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The Journal of Affordable Housing & Community Development Law is the official quarterly publication of the Forum on Affordable Housing & Community Development of the American Bar Association. It is targeted toward attorneys and other housing and community development specialists. It provides current practical information, public policy, and scholarly articles of professional and academic interest.

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From the Editor-in-Chief

Laurie J. Hauber

As lawyers, law faculty, and soon-to-be-lawyers working in the area of affordable housing, we have an obligation to elevate the discussion about affordable, fair housing so it becomes a consistent part of our presidential candidates’ campaigns and central to national discussions on domestic policies. The United States has the highest rate of poverty among all developed countries. A major contributing factor to such a high poverty rate is the fact that 25 percent of households spend at least half their income on housing. As the National Low Income Housing Coalition reminds us in its recent report, Out of Reach 2015, while housing costs have continued to rise, the minimum wage for low-income workers has remained the same since 2009, making housing a significant cost burden for many Americans, not merely those who are unemployed or underemployed. Housing and employment are inextricably intertwined—to obtain stable employment and seek better employment opportunities people need stable, safe housing. As we were reminded so poignantly by Matthew Desmond, keynote speaker at this year’s annual conference in Washington, D.C., and author of the New York Times best-selling book, Evicted: Poverty and Profit in the American City, lack of decent stable housing creates a downward spiral that adversely impacts all aspects of a person’s or family’s life, leading to homelessness and despair. Fortunately, for those who could not make the conference, this issue contains a brief review of Professor Desmond’s book. His book truly is a must read for all—students and practitioners alike.

The severe plight of low-income households in finding stable, affordable housing is discussed further in “Homelessness and the Crisis of Affordable Housing: The Abandonment of a Federal Affordable Housing Policy” by Al Clark. As the title suggests, Mr. Clark implores the federal government to do more to address this growing affordability crisis. His proposal, which he covers in impressive detail, is to reform the mortgage interest deduction. He also provides a wealth of useful macro data on recent homelessness trends as well as data on the factors contributing to the growing affordable housing crisis in this country.

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, this past 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.
In addition to the various discussions involving poverty and affordable housing, this issue includes a symposium of four articles on community development strategies to address poverty and achieve more economic and racial justice. Focused on the work of law school legal clinics and community organizations in Baltimore and the District of Columbia, these articles cover a range of innovative strategies from worker cooperatives to the promotion of entrepreneurship for returning citizens and the innovative use of social impact bonds to fund such efforts. Thanks to the leadership of Susan Jones, speakers from a panel she moderated at this year’s Association of American Law Schools Conference on Clinical Legal Education worked hard to turn their presentations into compelling articles. Renee Hatcher and Jaime Lee discuss how the University of Baltimore School of Law Community Development Clinic fosters community driven equitable development, including affordable housing and access to affordable water. Eva Seidelman, with Louise Howells of the David A. Clarke School of Law Community Development Law Clinic, explore how worker cooperatives can promote systemic change. In her own contribution, Susan, who is Professor of Clinical Law and Director of the Small Business & Community Economic Development Clinic at George Washington University Law School and a former editor-in-chief of the Journal, examines how soon-to-be lawyers can support the growing effort in Washington D.C., to promote entrepreneurship for citizens returning to society after incarceration. Her discussion includes a detailed overview of the Clinic’s multi-year Action Research Project, which has positioned the Clinic as a key player in promoting the city’s effort around entrepreneurship for returning citizens and could inform similar efforts in other cities around the country. Finally, Etienne Toussaint, Visiting Associate Professor of Law at George Washington University, provides an additional dimension to the Clinic’s project by writing about how social impact bonds can direct private sector investments to finance projects such as these as well as ones in other much-needed areas.

To round out the issue, we have two excellent student submissions—one that focuses on historic preservation and the other on receivership laws around the country. In “Historically Affordable: How Historic Preservationists and Affordable Housing Advocates Can Work Together to Prevent the Demolition of Rent-Stabilized Housing in Los Angeles,” Emily Milder discusses a number of recent historic preservation initiatives in Los Angeles and explores how certain protections offered in the historic preservation context might be leveraged by affordable housing advocates. Melanie Lacey, in “A National Perspective on Vacant Property Receivership,” provides an overview of the development of receivership laws in the United States as a means to address blight, an in-depth analysis of receivership laws in two states, and a detailed chart of receivership laws around the country.

Finally, this issue includes the Journal’s second digest, which we introduced in the last issue. Associates from Holland & Knight and Klein
Hornig LLP have created an excellent digest with brief summaries of twelve law review articles, academic reports, and reports from policy institutes.

As always, proposals for submissions as well as comments and criticisms are encouraged. We also welcome additional reviewers for the Journal’s digest. Anyone interested in participating should contact me directly at hauberyang@gmail.com.
From the Chair

Post-Olympics—Keeping Clear of the Goal

Dina Schlossberg

This is my first column as Chair of the Forum so let me start with a brief introduction. I work and live in the Philadelphia area, and I have spent most of my career as an affordable housing and community development attorney. I’ve done this work from many perspectives: as a legal services attorney, as a municipal government attorney, as a law school clinical professor, in private practice (big firm and small), and now back in the legal services community. My interest and passion for this area of practice is borne out of a simple social and economic justice framework. When I attended law school, homelessness was on the rise. With my youthful indignation and naïveté, I could not believe that people lived on the street and that we as a society tolerated homelessness as normal and possibly an inevitable outcome of mental illness, substance abuse, and poverty. This propelled me to want to work to secure affordable and decent housing as the backbone of my career.

With age I’ve mellowed (some), but my commitment to addressing issues of homelessness and affordable housing has remained strong. Housing (the industry term) or having a place to call home (the human term) is a fundamental and basic human need. And yet, as more thoroughly detailed in the article by Al Clark in this issue of the Journal, we currently have almost 565,000 Americans homeless and more than 7 million people living in doubled up or inadequate housing and thus at risk of homelessness. Furthermore, poverty in the United States currently remains high: approximately 47 million people, or 15 percent of the population, live in poverty. Philadelphia, my home, is experiencing a cultural and economic renaissance, as well as rising housing prices, and yet the city stubbornly remains with 26 percent of its residents living in poverty, the highest rate of any major U.S. city. Philadelphia also has the highest deep poverty rate of

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any major American city with approximately 12.3 percent of the population experiencing living with deep poverty. What does this mean in economic terms? Officially, a family of four is in poverty if it has a cash income of around $24,000; deep poverty for that same family is $12,000 or less of annual income. Sometimes, it is hard not to despair and question the value of our work in the face of such overwhelming need.

While safe, decent, and affordable housing is essential to the well being of individuals and families, anti-poverty strategies and efforts that provide economic opportunity within an economic and racial justice framework are equally central to the core mission of affordable housing and community development advocates and attorneys. The articles in this Journal, especially those from a symposium sponsored last May by the Association of American Law Schools Conference on Clinical Legal Education, emphasize the importance of this work and provide examples of programmatic and legal work done to address these issues by community development attorneys in Baltimore and Washington D.C. Many are also legal educator members of the Forum.

I write this column as the international summer Olympics is drawing to a close. This Olympics was not without its controversies, but it was also a reminder of so many good lessons that we, as affordable housing and community development advocates, can embrace. The Olympic athletes remind us of what it means to work hard to achieve a goal; the value of working together as a team; the importance of believing that hard work, dedication, and perseverance will result in a positive outcome; and perhaps most importantly, sometimes dreams do come true. If we work together as a community, we can ameliorate at least some of the overwhelming need for affordable housing, as well as develop strategies, programs, and polices to address the deeper economic and racial justice issues that currently challenge lower income communities across the country.

Allow me to indulge in one more Olympian metaphor. The Forum, like Team USA, is comprised of attorneys and advocates from different aspects of the affordable housing and community development arena. Just as our athletes perform in different sports but all for the same Team USA, Forum members practice in different venues, and yet all strive for and use their excellent skills to meet a common goal of developing, preserving, and supporting affordable housing and community development. Go Team Forum!

Throughout my career I’ve relied on the Journal as a valuable resource for the technical and detailed information that is essential to keeping current on the laws and regulations that govern my specific areas of practices. Equally of value for me, has been the Journal’s focus on historic and contemporary housing and community development laws and policy. I’m proud to be able to promote the Journal, to embrace the Journal as this year’s Forum Chair, and to add my two cents to the dialogue. Happy reading—this is good stuff.
Real-Life, Heartbreaking Accounts Will Stir Housing Lawyers to Seek Justice

Robert B. Jaquay

Evicted: Poverty and Profit in the American City
Matthew Desmond
Hardback/420 pages/$28.00

*Evicted* is Matthew Desmond’s brilliant narrative about life in two impoverished neighborhoods of Milwaukee. His stories about low-income tenants and their landlords flow from the reality that a majority of poor renting families in the United States spend over half their income on housing. One quarter of this unfortunate group spends over 70 percent of their income to secure a roof over head. Though set in Milwaukee, such stories are found in cities across the country.

Matthew Desmond’s book contains a wide range of beautifully limned characters that seem like modern-day versions of those portrayed by Charles Dickens. Of course, there are the tenants: Arleen, a single mother, struggles to raise two teenaged sons on a very limited income. Scott fights to stay sober and keep his trailer after losing his nursing license due to his addictions. Lamar, a double amputee, looks after a number of neighborhood kids needing supervision while stretching his broken body to its limits in vain effort to work his way out of debt to his landlord and thus avoid being put out: he cleans, paints, and performs other physical labor despite his disability. Next, the landlords: Sherrena, the small-scale property owner, works with her handyman husband to earn more than she once did as a public school teacher. Tobin, the trailer park owner, clears over $400,000 per year while fending off calls by the city alderman to close his dilapidated trailer park down. Rounding out the cast is a host of minor characters, including Lenny, the trailer park maintenance man with the thick roll of keys; his cohort, known to tenants simply as “Office Suzy”; the clipboard-carrying housing inspector; the leather-gloved moving crew carting belongings either to the curb or a

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Robert B. Jaquay has served as Associate Director of the George Gund Foundation in Cleveland since 1996. A member of the Ohio Bar since 1981, he has extensive experience in housing and community development as a lawyer, grantmaker, planner, and local government official.
waiting truck as quickly as possible to keep up with a pair of sheriff deputies moving along their daily “eviction route.”

Yet, *Evicted* is not a work of fiction. The persons depicted—those who scrape to make rent and those that profit from the renter’s plight—really exist. Their painful struggles, indecent exploitations, or maddening indifference have been painstakingly documented in this ethnography by Harvard sociologist Matthew Desmond over 2008 and 2009.

For months, the author lived in the trailer park and another rental apartment alongside the individuals he describes. His fieldwork is bolstered by extensive endnotes citing the voluminous data analysis and published source material. *Evicted* is the rare social science book that meets academic rigor yet reads as easily as a novel.

Housing, Desmond passionately believes, is much more than shelter. A stable residence gives one a place in the community. It affords access to neighbors, church, schools, and webs of supporting relationships. Eviction—the loss of housing and one’s personal possessions—“sends families to shelters, abandoned houses, and the street. It invites depression and illness, compels families to move into degrading housing in dangerous neighborhoods, uproots communities and harms children.”

Desmond, Harvard sociologist and MacArthur Genius, asserts that the way housing markets operate in low-income neighborhoods—with the far too frequent post-eviction downward spiral—actually contributes to the creation of poverty.

Desmond offers only a few potential policies to ameliorate the problem he so well describes. These policies must be spotted within the twenty-two page epilogue that is further annotated by fifty-nine separate end notes. These too briefly discussed policy ideas nonetheless deserve to be lifted up for consideration:

- Increasing legal representation available to tenants in eviction actions is an important means to make the process of evictions less prevalent and to give poor families a fairer shake, Desmond argues. He observes that “in many housing courts 90 percent of landlords are represented by attorneys, and 90 percent of tenants are not.” Desmond urges an extension of the right to counsel for indigent civil defendants, established by the U.S. Supreme Court in the 1963 landmark case of *Gideon v. Wainwright*, to indigent criminal defendants.
- Desmond further observes that properly funded housing courts could actually dispense justice and avoid the phenomenon of “an eviction assembly line: *stamp, stamp, stamp.*” In recent years, eviction actions increasingly form a high-volume docket. Without more commissioners, judges, and clerks to handle the rapidly growing flow of cases, “due process has been replaced by mere process: pushing cases through.”
Lastly, Desmond puts forth a simple, yet bold, idea for a universal housing voucher program. Every family below a certain income level would be eligible for a housing voucher. This voucher would enable the holder to live anywhere in housing that is decent and appropriately sized. Under this plan, no more than 30 percent of a family’s income would be spent on housing, with the voucher paying the rest. In his text, Desmond states that, while the current federal Housing Choice Voucher Program serves 2.1 million households and an additional 1.2 million families live in public housing, a substantial majority of poor families “aren’t so lucky.” Expanding rental vouchers to all poor families in the United States would require an additional $22.5 billion—an amount offset, at least in part, by savings in reduced health care costs and other avoided consequences of homelessness or a lack of decent, affordable housing.

Much of the pith underpinning each of these policy ideas is relegated to fifty-nine separate endnotes. By doing this, Desmond downplays the strength of his arguments.

Scant treatment of policy ideas, although a definite weakness, does not diminish the book’s main strength—the vivid, heartbreaking depiction of the daily scramble poor people endure to maintain shelter, stability, and dignity. Indeed, in concluding the brief discussion of his policy ideas, Desmond makes the entreaty, “Let others (policy ideas) come.” The statement urges the reader to ask, “What policies do I suggest?” It could even be read as an implicit invitation to associations such as our Forum to further refine and advance Desmond’s prescriptions.

Books by social scientists long have focused upon topics highly relevant to the practice of affordable housing and community development law. George Sternlieb of Rutgers wrote *Tenement Landlord* in 1966. Twenty-four years later, Peter Rossi of University of Massachusetts published *Down and Out in America: The Origins of Homelessness*. Like these influential predecessors, Matthew Desmond’s *Evicted: Poverty and Profit in the American City* will inform the current generation of housing lawyers and inspire passion for our transactional, public policy formulation, and trial advocacy work.
Do Community Benefits Agreements Benefit Communities?

Edward W. De Barbieri,
37:5 Cardozo Law Review 1773 (2016)

This article argues that community benefits agreements (CBAs) can be more efficient than existing government processes for resolving disputes with developers by lowering transaction costs, enhancing civic participation, and protecting taxpayers. Much scholarship on the subject has either dismissed CBAs as harmful to communities or overemphasized the role of the state in negotiating such agreements. The author presents a framework for evaluating the impact of CBAs on community development and provides recommendations for a limited role for government in CBA negotiations that avoids triggering certain constitutional protections for developers.

Pessimism About Prolonged Housing Affordability Crisis Is on the Rise, 2016 How Housing Matters Survey Finds

MacArthur Foundation (June 2016)

This report related to the How Housing Matters initiative presents the findings and analysis of a telephone survey conducted during April and May 2016 for the MacArthur Foundation. The initiative aims to collect and track data, develop a better understanding of public perceptions about the housing market, and inform legislators and policymakers about housing market challenges. The report found that pessimism regarding the housing market is still on the rise despite the fact that, according to housing experts, the housing market is in full recovery. Americans believe that
economic security and the achievement of a middle-class lifestyle is more difficult now than it was for previous generations. This is due in part to difficulty in securing safe and affordable housing, which Americans, regardless of their political affiliation, view as key to economic mobility. A majority of Americans see housing affordability as a problem in their own communities; want action from their elected officials; and do not believe that housing issues receive enough attention, especially on the national campaign trail this year. The pessimistic view seems to stem from personal experience as more and more Americans are forced to make sacrifices in other areas to cover their housing costs. Most, however, are optimistic about the notion that action can be taken to improve access to quality affordable housing. This report provides support and evidence for implementing policies to improve such access.

**The State of the Nation’s Housing 2016**
*Joint Center for Housing Studies of Harvard University (June 2016)*

The latest edition of this annual report provides updates on national housing data and trends, including those related to affordability challenges. The report notes an undersupply of available, affordable housing for low- and extremely low-income U.S. families, particularly in metropolitan areas in the South and West. It highlights the very real potential for homelessness among the record numbers of low-income households that are now forced to spend disproportionately large amounts of their income on housing due to the lack of affordable rental units nationwide. The report links the limited supply of affordable housing to a drastic increase over the last fifteen years in the number of Americans living in neighborhoods with poverty rates of 40 percent or higher. The authors call for an increase in the supply of affordable housing in the United States through the elimination of exclusionary zoning practices, encouragement of inclusionary development, and enabling better access to permanent housing subsidies.

*Board of Governors of the Federal Reserve System (May 2016)*

This report publishes the findings from the Board of Governors of the Federal Reserve System’s third annual *Survey of Household Economics and Decisionmaking*. The survey and report, prepared by the Consumer and Community Development Research Section of the Division of Consumer and Community Affairs, examines the financial challenges facing American households and consumers. While the report finds that individuals and families continue to experience gradual improvements in their financial situations, it also highlights a number of concerning findings, including that nearly 46 percent of American adults either would not be able to
cover an emergency expense costing $400 or would only be able to cover it by selling something or borrowing money. The report also finds that only 35 percent of respondents in very-high poverty census tracts reported being satisfied with the overall quality of their neighborhood. Additionally, the report identifies significant challenges to financial stability and success among respondents, in particular: the unavailability of credit to low-income individuals and families, the high level of student loan debt among individuals and families between the ages of eighteen and forty-four, and the low levels of retirement savings among individuals earning less than $40,000 annually.

**Affordable Rental Housing Development in the For-Profit Sector: A Case Study of McCormack Baron Salazar**

Rachel G. Bratt

Joint Center for Housing Studies of Harvard University (March 2016)

This case study begins by conducting a literature review of research concerning the affordable housing development process and mixed-income housing. It highlights similarities and differences between projects undertaken by for-profit and nonprofit developers and notes that for-profit developers are more likely to prioritize economic goals and have greater access to capital. Nonprofits meanwhile may be more inclined to maintain housing affordability after the mandatory restricted-use period and tend to pursue projects in areas that for-profit developers are prone to avoid. The study next evaluates the work of the developer McCormack Baron Salazar, noting its history, mission, and approach to affordable housing. The article discusses the key elements of McCormack Baron Salazar’s success, focusing on its collaboration with other community organizations and stakeholders; its commitment to quality construction, resident services, and effective management; and its strategy of undertaking large projects to transform communities as opposed to pursuing smaller single-building projects. The case study concludes that further research is necessary, suggesting that this research should evaluate detailed elements of mixed-income housing projects created by various for-profit and nonprofit developers to effectively identify best practices and further the work of all developers engaged in affordable housing and community development work.

**Renting in America’s Largest Metropolitan Areas**

Ingrid Gould Ellen and Brian Karfunkel

NYU Furman Center (March 2016)

This report discusses rental housing affordability trends in the eleven largest metropolitan areas in the United States and finds that—between
2006 and 2014—the renter population grew faster than the inventory of rental units in all eleven metropolitan areas as well as in metropolitan areas nationwide. The rental housing stock also grew faster than the ownership stock, and rental household size increased during this period because more renters lived in single-family homes in 2014 than in 2006. Nationwide, a median-income earning renter in a metropolitan area could have afforded only 35 percent of the recently available rental units, as compared with 38 percent of the recently available rental units in 2006. A low-income renter—someone earning equal to or less than that of 25 percent of renters in the area—could afford less than 10 percent of the recently available rental units, and in all of the studied metropolitan areas except Boston, they could afford 5 percent or less of recently available rental units. Finally, the study highlighted that nationwide, more than 50 percent of low-income renters are severely rent burdened, paying rents that are greater than or equal to half of their household income.

Who Wants Affordable Housing in Their Backyard? An Equilibrium Analysis of Low Income Property Development

Rebecca Diamond and Tim McQuade
Stanford Graduate School of Business Working Paper No. 3329 (January 2016)

This working paper examines whether the Low Income Housing Tax Credit (LIHTC) is an effective place-based policy. The paper identifies place-based spillover effects resulting from siting subsidized housing in dense, low-income, higher-minority areas. These effects include lower crime rates, a 6.5% increase in house prices, an in-migration of higher-income households and more racially diverse residents, and an increase in total welfare of approximately $116 million. Conversely, the authors find a 2.5% decrease in house prices and losses of approximately $12 million when LIHTC developments are sited in high-income areas. The authors thus conclude that moving LIHTC properties from higher-income to lower-income neighborhoods benefits the residents of both types of neighborhoods.

Counting Casualties in Communities Hit Hardest by the Foreclosure Crisis

Matthew J. Rossman
2016 Utah Law Review 245
Case Legal Studies Research Paper No. 2015-22

While nationally and regionally based reports suggest that the housing market has largely recovered from the recent foreclosure crisis, this article argues that many smaller markets have rebounded little, if at all, and that
some continue to decline. These “hardest hit communities,” which are disproportionately comprised of low- and middle-income residents and communities of color, have sustained serious structural housing market damage and are not predicted to recover in the near future. As a mechanism to provide relief to these communities, the author proposes that the Internal Revenue Service allow homeowners in such communities to claim a casualty loss deduction for the permanent damage to the value of their homes. While the IRS has typically allowed the casualty loss deduction only in cases of physical damage to property, the author explains how the damage to home values in these communities has been similarly catastrophic and should qualify for the deduction. The author identifies challenges in applying the casualty loss deduction to these cases within the current statutory and regulatory framework and suggests ways in which the casualty loss deduction could be modified to provide meaningful relief to homeowners in hardest hit communities.

**Structural Subjugation: Theorizing Racialized Sexual Harassment in Housing**

*Kate Sablosky Elengold*


This article examines the pervasive problem of racialized sexual harassment against Black women tenants in residential rental housing. In particular, the author explains how sexual harassment by (primarily white) landlords against Black women tenants is typically characterized by the courts as instances of an aberrant landlord preying on a vulnerable woman in the sanctity of her home, while ignoring the role of race. The author argues that this “dirty old man narrative” ignores the structural factors that permit and perpetuate racialized sexual harassment, particularly the cultural myth of the Black “Jezebel,” the legal rights of landlords in the structure of subjugation, the unique access of the landlord to the tenant and her family, and generational economic and racial hierarchies. In so doing, the dirty old man narrative silences the individual stories of Black women who are victims of racialized sexual harassment and reinforces the historical sexual subjugation of Black women in their private spheres.

**Changing the Face of Urban America: Assessing the Low Income Housing Tax Credit**

*Kristin Niver*

102 *Virginia Law Review Online* 48 (2016)

This article reconciles what the author considers incongruous concerns that the LIHTC is a tool of “gentrification,” creaming the crop of subsidized tenants and thereby displacing the most marginalized from central cities, with
accusations that the “poverty housing industry” is relegating the poorest to slum, blight, and distress after the U.S. Supreme Court’s decision in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015). Celebrating the LIHTC as a successful public-private partnership, the author suggests that the program is changing the face of urban America by investing in both high- and low-poverty neighborhoods. This approach brings higher-income households into the lowest-income urban tracts and very low-income households into the suburbs. Countering criticisms that the LIHTC is redundant with demand-side subsidies, the article concludes that the program is fostering a more regional distribution of affordable housing, an outcome unattainable by voucher provisions alone.

**The Color of Wealth in Los Angeles**
*Federal Reserve Bank of San Francisco (2016)*

This article presents the findings of a survey from the National Asset Scorecard for Communities of Color (NASCC), which supplements existing data sets on household wealth in the United States. The NASCC data focus on debt and assets among various subpopulations, including along racial and ethnic lines. This report focuses on the data collected for households in Los Angeles and exposes wealth disparities among racial and ethnic groups. It identifies how the availability of liquid assets, net worth, and debt impact these groups in the short term, long term, and across generations.

**High Costs and Segregation in Subsidized Housing Policy**
*Myron Orfield, Will Stancil, Thomas Luce, and Eric Myott*
*25:3 Housing Policy Debate 574-607 (2015)*

This paper suggests that affordable housing policies in the Twin Cities metropolitan area are not meeting the region’s duty to affirmatively further fair housing. The paper contends that the Twin Cities are concentrating subsidized housing in the poorest and most segregated neighborhoods, thus exacerbating poverty concentration as opposed to siting units in high-opportunity suburbs. Critical of the involvement of private firms and interest groups, the paper concludes that affordable housing is not an effective economic development tool, but instead an instrument of segregation contributing to further decline and disinvestment in already disenfranchised urban communities.
Disparate Impact One Year After Inclusive Communities

Amy M. Glassman and Shanellah Verna

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Amy M. Glassman (glassmana@ballardspahr.com) is a partner and Shanellah Verna (vernas@ballardspahr.com) is an associate with the Washington, D.C., office of Ballard Spahr LLP.
I. Introduction

Approximately one year ago, the U.S. Supreme Court confirmed in Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.1 that disparate impact claims are cognizable under the Fair Housing Act (FHA). Prior to that decision, nearly all federal appellate courts had recognized FHA claims for disparate impact and, in 2013, the U.S. Department of Housing and Urban Development (HUD) issued a regulation on the topic. By some accounts, ICP might have had little actual impact. The Court, however, devoted lengthy discussion to the limitation of disparate impact liability. This article highlights HUD actions and disparate impact litigation in lower courts since the ICP decision. Although there have been a range of disparate impact claims since ICP, our review of those cases suggests that the guidance of the ICP case is creating difficulty for many plaintiffs to make a prima facie showing of disparate impact.

II. Background

The FHA prohibits housing discrimination based on a person being a member of a protected class.2 More specifically, the FHA makes it unlawful to refuse to sell, rent, finance, or otherwise deny or make unavailable a dwelling on the basis of one’s race, color, religion, sex, disability, familial status, or national origin.3 The FHA includes several components. First, and most commonly, the FHA bans intentional discrimination (also referred to as disparate treatment) where individuals of a protected group are treated less favorably than others similarly situated. Next, the FHA recognizes and prohibits actions having disparate impact, meaning facially neutral practices that have a discriminatory effect on a protected class regardless of any evidence of intent to discriminate. Lastly, the FHA requires entities receiving funding from the HUD to take affirmative and meaningful actions to further fair housing.

In February 2013, HUD issued a final rule4 (the HUD Rule) expressly establishing HUD’s approach to disparate impact liability under the FHA. Under the HUD Rule, “a practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.”5

2. 42 U.S.C. §§ 3601 et seq.
3. 42 U.S.C. §§ 3601 et seq.
5. 24 C.F.R. § 100.500(a).
The HUD Rule creates uniform procedural requirements for pleading a disparate impact case. Using a burden shifting framework, the plaintiff or charging party alleging an FHA violation under a disparate impact theory must first make a prima facie showing that the challenged practice “caused or predictably will cause a discriminatory effect.” If that burden of proof is met, the defending party must prove that the practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests. If met, liability may still be imposed if the plaintiff or charging party can prove that those interests could be served by an alternative practice with a less discriminatory effect.

In *ICP*, the Texas Department of Housing and Community Affairs (TDHCA) was accused of allocating low income housing tax credits (LIHTC) for non-elderly developments disproportionately to high minority concentration. Although TDHCA argued that its procedures followed Internal Revenue Service rules requiring preferences for LIHTCs in low-income Qualified Census Tracts, the plaintiffs maintained that the practice made it difficult to house minority residents in other communities. The district court ruled in favor of ICP on the disparate impact claim, finding that however legitimate the intent, TDHCA failed to demonstrate its allocation practices served a compelling government interest or that there was no less discriminatory alternative—a burden of proof slightly different from what the HUD Rule provides. On appeal, the Fifth Circuit adopted the HUD Rule and agreed that disparate impact can be recognized under the FHA, but remanded the case to the district court for evaluation consistent with the HUD Rule. The Supreme Court granted certiorari solely to consider the disparate impact question in the case. In a five-to-four verdict, the Supreme Court ruled that there was a cognizable disparate impact claim under the FHA, citing to the wording and overall purpose of the FHA as well as congressional intent found in 1988 FHA Amendments to support its conclusion.

The Court’s opinion also discussed the limitation of disparate impact claims at length. The Court emphasized that disparate impact claims must be supported by more than statistical disparities and that plaintiffs must prove that a “robust causality” exists between the evidence presented and the challenged practice in order to make a prima facie case. This robust causality requirement protects defendants from liability for disparities that are not clearly connected with their policies and ensures that defendants do not resort to the use of racial quotas as a remedial measure. The Court also stated that disparate impact challenges should not

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6. 24 C.F.R. § 100.500(c)(1)
7. 24 C.F.R. § 100.500(c)(2).
8. 24 C.F.R. § 100.500(c)(3).
prevent governments from achieving legitimate objectives and that policies are not contrary to the disparate impact requirement unless they create “artificial, arbitrary, and unnecessary barriers.”

Following the ICP decision, the anticipated legal consequences and questions were vast. From a regulatory standpoint, some felt that Congress might feel pressure to carve out new statutory exceptions to disparate impact liability under the FHA. Although the HUD Rule on disparate impact provided the overall pleading framework, questions remained as to how to prove disparate impact claims and whether HUD would revise the HUD Rule to address safeguards and causation requirements. In terms of litigation, many wondered if the verdict would increase the overall number of cases challenging various housing practices or other well-intentioned policies with potential impacts on protected classes and whether there would be an expansion of pseudo-protected classes claiming the same FHA protections.

The remainder of this article examines the regulatory and litigation updates that have taken place in the past year.

### III. HUD Regulatory Updates

Since the ICP verdict, HUD has not issued any changes to the HUD Rule. However, in April 2016, HUD’s Office of General Counsel released guidance on how the FHA applies to the use of criminal history by housing providers and other operators of housing and to real estate transactions (HUD Criminal History Guidance). The HUD Criminal History Guidance examines how the burdens of proof outlined in the HUD Rule apply in the context of disparate impact and disparate treatment liability. Highlighting statistics that show African Americans and Hispanic persons suffer disproportionate rates of arrest, convictions, and incarceration compared to the rest of the nation’s population, the HUD Criminal History Guidance refers mostly to disparate impact on the basis of race and national origin, but recognizes that the same analysis would apply to discrimination on account of membership in any other protected class.

The HUD Criminal History Guidance walks through a disparate impact analysis applicable to criminal records checks, using the burden shifting approach of the HUD Rule. The first step of the disparate impact analysis requires proof that a criminal history policy or practice has a discriminatory effect. Depending on the nature of the claim and relevant

10. See id. at 2522, 2524, 2543.
12. The HUD Criminal History Guidance also discusses the burdens of proof for disparate treatment cases, but this section will focus only on disparate impact.
facts, plaintiffs can present state, local, or national statistics on racial and ethnic disparities and additional evidence such as applicant data, tenant files, local criminal justice, or census demographic data to make their prima facie case.\textsuperscript{13}

Once the burden shifts to housing providers to justify the challenged policy or practice, they must prove both that there is a substantial, legitimate, nondiscriminatory interest to support the policy and that the challenged policy actually achieves that interest.\textsuperscript{14} The HUD Criminal History Guidance warns that, although housing providers commonly argue that criminal history policies are needed for the protection of other residents and their property, they must be able to prove through reliable evidence, and not just generalized statements and stereotypes, that making decisions based on criminal history actually contributes to resident and property safety.\textsuperscript{15} Policies of excluding individuals from housing based on one or more records of prior arrest not resulting in a conviction cannot satisfy the housing provider’s burden of proof.\textsuperscript{16} General prohibitions imposed against any persons with any conviction record without consideration of individualized facts or circumstances will also fail to meet the burden of proof. Similarly, a prohibition that would exclude persons based on specific types of convictions but do not take into account the amount of time passed since the conviction, the severity of the offense, or the person’s behavior since the conviction is unlikely to satisfy that burden of proof because the housing provider cannot show that the practice serves a “substantial, legitimate, nondiscriminatory interest.” Although HUD acknowledged that a statutory exemption from disparate impact liability exists where a housing provider excludes individuals due to conviction for the illegal manufacturing or distribution of certain controlled substances, there is no such exemption to disparate impact claims based on exclusions due to drug arrests or drug possession.\textsuperscript{17} There is also a statutory prohibition in the HUD-assisted housing program on admitting applicants into housing who are subject to a lifetime sex offender registration requirement, who were convicted of manufacturing methamphetamine in assisted housing, or persons evicted from federally assisted housing for drug-related criminal activity in the past three years.\textsuperscript{18}

Lastly, HUD suggests that although identifying less discriminatory alternatives will vary by case, evaluating mitigating factors in one’s personal and criminal records and/or delaying consideration of criminal history until after other qualifications are verified would likely produce

\textsuperscript{13} HUD Criminal History Guidance, supra note 11, at 3–4.
\textsuperscript{14} Id. at 4.
\textsuperscript{15} Id. at 4–5.
\textsuperscript{16} Id. at 5.
\textsuperscript{17} Id. at 8.
\textsuperscript{18} See 42 U.S.C. §§ 1437n, 13663.
fewer discriminatory effects than general prohibitions.\textsuperscript{19} We note this approach is generally consistent with that mandated for the public and Section 8 housing programs.\textsuperscript{20}

\textbf{IV. Litigation Updates}

In the year since the \textit{ICP} verdict, courts across the county have adjudicated a variety of disparate impact cases, many of them largely falling into housing or employment discrimination categories. This section will briefly summarize a selection of those cases and will highlight several pending cases to watch in the near future.

\textbf{A. Housing Cases}

1. \textit{Inclusive Communities Project, Inc. v. Texas Dep't of Housing & Community Affairs}\textsuperscript{21}

On remand, the U.S. District Court for the Northern District of Texas reconsidered whether ICP established a prima facie case for disparate impact in light of the HUD rule and the causation requirements in the Supreme Court verdict. In August 2016, the court ultimately dismissed the disparate impact claims against TDHCA finding that (1) a generalized policy of discretion could not be the basis of a disparate impact claim; (2) ICP failed to display a robust causal connection between TDHCA’s practices and statistical racial disparities in housing; and (3) ICP’s claim, however worded, was essentially a complaint for disparate treatment rather than disparate impact.

2. \textit{Burbank Apartments Tenant Association v. Kargman}\textsuperscript{22}

In this case, the principals and owners of the Burbank Apartments complex decided they would not renew Burbank’s Section 8 Housing Assistance Payments (HAP) contract with HUD upon expiration of their subsidized mortgage contract term, but would accept enhanced Section 8 vouchers instead. The plaintiffs, comprised of current and potential building residents, brought suit under a disparate impact theory, alleging that the defendants’ decision had a disproportionately negative impact on people of color, disabled persons, female-headed households, families with children, the elderly, and recipients of welfare assistance.

At issue was whether defendant’s decision not to renew the project-based HAP contracts in favor of tenant-based Section 8 subsidies could be the basis of a disparate impact claim. Applying the burden shifting framework laid out in the \textit{ICP} case and the HUD Rule, the Supreme Judicial Court found that plaintiffs did not meet their burden of proof because the allegations failed to meet the robust causality requirement. The

\textsuperscript{19} \textit{HUD Criminal History Guidance}, supra note 11, at 7.

\textsuperscript{20} See 24 C.F.R. § 5, subpart I; 24 C.F.R. § 960.204; 24 C.F.R. § 982.553.


\textsuperscript{22} 48 N.E. 3d 394 (Mass. 2016).
plaintiffs could not demonstrate that the decision not to renew the HAP contracts had any negative impact—indeed, the enhanced vouchers allowed any tenants who wanted to remain on site or to move off-site to do so—nor did they prove that the statistical disparity was caused by the defendants’ policy. Citing to the ICP case, the court explained that a policy would be contrary to disparate impact rules if it created artificial, arbitrary, and unnecessary barriers that create discriminatory effects or perpetuate segregation. In making its ruling, the court also determined that despite the similarities in the language and intent of the FHA and Title VII of the Civil Rights Act, the FHA carries a heightened pleading requirement for disparate impact cases.

3. Ellis v. City of Minneapolis

In this case, landlords brought an action against the City of Minneapolis arguing that the city’s facially neutral housing policies, e.g., stricter housing and enforcement standards for low income rental in high poverty areas, had a disparate impact on protected classes. The court granted the city’s motion to dismiss the case, finding that under the ICP pleading standard, the city needed only to demonstrate a legitimate government interest to uphold its policies. The court found that the city’s desire to comply with health and safety codes qualified as a legitimate interest. The plaintiffs previously argued incorrectly that the government needed a compelling interest to uphold its policies and also failed to articulate the plausible causation between the city’s housing policies and racial disparities.

The plaintiffs amended and re-alleged their disparate impact complaint in the fall of 2015, where the court again granted the city’s motion for judgment on the pleadings. The court again found that the plaintiffs had not grasped the pleading standard and robust causality requirements in ICP because the amended complaint failed to produce proper evidence that demonstrated a causal connection between the city’s policies and the discriminatory effects.

4. Azam v. City of Columbia Heights

The plaintiff landlord rented rooms in a multi-unit apartment building; when he failed to improve his building to meet the city’s health and safety codes, the city revoked his rental licenses. The district court granted the city’s motion for summary judgment on the disparate impact claim because the plaintiff failed to make a prima facie showing that city policies or practices had a discriminatory effect. The plaintiff simply alleged a sole instance of discrimination, which was not enough to evidence a city-wide practice or policy. The plaintiff also failed to show that there was a viable

and less discriminatory alternative practice by which the city could still achieve its interest in complying with local health and safety codes.

