

PROMISES STILL TO KEEP: THE FAIR HOUSING ACT FIFTY YEARS LATER

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INTRODUCTION

It has been fifty years since Congress enacted the Fair Housing Act (the Act).¹ The law, the third in a trilogy of groundbreaking civil rights

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¹ JORGE ANDRES SOTO & DEIDRE SWESNIK, THE PROMISE OF THE FAIR HOUSING ACT AND THE ROLE OF FAIR HOUSING ORGANIZATIONS 1 (2012), <https://www.acslaw.org/wp-content/>

laws enacted in the 1960s,² aimed to undo the shameful legacy of *de jure* and *de facto* race-based housing discrimination that excluded Blacks from white communities. Laws and policies that persisted for much of the twentieth century segregated neighborhoods and whole regions into Black and white districts, denied home-owning opportunities to African Americans, and relegated available affordable housing to low-income neighborhoods. The result was “two societies, one black, one white—separate and unequal.”³ The Act was intended by its drafters to right that wrong by both ending racial discrimination and eradicating systemic segregation in housing.⁴

In the five decades since its ratification, the optimism of the Act’s drafters has yielded to the frustrations of lax enforcement, administrative neglect, federal budget cutbacks, the rise of exclusionary economic zoning measures, gentrification, and ever dwindling stocks of affordable and habitable housing for low-income individuals. While the Act has facilitated a decline in race-based housing segregation for middle-income Blacks, racial segregation by residence for those of low-income remains high and class-based segregation has been rising.⁵ Because people of color are disproportionately low-income, economic segregation achieves many of the same outcomes as explicit race-based exclusion.⁶

This Article considers how the Act’s aims have been impeded by drastic declines in the quantity and quality of available subsidized housing, the practice of tenant blacklisting, and exclusionary zoning.

uploads/2018/04/Soto_and_Swesnik_-_Promise_of_the_Fair_Housing_Act_1.pdf [https://perma.cc/H9DB-8EJ5].

² The Civil Rights Act of 1964 was the first of those three statutes, and the Voting Rights Act of 1965 was the second. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.); *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

³ NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

⁴ One of the Fair Housing Act’s principal architects, Walter F. Mondale, has noted that the Act’s aims were both “anti-discrimination” and “pro-integration,” and that “to the law’s drafters, those ideas were not in conflict.” Walter F. Mondale, Opinion, *The Civil Rights Law We Ignored*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/opinion/walter-mondale-fair-housing-act.html> [https://perma.cc/73J4-AFAB].

⁵ *See generally* ROBERT D. PUTNAM, OUR KIDS: THE AMERICAN DREAM IN CRISIS (2015).

⁶ Richard D. Kahlenberg, Opinion, *The Walls We Won’t Tear Down*, N.Y. TIMES (Aug. 3, 2017), <https://www.nytimes.com/2017/08/03/opinion/sunday/zoning-laws-segregation-income.html> [https://perma.cc/2CJ8-4X2T].

Those and other barriers exist as the need for affordable housing rises, with one in three Americans struggling to get by.⁷ Reclaiming the Act's promise depends on the coalescing of diverse and varied alliances around the unifying premise that decent housing is a human right. We can and must arrive at a collective will to assure that no one is denied a safe place to call home and all are afforded the opportunity to reap the benefits of inclusion.

I. HISTORICAL AND THEORETICAL ANTECEDENTS: HOW GOVERNMENT CREATED AND ENFORCED HOUSING SEGREGATION

The Fair Housing Act hoped to cement into law the legacy of the civil rights movement and its calls for housing justice. Passed one week after the assassination of the Reverend Dr. Martin Luther King, Jr., the law represented a bipartisan consensus that, in the words of one of the Act's drafters, "[s]omething had to be done—not just about America's ugly history of housing discrimination but also about the divided system that had led the nation to this awful moment."⁸ The law set about to right the wrongs of the racially explicit laws and policies that quite purposefully imposed segregation and determined where African Americans could live.⁹

Those laws are by no means historical relics. It is startling that for the first half of the twentieth century, *less than two percent of housing was sold to minorities*, and only one percent of housing was built in minority subdivisions.¹⁰ That figure is not a product of happenstance but instead is the result of deliberate laws and procedures. Indeed, "minority subdivisions" did not arise as a matter of choice or preference.

⁷ Brad Plumer, *One in Three Americans Slipped Below the Poverty Line Between 2009 and 2011*, WASH. POST: WONKBLOG (Jan. 8, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/01/08/one-in-three-americans-slipped-below-the-poverty-line-between-2009-and-2011/?noredirect=on&utm_term=.71b574254848 [<https://perma.cc/JZ9A-QYVC>]; Greg Kaplan, Giovanni L. Violante & Justin Weidner, *The Wealthy Hand-to-Mouth*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY 77, 80, 101, 113 (Spring 2014), https://www.brookings.edu/wp-content/uploads/2016/07/2014a_Kaplan.pdf [<https://perma.cc/KAQ2-49J2>].

⁸ Mondale, *supra* note 4.

⁹ SOTO & SWESNIK, *supra* note 1, at 1, 4–5, 7.

¹⁰ ROBERT D. LEIGHNINGER, JR., LONG-RANGE PUBLIC INVESTMENT: THE FORGOTTEN LEGACY OF THE NEW DEAL 134–35 (2007) ("Thus New Deal housing programs that initially envisioned a better quality shelter for all citizens came unstuck, dividing along racial and class lines.").

