but-it-already-is/> (describing the ties between Peers, a sharing economy lobbying group, and Airbnb); Vilensky, *supra* note 214 (claiming lawmakers are representing the interests of the hotel lobby group "ShareBetter").

system, all hosts and rental property listings would be identified by the City, making administration of their use more attainable and efficient for the appropriate agency. Registration requirements have been popular policy measures enacted as of late but their implementation has varied and lawmakers should be aware that too heavy a burden on a host may provide for unequal application. For example, in New Orleans, the price of a permit ranges from \$50 to \$500 per year, depending on the type of unit being rented; such a cost may be prohibitive to some while more accessible to others.

The Lentol proposal would provide for registration of short-term rentals directly with the Division of Housing and Community Renewal or allow hosting platforms to implement “pass-through registrations” such as that of New Orleans. While the New Orleans fee range is said to be prohibitive, the Lentol proposal would limit the registration fee to \$100 or less. The fee in both New Orleans and in the Lentol proposal are collected to pay for enforcement of the short-term rental regulations. This is an area that remains widely different by jurisdiction and an area where Airbnb and other short-term rental platforms should be eager to work with municipal agencies in designing creative solutions toward a streamlined and cost-effective permit process.²¹⁶

B. A Strict One Host, One Listing Policy

The disparity in reporting on usage of Airbnb is also in part due to the varying measurements. While Airbnb has required a “One Host, One Home” policy in New York, it is apparent that there are hosts violating this policy by posting multiple listings of full apartments. These are clear examples of units that are directly cutting into the rental vacancy rate and should be banned immediately. These “bad actors” are currently difficult to police because of a lack of a permit system that tracks who or where they may be. New York, Airbnb, and other short-term rental hosting platforms will need to work together to identify non-registered listings, particularly those listing multiple units or attempts to run “illegal hotels” (whether be one apartment building or a network of units across the city). This will require more restrictive language than the Lentol proposal and sharing of specific information from hosting platforms.

216. For example, see Chicago and New Orleans for efficient “pass through registration” process. *Policy Tool Chest*, *supra* note 24, at 9 (Chicago); City of New Orleans, Short Term Rental Zoning Amendments & Enforcement Regulations at 10. See Barcelona or Denver for less efficient processes. Lomas, *supra* note 190 (for a description of Barcelona’s process); Business Licensing Center: Short-Term Rental Regulations & Licensing in Denver, DENVERGOV.ORG, <http://www.denvergov.org/content/denvergov/en/denver-business-licensing-center/business-licenses/short-term-rentals.html> (Denver).

C. A Data Sharing Policy

Having a ban is not enough without the ability to track and enforce the ban. A permit will allow the City to track how many listings are operating with accuracy, but it is inadequate without knowing who may be violating the permit and the one listing per host requirements. Thus, Airbnb and similar platforms should be required to share some user data. A data sharing policy will efficiently ensure that no users are eating into the already dismal rental vacancy rate, while the permit system in conjunction with a ban on more than one listing would allow authorities to more adequately track “bad actors” who are listing multiple apartments as short-term rentals. While Airbnb has been reluctant to share user information in the past, the New Orleans plan and details in a recent policy report from Airbnb raise new hope for the prospects of limited data sharing. For example, in New Orleans, Airbnb and other platforms will share some user information such as names and addresses, types of listing, and number of overnight stays per year.²¹⁷

The Lentol proposal sets clear objectives for data sharing, such as quarterly reporting and requiring hosts to keep a log of guest information for one year. However, the Lentol proposal does not require Airbnb to share specific data, such as that which is shared in New Orleans.

D. A Limit to Overnight Listings per Year

With the sharing of information from short-term rental hosting platforms, New York City would also be able to measure short-term rental use and identify which hosts are renting for substantial parts of the year. This information will be critical to identifying how short-term rentals are impacting the City housing stock and how many hosts are appropriate “permanent residents” versus those who are gone for substantial amounts of time. Cities have ranged in the number of nights that they allow entire units to be rented out to short-term rental guests. For example, Amsterdam prohibits renting for more than 60 nights while Los Angeles County settled on 180 nights per year.²¹⁸

New York should implement a similar per annum cap, but the cap should be based on number of nights a unit is *listed* as available rather than a cap on the number of overnight stays. For example, if a unit is listed 300 days a year but only rented 20 nights, it is still likely that this unit could be used by a potential permanent resident. Such measures will ensure hosts are not using their one allowed listing as a commercial short-term rental that may be exacerbating the housing stock and adversely impacting neighborhoods. The Lentol proposal neglects this issue.

217. Benner, *supra* note 200.

218. Woolf, *supra* note 190.

E. A Ban in Certain Municipal Zones

The New York City housing crisis and rise of short-term rentals have adversely impacted traditional neighborhoods of color more than others.²¹⁹ New York should identify neighborhoods more vulnerable to the negative impact of short-term rentals and establish restrictive zones where short-term rentals are either capped or banned all together. To enact such a ban or moratorium the city would first need to access data from short-term rental platforms and analyze how pervasive and how rapidly short-term rentals have grown by neighborhood. The city, working with the Rent Guidelines Board, should then determine which of these neighborhoods have experienced the highest numbers of displacement, homelessness, or adequate affordable housing.

These moratoriums have not been popular in the jurisdictions that have implemented them but they are prudent measures in counteracting the rapid rise of short-term rentals.²²⁰ As more people move to neighborhoods such as Brownsville, East New York, and Harlem, long-time tenants of those neighborhoods battle more and more with affordability.²²¹

219. Office of N.Y. State Att’y Gen., *Airbnb in the City*, *supra* note 50, at 3.

220. See *supra* n. 105.

221. Brownsville Plan, NYC.GOV (June 2017), <https://www1.nyc.gov/assets/hpd/downloads/pdf/community/the-brownsville-plan.pdf> 9 (discussing the city’s \$1.4 billion plan to revitalize Brownsville); *Brownsville residents worry Cuomo’s \$1.4B plan may do more harm than good*, THEREALDEAL.COM (Mar. 15, 2017), <https://therealdeal.com/2017/03/15/brownsville-residents-worry-cuomos-1-4b-plan-may-do-more-harm-than-good/> (arguing that the development will cause gentrification). *Contra* Gina Bellafonte, *No ‘Inner City’ in Brownsville, Brooklyn, Just Overlooked Strengths*, N.Y. TIMES (Mar. 30, 2017) (arguing that the development in Brownsville is not causing gentrification). East New York: Emma Whitford, *Report: Most East New York Residents Can’t Afford De Blasio’s “Affordable” Housing Plan*, GOTHAMIST.COM (Dec. 4, 2015), http://gothamist.com/2015/12/04/east_new_york_gentrification.php; Amanda Mikelberg, *East New York, Bushwick are 2017’s hottest neighborhoods: Survey*, METRO.US (Jan. 18, 2017), <http://www.metro.us/new-york/east-new-york-and-bushwick-are-2017-s-hottest-neighborhoods-says-survey-of-pros/zsJqar—eoJQ6Z8Dm1TO6>. *Contra* Michael Spitzer-Rubenstein, *Development killers make New York less affordable*, CRAINSNEWYORK.COM (May 29, 2017), <http://www.crainsnewyork.com/article/20170529/OPINION/170529952/development-killers-make-new-york-less-affordable>; Zoe Rosenberg, *Fully affordable 403-apartment building for East New York unveiled*, CURBED.COM (July 5, 2017). On Harlem, see Michael Henry Adams, *The End of Black Harlem*, N.Y. TIMES (May 27, 2016), <https://www.nytimes.com/2016/05/29/opinion/sunday/the-end-of-black-harlem.html>; Jeffery C. Mays, *As Gas Stations Vanish, Harlem Sees Gentrification Creeping In*, N.Y. TIMES (May 28, 2017), <https://www.nytimes.com/2017/05/28/nyregion/as-gas-stations-vanish-harlem-sees-gentrification-creeping-in.html>; Rose Hackman, *What will Happen When Harlem Becomes White?*, GUARDIAN (May 13, 2015), <https://www.theguardian.com/us-news/2015/may/13/harlem-gentrification-new-york-race-black-white>.

Such areas should be regulated to ensure “bad actors” do not usurp units critical to permanent resident livability and a cap should be favored so as to not unequally restrict opportunity from some and not others.

In addition to restrictions on short-term rentals, zoning prohibitions may also be used to work collaboratively with neighbors and neighborhood organizations.²²² Similar to the cap on number of overnight listings or stays, the Lentol proposal avoids this zoning issue altogether save to limit short-term rental hosting in rent stabilized units and SROs.

F. A Comprehensive Tax Policy

Introducing the above measures will be costly. This makes it all the more important to require a tax on short-term rentals to provide a budget for enforcement and increase revenue for the municipality and the state. Airbnb has been amenable to tax collection in the past, working with municipalities through Voluntary Collection Agreements (VCAs), which are meant to “ensure that proper taxes are collected and remitted while relieving hosts of onerous tax filings and governments of the burden of collection and enforcement.”²²³ Airbnb claims that jurisdictions have used such tax revenue to aid affordable housing and combat homelessness and have increased spending in “destination-marketing efforts and tourism infrastructure.”²²⁴ In New York City, a tax should be modeled after the New Orleans hotel tax policy, which, like other VCAs, collects a local hotel or occupancy tax but also includes a \$1 fee on every short-term rental transaction, which is then dedicated to New Orleans affordable housing.²²⁵ The Lentol proposal provides for municipalities to contract with hosting platforms to enter into VCAs but does not propose the \$1 affordable housing fee.

G. A Short-Term Rental Agency or Division

A robust and proactive reform in this area requires oversight. Personnel will be needed to sufficiently address the impact and administration of short-term rentals in New York.²²⁶ To administer such reform, the creation of a Short-Term Rental Agency or a Short-Term Rental division in an already existing agency is recommended. This unit would be responsible for administering the registration process, tracking the prohibitions on short-term rentals in the City, and facilitating the processing of complaints against short-term rentals that may be operating illegally.

222. Benner, *supra* note 200.

223. *Policy Tool Chest*, *supra* note 24, at 4.

224. *Id.*

225. Litten, *supra* note 200.

226. City of New Orleans, Short Term Rental Zoning Amendments & Enforcement Regulations at 11.

H. Other Considerations

Other options should also be explored. For example, New York should work toward an agreement with short-term rental platforms and short-term rental hosts to share data regarding short-term rentals so lawmakers can appropriately account for their impact. Further examples should be borrowed from jurisdictions like Los Angeles, which has a policy that requires landlord consent to operate a short-term rental.²²⁷ New York City should consider such a policy but should adjust it to include the complexities of the tenant-cooperative relationship.