5. *Long Island Housing Services, Inc. v. Nassau County Industrial Development Agency*\(^{25}\)

The plaintiffs alleged that the city’s affordable housing ordinance, which included age restrictions and a residency preference, had the effect of excluding middle-aged and non-white persons from eligibility and thus constituted unlawful housing discrimination and a violation of the FHA. The complaint alleged that the Industrial Development Agency (IDA) provided tax credits to housing projects on the condition that the projects apply the allegedly discriminatory city ordinance to affordable housing unit rentals. The plaintiffs also contended that, despite warning from the mayor of the ordinance’s disparate impact, the IDA willingly insisted that the housing project continue to apply age requirements and residency preferences established by the allegedly discriminatory ordinance. The district court denied the defendant’s motion to stay discovery, finding that the plaintiff’s allegations, if true, would satisfy the causation requirement of ICP by showing sufficient connection between the challenged practice and the disproportionately adverse effect.


After a Rhode Island couple gave birth to their first child, their landlord, claiming that the building’s occupancy limits precluded more than two persons in a one-bedroom apartment, sent a letter requiring them to either move from their one-bedroom unit to a larger apartment or face eviction. The couple filed a housing discrimination complaint with the Rhode Island Commission for Human Rights, which in turn brought the lawsuit against the landlord alleging disparate impact discrimination due to the couple’s familial status in violation of the FHA and state fair housing laws.

The district court granted the plaintiff’s partial motion for summary judgment, following the ICP requirements for evaluating disparate impact claims. The court found that (1) the plaintiff met its burden through expert statistical evidence showing disproportionate impact of the occupancy policies on families with children versus families without children, and (2) the defendants’ unreasonably flawed interpretation of applicable building codes and other defenses were insufficient business justifications to overcome the disparate impact. The parties entered a settlement agreement on June 6, 2016.

\(^{26}\) 120 F. Supp. 3d 110 (D.R.I. 2015).
B. Employment Discrimination Cases

To determine whether disparate impact liability exists under the FHA, the Supreme Court relied heavily on similar wording, intent, and interpretations of Title VII and landmark employment discrimination cases. As a result, the ICP opinion also carried implications for Title VII discrimination cases going forward. Various courts began citing to the ICP decision in addition Title VII case precedent when adjudicating disparate impact claims, particularly focusing on the ICP’s burden shifting analysis when assessing causation or the business justifications of challenged employer practices. This section highlights select employment discrimination cases decided since the ICP verdict.

1. Sneed v. Strayer University

In 2014, the plaintiff sued his former employer alleging Title VII disparate impact based on age and race after the employer closed the plaintiff’s branch facility and did not transfer him elsewhere. The district court granted the defendant’s motion for summary judgment, finding that the plaintiff could not meet the causality requirement articulated in the ICP case for his Title VII disparate impact claims. The plaintiff based his allegations on the defendant’s one-time decision to close the facility, an action that alone cannot establish the existence of a discriminatory policy or practice. In attempting to prove his prima facie case, the plaintiff pointed to statistical data of minority employee terminations, but could not demonstrate that the impact or statistical disparity of the terminations was caused by the facility closing.

2. Smith v. City of Boston

This Title VII discrimination suit involved black police sergeants claiming that the multiple choice lieutenant exam had racially disparate impact on minorities because blacks passed at lower rate than whites. Citing to the ICP decision, the district court maintained that the statistical disparity, without causation, was not enough to support the claim.

3. O’Neal v. Oregon Department of Justice

The plaintiff filed a Title VII gender discrimination suit against the Oregon State Department of Justice related to the state’s collection and enforcement of child support payments. The plaintiff failed to show the causal connection between the defendant’s collection of child support payments in that instance and statistical data showing that the state collected child support payments from more men than women. Here as
well, the district court noted that under *ICP*, statistical disparity alone without a causal link to the defendant’s policy is not enough to succeed on a disparate impact claim.

4. *Abril-Rivera v. Johnson*\(^\text{31}\)

This case involved Title VII employment discrimination challenge based on national origin against the Federal Emergency Management Agency (FEMA). The plaintiff worked for a call center established by FEMA in 1995. After inspections revealed serious safety concerns, FEMA decided to reduce staffing levels of the plant, which was ultimately closed. Citing to the *ICP* case, the First Circuit concluded that FEMA had legitimate business justifications for its decisions regarding the call center and that the plaintiffs could not make a prima facie case of discrimination as the policies were not artificial, arbitrary, or unnecessary barriers. The plaintiffs also failed to show a less discriminatory alternative to serve FEMA’s legitimate business necessities.

C. Cases to Watch

1. *American Insurance Association v. U.S. Department of Housing and Urban Development*\(^\text{32}\)

In June 2013, plaintiff trade associations argued that the HUD Rule exceeded the agency’s authority under the Administrative Procedures Act, claiming that the FHA allowed only for disparate treatment liability and not disparate impact. Finding for the plaintiffs in a scathing opinion issued shortly before the Supreme Court heard oral arguments in *ICP*, the U.S. District Court for the District of Columbia vacated the HUD Rule. In light of the *ICP* verdict, the District of Columbia Circuit vacated the order striking down disparate impact liability and remanded the case to the district court. With the district court’s consent, the plaintiffs filed an amended complaint on June 14, 2016, arguing that the HUD Rule is inconsistent with the *ICP* case. Additionally, the amended complaint argues that applying disparate-impact liability to the provision and pricing of homeowner’s insurance is contrary to law because it would require insurers “pervasively to use and consider race and ethnicity in their insurance decisions and to discount or disregard limited risk-related factors.”\(^\text{33}\) The plaintiffs also assert that disparate impact theory conflicts with state insurance laws that limit insurers’ discretion in underwriting and ratemaking.\(^\text{34}\)

\(^{31}\) 806 F.3d 599 (1st Cir. 2015).


\(^{33}\) Amended Complaint ¶ 5.

\(^{34}\) Id.
2. Avenue 6E Investments, LLC v. City of Yuma

Plaintiff real estate developers alleged a disparate impact case against the City of Yuma, citing the city’s refusal to rezone land for higher density development due to alleged animosity toward a protected class of minority homebuyers. The plaintiffs argued that alleged code words used by neighborhood opposition to stereotype Latinos demonstrated discriminatory intent and that the denial of the developers’ application was contrary to the city’s normal procedures. The district court decision issued prior to the ICP verdict ruled that the plaintiffs had no disparate impact claim because similar housing was available elsewhere in the city, negating any impact from the city’s denial of the developers’ application. The Ninth Circuit reversed the lower court’s grant of summary judgment for the city and remanded the case to be decided consistent with the ICP, holding that the existence of similar housing did not necessarily preclude a finding of disparate impact. On June 23, 2016, the city filed a petition for certiorari to the U.S. Supreme Court.

3. City of Miami v. Bank of America Corp.

The City of Miami alleged that Bank of America and other defendants engaged in decades-long pattern of discriminatory lending in the residential housing market that caused the city economic harm. The lower court dismissed, finding that the city did not have standing because FHA allowed for complaints only by an “aggrieved person” and cities and other municipalities were not so defined in the FHA definition. Relying on Supreme Court precedent, the Eleventh Circuit disagreed, finding that the economic harm suffered could warrant an FHA claim. In September 2015, the court remanded the case so that the city could amend its complaint in light of the ICP pleading standards. The district court granted the defendant’s motion to dismiss. The court held that plaintiffs must meet four requirements to establish disparate impact liability under the case. Plaintiffs must (1) show statistically imbalanced lending patterns that adversely impact a minority group; (2) identify a facially neutral policy used by defendants; (3) allege that such policy was “artificial, arbitrary, and unnecessary”; and (4) provide factual allegations that meet the “robust causality requirement” linking the challenged neutral policy to a specific adverse racial or ethnic disparity. In this case, the district court found that the city did not meet the second, third, and fourth requirements and failed the robust causality requirement by not showing causal link between the policy and alleged statistical disparity.

The U.S. Supreme Court granted the petition for certiorari on June 28, 2016, to decide in part whether the FHA’s “aggrieved person” standard requires plaintiffs to plead more than just Article III injury-in-fact. The

35. 818 F. 3d 493 (9th Cir. 2016).
Court also consolidated this case with Wells Fargo & Co. v. City of Miami, in which it will decide whether the city is an “aggrieved person” under the FHA and the FHA’s standing requirements. Arguments for both will be heard during the October 2016 Term.

4. City of Los Angeles v. Wells Fargo & Co.\(^{37}\)

The City of Los Angeles alleged an FHA disparate impact claim against Wells Fargo for discriminatory mortgage lending practices toward minorities. The city pointed to difference in the numbers of high-cost loans offered to whites versus minorities. The district court granted summary judgment for the defendant, stating that a disparate impact claim cannot rest solely on statistical evidence absent evidence that the bank’s policy actually caused the disparate impact. The court further argued that ICP required it to look at the entire picture and not just statistics, and entities cannot be held liable for racial disparities that they did not create. In July 2015, the city appealed to the Ninth Circuit, which has yet to release an opinion.

5. Cobb County v. Bank of America Corp.\(^{38}\)

The plaintiffs in this case brought an FHA disparate impact claim against the Bank of America and others, alleging that the defendants had engaged in mortgage discrimination against minority borrowers for the past fifteen years, and continued to do so through equity stripping, as well as engaging in predatory loan servicing and foreclosure practices. The complaint alleged that the practices resulted in both disparate treatment and disparate impact against minorities and decreased rates of minority homeownership, leading to the segregation and urban blight of certain communities.

The court agreed that the FHA provisions should be construed broadly and thus applied to both lenders and any other entity that directly or indirectly makes any loan unavailable to minority borrowers through equity stripping or other actions. Nevertheless, it granted the defendants’ motion to dismiss, stating that plaintiffs failed to meet the ICP pleading requirements. The court found that the plaintiffs’ claim (1) pleaded examples of intentional discrimination against minorities instead of pleading facially neutral policies; (2) did not allege that the challenged practices were artificial, arbitrary, and unnecessary; and (3) did not allege how the challenged policies led to the statistical imbalances in homeownership described.

The plaintiffs filed an amended complaint on June 17, 2016.


6. Crossroads Residents Organized for Stable & Secure Residencies v. MSP Crossroads Apartments LLC

In September 2015, a new owner purchased an unsubsidized affordable complex that housed mostly low income residents, most of whom were ethnic minorities or disabled persons. Out of over 2,000 residents, thirty-five were federal housing choice voucher recipients, while approximately another hundred used state rental vouchers. The defendants renovated and rebranded the building and sent a notice to all current residents that their leases would terminate at the end of the lease term and that it would no longer accept housing choice vouchers once the lease term expired. Going forward, new tenants and those who wished to remain would have to submit an application, be approved under new screening criteria, and pay new market rate rents. The plaintiffs alleged both disparate treatment and disparate impact based on race, national origin, disability, and familial status.

In an April 2016 decision, the district court denied the plaintiff’s motion for preliminary injunction, which had requested a court order for the housing provider to accept the housing choice vouchers, noting that plaintiffs would have a difficult burden of establishing a disparate impact case on the merits based on the ICP standard. Although the court declined to answer whether rejecting housing choice vouchers could give rise to disparate impact liability, it highlighted a circuit split on that issue. The case noted that both the Second and Seventh Circuits adopted a per se rule that refusal to participate in Section 8 cannot form the basis of a disparate impact claim; the Sixth Circuit recognizes that such an act could form the basis of a claim but distinguishes between landlords who withdraw from Section 8 program and those who refuse to participate in the first place. In the latter case, the Sixth Circuit held that landlords should never face disparate impact liability for non-participation in Section 8.

In July 2016, in light of the ICP decision and HUD Rule, the district court allowed the plaintiffs’ FHA disparate impact claim to go forward. The court found sufficient factual allegations to support an inference that the plaintiffs will be able to show through statistical analysis that the new housing policies disproportionately affect members of a different protected classes. The court also found that the plaintiffs’ complaint showed a sufficient causal link between the revised housing policies and residents’ inability to remain at the complex and adequately identified viable alternative practices to meet the defendants’ business needs. In sum, the plaintiffs satisfied their burden of proof to assert a plausible disparate impact claim, thus shifting the burden to the defendants to
prove that the challenged practices were necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.

V. Conclusion

Although the Supreme Court’s *ICP* verdict was significant in expressly confirming the existence of disparate impact claims under the FHA, in practice, the case has not resulted in increased victories for plaintiffs bringing disparate impact challenges. Indeed, as discussed above, it appears that courts are focusing on the “robust causality requirement,” dismissing cases that cannot identify a causal link between a practice and a harmful impact against a protected class. Due to the strict pleading causation standards outlined by the Court, and a lack of further regulatory clarification, plaintiffs have great difficulty meeting their prima facie burden of proof.

The above, of course, only covers roughly the first year following *ICP* case. Time will tell as to the long-term impact of the *ICP* case.
Lessons from Baltimore and Washington, D.C.: Working with Community-Based Organizations to Build Capacity and Fight for Economic Justice

Susan R. Jones

The following articles, written by legal educators, are based on a joint presentation, Lessons from Baltimore and Washington, D.C.: Working with Community-Based Organizations to Build Capacity and Fight for Economic Justice, at the Association of American Law Schools Conference on Clinical Legal Education, April 30–May 3, 2016, in Baltimore. The conference location is emblematic of many challenges in America—from the criminalization of poverty to the racial justice cries of the Black Lives Movement following the Baltimore Uprisings in the aftermath of the death of Freddie Gray, an unarmed Black man in Baltimore who suffered a fatal spine injury while in police custody in April 2015.

The conference theme, “Clinics and Communities: Exploring Community Engagement Through Clinical Education,” was a platform for examining “the role of law and lawyers in aggravating or alleviating suffering, and in collaborating on legal efforts to build communities’ strengths and address harms experienced by those who seek their assistance.” 1 Featuring the work of CED and transactional clinical law professors, the following articles capture their tireless work with law students and the communities and individuals they represent in partnerships with community-based institutions. The goal of this work is to redress economic inequality, fight


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for racial justice, build capacity, create system reforms, and contribute to innovative legislation within low-income communities.

In *Building Community, Still Thirsty for Justice: Supporting Community Development Efforts in Baltimore*, Renee Hatcher and Jaime Lee discuss how the University of Baltimore School of Law Community Development Clinic provides legal services and legal education to Baltimore residents by supporting equitable development, community controlled affordable housing, and access to affordable water.

*Building Economic and Racial Equity in D.C. Through Cooperative Businesses* by Eva Seidelman with Louise Howells of the David A. Clarke School of Law Community Development Law Clinic explores how worker and economic empowerment cooperatives can promote systems change.

My contribution to this symposium, *Representing Returning Citizen Entrepreneurs in the Nation’s Capital*, considers the ways lawyers can support entrepreneurship for citizens returning to society after periods of incarceration and analyzes a multi-year Action Research Project in Clinical Legal Education at The George Washington University Law School Small Business and Community Economic Development Clinic.

Etienne Toussaint’s article, *Incarceration to Incorporation: Economic Empowerment for Returning Citizens Through Social Impact Bonds* builds on the Clinic’s work and considers how social impact bonds contribute to market-based CED strategies by channeling private sector investments into needed areas such as reducing returning citizen recidivism.

On the whole, these articles are illustrative of the important work of CED and transactional clinic not only in the Baltimore-Washington area, but also across America. My hope is that they will inspire others to action.
Building Community, Still Thirsty for Justice: Supporting Community Development Efforts in Baltimore

Renee Hatcher and Jaime Lee

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I. Introduction

Baltimore is a city of many challenges, but it possesses true community-based strength. The city’s residents and community organizations are its greatest assets. This article highlights some of the community’s work and how the Community Development Clinic at the University of Baltimore School of Law (CDC) supports this work through its experiential learning curriculum.

The challenges facing Baltimore’s communities (systemic disinvestment, structural racism, vacant buildings, unemployment, and the criminalization of poverty, to name a few) existed long before the national media coverage and uprising surrounding the death of Freddie Gray, an unarmed Black man who suffered a fatal spinal injury while in Baltimore police custody in April 2015.¹ In the days that followed Gray’s death, thousands of Baltimoreans took to the streets to protest state-sanctioned violence in low-income Black neighborhoods across the city.


Professor Renee Hatcher (rhatcher@ubalt.com) is the Clinical Teaching Fellow for the Community Development Clinic at the University of Baltimore School of Law. Her current research focuses on new legal strategies to build power and create equitable development practices in communities of color. Professor Jaime Lee (jlee@ubalt.com) is the Director of the Community Development Clinic and an Assistant Professor at the University of Baltimore School of Law. Her recent articles focus on the subversion of legal structures intended to support those in poverty.
After the Baltimore Uprising, and in the spirit of the city’s long history of community organizing, new community-based groups formed and existing organizations created wide-tent coalitions to collectively advance their organizing efforts. These groups have fostered public discourse not only about police violence, but also about the economic violence that poses an everyday threat to individual and community safety and security, such as the lack of access to basic human needs—food, water, and housing.

Broadly speaking, Baltimore’s community groups take a two-pronged organizing approach towards community transformation: (1) holding police, elected officials, and public agencies accountable for the state-sanctioned physical and economic violence in low-income, primarily Black, neighborhoods; and (2) building independent community-controlled institutions to provide for the needs of Baltimore’s abandoned and ignored communities.

This approach is evident in the numerous mayoral candidate forums hosted by grass-roots organizations this year—some specifically about housing, the needs of returning citizens, and community development—as well as the efforts of organizations developing new community land trusts, working toward food sovereignty, and starting worker-owned cooperatives to provide meaningful employment for residents.

II. University of Baltimore School of Law Community Development Clinic

What role can law school clinics play in these efforts? Many of Baltimore’s community organizations and community-based enterprises are in need of legal services from time to time, yet cannot afford to retain private counsel or access legal services. The University of Baltimore School of Law’s Community Development Clinic (CDC) is privileged to assist in filling this need.


3. For example, the Baltimore Action Legal Team (BALT), the Black Church Food Security Network, and Baltimore United for Change (BUC) were founded in the wake of the Baltimore Uprising.

For twenty years, CDC has provided free legal support to Baltimore-area organizations that work to transform the city’s neighborhoods and community conditions. CDC’s clients are nonprofits, small businesses, social enterprises, groups promoting affordable housing and equitable development, cooperatives, coalitions, and other locally based organizations in underserved neighborhoods. They include free health clinics, worker and consumer cooperatives, minority-owned businesses, farmers’ markets in urban food deserts, churches engaged in urban agriculture, and community-based schools.

CDC is part of UB’s nationally recognized clinical program. Upper-level law students serve as “first-chair” attorneys and work directly with clients, with the guidance of a faculty member and peers, under a special court rule that permits students to practice law in a clinical setting. UB students represent clients in structuring and forming nonprofit organizations, corporations, partnerships and LLCs; counsel boards and staff about their legal duties and best practices in running a nonprofit or small business; help organizations apply for tax exemption or 501(c)(3) status; and draft and review contracts.

In addition, to serving in traditional client-attorney relationships, CDC students also engage in community education and advocacy projects to affect systemic change. Recent examples of the CDC’s advocacy and community education work are described in more detail below.

III. Advocating for Equitable Development and Community-Controlled Affordable Housing

During the past two years, CDC students assisted with preparing a recent report, Community + Land + Trust: Tools for Development Without Displacement, on inequitable real estate practices and community-based alternatives. Published by the Baltimore Housing Roundtable and funded in part by the UB Foundation Fund for Excellence, the report is the work of a coalition that includes United Workers, housing advocates, the Public Justice Center, and the community development clinics at the University of Maryland and University of Baltimore law schools; it is part of a larger effort to demand $40 million in annual city funds to transform some of Baltimore’s vacant housing into community-owned and community-developed affordable housing (20/20 Campaign). CDC student attorneys attended coalition meetings, conducted research and wrote memos, and helped to prepare “plain English” versions of housing policy issues for community education purposes.

One recent victory of the affordable housing coalition is securing a voter referendum in November 2016 to create an affordable housing

trust fund in Baltimore city. The trust fund would provide loans or grants for the planning, production, maintenance and expansion of affordable quality housing for low and extremely-low income families in Baltimore.6

IV. Still Thirsty for Justice: Advocating for Water Access and Affordability

In the spring semester of 2016, CDC students also engaged in two unique advocacy projects related to water affordability in Baltimore.

Every year, many thousands of Maryland homeowners are placed at risk of foreclosure through the state’s privatized foreclosure system. Many are elderly and disproportionately African-American and have spent their lifetimes successfully paying off their homes, yet are losing those homes due to unpaid water bills and other city charges of as little as $750.

CDC students used their legal skills to assist with free legal advice clinics and to represent homeowners at administrative agency meetings to dispute incorrect water bills and prevent homeowners from losing their homes to real estate speculators and others. The CDC student attorneys’ work is helping to prevent homeowners from being stripped of the American Dream and also to prevent homes from being placed into the hands of real estate speculators, many of whom then leave the homes empty or in limbo, further contributing to the decline of Baltimore’s neighborhoods.

In March 2015, the City of Baltimore announced plans to shutoff water service to 25,000 households, affecting 60,000 to 75,000 people, who were $250 or more behind on their water bill.7 Approximately 600 households per week experienced a water shutoff last spring, simply because a disproportionate number of poor, Black families were unable to afford their outstanding bills. According to a report by Food & Water Watch, water service in Baltimore is unaffordable for one-third of all Baltimore households.8 The collateral consequences of a water shutoff are severe. Families are exposed to serious health risks, can be evicted, and children can be removed by the state. CDC students have been working on a “right to water” project, conducting research, interviewing directly affected residents, and gathering information for a human rights complaint. As a part

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of the project, the CDC has participated in a civil society fact-finding meet-
ing with the UN Working Group of Experts on People of African Descent
and submitted written testimony to the Inter-American Commission of
Human Rights in a hearing on the right to water in the United States.

Unfortunately, in the midst of the current water affordability crisis, the
Baltimore Board of Estimates recently voted to increase water rates by
33% over the next three years. As a result, CDC is continuing to work
with a broad coalition to advocate for an income-based water affordability
plan.

V. Building Capacity through Community Legal Education

Another service that CDC students provide is in-person free legal edu-
cation on topics of interest to community groups. Past topics have in-
cluded cooperatives (a form of business that puts workers in power);
laws regulating the sale of urban farm produce and home-made foods;
tax rules regarding nonprofits that must support themselves through
for-profit activities; and Maryland’s benefit corporations law, which sup-
ports companies that wish to combine profit and social benefits.

CDC students have also shared their legal knowledge with the public
by publishing nearly twenty articles on various aspects of non-profit
and small business law in the online encyclopedia known as the People’s
Law Library, which is consulted by approximately 60,000 people each
month. The People’s Law Library is a branch of the Maryland Judiciary
that provides free legal education to the public. Articles explain what
at-home child care providers should include in their contracts with clients,
how non-profit start-ups can save time and money by legally partnering
with more established organizations, and how community development
corporations work.

VI. Looking to the Future

Baltimore’s community-based organizations continue to work towards
a better future for its residents. Every day, Baltimore’s organizations de-
velop creative solutions, provide important services to residents, and ad-
ance structural policy changes. CDC is dedicated to providing legal and
advocacy support to these organizations, as we collectively build a more
just and equitable city.

entry/baltimore-water-rates_us_57c72a64e4b0e60d31dcda76.
I. Introduction

The Community Development Law Clinic (CDLC) at the UDC David A. Clarke School of Law (UDC-DCSL), the District of Columbia’s public and public-interest focused law school, seeks to change structural economic and racial inequities within the District by representing low-wealth resident-led organizational clients that seek ownership and control over local housing, business, and community assets. The Clinic’s client base has always included some housing cooperatives, and those clients, with few exceptions, have succeeded in shifting an important capital asset into the hands of their low-wealth residents. A few years ago, working with a small group of activists, the Clinic began to explore cooperative business models as a means to address wealth disparities in D.C.’s low wealth communities, largely communities of color.1

1. Seidelman had the opportunity to build on these fledgling efforts with the mentorship and support of UDC-DCSL Community Development Law Clinic Director Louise Howells and with assistance from J.D. students.
The Clinic’s focus on cooperative and publicly owned institutions fits well within USC-DCSL’s LL.M. program in Clinical Education, Social Justice and Systems Change. Furthermore, bringing commercial, worker, and economic empowerment cooperatives into the Clinic not only provides an important service to the community but also creates a rich learning experience for students enrolled in the Clinic.

II. Inequality and Economic Development in the District of Columbia

Income inequality in the District of Columbia has remained one of the highest among large U.S. cities for nearly a decade, and new data shows that incomes are falling for already low-income households. Inequality is exacerbated by the unusually high income of DC’s wealthiest residents as compared to other large U.S. cities. Furthermore, D.C. is arguably the nation’s second most expensive city for renters, particularly families. This crisis in income, housing, and wealth has disproportionately impacted low-income Black and Latino residents and immigrant communities.

Amid this crisis, the D.C. government has engaged in a traditional economic development strategy, which favors taxpayer subsidized developments that benefit large unaccountable companies with absentee owners over local, small business development and living wage jobs. Given
D.C.’s income and wealth inequality issues, it is not surprising that Good Jobs First report ranked D.C. last (51 out of 51) in its state-by-state analysis, *Money for Something: Job Creation and Job Quality Standards in State Economic Development Subsidy Programs,* since D.C. has practically no wage or job performance requirements for the employers it subsidizes. Furthermore, many of the city’s job training programs have, in large part, failed to provide decent jobs to meaningful numbers of D.C.’s neediest, most impoverished residents, particularly African American returning citizens.

### III. Cooperatives as a Systems Change Approach to Economic Empowerment

D.C.’s economy has grown exponentially over the last decade as it pursues traditional, top-down economic development strategies. For the wealthiest D.C. residents and dominant economic agents, the city’s economic system is working quite well, despite growing inequality. However, the system is clearly broken for the city’s poorest residents. Thus, changing existing business paradigms to empower low-wealth communities is imperative. Grassroots community organizations, and the CDLC through the law school’s systems change approach, have realized the need to look beyond marginal initiatives such as job training programs and incremental wage increases within inherently inequitable business models. Changing business structures requires, among other shifts, a reduction in economic extraction and rent seeking, the practice of increasing wealth through exploitation of people and the environment.

According to Nobel Prize winning economist Joseph Stiglitz:

> The word “rent” was originally used, and still is, to describe what someone received for the use of a piece of his land—it’s the return obtained by virtue of ownership, and not because of anything one actually does or produces. This stands in contrast to “wages,” for example, which connotes compensation

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for the labor that workers provide. . . . The magnitude of “rent seeking” in our economy, while hard to quantify, is clearly enormous.10

Business ethics expert Marjorie Kelly describes the need for businesses and the economy at-large to shift from “extractive” to “generative” models that promote social missions and equity.11 Furthermore, there is consensus within certain dissidents of the current system that low-wealth people must own and control the social and economic assets within the communities in which they work and live. Cooperatives provide the ideal business form to enable community-controlled assets.

A worker cooperative is a democratic enterprise that is owned and governed by its employees or those who provide labor to the business.12 As such, worker-owned cooperatives can provide low-wealth people with a means to control economic assets in such a way that inherently reduces inequality and rent-seeking. Cooperatives of small businesses and/or independent contractors (economic empowerment cooperatives), such as production and marketing cooperatives, also empower the low-wealth owners of those enterprises and, ideally, their workers. Cooperatives are different than traditional shareholder-owned businesses in two primary ways: they typically distribute profits on the basis of “patronage,” including business or work contributed to the organization; and decisions are made on the principle of “one-member, one-vote,” as opposed to voting on the basis of financial interest.

Worker cooperative development has become an increasingly popular community wealth building, economic empowerment, and racial justice strategy nationwide. There are examples of low-wage workers in New York City who have seen their hourly wages more than double within a few years after forming worker cooperatives.13 Other cooperatives have


12. In some cases, they are owned by partners or members who perform labor or independent contractors who are not categorized as employees. See Employment Law, Co-opLaw.org, http://www.co-oplaw.org/topics-2/employment-law/#Who_is_NOT_an_Employee.

trained marginalized workers and placed them in stable jobs that give them ownership and control over their working conditions. Given such successes, there has been a resurgence of support for the cooperative business model among communities and institutions nationwide and internationally. Nearly 30,000 cooperatives employ over 2 million people in the United States. Of those, there are almost 300 worker cooperatives employing close to 7,000 worker-owners, according to the Democracy at Work Institute.

In recent years, a number of D.C. grassroots organizations and community leaders with community development, racial and economic justice, and business backgrounds have started to build a fledgling movement to empower low-wealth communities of color through cooperative businesses. Cooperation DC, a new project of Organizing Neighborhood Equity (ONE DC), has largely spearheaded D.C.’s worker cooperative movement, seeking to generate support, resources, and technical assistance for worker cooperatives, with a focus on low-income communities of color. The momentum has grown out of frustrations with current development models and recent successes with worker cooperatives in cities nationwide, particularly in urban centers like New York City.

The recent momentum is not new for the D.C. metropolitan region; in fact, it is a revival of the District’s historic tradition of cooperative economics, particularly within the African American community, as

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Worker Cooperatives and Their Role in the Changing Economy, J. AFF. HOUSING & CMTY. DEV. L. 355 (2015).

14. Cooperative Homecare Associates in New York City (www.chcany.org) and Evergreen Cooperative Corporation in Cleveland (www.evgoh.com) are two examples of large-scale worker-owned cooperatives that were formed to create stable, high-quality jobs for marginalized unemployed, underemployed, or exploited workers.

15. New York City is the most notable example of the rapid expansion of worker cooperatives. Given the past success of the Worker Cooperative Business Development Initiative, the Council of the City of New York and the Mayor agreed to allocate $2.1 million to expand the initiative in the FY2016 budget. See N.Y.C. City Council, Press Release, Speaker Mark-Viverito, Mayor De Blasio and City Council Announce FY2016 Budget Agreement to Add More NYPD Officers in the Beat, Establish a Citywide Bail Fund and Create Year Round Youth Employment (June 22, 2015), http://council.nyc.gov/html/pr/062215budget.shtml.

16. Cooperatives play an essential role in equitable international development. The United Nations has promoted the model in various ways, including the creation of an International Day of Cooperatives through its Department of Economic and Social Affairs. See www.un.org/development/desa/cooperatives/.


documented by scholars Dr. Jessica Gordon Nembhard and Dr. Joanna Bockman. The legacy has largely remained in the housing cooperative sector: the District is home to more than 100 housing cooperatives, the vast majority of which serve low- and moderate-income families, particularly as a result of D.C.’s unique right-of-first refusal law, the Tenant Opportunity to Purchase Act. Communities with housing cooperative experience have been instrumental in reviving the District’s tradition of worker, producer, and consumer cooperatives.

Local advocates have galvanized support for worker cooperatives as they point to current examples of worker cooperative successes both elsewhere and at home. Brighter Days is a worker-owned, collectively managed D.C. dog walking company that, since its founding in 2006, has been D.C.’s most well-reviewed dog care company in terms of customer service. In 2015, entry-level worker-owners earned an annual salary of $35,000 for less than forty hour work weeks, had access to health insurance, and received six weeks of paid vacation. In contrast, employees at other D.C. dog walking companies earn less per hour and have no opportunity for paid vacation or benefits because a large percentage of the companies’ income is allocated to management and non-worker company owners rather than to employees.

In addition to Brighter Days, several D.C. cooperatives are in the early stages of development, including a health food eco-catering company owned by two women of color who plan to add additional worker-owners with growth, a largely low-wealth Latina women-owned childcare center, and multi-stakeholder taxi-cooperative.

25. July 30, 2015 email advertisement from Brighter Days member to CoopDC listserv.
26. Seidelman was employed by a dog walking company in 2010 that did not offer benefits or adequate income for its employees. The company kept a large share of the service charge paid by the customer. After speaking to employees of similar companies, she learned that what she had experienced was standard industry practice.
IV. Counseling Cooperatives in D.C.

A. Counseling Cooperatives in the Clinic

The CDLC has a history of counseling affordable housing cooperatives in D.C. but it recently expanded representation to cooperatives that seek to create decent jobs, encourage capital ownership, and promote workplace democracy. Cooperative representation has provided a rich and valuable pedagogical experience for students. Students are exposed to, and develop skills in, various business law practice areas, including complex business structures, and they learn the mediation skills required to represent multiple stakeholders prone to internal conflict and facilitate progress among several stakeholders. The following sections will discuss two cooperatives—a taxi cooperative and a worker-owned childcare center—that seek to empower low-wage workers and business owners. Each has a unique purpose and ownership model. The Clinic assisted the taxi cooperative during its start-up phase and plans to start working formally with the childcare cooperative founding members in the fall of 2016.

B. D.C. Taxi Cooperative

In the winter of 2014, the Clinic was approached by a group interested in reviving D.C.’s struggling taxicab industry and providing much-needed wealth and income to its taxi drivers. The initiative arose as the livelihoods of the drivers, largely immigrant and Black, have been decimated by on-demand ride app companies such as Uber.

Although Uber considers itself part of the “sharing economy,” its drivers have no ability to share in the company’s $50 billion estimated net worth. It is safe to say that the Silicon Valley based company’s private shareholders live outside of the District and therefore contribute little to the wealth of District residents. Although tens of thousands of Uber drivers, deemed independent contractors, operate in the District, the company has not generated substantial income or wealth for its drivers who earn an average net hourly wage of less than $10 after expenses (not counting the cost of their cars), which is less than D.C.’s $11.50 minimum wage. Uber and Lyft also face a competitive advantage since they are largely exempt from the extensive regulations that apply to taxicabs, partly as a result of extensive lobbying, although they largely operate within the same market as taxis. Within D.C. alone, Uber has likely generated significant profits for its shareholders as part of its exploitative “rent-seeking” system.

27. 31 DCMR § 1613.2.
of extracting commissions from its drivers, who are excluded from ownership rights and privileges.

D.C. has far more taxicabs per consumer than most other jurisdictions, creating a particularly difficult market for drivers who face competition from Uber and Lyft. D.C.’s taxi industry also differs from other metropolitan areas in that most drivers own their vehicles.\textsuperscript{30} Although many taxi-cab owner-operators have formed worker-owned companies, close to one hundred separate taxicab companies\textsuperscript{31} in the District and thousands of cabs contribute to an oversaturated market. While taxi drivers, particularly those who own their own vehicles, earn a larger share of the per-ride charges paid by consumers than Uber drivers, they have been reduced to picking up less than two rides per hour on average, according to informally reported estimates. In order to compete for the small pool of consumers who do not use digital dispatch/ride sharing apps, D.C. taxi drivers often work twelve to fourteen hours a day, seven days a week\textsuperscript{32} to make ends meet in a city with a skyrocketing cost of living. The increased presence of on-demand ride apps, the density of taxi vehicles in the taxi market, and the lack of a common ride-sharing app for taxi drivers, among other factors, have all contributed to taxi drivers’ loss of income and taxi industry owners’ loss of wealth.

In order to revive the industry and improve the lives of taxi drivers, a group of small taxicab businesses, many of which are owned by drivers, and independent drivers realized the need to develop a joint digital dispatch app that would operate similarly to Uber and Lyft.\textsuperscript{33} Within its mission to regulate and support the taxicab industry, the D.C. Taxicab Commission (DCTC) promulgated regulations that would require it to develop and help market a “universal” digital dispatch app that will be accessible to all taxi drivers.\textsuperscript{34} In a creative move, the DCTC required that the app be licensed to and operated by a “co-op” company that must be owned, managed, and operated for the mutual benefit of its members, i.e., stakeholders in the D.C. taxicab industry.\textsuperscript{35} Ideally, the company and the app will


\textsuperscript{32} Supra note 18.


\textsuperscript{34} 31 DCMR § 1612.

\textsuperscript{35} 31 DCMR § 1613.
generate income and wealth for taxi industry drivers and company owners, while improving customer service for consumers.

The Clinic had the opportunity to assist taxi industry stakeholders at the start-up phase of the co-op. Students had a rich pedagogical experience researching local business entity law and engaging in the drafting of complex bylaws that considered interests of drivers, small business members, and investors. They also solicited input and built consensus from stakeholders around bylaws provisions and engaged with DCTC officials to interpret and clarify regulations while educating prospective co-op members about the regulations. Furthermore, they had the opportunity to investigate antitrust and securities law implications of multi-stakeholder cooperative ownership.

Clinic students were able to witness and reflect on the challenges associated with a project that required competitors to cooperate to further their joint economic interests. Taxicab owners were accustomed to a fiercely competitive market system in which they prioritized their own particular business’s short-term interests, inadvertently at the expense of the industry’s long-term survival. But given market forces, acting together became the only means by which to save their companies and the industry and improve drivers’ lives. The project also demonstrated the need for a community-based technical assistance and conflict mediation organization that would bring the various stakeholders together to promote their values and create new systems while managing power dynamics. Furthermore, students realized the importance of developing organizational structures that would equitably build wealth for members by balancing the interests of investors with capital-poor workers.

C. D.C. Childcare Cooperative

From 2006 to 2010, a racially, ethnically, and economically diverse group of residents of the Norwood at 1417 N Street NW, a seven-story eighty-four unit rent-controlled building in D.C.’s rapidly gentrifying Logan Circle neighborhood, engaged in a protracted organizing campaign to fight rent increases in the face of uninhabitable conditions and landlord neglect. The majority of the building’s residents are low-wealth immigrant families, primarily from Central America. Strong leadership, creative organizing strategies, litigation, and perseverance enabled the residents to successfully purchase the building in 2011 under D.C.’s strong right-of-first refusal law, the Tenant Opportunity to Purchase Act. With subsidized loans from the D.C. Department of Housing and Community Development and other partners, the Norwood Tenant Association converted the building to an affordable housing cooperative known as 1417 N Street NW Cooperative (N. St. Cooperative), owned by its residents.36 The Cooperative has successfully completed the renovation phase and residents are now enjoying much

improved housing conditions and amenities at an affordable rate. Most importantly, they have survived displacement due to gentrification and have remained in their homes and helped their community.