They, like housing projects in “inner cities” (a euphemism for government-created ghettos), were built to assure that African Americans would live separately from whites.¹¹

Franklin Delano Roosevelt’s New Deal and its National Housing Act of 1934¹² created a Federal Housing Administration (FHA) armed with discriminatory rules that quite overtly excluded Blacks from lending opportunities generously made available to whites. The FHA redlined maps to prescribe where Blacks could live.¹³ Those areas within the redlines, often quite literally “on the other side of the tracks,” were the run-down, isolated, and impoverished zones.

In response to the problems that its social engineering had wrought, in 1937 the government passed the U.S. Housing Act, the first federal legislation providing for low-income tenants.¹⁴ It intended to improve unsafe and unsanitary housing conditions in the “inner cities” and increase stocks of habitable housing for low-income families.¹⁵ That statute ordained even stricter racial segregation in housing¹⁶ and failed to achieve its stated purpose of increasing the quality and quantity of

¹¹ RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* xvi (2017).

¹² The Act was intended to “encourage improvement in housing standards and conditions, [and] to provide a system of mutual mortgage insurance . . .” *National Housing Act (1934)*, LIVING NEW DEAL, <https://livingnewdeal.org/glossary/national-housing-act-1934> [<https://perma.cc/7KPW-QSHQ>] (last visited Oct. 17, 2018). The Act created the two governmental agencies, the Federal Housing Administration (FHA) and the Federal Savings and Loan Insurance Corporation (FSLIC). *Id.* The FHA program allowed 12 million to improve their housing standards and conditions. *Id.* For the first time, residents could afford “better planned, better [sic] built, and better financed homes than ever before.” *Id.*

¹³ LEIGHNINGER, JR., *supra* note 10, at 134.

¹⁴ United States Housing Act of 1937 (Wagner-Steagall Housing Act), Pub. L. No. 75-412, 50 Stat. 888 (codified as amended in scattered sections of 42 U.S.C.).

¹⁵ See Allison Pappas, *The History of Public Housing: Started Over 70 Years Ago, Yet Still Evolving . . .*, SOCIAL WORK HELPER (Feb. 4, 2013), <https://www.socialworkhelper.com/2013/02/04/the-history-of-public-housing-started-over-70-years-ago-yet-still-evolving> [<https://perma.cc/K8CS-KQP5>]. In order to qualify as “low-income,” a family’s income could be no greater than “five times the cost of rent, or six times” for those who had at least three or more children. *Id.* The Act also provided loans to public housing agencies that would support low-rent public housing construction. *Id.* The U.S. Housing Act resulted in a program that was “geared to the needs of the submerged middle class, tied to slum clearance, and purged of any element of possible competition with business.” Lawrence M. Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF. L. REV. 642, 647 (1966).

¹⁶ ROTHSTEIN, *supra* note 11, at 24 (“[T]he federal government’s housing rules pushed these cities into a more rigid segregation than otherwise would have existed.”).

low-income housing. By the 1940s, waiting lists for Black-designated affordable units overflowed.¹⁷

Racial tensions reached a tipping point in the 1960s. The Civil Rights Movement erupted in the streets, forcing the nation to reckon with rallying cries for social justice and the end to separate and unequal. With the passage of the Fair Housing Act, housing discrimination became unlawful. The Act prohibited various racially discriminatory housing methods, such as refusing to rent or sell; refusing to negotiate; falsely denying the availability of housing; refusing to make a mortgage loan; and creating advertisements with limitations or preferences based on membership in a protected group.¹⁸ The term “discriminatory housing practices” was amended to include “acts of interference, coercion, and the intimidation or threatening” of those seeking to rent or buy.¹⁹

In his seminal account of how the government segregated America,²⁰ Richard Rothstein observes that while one might deem the fifty years since the Act’s passage as time enough to undo the effects of government-backed segregation, “the public policies of yesterday still shape the racial landscape of today.”²¹ He concludes that “we shouldn’t have expected much to happen from a Fair Housing Act that allowed African Americans now to resettle in a white suburb.”²² Residential segregation is reinforced by the multi-generational replication of depressed incomes, the consistently vast differences in wealth and income between Blacks and whites,²³ and the persistence of economic exclusionary development and zoning.²⁴

¹⁷ *Id.* at 27. So, while white-designated units remained empty, Blacks stayed on overflowing waiting lists. *Id.* at 33.

¹⁸ SOTO & SWESNIK, *supra* note 1, at 4.

¹⁹ *Id.* at 4–5. Even though the Act made it a federal crime to resort to violence to prevent residential integration, attacks nonetheless continued as late as the 1980s. ROTHSTEIN, *supra* note 11, at 147.

²⁰ See generally ROTHSTEIN, *supra* note 11.

²¹ *Id.* at 178.

²² *Id.* at 179.

²³ *Id.*

²⁴ See discussion *infra* Section II.C.

II. BARRIERS TO ACHIEVING THE PROMISE OF THE FAIR HOUSING ACT

A. *Dwindling and Deteriorating Stocks of Affordable Housing*

In the five decades since the Fair Housing Act's passage, stocks of subsidized affordable housing continue to be concentrated in the inner-cities' most impoverished areas, thereby denying the promises of inclusion.²⁵ Those stocks are depleted and deteriorating.²⁶ Budget cuts have led over time to a drastic decline in both the quantity and quality of subsidized housing.²⁷ The U.S. Department of Housing and Urban Development (HUD), the federal agency charged with oversight of the Act and enforcement of its habitability standards, is understaffed.²⁸ Meanwhile, HUD's budget continues to be slashed.²⁹

With allocations for affordable housing shrinking³⁰ and the ranks of the poor growing,³¹ government housing assistance programs have

²⁵ See Alana Semuels, *Where Should Poor People Live?*, ATLANTIC (June 2, 2015), <https://www.theatlantic.com/business/archive/2015/06/where-should-poor-people-live/394556> [<https://perma.cc/NRZ6-HLLD>].

