

REPORT BY THE INTERNATIONAL HUMAN RIGHTS COMMITTEE¹ OF THE NEW YORK CITY BAR ASSOCIATION

ADVANCING THE RIGHT TO HOUSING IN THE UNITED STATES: Using International Law as a Foundation

Introduction

International human rights law recognizes a right to adequate housing. The International Covenant on Economic, Social and Cultural Rights ("ICESCR") upholds "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." The right is further enumerated in international law through additional conventions and standards, and is continuously being explored and analyzed.

In the United States, concerns about adequate housing grew during the Great Depression, and it was then that the basic framework for America's modern-day housing laws began to form. Nevertheless, the United States, though a signatory to several international human rights conventions, including the ICESCR, has not ratified any convention that would make the right to adequate housing enforceable; and the United States does not explicitly recognize a right to adequate housing in its Constitution or in federal law.

The United States does, however, address the issue of inadequate housing through federal laws and programs that seek to alleviate the challenges to adequate housing. Likewise, states attempt to address housing issues through similar regulatory programs, and often go further than the federal protections that are in place. Unfortunately, this piecemeal approach falls far short of the protections that would be provided under a codified right to adequate housing. The weaknesses in this approach at the federal and state level are evidenced, for example, through housing discrimination and ineffective responses to natural disasters. Ultimately, although Americans have access to various federal, state, and local forms of assistance, there is no federal statutory entitlement to housing.³

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² International Covenant on Economic, Social and Cultural Rights, art. 11(1), Jan. 3, 1976, 999 UNTS 3 [hereinafter ICESCR].

³See Maria Foscarinis & Eric Tars, *Housing Rights and Wrongs: The United States and the Right to Housing*, in 3 BRINGING HUMAN RIGHTS HOME: PORTRAITS OF THE MOVEMENT 150–51 (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008).

By outlining the international right to adequate housing, this report brings into focus a handful of the current challenges the United States faces with respect to housing, including, most recently, housing discrimination arising out of economic incentives and the subprime mortgage crisis, and the effects of increasingly frequent natural disasters. By looking at the impact of some of the consequences of the patchwork approach to housing rights in the United States, the value of a codified, comprehensive, and enforceable right to adequate housing becomes clear. 4 Ideally the United States should ratify and execute the ICESCR; however, until it does so, this paper recommends that government actors draw on the comprehensive approach to the right to housing under international human rights law in order to alleviate some of the issues that plague access to adequate housing in the United States today. The international law approach to human rights not only provides a structure of concrete and realistic standards and goals, but it also draws on the international community for its legitimacy, rather than on the fluctuations of political preferences at the national or subnational level.⁵ The international community is progressing toward the legal and practical realization of economic, social, and cultural ("ESC") rights, and the United States is poised now to benefit from that process if it is willing to apply the standards and structures of the international human rights regime.

I. The Right to Adequate Housing under International Law

The right to adequate housing under international law supplies the standards to which the United States should aspire and look to until such a time as when the federal government has made it an enforceable right. According to the United Nations' Committee on Economic, Social and Cultural Rights ("CESC"),

the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.⁶

Most importantly, the right emphasizes adequacy, which has been defined to include "adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities—all at a reasonable cost."

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⁴ This report seeks only to provide an overview of housing in the United States and uses limited examples to demonstrate the consequences and failures of the US approach to housing issues. A more comprehensive analysis of the issue is beyond the scope of this report.

⁵ UN-HABITAT & OHCHR, HOUSING RIGHTS LEGISLATION: REVIEW OF INTERNATIONAL AND NATIONAL INSTRUMENTS: UNITED NATIONS HOUSING RIGHTS PROGRAMME REPORT No. 1, at 35 (2002) ("Reliance on international law to inform domestic law will result in greater consistency across domestic legal systems with respect to universally recognized human rights. Furthermore, States that turn to international law for guidance benefit from the process by which international law is derived. This process often takes a 'best practices' approach. International law is influenced by a variety of ideas stemming from diverse legal, political, economic and cultural traditions. The process of codifying norms into international law reflects the acceptance of those ideas that have been deemed by the international community to be not only 'best practices' but also universally applicable.").

⁶ Comm. on Econ., Social and Cultural Rights, General Comment 4, The right to adequate housing (art. 11(1) of the Covenant) (Sixth session), U.N. Doc. E/1992/23, annex III at 114 (1991), ¶ 7 [hereinafter General Comment 4].

⁷ Id. ¶ 7 (internal quotation marks and citations omitted).

A. The Human Rights Framework on the Right to Adequate Housing

1. International Legal Principles

The right to adequate housing is a well-protected right with clear standards and modes of implementation. Several international legal instruments set forth the international legal framework on the right to housing. The Universal Declaration of Human Rights ("UDHR") affirms that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services." The ICESCR, which is the primary instrument articulating the right to housing in international law, codifies the right, mandating that States Parties "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."

The CESC has further defined the right to adequate housing in the ICESCR in its "General Comments," which are widely recognized as authoritative interpretations of international law in matters relating to housing and other ESC rights. Most importantly, General Comment 4 provides a non-exhaustive list of factors to consider in determining whether the right to adequate housing has been satisfied: (1) legal security of tenure, (2) availability of services, (3) affordability, (4) habitability, (5) accessibility, (6) location, and (7) cultural adequacy. Expanding on these factors, the UN Special Rapporteur on the Right to Adequate Housing offers seven additional elements to consider: (1) physical security and privacy, (2) safe environment, (3) resettlement, (4) participation in decision making, (5) information, (6) freedom from dispossession, and (7) environmental goods and services.

Additional international covenants include similar protections, specifically barring discriminatory practices in the context of housing rights. The International Covenant on Civil and Political Rights ("ICCPR") "protect[s] against 'arbitrary or unlawful interference' with one's home," while the Convention on Elimination of All Forms of Discrimination against Women ("CEDAW") obligates States Parties to eliminate discrimination against women in rural areas in an effort to ensure their right to "adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications," among other rights. In addition, the Convention on the Elimination of Racial Discrimination ("CERD") obligates States Parties to prohibit and eliminate racial discrimination with respect to the right to housing, ¹⁴ and the Convention on the Rights of the Child ("CRC") obligates States Parties, "in accordance with

⁸ Universal Declaration of Human Rights, art. 25(1), G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

⁹ ICESCR, *supra* note 2, at art. 11(1).

¹⁰ See General Comment 4, supra note 6, ¶ 8.

¹¹ See id.; see also Comm. on Econ., Social and Cultural Rights, General Comment 7, The right to adequate housing (art. 11(1) of the Covenant): Forced evictions (Sixteenth session), U.N. Doc. E/1998/22 (1997) (exploring the issue of forced evictions as they relate to the right to housing).

¹² International Covenant on Civil and Political Rights, art. 17(1), Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR].

¹³ Convention on the Elimination of All Forms of Discrimination Against Women, art. 14(2)(h), Dec. 18. 1979, 1249 UNTS 13.

¹⁴ See International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(e)(iii), March 7, 1966, 660 U.N.T.S. 195.

national conditions and within their means, [to] take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing." ¹⁵ In this way, the international human rights regime approaches the right to housing through a rights-protective framework in which human rights are strengthened by each other.

2. Regional and National Protections

There are also a number of regional legal documents that bind States Parties and have special bearing on the United States. The Charter of the Organization of American States ("OAS"), which the United States has signed and ratified, requires States to "devote their utmost efforts to" the realization of the right to "adequate housing for all sectors of the population," in an effort to achieve "equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development." The Declaration on the Rights and Duties of Man, which also applies to the United States, recognizes every person's "right to the preservation of . . . health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources." Finally, the American Convention on Human Rights, which the United States has signed but not ratified, protects rights to property and privacy, and also includes a broader obligation that States Parties "undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means" the rights implicit in the OAS Charter. ¹⁸

In addition to these regional protections of the right, States have drafted or amended their constitutions or enacted domestic legislation to codify the right to housing. UN-HABITAT estimates that 75% of States have constitutions or national laws that promote the full and progressive realization of the right to adequate housing. ¹⁹ This codification of the right helps the right become justiciable:

¹⁵ Convention on the Rights of the Child, art. 27, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹⁶ Charter of the Organization of American States, chap. VII, art. 34(k), Apr. 30, 1948, 2 U.S.T. 2394.

¹⁷ American Declaration on the Rights and Duties of Man, art. XI (adopted by the Organization of American States), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System 9.

¹⁸ American Convention on Human Rights, art. 27 (adopted by the Organization of American States), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System 29.

¹⁹ UNCHS, HABITAT DEBATE, Mar. 2001, at 7 (citing UN-HABITAT STATE OF THE WORLD'S CITIES REPORT (2001)); *see also* Special Rapporteur on Adequate Housing as a Component of the Right to Adequate Standard of Living, *Rep. of the Special Rapporteur on Adequate Housing as a Component of the Right to Adequate Standard of Living*, ¶ 22,Comm'n on Hum. Rts., U.N. Doc. E/CN.4/2002/59 (Mar. 1, 2002) (by Miloon Kothari) [hereinafter Kothari 2002] ("Globally, more than 50 countries have adopted or amended national constitutions to include elements that address the right to adequate housing, many of which contain explicit guarantees to the right to adequate housing."); UN-HABITAT & OHCHR, *supra* note 5, at 36–37 ("Approximately 40 per cent of the world countries, representing various legal, social and cultural traditions, have indeed enshrined the right to adequate housing in their respective constitutions."); *id.* at 38 ("[M]ost States have expressed components of general housing policies in their national legislation."). *See generally*, UN-HABITAT, NATIONAL HOUSING RIGHTS LEGISLATION: UNITED NATIONS HOUSING RIGHTS PROGRAMME, REPORT NO. 3 (2006) (collecting national legislation on the right to adequate housing).