Because many of the N. St. Cooperative’s Central American women have become empowered leaders and owners, they looked to the creation of an affordable childcare center within the building to serve resident families and the families within the surrounding community. While a challenging industry, there is need for affordable childcare, particularly within certain niches of the local market. In 2013, there were 26,500 children in D.C. younger than three, an increase of 26 percent over 2010, according to a study, but there were only enough licensed day-care centers and home-based programs to serve a quarter of those children. Furthermore, D.C. has some of the least affordable childcare in the country and affordable childcare is especially inaccessible to low- and moderate-income families.

Familiar with the benefits of the cooperative model, the N. St. Cooperative members decided to form a worker-owned cooperative childcare center that would ideally employ building residents and licensed childcare providers who seek dignified work and business ownership. The childcare cooperative will draw on experiences from childcare providers such as Las Semillitas in D.C. and Childspace, a worker-owned cooperative and nonprofit affordable childcare center in Philadelphia.

As of May 2016, a group of approximately ten women have regularly met for a number of months to understand cooperative decision making and discuss the childcare cooperative’s business plan, as a result of the organizing efforts of N. St. Cooperative’s Board President, Silvia Salazar, and with the help of students in the Social Enterprise Masters program at American University and Cooperation D.C., a project of Organizing Neighborhood Equity (ONE DC). The childcare cooperative is looking to find its niche by staying open evenings and nights because of the significant need for affordable overnight childcare accessible to restaurant workers, health care workers, and others.

The founding members of the childcare cooperative have engaged substantially and enthusiastically in the cooperative business planning process. The combination of the N. St. Cooperative’s cooperative expertise and the outside childcare providers’ childcare business expertise has led to a complimentary mix of talents. Additionally, more than a dozen


community supporters with expertise in organizing, cooperative businesses, and philanthropy have attended meetings to show support. The childcare cooperative will need to raise substantial funds but founding members and supporters are hopeful that goals will be met, given preliminary interest from local community development banks and local foundations.

The CDLC looks forward to providing legal assistance to the cooperative in the fall of 2016. Because the cooperative may decide to utilize D.C.’s new equity crowdfunding regulations to raise up to $2 million from hundreds of small equity investments, its members will require counseling on securities law.\(^{39}\) Furthermore, the cooperative may also form a worker-owned management company as a limited liability company or limited cooperative association in which worker-owners will make decisions on the basis of one-member, one vote and have equal ownership interests in the company in order to facilitate wealth building. The Clinic anticipates advising the cooperative on tax exemption, entity choice and structure, governance, and related matters.

V. Creating a Supportive Infrastructure Moving Forward

Transitioning to a generative economy, inclusive of cooperative businesses that empower workers to own and control their economic livelihoods, is essential for social and racial justice, both nationally and internationally. However, examples of D.C.’s nascent cooperative businesses demonstrate that growing a cooperative movement requires an appropriately supportive local infrastructure. Growing a supportive ecosystem will involve building cooperative business development capacity and obtaining technical assistance from lawyers, business developers, accountants, and funders. In conjunction with the LL.M. systems change program, the CDLC has developed legal resources pertaining to D.C. cooperative law and other relevant issue areas and coordinated an extensive training for local lawyers, law students, and others interested in supporting local cooperatives. Similarly, Cooperation DC, a project of Organizing Neighborhood Equity (ONE DC),\(^{40}\) worked with the Democracy at Work Institute\(^{41}\) to host a series of training sessions and events to build local knowledge of cooperative development. This capacity building must be ongoing.

More importantly, the movement will need financial institutions and other non-traditional investors to specifically fund cooperative development. This may necessitate altering paradigms within current business financing to recognize social mission as much as or subordinate to financial return. D.C. is moving toward creating these institutions and models.

\(^{39}\) 26 DCMR § 250.

\(^{40}\) See note 18.

\(^{41}\) Democracy at Work Institute, www.institute.coop.
New equity crowdfunding regulations will enable small, community investors to more easily invest in cooperatives; a potential start-up loan fund will partner with the Working World, a non-profit financial institution dedicated to funding worker cooperatives; and a movement to create a public bank will ideally be owned and financed by the D.C. government and circulate profits from D.C. revenue back into essential community economic development projects like cooperatives. Furthermore, these projects will need funding and other policy support from the D.C. government and local philanthropists. The strength of D.C.’s cooperative movement may be successful only if it can develop an amenable foundation among local institutions that will be patient and support its slow growth.

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We live in a time of extraordinary change—change that’s reshaping the way we live, the way we work, our planet, our place in the world. . . . It’s change that can broaden opportunity, or widen inequality. And, whether we like it or not, the pace of this change will only accelerate.”

—President Barack Obama, State of the Union Address, January 2016


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I. Introduction

D.C. Code Section 24-1301(5) defines returning citizens as “persons who are residents of the District who were previously incarcerated.” This terminology, designed to be non-stigmatizing in the aftermath of punishments and debts paid to society, recognizes the need for returning citizens to re-integrate into their communities, get on with their lives, and become productive members of society. The world that returning citizens confront, however, is besieged by a rapidly changing economy, low wage jobs, high rates of joblessness, a decline in middle class jobs, limited opportunities for economic mobility, and the rise of automation and technology.

The manufacturing businesses that once offered decent paying jobs and an opportunity for mobility for people with limited skills have largely moved overseas, and a significant share of new jobs created in recent years offer extremely low wages, no benefits and little opportunity for upward mobility. In this economic environment, those who previously shunned the idea of starting a business in favor of the safer route of getting a job might view entrepreneurship in a whole new light.

Indeed, the term “necessity entrepreneurship” has been used to capture this form of entrepreneurship. To be clear, while entrepreneurship can be a pathway out of poverty, some observers caution that it “should never be the primary route to economic empowerment for low-income individuals.” Business failure rates are high. Entrepreneurship requires hard work, drive, and determination.

On the other hand, owning a small business builds wealth. The Association for Enterprise Opportunity (AEO), a nonprofit organization that creates economic opportunity for underserved entrepreneurs, reports that there are 28.5 million U.S. businesses; 25.1 million, or 88 percent, of these are microbusinesses operating with five or fewer employees. The

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4. See id. at 7.
5. See id. at 3.
6. See id. at 10.
median net worth for a nonbusiness owner is $85,000,\textsuperscript{10} and for a business owner, it is $211,000.\textsuperscript{11} The median net worth for an African-American business owner is $77,000 but only $10,000 for a non-business owner, while the median net worth for a Latino business owner is $37,000 but only $9,000 for a non-business owner.\textsuperscript{12} The District of Columbia has 64,355 businesses and 53,586 of these, or 83 percent, are microbusinesses.\textsuperscript{13}

The promise of entrepreneurship in the face of current economic realities calls for policy makers, economic development officials, workforce development providers, academics, lawyers, and others to strategically support and promote self-employment through entrepreneurship as a workforce development strategy for returning citizens.\textsuperscript{14} Transactional and CED lawyers can help by (1) providing pro bono legal assistance to new and emerging nonprofit organizations, such as Mission Launch, which works directly with returning citizens, governments, and communities to “cause system level change designed to expedite self-sufficiency”\textsuperscript{15}; (2) representing returning citizen entrepreneurs with respect to transactional legal matters, such as creating corporations and limited liability companies, drafting and reviewing contracts, reviewing intellectual property matters, such as copyrights and trademarks, and obtaining occupational and professional licenses; and (3) supporting law school clinical programs engaged in providing transactional legal services to returning citizens.

Scholars have recognized the opportunities and possible roles that collegiate schools of business can have in creating and supporting reentry programs for returning citizens. Indeed, teams of business students, supported by faculty and alumni, can help returning citizens in class and through fieldwork consulting programs. That work, within the discipline of social entrepreneurship, can yield positive public relations benefits and introduce new funding opportunities for the school.\textsuperscript{16} There are similar opportunities for law school entrepreneurship programs, and a few

\textsuperscript{10} See Number of Microbusinesses: District of Columbia, Ass’n for Enter. Opportunity, http://www.aeoworks.org/pdf/states/Microbusiness_State_Factsheet-DC.pdf (last visited May 15, 2016) (“Net worth is defined as the total value of all real and financial assets, including equity in the home, other property, vehicles, businesses and other financial assets.”).

\textsuperscript{11} See id.

\textsuperscript{12} See id.

\textsuperscript{13} See id.

\textsuperscript{14} See Launching Low-Income Entrepreneurs, supra note 3.


such programs are emerging. Indeed, The George Washington University Law School Small Business and Community Economic Development Clinic (SBCED Clinic or Clinic) in Washington, D.C., provides legal representation to the nonprofit organizations that support returning citizens as well as direct representation to returning citizens.

II. Case Study of an Action Research Project on Entrepreneurship for Returning Citizens

It’s no surprise that a number of formerly incarcerated individuals turn to entrepreneurship. Many of those who served time in prison are enterprising and open to taking risks. Perhaps most importantly, the formerly incarcerated typically encounter serious barriers to securing fulltime gainful employment upon release and often view self-employment as the least arduous path to economic self-sufficiency.

In 2010, the SBCED Clinic initiated an Action Research Project in Clinical Legal Education on Entrepreneurship for Returning Citizens (Entrepreneurship for Returning Citizens Project or Project) to complement the Clinic’s robust pro bono business and community economic development (CED) law practice. In the Clinic, teams of second- and third-year student attorneys, working under law faculty supervision, represent small and micro-businesses, nonprofit organizations, social enterprises, artists, and creative entrepreneurs. In addition, the student attorneys counsel and advise emerging and existing start-ups on corporate, tax, regulatory, contracts, and intellectual property law matters. Like many law school clinics in a wide range of doctrinal areas, the Clinic has a social justice mission.

Action research “refers to a cluster of applied research methods, namely, participatory research, collaborative inquiry, action learning, and community-based research.” It is a pedagogical approach to educating students while helping communities.

17. Stanford Law School’s pro bono effort, Project ReMade, is an entrepreneurial training program organized by law students. See Stanford Students Help Formerly Incarcerated People Become Entrepreneurs, STANFORD LAW SCHOOL, https://law.stanford.edu/levin-center/pro-bono-program/#slsnav-pro-bono-projects-by-skills-categories. There are approximately forty law schools with re-entry or clean slate clinics but there is no evidence they specifically assist returning citizen entrepreneurs. The list is on file with the author.


19. See Launching Low-Income Entrepreneurs, supra note 3, at 27.


21. See id. at 384–90.
The Project rests on a change theory ideology called positive deviance, which is premised on the notion that every community has individuals or groups “whose uncommon behaviors and strategies enable them to find better solutions to problems than their peers, while having access to the same resources and facing similar or worse challenges.” Positive deviants leverage tangible community success and amplify proven strategies instead of simply rehashing well-articulated problems. The Entrepreneurship for Returning Citizens Project is also deeply rooted in addressing re-entry for returning citizens through a CED lens that offers a broader, systems-changing approach, as opposed to a criminal justice perspective. The Project was informed by the path-breaking work of several former clients, namely, the Free Minds Book Club and Writing Workshop, which was founded by resilient social entrepreneurs who pioneered a weekly book club in the D.C. Jail to awaken incarcerated youth to their own potential. Free Minds has become an award winning re-entry program that also encourages entrepreneurship for those uniquely suited to it. Another former client, Life Asset Inc., a non-predatory financial resource center for poor, low, and moderate income persons, aims to “help alleviate poverty in Washington, D.C., through affordable financial products, services, and education, thereby promoting self-help and self-respect and expanding social and economic opportunities for lower income residents.” Modeled on the world renowned Grameen Bank, founded by economist and Nobel Peace Prize winner, Muhammad Yunus, Life Asset has trained more than 1,500 entrepreneurs and made 215 business loans averaging $1,050 each. Ninety-seven percent of the microbusinesses supported by Life Asset are still in business after two years of operation.

Concerns about the over-incarceration of black and brown men and women and the American carceral state are well documented. Sixty thousand people in the nation’s capital, or 10 percent of D.C. residents, have criminal records, and each year more than 8,000 individuals return to D.C. from disparate penal institutions. The largest percentage of returning citizens is African-American men twenty-one to thirty years of

22. Id. at 406–09.
24. See id.
26. See id.
An October 2014 D.C. Department of Corrections report found that 37 percent of young men in custody had no education, high school diploma, or GED.

On the national landscape, the U.S. Department of Justice made history in October 2015 by announcing the largest discharge of inmates from federal prisons in America. Prompted by an effort to reduce overcrowding and provide much needed relief to drug offenders who have been incarcerated over the past four decades, the government released approximately 6,000 individuals from federal prisons across the United States. Among them are D.C. residents made up of men and women from various backgrounds who have all been given one powerful thing: a second chance at life.

Positive deviance shuns emphasis on gloomy statistics but respects the power of data and metrics. The Entrepreneurship for Returning Citizens Project focuses on learning from the positive deviants: those organizations and entrepreneurs who make it, persevere, and excel in spite of their circumstances.

A. Entrepreneurship for Returning Citizens—Building the Case

We have nothing but talent and people who can operate businesses and do it well. . . . The impediment [is] transitioning them from the underground economy to legitimate business.

* * *

I want to expand the narrative of who goes to prison. . . . prisons are a microcosm of the U.S.

—Teresa Hodge, Mission Launch

Washington, D.C., is a pioneer with respect to support services for returning citizens and an exemplar for “a city taking on prisoner re-entry as a basic municipal service.” This is especially true in the aftermath of the 1997 National Capital Revitalization and Self-Government Improvement

29. See id.
30. See id.
33. Launching Low Income Entrepreneurs, supra note 3, at 12 (discussing the “side-hustles” common in many low-income neighborhoods: “barbers cutting hair in their living rooms, people baking cakes for neighborhood birthdays, teens deejaying parties, moms operating informal child care centers, men washing windows of local businesses,” and other examples of microbusinesses).
34. See Comm. on Business, Consumer and Regulatory Affairs (testimony of Teresa Hodge, Director, Mission Launch).
35. Jessica Kourkounis, Will D.C. Be the First U.S. City to Escape the Prison Trap?, NEXT CITY (Sept. 28, 2015), https://nextcity.org/features/view/dc-escape-prison-
Act,\textsuperscript{36} which required “the District to turn over its 5,400 offenders to the federal Bureau of Prisons.”\textsuperscript{37} According to D.C. congressional delegate Eleanor Holmes Norton, the District of Columbia gladly relinquished its parole and probation responsibilities to the federal government because it was carrying a state prison function that no city provides.\textsuperscript{38}

The Mayor’s Office of Returning Citizen Affairs (ORCA) was created in 2008 and served 4,644 people in 2015. D.C. is one of the few jurisdictions that restore voting rights upon completion of a prison sentence; ORCA registered 640 people to vote in 2015, but its other efforts have been criticized. “ORCA only receives 0.2 percent of the D.C. Department of Corrections’ $151 million budget” . . . [and] operates on less than $400,000 annually.”\textsuperscript{39} Perhaps partially due to its limited budget, a D.C. Office of the Inspector General report found that in spite of ORCA’s efforts to help, it lacked the capacity to work with other organizations and provide meaningful reentry assistance to returning citizens.\textsuperscript{40}

Washington D.C.’s focus on entrepreneurship for returning citizens is based on a few core local realities. First, many D.C. residents face chronic unemployment and under employment; unemployment in Wards 7 and 8, low-income areas of D.C., is reported to be as high as 13.5 percent and 16.6 percent, respectively.\textsuperscript{41} The unemployment rate, hovering at 60 percent, is much higher for returning citizens.\textsuperscript{42} Second, advances in technology have changed the landscape of traditional employment, making

\begin{flushleft}
\textit{Representing Returning Citizen Entrepreneurs in D.C.}
\end{flushleft}
self-employment through entrepreneurship an important component of workforce development. Third, entrepreneurship is especially important for returning citizens in D.C. who have been incarcerated in jurisdictions outside of the city and may lack the necessary social capital to obtain gainful employment. Fourth, supported by shared workspaces, business incubators and accelerators, microbusiness training and loan programs, and community development financial institutions, entrepreneurship in D.C. is rapidly advancing, necessitating special efforts to include returning citizens in the entrepreneurial eco-system. Fifth, as noted earlier, self-employment through entrepreneurship is a form of necessity entrepreneurship for some returning citizens. Sixth, entrepreneurship is a tool of empowerment for persons lacking formal education; research shows that two in five returning citizens lack a high school diploma.

B. Project Activities and Stages

Since its inception in 2010, the Entrepreneurship for Returning Citizens Project has had ten significant activities and stages. Stage One was an analysis of workforce development and self-employment through entrepreneurship as a key component of broader workforce development strategies. In 2010 and 2011, students studied well-performing nonprofit organizations engaged in providing jobs for returning citizens with a goal of identifying the “positive deviants,” i.e., those doing better than the majority, among them. The findings from that study were set forth in a workforce development report.

In Stage Two, clinical faculty from George Washington University, American University Washington College of Law, and University of Maryland participated in an Entrepreneurship and Reentry Forum sponsored by the U.S. Probation Office and the District of Columbia Workforce Development Program in partnership with American University Washington College of Law. The goal of that Forum was to explore the ways that

43. See generally Launching Low Income Entrepreneurs, supra note 3.
49. The panel, which took place in October 2013, was organized by Professor Brenda Smith (American University Washington College of Law) and included
clinical programs could contribute to reentry and how transactional clinics could support entrepreneurship for returning citizens.

This effort resulted in *Stage Three*: direct representation of returning citizens entrepreneurs. After discussing opportunities available through pro bono legal clinics at the Forum, the SBCED Clinic received several requests for legal assistance from returning citizens who were exploring, starting, or growing legal businesses. For instance, the Clinic represented a returning citizen who, in an effort to be reinstated as a federal construction contractor, sought legal advice on business formation and federal contracting laws regarding debarment and responsibility.50 After months of planning meetings, *Stage Four* involved the Clinic’s participation in Major Projects Lab: Ward 8, a summit on job creation in D.C.51 This was a city-wide workforce development effort sponsored by the George Washington University School of Business and the Washington Economic Partnership during which the Clinic proposed a virtual law firm to support entrepreneurship for returning citizens.52 Students contributed to this effort with valuable research from their interviews with well-performing nonprofit organizations serving returning citizens and other research.53

In *Stage Five*, which took place between 2014 and 2016, law students researched the ethical issues involved in the creation of a virtual law practice and drafted and edited a white paper proposing a virtual law pro bono initiative to assist returning citizen entrepreneurs.54 In *Stage Six*, the Clinic participated in a “Rebuilding Reentry Coalition Hackathon” hosted by Mission Launch and others.55 Broadly defined, hackathons are collaborative events where people, often using technology, come together to creatively solve problems. Lasting anywhere from a day to a

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Professor Susan Jones (George Washington University Law School) and Professor Michael Pinard (University of Maryland Francis King Carey School of Law).


week, hackathons “innovate on a theme or improve on an existing project.”56 The participants may be computer programmers, developers, visionaries, marketers, and project stakeholders.57 Hackathons are significant because they are designed to provide technological solutions to pressing social problems. At the same time, organizing a hackathon raises many legal issues pertaining to participation agreements and ownership of technology jointly created during a hackathon. Clinic students researched a range of legal issues for hackathon organizers.

In Stage Seven, after a series of meetings with the D.C. Office of Court Supervision and Offender Services (C-SOSA), the office responsible for reentry efforts, the Clinic hosted a Returning Citizens and Entrepreneurship Convening at the George Washington University Law School in November 2015, which gathered key leaders, thinkers, and innovators in the reentry field. The Convening was attended by returning citizens, representatives of the D.C. Reentry Task Force, government officials from C-SOSA and the U.S. Small Business Administration, and reentry advocates.

In part as a result of the Convening, Stage Eight resulted in faculty testimony before the D.C. City Council on B21-463, Incarceration to Incorporation Entrepreneurship Program Act of 2015 (IIEP bill).58 Students conducted legal research on key components of the bill and drafted testimony. In the months leading up to the City Council hearing, SBCED Clinic faculty participated in meetings of the D.C. Reentry Task Force Working Group, which is a diverse group of entrepreneurs, academics, reentry professionals, and returning citizens, to study, share comments, and mobilize testimony on the IIEP bill. The working group submitted recommendations to the Committee on Business, Consumer and Regulatory Affairs and engaged in an advocacy campaign to encourage passage of the IIEP bill.59 On June 23, 2016, the Committee favorably recommended its approval by the Council of the District of Columbia and the bill was passed and moved forward subject to appropriation.60 Recognizing that

57. Id.
many returning citizens have bona fide entrepreneurial ambitions and limited options for gainful employment, this bill offers entrepreneurship training, resources and funding to support entrepreneurship for returning citizens.

This new law has not yet been funded, however, and returning citizen entrepreneurs, with or without the support of the law, will need pro bono legal assistance to support their businesses. Returning citizen entrepreneurs are not unlike other SBCED Clinic clients seeking legal business structures in the form of limited liability companies, benefit corporations, and other business structures for new or emerging businesses; help with business licenses, permits and taxes, contracts and intellectual property; and specialized legal research.

In Stage Nine, Clinic students conducted extensive research and drafted a *Returning Citizens’ Legal and Business Entrepreneurship Tool Kit*, which provides a broad range of resources for returning citizens. *Stage Ten* involves reflection, storytelling, and scholarship to memorialize the six-year project. This article is a manifestation of that process.

II. Second Chances—Legislative Proposals and Policy Initiative

*The work of redemption reflects our values. . . . Our government has a responsibility to help prisoners return as contributing members of their community.*

—President Barack Obama

* * *

*Investing in ex-convicts is not only morally right, it’s economically smart.*

—Robert E. Rubin

When President Obama signed into law the Second Chance Act, 63 he acknowledged the deprivations associated with high rates of recidivism: tax burdens on Americans, loss of labor force productivity, and especially loss to family members—fathers and mothers, sons and daughters, and spouses. Research shows there is a slow but growing bipartisan support for “entrepreneurship and self-employment as a viable alternative to


post-prison employment and as a means to reduce recidivism.” For example, an “empirical testing of the entrepreneurial propensity of prison inmates” found that they “seemed quite ‘business-savvy’ with a surprising understanding of the nuances of marketing, finance etc.” The test results showed that “the inmates scored higher . . . [on the test] than did comparable groups of ‘normative entrepreneurs,’ ‘slow-growth-entrepreneurs,’ and ‘manager-scientists,’ thus indicating that some prison inmates possess high levels of entrepreneurial aptitude.” The empirical testing report concludes:

These results may not be that surprising. About 35% of all prison inmates have been convicted of drug trafficking crimes . . . It is not unusual for a local drug dealing operation to have $100,000 in sales per week, a 90% profit margin, and 90% repeat business. . . . Drug dealers, and their employees, often display the same entrepreneurial and managerial skills as successful owners and employees of legitimate business operations. If entrepreneurial “propensity” or aptitude” is an attribute that some people possess to a greater degree than do others, and if a portion of our nation’s prison inmates possess this attribute, then entrepreneurial or self-employment training for soon-to-be-released inmates and recently-released ex-convicts would be a potentially viable component of our nation’s social policy efforts, and might result in a lowering of recidivism rates with resultant benefits for society.

A. District of Columbia Incarceration to Incorporation Entrepreneurship Program Act of 2015

As explained in more depth in the fourth article of this symposium by Professor Etienne C. Toussaint, D.C. Council Member Vincent Orange introduced the IIEP bill on November 3, 2015. The goal of the bill is to broaden opportunities for returning citizens by creating a sorely needed business development program. The proposed program, which would be administered by the D.C. Department of Employment Services (DOES) and the D.C. Department of Small and Local Business Development (DSLBD), would promote economic self-sufficiency for returning citizens, including investments in businesses owned by returning citizens, a fast track GED program, business training and workshops, and grants and scholarships for classes at the University of the District of Columbia and the University of the District of Columbia Community College, as well as an IIEP fund to be administered by the Office of the Deputy Mayor for

65. Id. at 68–69.
66. Id.
67. Id. at 70.
69. See also Returning Citizens, Creating Entrepreneurs, supra note 54.
Greater Economic Opportunity. The bill calls for an IIEP fund balance of $10 million from multiple sources, such as D.C. government appropriations, public and private donations, and other funds. As noted earlier, entrepreneurship for returning citizens is not a panacea and will not be a viable opportunity for every person, but given how hard it is for returning citizens to find employment, the IIEP bill helps to significantly broaden their opportunities.

There are models of successful D.C. based businesses that are owned and operated by returning citizens. A few noteworthy local examples include Clean Decisions, a professional-grade cleaning company for kitchens and food trucks,70 and Flikshop, a smartphone app that allows users to send photos and messages to incarcerated loved ones on a 99-cent post card.71

On a national level, a pre-release program called the Last Mile in San Quentin, a technology accelerator, “prepares incarcerated individuals for successful reentry through business and technology training.”72 The program allows incarcerated persons to pitch business ideas to investors before their release from prison and provides broader context for the possibilities for returning citizens.73

The SBCED Clinic represents clients such as the ones just mentioned who have certain striking and defining qualities, including a strong need for achievement; internal drive and perseverance; a tolerance for ambiguity and uncertainty; resourcefulness; and a powerful passion to change the world with their ideas, services, and the persons they employ. This common entrepreneurial thread is the same spirit found within the hearts of many within America’s prison systems. It is this same spirit that we as a community need to ignite by fortifying and engaging individuals equipped with this inherent skill set to pursue creating businesses that will stimulate growth and promote greater success among other D.C. residents.

There is no more suitable place to propose this legislation than in our nation’s capital. The creation of ORCA demonstrates D.C.’s leadership vision in the re-entry field and IIEP bill supports successful reentry by giving returning citizens the chance to infuse their communities with both human and monetary capital, increasing the tax base, and celebrating the talents of individuals with the capacity to effectuate positive change.

B. U.S. Small Business Administration Permits Loans to Returning Citizens

Effective July 15, 2015, the U.S. Small Business Administration (SBA) issued new rules allowing SBA microlenders to make loans to returning citizens on parole or probation. The SBA microloan program provides loans up to $50,000 to help finance small businesses. This is an important rule change because many returning citizens are unable to secure above minimum wage jobs. These microloans, dispensed through SBA approved intermediaries, average $13,000.

Another SBA improvement is a “streamlined policy to improve access to small dollar loans,” thereby expanding access to capital for minority entrepreneurs. Indeed, a recent report found that while “businesses owned by people of color are playing an important part in restoring the health of the American economy after the Great Recession (December 2007 through June 2009), . . . African American men were the only group to have a decline in the number of their businesses in the period 2007 through 2012.”

As previously noted, black men between the ages of 21 to 30 are the highest percentage of returning citizens. The report concludes:

Although the number of minority-owned businesses is increasing dramatically, America is currently forgoing an estimated 1.1 million businesses owned by people of color because of past and present discrimination in American society. These missing businesses could produce an estimated 9 million more jobs and boost our national income by $300 billion. Thus, expanding entrepreneurship among people of color is an essential strategy for moving the country toward full employment for all.

C. Social Impact Bonds and Justice Reinvestment Initiative

Advocates of the IIEP bill are thoughtfully considering funding sources for this proposed legislation. Impact investing funding streams and Justice Reinvestment Initiative (JRI) are two innovative possibilities. Social impact bonds (SIBs), discussed in more depth in Professor Toussaint’s article, are a form of innovative financing, designed to help state and local
governments fund social programs, that creates public-private partnerships involving government, nonprofit organizations, and private investors. Premised on evidenced-based cost savings metrics, investors are “repaid only if and when social outcomes are achieved.” State and local governments have used SIBs in areas such as health care, education, poverty reduction, and the criminal justice system. SIBs in the criminal justice arena have been aimed at recidivism reduction; employment, including self-employment, is a key factor in reducing recidivism.

The Justice Reinvestment Initiative is a creative cost-saving, data-driven approach to criminal justice reform. According to the Urban Institute, “[l]eaders in 24 states and 17 localities have implemented JRI.” Like SIBs, JRI strives for achieved cost savings but seeks to reinvest the savings “in new or expanded evidence-based practices.” In the aftermath of D.C. Act 20-565, Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Initiative of 2014, commonly called Initiative 71, which took effect February 26, 2015, reports show “marijuana arrests decreased by 85 percent from 2014 to 2015” and that marijuana “arrests fell from 1,840 in 2014 to just 32 in 2015.” A JRI approach suggests that it may be possible to quantify and redirect the cost savings of policing due to fewer arrests.

III. Conclusion

A Ewing Marion Kauffman Foundation-funded monograph, *Venturing Beyond the Gates: Facilitating Successful Reentry with Entrepreneurship*, points

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81. Id.


83. Id.


out that the “promotion of entrepreneurship as a reentry strategy is in an embryonic stage.” The monograph concludes:

The time is ripe to establish funding streams, create pilot projects and develop the infrastructure necessary to identify, evaluate and share promising practices. We must take advantage of the opportunities to pool our collective knowledge and resources, capitalize on the talents and skills of individuals leaving prison and empower them to become agents of change in their lives and contribute to the vibrancy and health of our communities.

Indeed, in the District of Columbia and across America, a robust and complex entrepreneurial eco-system has emerged. Today’s entrepreneurial culture, driven by millennial and next generation entrepreneurs, social entrepreneurs, business incubators and accelerators, shared work spaces, and new venture competitions in college campuses and beyond, have all changed the way America views entrepreneurship. Returning citizens comprise approximately 10 percent of the city’s population; to be inclusive, D.C.’s entrepreneurial ecosystem must properly include them. To be sure, entrepreneurship education and support are important components of reforming America’s carceral system, which is disproportionately comprised of men and women of color.

Law school clinic programs can contribute to CED by representing nonprofit organizations and social enterprises, such as Mission Launch and Life Asset, that help returning citizens. Legal clinics can also represent businesses and worker cooperatives owned by returning citizens, especially those businesses that employ returning citizens.

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86. NICOLE LINDAHL, VENTURING BEYOND THE GATES: FACILITATING SUCCESSFUL REENTRY WITH ENTREPRENEURSHIP 82 (2007).
87. Id. at 83.
88. The SBA launched a number of initiatives for millennials including, My Brother’s Keeper Millennial Entrepreneurs Initiative, Millennial Entrepreneurs College Road Show and Millennial Entrepreneurs College Road Show. See My Brother’s Keeper, supra note 77.
Incarceration to Incorporation: Economic Empowerment for Returning Citizens Through Social Impact Bonds

Etienne C. Toussaint

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Black rage is founded on blatant denial
Squeezed economics, subsistence survival,
Deafening silence and social control.
Black rage is founded on wounds in the soul!

—Lauryn Hill, Black Rage (Sketch) (2014)¹


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I. Introduction

On a crisp New Year’s Eve in December 2015, fiery words sprung from the lips of hundreds of frustrated protestors gathered near the Gallery Place-Chinatown Metro station in downtown Washington, D.C. “This is more important than partying,” one woman shouted. Others quickly followed with their own passionate declarations as Black Lives Matter activists and a diverse body of outraged community members, young and old, marched in unison down the street. Their collective cries of disapproval called attention to the growing number of police misconduct cases and the rising tension between law enforcement agents and communities of color that have taken American cities by storm. Picket signs and bullhorns filled the nighttime sky as the protestors expressed their disdain.


3. In the summer of 2013, after the acquittal of George Zimmerman in the shooting and murder of African-American male, Trayvon Martin, a new Black liberation movement was birthed with the use of the social media hashtag #BlackLivesMatter by Alicia Garza, Patrisse Cullors, and Opal Tometi. By August 2014, Black Lives Matter (BLM) had evolved into a vibrant activist movement, gaining international acclaim after organizing massive street demonstrations following the deaths of Michael Brown in Ferguson, Missouri, and Eric Garner in New York City. BLM members seek to affirm the lives of Black men and women who, on a daily basis, experience the negative impacts of institutionalized white supremacy and structural racism in America. The movement has primarily focused on decrying the extrajudicial killings of Black people by law enforcement officers and racial injustices perpetuated by the criminal justice system (e.g., racial profiling, police brutality, mass incarceration, etc.). See generally Khury Petersen-Smith, Black Lives Matter: A New Movement Takes Shape, 96 INT’L SOCIALIST REV. 2015, http://isreview.org/issue/96/black-lives-matter (describing the history of Black Lives Matter and providing useful context for the future of the activist movement).

Since the movement’s formation, BLM activists have organized over one thousand demonstrations against the deaths of numerous Black people killed by police officers, such as Tamir Rice in Cleveland; Walter Scott in North Charleston, South Carolina; Sandra Bland in Waller County, Texas; and Freddie Gray in Baltimore. The movement has sparked conversation about the tense relationship between law enforcement and communities of color across America. See, e.g., Conor Friedersdorf, The Brutality of Police Culture in Baltimore, ATLANTIC (Apr. 22, 2015), http://www.theatlantic.com/politics/archive/2015/04/the-brutality-of-police-culture-in-baltimore/391158/ (noting that “as in Ferguson, where residents suffered through years of misconduct so egregious that most Americans could scarcely conceive of what was going on, the people of Baltimore are policed by an entity that perpetrates stunning abuses”); Maria Alvarez, Invoking King’s Memory, de Blasio, Sharpton Try to Mend Fences with NYPD, NEWSDAY (Jan. 19, 2015), http://www.newsday.com/news/new-york/invoking-king-s-memory-deblasio-sharpton-try-to-mend-fences-with-nypd-1.9823321 (noting “Mayor Bill de Blasio and the Rev. Al Sharpton . . . promised their commitment to social justice
over America’s criminal justice system. Other community members watched silently from afar, confused at the anger and frustration raining down on their city. Perhaps our country’s failure to indict the police officers involved in the shooting of twelve-year old Tamir Rice who waived a toy gun in the wrong park in Cleveland or those officers involved in the unexplained death of 28-year old Sandra Bland after a routine traffic stop in Waller County, Texas, may explain why some Washingtonians resolved that the year 2015 was not one to be celebrated with colorful streamers, pointed party hats, or bubbly champagne.4

As an increasing number of citizens in urban and rural communities across America take to the streets in protest to demand justice for victims of police brutality,5 lawmakers are calling for much-needed reform to our country’s criminal justice system.6 And, while the media primarily highlight the troubled lives of the Black bodies that have flooded our streets with the painful stories of their untimely death,7 the zealous protesters who wade through the aftermath following every instance of “law


6. As recently as February 2016. See, e.g., Jordain Carney & Lydia Wheeler, Senators locked in negotiations over criminal justice reform, THE HILL (Feb. 9, 2016), http://thehill.com/regulation/legislation/268840-senators-locked-in-negotiations-overcriminal-justice-reform (noting “[l]awmakers are said to be considering cutting a section from the [criminal justice reform] bill that would have reduced mandatory minimum sentences for armed career criminals from 15 to 10 years, with that standard applied retroactively to people already in prison”).

7. For an example of how the media portrayed the death of Michael Brown, see, e.g., Tracking the Events in the Wake of Michael Brown’s Shooting, N.Y. TIMES (Nov. 24, 2014), http://www.nytimes.com/interactive/2014/11/09/us/10ferguson-michael-brown-shooting-grand-jury-darren-wilson.html#/time354_10512 (noting “[s]ome witnesses later said that Mr. Brown appeared to be surrendering with his hands in the air as he was hit with the fatal gunshots. Others say that Mr. Brown was
enforcement gone wrong” are fueled by concerns that sink far deeper than the loss of unrealized potential. Communities are not only advocating for the mending of fractured relationships between citizens and local police officers, but also for the healing of a broken carceral system that too often hinders economic justice. Not only does America’s criminal justice system overwhelmingly target young Black men in low-income communities as the primary perpetrators of criminal activity, but it also routinely relegates them to second-class citizenship upon their release from prison.

Formerly incarcerated individuals in America—appropriately called “returning citizens” but more frequently labeled “ex-felons”—are shackled with the stigma of their prison record long after serving time behind bars, a stigma that impairs their civil rights and limits their prospects for economic prosperity in the job market. Many social justice advocates recognize that mass incarceration has done more harm than good in addressing drug abuse and crime in communities of color where the cycle of poverty churns unrelentingly. Further, they argue that lasting social

moving toward the officer when he was killed. What is not in dispute is that Mr. Brown was unarmed. His body would lie in the street for four hours.”.

8. See, e.g., William Powell, The Roots of Violence in Ferguson, ATLANTIC (Aug. 16, 2014), http://www.theatlantic.com/national/archive/2014/08/racial-tension-ferguson-isnt-over/378625/ (noting that when residents gathered with other protesters for a peace march days after the shooting of Michael Brown by a police officer, “[m]any in the crowd wore goggles or painters’ masks, concerned about another round of tear gas”).


10. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007); see also MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (explaining that mass incarceration has become “a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow” for African Americans).


12. See, e.g., MARY PATTILLO, IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION (2004) (noting “[a]lthough young minority men with little schooling had relatively high rates of incarceration, before the 1980s the penal system was not a dominant presence in disadvantaged neighborhoods. Criminal behavior, as officially recognized by the police, was much more unusual than poverty. The utter marginality of prisons and other carceral institutions shaped criminological and penological understanding of punishment.”); see also Ta-Nehisi Coates, The
change and long-term income equality cannot be achieved without advancing economic justice. The U.S. government has heeded their call by shrinking overcrowded prisons and reducing excessively long prison sentences. Nevertheless, concerns about recidivism persist, and the cycle of poverty among the formerly incarcerated continues. Indeed, more than one-third of federal inmates return to prison within five years of their release, often after struggling to secure employment due to the stigma of their criminal record and the lack of employment opportunities in their home communities. Although the facts speak for themselves, scholars agree that the politics of race that drive criminal justice reform are inextricably linked to the movement for economic justice that steer historically marginalized communities deeper and deeper into inequality.