Similarly, New York regulators should take this as an opportunity to innovate and introduce less commonly considered options, such as a revenue-sharing model. Under such a regulation, tenants would be required to share a percentage of the revenue on each rental. Under some cooperative agreements, income from subleasing is likely required, but under such a regulation, a similar requirement would hold for any host of a short-term rental; this would serve as a type of compensation for other tenants who use shared accommodations in the building. Some legal commentators have explored this as an option, and it would be aligned with Airbnb's mission to be "Good Neighbors."²²⁸

Conclusion

In October 2016, when asked about municipal regulation and Airbnb's valuation, co-founder Joe Gebbia urged caution. Referring to the dot.com bubble, he said he "remembered companies that were here today and gone tomorrow" and that "if you're not thinking of what's next, the world could change around you."²²⁹ The comments alluded to Gebbia's awareness of his company's precarious position in jurisdictions across the world. This tenuous situation has been harshened as hotel advocates and landlords begin to battle Airbnb and other hosting platforms in the policy arena, in court, and in the boutique tourist industry at large.²³⁰

227. Los Angeles Department of City Planning: Recommendation Report City Planning Commission (June 23, 2016), <http://planning.lacity.org/ordinances/docs/HomeSharing/StaffRept.pdf>.

228. Janelle Orsi, *Principles for a True Sharing Economy* (2015).

229. *How I Built This With Guy Raz*, *supra* note 1.

230. Katie Benner, *Inside the Hotel Industry's Plan to Combat Airbnb*, NYTIMES.COM (Apr. 16, 2017), <https://www.nytimes.com/2017/04/16/technology/inside-the-hotel-industrys-plan-to-combat-airbnb.html>; see also Dan Rene, *Will Hotels Destroy Faster Than Airbnb Builds?*, THEHILL.COM (Apr. 20, 2017), <http://thehill.com/blogs/pundits-blog/technology/329715-will-hotels-destroy-faster-than-airbnb-builds>; see further, Arjun Kharpal, *Airbnb's Growth is Slowing Because it's Being Hit by Regulation, UBS Says*, CNBC.COM (Apr. 13, 2017), <http://www.cnbc.com/2017/04/13/airbnb-growth-slowing-regulation-ubs.html>; Glenn Blain, *EXCLUSIVE: Anti-Airbnb Coalition Launches Ad Campaign About Illegal Rentals in New York*, NYDAILYNEWS.COM (Feb. 20, 2017), <http://www.nydailynews.com/news/>

As these challenges increase, the bystander is the New Yorker struggling to find affordable housing.

While the pressure placed on Airbnb and similar platforms continues to grow—and while Airbnb founders seem more willing to participate—it is critical that they do not overlook the neighborly principles of Community that they so often promote.²³¹ In the same 2016 interview where Gebbia cautioned listeners about the need to adapt to your surroundings, he also made the following analogy when asked about the introduction of municipal regulations on disruptive companies such as Airbnb and Uber:

I think about that question in the context of innovations over the last 100 years and there are three examples that come to mind of new ideas that entered the world that had a pretty rough start but are now so commonplace and everyday you'd laugh if you thought like, "Oh wow, people were against that at one point?" So, ATM machines at one point had a lot of criticism and I think had laws being written against them in certain states in the U.S. because it was this new and different way of banking where you didn't have to talk to a person[,] can you imagine today without ATM machines? The VCR I think is another great example . . . it was met with such resistance from incumbent industries because they didn't want you to watch movies at home. The car is another example . . . there were certain cities against the car and there were actually laws drafted to outlaw cars but after a year of trying a more efficient way of transportation, the people demanded that they didn't want to go back to horse and buggy and so the policy makers had to modify the laws to what people wanted. And so, I think the world is ready for our invention given that there have been over 100 million people that have stayed in homes all over the world.²³²

Gebbia should be aware that this is a false analogy. The ATM, the VCR, and the car were all inventions that gave users alternative options to amenities, they were not options that restricted a crucial right such as housing. While *some* people may be ready for Airbnb—without comprehensive legislation and efficient regulatory oversight—others will be blighted by its adverse impact. Those others will include the New York City rental vacancy rate and the New York City housing ecosystem.

politics/anti-airbnb-group-launches-ad-campaign-illegal-n-y-rentals-article-1.2977598; Megan Rose Dickey, *A Big Apartment Management Company is Suing Airbnb*, TECHCRUNCH.COM (Feb. 18, 2017), <https://techcrunch.com/2017/02/18/a-big-apartment-management-company-is-suing-airbnb/>.

231. James Temperton, *Airbnb has Taken on Hotels, Now it's Gunning for the Whole Travel Industry With Trips*, WIRED.CO.UK (Nov. 17, 2016), <http://www.wired.co.uk/article/airbnb-trips-launch>.

232. *How I Built This With Guy Raz*, *supra* note 1.

Democratizing Entrepreneurship: Online Documents, Tools, and Startup Know-How

Jeff Thomas, Praveen Kosuri, and Bernice Grant

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I. Introduction

New ventures are inherently cash strapped. The entrepreneurs who start them are typically doers—problem-solvers who will find a way within given constraints. For most entrepreneurs, the legal formalities of a new venture are low priority at best and unnecessary bureaucracy at worst. No startup wants to expend scarce resources on what it perceives to be legal formality. Whether a venture is a limited liability company, C-corporation, or S-corporation, it will not exist if it has no product, sales, customers, or strategy to compete in the marketplace. This is a truth across all new ventures whether community-based, socially conscious, or high-tech and high growth. Online tools have recently emerged that address this issue by making it easier for entrepreneurs to comply with formalities. These tools also democratize access to legal documents and startup know-how for all types of entrepreneurs.

Leading venture capital (VC) law firms and startup accelerators are sharing their playbooks for forming and financing new ventures. Their websites provide free access¹ to battle-tested legal documents and wizards that even generate documents based on a company's particular facts and circumstances. Although these open source legal resources are made available by competing law firms, the materials are strikingly similar. This is because best practices have evolved in servicing the typical clients of these law firms: VC seeking companies. While only a small percentage of entrepreneurs are likely to raise VC, best practices built-in to these open source legal resources, and the reasons for using them, are far more universal. Leveraging this know-how could significantly impact a much broader range of entrepreneurs, including community-based businesses, worker cooperatives, social ventures, and even sole proprietors. Maybe most significantly, open source startup documents allow ventures outside major metropolitan areas newfound access to the same documents used in entrepreneurial epicenters such as Silicon Valley, New York, and Boston. Further, the open source movement is impacting organizations that assist all types of entrepreneurs. These organizations include law firms, legal clinics, small business development centers, accelerators, accounting and tax professionals, university entrepreneurship centers, and crowdfunding portals—all of which now have access to the same documents that were once exclusive to elite Silicon Valley law firms. The democratization of startup documents has the potential to transform entrepreneurial ecosystems and the global economy.

Parts II and III of this Article will recount the origins and evolution of open source legal documents for startup companies. Part IV will examine how the impact and utility of these documents extends far beyond the narrow slice of VC-backed businesses that were their initial intended audience. And finally, Part V describes how advisors and service providers

1. Most of the open source legal resources referred to herein are free. We have also noted some that are low cost.

that are not themselves entrepreneurs or lawyers may leverage open source legal documents to better execute their own missions.

II. Open Source Legal Resources: Lessons from Venture Capital Seeking Companies

Less than one percent of new businesses will likely raise venture capital.² However, there are at least four reasons why the entire spectrum of entrepreneurs, and the organizations supporting them, should examine open source legal resources aimed at VC seeking companies.³ First, these resources bridge the gap between expensive legal services and customary non-lawyer, do-it-yourself options available to entrepreneurs by providing foundational documents that entrepreneurs and even attorneys can use to reduce startup costs.⁴ If companies on the verge of raising millions of dollars are turning to open source legal resources to formalize their businesses and reduce costs, it is likely that entrepreneurs with fewer resources would benefit even more from the same offerings. Second, many of the open source legal resources address transactions commonly faced by all types of entrepreneurs, such as forming an entity,⁵ cre-

2. EWING MARION KAUFFMAN FOUNDATION, ENTREPRENEURSHIP POLICY DIGEST—HOW ENTREPRENEURS ACCESS CAPITAL AND GET FUNDED (June 2, 2015), <http://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/how-entrepreneurs-access-capital-and-get-funded> (stating that the “main sources of equity financing are angel investors and venture capitalists, which finance less than 3 percent and 1 percent of new firms, respectively”).

3. A summary of examples of such resources is included as Exhibit A to this Article. This summary was presented by the authors at the 2017 Transactional Clinical Conference. An electronic version of the summary is available at <https://teachvlgcom.files.wordpress.com/2017/05/revised-resources-1-pager2.pdf> (last visited June 29, 2017).

4. See, e.g., *Model Legal Documents*, NATIONAL VENTURE CAPITAL ASSOCIATION, <http://nvca.org/resources/model-legal-documents/> (last visited June 29, 2017) (“By providing an industry-embraced set of model documents that can be used as a starting point in venture capital financings, it is our hope that the time and cost of financings will be greatly reduced and that all principals will be freed from the time consuming process of reviewing hundreds of pages of unfamiliar documents and instead will be able to focus on the high level issues and trade-offs of the deal at hand.”); *About the Series Seed Documents*, SERIESSEED.COM, <http://www.seriesseed.com/posts/2010/02/about-the-series-seed-documents.html> (Feb. 24, 2010) (“The Series Seed Documents should reduce both the time and cost of a financing transaction. It should go without saying, but time and money are the two things most vital to a young company.”).

5. See, e.g., *Incorporation Package (Delaware)*, COOLEY LLP, <https://www.cooleygo.com/documents/incorporation-package/> (last visited June 29, 2017); *Startup Forms Library*, ORRICK, HERRINGTON & SUTCLIFFE LLP, <https://www.orrick.com/Total-Access/Tool-Kit/Start-Up-Forms> (last visited June 29, 2017); *Founders Workbench*, GOODWIN PROCTER LLP, <http://www.foundersworkbench.com> (last visited June 29, 2017); *Startup Percolator*, PERKINS COIE LLP, <http://www.startuppercolator.com/>

ating governance structures, and raising startup capital.⁶ Third, leading law firms are sharing their resources and thereby giving credibility to both specific open source legal resources and the overall movement. In fact, five of the United States' most active VC law firms in 2016 have put company formation documents online for anyone to use.⁷ By way of further example, the nation's most active seed investors,⁸ VC law firms,⁹ and people affiliated with these parties¹⁰ are sharing seed financing materials with the public. Seed financing is a fancy term for startup

formation/ (last visited June 29, 2017); *WilmerHale LAUNCH, Document Generator*, WILMER CUTLER PICKERING HALE AND DORR LLP, <https://launch.wilmerhale.com/build/document-generator/> (last visited June 29, 2017).

6. See, e.g., *WSGR Term Sheet Generator (Convertible Notes)*, WILSON SONSINI GOODRICH & ROSATI, <https://www.wsgr.com/WSGR/Display.aspx?SectionName=practice/termsheet-convertible.htm> (last visited June 29, 2017); *Startup Documents, SAFE Financing Documents*, Y COMBINATOR (Feb. 2016), <https://www.ycombinator.com/documents/>; *500 Startups Announces 'KISS'*, 500 STARTUPS (July 3, 2014), <https://500.co/kiss/>; *Gust's Series Seed Documents*, GUST, <http://gust.com/series-seed/> (last visited June 29, 2017); *Series Seed Financing Documents*, SERIESSEED.COM, <http://www.seriesseed.com/posts/documents.html> (last visited June 29, 2017).