²⁶ See DOUGLAS RICE & BARBARA SARD, *THE EFFECTS OF THE FEDERAL BUDGET SQUEEZE ON LOW-INCOME HOUSING ASSISTANCE* 5 (2007), <https://www.cbpp.org/sites/default/files/atoms/files/2-1-07hous2.pdf> [<https://perma.cc/22H3-A4QR>] (“Over the past decade, the nation has experienced a net loss of approximately 170,000 public housing units to deterioration and decay, and much of the remaining public housing stock has substantial repair and rehabilitation needs that must be met if public housing is to be revitalized and preserved.”).

²⁷ See, e.g., BEN AUSTEN, *HIGH-RISERS: CABRINI-GREEN AND THE FATE OF AMERICAN PUBLIC HOUSING* (2018) (chronicling the deterioration of subsidized housing developments on Chicago's North Side); see also Alana Semuels, *How Housing Policy is Failing America's Poor*, ATLANTIC (June 24, 2015), <https://www.theatlantic.com/business/archive/2015/06/section-8-is-failing/396650> [<https://perma.cc/8AJM-WMP3>] (“The result is that voucher-holders are pushed farther out from a city's core, and into buildings that are dilapidated and have multiple code violations . . .”). For example, in Austin, city enforcement officers ordered an apartment complex “evacuated after a second-floor walkway sagged and then collapsed.” *Id.* The cause was termite damage—something that the low-income and Section 8 voucher-holders were hesitant to report out of fear of facing an eviction and the impossibility of finding replacement housing. *Id.*

²⁸ See Alissa Walker, *Opinion, Why Ben Carson's HUD Isn't Equipped to Address the Country's Housing Crisis*, CURBED (Aug. 22, 2017, 5:20 PM), <https://www.curbed.com/2017/8/22/16184494/hud-ben-carson-new-york-magazine> [<https://perma.cc/5JQW-K9MC>].

²⁹ Jeff Andrews, *Trump Budget Proposal Would Decimate HUD Funding*, CURBED (Feb. 12, 2018, 5:23 PM), <https://www.curbed.com/2018/2/12/17003900/trump-budget-proposal-hud-low-income-housing> [<https://perma.cc/3835-WGCV>].

³⁰ *What Trump Proposed Cutting in His 2019 Budget*, WASH. POST (Feb. 16, 2018), https://www.washingtonpost.com/graphics/2018/politics/trump-budget-2019/?utm_term=.

been unable to keep up with demand.³² Two out of three renters with incomes below the poverty line do not receive any housing assistance.³³ Proposed changes to the 2019 federal budget would result in further reductions to Section 8 subsidies and elimination of the \$1.9 billion fund for public housing repairs.³⁴

Across the country, over forty-seven million people, nearly half of them children, live in low-income families.³⁵ An estimated 1.65 million U.S. households survive on just two dollars each day.³⁶ The number of families facing eviction each year is overwhelming: there were nearly 900,000 eviction judgments nationwide in 2016, meaning that landlords were given the right to evict at least one in fifty renters.³⁷ In New York City alone, over 450,000 evictions were filed between 2013 and 2015.³⁸ By 2016, nearly 100 New York City households were evicted each day.³⁹

13a21eee3ea8 [https://perma.cc/JC3T-GUSE] (“Trump’s proposed budget for the 2019 fiscal year includes a 14 percent cut to HUD, amounting to \$6.8 billion below the agency’s current \$48 billion spending.”).

³¹ See Premilla Nadasen, *Extreme Poverty Returns to America*, WASH. POST (Dec. 21, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/12/21/extreme-poverty-returns-to-america/?utm_term=.17985966e426 [https://perma.cc/6Q72-GBVQ].

³² Government housing-assistance programs have been unable to keep up with the constantly growing demand for subsidized housing or federal vouchers. Andrew Flowers, *Why So Many Poor Americans Don’t Get Help Paying for Housing*, FIVETHIRTYEIGHT (Sept. 16, 2016, 7:00 AM), <https://fivethirtyeight.com/features/why-so-many-poor-americans-dont-get-help-paying-for-housing> [https://perma.cc/QCJ4-84SL].

³³ Rachel G. Bratt, Michael E. Stone & Chester Hartman, *Introduction to A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 7* (Rachel G. Bratt, Michael E. Stone & Chester Hartman eds., 2006).

³⁴ See *What Trump Proposed Cutting in His 2019 Budget*, *supra* note 30.

³⁵ BRANDON ROBERTS, DEBORAH POVICH & MARK MATHER, *LOW-INCOME WORKING FAMILIES: THE GROWING ECONOMIC GAP 1* (2012–2013), https://www.prb.org/wp-content/uploads/2013/01/Winter-2012_2013-WPPF-Data-Brief.pdf [https://perma.cc/YPG3-XXWH] (statistics are current as of 2011).

³⁶ Jordan Weissmann, *How Many Americans Live on Less than \$2 Per Day?*, SLATE (Aug. 27, 2014, 12:02 PM), http://www.slate.com/blogs/moneybox/2014/08/27/extreme_poverty_in_america_how_many_live_on_less_than_2_per_day.html [https://perma.cc/A2VV-9NL5].