The establishment within State constitutions, of both individual and family rights to adequate housing and the corresponding series of State obligations to create the legal, social and economic conditions necessary for the exercise by all of this right constitute important legal foundations for further judicial and other actions geared towards ensuring this right and making it justiciable. As a result judges are being increasingly called upon to play a role in the implementation of housing rights, and the growing body of housing rights case law is evidence of this important development.²⁰

Enshrining housing rights standards in national legal frameworks may be the only manner of ensuring equitable access to adequate housing resources by disadvantaged groups and protecting the rights of the economically marginalized populations. Additionally, the incorporation of housing rights provisions in law encourages governmental accountability to citizens and provides tangible substance to what are often in practice vague international commitments by a particular State. Housing rights legislation can provide important incentives towards ensuring substantive equality of treatment throughout societies, which in turn transcend purely moral, ethical or humanitarian claims to adequate housing for all people. ²¹

B. The Specific Nature of State Obligations Under the Human Rights Legal Framework

As noted, the international obligations of States with respect to the right to adequate housing are generally set forth in the ICESCR and in "the more specific obligations to recognize, respect, protect and fulfill this and other rights." Under the ICESCR, States Parties must ensure that the right to adequate housing can be exercised without discrimination, and must also take immediate steps to ensure realization of the right upon the ICESCR's entry into force, including by monitoring the status of housing rights domestically and harmonizing their national laws with the covenant. These obligations are immediate and continuing, requiring States Parties to "move as expeditiously and effectively as possible" toward full realization of the right. While passing legislation is a good first step, it is not exhaustive of the obligations States Parties have, and "administrative, judicial, economic, social and educational steps must also be taken."

²⁰ Kothari 2002, *supra* note 19, \P 22.

²¹ UN-HABITAT & OHCHR, *supra* note **5**, at 33.

²² United Nations Office of the High Comm'r for Hum. Rts., Fact Sheet 21, The Human Right to Adequate Housing 6 (2009) [hereinafter Fact Sheet 21].

²³ See Comm. on Econ., Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (art. 2, para. 1, of the Covenant) (Fifth session), U.N. Doc. E/1991/23, at ¶ 2 (Dec. 14, 1990) [hereinafter General Comment 3].

 $^{^{24}}Id., \P 9.$

 $^{^{25}}Id., \P 7.$

CESC recognizes that implementation strategies and methods will likely vary in differing contexts. ²⁶ In addition, Article 2(1) of the ICESCR states,

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.²⁷

Thus, codifying the right to adequate housing does not mean that State Parties are required to immediately ensure adequate housing for all of its citizens, but rather it ensures that housing becomes a national priority, which requires monitoring, measuring, and policy planning—to the best of the State's abilities given its particular situation.

Once a State Party has ratified the ICESCR, any deliberately retrogressive measures are carefully analyzed to determine their necessity. States Parties must also "ensure the satisfaction of, at the very least, minimum essential levels of each of the rights" in the ICESCR. 9 For example, any state where a significant number of people are deprived of "basic shelter and housing . . . is, prima facie, failing to discharge its obligations under the Covenant. Finally, under Article 2(2), States Parties must guarantee that rights will be exercised without discrimination of any kind, including race, sex, religion, birth, and other status.

Note, however, that, as of May 5, 2013, individual complaints against States Parties that allege violations of any of the economic, social and cultural rights in the ICESCR may be submitted to the CESC for review and examination.³² This process will allow for the further development of the application of these rights as well as remedies that are appropriately responsive.³³

The United States has not yet ratified the ICESCR, ³⁴ CEDAW, or the CRC, nor may individuals file complaints against the United States under the Optional Protocol to the ICESCR. As a signatory to these conventions, however, the United States is under an obligation to "refrain from acts" that would defeat their object and purpose "until it shall have made its intention clear

²⁶See id., ¶ 9; see also Comm. on Econ., Social and Cultural Rights, General Comment 9, The domestic application of the Covenant (Nineteenth session), U.N. Doc. 1E/C.12/1998/24, at ¶ 1 (Dec. 3, 1998).

²⁷ ICESCR, *supra* note 2, at art. 2(1).

²⁸See General Comment 3, supra note 23, ¶ 9.

 $^{^{29}}$ *Id.*, ¶ 10.

³⁰ *Id*.

³¹ See ICESCR, supra note 2, at art. 2(2).

³² See Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, art. 2, U.N. Doc. A/RES/63/117 (Mar. 5, 2009).

³³ See UN Lauds New Tool Enabling Individual Complaints on Economic, Social and Cultural Rights, UN NEWS CENTER, Feb, 6, 2013,

 $[\]underline{http://www.un.org/apps/news/story.asp?NewsID=44081\&Cr=cultural\&Cr1=rights\#.UWhVvrr6bf0.}$

³⁴See Status of Treaties, U.N. TREATY COLLECTION,

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en.

not to become a party" to such conventions.³⁵ In the past, the United States has declined to support the ICESCR³⁶ and the legal principle of progressive realization, regardless of the fact that this position is not popular among other UN states.³⁷ While its denial of ESC rights as justiciable rights is an outdated position, the United States has, as discussed in this report, at a minimum begun to realize the value of these rights in its social policy. Nevertheless, as outlined below, US law—both federal and state—includes only general statements about the right to adequate housing and very few specific protections of that right.

C. Housing's Impact on Other Rights

Without full realization of the right to adequate housing, other rights become difficult to realize.³⁸ At a base level, the right to housing affects the right to life, liberty, and security of person.³⁹ For example, domestic violence victims especially need secure housing to ensure their safety.⁴⁰ The lack of adequate housing also inhibits the realization of the rights to health and well-being,⁴¹ education,⁴² and clean water and sanitation.⁴³ Furthermore, where the exercise of a

³⁵ Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

³⁶ See, e.g. Philip Alston, Putting Economic, Social, and Cultural Rights Back on the Agenda of the United States, CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE WORKING PAPER NUMBER 22, 2009: CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE NYU SCHOOL OF LAW; available at http://chrgj.org/documents/putting-economic-social-and-cultural-rights-back-on-the-agenda-of-the-united-states/ (noting the United States' general hostility toward the ICESCR).

³⁷ See, e.g., Litigating Social, Economic and Cultural Rights: Achievements, Challenges and Strategies, CENTER ON HOUSING RIGHTS AND EVICTIONS, 2003, available at http://globalinitiative-escr.org/wp-content/uploads/2012/06/Litigating-ESCR-Report.pdf.

³⁸ See General Comment 4, *supra* note 6, ¶ 9 (indicating that "the right to adequate housing cannot be viewed in

³⁸ See General Comment 4, supra note 6, ¶ 9 (indicating that "the right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and other applicable international instruments. . . . In addition, the full enjoyment of other rights—such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making—is indispensable if the right to adequate housing is to be realized and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing."); see also FACT SHEET 21, supra note 22; Katherine Hughes & Elizabeth Wickeri, A Home in the City: Women's Struggle to Secure Adequate Housing in Urban Tanzania, 34 FORDHAM INT'L L.J. 788, 812 (2011).

³⁹ See UDHR, supra note **8**, at art. 3.

⁴⁰ See, e.g., Letter from Leslie A. Rubin, Chair, Sex and Law Committee, Ass'n of the Bar of the City of New York, to Tino Hernandez, Chairman, New York City Hous. Auth. (May 6, 2005), available at http://www.nycbar.org/pdf/report/5605NYCHAletter_v1_.pdf ("Domestic violence victims' ability to maintain safe and secure housing is often key to their safety.").

⁴¹ See UDHR, supra note **8**, at art. 25; ICESCR, supra note **2**, at art. 11; see, e.g., Special Rapporteur on the Right to Adequate Housing, Rep. of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, Mission to the United States of America, Hum. Rts. Council, U.N. Doc. A/HRC/13/20/Add.4 (Feb. 12, 2010) (by Raquel Rolnik) [hereinafter Rolnik 2010] ("The link between housing and health was stressed to the Special Rapporteur throughout her visit. Poor housing conditions expose residents—especially children—to a number of diseases.").

⁴² See UDHR, supra note 8, at art. 26; ICESCR, supra note 2, at art. 13; see, e.g., NAT'L COAL. FOR THE HOMELESS, EDUCATION OF HOMELESS CHILDREN AND YOUTH, NCH FACT SHEET #10 (2007), available at http://www.nationalhomeless.org/publications/facts/education.html.

⁴³ See Special Rapporteur on the Right to Safe Drinking Water and Sanitation, Rep. of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Mission to the United States of America, Hum. Rts. Council, U.N. Doc. A/HRC/18/33/Add.4 (Aug. 2, 2011) (by Catarina de Albuquerque) [hereinafter de Albuquerque 2011]

right requires proof of residency—as is sometimes seen with the rights to vote, 44 secure employment, 45 or make decisions about the family 46—the right to housing becomes paramount.

The United States has implemented a handful of programs that support the right to housing by way of supporting other recognized rights. For example, the US Department of Housing and Urban Development ("HUD") offers a Family Unification Program that provides Housing Choice Vouchers to families if lack of shelter is the major reason a child is removed from or not returned to his or her parents' care. Additionally, the government and four philanthropic organizations initiated a \$35 million partnership to create supportive housing for homeless families in order to prevent children from entering the foster care system. Other reforms attempt to realize these rights without any support for the right to housing. For example, in all fifty states, voters no longer must reside in a "traditional dwelling." These programs and reforms are important to the realization of these other rights, but should not detract from the importance of the right to housing as a fundamental right of its own.