7. PitchBook 2016 Annual Global League Tables, PITCHBOOK DATA, INC. 29, <https://pitchbook.com/news/reports/2016-annual-global-league-tables> [hereinafter PITCHBOOK VC LAW FIRMS LIST] (last updated Feb. 14, 2017) (ranking these firms and others as their top 14 "most active in US" firms: Cooley LLP, Wilson Sonsini Goodrich & Rosati, Fenwick & West LLP, Orrick, Herrington & Sutcliffe LLP, Goodwin Procter LLP, Perkins Coie LLP, and Wilmer Cutler Pickering Hale and Dorr LLP).

8. PitchBook-National Venture Capital Association 4Q 2016 Venture Monitor, PITCHBOOK DATA, INC. 19 (Jan. 11, 2017), <https://pitchbook.com/news/reports/download/4q-2016-pitchbook-nvca-venture-monitor?key=zSirbDbTpz> (listing 500 Startups and Y Combinator as two of the top ten most active angel/seed investors in 2016).

9. See PITCHBOOK VC LAW FIRMS LIST, *supra* note 7.

10. See, e.g., SERIESSEED.COM (Feb. 24, 2010), <http://www.seriesseed.com/posts/> (presumably written by Ted Wang, Special Counsel at Fenwick & West LLP: "these are not Fenwick & West or my own form documents. Although I undertook the laboring oar (with the assistance of Khang Tran) and many of my colleagues at Fenwick & West have assisted me in the original drafts, these documents are intended to be an open source project and not particular to any lawyer or law firm. Similarly, this is not an Andreessen Horowitz undertaking. Although I am pleased to have the firm's support in launching this effort, the Series Seed Documents will require broad adoption in order to become an effective standard. The following investors have agreed to use the Series Seed Documents in certain of the [sic] their deals: Baseline, Charles River Ventures, SV Angel (Ron Conway), First Round Capital, Harrison Metal Capital, Mike Maples, Polaris Venture Partners, SoftTech VC and True Ventures.") (Fenwick & West LLP is also one of the firms listed in the PITCHBOOK VC LAW FIRMS LIST, *supra* note 7.).

capital, which every business needs.¹¹ In addition to being battle-tested, these open source legal documents have a better chance of being supported by others and even creating standards.¹² In fact, the similarities found when comparing these resources against each other suggest that standards and best practices have already emerged. This provides a fourth reason to consider these resources—many firms unable to raise venture capital are now able to take advantage of strategies that they previously did not have the ability to pursue. For example, the resources make it easier for these firms to grant employees equity that is subject to vesting¹³ or to create two classes of stock.¹⁴ Neither of these options is typically used in community-based businesses but could be if incorporated into standard formation documents that are used widely and available broadly. They may even influence how lower growth, less complex businesses incentivize employees and owners. These strategies were previously too complex and costly for most entrepreneurs to employ. However, the combination of open source legal documents and new tools and practices make it feasible for additional entrepreneurs to benefit from these strategies. The end result is that there is a leveling of the playing field for all entrepreneurial ventures, whether located in Silicon Valley, inner-city Chicago, or Clinton, Iowa.

III. Evolution of Open Source Tools and Practices

Form banks have long existed in law firms across the country. Lawyers rarely create a document starting with a blank piece of paper, or these days a blank screen. Lawyers are more efficient when customizing a docu-

11. While seed investors may include angel investors, or funds associated with accelerator programs, they may also include an entrepreneur's friends and family members.

12. See SERIESSEED.COM, *supra* note 10.

13. See, e.g., Portions of a Restricted Stock Purchase Agreement, generated by Cooley GO's Incorporation Package, attached as Appendix B to this Article.

14. It is well settled that companies seeking venture capital will leverage a structure that includes two classes of stock. One class, the less expensive common stock, is reserved for a company's founders and other employees. The other class, the more expensive convertible preferred stock, is issued to the venture capitalists. By holding convertible preferred stock, venture capitalists have rights and preferences generally not given to holders of common stock. In addition to providing investors with unique economic and control rights, issuing them convertible preferred stock may help to justify the lower fair market value for common stock and the associated minimal tax on employee incentive compensation. See, e.g., CONSTANCE E. BAGLEY & CRAIG E. DAUCHY, *THE ENTREPRENEUR'S GUIDE TO LAW AND STRATEGY* 95–97 (5th ed. 2017); Ronald J. Gilson & David M. Schizer, Understanding Venture Capital Structure: A Tax Explanation for Convertible Preferred Stock, 116 HARV. L. REV. 874, 879 (2003) (convertible preferred stock is “practically the exclusive means of external financing for U.S. venture capital-backed companies”); Michael A. Woronoff & Jonathan A. Rosen, Practitioner Note, *Effective vs. Nominal Valuations in Venture Capital Investing*, 2 N.Y.U. J.L. & Bus. 199, 206 (2005).

ment from an existing template than creating a new document from scratch every time. Clients benefit from this efficiency as well in the form of lower costs and quicker turnaround times. However, an unintended consequence to this practice is the notion that lawyers use the same form over and over again and just change the names. That notion has created the belief in many consumers that if they simply had the forms, they could change the names and do the work themselves. Some assert businesses like LegalZoom.com, Inc.¹⁵ and Incorporate.com¹⁶ have seized upon this belief by offering generic forms that consumers can fill in to complete before executing—no lawyer needed. The appeal is obvious—save money by not hiring a lawyer. The implication is that lawyers are not essential. The result, however, may be documents that do not comply with jurisdictional requirements or local laws, documents that do not address the factual reality of a particular business, and documents that were generated without any input from the consumer. Oftentimes, consumers that have utilized these types of self-help documents seek out legal counsel at some future point because they have discovered that their documents are a mess. Lawyers are often retained to clean up these messes.

Considering this context, the remainder of this Part III summarizes the evolution of tools and practices associated with open source legal resources. Resources aimed at VC seeking companies are used as examples; however, as discussed in Parts IV and V, many of these tools and practices can be utilized by the entire spectrum of entrepreneurs as well as the organizations that support them. We selected these as our examples for two reasons. First, there is a strong ecosystem for VC seeking companies and it has a solid history of providing open source legal resources.¹⁷ Second, these examples highlight the fact that established, sophisticated international law firms utilize these tools and practices, making it difficult for anyone to argue that only uniformed solo practitioners or small niche firms are engaging in these actions.

15. LEGALZOOM.COM, INC., <https://www.legalzoom.com> (last visited June 29, 2017) (noting the LegalZoom.com, Inc. disclaimer reads, “Disclaimer: Communications between you and LegalZoom are protected by our Privacy Policy but not by the attorney-client privilege or as work product. LegalZoom provides access to independent attorneys and self-help services at your specific direction. We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies. Your access to the website is subject to our Terms of Use.”).

16. INCORPORATE.COM, <https://www.incorporate.com> (last visited June 29, 2017) (noting small print at the bottom of Incorporate.com’s website that “incorporate.com is a service company and does not offer legal or financial advice”).

17. See, e.g., John F. Coyle & Joseph M. Green, *Startup Lawyering 2.0*, 95 N.C. L. REV. 1403, 1412 (2017) (“In 2003, the National Venture Capital Association (‘NVCA’) published a set of ‘model’ documents for venture finance transactions.”).

A. Shared Documents and Collections

After cleaning up enough messes caused by using the low-cost, non-lawyer forms, some lawyer presumably thought to post her own form documents that were at least vetted by her and other members of her firm and thus likely to be of higher quality than those documents that were then available in the marketplace. The lawyer-posted forms may have addressed company formation, business governance, or seed financing and were available on her law firm's website for visitors to access. These lawyer-posted forms were not advertised or marketed, but were available to enterprising entrepreneurs who may have been considering hiring that lawyer in the first place. The firm's intent was not for the entrepreneurs to use the forms themselves, but to see what well-crafted forms looked like in order to influence the entrepreneurs to call the lawyer to help draft and execute their own documents. Eventually, resources like Orrick's Startup Form Library emerged and went further by providing comprehensive sets of starting point documents that can be downloaded and completed by anyone with an Internet connection.¹⁸ In addition to providing more documents, these collections create value by ensuring that various documents work well together. For example, if an entire set of incorporation documents is provided and maintained by one source, that set's organizational resolutions, bylaws, and restricted stock purchase agreements are more likely to accurately reference each other and to otherwise be internally consistent.¹⁹

B. Wizards and Generators

Wizards and generators, such as Cooley GO's Incorporation Package, went beyond sharing collections of starting point documents.²⁰ When using wizards and generators, people enter specific data into simple online forms designed to solicit only the necessary information. An online program or "wizard" then "generates" (i.e., completes) the applicable documents by populating appropriate fields within each document with the user-provided data. The documents created by the wizards and generators are immediately made available online in a compressed (ZIP) folder that can easily be saved by the user. The wizards and generators add value by allowing users to focus on providing small amounts of data be-

18. See ORRICK, HERRINGTON & SUTCLIFFE LLP, *supra* note 5.

19. Problems are more likely to arise if documents from multiple sources are used instead of documents from one set. For example, a right of first refusal may be found in bylaws prepared by one author but restricted stock purchase agreements drafted by another. If a company used each such document, and thus granted the same right using two different documents, issues would arise if the terms of the right of first refusal varied by document.

20. See COOLEY LLP, *supra* note 5.

fore addressing the much lengthier documentation.²¹ As an example, it took the authors approximately ten minutes to enter data into the online forms associated with Cooley GO's Incorporation Package. Of course, Cooley GO's Incorporation Package is only one such generator. The authors reference it frequently throughout this Article to demonstrate various aspects of open source documents. However, resources provided by other law firms, including firms referenced in Appendix A, are also available. The wizard then took less than one additional minute to generate twenty-four entity formation-related documents. The Cooley GO offering (and others like it) is a substantial step forward to the consuming entrepreneur. If they were already inclined to form their company without formal legal assistance, the Cooley GO Incorporation Package saves the entrepreneur the time of figuring out what documents she needs. Further, the information that an entrepreneur must gather in advance of making any decisions is centralized and summarized in one location.

C. Incorporating Terms and Conditions by Reference

Interestingly, some of the documents generated by wizards also shift lengthy legalese from an otherwise long agreement into a separate "terms and conditions" exhibit, which is attached to a much shorter agreement that incorporates the terms and conditions by reference. The result is a simple and short document that contains only the key business terms and signature blocks with the lengthier text (i.e., legalese) attached as an exhibit. Portions of a Restricted Stock Purchase Agreement, generated by Cooley GO's Incorporation Package, are included in Appendix B of this Article in order to provide an example of this approach. In this particular case, the terms and conditions approach turned a nine-page agreement into a one-page agreement with a signature page and a seven-page exhibit containing the terms and conditions.

D. Comprehensive Platforms

Another development is the use of comprehensive platforms, such as those offered by Shoobx, Inc., eShares, Inc., and Gust.²² These subscription-based platforms leverage technology to help companies with various legal and related needs, which may include forming entities, onboarding employees, granting equity, administering stock incentive plans, managing equity ownership, storing records and documents, performing bookkeeping and payroll functions, obtaining electronic signatures, obtaining board and stockholder approvals, communicating with counsel, raising capital, and conduct-

21. While some appreciate this feature, others are concerned that value is actually lost (not gained) when it is easier for users of legal documents to more easily avoid reading the legal provisions.