The George Washington Law School Small Business and Community Economic Development Clinic (SBCED Clinic), under the leadership of Professor Susan R. Jones, has played a leading role in advancing economic empowerment for returning citizens in Washington, D.C. In addition to
providing pro bono legal services to returning citizen entrepreneurs, the SBCED Clinic has been engaged in an action research project during the past several years that actively supports entrepreneurship for returning citizens.\(^\text{17}\) Most recently, the clinic faculty and student attorneys conducted policy research on legislation in the District of Columbia that promotes economic justice for returning citizens, the product of which resulted in public testimony before the Washington D.C., Council in January 2016.\(^\text{18}\) During the spring 2016 academic semester, the clinic faculty and student attorneys explored various social finance innovations that could support proposed legislative economic empowerment initiatives for returning citizens. This essay highlights the potential for an emerging social finance tool—the social impact bond—to help finance newly proposed legislation in Washington, D.C., targeting returning citizens.

Part I of this article discusses the D.C. Incarceration to Incorporation Entrepreneurship Program Act of 2015, an innovative bill that seeks to economically empower the District’s most vulnerable citizens. Part II briefly traces the history of the social impact bond in the United States and positions the financial tool within an evolving history of community economic development that currently emphasizes market-based initiatives. Part III offers a critique of the social impact bond as a vehicle to fund criminal justice reforms, identifying benefits of the financial tool while discussing key challenges that may hinder its future success. The

\(^{17}\) The George Washington Law School SBCED Clinic “Action Research Project for Returning Citizens” has gone through several stages of development during the past few years, including: (1) the creation of a workforce development report investigating issues for marginalized population in D.C.; (2) faculty participation in an Entrepreneurship and Reentry Forum with the U.S. Probation Office under the D.C. Workforce Development Program in October 2013; (3) direct requests for legal assistance from returning citizens; (4) creation of a white paper proposing a virtual law pro bono initiative at a city-wide George Washington University sponsored workforce development workshop; (5) faculty participation in a “Rebuilding Reentry Hackathon” in October 2015; (6) hosting of a “Returning Citizens and Entrepreneurship Convening” at George Washington Law School in November 2015; (7) clinic participation in the “D.C. Reentry Task Force” and faculty public testimony on the District of Columbia Incarceration to Incorporation Entrepreneurship Program Act of 2015 in January 2016; (8) creation of a draft “Returning Citizen’s Legal and Business Entrepreneurship Toolkit” during the spring and summer of 2016; and (9) intentional reflection and storytelling. For more information, see Susan R. Jones, Representing Returning Citizen Entrepreneurs, 25-1 J. AFFORDABLE HOUS. & CMTY. DEV. L. page no. (2016).

essay concludes by urging social justice advocates to consider the social impact bond, while also noting the importance of incorporating strategies and strategic partnerships that will ultimately empower communities at the grassroots level.

II. The D.C. Incarceration to Incorporation Entrepreneurship Program Act of 2015

In the nation’s capital, an estimated 60,000 people, approximately ten percent of the city’s current population, have a criminal record. Additionally, more than 8,000 people return to the city each year from prisons across the country. These returning citizens, predominantly young Black men between the ages of 21 and 30, face tremendous challenges as they transition into their old neighborhoods and seek access to employment opportunities. In an October 2014 report by the District of Columbia Department of Corrections, 37 percent of these young men self-reported their education level as “none.” The Council for Court Excellence found that 77 percent of Washington, D.C., offenders who return home from prison received no employment assistance while incarcerated, and only one-third of those surveyed stated that assistance was available to them after their release. Additionally, approximately 80 percent of those surveyed said that they were asked “all the time” about their criminal records when

21. See Justin Wolfers, David Leonhardt & Kevin Quealy, 1.5 Million Missing Black Men, N.Y. TIMES (Apr. 20, 2015), http://www.nytimes.com/interactive/2015/04/20/upshot/missing-black-men.html?_r=5&abt=0002&abg=0 (revealing “African American men have long been more likely to be locked up and more likely to die young, but the scale of the combined toll is nonetheless jarring. It is a measure of the deep disparities that continue to afflict black men—disparities being debated after a recent spate of killings by the police—and the gender gap is itself a further cause of social ills, leaving many communities without enough men to be fathers and husbands.”).
looking for a job. Although the D.C. Mayor’s Office on Returning Citizen Affairs (MORCA) has launched various initiatives for returning citizens targeting these challenges, MORCA operates with a limited budget and has received criticism for failing to achieve its laudable goals.

These challenges are not new. At the national, state and local levels, our government has historically employed a variety of community economic development (CED) policy measures to combat the concentrated poverty that plagues low-income communities of color and frustrates the economic prospects of individuals with criminal records. Yet, as the racial wealth gap in America widens, and as our country’s incarceration rate remains among the highest in the world, both non-profit initiatives and government-sponsored social service programs continue to offer insufficient

24. Id.

25. The D.C. Mayor’s Office on Returning Citizen Affairs, developed under former Mayor Vincent Gray to “provide zealous advocacy, high-quality services and products, up-to-date, useful information for the empowerment of previously incarcerated persons,” has launched various initiatives to address the challenges facing returning citizens in the district. On September 14, 2015, current D.C. Mayor Muriel Bowser announced two new training and professional development programs for D.C. returning citizens: (1) the DC Jail Work Readiness Program, a partnership between the Department of Corrections (DOC) and the Department of Employment Services that will provide male inmates at the D.C. Central Detention Facility with six weeks of pre-release workforce training and development; and (2) an initiative between Events DC and the Congress Heights Community Training & Development Corporation that will provide female returning citizens with a fourteen-week program teaching professional skills, such as etiquette, conflict management, and digital literacy. See generally Mayor Bowser Announces New Programs to Support the District’s Returning Citizens, Executive Office of the Mayor (Sept. 14, 2015), http://mayor.dc.gov/release/mayor-bowser-announces-new-programs-support-districts-returning-citizens (“A major component of Mayor Bowser’s Safer, Stronger plan is recommitting ourselves to building pathways to the middle class. The Mayor is championing a mix of legislation and programs that will provide returning citizens with work readiness skills and experience.”).

26. See, e.g., Jeffrey Anderson, IG Report: Returning Citizens Office Lacks ‘Fundamental’ Ability to Help Ex-Offenders, WASH. CITY PAPER (Sept. 30, 2015), http://www.washingtontoday.com/blogs/citydesk/2015/09/30/ig-report-returning-citizens-office-lacks-fundamental-ability-to-help-ex-offenders/ (noting “OIG inspectors found that, while MORCA staff worked diligently to directly serve returning citizens, it lacked fundamental organizational mechanisms and resources to inform them about available resources and collaborate with other entities on critical job readiness, life skills, and family reunification services”).

27. See Tanzina Vega, Minorities Fall Further Behind Whites in Wealth During Economic Recovery, N.Y. TIMES (Dec. 12, 2014), http://www.nytimes.com/2014/12/13/us/pew-research-finds-growing-net-worth-gap.html?_r=0 (citing a report by the Pew Research Center, noting that “the median net worth of white households in 2013 was $141,900, about 13 times that of black households at $11,000”).
solutions to tackle these societal challenges. Further, state and local governments across the country have struggled to finance existing social service programs, much less bring successful models to scale and finance new innovations.

Among a growing number of other jurisdictions across the country, Washington, D.C., has begun to explore new public policy solutions that can address the shortcomings in America’s criminal justice system while helping returning citizens seeking access to economic opportunities when they return home. Specifically, a new initiative promoting entrepreneurship for returning citizens provides a platform for returning citizens to achieve economic justice and reveals the potential for decreasing recidivism. Convincing stakeholders in both the public and private sector of the viability of this model, as well as identifying how it can address entrenched issues of racial and economic justice, will be an important step in economically empowering these citizens.

On January 28, 2016, the District of Columbia Council Committee on Business, Consumer, and Regulatory Affairs responded to the demands of frustrated Washingtonians by holding hearings on B21-463, the District of Columbia Incarceration to Incorporation Entrepreneurship Program Act

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29. See, e.g., Julie Bosman, One State’s Struggle to Make Ends Meet: Why Illinois Is Without a Budget, N.Y. TIMES (Oct. 26, 2015), http://www.nytimes.com/2015/10/27/us/illinois-budget-stalemate-rauner-and-democrats-divided.html (describing Illinois’ budget challenges, noting “[s]ocial service organizations that have contracts with the state, and the low-income populations they serve, may be suffering the most. Some nonprofits have not received money from the state since July 1 and say they have been forced to deplete their cash reserves and scale back services. Mark Mathews, the executive director of the Child Abuse Council in Moline, which provides counseling and visits homes of troubled families, said he had eliminated two staff positions and reduced one program’s caseload by 40 percent.”).

30. See infra Part I. Research demonstrates that employment opportunities with higher wages can reduced the likelihood of re-offense among returning citizens and ultimately lower the rate of incarceration. See Michelle N. Rodriguez & Maurice Emsellem, 65 Million “Need Not Apply:” The Case for Reforming Criminal Background Checks for Employment, NAT’l EMP. LAW PROJ. (Mar. 2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf.

Additionally, studies have revealed that reducing the unemployment period among returning citizens by as little as three months can decrease recidivism by five percent. See Jeremy Travis, But They All Come Back: Facing the Challenges of Prisoner Reentry (Urb. Inst. Press 2005).

31. For a discussion of the issues inspiring this frustration, see supra notes 2–5.
of 2015 (Incarceration to Incorporation Bill), an innovative bill that seeks to economically empower the District’s most vulnerable citizens. Through the creation of a business development program administered by the D.C. Department of Employee Services (DOES) and the D.C. Department of Small and Local Business Development (DSLBD) that targets formerly incarcerated D.C. residents, this legislation promises to help “educate, train, and assist returning citizens, in becoming self-sufficient entrepreneurs and civicly engaged residents.”

The Incarceration to Incorporation Bill requires DOES and DSLBD to establish the Incarceration to Incorporation Entrepreneurship Program (IIEP), which:

1. invests in for-profit and non-profit businesses owned, operated, or managed by returning citizens;
2. provides a fast-track GED program;
3. provides classes to improve math, reading, and writing abilities;
4. provides business training including accounting, finance, administration, business planning, budgeting, marketing;
5. provides business-themed educational workshops and seminars;
6. provides scholarships and/or grants for returning citizens to enroll in business classes at the University of the District of Columbia (“UDC”) and the University of the District of Columbia Community College (“UDCCC”); and
7. establish an IIEP Fund.

The IIEP Fund will be administered by the Office of the Deputy Mayor for Greater Economic Opportunity. Additionally, the Incarceration to Incorporation Bill calls for the IIEP Fund to maintain a balance of $10 million, to be generated from D.C. government appropriations, public and private donations, and sponsored funds. Given funding challenges to

32. Introduced by Councilmember Vincent Orange on November 3, 2015, and cosponsored by Councilmember Yvette Alexander, the bill presents an opportunity for returning citizens in Washington, D.C., to learn about and utilize entrepreneurship as an economic empowerment tool, critically important in an economic climate marked by persistent employment challenges for Washingtonians with criminal records. After a public hearing on January 28, 2016, the bill underwent a committee mark-up on June 23, 2016, and received a unanimous affirmative vote from the Committee on Business, Consumer, and Regulatory Affairs after a final reading on July 12, 2016. B21-0463 was transmitted to the mayor of the District of Columbia on August 4, 2016, for a response due on August 18, 2016. For more information, see B21-0463, District of Columbia Incarceration to Incorporation Entrepreneurship Program Act of 2015, Committee on Business, Consumer, and Regulatory Affairs, Council of the District of Columbia (Nov. 3, 2015), http://lims.dccouncil.us/Legislation/B21-0463.

33. Id at 1.

34. Id.

35. Interestingly, and perhaps in response to harsh criticism of the D.C. Office on Returning Citizens Affairs, the Incarceration to Incorporation Bill did not include a management role for the district’s primary governmental reentry organization. See id.

36. Id. at 2.
meet the existing social service needs for marginalized communities in Washington, D.C., policymakers recognize that this program will require innovative financing mechanisms. Such funding streams would benefit from the growing pool of investment capital available in the private sector, particularly from the impact investing community. Impact investments prioritize social and environmental investments that are “intended to create positive impact beyond financial return.”

The Incarceration to Incorporation Bill offers a unique platform for Washington, D.C., to both invest in the lives of returning citizens struggling to find employment and empower communities seething with frustration over unequal economic opportunities. As civil rights activist and philosophy professor Dr. Cornel West has eloquently pointed out, marginalized communities across America “have a righteous indignation at injustice” that has become emblematic of this millennial generation.


38. The Incarceration to Incorporation Bill anticipates a diversity of funding streams, including appropriated funds, donations from the public, donations from private entities, and funds provided through a sponsorship agreement. See B21-0463, supra note 32, at 2.


41. See D. Watkins, In Baltimore, We’re All Freddie Gray, N.Y. TIMES (Apr. 28, 2015), http://www.nytimes.com/2015/04/29/opinion/in-baltimore-were-all-freddie-gray.html?_r=0 (declaring “[b]ut it’s not only about Freddie Gray. Like him, I grew up in Baltimore, and I and everyone I know have similar stories, even if they happened to end a little differently. To us, the Baltimore Police Department is a group of terrorists, funded by our tax dollars, who beat on
and reminiscent of a not too distant civil rights movement. However, opinions remain divided on how best to provide beneficial social services for needy citizens while promoting economic growth and development in evolving communities. How does a local government sustainably fund a program like the IIIP? Perspectives are mixed, in part due to differing opinions on who is to blame for poverty. While some scholars believe that low-income communities of color are responsible for their inability to break the cycle of poverty in their neighborhoods, others point to a history of institutionalized racism that has stifled opportunity for marginalized peoples. These ideologies have shaped the landscape of CED initiatives, policies, and tools used by the public and philanthropic sectors to spark social transformation. However, foundations and philanthropists have historically lacked the necessary capital to scale proven programs and provide non-profit service providers with much-needed multiyear support to create lasting change. Funding innovative social service programs that address the range of challenges plaguing our communities requires creative solutions that can overcome government funding constraints.

people in our community daily, almost never having to explain or pay for their actions.

42. See Aldon D. Morris, The Origins of the Civil Rights Movement 195 (1984) (“Nineteen sixty was the year when thousands of Southern black students at black colleges joined forces with “old movement warriors” and tremendously increased the power of the developing civil rights movement.”).

43. Compare Wesley Lowery, Paul Ryan, Poverty, Dog Whistles, and Electoral Politics, Wash. Post (Mar. 18, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/03/18/paul-ryan-poverty-dog-whistles-and-racism/ (quoting Congressman Paul Ryan (R-WI), “We have got this tailspin of culture, in our inner cities in particular, of men not working and just generations of men not even thinking about working or learning the value and the culture of work, and so there is a real culture problem here that has to be dealt with.”) with Ta-Nehisi Coates, The Secret Lives of Inner-City Black Males, Atlantic (Mar. 18, 2014), http://www.theatlantic.com/politics/archive/2014/03/the-secret-lives-of-inner-city-black-males/284454/ (declaring “Certainly there are cultural differences as you scale the income ladder. Living in abundance, not fearing for your children’s safety, and having decent food around will have its effect. But is the culture of West Baltimore actually less virtuous than the culture of Wall Street? I’ve seen no such evidence. Yet that is the implicit message accepted by Paul Ryan, and the message is bipartisan.”).

44. See Emily Gustafsson-Wright et al., The Potential and Limitations of Impact Bonds: Lessons from the First Five Years of Experience Worldwide at 1 (Brookings Inst. 2015), http://www.brookings.edu~/media/Research/Files/Reports/2015/07/social-impact-bonds-potential-limitations/Impact-Bondsweb.pdf?la=en (noting, for example, “Low levels of education and the prevalence of malaria result from the inability of governments to equitably deliver high-quality services in the education and health sectors. This inability May arise from lack of resources, ineffective use of such resources, or both.”).
This, coupled with a now dominant CED ideology that favors market-based strategies over grassroots political activism, has resulted in a focus on innovations that expand opportunities for the private sector to invest in low-income communities to drive community development.

Recent efforts by foundations, corporations, and governments across the globe highlight the ability to leverage private investment capital to finance social service programs through “pay-for-success” contracts. Specifically, a type of pay-for-success contract called the “social impact bond” has been heralded as a new financial vehicle that can help local governments attract capital from the private sector to finance important social service programs. In the United States, President Barack Obama’s administration has demonstrated a tangible interest in the social impact bond, and various states have also begun to consider its potential for financing their social service programs, particularly in the criminal justice arena. As Washington, D.C., explores the implementation of the Incarceration to Incorporation Bill, a deeper analysis of the social impact bond model and its potential for funding criminal justice programs should be considered.

### III. Can Social Impact Bonds Finance Criminal Justice Reform?

Social impact bonds (SIBs) add to a rich history of market-based CED strategies in the United States that seek to address social inequities by creating new channels for the private sector to make strategic investments into marginalized communities. Unlike traditional bonds or debt instruments,

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45. See infra, note 48.

46. See V. Kasturi Rangan & Lisa A. Chase, The Payoff of Pay-for-Success, STANFORD SOC. INNOVATION REV. (Fall 2015), http://ssir.org/up_for_debate/article/the_payoff_of_pay_for_success (explaining that social impact bonds have been “widely touted as a clever way to fill the funding gap plaguing social programs by attracting a tranche of the trillions of dollars in private return-seeking capital”).

47. In February 2011, President Barack Obama’s proposed fiscal year 2012 budget included up to $100 million to support pilot pay-for-success programs targeting issues like recidivism, workforce training, and homelessness. In fiscal year 2013, a similar request was made for the slightly increased amount of $109 million. Although neither of the budget proposals were supported in Congress, in the 2014 fiscal year budget proposal, the Obama administration requested nearly $500 million to support these programs, which included a proposed $300 million fund designed to encourage state and local governments to develop Social Impact Bonds and to be administered by the Treasury Department. See Sonal Shah & Kristina Costa, Social Impact Bonds: White House Budget Drives Pay for Success and Social Impact Bonds Forward, CTR. FOR AM. PROGRESS (Apr. 23, 2013), https://www.americanprogress.org/issues/economy/news/2013/04/23/61163/white-house-budget-drives-pay-for-success-and-social-impact-bonds-forward/.

48. During the 1990s, CED evolved into a market-based poverty alleviation strategy that stood in opposition to the welfare policies and entitlement programs born out of the civil rights movement. As consensus formed around the idea that increasing for-profit opportunities in geographically isolated low-income neighborhoods
SIBs work by creating public/private partnerships between state or local governments, private foundations, non-profit organizations, and private investors. These entities collaborate to inject private-sector capital into traditionally public-sector activities. Non-profit service providers are funded through privately invested funds, and private investors are repaid with government cost savings after evidence-based outcome metrics have been achieved by the SIB program. If the outcome metrics outlined in the social impact bond are not met, the government typically does not have to pay for the services delivered. This financing model is a powerful tool for state and local governments to reduce long-term costs while prioritizing the outcomes of their social programs, as well as an opportunity for philanthropies and private investors to help increase the pool of funding available for innovative social service programs that target challenging issues like recidivism and unemployment.

The first SIB in the United States was launched by New York City in 2012 to help reduce juvenile recidivism at the Rikers Island Correctional Facility (Rikers Island SIB). In the Rikers Island SIB, Goldman Sachs could produce social transformation and economic empowerment, government policy followed. At the national level, initiatives such as the Empowerment Zones Program and New Markets Tax Credit sought to stimulate investment in low-income neighborhoods and promote economic development. The privatization of social welfare policy led to increased support for CED financing strategies, such as real estate investment trusts, microfinance, and community development trusts, that channeled private sector capital into low-income neighborhoods. For a discussion of the history and impact of market-based CED in the United States, see Scott L. Cummings, Community Economic Development as Progressive Politics: Towards a Grassroots Movement for Economic Justice, 54 STANFORD L. REV. 3, 399–493 (2001).

49. See Gustafsson-Wright, supra note 44, at 4.
50. Id.
51. Id. at 6.
52. SIBs differ from traditional performance-based government contracting, where payments are typically triggered by performance “outputs” like the number of individuals reached through a social service program, rather than performance “outcomes,” which focus more on tangible changes in the lives of the target population. See Deborah Burand, Globalizing Social Finance: How Social Impact Bonds and Social Impact Performance Guarantees can Scale Development, 9 N. Y. U. J. L. & BUS. 447, 464 (2013).
invested $9.6 million to support a social service program for approximately 3,000 adolescent males to receive cognitive behavioral therapy before and during their transition out of prison.\textsuperscript{54} In 2013, New York State created a SIB valued at $13.5 million that aimed to reduce adult recidivism by providing job training for recently incarcerated adults through a non-profit called the Center for Employment Opportunities (CEO SIB).\textsuperscript{55} The CEO SIB in New York, which targeted 2,000 recently incarcerated adults, was funded through an investment from Bank of America-Merrill Lynch.\textsuperscript{56} An increasing number of other jurisdictions across America have also begun exploring social impact bonds as a funding tool for CED, particularly in the criminal justice arena where the reduction of prison beds can lead to verifiable cost savings to the government. For example, in 2014, the State of Massachusetts contracted with non-profit service provider Roca and announced a $21.3 million, seven-year social impact bond aimed at reducing the recidivism rate within the state by 40 percent by working with 929 young adult males.\textsuperscript{57}

SIBs are a new innovation and have faced criticism.\textsuperscript{58} The financing model was only recently pioneered in the United Kingdom in September

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54. See Shah, supra note 47.
56. Id.
57. See Ben Hecht, Massachusetts Pay for Success Initiative Advances Government, Private Sector, and Philanthropic Investment in Human Capital, HUFFINGTON POST (Apr. 13, 2014), http://www.huffingtonpost.com/ben-hecht/massachusetts-pay-for-suc_b_4761124.html (explaining that the investment would “allow Roca, a non-profit that for 25 years has delivered an evidence-based high impact intervention that has reduced incarceration rates among high-risk individuals . . . to tackle the problem of juvenile recidivism, but also to train participants in job readiness, education readiness, and life skills.”).
58. Scholars have argued that SIBs may lead to the privatization of important social objectives that should be managed by the public sector. See Dexter Whitfield, Alternative to Private Finance of the Welfare State; A Global Analysis of the Social Impact Bond, Pay-for-Success and Development Bond Projects, Australian Workplace Innovation and Social Research Centre (Univ. of Adelaide 2015) (arguing that SIBS “increase the rate of commodification, marketization and privatization processes”); see also Rick Cohen, Social Impact Bonds Not Well Received at Senate Budget Hearing, NONPROFIT Q. (May 7, 2014), https://nonprofitquarterly.org/2014/05/07/social-impact-bonds-not-well-received-at-senate-budget-hearing/ (quoting Senator Angus King (I-ME) as stating, “I think this is an admission that government can’t do what it’s supposed to do. . . . This just strikes me as . . . it’s a fancy way of contracting
2010 with a social service program focused on reducing recidivism at the Peterborough Prison.\textsuperscript{59} As a result, although the structure has the potential to provide long-term capital investments for social service programs with the capacity to scale, to truly advance innovation, there is a critical need for accelerated learning that quickly translates lessons learned into best practices.\textsuperscript{60} Moreover, not every SIB program will reap financial rewards for private investors, especially those that are being used to fund program ideas that have yet to be proven. Notably, the Rikers Island SIB was recently terminated in July 2015 after failing to meet its recidivism goals, resulting in a $1.2 million loss in outcome payments for Goldman Sachs.\textsuperscript{61} However, because a myriad of factors impact juvenile recidivism, it is unclear whether one can truly measure success over the span of only a few years of program implementation. Perhaps the lesson to be learned from the “failure” of the Rikers Island SIB program is that the best strategy to reduce juvenile recidivism may be one that not only includes one-on-one counseling, but also incorporates robust community-centered CED initiatives that address the economic opportunities available to returning citizens outside prison walls.\textsuperscript{62} Incarcerated men and women may need fewer social service programs premised on a cognitive behavioral therapy out. And as I say, I don’t believe government contracts very well . . . and the government is always going to be outfoxed on the contracts, in my experience.”


\textsuperscript{60} See Jeffrey B. Liebman, Social Impact Bonds: A Promising New Financing Model to Accelerate Social Innovation and Improve Government Performance, CTR. FOR AM. PROGRESS (Feb. 2011), https://cdn.americanprogress.org/wp-content/uploads/issues/2011/02/pdf/social_impact_bonds.pdf (arguing “if long-duration contracts or payments that include the future value of learning are not feasible, social impact bonds will likely be limited to interventions that have already demonstrated significant net benefits in rigorous impact studies and proved themselves scalable”).

\textsuperscript{61} Goldman Sachs suffered only a $1.2 million loss from its $9.6 million investment. Its overall loss was reduced because of a partial guarantee provided by Bloomberg Philanthropies. See Burand, supra note 52, at 458. For an overview of the Rikers Island SIB evaluation by the Vera Institute of Justice, see Impact Evaluation of the Adolescent Behavioral Learning Experience (ABLE) Program at Rikers Island, Vera Institute of Justice (Vera Inst. of Just. July 2015), http://www.vera.org/sites/default/files/resources/downloads/adolescent-behavioral-learning-experience-evaluation-rikers-island-summary-2.pdf.

\textsuperscript{62} Indeed, such a model would be more similar to the approach taken at the criminal justice SIB at the Peterborough Prison in the United Kingdom, which created a voluntary rehabilitation program called “One Service” that provided individualized housing, education, vocational training, and health care services to incarcerated individuals as they transitioned out of prison. See Emma Disley et al., Lessons Learned from the Planning and Early Implementation of the Social Impact Bond
model that pathologizes their criminality\(^63\) and more comprehensive CED initiatives grounded in an economic justice framework that seeks to enrich their future employment prospects and drive economic mobility.\(^64\) In fact, scholars have argued that the true driver of recidivism may not be poor decision making by supposedly “irresponsible” citizens in our land of opportunity, but rather limited choices for frustrated individuals living in neighborhoods riddled with concentrated poverty.\(^65\) This is an important insight for policymakers in Washington, D.C., in their consideration of how to implement the Incarceration to Incorporation Entrepreneurship Program. Returning citizens need greater access to economic empowerment opportunities as much as they need greater access to skill training.

Nevertheless, these early criminal justice initiatives funded through SIBs have proven immensely valuable. SIBs provide state and local governments with important lessons on how to vet social service providers and effectively measure the success of social service programs, while also illuminating best practices for public/private partnerships. Moreover, investment banks like Goldman Sachs have not stopped investing in SIBs.\(^66\) In fact, Goldman Sachs recently became the first successful SIB investor in the United States by financing a SIB to help pay preschool

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\(^{63}\) The model used in the Rikers Island SIB employed moral reconation therapy with the incarcerated youth, a form of cognitive behavioral therapy that focuses on improving social skills, personal responsibility, and decision making. See Shah, supra note 47.

\(^{64}\) See Jarrett Murphy, Did Rikers Policy Experiment Look at the Right Policies?, City Limits (July 7, 2015), http://citylimits.org/2015/07/07/did-rikers-policy-experiment-look-at-the-right-policies/ (questioning “[i]s the main driver of youth recidivism a lack of social skills, a deficiency of personal responsibility or an epidemic of poor decision-making? . . . Is a youth who is homeless really able to make decisions that keep him out of the criminal justice system?”).

\(^{65}\) See Trymaine Lee, Recidivism Hard to Shake for Ex-Offenders Returning Home to Dim Prospects, Huffington Post (June 10, 2012), http://www.huffingtonpost.com/2012/06/09/recidivism-harlem-convicts_n_1578935.html (noting “[i]n the case of East Harlem, also known as El Barrio or Spanish Harlem, analysts blame the area’s high incarceration and recidivism rates on the continuing plague of poverty, a concentration of public housing complexes, major disparities in the quality of education and a long history of gangs and drug culture”).

\(^{66}\) Goldman Sachs has expressed a commitment to the SIB model. In August 2012, CEO and Chairman Lloyd Blankfein observed, “We believe this investment paves the way for a new type of instrument that enables the public sector to leverage upfront funding from the private sector.” Press Release, N.Y.C. Office of the Mayor, Mayor Bloomberg, Deputy Mayor Gibbs and Corrections Commissioner Schriro Announce Nation’s First Social Impact Bond Program (Aug. 2, 2012), http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=
costs for special needs students in Utah. After a year in preschool, the one hundred students participating in the program did not require additional educational assistance, enabling the State of Utah to repay Goldman Sachs with state educational cost savings.

IV. Opportunities for the Future of SIBs in the United States

The benefits of social impact bonds for the future of social service programs have garnered much interest among social justice advocates and impact investors. First, SIBs expand the pool of available capital for social service programs, especially important during an era of government austerity at both the state and local levels. Not only does this method of financing enable governments to tap into the growing pool of capital in the impact investing community, but it also provides a platform to scale proven evidence-based social service programs and drive innovation.

Second, government-sponsored social service programs are historically remedial in nature, targeting social problems as they arise or after they have materialized in communities. This practice mitigates the impact of political and financial risk. However, these political strategies often fail to situate the key drivers of crime in low-income communities within the context of our country’s history of institutional racism. Rather than address the structural aspects of poverty that often promote criminal behavior, they offer redevelopment that fails to provide meaningful economic opportunities for longstanding residents. In contrast, SIBs allow state and local governments to prioritize preventive and forward-thinking programs, which benefit the public through future government costs savings while also shifting the financial risks of innovation to the private sector. Of course, jurisdictions that are


67. See Nathaniel Popper, For Goldman, Success in Social Impact Bond That Aids Schoolchildren, N.Y. TIMES (Oct. 7, 2015), http://www.nytimes.com/2015/10/08/business/for-goldman-success-in-social-impact-bond-that-aids-schoolchildren.html (“For people studying social impact investing, the results in Utah are exciting—even more so given the children’s success. Among the 110 students who had been expected to need special education had they not attended preschool, only one actually required it this year.”).

68. See Peter Gosselin, Here’s How You Add 2.4 Million Jobs to the Economy, BLOOMBERG (May 28, 2015), http://www.bloomberg.com/news/articles/2015-05-28/government-austerity-exacts-toll-on-u-s-jobs-wages-and-growth (“The nation’s retreat from tax cuts and spending increases to promote the recovery has been a bipartisan affair. Democratic President Barack Obama and Republican House Speaker John Boehner agreed in 2011 to apply the fiscal brakes by negotiating $1 trillion in spending cutbacks over 10 years and a process to impose more.”).

69. See McKinsey & Co., supra note 59; see also Burand, supra note 52, at 463.
70. See McKinsey & Co., supra note 59; see also Burand, supra note 52, at 463.
71. See Hauber, supra note 13, at 8.
72. See Gustafsson-Wright, supra note 44, at 38.
structuring SIBs must recognize that the problems of social and economic inequality in America do not lie solely within the hands of marginalized individuals struggling to find employment and improve their well-being, but also in the tools that are within their grasp as they wrestle with a criminal and economic justice system that does not always meet their needs.73 As a result, a SIB investing in a social service program targeting recidivism—such as a theoretical SIB in Washington, D.C., funding the IIEP—must be grounded in an equitable CED model that advances economic justice through an authentic engagement with the community.

Third, due to the complexity of the SIB model and the focus on assessing outcome metrics, SIBs promote the efficient allocation of public resources and provoke a shift in government culture with respect to the procurement and provision of critical government social services.74 Through public/private partnerships, both state and local governments learn to better quantify the costs of addressing social inequities, and non-profit service providers learn to better quantify the benefits of their social service interventions, all of which drive enhanced performance management for social services.75 In addition, successful non-profit service providers that identify workable solutions to critical challenges are rewarded with investments that help them scale.

Despite these benefits, the future implementation of SIBs in the United States face several challenges. First, SIBs are very complex transactions with high transaction costs, requiring significant legal and financial expertise, institutional expertise, and detailed negotiation among key stakeholders. Deal structuring can take hundreds of hours of financial analysis and legal drafting, as well as require extensive due diligence on the appropriate metrics to measure success, the relevant strategies to engage with constituents, and the best tools for impact evaluation.76 The conventional SIB ecosystem includes at least seven stakeholders, and each stakeholder brings certain skills to the table and faces unique challenges.77 Additionally,
the balance of risk and reward is difficult to navigate because local governments may not always be able to pay a financial return that is proportional to the risks taken by impact investors. Second, although SIBs have received great reception in the United Kingdom, they are not widespread in the United States. It is also unclear whether the impact investing community in the United States will invest in social service programs that truly drive innovation or will simply focus on the “tried and true” service providers that offer a lower risk of failure. As the private sector takes a more active role in selecting social service providers, the high level of sophistication required to negotiate SIB deals may squeeze out smaller, less-resourced non-profits from these funding opportunities. Furthermore, insisting on a model solely premised on government cost savings might unnecessarily rule out innovative programs that are hard to quantify but still yield valuable social benefits. Many local and state governments will simply not know how to adequately price some SIB programs. If governments are pressured to renegotiate terms in the middle of a SIB implementation because program costs outweigh the benefits, they face the risk of private investors “shutting down” the deal, which ultimately hurts the recipients of these critical social services.

To combat these risks, some private investors have required credit enhancements in the form of partial guarantees from the philanthropic community, while other SIBs have prioritized “proven” social service programs to reduce the risk of program failure. It remains unclear whether private investors can overcome the appropriations risk from governments that may choose to withdraw from negotiated commitments after changes in administration leadership. Some governments have attempted to use legislation to address this challenge. Still, SIBs in the United States will always maintain a degree of political risk because state and local procurement rules often hinder collaborative negotiation between governments and certain stakeholders, slowing negotiation and limiting the feasibility of closing transactions.

supra note 52, at 467–80 (explaining the broad range of risks facing the various stakeholders involved in SIB deals).


79. See McKinsey & Co., supra note 59, at 37 (noting “[r]epaying investors from realized cash savings may require aggregating SIB benefits across multiple agencies and programs as well as different levels of government. This could prove challenging.”).

80. See text accompanying supra note 59.

81. See Burand, supra note 52, at 477 (“In 2012 Massachusetts passed legislation to establish a sinking fund to finance payments owed by the state on certain qualifying pay-for-success contracts.”).

82. See Berlin, supra note 78, at 14.
Finally, SIB models must overcome a dominant market-based CED ideology that scholars argue fails to adequately address the root causes of criminal activity and poverty. Indeed, the presumption that an infusion of external capital can adequately address community-centered challenges may divert attention from the political dimensions of CED and poverty, while also favoring local incrementalism over broad-based structural reform. Addressing the systemic drivers of poverty and racial injustice in marginalized communities, which often can trigger criminal behavior, is a critical component of CED. Unfortunately, too many CED strategies fail to empower residents in a meaningful way and provide opportunities for them to directly benefit from redevelopment initiatives in their own neighborhoods. At the conclusion of social service programs, are communities left more politically engaged and prepared to challenge the institutional structures that perpetuate cyclical poverty? And perhaps most important of all, has anyone asked community-based organizations and community-centered coalitions whether they would also like to invest in and profit from the SIBs targeting social challenges in their very own neighborhoods? This will be a critical consideration for the implementation of the IIEP in Washington, D.C. Indeed, a sole focus on SIB models that include only evidence-based metrics for program evaluation and large, institutional impact investors could lead to a reliance on oversimplified program models that obscure the true scope of the costs, benefits, and savings to local communities. SIB programs targeting recidivism must be certain to avoid pathologizing criminality by placing blame solely on the mindset of incarcerated individuals and instead seek to empower entire communities struggling to overcome poverty.

Looking forward, scholars are beginning to identify alternative SIB models that address the myriad of concerns facing the financial model’s success. The successful SIB not only capitalizes on the funding provided by eager impact investors, but also integrates a more equitable CED model that forges new multiracial coalitions, links community-based initiatives to broad-based structural reform, and advances economic justice through community accountability and ownership. Innovations such as the micro-SIB model, equity crowdfunding platforms, and the impact

83. See generally Cummings, supra note 48; see also Hauber, supra note 13, at 7–9.
84. See Cummings, supra note 48 at 442 (noting that “there has been a powerful tendency to treat the local neighborhood as a discrete economic unit in need of rebuilding”).
85. See Roman, supra note 74, at 2 (noting “[as] currently constituted, the juvenile justice and adult criminal justice systems focus on remediation rather than prevention, if they are therapeutically oriented at all”).
bond fund model, which has been primarily used in the United Kingdom, offer a promising pathway for the future of this financial tool.

Further, pro bono legal service programs like the Small Business & Community Economic Development Clinic at the George Washington Law School can help facilitate the business development goals of returning citizens and the policy goals of social justice advocates. Students at the SBCED Clinic have helped advance small business development by creating small businesses and worker cooperatives, forming non-profit organizations, conducting business negotiations, creating corporate subsidiaries, obtaining federal tax exemptions, registering trademarks, and supporting community organizers and community groups to achieve economic justice through advocacy. The SBCED Clinic has also empowered returning citizens by advancing important policy measures, from the publication of white papers discussing economic justice initiatives to hosting public forums with key stakeholders to discuss innovations in criminal justice reform. With respect to the Incarceration to Incorporation Bill, the SBCED Clinic could play a helpful role in negotiating and drafting important legal documents for a social impact bond deal, as well as help facilitate the participation of important community-based entities, such as community development financial institutions and business incubators focused on the returning citizens community. All of these activities help law students develop critical lawyering skills, while also supporting innovations that advance economic justice and embody the core public service mission of clinical legal education.

Returning citizens do not have to do it alone. Developing strategic partnerships between the public and private sector, while also involving the academic community through law school clinics, can facilitate community-driven economic justice initiatives that not only forge and fortify new and existing multiracial coalitions, but also develop a broader network of stakeholders who are invested in advancing economic justice. Ultimately, by working together, we can help level access to economic opportunities and impact the structural determinants of poverty that trigger criminal activity.