II. The Right to Adequate Housing Under US Law

While the United States does not explicitly recognize the right to adequate housing, elements of the right are manifested in various federal, state, and local laws and programs. Any protections of this right, or programs to support this right, are important. But this ad-hoc approach to the right to housing in the United States does not comply with the international legal standards outlined above and leads to serious shortfalls.

A. Federal Housing Laws

At the most fundamental level, the US Constitution does not include a right to housing.⁵⁰ Although arguments have been made that certain language in the Constitution is broad enough to

⁽noting that the long-term solution to the lack of access to water and sanitation and the problem of homelessness is to ensure adequate affordable housing).

⁴⁴ See UDHR, supra note **8**, at art. 21; ICCPR, supra note 12, at art. 25.

⁴⁵ See UDHR, supra note 8, at art. 23; ICESCR, supra note 2, at art. 6; see, e.g., Employment and Homelessness, NAT'L COAL. FOR THE HOMELESS, http://www.nationalhomeless.org/factsheets/employment.html.

⁴⁶ See UDHR, supra note **8**, at art. 16; ICESCR, supra note **2**, at art. 10; see, e.g., Marilyn H. v. Roger Lee H., 455 S.E.2d 570, 571 (W.V. Sup. Ct. 1995) ("To be considered fit, the primary caretaker parent must . . . provide habitable housing."); Me. Rev. Stat. Ann. tit. 19A, § 1653(3) (citing "the stability of any proposed living arrangements for the child").

⁴⁷ See Family Unification Program, U.S. DEP'T OF HOUS. AND URBAN DEV.,

http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/family.

⁴⁸ See Making It Happen: Keeping Families Together, CSH (2012), http://www.csh.org/news/making-it-happen-keeping-families-together; Partnerships to Demonstrate the Effectiveness of Supportive Housing for Families in the Child Welfare System, ADMIN. FOR CHILDREN & FAMILIES (2012),

http://www.acf.hhs.gov/grants/open/foa/view/HHS-2012-ACF-ACYF-CA-0538.

⁴⁹ NAT'L COAL. FOR THE HOMELESS, VOTING RIGHTS: REGISTRATION MANUAL, YOU DON'T NEED A HOME TO VOTE 42 (2012), *available at* http://www.nationalhomeless.org/projects/vote/Manual 2012.pdf.

⁵⁰ See Chester Hartman, The Case for a Right to Housing (2006),

http://nhi.org/online/issues/148/righttohousing.html; see also NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY, "SIMPLY UNACCEPTABLE": HOMELESSNESS AND THE HUMAN RIGHT TO HOUSING IN THE UNITED STATES 28-29 (2011) [hereinafter SIMPLY UNACCEPTABLE] (advancing scholarly arguments that the US Constitution embraces a right to housing).

encompass a right to adequate housing,⁵¹ in *Lindsey v. Normet*, 405 U.S. 56 (1972), the US Supreme Court held that the Constitution provides no "guarantee of access to dwellings of a particular quality."⁵² The debate persists, but federal law continues to offer only a limited scope of protections with respect to housing.⁵³

Federal statutes similarly do not contain an explicit right to housing. Some federal laws do provide discretionary assistance to people of low income if they meet certain criteria; 54 however, "there is no requirement that the assistance be at sufficient levels to meet basic needs such as housing."55

The nation's first significant piece of legislation addressing housing concerns is the National Housing Act of 1934, which established the Federal Housing Administration ("FHA") (later incorporated into HUD) followed by the Federal National Mortgage Association (Fannie Mae) in 1937.⁵⁶ While these measures stimulated housing construction in the United States and stabilized the housing market for middle-income Americans, 57 they provided little assistance to low-income Americans. As a result, the Housing Act of 1937 (also known as the Wagner-Steagall Act) established the nation's first framework for public housing, wherein the federal government provided funding to local housing authorities to replace substandard housing with quality, affordable units.⁵⁸ Because all operational decisions were ultimately delegated to public housing authorities through this program, much of the affordable housing stock was concentrated in low-income areas, perpetuating existing patterns of racial segregation. ⁵⁹ Notably, the 1937 Act references job creation as its first purpose, followed by housing, and provides "an apt example of affordable housing being a means to the more popular end of job creation" in the United States. 60

In its most significant attempt to address US housing deficiencies, Congress enacted the Housing Act of 1949 in the post-World War II era. Responding to trends of rapid

⁵¹ For example, the Preamble declares, "We the people of the United States, in order to . . . promote the general welfare . . . do ordain and establish this Constitution," and Article I, Section 8, states, "The Congress shall have Power . . . to . . . provide for . . . the general welfare of the United States" (emphasis added).

⁵² See Foscarinis & Tars, supra note 3, at 150. But see SIMPLY UNACCEPTABLE, supra note 50, at 27–28 (asserting that the case is "not conclusive on the constitutional status of the right to housing as that housing is defined and understood in human rights jurisprudence").

⁵³ See HARTMAN, supra note 50 (describing basic warranty of habitability and rent control protections that exist in some jurisdictions, as well as the evolution of Section 8).

⁵⁴ See SIMPLY UNACCEPTABLE, supra note 50, at 29–30.

⁵⁵ Foscarinis & Tars, *supra* note **3**, at 150.

⁵⁶ See Major Legislation on Housing and Urban Development Enacted Since 1932, U.S. DEP'T OF HOUS. AND URBAN DEV., http://portal.hud.gov/hudportal/documents/huddoc?id=Legs_Chron_June2014.pdf [hereinafter Major Legislation on Housing and Urban Development].
⁵⁷ See Charles L. Edson, Affordable Housing: An Intimate History, in The Legal Guide to Affordable Housing

^{4 (}Tim Iglesias & Rochelle E. Lento eds., 2011).

⁵⁸ See 1937: Housing Act (Wagner-Steagall Act), THE FAIR HOUSING CENTER OF GREATER BOSTON, http://www.bostonfairhousing.org/timeline/1937-Housing-Act.html [hereinafter Wagner-Steagall Act]. The Bankhead-Jones Farm Tenant Act was passed at the same time to effectuate rural housing loans. This separation of rural and urban housing policy continues today.

⁵⁹ See Wagner-Steagall Act, supra note 58; see also Edson, supra note 57, at 5 (describing the Sixth Circuit's decision in United States v. Certain Lands in Louisville, Jefferson County, Ky., 78 F.2d 684 (6th Cir. 1935), which held that federal government housing ownership under the Public Works Administration was unconstitutional). ⁶⁰ Edson, *supra* note 57, at5.

suburbanization and general urban decay, the Act provided federal funds for purposes of redevelopment and slum clearance, including peripheral services such as green spaces, water, and sewerage. Although not explicitly establishing a right to housing, the Act aspires to "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family," a goal that was also included in the 1968, 1974, and 1990 Housing Acts. Unfortunately, the federal government has never defined this goal in any tangible way, nor has it provided adequate resources to achieve it. Notably, in line with international human rights standards, the 1949 Act also calls for "sound standards of design, construction, livability, and size adequate for family life." Again, the specifics of these standards remain unclear.

The Housing Act of 1954, which amended the 1949 Act, provided funding for new construction and demolition of housing structures, but also began a new era of emphasizing rehabilitation and conservation of urban housing units. This move away from focusing only on construction toward policies of urban renewal is reflected in subsequent legislation through the 1960s, 1970s, and 1980s. In support of this trend, in 1965, the federal government formally established HUD, and laws enacted in the 1960s and 1970s advanced a plethora of initiatives targeted at ensuring that low-income families and individuals had access to affordable housing, including by establishing the Section 8 program in 1974.

By the mid-1960s, middle-class families were moving out of public housing and into their own homes; public housing then became home to many single-parent or welfare-based households. As a result, public housing authorities began charging increased rents to cover their expenses, and Congress responded by capping rents at 25% of family income. This rate was eventually increased to 30%. Congress then began providing operating subsidies to public housing authorities to make up the difference to an agreed-upon fair market rent. Congress also

⁶¹ See Major Legislation on Housing and Urban Development, supra note 56. The 1949 Act was preceded by the 1944 Veterans Administration home loan program, which precipitated a suburban housing boom.

⁶² HARTMAN, *supra* note 50.

⁶³ See id. Note, however, that the 1968 Act set a ten-year target of 26 million housing units, with 6 million reserved as low/middle income, but "the effort failed by a considerable margin, and never again was Congress foolish enough to risk such embarrassment." *Id.*

⁶⁴ Sylvia C. Martinez, *The Housing Act of 1949: Its Place in the Realization of the American Dream of Homeownership*, 11 HOUSING POLICY DEBATE (2000) (detailing the evolution of federal housing law in the United States).

⁶⁵ See id.

⁶⁶ For example, the Housing Act of 1956 provided relocation payments to people displaced by urban renewal, among other benefits. *See Major Legislation on Housing and Urban Development, supra* note 56.

⁶⁷ See Housing and Urban Development Act of 1965; Major Legislation on Housing and Urban Development, supra note 56.

⁶⁸ See, e.g., Housing and Community Development Act of 1974 (creating the Section 8 Leased Housing Assistance Payment Program); Home Mortgage Disclosure Act of 1975 and the Community Reinvestment Act of 1977 (requiring lenders to share the location of housing loans to try to discourage geographical discrimination); see also Major Legislation on Housing and Urban Development, supra note 56.

⁶⁹ See Housing and Community Development Act of 1974.

⁷⁰ See Edson, supra note 57, at 5.

⁷¹ See id.

⁷² See id.