³⁷ Emily Badger & Quoc Trung Bui, *In 83 Million Eviction Records, a Sweeping and Intimate New Look at Housing in America*, N.Y. TIMES (Apr. 7, 2018), <https://www.nytimes.com/interactive/2018/04/07/upshot/millions-of-eviction-records-a-sweeping-new-look-at-housing-in-america.html> [https://perma.cc/Z4JK-UL44].

³⁸ Tanay Warerkar, *Track Every NYC Apartment Eviction on This Interactive Map*, CURBED N.Y. (Sept. 25, 2017, 1:23 PM), <https://ny.curbed.com/2017/9/25/16361572/rent-stabilization-map-crown-heights-bushwick> [https://perma.cc/WT6A-KNPH].

³⁹ Across the nation, New York City saw the most evictions in 2016. *Top Evicting Large Cities in the United States*, EVICTION LAB, <https://evictionlab.org/rankings/#/evictions?>

Courts have become eviction factories. The severe consequences of eviction include illness, anxiety, employment and education disruption, and the attendant harms that result from the trauma of displacement.⁴⁰ With the stakes so high, it is unconscionable that while upwards of ninety percent of landlords are represented by counsel, at least ninety percent of tenants are not.⁴¹ The very nature of summary proceedings allows for the swift displacement of tenants who fail to appear in court. Tenants who appear pro se typically suffer the same fate.⁴²

Tenants who cannot afford to lose a day's wages or secure child care will be unable to even appear pro se, thereby suffering default and prompt dispossession. Tenants who do appear without counsel are left to navigate the intimidating and often chaotic court processes on their own. Some tenants who manage to make it to court will suffer default simply because, amidst the cacophony of voices in the crowded courtroom during docket call, they were unable to hear their name being called. Meanwhile, in the hallways just outside the courtroom, counsel for landlords can seek out the tenant named in the given landlord's eviction action and pressure or dupe that tenant into making unwarranted concessions and agreeing to unfair stipulations whose consequences escape the tenant until she enters the courtroom and is promptly evicted.⁴³ In eviction proceedings, having a lawyer matters. By providing free legal representation to approximately 250,000 low-

r=United%20States&a=0&d=evictions&l=0 [https://perma.cc/6DUZ-FS6W] (last visited Oct. 18, 2018).

⁴⁰ See, e.g., REG'L PUB. HEALTH, HOUSING DISPLACEMENT AND HEALTH: A SUMMARY OF THE IMPACTS OF HOUSING DISPLACEMENT ON HEALTH AND WELLBEING 1, 4 (2011), <http://www.rph.org.nz/content/e3f1f46f-25d8-4e04-b9e1-0ee864865ae8.cmr> [https://perma.cc/T4H5-ARXB] ("Evidence suggests that housing displacement and subsequent relocation is a traumatic experience with considerable short term and long-term health costs.").

⁴¹ Lauren Sudeall Lucas & Darcy Meals, *Ever Year, Millions Try to Navigate US Courts Without a Lawyer*, SALON (Oct. 1, 2017, 2:00 AM), https://www.salon.com/2017/09/30/every-year-millions-try-to-navigate-us-courts-without-a-lawyer_partner [https://perma.cc/7U6X-YCTS] ("Across the county, roughly 90 percent of landlords are represented by counsel, while 90 percent of tenants are not."); see also Matthew Desmond, Opinion, *Tipping the Scales in Housing Court*, N.Y. TIMES (Nov. 29, 2012), <https://www.nytimes.com/2012/11/30/opinion/tipping-the-scales-in-housing-court.html> [https://perma.cc/J3RG-CXUG].

⁴² See generally Lucas & Meals, *supra* note 41.

⁴³ Karen Rouse, *Why Tenants Lose When They Go Up Against Landlords in Newark*, WNYC (Mar. 6, 2017), <https://www.wnyc.org/story/why-tenants-lose-against-landlords-newark> [https://perma.cc/8AUQ-L9PG].

income tenants since 2014, New York City has lowered its eviction rate by nearly thirty percent.⁴⁴

Some landlords in rapidly gentrifying neighborhoods, anxious to attract high-rent tenants, resort to intimidation tactics to drive out residents of rent-stabilized apartments by harassing them with dangerous and disruptive “renovations.”⁴⁵ Those renovations permit noisy construction at all hours of the night that cut off water lines, gas lines, or heating.⁴⁶ Affected tenants can find themselves exposed to dangerous toxins like asbestos, as well as rodents and vermin. By resorting to unsafe and/or unnecessarily disruptive renovations to constructively evict rent-stabilized tenants, landlords exploit loopholes that let them phase out of the rent-regulation system and into the open market.⁴⁷

A package of eighteen bills is currently before the New York City Council and includes measures that would require the City to expand enforcement actions against bad faith landlords and require the Department of Buildings to deny permits for new construction to buildings with unresolved violations for hazardous conditions.⁴⁸ The bills would also force the City to inspect renovations and construction to ensure that city codes are not violated, and would escalate penalties for landlords who submit false information about planned construction. City inspectors would also be granted access to these buildings, thus vastly increasing oversight.⁴⁹

The harassment that tenants in rent-subsidized and rent-stabilized housing can face hastens the displacement of New York City residents from their homes—an ongoing crisis resulting in over 60,000 people living in city homeless shelters.⁵⁰ Gentrification has many root causes, one of which is fraud promulgated by bad faith machinations that decrease affordable housing options.⁵¹