V. Conclusion

The Incarceration to Incorporation Entrepreneurship Bill can utilize the social impact bond model, alongside other funding streams, to help finance the IIEP Fund. Recidivism is a social problem that can be objectively measured and will result in identifiable cost savings to the Washington, D.C., government, factors that have proven to be critical to the success

87. See Gustafsson-Wright, supra note 44, at 9 (the impact bond fund model facilitates multiple outcome payment contracts around the same social issue).
88. See Jones, supra note 16, at 53.
89. See text accompanying supra note 17; see also Jones, supra note 17.
Moreover, in a world of limited employment prospects for returning citizens, entrepreneurship can be a viable pathway to the middle class, an important theme of D.C. Mayor Muriel Browser’s administration. However, Washington, D.C., must be certain that this market-based CED financial tool integrates an economic justice approach to community empowerment. As highlighted in the Rikers Island SIB, a social service program that focuses almost exclusively on the behavior of incarcerated individuals may lead to failure.

For too many Americans, a prison record feels like a revocation of citizenship and all of its associated benefits. But in the words of President Barack Obama, “In America, we believe in redemption . . . We believe that when people make mistakes, they deserve the opportunity to remake their lives.” The Incarceration to Incorporation Entrepreneurship Bill is not simply about individuals who made mistakes and served their time behind bars. This initiative is not simply about mothers and fathers, and sisters and brothers who need our help. This is about residents of Washington D.C., and citizens of these United States. This is about driving innovation and leveraging every available funding platform to eliminate recidivism for good. This is about ending the debate over retribution and shifting our focus towards economic democracy. In a country where over 35 percent of the prison population is Black, it’s about time that Washington D.C. stands up, fights back, and proudly declares that Black Lives Matter. Let’s do something to empower returning citizens and welcome them home.

90. See Berlin, supra note 78.
91. See generally Executive Office of the Mayor, supra note 25.
93. Economic justice was a critical building block of the vision of democracy our country was founded upon and an important component of the civil rights movement. As Gary Chartier explains, “If democracy means self-government, then our progress toward democracy will be incomplete until all people are able meaningfully to influence the structures and processes that shape their environments and constrain their choices.” See Chartier, supra note 16, at 274.
I. Introduction

It has been almost twenty years since the federal government fundamentally abandoned any pretense of a commitment to grow the stock of affordable housing. And it is clear that the private market is not capable of profitably building housing affordable to low-income families. The time is overdue for the federal government to step in and facilitate the construction of inventories of affordable housing to meet the increasing demands. While affordable housing is a challenge even in a strong economy, it would seem almost impossible in today’s political climate with the current pressure on the government to reduce its spending. Nevertheless, it cannot be denied that America is faced with a growing crisis of housing affordability with the real likelihood that continued inaction will result in increases in the already shocking number of low-income individuals and families suffering severe housing cost burdens and at serious risk of homelessness.

Twenty years ago, the National Low Income Housing Coalition reported that approximately 750,000 Americans were homeless each night, and between 1.3 million and 2 million Americans were homeless during
In January 2015, the National Alliance to End Homelessness reported that almost 565,000 Americans are homeless, including the unsheltered homeless: those living on the street, in cars or in abandoned buildings, as well as those in emergency or transitional shelters. In addition to the homeless, it is estimated that approximately seven million households are doubled up with family and friends and, as a result, are at significant risk for homelessness. Although this represents a 9 percent decline from 2013, it reflects a 52 percent increase in such at risk households over 2007. Another factor providing additional risk for homelessness involves households experiencing severe cost burdens: those forced to pay in excess of 50 percent of their incomes on housing. Approximately 6.6 million households were severely cost burdened in 2014, an increase of almost 28 percent over 2007.

As more families experiencing housing indigency struggle to avoid homelessness, the American dream of universal home ownership, which became a nightmare for millions of families in the recent recession, is being reconsidered. In the first quarter of 2015, the national homeownership rate stood at 63.7 percent, the lowest since 1993. This reduction in homeownership has increased the number of households seeking rental housing. While the number of single-family detached homes added to the rental market has increased as a result of the recession and the supply of new multifamily housing has expanded, demand exceeds supply: national vacancy rates are at 7.6 percent, the lowest in twenty years.

While the number of households at serious risk of homelessness grows, the Pew Research Center reports that the median wealth of America’s upper-income families is now almost seven times greater than the median wealth of middle-income families, the largest gap in the thirty years that the Federal Reserve has collected such data. The median wealth of upper-
income families is almost seventy times that of the median wealth of lower-income families.\textsuperscript{9} This growing disparity is likely attributable in substantial part to the decline in homeownership among middle- and lower-income families, to which eroding household incomes and credit tightening by financial institutions, as well as the inequitable allocation of federal housing subsidies, have contributed.

A source of revenue is available to the federal government that could be applied to facilitate the construction of affordable housing. Those revenues could become available with a reform of the mortgage interest deduction, which subsidizes American families in least need of housing assistance. Estimated to cost the U.S. government approximately $131 billion for fiscal year 2012 alone,\textsuperscript{10} 77 percent of the benefit of the deduction is consumed by homeowners with incomes in excess of $100,000 and almost half by homeowners with incomes in excess of $250,000.\textsuperscript{11} This reflects a significant increase in the concentration of the subsidy from 1996, when homeowners with incomes in excess of $100,000 accounted for slightly less than half of the mortgage interest deduction.\textsuperscript{12} The overwhelming absorption of that subsidy by the wealthiest Americans reflects a disturbing consolidation, resulting in a much broader conversation of the need for reform among persons: progressives, moderates, and conservatives alike.\textsuperscript{13}

This Article will explore current trends in homelessness and the growing number of severely cost burdened households at risk for homelessness as a result of limited supply of affordable housing units and the increasing demand for rental housing. It will then propose a source of funds that can be raised and reallocated by the federal government to address the inability of private developers to construct and maintain decent affordable housing to meet the growing crisis.

\textsuperscript{9} Id.


\textsuperscript{13} Ulam reports that mortgage interest deduction reform proposals were included in President Bush’s 2005 Tax Reform Panel of Federal Tax Reform, President Obama’s bipartisan National Commission on Fiscal Responsibility and Reform, and the 2013 Congressional Budget Office’s Options for Reducing the Deficit.
II. Homelessness Trends

In December 2011, the U.S. Department of Housing and Urban Development refined its definition of homelessness, incorporating the following categories: (1) individuals and families lacking “a fixed, regular and adequate nighttime residence,” including those residing in emergency shelters, transitional housing, an abandoned building, a car, or on the street; (2) individuals whose loss of primary residence is “imminent”; (3) “unaccompanied youth and families with children defined as homeless by other federal statutes”; and (4) “individuals and families fleeing domestic violence, sexual assault” and other dangerous or life threatening conditions.14

The Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009 (HEARTH Act), enacted into law on May 20, 2009,15 established the Continuum of Care Program to organize community-based homeless assistance program planning networks in an effort to improve the effectiveness and efficiency of local initiatives. On December 9, 2011, HUD published regulations for the Homeless Management Information Systems relating to data collection requirements for Continuum of Care entities.16 Every January, volunteers organized by Continuum of Care entities count persons experiencing homelessness, including those sleeping outside, in other places not fit for human habitation, and in shelters and transitional housing. The results are transmitted to HUD and included in HUD’s Annual Homeless Assessment Report to Congress.

The January 2015 count reflected an estimated homeless population of 564,708 people, of whom 31 percent were unsheltered and the remainder in homeless residential programs.17 The total number of homeless represents an 11 percent decline from 2010. The 2016 State of Homelessness Report issued by the National Alliance, based upon the January 2015 count, reported some good news:

- a 35 percent decline in the number of homeless veterans from 2009;
- a 32 percent decline since 2007 in the unsheltered homeless; and
- a 31 percent decline in the number of chronically homeless from 2007.18

18. State of Homelessness in America, supra note 3. All of the data included in this paragraph is from this report.
The 2016 State of Homelessness Report reflects the composition of homeless population as reflected in the following chart:

Approximately 25 percent of the individuals are chronically homeless.\footnote{Chronic homelessness is characterized by a disabling condition, mental and/or physical, and continuous homelessness for a year or more, or having experienced four episodes of homelessness in the last three years.} The National Alliance report noted that 6.4 percent of homeless families were chronically homeless, one-third of whom are unsheltered. The following states report chronically homeless families of more than 10 percent of their population of homeless families:

- North Dakota 15.4 percent;
- Arkansas 13.6 percent;
- California 13.5 percent;
- Oregon 13 percent; and
- Idaho 10.2 percent.

Unaccompanied youth and children are reported to make up 6.5 percent of the national homeless population, but the National Alliance is skeptical of the accuracy of that count because homeless youth are unlikely to congregate in areas that would be the focus of the Continuum of Care counts, and far fewer shelter beds are available for that population.\footnote{State of Homelessness in America, supra note 3.}
The national rate of homelessness in 2015 was 17.7 per 10,000 people in the general population in comparison to the 2007 rate of 21.5 per 10,000. The District of Columbia and thirty-three states, mostly in the South and the Midwest, reported declines in the number of people experiencing homelessness.\(^{21}\) However, seventeen states, including California and New York, the states with the largest population of homeless, experienced increases: California reported 115,738 persons experiencing homelessness (29.8 per 10,000 people), a 1.6 percent increase over the prior year, and New York reported 88,250 (44.7 per 10,000 people), a 1.9 percent increase over the prior year.\(^{22}\)

Perhaps the best news in the 2016 report is the decline in homeless veterans, whose rate of homelessness is 24.8 per 10,000 veterans, down from 32.7 per 10,000 in 2009. HUD attributes this decline to “significant investments made by the U.S. Congress and close collaboration between HUD and the U.S. Department of Veterans Affairs” on a program combining rental subsidies and support services to at risk veterans.\(^{23}\) However, the news is not so great for the District of Columbia, California, and Hawaii, which reported 145.4, 66.8, and 63 homeless veterans per 10,000, respectively.\(^{24}\)

Other good news is the narrowing gap between the aggregate number of emergency shelter and transitional housing beds and the total number of people experiencing homelessness. In 2007, that gap was almost 250,000 beds; by 2015, it narrowed to almost 135,000 beds. While more than 98 percent of the emergency shelter beds were occupied, less than 82 percent of transitional housing beds were occupied, figures fairly consistent since 2007 and reflected in the 25.1 percent net growth in emergency shelter beds and 23.4 percent decline in transitional housing beds during that period.\(^{25}\) This disparity in utilization between emergency shelter and transitional housing reflects a consistent trend from 2007 and argues for increased investments in shelter beds and permanent solutions, rather than transitional housing.\(^{26}\) Transitional housing, which typically involves coupling housing with a variety of social services (often including mandatory programs), has been criticized as being more expensive than alternative solutions to assist homelessness, including the “housing first” model and permanent supportive housing.\(^{27}\) Housing first programs prioritize

\(^{21}\) Although the D.C. rate of 110.8 per 10,000 people remains at an unacceptable level. \textit{Id.}

\(^{22}\) \textit{Id.}


\(^{24}\) \textit{State of Homelessness in America, supra} note 3.

\(^{25}\) \textit{Id.}

\(^{26}\) \textit{Id.}

providing homeless persons and families with permanent housing and thereafter providing access to such social services as needed.28 Transitional housing has principally focused on the chronic homeless, but given the variety of issues contributing to chronic homelessness and the strings attached to much of the available transitional housing alternatives, it appears to be an imperfect solution.

To get a sense of the methodology of the Continuum of Care homeless count, it may be instructive to review the Los Angeles homeless count for 2016, as published by the Los Angeles Homeless Services Authority (LAHSA), a network of city and county agencies, nonprofits, and civic and community leaders. The count involved the participation of 7,500 volunteers. LAHSA reported that the Los Angeles County homeless population is the largest in the nation.29 The findings were based upon a street count of unsheltered homeless; a count of homeless in emergency shelters, transitional housing, safe havens, and vouchered motels; a demographic survey of the unsheltered; and a collaborative process with youth stakeholders to get a better understanding and identification of homeless youth. The street count involved 100 percent of the census tracts in the county, an improvement over the 72 percent included in the 2013 count. The count reflected a total homeless population of 46,874, a 6 percent increase over 2015 and a 19 percent increase over 2013. The number of unsheltered homeless identified was almost three times the number of sheltered, and among the unsheltered, those living in tents, makeshift shelters, and vehicles increased by 20 percent over 2015 and 85 percent over the 2013 count. The number of homeless veterans declined by 30 percent, 4,362 in 2015 to 3,071 in 2016.30

Although it appears that, at least at the national level, homelessness figures are trending in a positive direction, the unacceptable fact is that more than a half million people in the United States are homeless every night. And that number does not include the potential homelessness iceberg presented by frighteningly large number of families with severe housing cost burdens. The Obama administration’s “Opening Doors” program, overseen by the U.S. Interagency Council on Homelessness, and recent initiatives of local communities, such as the City and County of Los Angeles, to address homelessness are positive steps and point to the important role governments must play in addressing the problem. However, without

29. Los Angeles Homeless Services Authority, 2016 Results of Los Angeles Continuum of Care (May 4, 2016), https://documents.lahsa.org/Planning/homelesscount/2016/datasummaries/CoC.pdf (updated July 25, 2016). All of the data included in this paragraph is from this report.
30. Id. Unsheltered veterans declined by 44 percent, 1,618 in 2016 from 2889 in 2015.
adequate and affordable housing, there will be no meaningful resolution of homelessness.

III. Crisis of Affordable Housing

It is clear that one of the major factors contributing to homelessness today is the lack of affordable housing and the significant increase in rental demand experienced in the past decade. The Joint Center for Housing Studies of Harvard University reported that, in 2015, 43 million families and individuals reside in rental housing, an increase of 9 million over 2005. As a result, 37 percent of U.S. households rent, up from 31 percent in 2005, and the highest rate of household renters since the mid-1960s. The Joint Center pointed to the loss of approximately 8 million homes to foreclosure, declines in household incomes, and tightening credit as factors contributing to this substantial increase in renters.

In its annual report on the State of the Nation’s Housing 2015, the Joint Center noted that the nation’s homeownership rate fell to 64.5 percent in 2014, the eighth straight year of declining home ownership; for the first quarter of 2015, the homeownership rate continued the decline to 63.7 percent, erasing the gains of homeownership experienced for the prior twenty years. In California, boasting the highest home prices in the United States, homeownership has fallen to 53.8 percent, down from slightly more than 60 percent in 2005.

Homeownership declines have resulted in the addition of 3.2 million single-family detached homes to the rental market for the period from 2004 to 2013, and developers have added 1.2 million apartment units since 2010. Despite these additions to rental markets, the national vacancy rate fell to 7.6 percent, the lowest in twenty years, and national rents rose an average 3.2 percent.

Rising demand outpacing the growth in supply has increased the burden on renter households. The Joint Center reported almost half of all renters experience cost burdens, paying more than 30 percent of their incomes for their housing, and more than a quarter of renters are severely cost burdened, paying more than 50 percent of their incomes for housing. These factors compare unfavorably with the applicable figures for

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32. Id.
33. The State of the Nation’s Housing 2015, supra note 7.
35. The State of the Nation’s Housing 2015, supra note 7.
36. Id.
37. Id.
2001 when 41 percent of renters faced cost burdens.\textsuperscript{38} The impact of housing cost burdens on low-income families are obvious and will be discussed in more detail below; however, moderate-income families are also suffering from the increasing housing costs. Approximately half of renter families with incomes between $30,000 and $45,000 are cost burdened, as are approximately 21 percent of renter families with incomes between $45,000 and $75,000.\textsuperscript{39} In the ten most expensive cities in the country, including Boston, Los Angeles, New York, and San Francisco, 75 percent of renters with incomes between $30,000 and $45,000 and just under half of renters with incomes between $45,000 and $75,000 experience cost burdens.\textsuperscript{40}

The number of severely cost burdened renters, 11.2 million as of 2013, represents an increase of four million households from 2000.\textsuperscript{41} With the growing number of renters and the limited expansion of the stock of affordable housing, prospects for improvement are not promising, particularly in light of projections of growth in renter households estimated at between 4.2 and 6 million in the next several years.\textsuperscript{42} For each 0.25 percentage point in rent growth above income gains, it is estimated that 400,000 more households will suffer severe rent burdens; if rent growth exceeds income growth by one percent annually, the number of severely burdened households will increase by 3 million by 2025.\textsuperscript{43} To illustrate the crisis, note that median rents in Los Angeles County increased by 25 percent between 2000 and 2012 while during the same period median income fell by 9 percent.\textsuperscript{44}

In 2013, 18.5 million renter household had very low incomes,\textsuperscript{45} up to 50 percent of area medians, and there were approximately 18 million units that these households could afford without being cost burdened. Unfortunately, many of these “affordable” units were occupied by households with higher incomes or were severely physically deficient. Taking these factors into account, there were just fifty-eight affordable units available for every 100 very low-income households.\textsuperscript{46} In 2014, the 11.2 million extremely low-income renter households, those whose incomes do not
exceed 30 percent of area medians, had 7.3 million affordable units available, a theoretical shortfall of 3.9 million. Since many of these units affordable to extremely low-income households were also occupied by higher income households or otherwise physically deficient, there were only thirty-four affordable units available for every 100 extremely low-income families.

Severely cost burdened low-income families are forced with difficult choices in evaluating other necessary expenditures. It is estimated that these households spend 55 percent less on health care and 38 percent less on food than similar households living in affordable housing. The potential adverse consequences to the health and well-being of the individuals within such households as a result of such reduced expenditures on food and health care are destabilizing and are likely to lead to homelessness. The problems are worse for those suffering from long-term disabilities, whose sole source of income is Supplemental Security Income (SSI). In 2014, the average monthly income of an SSI recipient was $750, making an apartment affordable at a monthly rent of $225. The average monthly rent for a one-bedroom apartment in the United States in 2014 was $780, or 104 percent of an SSI recipient’s income.

Private developers are unable to profitably construct affordable housing for low-income families so it is unreasonable to expect the market to solve the affordable housing crisis without governmental assistance. The Low Income Housing Tax Credit (LIHTC) Program has been the principal factor in supporting construction of affordable housing since 1986. However, the tax credits available under the LIHTC program alone are not a sufficient subsidy, and such projects typically include state and local grants and subsidies as well as housing vouchers. While low-income families qualify for federal housing subsidies, and HUD has estimated that approximately 18.5 million very low-income households qualified for such subsidies in 2013, only 26 percent of those households received any housing subsidy that year. That means that approximately 13.7 million very low-income qualified households are unable to secure a housing subsidy because insufficient funds have been appropriated by the federal government. Although appropriations for housing choice vouchers and project-based rental assistance grew in real dollars between 2005 and 2015, most of that increase was applied to rising rents rather than serving more households. There is a clear need to explore additional revenue

47. Charette et al., Projecting Trends in Severely Cost-Burdened Renters, supra note 41.
48. America’s Rental Housing, supra note 31.
49. Id.
51. The State of the Nation’s Housing 2015, supra note 7.
52. Id.
sources to fund subsidies for the almost 14 million very low-income families who qualify but are unable to secure needed assistance.

IV. The Growing Wealth Gap

In December 2014, the Pew Research Center issued a report finding that the median wealth of America’s upper-income families of $639,900 exceeded the median wealth of middle-income families of $96,500 by 6.6 times, almost doubling the 1983 wealth gap. Upper-income median wealth exceeded the median wealth of lower-income families of $9,300 by seventy times. For purposes of the study, upper-income families are defined as those whose incomes exceed two times the adjusted area median income ($132,000 for a family of four), middle-income families as those whose incomes are between two-thirds and two times the adjusted area median income ($44,000 for a family of four), and lower-income families are those with incomes of less than two-thirds of the adjusted area income. Approximately one in five families in the United States meets the standard for upper income, while 46 percent comprise middle-income families. It has been reported that the share of national wealth held by the top 0.1 percent of upper-income households increased from 7 percent in 1979 to 22 percent in 2012.

Notwithstanding the wealth gap, the median wealth of each of the three categories of income has fallen from the pre-recession levels of 2007. From 2007 to 2010, upper-income median wealth fell from $718,000 to $595,300, middle-income wealth declined from $158,400 to $96,500, and lower-income wealth declined from $18,000 to $10,500. Unfortunately, the recovery from the recession has benefitted upper-income families only. Middle-income median wealth has remained unchanged from 2010, and the median wealth of lower-income families has continued to decline to $9,300.

The Pew Study calculated wealth as the positive difference between the value of a family’s assets, such as its home, automobiles, and investments, and debts. It is likely that the recession and the shift from homeownership to renting described above are significant factors contributing to this growing wealth gap. It is also probable that the growing number of severely cost burdened households prevents meaningful improvements in their particular circumstances. The potential for social instability presented by the wealth gap and the particular role housing may play is just another reason the country needs to address the crisis of affordable

53. Fry & Kochhar, supra note 8.
54. Id.
56. Id.
housing and reconsider the inequity presented by the current housing subsidy for the wealthy.

V. Using the Tax Code to Address Housing Affordability

The Internal Revenue Code allows taxpayers to deduct mortgage interest paid on up to $1 million in debt on first and second homes and up to $100,000 in additional debt on home equity credit lines or other loans secured by their homes.\(^\text{57}\) The Office of Management and Budget estimated $108 billion in lost revenues as a result of the mortgage deduction in 2010,\(^\text{58}\) although reports of the cost of such deductions vary.\(^\text{59}\) This represents an increase from the 1986 OMB estimate of $27 billion\(^\text{60}\) and its 1996 estimate of $57 billion.\(^\text{61}\) The mortgage interest deduction provides a direct housing subsidy to certain taxpayers of at least $108 billion per year, and the subsidy continues to grow.

Not only does the mortgage interest deduction cost the Treasury more than $100 billion a year, the benefits also are increasingly allocated to taxpayers who least need a government housing subsidy. In 2011, approximately 90 percent of the 10.5 million homeowners facing severe cost burdens, and approximately 40 percent of all homeowners, had incomes below $50,000, but the Joint Committee on Taxation estimated that those homeowners received only 3 percent of the benefits of the mortgage interest deduction.\(^\text{62}\) At the other end of the spectrum, approximately 77 percent of the benefits, an estimated subsidy of $83.16 billion, went to households with incomes in excess of $100,000, with households with incomes in excess of $200,000 enjoying 35 percent of the benefits.\(^\text{63}\) In testimony before the House Committee on Ways and Means on April 25, 2013, Eric Toder, an Institute fellow and co-director of the Urban–Brookings Tax Policy Center, estimated that 47 percent of tax filing units will have some mortgage interest expense in 2015, but only 24 percent will benefit from the mortgage interest deduction.\(^\text{64}\)

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57. I.R.C. § 163(h).
59. See text at supra note 10.
61. OMB REPORT, supra note 58, at 43.
63. Id.
64. Id. at 3 n.6.
The deduction has been widely justified as critical to encouraging broad levels of home ownership.\textsuperscript{65} The disproportionate allocation of the benefits described above questions the legitimacy of that assertion. Those arguing against reform claim that a loss of the deduction will result in a collapse of home prices.\textsuperscript{66} However, other commentators disagree— with one characterizing such claims as “overstated.”\textsuperscript{67} Another asserts that the elimination of the deduction “would lower demand for housing, especially for large houses, which would result in a short-run oversupply of these homes.”\textsuperscript{68} “The excess supply would result in declining values for these properties until natural growth in demand restored the balance between supply and demand.”\textsuperscript{69} In this regard, it appears that reform would not likely materially impact most homeowners and would affect other families only until the market for large homes is rebalanced. Even the Congressional Budget Office has sounded in: “Despite the favorable tax treatment that mortgage interest receives in the United States, the rate of homeownership here is similar to that in Australia, Canada and the United Kingdom, and none of those countries currently offers a tax deduction for mortgage interest.”\textsuperscript{70}

Although challenging the Treasury Department to propose a tax reform package that achieves goals of “fairness, simplicity and incentives for growth,”\textsuperscript{71} President Reagan warned against tampering with the deduction to “preserve that part of the American dream which the mortgage interest deduction symbolizes.”\textsuperscript{72} Presidents Clinton and George W. Bush also encouraged initiatives to facilitate homeownership, including the preservation of the mortgage interest deduction.\textsuperscript{73} Even Nancy Pelosi, as House Minority leader, characterized the mortgage interest deduction in 2005 as “untouchable.”\textsuperscript{74}

\textsuperscript{65} Dennis J. Ventry, Jr., The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest, 73 LAW & CONTEMP. PROBS. 233, 269 (2010).
\textsuperscript{66} Id. at 281 n.417 (citing, among others, Letter from Charles McMillan, President, National Association of Realtors, to President Barack Obama (Feb. 26, 2009)).
\textsuperscript{67} Id. at 281 n.418.
\textsuperscript{68} Id. at 281 n.419.
\textsuperscript{69} Richard Voith, Does the Federal Tax Treatment of Housing Affect the Pattern of Metropolitan Development?, BUS. REV. FED. RESERVE BANK OF PHILADELPHIA (Mar.–Apr. 1999).
\textsuperscript{70} CONGRESSIONAL BUDGET OFFICE, REDUCING THE DEFICIT: SPENDING AND REVENUE OPTIONS 147 (Mar. 2011).
\textsuperscript{71} President Ronald Reagan, State of the Union Address (Jan. 25, 1984).
\textsuperscript{73} Ventry, supra note 65, at 276.
\textsuperscript{74} Heidi Glenn, Tax Reform Panel’s Ideas Cause Stir in Washington, 109 TAX NOTES 415, 418 (2005).
Notwithstanding the historic lack of political will to address the inequities and inefficiencies of the mortgage interest deduction, the recent global recession—brought about in part as a result of the Clinton and Bush administrations’ challenges to the financial markets to facilitate homeownership for all—has refocused perspectives on the need for reform. U.C. Davis Law professor Dennis J. Ventry, Jr., in his thoughtful and comprehensive critique of the mortgage interest deduction, writes: “Housing tax policies fueled the boom and exacerbated the bust. The [mortgage interest deduction] played a particularly insidious role in the crisis by explicitly promoting overinvestment in housing.”75 Despite claims that homeownership has broad social benefits, including encouraging homeowners to take active roles in their communities and that the mortgage interest deduction promotes homeownership,76 Professor Ventry concludes that the deduction “encourages suburbanization and decentralization of metropolitan areas, distributes benefits unequally across different regions of the country, discriminates against minorities and low-income households, raises unemployment, destabilizes the national economy and may even reduce the supply of housing.”77

On March 26, 2015, Representative Keith Ellison (D-MN) introduced H.R. 1662, the Common Sense Housing Investment Act of 2015.78 The bill establishes a finding that the two “principal Federal housing goals” are to expand home ownership and make rental housing affordable for low-income families and individuals and finds that “more progress has been achieved on the first goal than on the second goal.” The bill proposes a reduction in the cap on the amount of a mortgage for which interest can be deducted from $1 million to $500,000 and converts the deduction to a 15 percent non-refundable mortgage interest tax credit.79 The changes would be phased in over five years in equal annual increments. The ceiling of the mortgage amount would reduce by $100,000 per year, the amount of the mortgage interest that may be deducted would reduce by 20 percent per year, and the credit would increase 3 percent per year—all over the five-year period. The bill proposes to direct the estimated $196 billion in revenue generated over ten years to the National Housing Trust Fund ($109 billion), the Low-Income Housing Tax Credit ($14 billion), Section 8 ($54 billion), and the Public Housing Capital Fund ($18 billion).

75. Ventry, supra note 65, at 278.
76. Fischer & Huang, supra note 62.
77. Ventry, supra note 65 at 279.
79. A nonrefundable tax credit that is not fully applied expires and is not refunded to the taxpayer. A refundable tax credit can reduce taxes to below zero, and if the credit is more than taxes due, the excess can be returned as a tax refund. U.S. Tax Center, Refundable vs. Non-Refundable Tax Credits, https://www.irs.com/articles/refundable-vs-non-refundable-tax-credits.
This bill is based in substantial part on options presented in a study, *Updated Options to Reform the Deduction for Home Mortgage Interest* (2014 TPC Study), issued by the Tax Policy Center on May 7, 2014. The 2014 TPC Study sets forth four options for reforming the mortgage interest deduction. H.R. 1662 essentially adopts the first option. The second option modifies the first only with respect to the amount of the mortgage interest credit, increased to 20 percent from the 15 percent credit contemplated in the first option.

The third option involves a repeal of the deduction of mortgage interest and property taxes, replacing them with a refundable credit based upon 65 percent of property taxes paid, up to a maximum credit for single taxpayers of $1,400 and $2,100 for married taxpayers filing jointly; those maximum credits would be indexed for inflation. Immediate implementation would result in additional revenue of approximately $300 billion over ten years. If phased in over five years, taxpayers would be entitled to a credit starting at 9.9 percent and increasing by that same amount each year until reaching 49.9 percent, with deductions for mortgage interest and property taxes reducing 20 percent each year. The phase in of this option is revenue neutral with the immediate enactment.

The fourth option would replace the mortgage interest deduction with a refundable flat amount of credit for homeowners. If immediately implemented, the credit amount would be $536 for a taxpayer and $804 for married taxpayers filing jointly, resulting in approximately $300 billion in additional revenue over ten years. The credit would be indexed for inflation reaching $654 for taxpayers and $981 for married filing jointly at the tenth year. Phasing in the option over five years would begin the credit at $111 for individuals and $166.50 for married filing jointly, increasing by the same amount for five years reaching $555 and $832.50, respectively, at the fifth year. The phase in would not affect the additional revenue estimate of $300 million.

Implementation of the first option would result in a decrease in the tax burden for 17.7 percent of tax units and an increase for 13.8 percent. Households with annual incomes between $40,000 and $75,000 would

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80. This report updates a report authored by Amanda Eng, Harvey Galper, Georgia Ivsin, and Eric Toder entitled *Options to Reform the Deduction for Home Mortgage Interest* (Tax Pol’y Ctr. Mar.18, 2013).

81. The 2014 TPC study reports that if the first option was implemented without a phase-in, the 15 percent credit is estimated to raise approximately $257 billion over ten years; this would decrease to $232 billion if phased in over five years. This compares with approximately $26 billion raised with an immediate effectiveness of the 20 percent credit and approximately $38 billion if phased in. The increased revenue estimated for a phase in of the 20 percent credit results from the fact that if immediately implemented, there would be a net loss of revenue for the first five years. Clearly, the 15 percent credit has a much greater potential impact in reallocating the federal government’s housing subsidy.
fare the best, with an average 0.2 percent increase in after-tax income. Those with incomes between $200,000 and $1 million would experience an average 0.8 percent decrease in after-tax income, the largest decrease. The results of the second option, increasing the credit from 15 percent to 20 percent, does not significantly alter the impact upon taxpayers.\(^{82}\) The proposed property tax credit and the flat credit (options three and four, respectively) provide greater benefits to low-income families, in part because the credits are refundable, and in part based upon the assumption that many lower-income homeowners, particularly the elderly, do not have mortgages. The property tax credit would result in a tax cut of an average of $606 for 36 percent of tax units, and 14.8 percent of tax units would experience an average additional tax burden of $2,589. Households with incomes between $500,000 and $1 million would experience an average decrease of 1.2 percent of after-tax income. The flat credit has a very similar impact.\(^{83}\)

Following introduction, H.R. 1662 was referred to the Committee on Ways and Means and to the Committee on Financial Services; no action has been taken on the bill. Nevertheless, momentum for reform, and particularly conversion of the deduction into some form of credit, appears to be growing. President Bush’s tax reform plan announced in 2005 contemplated a 15 percent nonrefundable credit for owners on mortgages in amounts up to 125 percent of the median price of homes within a market area.\(^{84}\) In 2010, the Bipartisan Policy Center’s Debt Reduction Task Force, chaired by former Congressional Budget Office and Office of Management and Budget Director Alice Rivlin and former Senator Pete Domenici, proposed a 15 percent refundable tax credit to all taxpayers with the mortgage limit lowered to $500,000.\(^{85}\) That same year, the National Commission on Fiscal Responsibility and Reform, chaired by Erskine Bowles and Alan Simpson, recommended a similar reduction in the mortgage limit and a 12 percent nonrefundable credit.\(^{86}\)

\(^{82}\) Households with incomes between $40,000 and $100,000 will receive a 0.3 percent increase in after-tax income, and those with incomes between $500,000 and $1 million will experience an average 0.7 percent decrease in after-tax income.

\(^{83}\) Under the flat credit proposal, 36.8 percent of tax units will benefit by an average tax savings of $604, and 17.1 percent of tax units will experience an average increase of $2,322. Taxpayers with incomes between $500,000 and $1 million will experience an average 1.2 percent decrease in after-tax income.

\(^{84}\) Fischer & Huang, supra note 62, at 7, tbl. 1.

\(^{85}\) Bruce Katz, Cut to Invest, Reform the Mortgage Interest Deduction to Invest in Innovation and Advanced Industries (Brookings Inst. Nov. 2012), http://www.brookings.edu~/~media/research/files/papers/2012/12/06-federalism/06-mortgage-interest-deduction.pdf. A variation in the Rivlin–Domenici plan would permit the taxpayer to have the credit claimed by the lender in exchange for a lower interest rate.

\(^{86}\) Id.
developing consensus that transforming the deduction to a credit is more equitable and will provide more assistance for homeowners in greater need of such assistance and generate substantial sums for the Treasury over time.

Clearly, reform of a tax deduction that benefits only wealthy homeowners—and a commitment to apply revenues realized as a result of such a change to address the twin crises of homelessness and affordable housing—injects fairness and rationality into the federal government’s housing subsidy program. There must be a broader public dialogue on the issue because it is inconceivable that the inefficiencies and inequities of the present system should be allowed to continue.

In addition to replacing the mortgage interest deduction with a limited credit based upon a reduced principal amount of mortgage, a renter’s credit could be created to reduce housing cost burdens on low-income families. A report issued by the Center on Budget and Policy Priorities in August 2013 advocates congressional authorization and appropriation of funds to be delivered to states to apply a capped amount of renters’ credits, covering the gap between moderate housing costs and 30 percent of the annual income of eligible households. Landlords or lenders holding mortgages on rental properties would be allocated the tax credits in exchange for offering lowered rents. The report suggests that eligibility for such credits would be limited to families with incomes below 60 percent of area median incomes or 150 percent of the federal poverty level, with a substantial portion of the credit allocated to extremely low-income households (below 30 percent of area median incomes) or with incomes at the poverty line. Credits could be allocated as a tenant-based subsidy, a project-based subsidy, or a lender-based subsidy. While such a program would likely involve administrative costs that would be allocated by the federal government to the participating states and in turn allocated to involved owners and lenders, as applicable, the amount of the credit could be structured to compensate for the additional administrative burden.

VI. Conclusion

Although the national homeless population appears to have declined in the past twenty years, it is unacceptable that today approximately 565,000 people in the United States remain homeless and more than half of renter households are paying more than 30 percent of their incomes on rent. It is unconscionable that the federal government has abandoned any meaningful effort to encourage the construction or preservation of

88. Id. at 11.
affordable housing, resulting in more than 11 million households being forced to pay more than 50 percent of their incomes for housing, while continuing to provide housing subsidies aggregating more than $83 billion to families earning more than $100,000. In America, a safe, clean, and stable home should be a human right. Despite improvements in the personal financial circumstances of the wealthiest Americans, the housing problems of the poor have deteriorated, and those problems are spreading to the middle class. Recognizing that, we must revise America’s upside down housing subsidy because growing numbers of families are forced to experience housing burdens that adversely impact their health, education, and employment circumstances, and their ability to positively contribute to their communities. The solutions are clear. We must find the will to act.
Historically Affordable: How Historic Preservationists and Affordable Housing Advocates Can Work Together to Prevent the Demolition of Rent-Stabilized Housing in Los Angeles

*Emily Milder*

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I. Introduction

Los Angeles is grappling with a severe affordable housing crisis. As with all large-scale socioeconomic problems, its causes are complex. This paper will focus on one exacerbating factor—the rise in demolition of rent-stabilized multi-family housing—and suggest ways in which historic preservationists and low-income tenants’ advocates might collaborate to combat this trend.

Historic preservationists and housing advocates have distinct priorities and may at first glance seem to be strange bedfellows. Historic preservation in the public imagination is more often connected, rightly or not, with increased property values and gentrification than with concerns about social or economic justice. In New York City, for example, real estate developers have sought (perhaps disingenuously) to blame strong local historic preservation ordinances for the city’s extraordinarily expensive rental market. However, unique circumstances in Los Angeles present historic preservationists and housing advocates with an opportunity to form a mutually beneficial alliance. Due to the confluence of the city’s rent-stabilization ordinance and a state law called the Ellis Act, the permanent loss of rent-stabilized housing goes hand-in-hand with the demolition of buildings constructed before 1978—some of which are notable examples of early- and mid-twentieth century architecture. This dynamic creates an overlap in goals between two civic-minded groups reliant on community support, offering them a chance to broaden each other’s coalitions while more effectively advocating the preservation of Los Angeles’ affordable, historically valuable rental residences.

In this paper, I will first sketch the bleak affordable housing landscape in Los Angeles, followed by a discussion of the importance of Los Angeles’ Rent Stabilization Ordinance (LARSO) and the challenge posed to housing advocates by the Ellis Act and the Costa-Hawkins Act. Next, I

1. Los Angeles City Council Housing Committee Report (Oct. 21, 2015).
2. Rosalie Ray, Paul Ong & Sylvia Jimenez, Impacts of the Widening Divide: Los Angeles at the Forefront of the Rent Burden Crisis (Ctr. for the Study of Inequality, UCLA Luskin Sch. of Pub. Affairs, rev’d Sept. 2014), https://issuu.com/csiucla/docs/ziman_2014-08w/1. This report points to the relatively low number of publically subsidized units, decreased state and federal funding for construction of new affordable housing, the frozen local Section 8 voucher program, population growth, and the decline in median income as contributing factors.
3. Unless greater precision is required, I will use the term “housing advocates” to refer to both tenants’ rights advocates and those who advocate for the development of new affordable housing.
will outline the recent progress of historic preservation efforts in Los Angeles and describe the protections offered to Historic-Cultural Monuments (HCMs) and how housing advocates could leverage them. I will then examine three illustrative examples of coordination between local housing advocates and historic preservationists. Finally, using lessons learned from these examples, I will present six suggestions for how the two groups can further collaborate to more effectively preserve historic rent-stabilized housing in Los Angeles.