⁷³ *See id.* (citing Housing and Urban Development Act of 1969 (Brooke Amendments), Pub. L. No. 91-152, 83 Stat. 379, 12 U.S.C. § 1701 (2010)).

established income-based thresholds for tenants to qualify for public housing, requiring that tenants earn less than 80% of the area median income, with 40% of all public housing units reserved for those families earning below 30% of the local median income. Today, the national average income level of a public housing resident is approximately 20% of area median income.

Up until the early 1980s, HUD's Section 8 program successfully attempted to increase housing stock and utilize existing housing units through one of Section 8's two major components, namely one that "provided project-based assistance to subsidize the construction and substantial rehabilitation of housing for low income tenants." Section 8's new construction and rehabilitation programs vastly increased the stock of affordable housing in American urban areas, contributing approximately 850,000 new units. However, in 1983, at President Reagan's request, Congress ceased all new construction under Section 8. The "new construction" arm of Section 8 would eventually be replaced by various grants, tax incentives, and public-private partnership programs.

Meanwhile, the "existing housing" arm of Section 8, the other major component of Section 8 that provided tenant-based assistance or rent subsidies, has evolved over the past several decades. First, the Section 8 certificate program provided rental assistance whereby families paid a percentage of their income for rent, and HUD paid the difference between the tenant's contribution and the fair market rent. In 1987, Congress enacted the Section 8 voucher program, which allowed families to rent apartments that were more than the fair market rent, if the tenant paid the additional cost. From 1983 to 1998, HUD administered both the certificate and voucher programs, but in 1998, under the Quality Housing and Work Responsibility Act, the programs were merged and a revised voucher program was instituted that allowed tenants to pay up to 40% of family income toward a "reasonable" rent that would not be subject to federal fair market rent limitations. Consequently, added flexibility was introduced for tenants, and landlords were incentivized to remain in the program. Moreover, in 2000, the program was amended to include "project-based vouchers," which stay with the landlord (rather than going with the tenants upon his or her departure from the unit). As a result of these vouchers and their guaranteed income streams, landlords have been able to obtain financing for new units.

With respect to enabling low-income home ownership—rather than just rentals—the federal government's record is "bleak." Although Congress has established a number of

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⁷⁴ See id. (citing Housing and Community Development Amendments of 1981, Pub. L. No. 97-35, 95 Stat. 384, 42 U.S.C. § 8107 (2010)); see also Housing Justice, NAT'L HOUS. LAW PROJECT, http://nhlp.org/resourcecenter?tid=34; Data Sets: Income Limits, U.S. DEP'T OF HOUS. AND URBAN DEV., http://huduser.org/datasets/il.html (detailing area median income and income limits).

⁷⁵ See NAT'L HOUS. LAW PROJECT, supra note 74.

⁷⁶ Paulette J. Williams, *Special Series: Developing Sustainable Urban Communities: The Continuing Crises in Affordable Housing: Systemic Issues Requiring Systematic Solutions*, 31 FORDHAM URB. L.J. 413, 440 (2004). ⁷⁷ *See* Edson, *supra* note 57, at 10.

⁷⁸ *See id.* at 10–17.

⁷⁹ Williams, *supra* note 76, at 440–41.

⁸⁰ *Id.* at 441.

⁸¹ See Edson, supra note 57, at 18.

⁸² See id.

⁸³ *Id*. at 19.

ownership-assistance programs over the decades, none has become as entrenched as, for example, Section 8, and many have been underfunded or underutilized. ⁸⁴ Moreover, although initially enabling low-income home ownership, the recent subprime mortgage crisis has effectively resulted in barring these families from participating in the housing market altogether. ⁸⁵

In addition to the above limited entitlement programs, the federal government has also focused on anti-discrimination protections in a number of statutes and Executive Orders when it comes to addressing housing concerns. Specifically, Title VI of the Civil Rights Act of 1964 obligates HUD to ensure that families and individuals are not subject to housing discrimination on the basis of race, color, or national origin by any HUD-funded grantee or sponsor participating in a HUD program (other than the mortgage insurance or loan guarantee programs). In addition, Title VIII of the Civil Rights Act of 1968 ("Fair Housing Act") "prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status (including children under the age of 18 living with parents of legal custodians, pregnant women, and people securing custody of children under the age of 18), and handicap (disability)." In 2012, HUD expanded discrimination protection by announcing new regulations "intended to ensure that HUD's core housing programs are open to all eligible persons, regardless of sexual orientation or gender identity."

Furthermore, in the months following the passage of the 1968 Act, the US Supreme Court, in *Jones v. Alfred H. Mayer Co.*, for the first time, recognized Congress's right to prohibit discrimination in the realm of private housing transactions. There, the Court found discrimination in housing to be so deplorable that it departed from a tradition of noninterference in private contracts⁸⁹ and recognized that people of all races have an equal right to acquire real property. In *Jones*, the Court equated racially discriminatory real estate practices with the "badges and incidents of slavery" and declared them unconstitutional.

Homelessness is the most extreme deprivation of the right to adequate housing. Despite the legal and programmatic advances that have been made, homelessness persists in the United

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⁸⁴ See id.; see, e.g., Home Ownership for People Everywhere (HOPE I), U.S. DEP'T OF HOUS. AND URBAN DEV., http://portal.hud.gov//?src=/programdescription/hope1 (noting that no further applications are being accepted).

⁸⁵ See Edson, supra note 57, at 19.

⁸⁶ See Title VI of the Civil Rights [Act], U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/programdescription/title6.

⁸⁷ Federal Fair Housing Laws, THE LEADERSHIP CONF., http://www.civilrights.org/fairhousing/laws/federal.html; see also Fair Housing – It's Your Right, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov//?src=/program_offices/fair_housing_equal_opp/FHLaws/yourrights.

⁸⁸ Press Release, U.S. Dep't of Hous. & Urban Dev., HUD Secretary Donovan Announces New Regulations to Ensure Equal Access to Housing for All American Regardless of Sexual Orientation or Gender Identity (Jan. 30, 2012).

⁸⁹ "The *Jones* case appears to be one of the first to recognize the economic equivalence between private racial discrimination and public racial discrimination. Darrell A.H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co., 77 FORDHAM L. REV. 999, 1024 (2008).*

⁹⁰ See Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

⁹¹ *Id.* at 441.

States. In fact, in 2013 there were an estimated 610,042 homeless people in the United States. ⁹² The UN Human Rights Committee has expressed concern "that some 50% of homeless people are African American although they constitute only 12% of the US population." ⁹³Although there are extensive shelter networks, approximately 40% of the homeless population in the United States remains unsheltered, meaning that these individuals live and sleep in areas that are not intended for human habitation. ⁹⁴ The effects of the economic and legal barriers addressed herein will play-out in the next several years and should be closely studied in order to comprehensively address the ongoing challenges to implementing a right to adequate housing.

In sum, although the United States has established an intricate framework for delivery of housing-related entitlements and has set a standard of non-discrimination that must not be diminished, it has never recognized a true right to housing, and discrimination in housing persists. In fact, individual states and municipalities have begun to surpass the federal government in their progress on this issue.

B. State and Local Law

1. States Generally

States have taken multiple approaches with respect to their recognition of the right to adequate housing, some of which may be helpful with respect to informing the way forward for the federal government. Approximately twenty-five state constitutions contain provisions that reference and address poverty, public health, and public welfare. Some states place the requirement to provide for the welfare of the state citizens at the county level. For example, the Alabama constitution states, It [is] the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor. In Indiana constitution states that county boards are authorized to establish farms to house those who have claims upon the . . . aid of society. The Kansas constitution states, The . . . counties of the state shall provide . . . for those inhabitants who, by reason of age, infirmity, or other misfortune, may have claims upon the aid of society. The Oklahoma constitution states, The several counties of the State shall provide . . . for those inhabitants who, by reason of age, infirmity, or

⁹² See U.S. DEP'T OF HOUSING & URBAN DEV., THE 2013 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 6 (2013). In 2013, there were approximately 54,667 homeless people in New York City. See Basic Facts about Homelessness: New York City, COAL. FOR THE HOMELESS (2012), available at http://www.coalitionforthehomeless.org/pages/basic-facts-about-homelessness-new-york-city.

⁹³ Consideration of Reports by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, United States, ¶ 22, Hum. Rts. Comm., U.N. Doc. CCPR/C/USA/CO/3.Rev. 1 (Dec. 18, 2006).

⁹⁴ See id.

⁹⁵ See NAT'L LAW CTR. ON HOMELESSNESS & POVERTY & COHRE, HOUSING RIGHTS FOR ALL: PROMOTING AND DEFENDING HOUSING RIGHTS IN THE UNITED STATES 57–58 (2006) [hereinafter HOUSING RIGHTS FOR ALL] (citing Alabama, Alaska, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, New York, Nevada, North Carolina, New Mexico, Oklahoma, Rhode Island, South Carolina, Texas, West Virginia, and Wyoming). In addition, Montana's constitution authorizes but does not require aid to the poor. See id.

⁹⁶ Ala. Const. art. IV, § 88.

⁹⁷ Ind. Const. art. IX, § 3.

⁹⁸ Kan. Const. art. VII, § 4.

misfortune, may have claims upon the sympathy and aid of the county." Still other states defer the duty to the state legislature. For example, the Mississippi constitution provides that the legislature is authorized to provide homes for those who have claims upon the aid of society. The North Carolina constitution states, "Beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and Christian state. Therefore the General Assembly shall provide for and define the duties of a board of public welfare."