⁴⁴ The Editorial Board, *New York City Can Protect Tenants Now*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/opinion/editorials/new-york-city-council-tenant-protection.html>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

With affordable housing in short supply and long waitlists for federally-subsidized units, eviction can swiftly lead to homelessness.⁵² Housing affordability is a major problem as rental and purchase costs, particularly in major cities, continue to skyrocket.⁵³ In countless metropolitan centers and towns across the country, housing is unaffordable to whole swaths of the population, including many who cannot afford to live near or even relatively close to their places of work.⁵⁴ In the more expensive cities, rental rates have dropped for the richest while rates are rising for the poor.⁵⁵ Wealth continues to grow for those in the highest economic strata,⁵⁶ while wages for low-income workers have remained stagnant for nearly fifteen years.⁵⁷ The poor and working class are left to forego other basic needs, including food, and medical and dental care, to pay their rents.⁵⁸

The poor who live in public housing endure the effects of deterioration and neglect and too often find themselves living in run-down, dilapidated, and uninhabitable “fair housing.”⁵⁹ It is estimated that upwards of 8.3 million low-income renters live in unsafe, overcrowded premises unfit for the most basic needs of human

⁵² MARTHA GALVEZ, MAYA BRENNAN, BRADY MEIXELL & ROLF PENDALL, HOUSING AS A SAFETY NET: ENSURING HOUSING SECURITY FOR THE MOST VULNERABLE 1, 4–5, 10 (Sept. 2017), https://www.urban.org/sites/default/files/publication/93611/housing-as-a-safety-net_1.pdf [<https://perma.cc/VQQ5-6P54>].

⁵³ Kathleen Elkins, *15 US Cities Where Home Prices Are Skyrocketing*, CNBC (June 20, 2018, 12:41 PM), <https://www.cnbc.com/2018/06/20/us-cities-where-home-prices-are-skyrocketing.html> [<https://perma.cc/7KSV-RGEP>]; see also Flowers, *supra* note 32.

⁵⁴ The Editorial Board, Opinion, *Affordable Housing vs. Gentrification*, N.Y. TIMES (Nov. 27, 2015), <https://www.nytimes.com/2015/11/28/opinion/affordable-housing-vs-gentrification.html> [<https://perma.cc/ZD2N-CBQJ>] (“[C]onstruction means disruption, which inevitably means gentrification and dislocation.”).

⁵⁵ Jeff Stein, *In Expensive Cities, Rents Fall for the Rich—But Rise for the Poor*, WASH. POST (Aug. 6, 2018), https://www.washingtonpost.com/business/economy/in-expensive-cities-rents-fall-for-the-rich--but-rise-for-the-poor/2018/08/05/a16e5962-96a4-11e8-80e1-00e80e1fd43_story.html?noredirect=on&utm_term=.4a9a79f7340a [<https://perma.cc/5WDV-2GZ4>].

⁵⁶ Noah Smith, *How the Top 1% Keeps Getting Richer*, BLOOMBERG (Aug. 28, 2017, 11:29 AM), <https://www.bloomberg.com/view/articles/2017-08-28/how-the-top-1-keeps-getting-richer>.

⁵⁷ Flowers, *supra* note 32.

⁵⁸ Stein, *supra* note 55.

⁵⁹ See generally Bratt, Stone & Hartman, *supra* note 33, at 3.

dwelling.⁶⁰ Low-income tenants struggle with rodent and insect infestation, battle mold contamination, contend with faulty plumbing, and live with the fear of fires sparked by defective wiring and aging furnaces.⁶¹

Throughout the country, compelling and heartbreaking stories line the broken roads of public housing's failures. In New York City alone, as of October 2018, it was reported that 35,000 public housing tenants were without heat or hot water.⁶² With winter fast approaching, the Legal Aid Society filed a class action lawsuit to compel housing authority compliance with essential habitability guarantees. That action is now pending.⁶³

Meanwhile, the casualties of public housing dysfunction grow. Sisters Ibanez Ambrose, 2, and Scylee Ambrose, 1, lost their lives to severe burns incurred when the radiator in their apartment burst.⁶⁴ Oliver Briscoe, 66, suffered debilitating spinal injuries when he slipped and fell in a puddle of water just outside his apartment door.⁶⁵ The water accumulation was caused by a leak in the roof that he had complained to housing authorities about no fewer than thirty-five times.⁶⁶

In September 2018, 700 of New York City's public housing tenants submitted letters to the U.S. Attorney's Office that detailed inhumane living conditions, unresolved work tickets, and decades of neglect.⁶⁷ Those testimonials were considered in the \$2.2 billion settlement between the U.S. Attorney's Office and the New York City Housing Authority (NYCHA), in which NYCHA took responsibility for filing

⁶⁰ *Id.* at 3; see also JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 32 (2018), http://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf [<https://perma.cc/KTM6-MFDE>].

⁶¹ Bratt, Stone & Hartman, *supra* note 33, at 3.

⁶² Ameena Walker, *NYCHA Heat and Hot Water Outages Already Impacting 35K Tenants*, CURBED N.Y. (Oct. 25, 2018, 10:30 AM), <https://ny.curbed.com/2018/10/25/18022306/nycha-heat-hot-water-outages-fall-2018> [<https://perma.cc/5UFQ-2YED>].

⁶³ As of this writing, this action is pending. *Id.*

⁶⁴ Rick Rojas & Nikita Stewart, *Burst Radiator Blamed for Deaths of 2 Sisters in the Bronx*, N.Y. TIMES (Dec. 7, 2016), <https://www.nytimes.com/2016/12/07/nyregion/2-young-girls-fatally-burned-by-radiator-steam-in-the-bronx-police-say.html>.