22. See SHOOBX, INC., <https://www.shoobx.com> (last visited June 29, 2017); ESHARES, INC., <https://esharesinc.com> (last visited June 29, 2017); GUST, <https://gust.com> (last visited June 29, 2017).

ing due diligence.²³ While the pricing for these comprehensive platforms varies depending on a company's particular needs and size (e.g., number of employees, number of investors, and storage space needs), at least one of the platforms offers a free version to small companies.²⁴ Once again, top VC law firms are already using these resources,²⁵ but the potential benefits apply to a much broader spectrum of entrepreneurs.

Combining the terms and conditions approach with comprehensive platforms creates interesting possibilities. In such a world, managers of platforms, attorneys, and others could analyze which documents have a significant terms and conditions component. Those documents could then be broken up so that the terms and conditions could apply to an entire group using the platform. This group of users could range from people within a single company to all of the users of a platform.²⁶ Members of the group could use much shorter forms to capture user-specific information and incorporate the lengthier terms and conditions by reference. For example, the terms and conditions of a restricted stock purchase agreement could apply to founders and employees of a single company (or, if desired, all companies using a platform). Thus, when founders and other employees acquire their company's common stock, a simple form could capture specific information for each individual (e.g., the individual's name and address, purchase date, number of shares being acquired, purchase price, and vesting commencement date). The individual would also agree that the applicable terms and conditions apply.²⁷ Examples of other items with heavy terms and conditions components include stock option plans,

23. *Id.*

24. See SHOOBX, INC., <https://www.shoobx.com/pricing/> (last visited June 29, 2017) (offering free service to small businesses with up to five workers, up to 10 stockholders, one class of common stock, and up to 100MB of storage space).

25. See, e.g., GOODWIN PROCTER LLP, *Shoobx, Goodwin Partner to Offer Enhanced Legal Technology Automation to Emerging Companies* (Dec. 7, 2016), http://www.goodwinlaw.com/news/2016/12/12_07_16-shoobx-goodwin-partner-to-offer-enhanced; DLA PIPER, *DLA Piper to collaborate with Shoobx to boost startup clients' ability to form, fund and grow* (Dec. 7, 2016), <https://www.dlapiper.com/en/us/news/2016/12/dla-piper-to-collaborate-with-shoobx>; FENWICK & WEST, LLP, *Fenwick Helps Startup Companies Streamline Equity Management Processes Through eShares Partnership* (Apr. 28, 2017), <https://www.fenwick.com/media/pages/fenwick-helps-startup-companies-streamline-equity-management-processes-through-eshares-partnership.aspx>.

26. In the spirit of the open source movement, perhaps parties who do not even use a platform could incorporate the terms and conditions of various documents by reference if, for example, the terms and conditions were made available on an open website.

27. Ancillary documents would also be created. Platform users should still understand the consequences of using the resources. However, as more users adopt the same terms and conditions, offering reusable high-quality educational materials becomes more feasible. Furthermore, platforms and their users will need to con-

employment agreements and policies, and seed financing documents.²⁸ However, due to the complex nature of issuing equity, users should be advised to seek legal counsel to ensure compliance with securities, tax, and other laws. They may also desire to engage counsel and other professionals who are able to use the same platform. This results in simplification for entrepreneurs, more productive basic services, and tied-in professionals who are ready to get more involved when complexities arise.

E. Ethical and Professional Responsibility Issues

Open source legal resources, tools, and practices present at least six ethical and professional responsibility issues. First, are providers of wizards, generators, or platforms practicing law when they create legal documents for users who share specific facts and circumstances? Unfortunately, there is uncertainty as to what constitutes the practice of law.²⁹ Because of this uncertainty, some attorneys do not adopt tools and technologies that could provide underserved clients with more affordable solutions.³⁰ Other members of the legal profession use the tools and technologies but take additional precautions. With respect to wizards and generators, the attorney-providers' terms of use attempt to make clear that the providers are not practicing law, even though they are law firms (unlike LegalZoom.com, Inc. and Incorporate.com).³¹ With respect to comprehensive platforms, some law

sider that some aspects of such agreements, such as state securities laws and the requirement for spousal consents, tend to vary significantly by state law.

28. However, platforms and their users will need to consider that some documents, such as Confidential Information, Invention Assignment, and Non-Compete Agreements, tend to vary significantly by state law.

29. See, e.g., Jacqueline Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 262 (2002) ("Efforts to define the 'unauthorized practice of law,' or conversely the 'practice of law,' are characterized, at best, by longstanding ambiguity. The ethical rules governing lawyers' behavior do not define unauthorized practice and instead leave it to the states for individual determination. There is little uniformity in the definition of unauthorized practice or law practice. . . . Despite the uncertainties of what constitutes the practice of law, vagueness challenges to UPL statutes have been routinely rejected.").

30. See, e.g., Mary Juetten, *Part V: Examining LegalTech Adoption*, LAW TECH. TODAY (Jan. 19, 2016), <http://www.lawtechnologytoday.org/2016/01/part-5-mary-mary-juetten/> (quoting an attorney who worked at two law tech startups: "It's not necessarily the technology that lawyers have trouble with adopting; it's how and when they're permitted to deliver their services. So, for us, we see a major barrier being regulatory ambiguity. . . . As technology develops that can help provide more affordable and accessible support for families, we should see regulations get clarified and evolved so they don't do more harm than good.").

31. See, e.g., COOLEY LLP, *Cooley GO Docs Terms of Use*, accessed by clicking "Click here" at <https://www.cooleygo.com/documents/incorporation-package/> ("You acknowledge and agree that the making available of these documents (the "Cooley

firms have embedded the tool within their business models by having clients use the platforms as a part of their attorney-client relationship.³²

Second, are the users of these resources protected by attorney-client privilege? The answer to this question should mirror the answer to the first question, i.e., if the attorney-client relationship exists, the attorney-client privilege applies. Once again, out of uncertainty or as a precaution, attorney-providers' terms of use attempt to make clear that neither an attorney-client nor other confidential relationship exists.³³

Third, does providing these resources constitute attorney advertising? Here, the law firms providing the resources assume that their actions could amount to attorney advertising and simply make the required disclosure of such.³⁴

Fourth, security issues should be considered, particularly with respect to the comprehensive platforms since confidential documents may be stored on servers for long periods of time and outsiders may be allowed access to certain items but not others. While uses of technology often involve security risks, that risk would presumably be managed by experts engaged by platform operators. Although this results in attorneys and law firms having less control, important security tasks would be taken care of by professionals with the proper expertise. However, several attorneys are still concerned about ethics-related issues, including the protection of confidential information and preservation of the attorney-client privilege.³⁵ Considering various ethics opinions that address cloud computing, issues to con-

GO Docs") to you . . . shall not create any attorney-client or other confidential or special relationship between you and Cooley LLP and does not constitute the provision of legal advice or other professional advice. . . . You should seek advice from an attorney licensed in the relevant jurisdiction(s), as well as a tax professional, before relying on the Cooley GO Docs. The questionnaire and documents produced by Cooley GO Docs may be considered Attorney Advertising under the ethical rules of certain jurisdictions.") (last visited June 29, 2017).

32. See *supra* note 25.

33. It may also be possible that, even if the attorney-client relationship does not actually exist, a prospective client using the resources expects confidentiality and thus possibly makes the attorney-client privilege applicable.

34. See *supra* note 31.

35. See, e.g., Robert Ambrogi, *This Week In Legal Tech: Lawyers Still Fear The Cloud*, ABOVE THE LAW (Nov. 7, 2016), <http://abovethelaw.com/2016/11/this-week-in-legal-tech-lawyers-still-fear-the-cloud/?rf=1> (discussing concerns regarding attorneys' use of cloud computing: "[a]s for concerns about security and confidentiality, lawyers are right to worry about them. After all, lawyers are bound by rules of professional conduct to safeguard confidential client information and to protect client property, including client files, from loss. However, ethics panels in at least 20 states have considered lawyers' use of cloud computing and have been unanimous in ruling that lawyers may ethically use the cloud—provided they take reasonable steps to minimize risk to confidential information and client files.").

sider may include the reputation of the company providing the platform, whether attorneys can access data on the platform without restriction, whether attorneys can retrieve data from the platform after service is terminated, whether the platform uses advanced passwords and two-step verifications, the policies governing how the platform's employees and third-parties may access data, whether data is encrypted while in transit and when stored on the servers, data backup procedures, and security protections in place at data centers used by the platform.³⁶ While companies often share this information openly on their websites, attorneys should contact platform companies directly when they are unable to confirm this information.³⁷

Fifth, many attorneys may resist using tools and practices that make it easier for clients (and even non-clients) to avoid dealing with complex legal issues when completing transactions (e.g., by moving legalese from documents to terms and conditions, which are then attached to the resulting—and much shorter—documents). The merit of this concern depends on several factors, including (1) whether users would be more likely to read and understand the legalese if it were included in the document itself, and (2) whether the terms and conditions are standards that users of documents will be aware of, even if they fail to read the legalese each time they engage in the applicable transaction. An example of the applicable risk comes from considering the bylaws that the Cooley GO Incorporation Package generates. The bylaws are the constitution of a corporation. They provide the rules by which the business will be governed. In a corporation, bylaws often articulate the rights of owners and, as a result, give rise to remedies if those rules are not followed. When the authors used the Cooley GO Incorporation Package, the generated bylaws were twenty-four pages long. They are comprehensive and thorough. If a startup's founders used Cooley GO to form their company and failed to read or understand the bylaws, the startup and its founders may be open to a stockholder lawsuit.

Finally, while ethical issues may challenge the use of these resources, it is also argued that both (1) the legal community has failed to satisfy its ethical obligation to ensure access to justice for the low and middle-income populations and (2) solutions like open source legal resources can improve that access.³⁸ Thus, ethical considerations cut both ways and could support the use of these resources since they make legal services more affordable and more available to a wider segment of the entrepreneurial population.

While many ethical and professional responsibility issues have been raised, it is worth remembering that examples provided in this Article involve several respected international law firms. Even if "everybody's

36. *Id.*

37. *Id.*

38. Cody Blades, *Crying Over Spilt Milk: Why the Legal Community Is Ethically Obligated to Ensure LegalZoom's Survival in the Legal Services Marketplace*, 38 *HAMLIN L. REV.* 31, 52 (2015).

doing it" is not always a good defense, this Article presents evidence that a significant number of prominent members of the legal community are not only supporting open source legal resources—they are already providing them to the public on their websites.