Some municipalities and counties have taken additional steps to ensure a right to adequate housing, which can serve as models for states and the federal government. For example, Madison and Dane County in Wisconsin passed a resolution in 2011 that recognized housing as a human right and stressed that Madison, as a county, had an obligation to promote fair housing in line with the ICCPR and CERD. ¹⁰²

2. New York State and New York City

The New York State Constitution does not guarantee a right to housing, but it does obligate the state to care for "the needy." Article XVII, Section 1 of the New York State Constitution states specifically that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." Though originally hospitable to provisions for the "needy," ¹⁰³ the interpretation of this provision in more recent times has been the purview of the administrative functions of the government, ¹⁰⁴ not the courts. In addition, the courts have allowed the legislature great leeway with only a cursory review of state rules and regulations. ¹⁰⁵

Nevertheless, in the last several decades there have been important cases affirming aspects of the right to housing for the most vulnerable populations. In 1981, *Callahan v. Carey* was settled by consent decree ("Callahan Consent Decree")¹⁰⁶ and New York State and New York City agreed to provide shelter and board to all homeless men. In 1983, *Eldredge v. Koch* affirmed that the Callahan Consent Decree applied to homeless women as well.¹⁰⁷ In 1983 the Legal Aid Society filed suit against the then Mayor of New York Edward Koch in *McCain v. Koch* seeking, among other relief, a right to emergency housing as well as minimum standards of habitability in emergency housing.¹⁰⁸ In a landmark appellate decision regarding injunctive relief, the Appellate Court held that the trial court had the power to require government officials

⁹⁹ Okla. Const. art. XXVII, § 3.

¹⁰⁰ Miss. Const. art. XIV, § 262.

¹⁰¹ N.C. Const. art. XI, § 4.

¹⁰² See Hum. Rts. Inst., Columbia Law Sch., Bringing Human Rights Home: How State and Local Governments Can Use Human Rights to Advance Local Policy 15 (2012).

¹⁰³ HOUSING RIGHTS FOR ALL, *supra* note 95, at 63–64.

¹⁰⁴ See McCain v. Giuliani, 252 A.D.2d 461 (N.Y. App. Div. 1998).

¹⁰⁵ See id.

¹⁰⁶ See The Callahan Consent Decree, Index. No. 45282/79 (N.Y. Sup. Ct.) http://www.escr-net.org/sites/default/files/callahanconsentdecree 0.pdf.

net.org/sites/default/files/callahanconsentdecree 0.pdf.

107 See Eldredge v. Koch, 459 N.Y.S.2d 960, 961 (N.Y. Sup. Ct. 1983); see also The Callahan Legacy: Callahan v. Carey and the Legal Right to Shelter, COAL. FOR THE HOMELESS,

http://www.coalitionforthehomeless.org/pages/the-callahan-legacy-callahan-v.-carey-and-the-legal-right-to-shelter.

108 McCain v. Koch, 70 N.Y.2d 109 (N.Y. 1987).

to abide by standards of minimum habitability set by the trial court. ¹⁰⁹ This lawsuit was litigated for over twenty years and was finally settled in 2008 after litigation and various similar suits resulted in an enforceable right to shelter for homeless families with children and numerous other standards changing the regulations and requirements of the shelter system in New York. ¹¹⁰

In addition, New York State and various municipalities have passed legislation to regulate rent in order "to protect tenants in privately-owned buildings from illegal rent increases and allow owners to maintain their buildings and realize a reasonable profit." The most common forms of rent regulation include rent stabilization and rent control. Tenants in rent stabilized apartments have rent increases set at particular rates and are entitled to receive required services, to have their leases renewed, and may not be evicted except on grounds allowed by law. Rent control limits the rent an owner may charge for an apartment and restricts the right of any owner to evict tenants. In 2011, 47% of New York City's total rental housing stock was rent-regulated.

Additionally, New York City specifically offers a number of housing rights-related protections. For example, the New York City Human Rights Law prohibits housing discrimination, whether it is considered to be direct or indirect, on the basis of race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation, or alienage or citizenship status of any person. In addition, in 2011, New York City agreed to keep young adults in foster care past the statutory age limit if they faced homelessness. This type of patchwork of agreements, regulations, and laws that secure housing for vulnerable populations in New York City is demonstrative of the fact that, without clear federal guidelines, states and municipalities are left to fend for themselves in protecting and ensuring housing rights.

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¹⁰⁹ *Id.* at 120 ("It was because of the absence of any departmental regulation that it was necessary for the court to establish its own minimum standards [of habitability]. With the adoption of departmental regulations there can be no question about the minimum level of habitability which defendants must meet when they undertake to provide emergency housing.")

¹¹⁰ See also Boston v. City of New York, Index No. 402295/08 (Sup. Ct. N.Y. Cnty.); Right to Safe and Adequate Emergency Housing for Families with Children, THE LEGAL AID SOCIETY, http://www.legal-aid.org/en/lawreform/lawreform/civillawreformunit/activecases/homelessrights/bostonvnyc.aspx.

New York State Div. of Housing & Community Renewal, Office of Rent Administration, Fact Street #1: Rent Stabilization and rent control (2008).

¹¹² *Id*.

¹¹³ *Id*.

¹¹⁴ FURMAN CENTER FOR REAL ESTATE & URBAN POLICY, RENT STABILIZATION IN NEW YORK CITY.

¹¹⁵ See N.Y. Comp. Codes R. & Regs. tit. 8, §8-107(4) (2010).

¹¹⁶ Mosi Secret, *A Deal to Help Foster Youths Find Housing*, N.Y. TIMES, Oct. 20, 2011, at A30; *see also* THE NEW YORK CITY ASS'N OF HOMELESS AND STREET-INVOLVED YOUTH ORGS., STATE OF THE CITY'S HOMELESS YOUTH REPORT 27–30 (2011).

III. Shortcomings of US Housing Law and Policy

Despite its piecemeal efforts at expanding housing stock, the failure of the United States to comprehensively codify the right to adequate housing has led to a host of violations of basic civil and political rights, including continued race- and gender-based discrimination in housing and inadequate responses to natural disasters. These failures, many of which are rooted in economics and finance, have resulted in scrutiny of the right to adequate housing in the United States; both the UN's Special Rapporteur on adequate housing 117 and its Special Rapporteur on safe drinking water and sanitation 118 have spoken out about housing rights-related concerns in the United States. Specifically, in 2010, Raquel Rolnik, the UN Special Rapporteur on adequate housing, highlighted the United States' lack of housing affordability, 119 inability to fully deter housing-related discrimination, ¹²⁰ and overall lack of meaningful public participation in decision-making on national housing policies. ¹²¹Applying international human rights standards in her assessment of the United States' realization of the right to adequate housing, Rolnik indicated that, while the US generally offers a high quality of housing stock across the nation, she had "deep concern about the millions of people living in the United States today who face serious challenges in accessing affordable and adequate housing, issues long faced by the poorest people and today affecting a greater proportion of society." These shortcomings should serve as an impetus for the United States to use and adopt international legal standards so that it can take a comprehensive, enforceable approach in securing the right to adequate housing. The international human rights approach to ESC rights, including the right to housing, provides a structure and clearly defined standards that cannot be achieved through the United States' piecemeal approach. 123

A. Discrimination in the Housing Market

Despite the Civil Rights Act of 1964 and the Fair Housing Act of 1968, direct discrimination in housing persists in the United States. In 2006, the National Fair Housing Alliance estimated that there are 3.7 million fair housing violations based on race annually, 124 although most went unreported; in Fiscal Year 2011 HUD and the Federal Housing Assistance

¹¹⁷ Rolnik 2010, *supra* note 41.

de Albuquerque 2011, *supra* note 43 (noting that the long term solution to the lack of access to water and sanitation and the problem of homelessness is to ensure adequate affordable housing.)

¹¹⁹ See Rolnik 2010, supra note 41, at 7–12 (highlighting concerns about (i) methods of determining eligibility for low-income federal housing assistance, (ii) budget cuts in low-income housing assistance programs, (iii) the demolition of public housing stock, (iv) expiring long-term rental assistance contracts and Section 8 vouchers, (v) overall habitability of public housing (e.g., mold, bedbugs, overcrowding, abandonment, pollution), and (vi) practices of predatory equity, including increased rates of foreclosure over rent-stabilized units). Ms. Rolnik also noted that more than 800,000 people are homeless in the United States on any given night, with as many as 3.5 million experiencing homeless on an annual basis (rising to 4.5 million when those living with friends or family because they have lost their homes are included in the calculation). *Id.* at 13–14.

¹²⁰ See id. at 15–19 (citing the United States' robust federal, state, and local legislative framework directed at combating housing-related discrimination, but noting "significant problems in its enforcement" and that "further strengthening is required").

¹²¹ See id. at 19 (noting that residents of public housing feel "they have no voice or participation in key decisions which affect their lives").

¹²² *Id.* at 19.

¹²³ See supra note **5**.

¹²⁴ Nat'l Fair Hous. Alliance, 2006 Fair Housing Trends Report 17 (2006).

Program received only a total of 9,354 housing discrimination complaints. Almost half of those complaints were based on disability, with an additional 35% based on race, 16% on familial status, 13% on national origin, 11% on sex, 3% on religion, and 2% on color. There are many causes of this discrimination, including steering, financing and predatory lending, and tax credits.