⁶⁵ Christina Carrega, *NYCHA Tenants Submit Over 700 Letters Detailing 'Inhumane' Living Conditions*, GOTHAMIST (Sept. 14, 2018, 2:29 PM), http://gothamist.com/2018/09/14/nycha_tenants_inhumane_living.php [<https://perma.cc/U7TJ-2C4Z>].

⁶⁶ *Id.*

⁶⁷ *Id.*

false reports on lead paint testing, failing to provide adequate heat, failing to take mold removal and abatement measures, and failing to follow federal safety laws.⁶⁸

Significantly, a federal judge rejected the settlement, highlighting the “breathtaking scope” of the squalid living conditions in NYCHA complexes.⁶⁹ The judge criticized the city for mismanaging the agency and accused the federal government of abandoning its responsibility to overhaul New York City’s public housing, which is home to approximately 400,000 New Yorkers and is the largest public housing stock in the country. He suggested that the City and NYCHA might need to resort to creating public-private housing partnerships, privately developing unused NYCHA land, selling air rights, replacing NYCHA management, or breaking collective bargaining agreements.

In November 2018, Mayor Bill de Blasio announced that the City would move forward with public-private partnerships to repair 62,000 NYCHA apartments, which would remain permanently affordable and be converted to public housing units, with rent no higher than thirty percent of a tenant’s income.⁷⁰ The following month, Mayor de Blasio unveiled a plan, NYCHA 2.0, to preserve public housing. The plan commits \$24 billion to repair broken elevators, remove lead paint, remediate mold infestation, and replace defective heating systems.⁷¹ As part of the plan, NYCHA will launch three new programs: Build to Preserve, Transfer to Preserve, and Fix to Preserve.⁷² Build to Preserve will transform underutilized, publicly owned land into new public

⁶⁸ Press Release, U.S. Dep’t of Justice U.S. Attorney’s Office, S.D.N.Y., Manhattan U.S. Attorney Announces Settlement with NYCHA and NYC to Fundamentally Reform NYCHA Through the Appointment of a Federal Monitor and the Payment by NYC of \$1.2 Billion of Additional Capital Money Over the Next Five Years (June 11, 2018), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-settlement-nycha-and-nyc-fundamentally-reform-nycha> [https://perma.cc/2PHA-UQUN].

⁶⁹ *Judge Rejects Settlement Agreement Between NYCHA and U.S. Attorney’s Office*, SPECTRUM NEWS NY1 (Nov. 14, 2018, 8:41 PM), <http://www.ny1.com/nyc/all-boroughs/news/2018/11/14/judge-rejects-settlement-agreement-between-nycha-and-u-s-attorney-s-office> [https://perma.cc/C6XC-GT6N].

⁷⁰ Aameena Walker, *NYCHA Enlists Private Developers to Oversee Repairs, Daily Operations*, CURBED N.Y. (Nov. 19, 2018, 2:04 PM), <https://ny.curbed.com/2018/11/16/18098381/nycha-repairs-private-developers-control> [https://perma.cc/6PRM-4Y9M].

⁷¹ Aameena Walker, *City Announces Plan to Resolve \$24B of NYCHA Repairs*, CURBED N.Y. (Dec. 12, 2018, 1:24 PM), <https://ny.curbed.com/2018/12/12/18137835/nycha-repairs-bill-de-blasio-funding-plan> [https://perma.cc/Q6UF-55W2].

⁷² *Id.*

housing developments, dedicating 100 percent of the rent proceeds from those new developments toward repairs for surrounding, existing public housing developments.⁷³ New developments will be subject to Mandatory Inclusionary Housing (MIH) standards to advance NYCHA 2.0's goal of creating and preserving 300,000 units of affordable housing by 2026.⁷⁴ Transfer to Preserve will generate approximately \$1 billion in capital repairs by selling underutilized development rights.⁷⁵ Fix to Preserve will improve infrastructure maintenance.⁷⁶

Those innovations are promising and long overdue. It is a fundamental canon of landlord-tenant law that all leased residential premises must be fit for human dwelling.⁷⁷ That assurance, known as the implied warranty of habitability, is essential to human dignity.⁷⁸ It requires that all leased residential premises meet basic standards of fitness and suitability for dwelling. Its fundamental guarantees are betrayed when, for example, leased premises are without working plumbing or heat in the winter. Its promises are broken when tenants are faced with mold, roach or rodent infestation, broken pipes and leakages, lead poisoning, and other on-site infirmities.⁷⁹

Across the country, tenants living in public housing (often referred to as Section 8 housing)⁸⁰ recount a host of dire conditions that violate habitability standards.⁸¹ Those include the absence of heat and running water, defective plumbing, mold and rodent infestation, broken doors, damaged windows, and other structural infirmities.⁸² But lax

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See JESSE DUKEMINIER ET AL., PROPERTY 533–42 (9th ed. 2017).

⁷⁸ See Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS L. REV. 1, 7–8 (2016).

⁷⁹ See, e.g., *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984); *Green v. Superior Court*, 517 P.2d 1168 (Cal. 1974); *Marini v. Ireland*, 265 A.2d 526 (N.J. 1970); *Lemle v. Breeden*, 462 P.2d 470 (Haw. 1969).

⁸⁰ Section 8 refers to the section of the Fair Housing Act that authorizes federal subsidies of qualifying affordable housing. See *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/topics/housing_choice_voucher_program_section_8 [https://perma.cc/9C7W-D5DH] (last visited Oct. 18, 2018).