IV. Impacting a Broader Spectrum of Entrepreneurs

Open source legal resources like the Cooley GO Incorporation Package and Orrick Startup Forms Library were designed for high growth emerging companies that have the potential to attract outside investor capital. For many law firms, startup formation work is unprofitable. A financing transaction, however, is more likely to generate significant fees. But very few startups will attract outside investment. Yet, some best practices contained in the tools and forms provided by open source legal resources apply to all entrepreneurs across the spectrum. First, these resources bridge the gap between expensive legal services and do-it-yourself options by providing foundational documents that entrepreneurs and attorneys can use to reduce transaction costs. Second, when entrepreneurs utilize comprehensive platforms, the quality of the legal and related services they receive may actually increase, even though transaction costs decrease. For example, by providing ways for entrepreneurs to manage and store information and more effectively communicate with others (e.g., legal counsel, other professionals, investors, co-managers, and employees), platforms encourage better transactions, compliance, and record keeping. Third, if the same quality documents are available online for all ventures, whether VC seeking or community-based, at least one structural impediment is removed. Entrepreneurs in different markets with different demographics, in theory, have the same legal construct and foundation from which to build their enterprises.

A. Additional High Growth Profit Driven Ventures

While VC-backed companies make up a small percentage of all entrepreneurial ventures, many *additional* high growth profit driven ventures should be able to take advantage of open source legal resources already available to VC seeking companies. This is because they share similar formation and financing goals. For example, many of these additional firms will also benefit from issuing equity to members of their teams and making that equity subject to vesting. In fact, since these additional firms are not raising VC, they should be even more dependent on using their equity to recruit, compensate, and retain talented employees. Moreover, although companies not seeking VC would appear to save money by forming entities in their home states (instead of Delaware, as many VC seeking companies do),³⁹ they may actually save money by forming their busi-

39. Forming the entity in one's home state (instead of forming it in Delaware and then qualifying to do business in the home state) will eliminate the require-

nesses as Delaware corporations. This is because the costs savings from using existing resources designed for Delaware corporations may outweigh the extra costs of having to qualify their Delaware entities in their home states and pay ongoing fees in both Delaware and their home states. For example, assume an entrepreneur can either pay a Chicago attorney: (1) \$2,000 to organize an Illinois corporation and provide the applicable startup documents or (2) \$500 to qualify a Delaware corporation, formed using an incorporation package, to transact business in Illinois. Assume further that the annual incremental cost of paying the Delaware franchise tax, annual report fee, and registered agent fee equals \$500.⁴⁰ The initial \$1,500 of savings appears to last only three years. However, additional resources designed for Delaware corporations, such as financing-related documents, may also reduce ongoing legal costs. Moreover, the business should consider reasons why VC seeking companies prefer Delaware, such as making it easier to raise funds from investors located in several states. These considerations apply to these additional high growth ventures as well. By way of further example, and because they will issue equity to their team members, these additional firms will benefit from leveraging and preserving two classes of stock. Granting equity to employees, making that equity subject to vesting and leveraging two classes of equity are strategies that are more commonly used by companies raising venture capital. However, the democratization of legal documents and online tools has created a new market of additional ventures that are now ready to tap this startup know-how. This new market is huge and its emergence should come as no surprise, since “if only the skilled and the rich have access to a product or service, then you can reasonably assume the existence of a market creating opportunity.”⁴¹

ments to file annual reports with Delaware, pay Delaware franchise taxes each year, and maintain Delaware registered agent each year. This, of course, assumes that the home state is not Delaware.

40. Filing fees with the Illinois Secretary of State should be a “wash” since they must be paid in either scenario, i.e., these fees must be paid regardless of whether the company is formed as (1) an Illinois corporation or (2) a Delaware corporation that then qualifies to transact business in Illinois.

41. Clayton M. Christensen & Derek van Bever, *The Capitalist's Dilemma*, HARVARD BUS. REV. at 5 (June 2014), <https://hbr.org/2014/06/the-capitalists-dilemma> (“Market-creating innovations have two critical ingredients. One is an enabling technology that drives down costs as volume grows. The other is a new business model allowing the innovator to reach people who have not been customers (often because they couldn’t afford the original product). Think of it like this: An efficiency innovation pointed in the right direction—toward turning nonconsumption into consumption—becomes a market-creating innovation. Ford’s Model T, for example, brought automobile ownership within reach for most Americans because of both its simple design and the revolutionary assembly line that brought scale to the enterprise. In the same way, Texas Instruments and Hewlett-Packard used solid-

B. Social Ventures

Social ventures are enterprises that champion people (often workers) and the environment as well as profit. They will also benefit from utilizing open source legal resources and the tools and practices discussed above. Like VC seeking companies, entrepreneurial social ventures commonly have formation and seed financing goals. However, the specific documents needed may differ significantly from the templates available for VC seeking companies. For example, social ventures are likely to consider additional entity types, such as not-for-profit corporations, L3Cs, benefit corporations, and worker cooperatives. Moreover, social ventures are likely to form entities in their home states (instead of Delaware, as many VC seeking companies prefer to do). Thus, social ventures require resources that support multiple entity types from numerous jurisdictions. While this diversity brings flexibility and other benefits, it makes it more difficult to develop standards and provide scalable open source materials. Further, financing materials used by VC seeking companies would be inappropriate for many social ventures, including those prohibited from issuing ownership interests that provide economic returns (e.g., if the social venture is a 501(c)(3)). Despite these challenges, social ventures still benefit from open source document collections, wizards and generators, and comprehensive platforms aimed at their unique needs. In fact, resources have been available to the public for several years via the IRS.gov website. These resources include information about tax-exempt organizations;⁴² forms and instructions;⁴³ and an interactive wizard-like form that provides definitions, examples, explanations, links to resources, checklist items, and prerequisite questions for users.⁴⁴ Non-government organizations also provide resources aimed at social ventures.⁴⁵

state technology to bring low-cost calculators to millions of students and engineers worldwide.”).

42. See, e.g., DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, *Publication 557: Tax-Exempt Status for Your Organization* (Jan. 2017), <https://www.irs.gov/pub/irs-pdf/p557.pdf>.

43. See, e.g., DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, *Form 1023: Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code* (Oct. 2013), <https://www.irs.gov/pub/irs-pdf/f1023.pdf>; DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, *Instructions for Form 1023-EZ* (Jan. 2017), <https://www.irs.gov/pub/irs-pdf/i1023ez.pdf>.

44. See DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, *Interactive Form 1023*, <https://www.stayexempt.irs.gov/Starting-Out/interactive-form-1023-prerequisite-questions> (last visited June 29, 2017).

45. See, e.g., SLS Mills Legal Clinic, Stanford Univ., *Nonprofit Corporations: Forms and Sample Documents*, <https://nonprofitdocuments.law.stanford.edu> (last visited Sept. 1, 2017); B LAB, *How to Become a Benefit Corporation*, <http://benefitcorp.net/businesses/how-become-benefit-corporation> (last visited June 29, 2017); PUBLIC COUNSEL, *Publications (Community Development)*, [http://www.publiccounsel.org/publications#Community Development](http://www.publiccounsel.org/publications#Community%20Development) (last visited June 29,

C. Community-Based Ventures and Small Businesses

Community-based ventures are those that typically do not employ a high growth strategy or attract professional investors. These are corner stores, restaurants, barber shops, beauty salons, dry cleaners, and daycare centers that populate the landscape of most communities in America. When starting a community-based venture, the legal needs are no less significant than those of a high growth, VC-backed business. There are formation issues, regulatory and licensing requirements, liability concerns, and governance needs. Because the capital behind these ventures is typically that of the entrepreneur and her friends and family, the stakes are arguably higher than for the VC-backed firm. If the business fails, the entrepreneur risks everything.

The same is true of the “small business.” Some argue that small business is not entrepreneurial in the same manner as the high growth VC seeking venture⁴⁶ and that communities serious about economic development should focus on supporting high growth ventures.⁴⁷ Listening to these positions, one might attempt to encourage small business owners to transform their companies into high growth ventures. That is, some small businesses may actually be quite scalable. For example, a current coffee shop might become the next Starbucks or an existing corner store might become the next Whole Foods Market. If such efforts worked, and applying the logic expressed in Part IV.A, the resources available for VC seeking companies would fit more entrepreneurs. However, even if such conversion efforts were desirable and wildly successful, small businesses would still continue to make up a significant part of the economy—and they would benefit from having access to more resources aimed at their particular needs. Like social ventures, these entrepreneurs need formation-related resources that support multiple entity types from numerous jurisdictions. They would also benefit from resources that could support employment and other contracting needs and platforms designed to help with bookkeeping, payroll, and other tax matters. There is an opportunity to offer more open source legal resources aimed at these entrepreneurs. Part V.B discusses some initiatives currently underway.

2017); FLADVOCATE.ORG, *Community Economic Development, Transactional Legal Forms*, <https://www.fladvocate.org/ced/> (last visited June 29, 2017).

46. See, e.g., Rui Baptista & Ana Naia, *Entrepreneurs Education: A Selective Examination of the Literature*, 11:5 FOUNDATIONS AND TRENDS IN ENTREPRENEURSHIP 337, 342 (2015) (“while economists may regard all kinds of self-employment as entrepreneurship, organizational theorists are more likely to focus on the creation of growth-orientated ventures”).

47. See, e.g., Daniel J. Isenberg, *How to Start an Entrepreneurial Revolution*, HARVARD BUS. REV. at 6 (June 2010) (arguing that community development programs “should try to focus first on ambitious, growth-orientated entrepreneurs who address larger potential markets”).

V. Impacting Organizations that Assist Entrepreneurs

Entrepreneurs are not the only population set that can benefit from open source legal resources. Law firms, law school clinics, small business development centers, business accelerators, accounting and tax advisors, university entrepreneurship centers, and crowdfunding portals can also gain from the development and proliferation of free online legal tools.

A. Law Firms

Silicon Valley based law firms represent a tiny slice of legal service providers to entrepreneurs. Most entrepreneurs cannot afford the market rates of large law firms that must cover the high fixed cost of large overhead. If a startup is going to consult an attorney, it is more likely to be a small firm or solo practitioner.⁴⁸ Often firms of this size do not have the same quality of form banks or collections of standardized documents that larger firms do. The technology they employ is also typically less sophisticated than that of large firms. For these smaller firms and solo practitioners, having access to the form banks of larger firms that regularly do more sophisticated and higher volumes of work, levels the playing field a bit. The non-VC law firms can essentially offer the same product as the VC law firms by utilizing their online tools and resources. The non-VC lawyers can also modify the templates to fit the transactions of their clients.

Since there is a void in the current offerings of open source legal resources aimed at community-based ventures and mainstream small businesses, regional and other smaller firms might develop their own tools to service the entrepreneurs from their own communities. Perhaps local bar associations could play a role, much like the National Venture Capital Association did for VC-backed companies when it commissioned attorneys from several firms to develop and maintain its model legal documents.⁴⁹ These firms also have an opportunity to collaborate with legal clinics already taking steps to address this gap.

B. Legal Clinics

For the VC law firms, business formation work is usually unprofitable yet necessary to get the client to the next stage. For lawyers representing community-based ventures and other small businesses, it is also difficult to bill clients for the time necessary to properly form a company. Often the work is done at a flat rate. Though entity choice and selection can be a complex issue for some ventures, it is pretty straightforward for most entrepreneurs. Open source documents provide lawyers, both VC law firms

48. For example, online services such as UpCounsel provide entrepreneurs with attorneys (most of whom formerly practiced at large law firms) on demand for project-based services. See UPCOUNSEL, INC., <https://www.upcounsel.com/> (last visited June 29, 2017).