1. Steering

Steering is a form of direct discrimination in which home buyers of certain races are directed toward neighborhoods occupied mainly by persons of the same races. Although the practice is prohibited by the Fair Housing Act, it remains a "stubbornly persistent practice," occurring in tests at the rate of 12 to 15%, ¹²⁸ and has contributed to the persistence of residential segregation. ¹²⁹

Because the Fair Housing Act makes it unlawful for an individual or firm covered by the Act to represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for sale or rental, the Supreme Court has held that that "Congress has thus conferred on all 'persons' a legal right to truthful information about available housing" and that standing to sue under the Act requires only that the plaintiff has suffered "a distinct and palpable injury." ¹³⁰ Accordingly, in *Havens Realty Corp. v. Coleman*, the Court found that (1) an African-American housing tester¹³¹ had standing to sue for being steered away from housing because of her race; (2) an African-American and white tester could have standing to sue because "steering practices... have deprived them of 'the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory practice," if they lived in areas where the practices had an appreciable effect; and (3) a non-profit housing organization had standing to sue because steering practices had impaired its "ability to provide counseling and referral services for low- and moderate-income homeseekers." The low threshold for injury and the broad spectrum of plaintiffs with standing to sue suggests that the Supreme Court takes seriously the discriminatory effects that steering has in housing.

 $^{^{125}}$ U.S. Dep't of Hous. & Urban Dev., Annual Report on Fair Housing Fiscal Year 2011, at 18 (2011). 126 $\emph{Id}.$ at 19.

¹²⁷ See, e.g., Special Rapporteur on the Right to Adequate Housing, Rep. of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, ¶ 60, Hum. Rts. Council, U.N. Doc. A/HRC/10/7 (Feb. 4, 2009) (by Raquel Rolnik) [hereinafter Rolnik 2009] ("Discrimination related to adequate housing may be the result of discriminatory laws, policies, and measures; inadequate zoning regulations, exclusionary policy development; exclusion from housing benefits; denial of tenure security; lack of access to credit; limited participation in decision-making processes related to housing; or lack of protection against discriminatory practices of private actors.").

¹²⁸ THE POVERTY & RACE RESEARCH ACTION COUNCIL & THE NAT'L FAIR HOUS. ALLIANCE, RESIDENTIAL

¹²⁸ THE POVERTY & RACE RESEARCH ACTION COUNCIL & THE NAT'L FAIR HOUS. ALLIANCE, RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES: VIOLATIONS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A RESPONSE TO THE 2007 PERIODIC REPORT OF THE UNITED STATES OF AMERICA 14 (Jan. 2008) [hereinafter RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES].

¹²⁹ Rolnik 2010, *supra* note 41.

¹³⁰ Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1983).

¹³¹ *Id.* at 373 ("In the present context, 'testers' are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices."). ¹³² *Id.* at 373–79.

2. Financing and Predatory Lending

Race also informs the availability and conditions of loans for home buyers. This problem is particularly acute when one considers that African Americans and Latinos have the lowest homeownership rates in the country, at less than 50%, compared with nearly 75% of non-Hispanic whites. 133 Home equity is important because it is the largest source of wealth for most American families ¹³⁴; before the 2008 recession, home equity composed about 66% of net worth of Hispanics and about 59% for African Americans. 135 Accordingly, "disparities in homeownership are a major component of persistent racial inequality." ¹³⁶

Financing discrimination can be seen, for example, in the effects of subprime loans, which are mortgages intended to serve groups typically unable to secure a mortgage, perhaps because of low income, a poor credit history, or other high-risk factors. To begin with, "African Americans were five times more likely to receive a subprime loan than whites, even when they qualified for a loan at lower, prime rates." ¹³⁷ "In areas where the population is no more than 20% white, 46.6% of borrowers received high-priced loans, compared with only 21.7% of borrowers in communities where whites made up at least 90% of the population." ¹³⁸ Moreover, the Center for Responsible Lending found that "for most types of subprime loans, African American and Latino borrowers are at a greater risk of receiving higher-rate loans than white borrowers, even after controlling for legitimate risk factors." ¹³⁹ In fact, "[a]ccording to Federal Reserve data, about 46% of Hispanics and 55% of African Americans who obtained mortgages in 2005 got higher-cost loans compared with about 17% of whites and Asians." High-interest loans can lead to greater household indebtedness and economic insecurity—effectively perpetuating the cycle of poverty. 141

The data reflect that subprime loans are specifically marketed to minorities—even when such individuals qualify for traditional loan products. "After controlling for various borrower characteristics, such as income and loan amount, these racial gaps are reduced but still statistically significant, with people of color tending to receive the most expensive subprime loans. These disparities are actually worse at higher income levels." ¹⁴² As indicated in a Wall Street Journal study of subprime loans made since 2000, "in 2005, 55 percent [and in 2006, 61 percent] of borrowers who received subprime loans had credit scores that would have qualified them for a conventional mortgage, indicating that credit was not a factor in the subprime loan

¹³³ See Debbie Gruenstein Bocian et al., Center for Responsible Lending, Foreclosures by Race and ETHNICITY: THE DEMOGRAPHICS OF A CRISIS 4 (2010).

¹³⁴ RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES, *supra* note 128, at 15.

¹³⁵ Peter Whoriskey, Wealth Gap Widens for Whites, Minorities, WASHINGTON POST, July 26, 2011, at A2.

¹³⁶ RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES, *supra* note 128, at 15. ¹³⁷ Rolnik 2009, *supra* note 127, ¶ 63.

¹³⁸ RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES, *supra* note 128, at 14.

¹³⁹ Debbie Gruenstein Bocian et al., Center for Responsible Lending, Unfair Lending: The Effect of RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES 3 (2006).

¹⁴⁰ Rolnik 2009, *supra* note 127, ¶ 62.

¹⁴¹ Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Rep., transmitted by Note by the Secretary-General pursuant to Human Rts. Council resolution 15/8, ¶ 26, U.N. Doc. A/67/286 (Aug. 10, 2012) [hereinafter Note by the Secretary-General 2012].

142 RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES, *supra* note 128, at 16.

disparities based on race and national origin. On a related note, subprime loans were also found to be marketed particularly toward minority women in 2005, one-third of women seeking mortgages received subprime loans whereas only one-quarter of men did.

Discrimination is also seen in the penalties associated with subprime loans. Up to 80% of subprime loans come with a penalty for paying off the loan early, compared with 2% of loans in the prime market. This has the potential to affect any low-income borrower. But, research from 2005 found that "subprime borrowers who live in zip code areas with a higher-minority concentration have a greater chance of receiving a prepayment penalty than similarly situated borrowers who live in lower minority areas." Other research found that "borrowers in rural communities are more likely than similar urban borrowers to receive subprime mortgages with prepayment penalties that have terms of three years or longer." In response to this problem, some states have passed laws and issued regulations prohibiting or limiting the use of prepayment penalties.

Race may affect the nature of the information that is given to applicants regarding home loans, 150 and the lack of traditional banking services in minority neighborhoods has given rise to predatory lending, the practice of imposing unfair lending terms on a borrower 151 by "offering them loans that are more expensive than their risk profile would warrant, overpriced mortgage insurance, and abusive or unnecessary provisions including balloon payments, large prepayment penalties and underwriting that ignores a borrower's ability to repay." Those guilty of this practice are "particularly active in communities of color, and intentionally seek out borrowers who cannot meet the terms of their loans, leading to default and foreclosure."

Not surprisingly, the discrimination found in the lending process has meant that minorities were disproportionately affected by the subprime mortgage crises and its corresponding foreclosures. The Center for Responsible Lending estimated in 2010 that, among recent borrowers, nearly 8% of both African Americans and Latinos had lost their homes to

¹⁴³ NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING: REPORT OF THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY 33 (2008).

¹⁴⁴ See Rolnik 2010, supra note 41, ¶ 64

¹⁴⁵ Avis Jones-DeWeever, *Losing Ground: Women and the Foreclosure Crisis*, NAT'L COUNCIL OF JEWISH WOMEN J., Summer/Fall 2008.

¹⁴⁶ DUBBIE GRUENSTEIN BOCIAN & RICHARD ZHAI, CENTER FOR RESPONSIBLE LENDING, BORROWERS IN HIGH MINORITY AREAS MORE LIKELY TO RECEIVE PREPAYMENT PENALTIES ON SUBPRIME LOANS 1 (2005); *see also id.* at 3 (noting that "[a] typical penalty is equal to six months' interest on any prepayment greater than 20 percent of the mortgage balance.").

¹⁴⁷ Id at 6

¹⁴⁸ *Id.* at 2 (citing John Farris & Christopher A. Richardson, Center for Responsible Lending, *The Geography of Subprime Mortgage Prepayment Penalty Patterns*, 15 HOUSING POLICY DEBATE 687 (2004)).
¹⁴⁹ *Id.* at 8.

¹⁵⁰ An Examination of Civil Rights Issues with Respect to the Mortgage Crisis: The Effects of Predatory Lending on the Mortgage Crisis: Public Briefing for the U.S. Comm'n on Civil Rights (2009) (draft statement of Lisa Rice, National Fair Housing Alliance).

¹⁵¹ See, e.g., Debbie Gruenstein Bocian et al, Race, Ethnicity and Subprime Home Loan Pricing, 60 J. OF ECON. & BUS., 110 (2008); John Relman, Foreclosures, Integration, and the Future of the Fair Housing Act, 41 IND L. REV. 629 (2008).

¹⁵² Note by the Secretary-General 2012, *supra* note 141, ¶ 25.