⁸¹ See, e.g., Semuels, *supra* note 27.

⁸² See generally *Renter Hell Investigation*, ASBURY PARK PRESS, <https://www.app.com/topic/32487bef-f11a-4065-9a67-822669674c7f/renter-hell> [https://perma.cc/RT5Z-7R4T] (last visited

enforcement and monitoring allow lessors to continue to receive federal and state affordable housing subsidies even for grossly unsound apartments, thereby providing little incentive for landlord remediation.⁸³

Moreover, to even raise the habitability defense to rent nonpayment, some jurisdictions, including New Jersey, require that all rent alleged by the landlord to be owed first be deposited with the court.⁸⁴ This demand is untenable. First, amounts claimed by the landlord to be due may not be accurate and certainly will not reflect the actual rental value of the premises if they are found to be as the tenant alleges. Second, tenants who have withheld rent (as is their right) because the landlord has failed to comply with habitability standards and who have dedicated (as is their right) all or part of the sums withheld to abatement of the on-site defects (by purchasing a space heater or hiring an exterminator, for example) will be denied the opportunity to even be heard on their habitability claim unless they can additionally post the entire amount alleged by the landlord to be due. Indeed, the rent posting requirement as a prerequisite to an aggrieved tenant's right to be heard contributes to the startling fact that, of the 40,000 eviction actions filed in Essex County, New Jersey in one year alone, only eighty of those cases had tenants asserting breach of habitability as a defense to rent non-payment.⁸⁵ That figure is remarkable in view of the dire and deteriorating conditions endured by tenants in public housing in Essex County's impoverished inner cities, which include Newark, East Orange, and Irvington.⁸⁶

The majority of states, including New York, have eliminated the rent posting requirement when a tenant asserts a habitability defense.⁸⁷

Dec. 4, 2018). *See also* Changlu Wang, Mahmoud M. Abou El-Nour & Gary W. Bennett, *Survey of Pest Infestation, Asthma, and Allergy in Low-income Housing*, 33 J. COMMUNITY HEALTH 31, 31-32 (2008).

⁸³ *See* Franzese, Gorin & Guzik, *supra* note 78, at 7-8.

⁸⁴ *See, e.g.*, *Drew v. Pullen*, 412 A.2d 1331 (N.J. Super. Ct. App. Div. 1980); ALA. CODE § 35-9A-405(a) (2018); COLO. REV. STAT. ANN. § 38-12-507(c) (2018); MINN. GEN. R. PRAC. 608 (2018); NEV. REV. STAT. ANN. § 118A.490(1) (West 2018).

⁸⁵ *See* Franzese, Gorin & Guzik, *supra* note 78, at 5.

⁸⁶ *Renter Hell Investigation*, *supra* note 82.

⁸⁷ *See* ANDREW SCHERER, RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK, § 12:97 (2018) ("A tenant does not have to deposit rent in court to raise the defense of a breach of warranty of habitability.").

Elimination of the requirement has not clogged the dockets.⁸⁸ Nor has it sparked a rise in false habitability claims.⁸⁹ New Jersey has now proposed legislation to remove the requirement that tenants first post rental amounts claimed by their landlord to be due in order to be heard on a habitability claim.⁹⁰ That reform would promote opportunities for betrayals of habitability standards to be heard and then corrected. It provides protection for vulnerable tenants and helps to prevent abuse by landlords who are intent on profiting unjustly by continuing to collect federal and state housing subsidies and tenant rent for dilapidated and uninhabitable dwellings. Most essentially, it establishes safeguards that good faith landlords should welcome, and duties that bad faith landlords must not be permitted to evade.

B. *Compounding the Harms: Tenant Blacklisting*

A tenant faced with a landlord's breach of the implied warranty of habitability is entitled by law to withhold or reduce rent pending a court's determination of the premises' fair rental value in view of its defects, deduct the costs of tenant-made repairs from future rent, report the landlord to housing code enforcement agencies, and/or sue the landlord for damages.⁹¹ But tenant blacklisting chills the exercise of these rights when aggrieved tenants decline to exercise them for fear of being evicted, losing their subsidized housing, and then, by virtue of the

⁸⁸ See Andrew Scherer, Professor of Law at N.Y. Law Sch., Expert Testimony Submitted to New Jersey Senate Economic Growth Committee (May 2, 2018) (in support of S805 to eliminate rent posting requirement for tenant habitability claims) (on file with authors). Professor Scherer has written a leading treatise on landlord-tenant law in New York, *see id.*, and is the Director of the Housing Rights Clinic. On the basis of his thirty plus years of experience, he concludes that removing the rent posting requirement to allow aggrieved tenants to substantiate their claims of breach of habitability standards would not clog court dockets or open the floodgates to litigation, but instead allow the courts to fairly and equitably adjudicate claims, as is their function. *Id.*

⁸⁹ In New York, for instance, the opposite would be achieved as a false claim could result in an award of attorney's fees in favor of the landlord and even sanctions against the tenant for putting forth a frivolous claim. *Id.*

⁹⁰ S.B. 806, 218th Leg. (N.J. 2018).