II. Los Angeles' Unaffordable Rental Market

With area home prices at record highs, Los Angeles' renters feel the affordable housing crisis most acutely.6 Renters make up 60 percent of the city’s population, the largest share in the country (or nearly the largest, depending on which study one consults).7 According to some measures, Los Angeles is the least affordable rental market in the nation.8 Between 2006 and 2013, the region’s median rent rose by nearly 11 percent; during the same time, median renter income declined by four percent.9 The situation for the poorest Angelenos is dire: fewer than five percent of rental units are affordable for low-income residents.10 In fact, in order to afford the average rent in Los Angeles County of just over $2,000 a month, a household needs to earn four times the state minimum wage.11 The vast majority of low-income renters in the area spend over half of their incomes on rent and utilities, which qualifies as a severe rent burden.12 Those with average resources are also struggling: 50 percent of residents with incomes in the middle of the spectrum are moderately or severely rent-burdened.13

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8. Ray et al., supra note 2.
10. See id.
12. Capperis et al., supra note 7; California Housing Partnership Corporation, supra note 11.
13. “Rent-burdened” is defined as spending over 30 percent of one’s income on rent and utilities: Ray et al., supra note 2.
When housing costs are factored into the equation, Los Angeles has a poverty rate of 26 percent, one of the highest in the nation. These unaffordable rents are in large part a product of low supply and high demand: the vacancy rate in Los Angeles is a dramatically low 3.4 percent; the national average vacancy rate is 7.3 percent, while the West Coast average is 5.2 percent. Most newly constructed rental housing in the area is targeted toward wealthier residents, while the city’s attempts to promote the creation of affordable rental housing have resulted in approximately 10,000 new units built since 2001, a fraction of the estimated 530,000 necessary to meet the need. Moreover, local, federal, and state funding for affordable housing construction in Los Angeles County has actually decreased by a staggering 65 percent since 2008. It is obvious that new construction of affordable rental housing must be a key component to any long-term, multi-pronged strategy aimed at solving the problem. However, to avoid slipping even deeper into crisis, it is imperative that advocates and city officials focus on preserving the affordable rental housing that already exists.

III. State Laws as Obstacles to Local Rent Control Efforts

Much of the affordable housing stock in Los Angeles is rent-stabilized multi-family residences. As a result of the Ellis Act, a state law that establishes the right of landlords to withdraw their units from the rental market in certain circumstances, these sorts of residences are especially vulnerable to demolition and conversion when the real estate market is highly lucrative—as it is currently. Compounding the problem is the fact that, due to the Costa-Hawkins Act, California cities are prevented from creating any new rent-controlled units to replace those lost to conversion.

A. LARSO and the Costa-Hawkins Act

In response to a housing shortage and subsequent sharp increase in citywide rents in the summer of 1978, the Council of the City of Los

16. LACC Housing Committee Report, supra note 1; California Housing Partnership Corporation, supra note 11.
17. California Housing Partnership Corporation, supra note 11.
Angeles adopted the Rent Stabilization Ordinance of Los Angeles (LARSO).\textsuperscript{21} Applicable to all multi-family housing issued a certificate of occupancy prior to October 1, 1978, LARSO established strict controls on how much and how often landlords could raise rents on their existing tenants. When a tenant voluntarily vacates or is evicted from a rent-stabilized unit, the landlord may then reset the rent to market level.\textsuperscript{22} Because this creates an economic incentive for landlords to find an excuse to evict long-term tenants when the rental market is strong, LARSO also provides tenants with certain protections against unwarranted evictions.\textsuperscript{23} In 2014, the Los Angeles Housing, Community, and Investment Department (HCID) estimated that 80 percent of the city’s 880,581 multi-family units were protected by LARSO, which would put the number of rent-stabilized units at about 705,000.\textsuperscript{24} Other sources estimate the figure to be closer to 638,000.\textsuperscript{25}

LARSO’s power was blunted in two key ways by the passage of the Costa-Hawkins Act in 1995. First, the act enshrined vacancy decontrol, which allows the landlord of a rent-controlled building to raise a unit’s rent to market rate when tenancies turn over.\textsuperscript{26} This means that if a rent-controlled unit has recently been leased to a new tenant, its rental rate is likely currently at market or close to it—in other words, not affordable for most residents. As a result, some housing advocates, when formulating objectives, are more inclined to focus on affordability covenants than on rent control.\textsuperscript{27} However, it would be a mistake to abandon the preservation of rent-controlled units as a goal. There are still more than 600,000 rent-controlled units in Los Angeles, representing a significant portion of the city’s affordable housing supply that cannot be easily replenished.\textsuperscript{28} Furthermore, even with vacancy decontrol, LARSO offers vital protections against unwarranted evictions and economic protection to tenants already occupying rent-stabilized units. Finally, no matter their rental rates, when LARSO units are converted to condominiums, renters are thrown back into a rental market with shrinking supply and growing demand, which pushes up rental rates for the entire market.

\textsuperscript{21} L.A. MUN. CODE § 151.01.
\textsuperscript{22} This is not a feature of the original LARSO, but a requirement of the Costa-Hawkins Act.
\textsuperscript{23} L.A. MUN. CODE §§ 151.02, 151.04, 151.09.
\textsuperscript{24} Bergman, supra note 18.
\textsuperscript{26} California Apartment Association, supra note 20.
\textsuperscript{27} Telephone Interview with Claudia Monterrosa, Director of Policy, Planning, and Research, Los Angeles Housing Community and Investment Department, Nov. 23, 2015.
\textsuperscript{28} Bergman, supra note 18.
LARSO-protected units are especially vulnerable to conversion because, unlike non-rent controlled units, landlords of LARSO buildings cannot take advantage of an increasingly lucrative market by dramatically raising rents on their tenants. The only option for owners determined to make a windfall profit is to invoke the Ellis Act, discussed in detail below, in order to convert their units into market-rate condominiums.

The other key provision of the Costa-Hawkins Act prevents municipalities from applying rent control protections to housing built after 1995. This means that, barring a change in state law, the current supply of rent-controlled housing in Los Angeles is as large as it will ever be: when a LARSO unit is lost, another cannot be constructed to replace it. It is therefore that much more important to preserve the rent-stabilized units still in existence.

B. Ellis Act

The Ellis Act, which establishes the right of landlords to remove their units from the rental market, has allowed rent-stabilized multi-family residences to be increasingly targeted for demolition and subsequent conversion to condominiums or luxury rental apartments.

The history of the Act is instructive. In 1983, pursuant to its rent control ordinance, the City of Santa Monica denied Jerome Nash, a landlord, the removal permit he sought in order to evict the tenants of his rent-controlled building and demolish the structure. Judging by his comments, Nash, whose mother had purchased the building in question for him when he was still a teenager, was apparently at least partially motivated by personal animus toward his tenants. “There is only one thing I want to do,” Nash said, “and that is to evict the group of ingrates inhabiting my units, tear down the building, and hold on to the land until I can sell it at a price which will not mean a ruinous loss on my investment.” A legal battle ensued, and in Nash v. City of Santa Monica, the Supreme Court of California ultimately held that Nash’s asserted right “to go out of business” was not constitutionally protected by either the United States or the State of California.

In response, the real estate community lobbied the State Legislature to pass the Ellis Act, which provides that “[n]o public entity . . . shall, by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance, or regulation, compel the owner of any residential real property to offer, or to continue to offer, accommodations in the

32. Id. at 101.
33. Id. at 100.
property for rent or lease . . . "34 In practice, the Act has significantly hindered Los Angeles’ efforts to maintain its affordable housing stock because it allows landlords to evict all of a rent-controlled building’s tenants in order to convert the property to condominiums.35 This conversion often involves the demolition of the original structure.36

An additional factor in the equation is the controversial Small Lot Subdivision Ordinance (SLS), approved by the City Council in 2005; it is aimed at increasing Los Angeles’ low homeownership rate by increasing the supply of small homes for sale.37 By reducing minimum lot sizes from 5,000 to 600 square feet, the SLS has made the prospect of redeveloping rental housing in sought-after neighborhoods into new condominiums or small homes highly economically attractive to speculators because they can fit more homes on a single parcel.38 In this environment, invoking the Ellis Act to evict tenants and redevelop the property is an increasingly appealing option for landlords seeking a bonanza.

In Los Angeles, landlords have invoked the Ellis Act to withdraw almost 19,000 rent-controlled units from the market since 2001.39 Use of the Act peaked in 2005 and 2006, when the local housing market was at its strongest, with the withdrawal of almost 10,000 units in those two years alone (for a bracing comparison, note that it took the city over a decade to construct that many new affordable units—see above). These numbers fell sharply with the arrival of the Great Recession. While current figures are nowhere near those of the pre-recession years, there is

34. CAL. GOV’T CODE § 7060.
35. Condominium conversion is one of several scenarios that qualify as an Ellis-sanctioned “withdrawal from the rental market.” A landlord may also use the Ellis Act to evict tenants if the building is then left vacant for a period of at least 5 years, after which the building is no longer subject to rent control and the landlord may re-rent the units at the market rate. See L.A. MUN. CODE § 151.2 –28. The City of Los Angeles does not yet track what happens to a property after it has been Ellised so there is no hard data on how often Ellis invocations result in condo conversions versus extended vacancy (or non-compliance). This may soon change, as the City Council is considering a proposal to require the Housing and Community Investment Department (HCID) to continue to monitor Ellised properties beyond the eviction stage. However, common sense indicates that extended vacancy would be economically appealing to few landlords.
36. Again, it is impossible to know exactly how often an Ellised residence is subsequently demolished since HCID does not yet collect this data. Anecdotal information relayed by city officials and housing and preservation advocates suggests that such properties are usually demolished or significantly renovated.
38. Interview with Adrian Scott Fine, Director of Advocacy, Los Angeles Conservancy, Nov. 18, 2015.
renewed cause for concern as the housing market again reaches record heights: from 2013 to 2014, the number of occupied units withdrawn from the rental market under the Act increased by 235 percent, from 308 to 725.\textsuperscript{40} In 2015, that number jumped to 1,075.\textsuperscript{41} The phenomenon gained sufficient attention to inspire the City Council to pass three motions in October 2015, calling on city agencies to study various approaches aimed at lowering the rate of Ellis evictions.\textsuperscript{42}

The purported rationale for the Ellis Act was to protect property owners of limited means from being forced to remain landlords of buildings they could not properly maintain, although, of course, the option to sell the property has always been available. In practice, rather than primarily being used by landlords to “go out of business,” the Act allows speculators and developers—which are not, and have no intention of being, landlords of rent-controlled buildings—to purchase LARSO-protected properties, evict their tenants, demolish the structures, and build luxury housing. In other words, it allows developers and investors to go into business at the expense of Los Angeles’ moderate- and low-income renters.\textsuperscript{43} In fact, more than half of the rent-controlled Los Angeles properties withdrawn from the market under the Ellis Act in 2013 had been purchased within the previous year.\textsuperscript{44} Often, the brand new owner invoking the Act is not an individual but an investment firm such as the Robhana Group, which recently purchased and served eviction notices on all tenants of the Cove, a LARSO-protected apartment building in Los Feliz. The firm plans to convert the rent-stabilized apartments into condominiums.\textsuperscript{45}

Jerome Nash—the plaintiff at the center of \textit{Nash}, the impetus for the passage of the Ellis Act—is himself a potent, albeit extreme, illustration of the gulf between the language used to justify the Act and its use in practice. More than twenty years after suing for the right to “go out of business,” Nash continues to own multiple residential rental buildings in the Los Angeles area.\textsuperscript{46} He has also repeatedly wielded the Ellis Act in a vindictive manner. After purchasing West Hollywood’s historic

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\textsuperscript{40} LACC Housing Committee Report, supra note 1.
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\textsuperscript{42} See id.
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\textsuperscript{44} See id.
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landmark El Mirador Apartments in 2002, Nash became embroiled in a feud with the city over replacing the building’s broken windows (the city’s Historic Preservation Commission insisted that he repair, not replace, the windows).47 Admittedly motivated by pique, in 2010 he invoked the Ellis Act and evicted all of El Mirador’s tenants, citing plans to convert the building to condos or an “urban inn.” It remains vacant as of June 2016.48 In 2013, Nash used the Ellis Act to evict all of the tenants of yet another historic West Hollywood landmark, El Pasadero, to spite two tenants with whom he was engaged in an acrimonious dispute.49

IV. Historic Preservation in Los Angeles

Meanwhile, the prospects for historic preservation in Los Angeles have brightened. In 1962, three years before New York City passed its touted Landmarks Preservation Law, Los Angeles became one of the first urban areas to implement historic preservation legislation with the passage of the Cultural Heritage Ordinance.50 However, until ten years ago, there was no city agency or department dedicated to historic preservation in the City of Los Angeles, nor was there a wide-ranging historic preservation agenda overseen by any agency.51

A. Recent Progress

In 2006, the Office of Historic Resources (OHR) was established within the Department of City Planning.52 The OHR’s mission is to “create a comprehensive, state-of-the-art, and balanced preservation program for the City of Los Angeles.” Prior to the creation of the OHR, the Cultural Affairs Department oversaw the designation of landmarks, called Historic-Cultural Monuments (HCMs), and a few staff members in the Department of City Planning handled the administration of historic districts, or Historic Preservation Overlay Zones (HPOZs).53 In addition to managing these two programs, the OHR has identified the following foundational goals: to complete the first thorough citywide historic resources survey,

52. See id.
53. See id.
to fully integrate historic preservation into the city planning process, and to “create additional incentives and creative partnerships for historic preservation.”54

The first of these goals, the historic resources survey, grew into the project now known as SurveyLA. Begun in 2010 and partially funded by a $2.5 million grant from the J. Paul Getty Trust, SurveyLA is the first attempt to systematically identify every historic resource, whether a building, object, structure, natural feature, or landscape, within the City of Los Angeles. This is no small feat because the city comprises 880,000 legal parcels spread over almost 500 square miles.55 The findings from concluded survey phases have been published on a dedicated, user-friendly website,56 and the final survey phase is scheduled to be completed this year. Historic resources are evaluated not solely based on their architectural significance, but also on their connection to social history, commerce and industry, cultural significance, or ethnic heritage—to name just a few of the broad-minded criteria considered by the OHR.57

These criteria are reflective of the innovative character of historic preservation in Los Angeles. According to Adrian Scott Fine, Advocacy Director of the Los Angeles Conservancy (LAC), while historic preservation is a more firmly established part of local planning regimes in the East Coast and Midwest, the focus of preservation efforts is almost exclusively on pre-modern structures of historic or architectural significance.58 In Los Angeles, however, historic preservationists have expanded their concerns to include architecture from the mid-twentieth century, as well as architecturally unremarkable sites of great cultural importance.59

The LAC is pioneering this sort of preservation advocacy.60 A private nonprofit, the LAC was founded in 1978 as part of the successful campaign to save the Los Angeles Central Library from demolition. The LAC now boasts 6,500 members, making it the largest local preservation advocacy organization in the nation.61 One of LAC’s current campaigns, supported by former Los Angeles County Supervisor Gloria Molina, is

54. Other goals listed by the OHR included earning “certified local government” status in historic preservation, achieved in 2007; to be an expert resource for the Department of City Planning and other agencies; and to provide customer service to community members throughout the historic preservation review process. Office of Historic Resources, Mission, http://preservation.lacity.org/about/mission.
57. SurveyLA, supra note 55.
58. Fine interview, supra note 38.
59. See id.
60. See id.
devoted to placing sites associated with the Chicano Moratorium on the National Register of Historic Places.\footnote{Los Angeles Conservancy, \textit{Chicano Moratorium}, https://www.laconservancy.org/issues/chicano-moratorium.} The Chicano Moratorium, considered a turning point in the Chicano/a activist movement, refers to the series of marches and rallies held in East Los Angeles between 1969 and 1971 to protest the Vietnam War and the disproportionate casualty rate among Mexican-Americans in particular.\footnote{KCET, \textit{The Chicano Moratorium}, http://www.kcet.org/socal/departures/highland-park/painting-the-walls/chicano-moratorium.html.} A march on August 29, 1970, drew 30,000 protestors from across the nation; the brutal response by the Los Angeles Police and Sheriff’s Departments resulted in the deaths of two protestors\footnote{The protestors killed were José Diaz and Lyn Ward, a Brown Beret. The Brown Berets are a Chicano/a activist organization founded in the 1960s and are still active today. National Brown Berets, \textit{History}, http://nationalbrownberets.com/History.html.} and prominent journalist Ruben Salazar.\footnote{Los Angeles Conservancy, \textit{supra} note 62.} The LAC is promoting historic recognition for three associated sites: Belvedere Park, where the fateful march began; Ruben F. Salazar Park (originally Laguna Park and later renamed for the slain journalist), where the march ended and where protestors were attacked by law enforcement; and the Silver Dollar Café, where Salazar was killed by a Sheriff’s deputy.\footnote{See id.}

The LAC has also launched an initiative to identify, discuss, and preserve sites associated with the LGBTQ community in Los Angeles, which possesses a rich and under-recognized history.\footnote{"Over the course of the twentieth century, [Los Angeles] was home to the world’s first gay pride parade, the world’s first LGBTQ synagogue and oldest continuously operating Christian LGBTQ ministry, the country’s longest-running LGBTQ publication, and groundbreaking work in medical research and care for members of the LGBTQ community.” Los Angeles Conservancy, \textit{Curating the City: LGBTQ Historic Places in L.A.}, https://www.laconservancy.org/lgbtq.} As is also the case with the Chicano Moratorium sites, many of the structures connected to this history are architecturally modest. Nevertheless, the LAC believes that such places are worthy of protection and preservation. The preservation of landscapes and structures attached to historic sociocultural events facilitates collective memory, understanding, and storytelling.\footnote{Fine interview, \textit{supra} note 38.} This forward-looking, democratic approach to preservation in Los Angeles should facilitate the development of relationships with grassroots community groups and housing advocates animated by social justice concerns.

There are indications that awareness of and support for historic preservation among Los Angeles residents have “gone mainstream.”\footnote{See \textit{id}.} The
Office of Historic Resources (OHR) has seen a large uptick in the number of Historic-Cultural Monument (HCM) nominations, mostly from owners of would-be historic properties (community members, the Cultural Heritage Commission, and the City Council may also submit HCM nominations). There is also great demand for new HPOZ designations. An HPOZ is a historic district, usually residential, consisting of between fifty and 3,000 parcels, with a high concentration of historically or culturally significant properties; these properties do not need to be HCMs to qualify. Any proposed alteration, addition, or renovation to a property within an HPOZ must undergo a rigorous review process. Originally four planning officials were tasked with managing HPOZs, but demand for the designation grew so overwhelming that in June 2014, the city approved a budget increase to cover the salaries of two additional staff members. With the recent approval of the 52nd Place HPOZ—the first historic district in Southeast Los Angeles, and the former neighborhood of jazz singer Ivie Anderson and Gilbert Lindsay, the first African-American City Council member—there are now thirty HPOZs in the City of Los Angeles, and seven more pending.

The past year has also seen the passage of two local ordinances welcomed by historic preservationists. First, in response to the “surprise” demolition in June 2014 of the Mole-Richardson Studio Depot on North La Brea Avenue, which was an historic Art Deco building that had not yet received HCM status and its attendant protections, advocates succeeded in persuading the City Council to approve a demolition notification ordinance that had been in discussion for over a year. The ordinance requires a property owner seeking a demolition permit to provide advance written notice to the City Council member representing the district in which the property is located and to all adjacent property owners, and to post a visible notification at the property site, for at least thirty days

70. Interview with Ken Bernstein, Manager of the Office of Historic Resources, Nov. 12, 2015.
71. See id.
76. Preservation Issues, 36:5 LAC NEWS (Sept./Oct. 2014); Ken Bernstein supra note 70.
prior to receiving a permit. This allows the City Council, neighboring property owners, or any member of the public who happens to walk by and encounter the notification to initiate an HCM nomination, which temporarily freezes or delays the issuance of a demolition permit.

In another promising development, Los Angeles County passed its very first historic preservation ordinance in October 2015. Similar to the preservation framework in the City of Los Angeles, the ordinance allows for the designation of landmarks as well as historic districts in unincorporated territories within Los Angeles County—a vast category that includes such varied neighborhoods as Marina del Rey, East Los Angeles, and Altadena—and does not require owner consent.

B. Protections for HCMs and Their Potential for Use by Housing Activists

When an historically significant, rent-stabilized multifamily residence is threatened with demolition and conversion to condominiums or luxury rentals, the goals of historic preservationists and tenants’ advocates are brought into more or less perfect alignment, assuming the following logical equation is accurate: designation as an HCM prevents a building from being demolished, and if owners are prevented from demolishing a rent-stabilized building, they will abandon plans to withdraw the building from the rental market. This is a generally appropriate assumption in most, although not all, situations.

While designation as an HCM does not guarantee that a building will not be demolished if its owner is determined to see it happen, it does provide layers of protection that make the process more time-consuming and demolition as the end result less likely. First, any demolition permit sought for an HCM is discretionary, not ministerial—that is, the Department of City Planning will review, rather than automatically approve, a permit request. As a discretionary project, it is now subject to the California Environmental Quality Act (CEQA) and accordingly must undergo

78. Bernstein interview, supra note 70.
80. An owner may invoke the Ellis Act to develop luxury or market-rate rentals as long as at least five years elapse between the withdrawal of the original units from the market and the offer of the new units for rent, or if the new development includes at least as many covenanted affordable units as required to replace the original LARSO units on a 1:1 basis. See L.A. MUN. CODE § 151.28. The latter sort of development plan could present a conflict of interest between historic preservationists and affordable housing advocates, a scenario I will discuss in more detail in the Wyvernwood case study.
81. Bernstein interview, supra note 70.
an evaluation to determine the extent of its environmental impacts. If the project is found to have “significant” impacts, an environmental impact report (EIR) must be prepared by the government agency, i.e., the lead agency, overseeing the project. Because CEQA considers historic resources to be part of the environment, the proposed demolition of an HCM will necessarily trigger the preparation of an EIR.

Looking at issues such as traffic, waste, air pollution, and cultural heritage, an EIR examines how a project would affect quality of life in the surrounding area and investigates alternative approaches to the project that would mitigate or avoid these negative impacts altogether. The EIR process has a built-in public review period, during which advocates and community activists may submit comments, questions, or propose alternatives to which the lead agency must respond. If an HCM is still facing demolition after the EIR process has been completed, the Cultural Heritage Commission may delay the issuance of a demolition permit for 180 days, with an additional 180-day extension possible with the consent of City Council. Finally, individuals or organizations may sue the local government if it has not properly discharged its duties under CEQA.

Thus, a determined developer with the support (or apathy) of local government and the public could eventually demolish a landmarked structure. Nevertheless, the protections afforded to HCMs provide activists with time to mobilize community support for preservation and potentially a cause of action for litigation. However, the question on the other side of the equation still remains: assuming that demolition was prevented or at least made into a prolonged, unappealing hassle, would landlords then choose to refrain from withdrawing those rent-stabilized units from the market? Without hard data on how often “Ellised” LARSO buildings are subsequently demolished, it is not possible to say with certainty how often saving a building from demolition would save its tenants from eviction. However, common sense and anecdotal data suggest that in most or at least many cases, converting a LARSO property to market-rate condominiums entails demolishing or significantly renovating the original building. Alternatively, leaving a property vacant for five years,

83. See id.
84. Los Angeles Conservancy, Using CEQA to Protect Your Community at 1 (2010).
85. Id. at 9.
87. California Office of Historic Preservation, supra note 82.
88. HCID does not collect this information. Monterrosa interview, supra note 27.
even with the prospect of market-rate rents, is unlikely to be economically appealing to many landlords. While some landlords may have other motivations (see the example of Jerome Nash, above), it is probably fair to assume that most of them operate as rational businesspeople.

C. Examples of Collaboration Between Housing Advocates and Historic Preservationists

In recent years, events have brought historic preservationists and housing advocates together on several occasions. The following examples of collaboration demonstrate how housing advocates can leverage the support of historic preservationists and benefit from the protections provided to landmarks—and also reveal potential impediments to an alliance.

1. Flores and Edinburgh

Until September 2015, Matthew Jacobs was the chairman of the California Housing Finance Agency (CHFA), which according to its website is dedicated to promoting “safe, decent and affordable housing opportunities for low to moderate income Californians.” Jacobs is also the owner of two architecturally notable rent-stabilized apartment complexes in Los Angeles: the Mendel and Mabel Meyer Courtyard Apartments on North Flores Street and the Edinburgh Bungalow Court on North Edin-burgh Avenue (hereinafter referred to as Flores and Edinburgh). In early 2015, less than a year after purchasing the properties, Jacobs exercised his right under the Ellis Act to serve eviction notices on all tenants residing at the two complexes. He intended to tear down both complexes in order to build new, luxury small lot subdivisions (SLS) (briefly discussed above).

Flores and Edinburgh tenants organized against the plan. Led by Steve Luftman, a long-time resident of Flores, tenants and community activists organized multiple protests, passed out fliers in front of Jacobs’ other luxury developments, and picketed in front of his home. No doubt aided by the glaring irony of Jacob’s public position contrasted with his private business, tenants attracted the support of tenants’ rights organizations

89. How often landlords violate this mandated vacancy period after invoking the Ellis Act is an open question.
92. Ryan, supra note 91.
93. Gross, supra note 43.
94. Ryan, supra note 91.
Tenants Together and the Coalition for Economic Survival, as well as attention from many local and even national media outlets, including LA Weekly, the Los Angeles Times, The Sacramento Bee, and The Daily Beast. After months of bad publicity and a letter-writing campaign—organized by Tenants Together and resulting in over 1,000 letters demanding his resignation from the CHFA sent to Governor Jerry Brown—Jacobs announced in July 2015 that he would step down from the CHFA at the end of his term in September. The tenants of the Edinburgh and Flores apartments, however, had already been forced to leave their homes, and the properties were still slated to be razed and redeveloped.

Despite the eviction battle seemingly lost, Luftman and his neighbors continued to fight for the buildings’ preservation. Working closely with the OHR, Luftman submitted an HCM nomination for the Flores apartments. Built in the late 1930s, the complex was designed in the Minimal Traditional style by architect Mendel Meyer, whose firm designed Grauman’s Chinese Theater, the Egyptian Theater, Charlie Chaplin Studios, and the Getty House. On September 3, 2015, the Cultural Heritage Commission (CHC) recommended that the City Council approve the nomination.

99. Tenants Together, supra note 95; Ortiz supra note 98.
100. Tenants Together, supra note 95; Ortiz supra note 98.
building’s HCM nomination, thereby freezing the demolition process that Jacobs had already set in motion. On November 25, the City Council voted to formally designate the Flores apartments as an HCM. The complex is thus protected from demolition while the project’s plans are subjected to the extensive environmental review and public comment period outlined above.

Luftman and his supporters were still putting together the HCM nomination for Edinburgh when the Flores nomination was endorsed by the CHC and its demolition permit frozen. Friends of the Edinburgh and Flores apartments had little time to celebrate this good news. Several days later, on September 9, Jacobs, exploiting a loophole, withdrew the SLS proposal for the Edinburgh property. An SLS is a discretionary project, subject to review by City Planning and Building and Safety officials, and the demolition permit is put on hold while approval for such a project is pending. By withdrawing the SLS application, Jacobs was now able to obtain a ministerial (that is, automatic) demolition permit. (Had Edinburgh’s HCM nomination already been submitted, a freeze would have been placed on the demolition process.) This is exactly what he did, and on September 11, workers arrived at Edinburgh to begin demolition.

However, savvy community supporters had already sprung into action. Notified by an Edinburgh neighbor on the eve of the impending demolition, Ken Bernstein, manager of the OHR, immediately rushed Edinburgh’s nomination to the CHC for formal consideration. This triggered a freeze on demolition. An order to halt demolition was posted at the site the same day, and workers went home after inflicting only minor damage to the building. The 1920’s Spanish Colonial Revival complex was now safe from destruction while the HCM-designation process was underway. On November 19, 2015, at a meeting attended by over 30 community supporters, the CHC formally recommended that the City Council designate

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104. See id.

105. The HCM nomination application requires information on the building’s architectural style, construction materials, renovation history, primary and secondary documentation, current and historical photographs, and two written essays, http://preservation.lacity.org/sites/default/files/HCM_Application%20Form_0.pdf.

106. Bernstein interview, supra note 70.

107. There would be nothing to stop Jacobs from resubmitting the discretionary SLS proposal for review after the building was already demolished. This is why the City Council passed a motion asking city agencies to look into the possibility of withholding demolition permits for LARSO units until all permits for the proposed replacement construction are granted. LACC Housing Committee Report, supra note 1.

108. Estell, supra note 102.

109. See id.
the site as an HCM. On March 2, 2016, the City Council unanimously voted in favor of Edinburgh’s historic designation.

If these efforts ultimately save Edinburgh and Flores from destruction (they were still intact as of June 2016), it will clearly be a win for historic preservationists. It is less obvious how rent-stabilized tenants have gained, but there is indeed reason for encouragement. Regarding the displaced tenants of Edinburgh and Flores, if Jacobs is ultimately required to abandon his plans for demolition, it is possible he will choose to re-offer the units for rent at the stabilized rate at the time withdrawal: he would have few alternatives at that point besides leaving the units vacant for five years. If he does, the original tenants have right of first refusal on their old units, assuming they preserved this right in writing. After such upheaval, it is unclear how much of a victory this outcome would be for the individuals directly affected.

On the other hand, this episode provides tenants of historic, rent-stabilized buildings potentially facing mass Ellis eviction in the future with instructive lessons: first, where the plight of long-time rent-stabilized tenants facing eviction intersects with the fate of a character-filled historic building threatened with demolition, there are deep reserves of community support waiting to be tapped. Second, had the HCM nominations been initiated earlier—ideally before Jacobs invoked Ellis, or before he decided to purchase the properties with an eye toward redevelopment—perhaps the evictions would have been avoided, suggesting that tenants’ rights groups could benefit from preemptively pursuing historic status for rent-stabilized buildings. Third, close cooperation and communication with the OHR throughout the HCM nomination process paid off for Edinburgh supporters in a time of crisis. The OHR does not usually initiate HCM nominations itself; rather, it prefers to receive nominations from property owners and community groups. However, because the OHR had already developed a relationship with the community members preparing the nomination, when it came to light that Edinburgh was under imminent threat, the OHR was willing to depart from protocol and immediately initiate Edinburgh’s nomination itself in order to trigger the demolition freeze.

2. Lincoln Place

Lincoln Place, an historic product of the Garden City Movement, originally opened in 1951 and consisted of fifty-two multi-family buildings
arranged over thirty-eight acres north of Lincoln Boulevard in Venice.\footnote{Los Angeles Conservancy, Historic-Cultural Monument Application for Lincoln Place Apartments, Oct. 6, 2011, https://www.laconservancy.org/sites/default/files/files/issues/CHC-2011-2002_HCM_Designation.pdf.} Built by architect Heth Wharton and Ralph Vaughan, a groundbreaking African American designer, Lincoln Place was the largest development in California to be financed under an early Federal Housing Association (FHA) mortgage program.\footnote{Los Angeles Conservancy, Lincoln Place, https://www.laconservancy.org/locations/lincoln-place.} This kind of garden apartment complex, meant to serve as quality affordable housing for returning World War II veterans and defense workers, flourished in mid-century Los Angeles more so than anywhere else in the nation.\footnote{See id.}

Garden apartment complexes, characterized by abundant communal green space and the purposeful separation of pedestrian and automobile traffic, foster a strong sense of community and high quality of life among residents. Their low density, however, makes them irresistible targets for developers.\footnote{Fine interview, supra note 38.} Lincoln Place’s troubles began in 1991 when its then owner announced plans to demolish all 795 rent-stabilized units in order to construct about 700 market-rate condominiums and 144 new affordable rental units.\footnote{Lincoln Place Tenants Ass’n v. City of Los Angeles, 155 Cal. App. 4th 425, 432 (2007).} At the time, Lincoln Place was not yet designated as an HCM. An EIR was prepared, and the city approved the redevelopment plan with the inclusion of explicit mitigation measures that would prevent the issuance of demolition permits unless the affected tenants were given the opportunity to move to a comparable or better unit at Lincoln Place or voluntarily accept a relocation fee and move elsewhere.\footnote{Id. at 432.} Preservationists and tenant activists were unimpressed, and the Committee to Preserve Lincoln Place and the Lincoln Place Tenants Association (LPTA) appealed the approval. As an inducement to the city, the owner-developer reiterated its commitment to the mitigation measures, and its plan—with mitigation measures incorporated—was eventually approved in late 2002.\footnote{Id. at 433.} By this time Lincoln Place had a new owner, Aimco, with the same intentions as its predecessor.

In 2003, Aimco applied for and was granted demolition permits from the city. LPTA and a historic preservation group, the 20th Century Architectural Alliance, sued to enjoin demolition on the ground that (1) the EIR was inadequate because it failed to sufficiently consider the apartments’ historical and cultural value; and (2) because Aimco had not complied with the mitigation measures regarding tenant relocation prior to

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116. See id.
117. Fine interview, supra note 38.
119. Id. at 432.
120. Id. at 433.
applying for the demolition permits, the city’s issuance of the permits was in violation of CEQA. The court, unpersuaded by the first argument, found the second one convincing and enjoined all further demolition. Perhaps the court would have come to a different conclusion on the first issue if Lincoln Place at that point already had been designated as an HCM.

Aimco switched tactics. Between 2004 and 2006, it employed a “relocation assistant,” who persuaded 250 tenants to sign “voluntary relocation agreements” and move out of Lincoln Place. In 2005, Aimco invoked the Ellis Act and began serving eviction notices to tenants who would not voluntarily relocate. LPTA filed a writ of mandate to compel the city to ensure that Aimco was complying with the mitigation measures outlined in the EIR and to enjoin Aimco from evicting Lincoln Place’s remaining tenants. Aimco asserted, among other things, that its rights under the Ellis Act to evict tenants and withdraw units from the rental market preempted any mitigation measures developed and adopted during CEQA proceedings. In 2007, the California District Court of Appeal held that CEQA qualified as “local or municipal environmental or land use regulations” with which the Ellis Act explicitly does not “interfere.” In other words, Ellis Act or no Ellis Act, Aimco was not allowed to evict tenants in noncompliance with the CEQA-developed mitigation measures by which it had earlier agreed to abide.

As Aimco entered into a series of settlement negotiations with the City Council, Southern California’s housing bubble burst and the bottom fell out of the condominium market. Forced to abandon its earlier plans out of legal and economic necessity, Aimco reached a final agreement with the city in May 2010: it would renovate the forty-four original buildings that remained according to historic rehabilitation standards and rebuild ninety-nine new units to replace those that had been illegally demolished. The renovated, and entirely rent-stabilized, Lincoln Place reopened in August 2014, and many of the tenants who had been forced to vacate earlier were able to move back in. The renovation was so well done that the Los Angeles Conservancy (LAC) actually gave Aimco a 2015 Conservancy Preservation Award for “outstanding achievement in

121. Id. at 435.
122. Id. at 436.
123. Id.
124. Id. at 438.
125. Id. at 451; CAL. GOV’T CODE § 7060.7.
127. Los Angeles Conservancy, Lincoln Place, supra note 115.
128. See id.; Fine interview, supra note 38.
Aimco’s turnaround is genuine: one Aimco executive, during testimony at a recent hearing in support of Lincoln Place’s inclusion on the National Register of Historic Places, declared that she had completely changed her mind regarding the value of historic preservation and was now an enthusiastic supporter. The LAC now uses Aimco as a resource to persuade developers that incorporating elements of historic preservation into their plans results in more successful projects.

The Lincoln Place saga highlights the helpful role that litigation, even when only partially successful, can play in such a battle. It is also an excellent example of the mutual benefits of collaboration between historic preservationists and tenant activists. Had there not been a core group of tenants resisting eviction and willing to endure prolonged litigation, the complex would probably have been entirely demolished in 2003 and again in 2006 and 2007. In addition to playing a key role in the litigation, had preservationists not passionately advocated for sensitive renovation, tenants likely would not have had such appealing homes to return to. Finally, Lincoln Place provides a useful reminder that sometimes it is possible to turn adversaries into allies.

3. Wyvernwood Garden Apartments

Boyle Heights’ Wyvernwood, opened in 1939, is the first garden apartment complex ever built in Los Angeles and the second largest rent-stabilized development in the city. About 98 percent of Wyvernwood’s 1,200 units are occupied by Latino/a tenants, most of whom have lived there for many years. Like other examples of the Garden City Movement, Wyvernwood features abundant communal green space and natural landscaping that encourages socializing among neighbors. It is listed in the California Register of Historical Resources but has not received local HCM-designation or been included in National Register of Historic Places, despite being deemed eligible. Wyvernwood’s owner, a Miami-based developer, wants to demolish the entire complex and build a mixed-used project that would quadruple the site’s density and destroy its historically significant park-like setting.