¹⁵³ RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES, *supra* note 128, at 17.

foreclosures, compared with 4.5% of whites. This was true even after controlling for differences in income patterns. Although whites represent the majority of "at-risk" borrowers, African American and Latino borrowers are more likely to be at imminent risk of foreclosure (21.6% and 21.4%, respectively) than whites (14.8%). This means that, as a whole, minorities have been disproportionately affected by predatory subprime lending: "Subprime loans are more likely than prime loans to end in foreclosure, and subprime foreclosures have been disproportionately concentrated in low-income and predominantly African American neighborhoods." Accordingly, "the indirect losses in wealth that result from foreclosure as a result of depreciation to nearby properties will disproportionately impact communities of color." 157

In the aftermath of the subprime mortgage crisis, there has been, and likely will continue to be, some movement toward attempting to rectify the harms suffered by minorities due to predatory lending practices. In late 2011, Countrywide Financial Corporation agreed to pay African American and Latino homeowners \$335 million for fraudulently and deceitfully encouraging them to choose high-risk loans during the period 2004 to 2008 even if they qualified for other types of credit. However, when parsed out, the settlement awards as little as \$10,000 to some of Countrywide's customers, not enough to rebuild predominantly minority neighborhoods with vast numbers of foreclosures. Wells Fargo also agreed to pay at least \$175 million to settle accusations that it discriminated against African-American and Hispanic borrowers by charging higher fees to more than 30,000 minority borrowers and by steering more than 4,000 minority borrowers into subprime mortgages.

In early 2012, forty-nine states agreed to accept \$25 billion from the top five mortgage servicers for widespread foreclosure abuses. This settlement's major features include \$5 billion for state attorneys general to give to foreclosed borrowers, \$20 billion for financial relief to borrowers in connection with loan servicing activities (including \$10 billion for principal loan modifications), servicing reforms for five banks, monitoring and enforcement, and the release of claims for servicing practices, robo-signing, and foreclosure processing practices. Mortgage servicers have three years to satisfy the settlement terms, and will not be released from criminal claims, securitization claims, or the claims of individual borrowers. However, the settlement has attracted growing criticism from borrowers, as the settlement money is expected to reach only 1 million of the 11 million borrowers who are behind on their mortgages.

¹⁵⁴ FORECLOSURES BY RACE AND ETHNICITY, *supra* note 133, at 2.

¹⁵⁵ Id at 3

¹⁵⁶ RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES, *supra* note 128, at 17.

¹⁵⁷ FORECLOSURES BY RACE AND ETHNICITY, *supra* note 133, at 3.

¹⁵⁸ See Charlie Savage, Countrywide Will Settle a Bias Suit, N.Y. TIMES, Dec. 22, 2011, at B1.

¹⁵⁹ Anita Hill, *How to Restore Communities Blighted by Subprime Loans*, TIME, Jan. 6, 2012.

¹⁶⁰ Charlie Savage, Wells Fargo Will Settle Mortgage Bias Charges, N.Y. TIMES, July 13, 2012, at B3.

¹⁶¹ See, e.g., Closing the Gaps: What States Should Do to Protect Homeowners from Foreclosure, CTR. FOR RESPONSIBLE LENDING (May 2013), http://www.responsiblelending.org/mortgage-lending/policy-legislation/states/Final-Servicing-Policy-Brief-4-8-2013.pdf.

¹⁶² Id.

¹⁶³ Press Release, United States Dep't of Justice, Federal Government and State Attorneys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012).

¹⁶⁴ Closing the Gaps, supra note 161.

Moreover, borrowers whose mortgages are with Bank of America, CitiBank, Wells Fargo, J.P. Morgan Chase, or Ally Financial will receive only principal reductions and no other benefits under the plan. 165

In addition to these settlements, litigation on this matter is likely to continue. In October 2012, the American Civil Liberties Union brought suit against Morgan Stanley in the District Court for the Southern District of New York. The ACLU claims that Morgan Stanley is culpable for predatory loans made through the New Century Financial Corporation because it "lent billions of dollars to New Century . . . and pressured it to make troublesome loans to African-American borrowers who could not afford them." ¹⁶⁷

3. Tax Credits

Tax credits present additional housing-related complications for racial minorities and women. In 2012, the mortgage interest tax deduction cost the United States almost double what it spends on housing programs designed specifically for low-income households. 168 While the "federal housing assistance budget authority has decreased 48% since 1976, housing related tax expenditures increased by 260% since 1976, totaling \$119.3 billion in 2004." Because of government support through the home mortgage interest tax deduction, home ownership rates have remained high in the United States. ¹⁷⁰ However, this support has reached only a limited segment of the American population. ¹⁷¹ Diverting assistance away from other housing programs such as Section 8 vouchers and public housing and toward home mortgages comes at a price, as the demographic group primarily benefitting is "wealthy, white, and male." ¹⁷²

Meanwhile, "Low Income Housing Tax Credits" were originally developed in the 1980s to give private developers an incentive to invest in affordable housing. ¹⁷³ Through this HUD program, developers get tax credits for constructing low-income housing. ¹⁷⁴ The credits are then sold to raise money and offset the amount of debt a developer must incur to build a project. 175 Since developers have less debt under this scheme, they can then charge lower rents. 176 However, many low-income housing tax credit programs have not succeeded in reducing racial

¹⁶⁵ Les Christie, Rage Grows Over Mortgage Deal, CNN MONEY, Mar. 13, 2012, available at http://money.cnn.com/2012/03/13/real_estate/mortgage-settlement/index.htm.

¹⁶⁶ See Jessica Silver-Greenberg, A.C.L.U. Sues Morgan Stanley Over Mortgage Loans, N.Y. TIMES, Oct. 15, 2012, at B1; see also Adkins et al. vs. Morgan Stanley, ACLU (Feb. 5, 2013), available at http://www.aclu.org/racialjustice/adkins-et-al-vs-morgan-stanley.

Silver-Greenberg, supra note 166.

¹⁶⁸ Yonah Freemark & Lawrence J. Vale, *Illogical Housing Aid*, N.Y. TIMES, Oct. 31, 2012, at A23 ("Today, the federal government spends about \$40 billion annually on housing programs designed specifically for low-income households. Yet the mortgage interest deduction alone costs the Treasury some \$80 billion a year.")

¹⁶⁹ INTERNATIONAL WOMEN'S HUMAN RIGHTS CLINIC, THE CITY UNIVERSITY OF NEW YORK SCHOOL OF LAW, A GENDERED PERSPECTIVE ON THE RIGHT TO HOUSING IN THE UNITED STATES 20 (2010) (citations omitted). ¹⁷⁰ *Id*.

¹⁷¹ *Id*.

¹⁷³ See What Happens to Low-Income Housing Tax Credit Properties at Year 15 and Beyond?, U.S. Dep't OF HOUS. & URBAN DEV. (2012).

 $^{^{174}}$ See id.

¹⁷⁵ See id.

¹⁷⁶ See id.

and economic class segregation because of the largely hidden practices of steering, discriminatory site determination, and barriers to participation. To ensure that Low Income Housing Tax Credits have a positive impact, a number of steps (reporting on racial and economic demographic markers, affirmative marketing in appropriate languages, and prioritization of families with the lowest incomes, or those with disabilities) have been recommended in a number of studies (but only sporadically adopted).¹⁷⁷

B. Discrimination in the Rental Market

Discrimination is also common in the rental market. Some reports document private landlords refusing to accept housing subsidies, including Section 8 vouchers and public assistance shelter payments; landlords are also not required to accept housing subsidies under federal law. Because the majority of voucher holders are minorities, the refusal to accept these vouchers is, effectively, another form of indirect racial discrimination. That said, many states and municipalities now prohibit discrimination based on source of income. ¹⁷⁸ However, there is great difficulty in enforcement, which is exacerbated by the lack of a right to counsel in civil proceedings and the high number of pro se defendants in eviction hearings and proceedings.

The privatization of public housing as advocated by HUD, the Obama Administration, and former administrations raises concerns of potentially increased discrimination through the refusal to accept Section 8 vouchers, increased ease of evictions of Section 8 tenants, and the loss of affordable units as a result of foreclosure and conversion from Section 8 voucher-friendly units to market rate rentals. Scaled-down Rental Assistance Demonstration ("RAD") legislation was passed in November 2011. HUD asserts that this law

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¹⁷⁷See, e.g., Sarah Bookbinder et al., Poverty & Race Research Action Council & Lawyers' Committee for Civil Rights Under Law, Building Opportunity: Civil Rights Best Practices in the Low Income Housing Tax Credit Program (2008).

¹⁷⁸See, e.g., Isabelle M. Thabault & Eliza T. Platts-Mills, *Discrimination Against Participants in the Housing Choice Voucher Program: An Enforcement Strategy*, POVERTY & RACE, Jan./Feb. 2006, at 11 (noting that DC, eleven states (California, Connecticut, Maine, Maryland, Massachusetts, Minnesota, New Jersey, North Dakota, Oklahoma, Utah and Vermont) and several municipalities had similar nondiscrimination laws). New York State does not have such a prohibition, but the following municipalities do: Buffalo, New York City, Hamburg, Nassau Co., and West Seneca. POVERTY & RESEARCH ACTION COUNCIL, KEEPING THE PROMISE: PRESERVING AND ENHANCING HOUSING MOBILITY IN THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM, app. B (updated March 2011). New York City's anti-discrimination law was amended to prohibit source of income discrimination by Local Law 10, 2008. NEW YORK CITY, NY., CODE § 8-101 (2008); *Tapia v. Successful Management Corp.*, N.Y. Sup. Ct., 24 Misc.3d 1222(A) (2009) (finding a landlord's refusal to accept Section 8 vouchers was prohibited under Local Law 10 & J-51). ¹⁷⁹ Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 419 (2001); Barbara Mulé & Michael Yavinsky, *Saving One's Home: Collateral Consequences for Innocent Family Members*, 30 N.Y.U. REV. L. & SOC. CHANGE 689, 696 (2006) (pointing out the complexity of legal system for pro se litigants and questioning how well they understand procedure).