49. See NATIONAL VENTURE CAPITAL ASSOCIATION, *supra* note 4.

and others, with a tool that allows them to be more efficient and cost-effective for their startup clients. That allows the lawyers and clients the ability to spend more time on higher value-add services.

The same holds true for law school clinics. There are over 150 transactional clinics spread across America's 200 law schools.⁵⁰ Nearly all of them provide pro bono legal assistance to entrepreneurs and organizations. But because they are typically curricular offerings within law schools, they are limited in the number of clients they can service at any given time. Existing open source legal resources provide transactional clinics with the ability to service more clients with formation issues, much more efficiently.⁵¹

Many transactional clinics service community-based enterprises and other mainstream small businesses rather than high growth, VC seeking companies. Thus, the vast majority of businesses created in the United States resemble the types of businesses represented by transactional clinics. These businesses typically have fewer resources and less access to advisors than high growth ventures. Until very recently, there was almost a complete void in the open resource marketplace. Specifically, there was very little explanation or guidance for the material that was made publicly available for download. There were a lot of forms but little educational guidance. As such, an entrepreneur was on his own to figure out whether a document was relevant to him, how to manipulate it, and whether to execute it. Open source offerings began to alter that with the inclusion of tutorials, brief articles, and frequently asked questions; however, the educational content void is still large.

Some law school clinics have attempted to fill that void with offerings targeting community-based enterprises and small businesses. Two such initiatives are the University of Pennsylvania Law School's Entrepreneurship Legal Clinic's (ELC) StartUp Kit and the Legal Technology Laboratory's Startup Advisor Toolkit.⁵²

With Penn ELC's StartUp Kit, the user is presented with numerous modules, each addressing common obstacles entrepreneurs face in getting their business off the ground. The modules include founder's agreements, entity choice, seed financing, financing generally, convertible notes, employment law, intellectual property, and independent contractors. Each

50. See *Law School Entrepreneurship Clinics in the United States*, ESHIPLAW.ORG (May 18, 2017), <http://eshiplaw.org/entrepreneurship-clinics-map?showall=&limitstart> (listing 157 clinics that assist entrepreneurs and innovators); Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U. J.L. & POL'Y 85, 100 (2014).

51. That efficiency may come at the expense of pedagogy and learning, however. The balance between legal training of law students and client service is an important consideration for law school clinics but beyond the scope of this Article.

52. These initiatives were addressed at the Transactional Clinical Conference held at the University of Pennsylvania Law School on June 2, 2017.

module includes some combination of a primer on the topic, checklists to assist in self-navigation, and annotated sample documents. The StartUp Kit also contains interactive web tutorials to facilitate entrepreneurs' deeper understanding of these and related topics. In creating the StartUp Kit, the ELC recognized the reality that entrepreneurs are going to continue creating businesses on their own without consulting lawyers. However, in order to help them avoid common mistakes, the StartUp Kit offers user-friendly materials written specifically for non-lawyers and designed to educate as well as service entrepreneurs.⁵³

Another online resource targeting mainstream small businesses is the Legal Technology Laboratory's Startup Advisor Toolkit, which will have two parts: (1) the Founders' Terms Sheet Generator Tool and (2) the LLC Formation suite of tools.⁵⁴ The Founders' Terms Sheet Generator Tool, which was designed for startups in their initial formation stage, addresses the rights and obligations between/among co-founders who are not seeking (and may never seek) VC or other professional investors.⁵⁵ The LLC Formation suite of tools will include checklists, templates, transmittal letters, and documents to complete the state-specific formation requirements of LLCs and it will initially be an online tool for law school entrepreneurship clinics serving a broad range of jurisdictions.⁵⁶ In contrast to Cooley GO's Incorporation Package, the LLC Formation suite of tools is being designed to help entrepreneurs create limited liability companies. The thought behind this is that most small businesses are better off as LLCs rather than corporations, especially if they do not seek to raise venture capital. LLCs are more flexible, less formal, and easier to administer in most circumstances. They still provide limited liability to owners while allowing flexible management structures.

Because both of these toolkits are aimed at community-based enterprises and are suitable for LLCs, they have the ability to bridge the gap between community-based enterprises and legal resources designed for VC seeking companies. In so doing, these toolkits help democratize access

53. The Penn ELC StartUp Kit can be found at <https://www.law.upenn.edu/clinic/entrepreneurship/startupkit/> (last visited Sept. 9, 2017).

54. See *Portfolio: Automated Document Creation*, LEGAL TECHNOLOGY LABORATORY, <http://www.thelegaltechlab.com/portfolio/automated-document-creation/> (last visited June 29, 2017) (The Founders' Terms Sheet Generator Tool project is being led by Tony Luppino, the Rubey M. Hulen Professor of Law and Director of Entrepreneurship Programs at the University of Missouri-Kansas City; Jeff Ward, Associate Clinical Professor of Law and Director of the Start-Up Ventures Clinic at Duke University Law School; and Larry Farmer, Director of the MediaNotes Project and J. Reuben Clark Law School Faculty at Brigham Young University. The LLC Formation suite of tools is also being developed by Jeff Ward and Larry Farmer.).

55. *Id.*

56. *Id.*

to legal documents and startup know-how for these underserved entrepreneurs who form the backbone of small businesses across the country.

C. Small Business Development Centers and Accelerators

Non-legal service providers, such as small business development centers and business accelerators, are also poised to benefit from open source legal resources. Small business development centers are a nationwide network of nonprofit organizations affiliated and supported by the Small Business Administration; they provide business consulting and business planning advice to entrepreneurs.⁵⁷ Business accelerators are mostly for profit ventures that provide education, mentorship, and sometimes financing to early stage ventures. Unlike SBDCs, which often offer à la carte services for all types of entrepreneurs to sample and participate in, accelerators are usually selective in the businesses they work with and often require participation in a fixed duration educational program followed by formal mentoring. Some take equity in the companies they assist as payment.⁵⁸ As organizations designed to help businesses create business plans and start their ventures, the desire to assist in creating the legal foundation for the entrepreneurs' businesses is natural. Before the development of open source legal resources, these organizations may have been practicing law without a license if they helped business founders create an entity or draft bylaws or draft a financing agreement. Now, because the documents are being provided online by law firms, business development centers and accelerators can point out the existence of these resources and perhaps assist businesses as they complete a wizard or document generator. In fact, some accelerators are even providing their own resources.⁵⁹

D. Accounting and Tax Professionals

In addition to legal aspects of entrepreneurship, open source materials are impacting accounting and tax aspects of entrepreneurship as well. Accounting and tax professionals, as well as entrepreneurs themselves, stand to benefit from these open source resources. Accounting and tax issues are critical to the success of startups. If startups do not track their expenses, monitor their burn rate, invoice and collect payments from customers, keep accurate books and records, comply with applicable employment and business tax laws, and properly process payroll, they will be unable to flourish, or perhaps even survive. Furthermore, many cash-strapped

57. See Small Business Administration/Small Business Development Center for further information and reference to the vast network of SBDCs nationwide, <https://www.sba.gov/tools/local-assistance/sbdc>.

58. Y Combinator is a famous accelerator located in Silicon Valley. See also Ian Hathaway, *What Startup Accelerators Really Do*, HARVARD BUS. REV. (Mar. 1, 2016), <https://hbr.org/2016/03/what-startup-accelerators-really-do>.

59. See Y COMBINATOR, *supra* note 6.

startups choose to compensate their workforce with equity rather than cash, presenting a host of accounting and tax issues.

Accounting issues, just like legal issues, are often misunderstood and not prioritized by entrepreneurs, who are primarily focused on building their businesses.⁶⁰ Furthermore, certified public accountants often prefer to work with more established companies that can provide lucrative auditing, financial reporting, compliance, and tax work that many entrepreneurs may not need or be able to afford. As such, entrepreneurs face hurdles in the accounting realm that mirror those in the legal realm.

Fortunately, there are various accounting platforms for entrepreneurs, many of which are conveniently integrated into open source legal resources. These enable entrepreneurs, and the accountants who advise them, to properly handle accounting and tax needs with minimal time and effort. These resources can be particularly helpful for community-based entrepreneurs because they often cannot afford extensive help from accountants and other advisors. Rather than saving boxes of receipts and simply presenting them to an accountant once per year, entrepreneurs with limited financial resources and accounting know-how can now get real-time information about the financial operations of their business. This is critical information that can enable entrepreneurs to correct course if, for example, they discover they are running out of cash because an aged accounts receivable report alerts them to large outstanding invoices. Moreover, entrepreneurs can access accountants through these resources, either on demand or by providing their accountant with direct electronic access to the platform. Although these resources are quite user-friendly and have online tutorials, many small business owners find it helpful to grant an accountant access to their accounting platform so they can ensure that transactions are properly classified under Generally Accepted Accounting Principles and that any accounting errors are corrected.⁶¹

For many years, there have been online tools to help small businesses manage their bookkeeping and taxes. For example, many small businesses use QuickBooks⁶² and TurboTax⁶³ for their bookkeeping and taxes, respectively. Accountants who represent small business clients are very familiar with these tools because they are widely used.⁶⁴ In recent years,

60. STARTUP SAVANT, *Bookkeeping 101: Everything You Need to Know* (May 7, 2017), <https://startupsavant.com/understanding-bookkeeping/> (noting that “TD Bank surveyed over 500 small-biz owners to find out what they liked least about running their businesses, and bookkeeping won, hands-down”).

61. Telephone Interview with Khadhyja Taylor, CPA, Owner of KTD Accounting Advisory (June 22, 2017).

62. QUICKBOOKS, https://quickbooks.intuit.com/?xciid=seq_intuit_qb_click_hd (last visited June 29, 2017).

63. TURBOTAX, <https://turbotax.intuit.com/> (last visited June 29, 2017).

64. Taylor, *supra* note 61.

some of these tools have migrated from download-only programs to easily accessible cloud-based and app-based programs that are constantly updated. Although some accounting tools are subscription-based, many are available for free; this may be particularly helpful for community-based or low- to moderate-income entrepreneurs. For example, there are various free, open source accounting software programs, such as TurboCASH,⁶⁵ which is “known as the world’s leading open source accounting software for small businesses.”⁶⁶ Another very popular free accounting software is Wave,⁶⁷ which has been heavily featured in well-known publications and is designed for small businesses with nine employees or less.⁶⁸

In addition, new platforms that integrate legal, accounting, and/or tax tools have arisen in recent years, including the comprehensive platforms referenced in Part III.D of this Article: Shoobx, eShares, and Gust Launch. For example, Gust Launch has several bookkeeping and accounting packages for entrepreneurs.⁶⁹

Furthermore, many transactions that are facilitated by such comprehensive platforms have important accounting and tax implications for businesses and their employees. For example, the above-referenced platforms help companies issue equity to employees, which presents issues under several sections of the Internal Revenue Code, including Sections 409A (regarding deferred compensation), 83(b) (regarding the recognition of income), and 422 (regarding incentive stock options). Some of these provisions can result in substantial penalties—such as a 20% penalty in the case of Section 409A—if non-compliance occurs.⁷⁰

65. TURBOCASH, <http://turbocash.ning.com/> (last visited June 29, 2017).

66. INVESTORGUIDE, *Ten Best Free Business Accounting Software for Freelancers and Small Businesses*, <http://www.investorguide.com/article/14818/10-best-free-business-accounting-software-freelancers-small-businesses/> (last visited June 29, 2017).