129. Los Angeles Conservancy, Lincoln Place, supra note 115.
130. Fine interview, supra note 38.
131. See id.
133. Fine interview, supra note 38.
135. See id.
136. Los Angeles Conservancy, Wyvernwood, supra note 132.
space, the plan entails 4,400 rental and condominium units, of which 660, or 15 percent of the total, would be covenanted affordable units. Current tenants would have first priority for new units and would pay no more than their current rent.\textsuperscript{137}

This scenario presents a complicated question: is it better to have 1,200 units of rent-stabilized housing that can be raised to market rate whenever tenancies turn over, or to have 660 units set aside for low-income families via affordability covenants that will eventually expire? Affordable housing proponents have not reached a consensus position on this issue.\textsuperscript{138} Depending on which side of the question advocates fall, this kind of development project could potentially pit preservationists and housing advocates against each other.

In fact, these plans have divided Wyvernwood tenants as well as the larger Boyle Heights community. Some are warier than others about the developer’s promises to minimize displacement or about the prospect of removing 1,200 LARSO units in exchange for 660 affordable units.\textsuperscript{139} Moreover, many of Wyvernwood’s units and common areas are in a shabby state of repair, and some frustrated tenants see the new development as an opportunity to upgrade to better living conditions.\textsuperscript{140} It is widely suspected that the owner has chosen not to properly maintain the building to garner more support for the redevelopment.\textsuperscript{141}

Preservationists, however, insist that it is economically and logistically feasible to renovate and preserve some or most of the site and redevelop and densify the rest—much like what happened at Lincoln Place.\textsuperscript{142} They have plenty of community and tenant support: Boyle Heights’ City Council representative, José Huizar, opposes the project, as do the majority of

\textsuperscript{137} The other 3,740 units would be market rate and not subject to LARSO. New Wyvernwood, \textit{Overview}, http://www.wyvernwood.com/files/overview.pdf.

\textsuperscript{138} Monterrosa interview, \textit{supra} note 27.


\textsuperscript{141} Fine interview, \textit{supra} note 38.

Wyvernwood residents. The East LA Community Corporation (ELACC) is staunchly opposed and has marched in protest alongside the LAC and El Comité de la Esperanza, a Wyvernwood tenant group.

When the CEQA-required environmental review process is complete, the City Council must decide whether to approve the project in its current shape. The final EIR, released in late 2012, recommended the project’s approval. According to the LAC, the EIR is characterized by “misleading information, unsubstantiated analysis, [and] factually erroneous arguments.” For example, it claims that rehabilitating the complex according to a proposed preservation-focused alternative would cost two to three times more than what similar rehabilitation projects typically cost, but provides no explanation as to why that is the case. If the City Council approves the project, the only remaining option for opponents will be litigation.

While historic preservationists, community development advocates, and tenant groups have for the most part found themselves united in opposition to the proposed redevelopment of Wyvernwood, the details of this project, namely, the promise of renovated amenities and covenanted affordable units, provide good examples of possible sources of discord. However, in this case, the historic preservationists’ support of a modified plan that would add density and renovate units while preserving much of the development’s historic character, and housing advocates’ continued concern for the loss of irreplaceable LARSO units, has enabled these groups to remain allied.

V. Suggestions for Enhanced Collaboration

Based on insights gleaned from the examples discussed above and from interviews with historic preservationists, housing advocates, and city government officials, I have developed six suggestions for ways in which the two interest groups might expand their sphere of cooperation.

146. See id.
and enhance their effectiveness at preserving historic rent-stabilized housing.

A. Joint Advocacy for Systemic Reform

Prospects for state-level reform of the Ellis Act or Costa-Hawkins Act appear dim at the moment. However, there may be more appetite for local zoning modifications aimed at addressing Ellis evictions and the loss of rent-stabilized housing: in October 2015, the City Council adopted three motions related to “the enforcement of Ellis Act provisions and the preservation of the City’s rent-controlled housing stock.” These motions instruct the Housing Community and Investment Department, the Department of City Planning, and other agencies to review how implementation of the Ellis Act is regulated in Los Angeles, develop a permitting process that would require HCID to approve plans for any alteration or demolition of a rent-controlled building, and study the feasibility of certain proposed regulations intended to preserve rent-controlled housing.

Housing advocates and historic preservationists should pinpoint the reforms being debated that benefit both groups and coordinate their advocacy efforts on those fronts. For example, modifying the Small Lot Subdivision Ordinance (SLS) to make the conversion of rent-stabilized apartment buildings more logistically difficult and/or less economically attractive to owners is a goal that seems to fall squarely within the area of overlap between the two groups’ interests, since owners that invoke the Ellis Act to take advantage of the SLS are, by definition, planning to demolish the original structures. By the same logic, housing advocates and historic preservationists would both probably find a yearly cap on the number of demolitions of rent-stabilized buildings to be an appealing prospect. There are almost certainly additional approaches that would fall within this sweet spot, and if the two groups communicated with each other they could be quickly identified.

B. Preemptive Pursuit of Historic-Cultural Monument Status

Tenants’ advocates should begin actively identifying historic rent-stabilized residences and pursue their designation as Historic-Cultural Monuments (HCMs), whether there is any inkling of an “Ellising” on the horizon. A preemptive strategy offers two key advantages over a reactive one. First, an HCM nomination submitted for a structure whose

147. See State Senator Mark Leno’s unsuccessful recent efforts on behalf of SB 364, a bill that would have required San Francisco landlords to own a rental property for at least five years before invoking the Ellis Act—a modest reform that was defeated two years in a row. Roland Li, Why Ellis Act Reform Failed—Again, S.F. Bus. J., Apr. 22, 2015, http://www.bizjournals.com/sanfrancisco/blog/real-estate/2015/04/ellis-act-marc-benioff-ron-conway-real-estates.html.
148. LACC Housing Committee Report, supra note 1.
owner has no plans to demolish and redevelop it will probably arouse less controversy and be more likely to succeed than a nomination that has dedicated opponents. While the Cultural Heritage Commission is apolitical, HCM nominations ultimately must be approved by the City Council. Second, speculators inclined to purchase a LARSO-protected property in order to raze and redevelop it are unlikely to set their sights on an HCM: a building’s HCM status ensures, at the very least, that the redevelopment process will be longer, more complicated, and more contentious—with no guarantee that the redeveloper will be granted permission to demolish the structure. Securing HCM status for qualifying multi-family residences in tranquil times means that its tenants are far less likely to face the ordeal of mass eviction in the future.

Thanks to the Office of Historic Resources, advocates now have access to all of the tools necessary to efficiently implement such a strategy. SurveyLA is nearly complete, and www.historicplacesla.com, which displays the results of the historic resources inventory on a manipulatable map, is online and fully functional. This means that advocates could quickly compile a list of rent-stabilized multi-family residences that have been identified by the OHR as possessing historic-cultural value and prioritize their efforts around buildings whose HCM nominations are the likeliest to receive approval, and/or buildings that are, by virtue of their location, most vulnerable to being targeted for conversion.

Both Ken Bernstein at the OHR and Adrian Scott Fine at the LAC emphasized that their institutions would support campaigns only for sites with legitimate historic or cultural value.150 If the OHR or the LAC were willing to step in any time any building was threatened with demolition, they would compromise their reputations as principled preservation experts and would have diminished clout to wield in controversies involving places with genuine historic-cultural merit. Fine explained that the LAC’s influence would be significantly weakened if it were viewed as “anti-development,” a politically toxic label. In light of this reality, any proposal involving lowering standards to allow more residences to qualify for historic protection would be a non-starter. However, with the number of LARSO properties at 630,000 (at least), there are almost certainly plenty of qualifying buildings to keep advocates and activists busy for the foreseeable future.

C. Historic Preservation Training for Tenants’ Advocates

According to the California Office for Historic Preservation’s brief guide to CEQA, “[i]t cannot be emphasized enough the importance of educating yourself prior to a preservation emergency arising.”151 CEQA is a

150. Bernstein interview, supra note 70; Fine interview, supra note 38.
151. California Office of Historic Preservation, Technical Assistance Series #1, supra note 82.
complex state law with strict controls on comment periods and statutes of limitations for litigation, and it is not the only layer of regulation that a would-be preservation activist must contend with. The process for achieving local historic designation is also relatively complicated and even more so when the interplay between city planning and building departments is factored in. As demonstrated by Edinburgh, when time is of the essence, familiarity—and mutual trust—with the relevant bureaucratic apparatus can mean the difference between demolition and preservation.

Upon request, the LAC will present a workshop on CEQA and local preservation for groups of ten or more people who are working on an “active preservation advocacy issue.”\(^{152}\) The LAC should consider offering these workshops to housing advocacy organizations that are not already in the midst of a preservation battle. Housing attorneys and groups like Tenants Together, the Coalition for Economic Survival, the L.A. Tenants Union, and the Los Angeles Community Action Network could all benefit from enhanced knowledge of CEQA and the preservation process.\(^{153}\) Not only would these advocates benefit from such training when a crisis clearly involving preservation issues arose in the future, they would also be more likely to consider the creative use of preservation as a tool in any situation if that tool was already in their belts.

**D. Data Sharing**

According to Ken Bernstein at the OHR and Claudia Monterrosa, the director of policy, planning, and research at the Housing, Community, and Investment Department (HCID), these two city agencies rarely communicate.\(^{154}\) However, if HCID were willing to develop a way to quickly and promptly share with the OHR the data it collects on recently “Ellised” properties, the OHR could identify under-the-radar historical resources at risk of being demolished at a very early stage in the process, improving both the chances of saving the property from destruction as well as sparing its tenants from eviction.

Landlords are required to follow certain procedures when withdrawing units from the rental market under the Ellis Act. First, they must notify HCID in writing of their intentions. Within five days of notifying HCID, they must inform their tenants. From this point, tenants without special needs have 120 days to vacate the premises; tenants over sixty-two years of age and tenants with disabilities have an entire year.\(^{155}\) If HCID shared the list of newly-Ellised properties with the OHR on a weekly basis, the OHR could check this list against the historic resources

\(^{152}\) Los Angeles Conservancy, *Using CEQA to Protect Your Community*, supra note 84.

\(^{153}\) Telephone Interview with Denise McGranahan, Senior Attorney at LAFLA, Dec. 3, 2015.

\(^{154}\) Bernstein interview, supra note 70; Monterrosa interview, supra note 27.

\(^{155}\) L.A. MUN. CODE § 151.23.
survey to flag any historic but not-yet-landmarked buildings at least four months ahead of the earliest possible moment the buildings could be demolished. At such an early stage, many options would be available to the OHR. It could simply notify the owner that the building has been identified as a historic resource, opening a dialogue in order to get a read on the situation, or perhaps persuade an amenable landlord to revise any plans involving demolition. It could inform its non-governmental preservation colleagues about the situation, allowing them to take the lead in midwifing a community-supported HCM nomination. Or, if the OHR thought the situation called for swift and decisive action, it could initiate its own nomination.

When I presented this idea to Ken Bernstein, he reacted positively and confirmed that access to this information would be useful to the OHR. Claudia Monterrosa of HCID responded with less enthusiasm. She pointed out that HCID already shares its Ellis notification information with the Department of City Planning, which uploads it into the Zoning Information and Map Access System (ZIMAS), an online database accessible to the public. However, it is not clear how frequently HCID shares this information with Planning, or how often Planning updates ZIMAS. Weeks could potentially elapse, and the later this information reaches OHR the less helpful it will be. Furthermore, there is no way to bring up a list of recently Ellised properties in ZIMAS because the search function allows users to look up only one specific property at a time.156

If HCID is already sharing Ellis information with the Department of City Planning, there is no reason it cannot share it with the OHR (an office within Planning) at the same time, or with minimal additional effort. However, as mentioned, it is unclear how regularly HCID provides this data to the department. If the OHR wants timely access to this information, it will have to take the initiative in establishing a regular channel of communication with HCID.

E. Multi-Disciplinary Working Group or Conference

The people best able to identify opportunities for cooperation among preservationists and housing advocates are preservationists and housing advocates. If they are rarely in the same space with each other, however, conversations will not happen and connections will be missed. A carefully selected working group that includes fifteen or so local leaders and strategists from both communities would not only allow advocates to identify shared objectives and complementary capacities, if all else fails, it would at the very least allow people deeply invested in similar issues to get to know one another.157 Someone is much more likely to think to pick up

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157. Adrian Scott Fine of the LAC pointed out that environmental groups’ objectives concerning the destruction of rent-stabilized housing also overlap with....
the phone or send an email to consult with a person if the two have already had a conversation.

An event like this requires a sponsor and organizer, most likely city government or private philanthropy. A nonprofit foundation concerned with housing and culture in Los Angeles could take on both of these roles or provide a grant to one of the participating organizations to design and plan the event.

F. Community Landlord Awards

Everybody likes to feel appreciated, and there is no reason to think landlords are any different. While there are no doubt plenty of conscientious, public-spirited landlords in the community, they often are not the ones that the public is introduced to in the news. Housing and tenants’ organizations like the ones mentioned above could partner with various local neighborhood preservation groups, of which there are dozens, to identify and celebrate exemplary landlords of historic, rent-stabilized buildings. This kind of joint initiative would not only help build relationships between the two advocacy groups, it would also connect these groups with community members whose input would naturally be sought in selecting nominees and winners.

Moreover, positive attention of this sort drawn to landlords in general could act as a counterweight to more venal incentives and serve to deepen or reorient landlords’ investment in the community and in their reputation. As with the LAC’s recognition of Aimco, a well-timed award could solidify a landlord’s loyalties and reinforce good behavior.

While the sincere primary purpose of an initiative like this would be to cultivate connections and generate good feelings, it also creates a silver lining in the case of a lauded landlord who disappoints—"Award-Winning Landlord Evicts Tenants" is a headline that is bound to generate more attention than such stories usually receive, as suggested by the widespread press coverage of Matthew Jacobs, the affordable-housing official turned landlord-profiteer.

VI. Conclusion

To best address the destruction of rent-controlled housing in Los Angeles on a systemic scale would require reform or repeal of the Ellis Act, and any effective approach to easing the affordable housing crisis must involve the construction of new affordable housing. Saving historic rent-stabilized residences is admittedly a narrowly targeted strategy, but it is

those of preservationists and housing advocates. It would be worthwhile to bring these three groups together and see what happens. Denise McGranahan of LAFLA mentioned the annual Housing California Conference in Sacramento as a possible venue, http://www.housingca.org/#/annual-conference/c1v9k.

a goal toward which concerned community members, tenants, and advocates can immediately take concrete steps. Every rent-stabilized building is irreplaceable, and each unit matters in a crisis as acute as our current one. Moreover, as described above, sometimes preserving one historic complex means saving 800 or even 1,200 units, and the preservation of Los Angeles’ historic structures is a valuable end in itself. Historic preservationists and housing advocates may not always end up on the same side of every controversy that arises, but when their interests overlap Los Angeles can only benefit from their close collaboration and mutual reinforcement.
A National Perspective on Vacant Property Receivership

Melanie B. Lacey

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I. Abstract

This article examines the development of vacant property receivership laws1 across the United States in order to compare provisions and identify best practices. A brief historical overview provides the constitutional basis for this area of law and describes how the expansion of housing codes gave rise to receivership as a legal remedy for combating blight. The evolution of receivership is discussed through analysis of laws enacted in New York and Ohio and the drafting of a model statute. Ultimately, this article highlights how the types of actionable properties, the number of parties with standing, the specificity of procedural requirements, and the breadth of financing options have increased with time. In addition, the diversity of existing legislation is illustrated through a national survey comparing laws in nineteen states.

II. Introduction

Blighted and abandoned houses affect every level of governance.2 At the neighborhood level, these houses discourage interest from prospective buyers, reducing the value of well-maintained properties by thousands of dollars.3 At the city level, millions of dollars are lost annually through demolition expenses and unrealized tax revenue.4 Regionally, they perpetuate demographic trends that increase the need for federal assistance.5 However, beyond financial consequences, derelict houses adversely affect public health and safety by attracting criminal activity, creating fire risks, and presenting hazards to children.6 Many factors contribute to the problem. At the forefront are post-industrialization and subprime mortgage lending that caused high foreclosure rates in areas that now have low

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1. Receivership is also known as “conservatorship” in the Commonwealth of Pennsylvania and “possession” in the State of New Jersey.
4. Id.
5. See City of Detroit, Michigan, Case No. 13-53846 (Bankr. E.D. Mich. 2016), http://www.mieb.uscourts.gov/apps/detroit/DetroitBK.cfm (Housing abandonment in Detroit is largely connected to the loss of automobile industry factory jobs. However, existing abandonment in turn encourages continued abandonment.)
6. A Nuisance Law Approach to the Problem of Housing Abandonment, 85:8 YALE L.J. 1130, 1132–33 (1976) (Problems created by abandonment include vandalism, criminal activity, fire hazards, and “aesthetic injuries,” leading to expectations of neighborhood deterioration that cause depressed real estate values, which precipitate further abandonment).
market demand. However, the profile of an absentee owner is diverse. In addition to financial institutions, one might be an unknowing beneficiary of an inheritance, a former occupant who walked away from a mortgage delinquent or unsellable home, a slumlord, or a real estate speculator.

Vacant property receivership is a public nuisance proceeding that allows a third party to petition a court for the right to rehabilitate a derelict property. Receivership is a useful tool for addressing properties with tangled or toxic titles, “zombie” houses, and properties that compromise the vitality of down-turning or upcoming communities.

This article examines the development and proliferation of vacant property receivership laws throughout the United States. Part III provides legal and historical context by discussing the expansion of public nuisance law and housing codes. Part IV focuses on the introduction of receivership laws in New York and discusses how certain court cases defined the parameters of local property regulation. Part V describes how the purview of receivership transitioned from rental tenements to single-family houses and provides an overview of a model statute. Since the mechanics of these laws are uniform in most jurisdictions, Part VI provides a national survey that compares and contrasts provisions of the nineteen receivership laws currently in place across the country. Part VII concludes with best practices.

8. This list provides examples of predominant groups, but it is not exhaustive.
9. Usually governmental entities or private parties that do not have an ownership interest in the property.
10. Most laws address houses that are simultaneously vacant and blighted for a period of time, such as one year.
13. Zombie Title, Investopedia, http://www.investopedia.com/terms/z/zombie-titles.asp (last visited Sept. 4, 2015) (“A zombie title is a title to real property that happens when a lender initiates foreclosure proceedings by issuing a notice of foreclosure and then unexpectedly dismisses the foreclosure [after the mortgagors abandon the property].”).
III. Birth of Public Nuisance Law and Housing Code Enforcement

A. General Background on Receiverships

Receivership is a legal remedy that becomes available under many types of litigation involving disputes over assets. The remedy entails a court-appointed party who gains custody of the assets-in-controversy in order to preserve and manage them during the course of the lawsuit. The receiver’s appointment terminates when the court directs the final disposition of the assets. At termination, a court may direct a receiver to return the assets to the owner or sell them to satisfy debts. In the latter scenario, sale proceeds are distributed to creditors according to their priority.

Within the context of public nuisances, the same logistics apply to the receivership process. Vacant property receivership laws create standing for municipalities and community members to sue property owners who are unwilling to rehabilitate chronically blighted properties. Therefore, public nuisance is the cause of action, abandonment and housing code violations are the basis for the action, and the property is the asset-in-controversy.

Receivership laws fall under two formats. The “minority” format allows receivers to carry out title clearance before selling the property to a qualified entity that will perform the rehabilitation. Under this format,
the receivership ends before the rehabilitation commences since the receiver is exclusively a seller. The “majority” format, which is discussed at greater length throughout this article, requires a petitioner to propose the appointment of a receiver that will directly manage the rehabilitation, which is overseen by the court, from start to finish. Here, the receivership ends after the rehabilitation is completed.

Both formats allow the appointment of a receiver only if a respondent-property owner or -lienholder fails to exercise its final opportunity to bring the property into code compliance. Therefore, a court may not appoint a receiver if a respondent shows that it is willing and able to abate the violations. Furthermore, when receivership is granted, the receiver’s expenditures become a lien against the property. The lien under the minority format is composed of administrative expenses, whereas the lien under the majority format is composed of construction and litigation expenses. Although the former specifically seeks to facilitate transferral of ownership, both formats premise the sale on a lien foreclosure that is permitted only if the owner does not repay within a designated timeframe.

B. Public Nuisance Exception to the Takings Clause

While vacant property receivership may divest an owner of its property interest, it is distinct from condemnation and does not implicate the Takings Clause for several reasons. Primarily, receivership does not fall under any particular category of takings, and Supreme Court precedence has long established the validity of enforcement actions relating to properties that create public nuisances.

Three categories of takings are more obviously dissimilar than receivership. First, receivership does not constitute a direct condemnation because it allows a property owner to “avoid . . . interference with his rights by demonstrating his prospective ability to renovate the property.”

20. At this point, the owners would have already ignored previous attempts to compel performance.

21. Jacobson, Receivership, supra note 19, at 3 (“In some cases the threat of litigation is enough to induce property owners to repair their buildings. They show up in court after years of neglect and plead to keep the houses by obtaining building permits and finally starting renovation.”).

22. See Kelly, Refreshing the Heart of the City, supra note 19, at 219 (such as the cost of preparing for sale).

23. See Joseph Y. Whealdon, A Primer in Eminent Domain and Takings Law under the U.S. Constitution, 101 PRACTICE SERIES (ABA Young Lawyers Div. 2011), http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/primer_earnin_domain_takings_law_under_us_constitution.html (last visited Aug. 3, 2016) (The government exercises direct condemnations when it “admits that it wishes to take or has taken private property from an individual. It then brings the individual into court to obtain the property in exchange for just compensation.”).

24. Kelly, Refreshing the Heart of the City, supra note 19, at 19.
Conversely, owners may not prevent condemnation by carrying out specific acts; instead, they are generally limited to challenging the legitimacy of the asserted “public use” or disputing the adequacy of the compensation offered. Second, receivership is not an inverse condemnation, such as a regulatory taking, since it does not deprive an owner of its property by creating severe economic burdens that eliminate or greatly lower the value or usefulness of the property. Rather, receivership seeks to restore economic value to the nuisance property and the surrounding area by inducing the owner to act or by enforcing repairs through an appointed receiver. Third, receivership does not constitute a “judicial taking” because it does not deprive an owner of pre-existing, established rights where ownership duties, in the form of compliance with housing codes, are being enforced.

Apart from these general conclusions, the opinions of hallmark cases established the right of the states to regulate property based on police power, as opposed to the Takings Clause. Even before ratification of the Bill of Rights formally established the police power, the U.S. Supreme Court in 1788 held that compensation is not mandated when

25. U.S. Const. amend. V (“. . . nor shall private property be taken for public use, without just compensation”). The 14th Amendment applies that same concept to all states.

26. See Whealdon, A Primer in Eminent Domain, supra note 23 (An inverse condemnation takes place “when a property was so burdened by regulation that the government should be forced to condemn the property by taking title to it and providing just compensation.” The Supreme Court has held that there “are three types of taking by inverse condemnation: physical, regulatory (categorical or non-categorical), and land-use exactions.”).

27. Hotel & Motel Ass’n of Oakland v. City of Oakland, 344 F.3d 959, 965 (9th Cir. 2003).

28. Id. (“Supreme Court case, a plurality of justices recognized that, theoretically, a taking could occur by an act of the judiciary”).

29. Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot., 130 S. Ct. 2592, 2602 (2010) (Scalia, J., plurality opinion, joined by Roberts, C.J., Thomas, J., and Alito, J.) (“Though the classic taking is a transfer of property by eminent domain, the Clause applies to other state actions that achieve the same thing, including those that recharacterize as public property what was previously private property. . . . This Court’s precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary.” [citations omitted]).

30. U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).


32. Id. Republica v. Sparhawk, 1 U.S. 357, 362 (Pa. 1788) (“. . . And, having done it lawfully, there is nothing in the circumstances of the case, which, we think, entitles the Appellant to a compensation for the consequent loss. . . .”).
the state action serves to protect public safety.\textsuperscript{33} 

\textit{Respublica v. Sparhawk} involved the removal of private property that constituted “wartime articles,” which the court justified as a protective measure authorized by necessity.\textsuperscript{34} Nearly one hundred years later, the \textit{Sparhawk} “wartime exception,” based on necessity, was expanded to a “public nuisance exception,”\textsuperscript{35} based on police power, through \textit{Mugler v. Kansas}. 

\textit{Mugler} involved an amendment to the Kansas constitution that prohibited the sale of alcohol; the legislature passed a law in 1885 that made places where liquor was manufactured or sold subject to abatement. The U.S. Supreme Court held that a state has a right to regulate property through an enforcement action when the property is used for illegal purposes that compromise public health and safety.\textsuperscript{36} However, the public nuisance exception requires that the state action pass the rational basis standard of review.\textsuperscript{37} 

Another notable distinction between receivership and condemnation is the underlying objective, especially in light of \textit{Kelo v. New London}.\textsuperscript{38} \textit{Kelo} controversially involved the transfer of condemned property to a private

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\textsuperscript{33} \textit{Sparhawk}, 1 U.S. at 362 (holding that “Congress might lawfully direct the removal of any articles that were necessary to the maintenance of the Continental army, or useful to the enemy, and in danger of falling into their hands . . .” because “. . . the safety of the people is a law above all others”). See also Todd D. Brody, \textit{Examining the Nuisance Exception to the Takings Clause: Is There Life for Environmental Regulations After Lucas}, 4 FORDHAM ENVTL. L. REV. 287, 288–89 (2011) [hereinafter Brody, \textit{Examining the Nuisance Exception}].

\textsuperscript{34} Id.


\textsuperscript{36} 123 U.S. 623 (1887) (“A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot [sic], in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.”). See also Brody, \textit{Examining the Nuisance Exception}, supra note 33, at 290.

\textsuperscript{37} See Kelly, \textit{Refreshing the Heart of the City}, supra note 19, at 220 (Kelly discussed the constitutionality of vacant property receivership through its relationship with the nuisance exception: “As with tests of the police power against the Contracts Clause or the Equal Protection Clause, the nuisance exception to the Eminent Domain, or Takings, Clause requires that the governmental action under review survive both parts of a two-prong test. First, the public policy objective must involve a legitimate state interest within the scope of the police power. Second, the governmental action itself must have some logical means-end connection to the permissible policy goal.”)

\textsuperscript{38} 545 U.S. 469 (2005).
party as a means of carrying out a revitalization plan for the City of New London. However, the Supreme Court upheld the city’s use of condemnation because the “public purpose” requirement of the Takings Clause would be achieved through “. . . appreciable benefits to the community, including, but not limited to, new jobs and increased tax revenue.” Conversely, the benefits to the community that are achieved through receivership result from the objective of remedying a harm. Here, the sovereign right of states to regulate unlawful property use narrowly applies the quiet enjoyment principle that “no man should use his property to injure . . . his neighbor.” In addition, receivership is most often appointed over single structures, regardless of zoning, and is not an appropriate vehicle for large-scale development schemes. Therefore, the common ground of transferring ownership to a private party that is shared by both processes is qualified by these factors.

In his article Refreshing the Heart of the City, James J. Kelly, Jr. highlights that the understanding of the police power evolved “as the nature of governmental intervention expanded from prohibition of noxious activity to promotion of social goods.” While cases like Mugler laid the foundation for nuisance enforcement actions, the development of housing codes defined the scope of responsibilities for property owners. Defined responsibilities resulted in defined violations, facilitating an extension of the public nuisance exception to the protection of neighborhood vitality.

IV. Development of Rental Receiverships

A. Housing Codes Creating a Basis for Remedy

Housing codes establish minimum standards for the construction and maintenance of property, which serve to protect the health, safety, and welfare of residents. They became necessary during the late nineteenth and early twentieth centuries in response to the poor condition of many tenement buildings in metropolitan areas. For example, a housing shortage in New York resulting from World War I allowed landlords to neglect

39. Id. ("The Court has embraced a broader and more natural interpretation of public use as ‘public purpose.’").

40. Id. ("Promoting economic development is a traditional and long accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized.").

41. Reznack, Land Use Regulation, supra note 35, at 859. Under common law, those who possess real property are entitled to the quiet enjoyment of their land.

42. The Appendix (National Survey) discusses various jurisdictions that allow receivership over commercial and/or industrial buildings, in addition to residential buildings and houses.

43. Id.

44. DAVID LISTOKIN, LIZABETH ALLEWELT & JAMES J. NEMETH, HOUSING RECEIVERSHIP: SELF-HELP NEIGHBORHOOD REVITALIZATION 1 (1985).

45. Id. See also MALLACH, supra note 7, at 49.
building upkeep without facing repercussions. To protect the rights of tenants, New York passed its first housing code, spurring similar legislation in other states.

Following continuing disregard of the new regulations, receivership appeared as a remedy attached to the New York Multiple Dwelling Law of 1929, which created both housing codes and enforcement for violations. Section 309(5) of the Multiple Dwelling Law gave city governments in the State of New York the authority to petition for receivership over buildings “to remove or remedy a nuisance . . . as known at common law or in equity jurisprudence. . . .” Housing receivership initially addressed occupied, substandard dwellings with a focus on multi-unit rental properties. In simpler terms, rental receivership was the predecessor to vacant property receivership. Thus, receivership became a tool through which local governments and, eventually private citizens, could bring legal actions to combat blight.

B. Overcoming Constitutional Challenges

Use of the Multiple Dwelling Law proved to be expensive, and New York City struggled to collect on repair costs since they operated similarly to mechanic’s liens. To assist with collection, the state legislature passed aggressive amendments that elevated the City’s liens to a super-priority status. However, one man’s solution became another man’s trouble. One year after enactment, the New York Court of Appeals in Central Savings Bank v. City of New York, held that these amendments unlawfully subordinated preexisting mortgages and violated due process rights by notifying only the owner-occupants and omitting lienholders from the action.

48. Id. at 2.
50. W. Dennis Keating, Judicial Approaches to Urban Housing Problems: Study of the Cleveland Housing Court, 19 Urb. Law. 345, 358 (1987) [Keating, Judicial Approaches to Urban Housing Problems].
51. Case Comment, Prior Lien on Rents and Profits Upheld as a Method of Financing Repairs: In re Dep’t of Bldgs., 63 Mich. L. Rev. 1304, 1305 (1965) [hereinafter Case Comment, Prior Lien on Rents].
52. N.Y. Sess. Laws 1937, ch. 353(g) (stating that repair liens should “have priority over all other liens and encumbrances including mortgages, whether or not recorded previously”; doing so was essential to the government’s likelihood of actually collecting on these debts.).
53. The New York Court of Appeals is the highest court in the state.
54. 18 N.E.2d 151 (N.Y. 1938), cert. denied, 306 U.S. 661 (1939); see also Case Comment, Prior Lien on Rents, supra note 51 (The law deprived lienholders of the right to
The Central Savings decision caused rental receiverships to lay dormant for nearly thirty years. However, these points of contention were resolved in 1962 through the passage of additional amendments, which required the city to notify lienholders with a written order directing elimination of the nuisance within a specified time. It also allowed respondents to “show cause” as to why a receiver should not be appointed and to contest the reasonableness of the expenses reflected in the lien. The issue of abrogation was mitigated but ultimately rendered moot. Ultimately, these modifications endured to lay the groundwork for vacant property receivership.

C. Emergence of the Private Right of Action

While court cases like Central Savings retracted the scope of rental receivership in New York, a case in Illinois notably expanded it in other ways. In 1981, the Appellate Court of Illinois in City of Chicago v. Westphalen found in favor of a private right of action to petition for receivership. The court held that the city was permitted to jointly petition with neighbors of the property-in-controversy. Thereafter, other states

55. Gribetz & Grad, Housing Code Enforcement, supra note 46, at 1265.
57. Case Comment, Prior Lien on Rents, supra note 51 (quoting N.Y. Multiple Dwelling Law § 309(1)(e), (5)(a),(5)(c)(3).
58. Id. (“in the event the nuisance is not properly removed, the department may apply to the [state] court for an order to show cause why a receiver should not be appointed”) (citing N.Y. Multiple Dwelling Law, § 309(5)(a)).
59. BLACK’S LAW DICTIONARY 7 (10th ed. 2014) (“To annul or annul or repeal [conditions of a contract.”). 60. N.Y. Multiple Dwelling Law § 309(5)(e); see Richard J. Marco & James P. Mancino, Housing Code Enforcement—A New Approach, 18 CLEV.-MARSHALL L. REV. 368, 376 (1969). By attaching to the rents and profits and not to the “fee,” the receiver utilizes the owner’s income over a period of time to finance improvements to the property. However, this provision did not carry over to vacant property receivership because the Supreme Court subsequently interpreted the Contract Clause to permit modification of private contracts. See also Energy Reserves Grp. v. Kansas Power & Light, 459 U.S. 400, 411–13 (1983) (the state “must have a significant and legitimate purpose behind the regulation, such as the remedying of a broad and general social or economic problem.”).
enacted laws that gave standing to private parties that are directly affected by the nuisance effects of the property condition. This change was important because rental receiverships depended on community involvement since government intervention was often delayed and infrequent. Because rental receivership overcame these various hurdles, vacant property receivership has not faced constitutional challenges.

V. Evolution of Vacant Property Receiverships

A. From Blighted Rentals to “Zombie” Houses

The need for legislation creating “vacant” property receivership originated in Cleveland during the 1970s when the city started to face significant housing abandonment. To alleviate court dockets and expedite a growing caseload relating to code enforcement, the state implemented one of the first housing courts in the country. These cases predominantly involved one- and two-family houses that were absentee owned rather than multi-unit buildings.

While traditional code enforcement was problematic for occupied, urban tenement buildings, the problem was even worse for unoccupied, suburban houses in the Midwest. With the former, income from tenants could be redirected to responsible use. Furthermore, rental receivership sought to remedy blight to prevent the displacement of tenants. In the latter scenario, the cause and effect were inverted because blight often followed abandonment and there were neither tenants nor structural requirements to trigger the purview of existing laws. Since code violations and tax delinquency often correlate, cities turned to tax sales as a strategy to recover lost revenue and generate responsible ownership. However, the tax sale process presented shortcomings. In particular, they often transferred title from delinquent owners to speculative buyers who had

63. Listokin et al., supra note 44, at 118.
64. Zombie Title, Investopedia, supra note 13.
65. Keating, Judicial Approaches to Urban Housing Problems, supra note 50, at 352–52 (Between 1970 and 1980, Cleveland lost one-quarter of its population.).
66. Id. at 347–48.
67. Id. at 352 (fifty-three percent; this was noteworthy because most receivership legislation addressed only tenement buildings, sometimes requiring a minimum number of units.)
68. Marco & Mancino, Housing Code Enforcement, supra note 60, at 376 (Properties eligible for rental receivership are “economically sound buildings.”).
69. Listokin et al., supra note 44, at 118.
70. Id. at 11–12 (identifying reasons, such as (1) tax sales are not always applicable because some owners of abandoned parcels continue to satisfy property tax obligations, (2) the strategy is passive because it must wait for the property to become delinquent, (3) it is time-consuming, and (4) large-scale foreclosure in a municipality can impose significant management/operating demands).
no immediate improvement plans. Because tax sales and rental receivership could not address those properties, the City of Cleveland responded by demolishing thousands of abandoned houses. In 1982, a local community development corporation sought an alternative to demolition. The Union-Miles Development Corp. (UMDC) persuaded the newly formed housing court to appoint it as receiver over an abandoned, dilapidated house that interfered with ongoing development efforts in a particular neighborhood. The property owner had died intestate, leaving distant heirs across the country who did not respond to repeated inquiries. Because there was no applicable state law, the hearing was adjudicated under equity jurisdiction. This project proved that the cost and complexity of equity receiverships could be prohibitive for the average community group. Recognizing the potential of this legal process, the UMDC commissioned a national study of existing receivership legislation and programs, resulting in the drafting of a model statute. This model statute guided the enactment of the first vacant property receivership law in the country, although the Ohio Legislature did not adopt all of the model provisions.

B. Model Receivership Statute

The national study identified trends, offered case studies, and aggregated best practices existing at the time for the purpose of drafting an

71. Id.
72. Id. at 358.
73. Kermit J. Lind, Collateral Matters: Housing Code Compliance in the Mortgage Crisis, 32 N. Ill. Univ. L. Rev. 445, 468 (2012) (Enforcing building and housing codes is ineffective when an institutional owner of an abandoned building merely pays court-imposed fines rather than repairing the building and correcting the violation.).
74. Listokin et al., supra note 44, at 13 (Union-Miles Development Corp. (UMDC). With the support of local foundations, Cleveland residents forged a partnership with area banks to establish the UMDC in August 1980.).
75. Id.
77. Listokin et al., supra note 44, at 24 (quoting Union-Miles Proposes Receivership Remedy for Abandoned Buildings, Ohio CDC News 1 (Fall 1983)).
78. Id.
79. Id.
80. Ohio Rev. Code § 3767.41 (1984) (However, the 1984 Ohio receivership statute addresses only vacant properties and does not incorporate occupied tenement or rental properties, such the model ordinance.). See also Listokin, supra note 44, at 133–38.
81. See Listokin et al., supra note 44. This book is the product of the referenced national study.
effective model statute. The model statute concisely set forth the anatomy of receivership actions and delineated procedures. For example, receivership laws must dictate eligibility requirements for the property-in-controversy and the potential litigants as well as the duties and powers of the litigants when a court appoints a receiver. Receivership laws always require a petitioner who initiates the action and a designated receiver who obtains possession of the property in order to manage it and carry out repairs, although some laws allow for the receiver and petitioner to be the same person or entity. In addition, these laws always require service of notice to all parties that have an ownership interest, although the form of service may vary. The forum may be either administrative or trial court; however, all cases are bench trials. Receivership laws may stipulate timelines for each phase of the case or set forth a maximum duration, such as two years, for the receivership appointment. In sum, these laws usually include financing options, entitlement to fees or commission, recoupment methods, and whether judicial sale is an available option. However, the model statute omitted definitions, leaving intricate details to the discretion of the adopting jurisdiction or to the presiding judge.