¹⁸⁰ See, e.g., CAMPAIGN TO RESTORE NAT'L HOUSING RIGHTS & NAT'L ECONOMIC & SOCIAL RIGHTS INITIATIVE, SELLING OFF PUBLIC HOUSING: A HUMAN RIGHTS ANALYSIS OF HUD'S NEW FUNDING PLAN (2011); Michael Zmora, Note and Comment: Between Rucker and a Hard Place: The Due Process Void for Section 8 Voucher Holders in No-Fault Evictions, 103 NW. U. L. Rev. 1961 (2009).

¹⁸¹ Consolidated and Further Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat 552.

provides the opportunity to test the conversion of public housing and other HUD-assisted properties to long-term, project-based Section 8 rental assistance to achieve certain goals, including the preservation and improvement of these properties through access by public housing agencies (PHAs) and owners to private debt and equity to address immediate and long-term capital needs. RAD is also designed to test the extent to which residents have increased housing choices after the conversion, and the overall impact on the subject properties. ¹⁸²

Despite these and similar statements, housing advocates fear that RAD will actually foster many of the same concerns as its unsuccessful predecessors, including the loss of affordable housing, increased reliance on housing vouchers without an increase in funding, and diminishing tenant protections. ¹⁸³

The current US trend toward housing privatization highlights the role of discrimination relating to race and class in US housing policy. ¹⁸⁴ This trend is especially worthy of attention given the current crisis in the private housing market, with its enormous increase in foreclosure rates ¹⁸⁵ and its link to predatory lending. ¹⁸⁶

C. Post-Natural Disaster Housing Crisis

The United States' failure to recognize a right to adequate housing further complicates its response to an increasing number of devastating natural disasters. ¹⁸⁷ A response to such disasters based on international human rights law would require an assessment of both the extent of the disaster and the ongoing implementation of the right to adequate housing. ¹⁸⁸ Were the federal government to recognize such a right, a number of key items to be assessed could be incorporated into its disaster recovery plans, including (i) the ratio of housing damage to overall damage, (ii) damage to rental units versus owner-occupied units, (iii) degree of habitability, (iv) cost to rebuild, (v) measurement of damage concentration, and (vi) pre-disaster local conditions such as housing costs and other social and economic data. ¹⁸⁹ During post-disaster recovery

¹⁸² Rental Assistance Demonstration: Processing of Conversion Requests Submitted under the Partial Rental Assistance Demonstration Notice, 77 Fed. Reg. 59,628 (Sept. 28, 2012).

¹⁸³ Human Impact Partners et al, The Rental Assistance Demonstration Project: A Health Impact Assessment 3 (2012).

¹⁸⁴ See, e.g., International Women's Human Rights Clinic, The City University of New York School of Law, *supra* note 169; Ira Goldstein & Dan Urevick-Ackelsberg, Subprime Lending, Mortgage Foreclosures and Race: How Far Have We Come and How Far Have We To Go?

¹⁸⁵ NAT'L COAL. FOR THE HOMELESS ET AL., FORECLOSURE TO HOMELESSNESS 2009: THE FORGOTTEN VICTIMS OF THE SUBPRIME CRISIS (2009).

¹⁸⁶ Nick Carey, Racial Predatory Loans Fueled US Housing Crisis, REUTERS, Oct. 4, 2010.

¹⁸⁷ Doyle S. Rice, *Report: Climate Change Behind Rise in Weather Disasters*, USA TODAY (Oct. 12, 2012), *available at* http://www.usatoday.com/story/weather/2012/10/10/weather-disasters-climate-change-munich-re-report/1622845/.

report/1622845/.

Recovery After Natural Disasters, 22 HARV. HUM. RTS. JOURNAL 169, 184–85 (2009). Gould argues, however, that the international rights framework currently fails to recognize housing rights for the "thousands of individuals and families who dramatically lose their homes every year to natural disasters" and that the human rights framework should be developed further to address this shortcoming. See id. at 204.

¹⁸⁹See id. at 185 (citing MARY COMERIO, DISASTER HITS HOME: NEW POLICY FOR URBAN HOUSING RECOVERY 38-45 (1998)); see also Special Rapporteur on the Right to Adequate Housing, Rep. of the Special Rapporteur on

periods, authorities could then measure annually, for example, the number of houses rebuilt, the profile of the returned population, and community participation, all as marked against this predisaster and pre-recovery information. As a result, these measurements could be used to ensure access to affordable, decent housing by all populations impacted during the disaster by streamlining disaster relief efforts, exposing discriminatory practices, appropriately allocating federal, state, and local relief funds, and otherwise.

Hurricane Katrina looms large in recent memory with respect to concerns about a lack of adequate housing in a post-disaster context. In the third year following the storm, 72% of New Orleans's population had returned to the city; however, approximately 70% of affordable rental housing was decommissioned or demolished due to the storm. ¹⁹¹ As a result, rents skyrocketed. ¹⁹² Furthermore, in the post-disaster period, HUD opted to demolish 4,500 severely damaged rental units and declined to renovate others, thus further exacerbating the situation. ¹⁹³ In fact, although New Orleans's rate of returning residents is impressive, there is a disparity in the rates of return between those who were able to rebuild with their own funds and those who were reliant on government aid. ¹⁹⁴ As has been well documented, the Lower Ninth Ward, home to a substantial low-income African-American population, has experienced "minimal levels of return," while the Lakeview district, home to a white, middle-class population, has experienced "significant" recovery. ¹⁹⁵ Recognition of a right to adequate housing, as defined under international human rights law, would go a long way toward curing the shortfalls in housing that were experienced by the most vulnerable populations in post-Katrina New Orleans.

The criticisms and shortcomings of the response to Hurricane Katrina have certainly informed federal, state, and local governments' response to the housing crisis that arose in New York and New Jersey following Superstorm Sandy. Moreover, the scale of the housing shortage in post-Sandy New York and New Jersey is far eclipsed by that experienced in the wake

http://www.nyc.gov/html/nycha/html/residents/hurricane.shtml; NYC Housing Recovery Portal http://www.nyc.gov/html/recovery/html/home/home.shtml.

adequate housing as a component of the right to an adequate standard of living, 22–25, U.N. Doc. A/66/270 (Aug. 5, 2011) (by Raquel Rolnik) [hereinafter UN Disaster-Recovery Report] (setting forth recommendations for a rights-based approach to post-disaster recovery efforts with respect to housing rights in the short and long terms).

190 See Gould, supra note 188, at 187.

¹⁹¹ See id. at 189; see also Rolnik 2010, supra note 41, at 9 (indicating that the demolition of New Orleans' "Big Four" public housing complexes had resulted in the displacement of 20,000 people).

¹⁹²See id. at 189. For example, fair market monthly rent for a two-bedroom apartment rose from \$676 to \$978 in the two years following the storm (a rise of 45%). *Id.; see also* Gwen Filosa, *Post-Storm Housing Costs Put Many on the Edge, The Times-Picayune*, Sept. 14, 2010.

¹⁹³ See Gould, supra note 188, at 189.

¹⁹⁴ See id.

¹⁹⁵ See id.; see also Kathy Lohr & Marisa Peñaloza, Left Out: Post Katrina Housing Battle Continues, NPR NEWS, Aug. 29, 2011, available at http://www.npr.org/2011/08/29/140012919/left-out-post-katrina-housing-battle-continues (describing race-related deficiencies in the governmental response to the Post-Katrina housing crisis in the Gulf region).

¹⁹⁶ See, e.g., Margaret Hartmann, With Thousands Still in the Dark, Officials Try to Solve the Post-Sandy Housing Crisis, NEW YORK, Nov. 12, 2012, available at http://nymag.com/daily/intelligencer/2012/11/officials-try-to-solve-post-sandy-housing-crisis.html; Charles V. Bagli, US Asks New York Landlords for Vacant Apartments to House Displaced Families, N.Y. TIMES, Nov. 11, 2012, at A22; Legal Alert, Lawyers Alliance for New York, Recent Temporary Changes to Rules for Projects Financed with Low Income Tax Credits (Nov. 12, 2012); Hurricane Sandy Housing Update, NYCHA (Dec. 21, 2012), available at http://www.nyc.gov/html/nycha/html/residents/hurricane.shtml; NYC Housing Recovery Portal,

of Hurricane Katrina.¹⁹⁷ However, a human rights-based housing framework, which recognizes the right to adequate housing and incorporates clearly-defined measurements of achievement, would be indispensable in crafting both preparation and post-disaster response plans that ensure that (i) the needs of the most vulnerable are met and (ii) housing-related discrimination—whether intentional or inadvertent—does not come into play.¹⁹⁸ Undoubtedly, government officials have gained valuable experience in dealing with these issues during recent disasters, but a human rights approach would ensure ongoing monitoring in the weeks, months, and years following the initial response.

IV. Conclusion

The international right to adequate housing is a well-established and comprehensive approach to housing. As described above, the United States has attempted over time to ensure the welfare of its citizens through ad hoc housing programs and state laws. However, this approach is too fractured to fully address the immense challenges residents face in accessing adequate housing in the United States. International human rights law provides a fulsome framework for addressing these challenges, either by ratification of the ICESCR (and its supporting Optional Protocol) or through application of the best practices that have evolved the monitoring mechanisms used under international law. Such a framework is needed to streamline and create an effective approach to housing in the United States.

International Human Rights Committee

Anil Kalhan, Chair Elisabeth Wickeri, Immediate Past-Chair

February 2016

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¹⁹⁷ See Andy Newman, Comparing Hurricanes: Katrina v. Sandy, N.Y. TIMES, Nov. 28, 2012, at A28 (comparing the Gulf region's late 2005 1.2 million hurricane-related housing losses to Sandy's approximately 308,000). ¹⁹⁸ See U.N. Disaster-Recovery Report, *supra* note 189, at 9–10 (describing risk of overlooking vulnerable populations during recovery efforts).