67. WAVE ACCOUNTING INC., <https://www.waveapps.com/> (last visited June 29, 2017).

68. *Id.*

69. These include: (1) a pre-revenue package for \$99/month that provides basic bookkeeping for very early-stage companies, which includes monthly financial statements, bookkeeping by Simplexity and accounting software by Xero, as well as (2) a revenue and billing package for \$199/month, and (3) CFO services at customized prices. GUST, *Gust Launch FAQ: What Is Provided in Each Financials Package?* (June 1, 2017), <http://faqs.launch.gust.com/article/301-what-is-included-in-each-financials-package>.

70. Tahir J. Naim, *Section 409A Valuations and Stock Option Grants for Start-up Technology and Life Science Companies*, FENWICK & WEST LLP, http://www.fenwick.com/FenwickDocuments/409_Valuations_Stock_Options.pdf (last visited June 29, 2017) (“Employees, officers, directors and consultants who receive stock options with exercise prices that cannot be shown to be at or above the

The platforms referenced above have wizards that ask a series of questions to promote compliance with these sections of the Code. For example, companies issuing stock options need to ensure that the strike price is at least equal to fair market value on the grant date for compliance with Section 409A of the Code. The platforms provide 409A valuations to assist entrepreneurs with determining the fair market value of their company's equity.⁷¹

It is important to note that because these are complex sections of the Code, users are advised to consult with an accountant or tax lawyer for further guidance. However, having tools at their disposal can be very valuable for entrepreneurs—especially those with limited resources—as well as the accountants who advise them. Ultimately, these various accounting resources, just like the legal resources described in this Article, can help level the playing field between community-based entrepreneurs and VC-backed entrepreneurs.

E. University Entrepreneurship Centers

Open source materials are also impacting university entrepreneurship centers and their initiatives, including campus pitch competitions. For example, in addition to sharing educational resources about non-law topics, the University of Chicago's New Venture Challenge (NVC) provides a Simple Agreement for Future Equity (SAFE) and frequently asked questions about SAFEs on its resources webpage.⁷² The NVC can also recruit judges, mentors, and advisors who support the use of these resources and are willing to use them to invest in NVC participants, which, in turn, become local businesses that create new products and services and generate employment opportunities. Thus, the NVC utilizes open source legal resources to both provide educational value (e.g., by demonstrating

reasonably determined FMV on the date of grant face immediate tax on vesting at a combined federal and state tax rate as high as 85% or more.”).

71. *409A Valuations*, eSHARES, INC., <https://esharesinc.com/product/409a> (last visited June 29, 2017); *Out of the Bx, Your 409A Valuation*, SHOOBX, INC. (Jan. 30, 2017), <https://www.shoobx.com/409a-valuation/>; *Expert 409A Valuations*, GUST EQUITY MANAGEMENT, <https://equity.gust.com/409a> (last visited July 13, 2017). Although community-based entrepreneurs typically do not issue stock options because they are not applicable in LLCs, these types of entrepreneurs do provide other types of employee compensation for which Section 409A compliance is required. Lexis Practice Advisor Attorney Team, *Understanding Partnership and LLC Equity Compensation*, LEXIS NEXIS (Jan. 23, 2017).

72. *New Venture Challenge: Resources*, UNIV. OF CHICAGO BOOTH SCH. OF BUS., <https://research.chicagobooth.edu/nvc/traditional-nvc/resources> (last visited June 29, 2017).

how seed financings can be structured and documented) and further economic development (e.g., by empowering the NVC's network of professional volunteers to make seed investments with low transaction costs). In addition to giving practicality and prestige to its program,⁷³ the NVC's use of open source legal resources encourages additional positive spillover effects. For example, friends and family members of NVC participants can also use these resources to make seed investments. Moreover, people who become familiar with the resources may use them to make investments in other ventures (e.g., other local businesses not even participating in the NVC). Similar to how VC-law firms are likely to have high growth clients with access to more resources than many small businesses, the NVC is likely to have participants with high growth ambitions and access to more resources than students at typical universities. That said, universities everywhere have students with lofty dreams; the open source legal resources should be needed more (not less) by students with less resources, and the resources are equally accessible to such students.⁷⁴ Further, the NVC's use of open source legal resources signals to other programs that use of open source legal resources is an acceptable practice.

F. Crowdfunding Portals

The Jumpstart Our Business Startups (JOBS) Act⁷⁵ recently created a "crowdfunding exemption" that allows companies to raise up to \$1 million every twelve months⁷⁶ by selling stock (or other unregistered securities) to accredited or non-accredited investors as long as the sales are made through a registered intermediary (often an SEC registered funding portal).⁷⁷ Prior to the JOBS Act, it was more difficult for companies to raise much needed capital from non-accredited investors.⁷⁸ One SEC study estimated that, in 2013, 10.1% of the households in the United States were

73. Yael Hochberg, Susan Cohen & Dan Fehder, *The Top 20 Start-Up Accelerators in the U.S.*, HARVARD BUS. REV. (Mar. 31, 2015), <https://hbr.org/2015/03/the-top-20-start-up-accelerators-in-the-u-s> (ranking the University of Chicago's NVC as the number 4 accelerator program in the United States).

74. However, as discussed above, resources could also be provided for additional types of entrepreneurs (e.g., social ventures and smaller community-based businesses).

75. Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified as amended in scattered sections of 15 U.S.C.) [hereinafter the JOBS Act].

76. After the passage of the JOBS Act, the SEC adjusted the \$1 million amount for inflation and increased the limit to \$1.07 million. See 80 Fed. Reg. 71,537 (Nov. 16, 2015), as amended at 82 Fed. Reg. 17,552 (Apr. 12, 2017).

77. See § 4(a)(6) of the Securities Act of 1933 (codified as amended at 15 U.S.C. § 77d(a)(6) (2012)); SEC Regulation Crowdfunding, 17 C.F.R. § 227 (2016); Jeff Thomas, *Making Equity Crowdfunding Work for the Unaccredited Crowd*, 4 HARV. BUS. L. REV. ONLINE 62 (2014), <http://www.hblr.org/?p=3773>.

78. See, e.g., Edan Burkett, *A Crowdfunding Exemption? Online Investment Crowdfunding and U.S. Securities Regulation*, 13 TRANSACTIONS: TENN. J. BUS. L. 63, 75 (2011)

accredited investor households.⁷⁹ While angel investors and VCs will usually be accredited, many entrepreneurs are unable to raise capital from them. Thus, the crowdfunding exemption is important because it creates a new source of capital (i.e., funds from non-accredited investors, which make up approximately 90% of the nation's households) for historically underrepresented entrepreneurs (i.e., entrepreneurs who are unlikely to raise money from angel investors or VCs or qualify for a bank loan).

While the JOBS Act was signed into law in 2012, the SEC's final crowdfunding rules did not permit the first equity crowdfunding transaction in the United States until May 16, 2016.⁸⁰ Even though equity crowdfunding is still in its infancy, the funding portals are already embracing open source legal resources. For example, funding portals are sharing resources that entrepreneurs can use to raise capital through their platforms.⁸¹ As the founder of one SEC registered funding portal notes, these resources reduce costs for issuers raising money through their platforms and add value beyond the equity crowdfunding:

Issuers are using templated offering documents on many platforms . . . along with other tools to help them assess their valuation, complete all SEC filings, required background checks and all investor flows during the investment process. The issuer may incur modest third party expenses—like an accountant's independent review, but these tend to pale in comparison to the \$5-25k that a lawyer might charge just to create traditional offering documents. We discovered this point after being approached by a few accelerators that sought access to our platform solely for the legal offering documents for their current cohorts and alumni.⁸²

Equity crowdfunding also illustrates a risk associated with open source legal resources: entrepreneurs and others may use documents that are inappropriate for their transaction. For example, arguments have been made that the SAFEs being shared by funding portals are, in fact, not suitable for

("[S]ecurities laws . . . are a formidable barrier to investment crowdfunding in the United States.").

79. U.S. Securities and Exchange Commission, *Staff Report on the Review of the Definition of "Accredited Investor"* at 48 (Dec. 18, 2015), <https://www.sec.gov/corpfin/reportspublics/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>.

80. See, e.g., Joseph M. Green & John F. Coyle, *Crowdfunding and the Not-so-Safe SAFE*, 102 VA. L. REV. ONLINE 168 (2016) ("On May 16, 2016, more than four years following the enactment of the Jumpstart Our Business Startups Act . . . the much-anticipated era of retail crowdfunding officially began in the United States.").

81. See, e.g., *Investment Contracts*, WEFUNDER INC., <https://wefunder.com/faq/legal-primer#securities> (last visited June 29, 2017); *The Crowd Safe*, REPUBLIC, <https://republic.co/crowdsafe> (last visited June 29, 2017).

82. Ken Staut, *Regulation Crowdfunding: What We See Day to Day*, CROWDFUNDING INSIDER (Apr. 27, 2017), <https://www.crowdfundinsider.com/2017/04/99381-regulation-crowdfunding-see-day-day/>.

equity crowdfunding.⁸³ Despite this risk, and given the small size of the investments in equity crowdfunding, open source legal resources are critical to reduce transaction costs to the point where the transactions are economically viable. Stated differently, even small transaction costs become economically prohibitive if the transactions themselves are quite small. Thus, open source legal resources must be leveraged to bring the transaction costs close to zero. Considering the above discussion, there may be opportunities to build entity formation resources and comprehensive platforms into funding portals. Imagine if all companies on a funding portal used essentially the same formation and financing documents, had the same stock option plan, and used the same bookkeeping and payroll tools.⁸⁴ These resources not only reduce transaction costs associated with companies raising funds directly from crowdfunding investors, they decrease other transaction costs (e.g., costs associated with forming entities, issuing equity to employees, and secondary trades of their securities) and possibly enhance the companies' operations (e.g., by improving compliance, record keeping, and communications).

VI. Conclusion

The open source movement has begun. Legal documents, wizards, and other resources are already available online for a broad spectrum of entrepreneurs—including underserved entrepreneurs who may stand to benefit from them the most. While these resources raise ethical and professional responsibility issues, they cannot be easily dismissed as something that only involves attorneys practicing on the fringe. Highly respected international law firms are not only supporting the open source movement, they are leading the charge by providing and maintaining high quality resources on their websites. Perhaps these firms are promoting themselves; however, they understand the importance of entrepreneurship and they see an opportunity to contribute to the ecosystem. They have the opportunity to share battle-tested resources and to make legal services more affordable and accessible to entrepreneurs who have been historically underrepresented. They also have the opportunity to help create a new market—a market where the attorney-client relationship is redefined and best prac-

83. See, e.g., Green & Coyle, *supra* note 80, at 170 (the SAFE “is not the right tool for channeling retail investment capital to crowdfunding companies”); *Investor Bulletin: Be Cautious of SAFEs in Crowdfunding*, U.S. SECURITIES AND EXCHANGE COMMISSION (May 9, 2017), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_safes.