C. National Survey

Nineteen states currently have receivership legislation. Legislation may be adopted at the municipal or state level. The consistent anatomy of these laws allows for a comparison of aspects, such as procedural and substantive requirements, scope, terminology, presumptions, and policy objectives. The discussion of these provisions also addresses some relevant collateral issues. The appendix summarizes key points and the article concludes with an overview of best practices.

1. Petitioner

The majority format of receivership laws can be broken into two categories, based on who is allowed to bring a petition. Petitions may be public or private actions brought by individuals or organizations. Since

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82. Id. at 115–21. The model statute is presented in Chapter Four, Proposed Receivership Statutory and Administrative Recommendations.

83. The analyzed group of laws include enacted and proposed laws. Receivership bills in North Carolina and Oklahoma died in 2013 and 2015, respectively. I do not discuss these bills in this section, however, they are included in the Appendix. See HB 1666 of 2015 (Oklahoma); HB 912 of 2011 (North Carolina). Amendments to the receivership law in Missouri failed in 2015; the original law addresses only rental receivership. See SB No. 391 of 2015, amending §441.500, 570, 590, 641 (Missouri).

84. Some states only have one city that adopted vacant property receivership ordinances.

85. This refers to laws that require the receiver to rehabilitate the property as opposed to those that require the receiver to facilitate title clearance and a sale.
virtually all receivership laws give standing to government entities, the categories relate to the presence or absence of the private right of action. For example, some jurisdictions still do not allow private actions.

Ten jurisdictions give standing exclusively to municipalities, which are represented by a designated official. Under this scheme, owners receive a final notice of their violations and the government’s intention to institute proceedings. Defending against public actions tends to be more difficult because the grounds are presumed to be accurate based on the prolonged failure of owners to address citations. Therefore, owners have the burden to disprove a claim that is akin to nuisance per se. When owner-respondents assert unsuccessful objections or defenses, they are enjoined to make repairs before they are subjected to the receivership. If the owner fails to make repairs and a receiver is appointed, the owner will have an opportunity to reassume possession by paying the receiver’s lien.

There are more filings in jurisdictions with initiatives that utilize this law in a quasi-public format, allowing municipalities to recommend private organizations for the receivership appointment. However, jurisdictions that offer dual standing to public and private parties are more likely to see private actions. In Philadelphia, conservatorship petitions are usually filed by community development corporations rather than by the city. Illinois is the only jurisdiction where actions are exclusively private. Despite the greater likelihood of private filings when there is no formal initiative, the private right of action does not always garner popularity. There are jurisdictions where vacant property receivership, much like rental receivership, lies dormant. Presumably, those states have prioritized other methods of revitalization that address blight on a larger scale, such as condemnation and land banks. Alternatively, at the ordinance level, if the text is broad in scope and relies heavily on common law or equity, the process may be cumbersome and intimidating. Generally, state statutes are more nuanced, establishing distinct parameters and procedures that provide stronger guidance for petitioners.

86. CAL. HEALTH & SAFETY CODE § 17980; LA. REV. STAT. § 40:600.31–.44; BLDG., FIRE & RELATED CODES OF BALTIMORE CITY § 121; MASS. GEN. LAWS ch. 16, § 111-127I; N.J. STAT. ANN. § 55:19-85[b], OHIO REV. CODE ANN. § 3767.41; OR. REV. STAT. § 105.430–.450; S.C. CODE ANN. § 38-6; VA. CODE ANN. § 15.2-907.2; WIS. STAT. § 823.23.  
87. Therefore, the conduct creating the statute is specifically prohibited by law and is not established on a factual basis.  
88. See BLDG., FIRE & RELATED CODES OF BALTIMORE CITY § 121; MASS. GEN. LAWS ch. 16, § 111-127I; OHIO REV. CODE ANN. § 3767.41.  
89. Pennsylvania uses the term “conservatorship” instead of “receivership.”  
90. Based on an evaluation of all conservatorship filings between January 2009 and July 2015.  
91. 310 ILL. COMP. STAT. § 50 (permitting “organizations” but mentioning the role of localities).  
92. E.g., IOWA CODE § 657A.
Nine private-action jurisdictions authorize petitioning by nonprofit corporations if they are “qualified” or “certified,” but only if housing redevelopment is one of their “purposes for existence.”93 This purpose is reflected in the organization’s articles of incorporation, which are provided to the court as an exhibit to the petition. Similarly, proof of nonprofit status is provided through a tax exemption certificate. These entities have standing based on proximity requirements, such as being situated within the municipality or within a specified radius.94 Private actions typically place the burden of proof on the petitioner to establish that the property falls within the purview of the law and that the petitioner belongs to the class of parties that the law seeks to protect. Private action laws also favor upholding the owner’s property interest and typically afford owners with more opportunities to abate the conditions than they would receive under public actions.

Private individuals may also petition for receivership in certain jurisdictions based on geographic proximity. Three jurisdictions allow neighboring homeowners to bring petitions.95 In those instances, the right to petition is based upon the direct effect of the nuisance property on the neighbor’s quiet enjoyment, health, safety, and property value. Ohio is the only jurisdiction that allows tenants to bring petitions since the law is hybrid, accounting for both rentals and vacant properties.96 Moreover, the other three jurisdictions with hybrid laws do not allow tenant-petitioners.97 Therefore, Ohio has the only vacant property receivership law that extends the private right to petition to non-property owners.

Only two states allow lienholders to petition for receivership,98 whereas lienholders usually have an opportunity to “intervene” while a trial is underway or after a receiver is appointed. These lienholders, which are usually financial institutions, petition against former owner-occupants, mortgagors, and other lienholders. However, a financial institution is unlikely to use vacant property receivership as a way to manage abandoned houses since abandonment often results from initiated or looming mortgage foreclosure.99 Instead, most mortgage contracts provide an option for mortgage receivership during the pendency of the

94. PA. STAT. ANN. tit. 68, §§ 1101 et seq. (requiring a five–mile radius).
95. IOWA CODE § 657A; PA. STAT. ANN. tit. 68, §§ 1101 et seq.; R.I. GEN. LAWS ANN. § 34-44; OHIO REV. CODE ANN. § 3767.41. Most often, this distance is 500 feet.
96. OHIO REV. CODE ANN. § 3767.41.
97. CAL. HEALTH & SAFETY CODE § 17980; OHIO REV. CODE ANN. § 3767.41; TEX. LOC. GOV’T CODE ANN. § 7-214.003; WIS. STAT. § 823.23. However, rental receivership actions are not commonly brought, and many people do not know that these laws exist.
foreclosure to prevent disgruntled occupants from destroying the property or causing waste. Ultimately, if a financial institution fails to exercise its contractual right to mortgage receivership and does not maintain the property in anticipation of resale, it is unlikely to petition for vacant property receivership as well. In practice, the right of a lienholder to petition allows joint filing with individual and non-profit petitioners as a way to access financing from a party that already has a vested interest. Financing is discussed in Part V.B.7.

2. Property

Properties are eligible for vacant property receivership based on such criteria as zoning; the physical condition of the property; and occasionally, a minimum duration for those conditions. For example, residential properties are always eligible for receivership. However, four jurisdictions provide that mixed-use properties are also eligible, three allow commercial properties, two allow industrial properties, and two jurisdictions do not specify zoning. The ambiguous laws have purview over “buildings” or “structures,” creating an inference that zoning limitations do not exist. Access beyond residential zoning obviously opens more opportunities to assist communities. For example, introducing new businesses can create employment in depressed areas and provide willing investors with corresponding tax credits.

To qualify for receivership, most jurisdictions require properties to meet two or more adverse physical conditions. Most often, the benchmarks are vacancy and proof that a property is a public nuisance and unsafe. The terms “abandoned,” “vacant,” and “unoccupied” are used interchangeably across the country. Furthermore, three jurisdictions specify a minimum duration for the vacancy. However, Pennsylvania defines a

100. RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES (1997). However, this option is typically exercised for houses with higher property values.

101. IOWA CODE § 657A; N.J. STAT. ANN. § 55:19-85[b]; OHIO REV. CODE ANN. § 3767.41; R.I. GEN. LAWS ANN. § 34-44.


103. PA. STAT. ANN. tit. 68 §§ 1101 et seq.; VA. CODE ANN. § 15.2-907.2.

104. BLDG., FIRE & RELATED CODES OF BALTIMORE CITY § 121; IND. CODE ANN. § 36-7-9-20.

105. BLDG., FIRE & RELATED CODES OF BALTIMORE CITY § 121; IND. CODE ANN. § 36-7-9-20.

106. Six jurisdictions specify that the vacant building must be “unsafe” or “dangerous.” See KAN. STAT. ANN. § 12-1750, 12-1756ag; BLDG., FIRE & RELATED CODES OF BALTIMORE CITY § 121; IND. CODE ANN. § 36-7-9-20; IOWA CODE § 657A; MICH. COMP. LAWS SERV. § 125.535; S.C. CODE ANN. § 38-6.

property as “abandoned” based on the simultaneous presence of five factors, including the absence of “legal occupants” for twelve months. Therefore, unlike mortgage foreclosures, squatters do not enjoy protections under receivership laws. Furthermore, a squatter’s use of the property for illicit activities further triggers the policy objective of protecting public safety. The unfortunate caveat to seeking receivership over properties where illegal activities take place is the greater risk of vandalism or robbery during construction or after rehabilitation.

As previously discussed, how petitioners meet the “public nuisance” threshold varies by jurisdiction. Four jurisdictions require that a property be placed on an official list of blighted properties prior to the petition filing. Many jurisdictions allow the petitioner to establish the grounds for receivership by identifying housing code violations. Violations may be officially cited by an inspector or proven with photographs and lay testimony.

In addition to these criteria, receivership laws consider whether the respondents exhibit disinterest in the subject property. For example, a few jurisdictions require or consider whether there is tax delinquency and its duration. Laws often proscribe eligibility of properties that are listed for sale or subject to foreclosure prior to the filing of a petition. The premise of this exclusion is that open proceedings indicate that conditions may be abated in the near future. However, some jurisdictions allow foreclosure and tax sales to be commenced after the filing of the petition, which intercepts the hearing or even the receivership appointment. Interception is usually seen in public-action jurisdictions, perhaps because the same parties stand to benefit.

108. PA. STAT. ANN. tit. 68, §§ 1105(d)(1-5).

109. Statutes and case law generally do not address squatters. However a receiver’s legal possession of property gives it the legal right to eject trespassers in the same manner as an owner. The method used would presumably depend upon the local rules and laws.

110. This is not to be confused with “civil forfeiture,” which allows the government to seize personal and real property that are suspected of being used in criminal activity. The presence of squatters would also implicate the policy basis of receivership if their presence compromises health and safety as the result of illicit activity, vermin, etc.

111. LA. REV. STAT. § 40:600.31–.44; N.J. STAT. ANN. § 55:19-85[b]; TENN. CODE ANN. § 13-6-106; WIS. STAT. § 823.23.

112. N.J. STAT. ANN. § 55:19-85[b] (New Jersey requires a minimum of one term of tax delinquency); KAN. STAT. ANN. § 12-1750, 12-1756ag (Kansas requires a minimum of two years of tax delinquency); PA. STAT. ANN. tit. 68, §§ 1101 et seq. (Pennsylvania may use tax delinquency as a consideration, but it is not mandatory for qualification).

113. See PA. STAT. ANN. tit. 68, §§ 1101 et seq. Pennsylvania amended its conservatorship law to bar commencement of foreclosure after a petition is filed and while a case is open.

114. KAN. STAT. ANN. § 12-1750, 12-1756AG; IND. CODE ANN. § 36-7-9-20.
Many jurisdictions also articulate an objective for their receivership law. For example, Massachusetts seeks to address foreclosed residential homes. Literature from the website of the state’s attorney general provides that the associated receivership grant serves “to help communities mitigate the impact of the foreclosure crises” and to “help revitalize distressed neighborhoods and communities that have suffered the impact of foreclosure clusters. . . .” Other laws articulate the advancement of policies such as preserving the supply of housing or historical properties, creating affordable housing, and reducing burdensome costs to taxpayers.

3. Receiver

While eligibility to petition is strict, the standards for receivers are often more generous. Most jurisdictions specify who can be a receiver by setting qualifications or defining eligible parties. Generally, a petitioning municipality or nonprofit organization may recommend itself as a receiver. However, some laws permit or require a petitioner to recommend a third party. A recommended third party may be a nonprofit organization, an entity, or a person that is qualified with redevelopment experience. It would not be acceptable to create a company for the purpose of carrying out the project because courts usually consider the track record of previous projects. Several jurisdictions, including Baltimore and New Jersey, use a selection process based on a certified list of companies that have been predetermined to be qualified, experienced, and capable. Five jurisdictions cite lienholders as eligible

121. Mallach, supra note 7, at 60.
122. Illinois permits “organizations” to be petitioners and receivers; however, the law does not mention any division of state government as a potential party to the matter. “Organization” is defined as “any Illinois corporation, agency, partnership, association, firm or other entity consisting of two or more persons organized and conducted on a not-for-profit basis with no personal profit inuring to anyone as a result of its operation which has among its purposes the improvement of housing.” See 310 Ill. Comp. Stat. § 50.
123. However, Virginia does not allow the municipality to recommend third parties. See Va. Code Ann. § 15.2-907.2.
124. Id.
receivers that organize and manage rehabilitation, attaching the receiver’s lien to the pre-existing mortgage. In addition, South Carolina allows appointment of “licensed and bonded general contractors.”

4. Notice

Receivership laws require petitioners to notify all legal owners of the action. The steps that a petitioner must take to notify said parties are usually uncomplicated. Twelve jurisdictions require certified or return receipt mail and a posting on the property, whereas four permit use of regular mail. Most jurisdictions require publication as a means of alternative service when an owner or lienholder cannot be identified or located. However, two jurisdictions require publication as the primary means of notice. For example, New Jersey requires that properties be added to a list that must be published for ten days. There are also requirements concerning the type of periodical or newspaper, and the number of editions in which the list must be advertised. Only a handful of jurisdictions require personal service. In conjunction with these details, there are procedural timelines for notifying a respondent before a petition is filed or before a hearing is scheduled.

5. Respondent’s Duties and Powers

The respondents’ right to intervene may be limited after the receiver is appointed. When this limitation is not present, respondents who failed to comply with an injunction or voluntarily commence repairs may subsequently present a rehabilitation plan and attest to their ability to carry it out. Usually by default, the court must allow legal owners to exercise this right. However, following such an arrangement, four jurisdictions require respondents to post bond and repay the petitioner’s

126. IOWA CODE § 657A; BLDG., FIRE & RELATED CODES OF BALTIMORE CITY § 121; OHIO REV. CODE ANN. § 3767.41; PA. STAT. ANN. tit. 68, § 1101 et seq.; R.I. GEN. LAWS ANN. § 34-44.


129. IND. CODE ANN. § 36-7-9-20; BLDG., FIRE & RELATED CODES OF BALTIMORE CITY § 121; OR. REV. STAT. § 105.430–.450; WIS. STAT. § 823.23.

130. 310 ILL. COMP. STAT. § 50; N.J. STAT. ANN. § 55:19-85[B].


133. CAL. HEALTH & SAFETY CODE § 17980; VA. CODE ANN. § 15.2-907.2 (owners cannot intervene).

134. This time period may be statutory or at the court’s discretion.
legal fees. \(^{135}\) Even during receivership, respondents have the right to participate in court decisions that may minimize the receiver’s costs, particularly when they desire to regain possession by repaying the receiver’s lien. \(^{136}\) However, when jurisdictions disallow intervention, willful violations by respondents constitute contempt that is punishable with sanctions. \(^{137}\)

6. Receiver’s Duties and Powers

When appointed, receivers are awarded temporary possession of the property to make repairs, pay operational costs, and enter contracts for labor and financing. Six jurisdictions require receivers to make payments toward preexisting mortgages during the appointment. \(^{138}\) With possession, a receiver has a right to physically enter the property to assess the damage and develop a final improvement plan. \(^{139}\) Given that unconsented entry may well constitute trespass prior to the appointment of the receiver, \(^{140}\) receivers rarely begin with information as to what improvements are needed and how much they will cost. \(^{141}\)

Most jurisdictions permit demolition when the cost of rehabilitation exceeds the cost of building a new structure, but preservation is usually favored. In ten jurisdictions, receivers must submit periodic status reports to the court and respondents during construction. \(^{142}\) The frequency of reports ranges from every twenty days, monthly, quarterly, annually, or at the court’s discretion. \(^{143}\) Following rehabilitation, some laws allow receivers to hold the property to collect rents in order to recover expenses. This is generally recommended rather than mandated. However, four jurisdictions require the collection of rent for a specified period as the primary source of recoupment before a property may be sold to satisfy remaining lien
balances.\textsuperscript{144} The latter format allows for greater payment toward preexisting mortgagees at the time of sale since the receiver would have already satisfied a large part of its investment through rental income.

7. Financing and Compensation

Financing options for receivership vary widely. Only eight jurisdictions mention the possibility of local grants.\textsuperscript{145} Instead, the majority permit the receiver to apply for public and private loans from financial institutions.\textsuperscript{146} In addition, some receivership laws indicate that a receiver may obtain court permission to issue notes and certificates.\textsuperscript{147} However, the position of the receiver’s lien varies significantly. Four jurisdictions make the receiver’s lien superior to state taxes,\textsuperscript{148} whereas eleven jurisdictions make it superior to preexisting mortgages and liens.\textsuperscript{149} The remaining jurisdictions do not specify an order, creating an inference that local recording acts determine the outcome. Under this scenario, the filing of a \textit{lis pendens}, which is usually required, preserves the receiver’s lien position should any new liens arise.\textsuperscript{150} In addition to financing the rehabilitation, most receivership laws compensate the receiver for its work. Ten jurisdictions are ambiguous about the actual amount, leaving the figure to the court’s discretion or consistent with standards provided under local

\begin{footnotes}
\begin{enumerate}
\item[144.] S.C. CODE ANN. § 38-6 (two years); VA. CODE ANN. § 15.2-907.2 (two years); BLDG., FIRE & RELATED CODES OF BALTIMORE CITY § 121 (no longer than 5 years); MASS. GEN. LAWS ch. 16, § 111-1271 (two years).
\item[145.] S.C. CODE ANN. § 38-6; N.J. STAT. ANN. § 55:19-85[B]; CAL. HEALTH & SAFETY CODE § 17980; LA. REV. STAT. § 40:600.31--44; MASS. GEN. LAWS ch. 16, § 111-1271 (partnership fund); TEX. LOC. GOV’T CODE ANN. § 7-214.003; VA. CODE ANN. § 15.2-907.2 (abatement program); IND. CODE ANN. § 36-7-9-20 (unsafe building fund).
\item[148.] OHIO REV. CODE ANN. § 3767.41; S.C. CODE ANN. § 38-6 (possibly); TEX. LOC. GOV’T CODE ANN. § 7-214.003 (possibly); VA. CODE ANN. § 15.2-907.2.
\item[150.] CAL. HEALTH & SAFETY CODE §17980; 310 ILL. COMP. STAT. § 50; KAN. STAT. ANN. § 12-1750, 12-1756AG; LA. REV. STAT. § 40:600.31--44 (third in line, following taxes and preexisting mortgages).
\end{enumerate}
\end{footnotes}
mortgage receivership rules governing compensation. Six jurisdictions provide a particular percentage, which is applied to either the total construction costs or to the sale price; two jurisdictions provide compensation through interest on the receiver’s notes and certificates.

8. Discharge and Sale

A court may terminate receivership in two ways. First, a receiver may move to terminate the appointment after rehabilitation is complete. Second, respondents may move to terminate the receivership during its pendency by showing that the receiver has failed to meet court-ordered requirements. Failure to meet requirements can relate to missing a project milestone or carrying out construction in a manner that is inconsistent with the order.

A receiver must obtain permission from the court to sell a property. Most jurisdictions allow the receiver to sell after rehabilitation is complete or after the receiver has been in possession of the property for a stipulated time period. In order to qualify, the receiver must have complied with all aspects of the approved rehabilitation plan. In addition to the receiver’s lien, a respondent who wishes to keep the property often must satisfy pre-existing mortgage and tax arrears. When the respondent cannot or does not repay, the property may be sold with marketable title in order to satisfy the lien. However, Baltimore and South Carolina allow for the sale of the property before rehabilitation commences to an experienced entity or person that expresses a commitment to start improvements immediately after the sale. Per the “minority format,” this sort of receivership serves to facilitate the transfer of ownership.

In both instances of conveyance, receivership laws stipulate either private sale or public auction. Public auction usually requires advertisement in a newspaper for a set number of days. Respondents are able to bid, and they are entitled to a right of redemption after the sale. Receivers


153. OHIO REV. CODE ANN. § 3767.41; R.I. GEN. LAWS ANN. § 34-44.

154. Virginia–2 years; South Carolina–2 years; Missouri–5 years; Massachusetts–2 years; Kansas–2 years. See Appendix.


156. LA. REV. STAT. § 40:600.31–.44; PA. STAT. ANN. tit. 68, §§ 1101 et seq.

157. IND. CODE ANN. § 36-7-9-20; IOWA CODE § 657A; BLDG., FIRE & RELATED CODES OF BALTIMORE CITY § 121; MASS. GEN. LAWS ch. 16, § 111-127I; S.C. CODE ANN. § 38-6; VA. CODE ANN. §15.2-907.2.
may bid as well, and their lien is credited toward the purchase. Alternatively, Texas provides that the property must be sold to the state’s land bank.158 Private sale can take place only with the consent of all respondents or by a court order. A rehabilitated property is usually resold at fair market value to the receiver or a third party who has demonstrated an ability to maintain the property. The intent of the parties is a prevalent consideration since the laws serve to prevent recurrence of the circumstances that made receivership necessary.159 Therefore, participation is limited to parties who are “injured,” but also to parties who are ready and willing to restore the property and the surrounding area. To better serve this end, some laws provide continued jurisdiction by the court to oversee the property for one year after rehabilitation is completed.

VI. Best Practices

Receivership finds greater success when there are formal governmental programs that allow for the appointment of private receivers from a list of qualified entities. However, the right of neighbors and other interested parties to bring petitions ensures attention to more neglected properties. For example, the private right of action can address situations that affect a limited group of people, which may not garner the broader attention of a municipality. As for financing, the availability of grants permits the filing of more actions and “democratizes” participation. Similarly, access to a certified list of potential receivers in private-action jurisdictions would provide unaffiliated petitioners with reliable resources and relieve them of the task of establishing the qualifications of a proposed receiver to a court.

Jurisdictions that blend rental and vacant property receivership cause confusion around the purpose of the law or the possibility that one purpose may overshadow the other. This is particularly problematic given that rental receivership is no longer in wide use.160 Furthermore, jurisdictions that allow private citizens to establish a factual basis for code violations where official violations are absent allow more properties to be addressed, irrespective of bureaucratic shortcomings.

Having clear definitions for qualifying properties helps to ensure that fewer claims will be rejected and promotes judicial economy. Clear definitions also ensure a consistent benchmark and lessen the likelihood of irregular standards within a state. While some jurisdictions rely on local definitions through incorporation of other laws, Pennsylvania’s statute

158. TEX. LOC. GOV’T CODE ANN. § 7-214.003.
159. MALLACH, supra note 7, at 62.
160. Id. at 49 (“Legal obstacles often arise from the inadequacy of state statutory provisions, and practical obstacles include uncertainty about financial exposure and the difficulty of finding qualified receivers.”).
serves as an example of a legislation that was drafted with clear and thorough requirements.

Requiring respondents to post bond encourages serious efforts to challenge a claim and minimizes bad faith disruptions in private actions that generally favor the owner’s right to intervene. Alternatively, progress reports are an important way for courts to oversee the receiver’s work. However, monthly submissions may be too frequent if an average project takes between nine months and two years to complete.\textsuperscript{161} Instead, quarterly reports should suffice unless a court finds closer management to be necessary. In addition, the payment of pre-existing mortgages during the course of receivership only serves to enlarge the receiver’s lien. Instead, allowing receivers to rent the property after rehabilitation, but before the judicial sale, allows the receiver to better recoup its investment before splitting limited sales proceeds. This arrangement is beneficial when the property has substantial tax arrears since the priority status of the taxes can compromise payment to the receiver. It also promotes greater repayment of mortgages, which often bear the brunt of the deal.

Providing that tax sales and foreclosures may not commence after filing a petition is important to judicial economy and effective revitalization. Given that many target properties have been abandoned for several years, it is also practical to provide strict injunction or action deadlines to the respondents. In addition, giving the respondents a right of redemption after the property is sold creates greater risk to the project and makes it less attractive to third party buyers.

Finally, it is worthwhile to have clear guidance concerning the receiver’s compensation. A clear definition allows the receiver to better analyze its cost exposure and gauge whether it is suited for the project. Leaving the compensation at the court’s discretion creates too much room for irregularity. However, establishing a formal calculation, based on a maximum dollar amount or a percentage, may remove some of the mystery that currently dissuades participation in some states.

In conclusion, these best practices have contributed to the success of receivership laws across the country. Adoption of these successful practices may better empower ready and able parties to seize an opportunity to make a difference at the neighborhood level.

\textsuperscript{161} This statistic is based on the average duration of conservatorship litigation in Pennsylvania between 2008–2014, when properties were conserved.
<table>
<thead>
<tr>
<th>Jurisdiction/Statute</th>
<th>Property</th>
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</thead>
<tbody>
<tr>
<td><strong>California</strong></td>
<td>Residential vacant or occupied, violations</td>
<td>Gov't; Nonprofit</td>
<td>CDC</td>
<td>Notice of violations by certified mail 30 days prior to filing petition</td>
<td>Monthly report; owner cannot intervene</td>
<td>Receiver posts bond, grants, loans, collect rent and apply to repair costs</td>
<td>Not specified</td>
<td>No; law does not authorize forced sale for judgment lien</td>
<td>Same as foreclosure receiver</td>
</tr>
<tr>
<td><strong>Illinois</strong></td>
<td>Residential, unoccupied for 1 year</td>
<td>Nonprofit</td>
<td>Petitioner</td>
<td>File affidavit with clerk, publication, mail w/in 10 days of ads</td>
<td>File annual report; pay taxes, pre-receivership installments; must create low-income housing for at least a 10 year period</td>
<td>Owner posts bond, loans</td>
<td>Not specified</td>
<td>No; receiver petitions for judicial quitclaim deed if owner takes no action to regain possession after 2 yrs</td>
<td>Court determined</td>
</tr>
<tr>
<td><strong>Indiana</strong></td>
<td>Unsafe building, vacant</td>
<td>Gov't; designated person; nonprofit any capable person</td>
<td>Nonprofit</td>
<td>Certified or return receipt mail 60 days notice of conditions before filing</td>
<td>Collect and use existing or future income for repairs</td>
<td>Owner posts bond, receiver notes &amp; certificates w/interest; “Unsafe Building Fund”</td>
<td>Second to taxes</td>
<td>Auction, FMV with permission, foreclosure within 2 years of default</td>
<td>Same as foreclosure receiver</td>
</tr>
<tr>
<td><strong>Iowa</strong></td>
<td>Residential, mixed-use, abandoned or dangerous or unsafe</td>
<td>Gov't; nonprofit; landowner</td>
<td>Lienor; nonprofit</td>
<td>Personal service or certified mail, then post notice conspicuously on building &amp; publication</td>
<td>Pay pre-receivership mortgage &amp; lien installments; OR title conveyance</td>
<td>Bond, receiver notes w/interest</td>
<td>Not specified, note must be recorded when issued</td>
<td>Same manner as actions to foreclose mortgages</td>
<td>Same as foreclosure receiver</td>
</tr>
</tbody>
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<tr>
<td>Kansas KAN. STAT. ANN. §§ 12-1750; 12-1756ag</td>
<td>Residential, commercial w/2 yr tax delinquency, abandoned, unsafe, dangerous</td>
<td>Gov’t; nonprofit</td>
<td>Gov’t nonprofit</td>
<td>Certified or registered mail 20 to 60 days before filing petition</td>
<td>File annual report, pay taxes and pre-receivership lien installments (subject to tax sale); subsequent purchaser must occupy for 2 yrs</td>
<td>Not specified</td>
<td>Not specified; judicial deed extinguishes existing interests, but receivership is subject to tax sale</td>
<td>No; receiver petitions for judicial deed no action to regain possession by owner prior to completion of rehabilitation</td>
<td>Court determined</td>
</tr>
<tr>
<td>Louisiana LA. REV. STAT. § 40:600.31–.44</td>
<td>Residential, officially designated as blighted &amp; listed on “blighted housing list”</td>
<td>Gov’t</td>
<td>Gov’t; qualified rehab entity</td>
<td>Registered or certified mail to secured parties who have 45 days to present alternate plan or object</td>
<td>Quarterly reports, 6 months to start substantial work</td>
<td>No bond, grants, loans f/local gov’t, collect rent and apply to repair costs</td>
<td>Not specified; lien must be recorded</td>
<td>Receiver petitions to sell, FMV</td>
<td>Not specified</td>
</tr>
<tr>
<td>Massachusetts MASS. GEN. LAWS ch. 16, §111-127I</td>
<td>Residential, foreclosed, abandoned, distressed</td>
<td>Attorney General Office</td>
<td>Nonprofit, individual, or private company</td>
<td>Certified or registered mail 14 days prior to any hearing</td>
<td>Bimonthly reports, manage &amp; collect rent for 2 years post-rehab</td>
<td>Bond, housing partnership fund, AHI receivership fund” &amp; loans</td>
<td>Second to taxes</td>
<td>Auction, owner/lienor may tender offer</td>
<td>“Reasonable fees of receiver”</td>
</tr>
<tr>
<td>Maryland BUILDING, FIRE, AND RELATED CODES OF BALTIMORE CITY § 121</td>
<td>Vacant, unsafe structure</td>
<td>Gov’t; qualified entity; lienholder</td>
<td>Regular or certified mail to last known addresses after filing petition and before appointment</td>
<td>Title clearance; or rehabilitation* – file accounting, 5 yr timeline; owner prohibited f/intervention</td>
<td>Lienholder must bond; apply rent to expenses for 2 yrs. post-rehab</td>
<td>Second to taxes</td>
<td>Auction, FMV OR owner pays</td>
<td>Not specified</td>
<td></td>
</tr>
<tr>
<td>Michigan MICH. COMP. LAWS SERV. § 125.535</td>
<td>Residential, occupied or unoccupied, unsafe, nuisance</td>
<td>Gov’t</td>
<td>Gov’t, competent person</td>
<td>Serve complaint and summons</td>
<td>Not specified</td>
<td>Bond at court discretion, apply rents to expenses, receiver certifies</td>
<td>Second to taxes</td>
<td>Foreclose on lien, according to court order</td>
<td>Not specified</td>
</tr>
<tr>
<td>State</td>
<td>Statute</td>
<td>Jurisdiction/Statute</td>
<td>Petitioner, Receiver, Notice, Duties</td>
<td>Financing</td>
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<td>Missouri</td>
<td>SB No 391 of 2015, amending §§ 441.500, 570, 590, 641 (pending)</td>
<td>Residential, unoccupied, occupied, violates housing code</td>
<td>Petitioner, lienor, licensed attorney, RE broker</td>
<td>Quarterly reports; owner must intervene within 1 year</td>
<td>Lienholder must bond; revenue from operation, loans, receiver’s certificates</td>
<td>Yes; expressly before taxes</td>
<td>Auction to highest bidder, FMV by judicial quit claim deed</td>
<td>“Reasonable remuneration for receiver’s time”</td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>N.J. Stat. Ann. § 55:19-85[b]</td>
<td>Residential &amp; mixed-use, abandoned (unoccupied for 6 months), public nuisance, unpaid taxes</td>
<td>Gov’t designated entity</td>
<td>Quarterly reports</td>
<td>Grants, loans, certificates</td>
<td>Second to taxes</td>
<td>Owner of certificates can initiate foreclosure within 6 months after rehab</td>
<td>“Reasonable development fee” consistent w/N.J. Dep’t of Community Affairs or N.J. Housing &amp; Mortgage Finance Agency</td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td>HB 912 of 2011 (failed)</td>
<td>Greensboro; vacant building, structure or dwelling</td>
<td>Gov’t; qualified person</td>
<td>Apply rent to expenses, manage &amp; collect rent 2 years post rehab</td>
<td>Lienholder must bond; loan from approved lender</td>
<td>Second to taxes</td>
<td>Auction, FMV, deed in lieu of foreclosure</td>
<td>Lesser of 5% of sale profits or $100,000</td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>Ohio Rev. Code Ann. § 3767.41</td>
<td>Residential, mixed-use, public nuisance, occupied or unoccupied</td>
<td>Gov’t; nonprofit; landlord w/in 500 ft; tenant</td>
<td>Pay pre-receivership mortgage &amp; lien installments</td>
<td>Bond; issue notes w/mortgage bearing interest</td>
<td>Yes; expressly before taxes</td>
<td>Per subsided housing; court ordered sale 3 days after completion</td>
<td>Interest from receiver’s notes</td>
<td></td>
</tr>
<tr>
<td>Oklahoma</td>
<td>HB 1666 of 2015 (pending)</td>
<td>Residential, single or multifamily, neglected, abandoned</td>
<td>District attorney</td>
<td>Report monies received &amp; indicate need for loan</td>
<td>Bond MAY be required, apply rent to expenses, and relief determined by court</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
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</table>
| Oregon  
OR. REV. STAT. §§ 105.430–450 | Residential, public nuisance | Gov’t | Housing authority; urban renewal agency; non-profit; local agency | Regular mail 60 days before filing application | All expenditures reviewed by the court for reasonableness and necessity; frequency of reporting not specified | No bond; apply rent to expenses, public or private loans, must pay pre-receivership mortgage/lien installments | Second to taxes | Not specified | Admin fee at a hourly rate approved by court OR at a rate of 15% of total cost of abatement |
| Pennsylvania  
PA. STAT. ANN. tit. 68, §§ 1101 et seq. | Residential, commercial, industrial, abandoned, nuisance | Gov’t; non-profit; neighbor w/in 2,000 ft; lienor | Gov’t; non-profit; lienholder | Certified or registered mail w/in 30 days of filing | Submit initial and final rehabilitation plan, periodic reports at courts discretion | Lienholder-owner posts bond, receiver uses public or private loans | Second to taxes | FMV | Greater of $2,500, adjusted upward by 2% each year, or a 20% markup of expenses |
| Rhode Island  
R.I. GEN. LAWS ANN § 34-44 | Residential, mixed-use, abandoned, public nuisance | Gov’t; neighboring landowner; non-profit w/in 200 ft | Lienholder; non-profit; qualified property manager | Personal, residence service for summons 20 days before hearing | Pay pre-receivership mortgage installments | Bond; receiver notes & certificates or mortgage | Second to taxes; must record receiver’s note w/in 60 days | Court ordered sale 3 days after completion | Interest from receiver’s notes & same commission as foreclosure receiver |
| South Carolina  
S.C. CODE ANN. § 38-6 | Residential, unoccupied, unsafe, dilapidated | Nonprofit; qualified entity or individual; licensed & bonded GC | Gov’t | Regular mail indicating intent to file 60 days prior to filing to address on tax roll | Progress reports every 45 days, 2 year timeline; OR title clearance | Bond; grants, loans, receiver’s notes | Possibly before taxes | Auction, FMV, receiver may bid & use lien as credit | Not to exceed 10% of costs and expenses incurred in repairs or demolition |
| Tennessee  
TENN. CODE ANN. § 13-6-106 | Residential, certified public nuisance | Gov’t; non-profit; lienholder; neighbor | Gov’t; non-profit | Registered return receipt or certified mail after filing, conspicuous posting on building, & publication | Report every 60 days, Pay pre-receivership mortgage & lien installments | Bond MAY be required; receiver’s note or mortgage | Second to taxes | Foreclose after 180 days | Not to exceed 10% of total costs of abatement or $25,000 |
<table>
<thead>
<tr>
<th>Texas</th>
<th>Residential, single- or multi-family, hazardous</th>
<th>Gov’t; certified nonprofit</th>
<th>Qualified individual or entity</th>
<th>Certified mail regarding violations 30 days prior to filing to address on tax roll</th>
<th>Pay taxes, full reporting after repairs complete; Bond MAY be required if property &gt; 100k; grants, loans</th>
<th>Possibly before taxes</th>
<th>Sold to land bank, auction, foreclose after 180 days</th>
<th>10% of costs and expenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Virginia</td>
<td>Residential, commercial, industrial, derelict</td>
<td>Gov’t</td>
<td>Notice of violations by certified mail prior to action</td>
<td>Not specified, 2 year timeline; Real estate abatement programs</td>
<td>Yes; on par with taxes</td>
<td>Auction, publication for 4 weeks</td>
<td>Lien is collectable in the same manner as delinquent real estate taxes</td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Residential, occupied or unoccupied, declared public nuisance</td>
<td>Gov’t</td>
<td>Housing authority, CDC, nonprofit, qualified person or company</td>
<td>Regular mail, disclose intent to file 60 days prior</td>
<td>Apply rent to expenses, pay taxes, penalties &amp; assessments</td>
<td>No bond; public &amp; private loans</td>
<td>Second to taxes</td>
<td>Sell to satisfy lien, manner not specified</td>
</tr>
</tbody>
</table>

* Section 121.8 of the Baltimore ordinance provides that, “If no qualified person with an ownership interest requests appointment to rehabilitate or demolish the property, or if an appointee is dismissed, the court must then appoint a receiver of the property for the purpose of rehabilitating and managing the property, demolishing the property, or selling it to a qualified buyer.” However, the City of Baltimore exclusively uses the last option, which is the previously described “minority format” of title-clearance sales.