84. While this *appears* to reduce options for entrepreneurs, it may reduce costs to the point where entrepreneurs *actually* have access to things, such as sophisticated entity structures and seed capital, they previously did not. It is also reminiscent of Henry Ford’s attributed quote that customers, who previously could not afford cars, could get a Model T in “(a)ny color . . . so long as it is black.” Patrick Vlaskovits, *Henry Ford, Innovation, and That “Faster Horse” Quote*, HARVARD BUS. REV. (Aug. 29, 2011), <https://hbr.org/2011/08/henry-ford-never-said-the-fast>.

tices are themselves open sourced. While some entrepreneurs may attempt, or even need, to utilize these resources without seeking legal counsel, many will use the resources to build more productive attorney-client relationships. Other organizations that assist entrepreneurs are also shaping their business models to capture and share the value created by these resources. Legal clinics, small business development centers, accelerators, accounting and tax firms, university entrepreneurship centers, and crowdfunding portals are all taking part in the open source movement. In short, open source legal resources are disrupting many business models and astute entrepreneurs and organizations are already capitalizing on the value they add.

While this Article focused on the impact open source legal resources have on entrepreneurs and the organizations that support them, the open source movement will spark broader implications in the legal community. Other transactions could also benefit from a pool of high quality resources that are open to clients, attorneys and others. Whether entering into a lease, submitting a trademark or copyright application, creating a will, preparing a prenuptial agreement, or (if things do not work out) filing for a divorce, open source legal resources will make legal work more productive and thus more affordable and accessible. It is time to bridge the gap between traditional legal services that few can afford and customary do-it-yourself options. The open source movement is building that bridge.

Examples of Existing Open Source Resources

FORMATIONS		LINKS
Delaware Corporation		
Incorporation Questionnaire	1, 2, 3	
Certificate of Incorporation	1, 2, 3, 4, 5, 6	
Bylaws	1, 2, 3, 4, 5, 6	
Action by Written Consent of Incorporator	1, 2, 3, 4, 5, 6	
Initial Organizational Board Resolutions	1, 2, 3, 4, 5, 6	
Founder Stock Purchase Agreement	1, 2, 3, 4, 5, 6	
Common Stock Certificate	1, 2, 3, 6	
Indemnification Agreement/Provisions	1, 2, 3, 4, 6	
Stock Plan	2, 6	
Board Approval of Stock Plan	2, 4, 6	
Stockholder Approval of Stock Plan	2, 4, 6	
Option Agreement (Grant)	2, 6	
Restricted Stock Purchase Agreement "RSP" (Grant)	2, 6	
Board Approval of Option/RSP Grant	2	
Delaware LLC (Single & Multiple Member)		
Certificate of Formation	3	
LLC Agreement	3	
Subscription Letter	3	
Contribution & Assignment Agreement	3	
Founder's Restricted Unit Agreement	3	
OTHER RESOURCES		
Employee Offer Letter/Employment Agreement	1, 2, 5, 6	
Consulting Agreement	1, 2, 5, 6	
Advisor Agreement	1, 5	
Confidential Info & Invention Assignment Agreement	1, 2, 3, 4, 5, 6	
Non-Competition & Non-Solicitation Agreement	5	
Nondisclosure Agreement		
Website Terms & Conditions and Privacy Policy	1, 2, 5	
Equity Management Platform	1	
	15	

FINANCINGS		LINKS
Convertible Debt		
Term Sheet		1, 7
KISS: Debt Version		8
Convertible (Non-Debt) Securities		
SAFE: Primer		9
SAFE: Cap, no Discount		1, 9
SAFE: Discount, no Cap		1, 9
SAFE: Cap and Discount		1, 9
SAFE: MFN, no Cap, no Discount		1, 9
Convertible Security Financing Term Sheet		10
Convertible Security Purchase Agreement		10
Convertible Security		10
KISS: Equity Version		8
Loans		
Promissory Note		11
Revenue Loan Agreement		11
Series Seed Convertible Preferred Stock		
Term Sheet		12, 13
Restated Certificate of Incorporation		12, 13
Stock Investment/Purchase Agreement		12, 13
Investors' Rights Agreement		13
Series A Convertible Preferred Stock		
Term Sheet		14
Stock Purchase Agreement		14
Amended and Restated Certificate Of Incorporation		14
Investors' Rights Agreement		14
Voting Agreement		14
Right of First Refusal and Co-Sale Agreement		14
Management Rights Letter		14
Indemnification Agreement		14

	SOURCE	LINKS
1	Cooley LLP's Cooley GO*	https://www.cooleygo.com/documents/index-document-generators/
2	Orrick, Herrington & Sutcliffe LLP's Startup Forms Library	https://www.orrick.com/Total-Access/Tool-Kit/Start-Up-Forms
3	Goodwin Procter LLP's Founders Workbench*	http://www.foundersworkbench.com
4	Perkins Coie LLP's Startup Percolator*	http://www.startuppercolator.com/formation/
5	WilmerHale LAUNCH*	https://launch.wilmerhale.com/build/document-generator/
6	Reed Smith LLP's RStart*	https://www.rstart.com/
7	Wilson Sonsini's Term Sheet Generator*	https://www.wsgr.com/WSGR/Display.aspx?SectionName=practice/termsheet-convertible.htm
8	500 Startups' KISS ("Keep It Simple Security")	http://500.co/kiss/
9	Y Combinator's Startup Documents	https://www.ycombinator.com/documents/
10	TheFunded.com, Founder Institute and Wilson Sonsini Initiative Reported by TechCrunch	https://techcrunch.com/2012/08/31/the-funded-founder-institute-and-wilson-sonsini-debut-startup-friendly-seed-financing-vehicle-convertible-equity/
11	Wefunder's Loan & Promissory Notes	https://wefunder.com/faq/securities#loan
12	Ted Wang's Series Seed Financing Documents	http://www.seriesseed.com
13	Gust's Series Seed Documents	http://gust.com/series-seed/
14	NVCA's Model Legal Documents	http://nvca.org/resources/model-legal-documents/
15	Shoobx, Inc.	https://www.shoobx.com

* Resources include a generator or wizard-like tool.

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APPENDIX B

RESTRICTED STOCK PURCHASE AGREEMENT

THIS RESTRICTED STOCK PURCHASE AGREEMENT (the “*Agreement*”) is made as of _____ by and between STARTUP INC., a Delaware corporation (the “*Company*”) and Ben Franklin (“*Purchaser*”). Certain capitalized terms used below are defined in the terms and conditions set forth in Exhibit A attached to this Agreement, which are incorporated by reference.

Total shares of Stock purchased: 4,000,000 shares of Common Stock (the “*Stock*”)
Purchase Price per share: \$0.0001
Total Purchase Price: \$400.00
Form of Payment: Cash: \$400.00

Vesting Schedule:

4,000,000 shares of the Stock (the “*Restricted Stock*”) are subject to the Repurchase Option as of the date of this Agreement. On the date 12 months from _____, 20__ (the “*Vesting Anniversary Date*”), 12/48th of the Restricted Stock shall vest and be released from the Repurchase Option; thereafter, 1/48th of the Restricted Stock shall vest and be released from the Repurchase Option on a monthly basis measured from the Vesting Anniversary Date, until all the Restricted Stock is released from the Repurchase Option (provided in each case that Purchaser remains a Service Provider as of the date of such release).

[Remainder of page intentionally left blank]

Additional Terms/Acknowledgements: The undersigned Purchaser acknowledges receipt of, and understands and agrees to, this Restricted Stock Purchase Agreement, including the terms and conditions set forth in **Exhibit A** attached to this Agreement, which are incorporated by reference.

COMPANY:

STARTUP INC.

By: _____

Name: Rocky Balboa
Title: Chief Executive Officer

Address: 123 Main Street
Suite 1302
Philadelphia, Pennsylvania 94500

PURCHASER:

BEN FRANKLIN

(Signature)

Address: 789 Main Street
Philadelphia, Pennsylvania 94500

EXHIBIT A

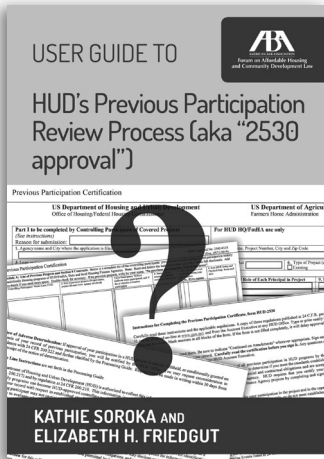
TERMS AND CONDITIONS INCORPORATED INTO
RESTRICTED STOCK PURCHASE AGREEMENT

1. **PURCHASE AND SALE OF STOCK.** Purchaser agrees to purchase from the Company, and the Company agrees to sell to Purchaser, the number of shares of Stock for the consideration set forth in the cover page to this Agreement. The closing of the transactions contemplated by this Agreement, including payment for and delivery of the Stock, shall occur at the offices of the Company immediately following the execution of this Agreement, or at such other time and place as the parties may mutually agree.
2. **INVESTMENT REPRESENTATIONS.** In connection with the purchase of the Stock, Purchaser represents to the Company the following:
 - (a) Purchaser is aware of the Company's business affairs and financial condition and has acquired sufficient information about the Company to reach an informed and knowledgeable decision to acquire the Stock. Purchaser is purchasing the Stock for investment for Purchaser's own account only and not with a view to, or for resale in connection with, any "distribution" thereof within the meaning of the Securities Act of 1933, as amended (the "*Act*").
 - (b) Purchaser understands that the Stock has not been registered under the Act by reason of a specific exemption therefrom, which exemption depends upon, among other things, the bona fide nature of Purchaser's investment intent as expressed in this Agreement.
 - (c) Purchaser further acknowledges and understands that the Stock must be held indefinitely unless the Stock is subsequently registered under the Act or an exemption from such registration is available. Purchaser further acknowledges and understands that the Company is under no obligation to register the Stock. Purchaser understands that the certificate evidencing the Stock will be imprinted with a legend that prohibits the transfer of the Stock unless the Stock is registered or such registration is not required in the opinion of counsel for the Company.
 - (d) Purchaser is familiar with the provisions of Rule 144 under the Act as in effect from time to time, that, in substance, permits limited public resale of "restricted securities" acquired, directly or indirectly, from the issuer of such securities (or from an affiliate of such issuer), in a non-public offering subject to the satisfaction of certain conditions.

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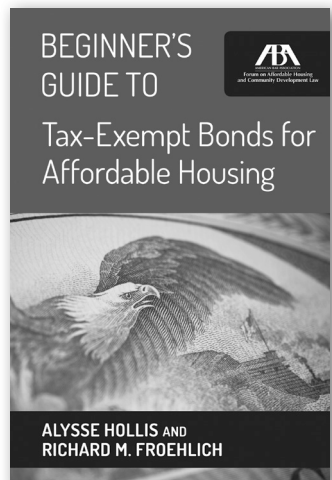


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