⁹¹ See Franzese, Gorin & Guzik, *supra* note 78, at 8.

eviction action, being placed on a registry (the blacklist) that all but assures the denial of future affordable renting opportunities.⁹²

Tenant blacklisting refers to the practice whereby tenants named in an eviction proceeding, regardless of outcome or context, find themselves on registries collected by “tenant reporting services.”⁹³ Those tenant reports do not provide context or circumstances and do not even indicate whether the given tenant has prevailed in the matter at hand.⁹⁴ Tenants are not given notice of their placement on the list or afforded the opportunity to supplement the record.⁹⁵ Tenants appearing on the dreaded “list” are denied future renting opportunities, stigmatized, and excluded from the promise of fair housing.⁹⁶

Some jurisdictions have endeavored to eradicate or hem the practice of tenant blacklisting. In 2017, U.S. Senator Cory Booker (D-N.J.) introduced legislation into Congress that would curb tenant

⁹² See generally Paula A. Franzese, *A Place to Call Home: Tenant Blacklisting and the Denial of Opportunity*, 45 FORDHAM URB. L.J. 661 (2018).

⁹³ See Rudy Kleysteuber, Note, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1346, 1356–57, 1360–62 (2007); see also Julie Satow, *On the List, and Not in a Good Way*, N.Y. TIMES (Oct. 16, 2014), <https://www.nytimes.com/2014/10/19/nyregion/a-tenant-blacklist-culled-from-tedium.html> [<https://perma.cc/G8YS-RH5F>]. Blacklists have been in existence since the 1970s but have grown exponentially in the past several decades, due in large part to the advent of quicker and more accessible technologies. Robert R. Stauffer, Note, *Tenant Blacklisting: Tenant Screening Services and the Right to Privacy*, 24 HARV. J. LEGIS. 239, 240–47 (1987). Currently, there are more than 650 tenant screening agencies operating across the nation. Ronda Kaysen, *Recourse for ‘Blacklisted’ Tenants*, N.Y. TIMES (Dec. 19, 2015), <https://www.nytimes.com/2015/12/20/realestate/recourse-for-blacklisted-tenants.html> [<https://perma.cc/ES3T-9JCE>].

⁹⁴ See Anne Machalinski, *The Dreaded Tenant Blacklist: What You Need to Know*, BRICK UNDERGROUND (Oct. 25, 2018, 2:30 PM), https://www.brickunderground.com/blog/2014/05/tenant_blacklist [<https://perma.cc/WSY6-FTMM>] (“[F]or tenants, the major issue is that the information is incomplete. The blacklist doesn’t provide any context for the case, such as who sued whom, the winning party, or whether there was a settlement.”).

⁹⁵ *Id.* Instead of a formal appeals process to remedy errors or explain misleading information, renters are limited to attempting to explain, on their own, to a potential landlord why they were placed on the report. *Id.*

⁹⁶ Teri Karush Rogers, *Only the Strongest Survive*, N.Y. TIMES (Nov. 26, 2006), <http://www.nytimes.com/2006/11/26/realestate/26cov.html> [<https://perma.cc/7R8F-H4TU>] (“[Ninety-nine] percent [of landlords] . . . flat out reject anybody with a landlord-tenant record, no matter what the reason is and no matter what the outcome is, because if their dispute has escalated to going to court, an owner will view them as a pain.”) (internal citation and quotation marks omitted).

screening practices by amending the Fair Credit Reporting Act.⁹⁷ Such an amendment would exclude from tenant screening reports (1) any landlord-tenant court matter that did not result in a judgment of possession in favor of the landlord; and (2) all matters that are more than three years old.⁹⁸ At the state level, New York, California, Minnesota, and Wisconsin are among the few jurisdictions to enact statutory reform measures aimed at assuring accuracy and fairness in reporting.⁹⁹ In 2015, the New York City Council (Council) passed a bill to render a landlord's rejection of a tenant's rental application unlawful when that rejection is based solely on the candidate's appearance on a list provided by a tenant screening service.¹⁰⁰ In New Jersey, legislation to significantly reform the practice is now pending.¹⁰¹ Still, comprehensive reform is yet to be achieved.

C. “Not in My Backyard”—Economic Exclusion

A disproportionate number of people of color live at or below the poverty line.¹⁰² The Fair Housing Act prohibits racial discrimination,¹⁰³

⁹⁷ See Tenant Protection Act, S. 1758, 115th Cong. (as referred to S. Comm. on Banking, Housing, and Urban Affairs, Aug. 3, 2017). The Fair Credit Reporting Act “promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies,” but does not impose time limitations on the information collection. See FED. TRADE COMM’N, A SUMMARY OF YOUR RIGHTS UNDER THE FAIR CREDIT REPORTING ACT 1 (2015), <https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf> [<https://perma.cc/RV6H-PJ6J>].

⁹⁸ S. 1758 § 2(b)(1)(i) (2017).

⁹⁹ See generally ESME CARAMELLO & NORA MAHLBERG, COMBATING TENANT BLACKLISTING BASED ON HOUSING COURT RECORDS 1–2 (2017), http://povertylaw.org/files/docs/article/ClearinghouseCommunity_Caramello.pdf [<https://perma.cc/9U5H-YKZ3>].

¹⁰⁰ N.Y. City Council Res. 0625-2015, 2015 Council (N.Y. 2015), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2141275&GUID=A28C7554-0B3F-4529-8CC2-455DBD9E6D3D> [<https://perma.cc/GR3X-9P3T>].

¹⁰¹ S.B. 3037, 218th Leg., 1st Ann. Sess. (N.J. 2018).

¹⁰² RICHARD D. KAHLENBERG, AN ECONOMIC FAIR HOUSING ACT 21 (2017), <https://tcf.org/content/report/economic-fair-housing-act> [<https://perma.cc/PN8V-F5YB>] (“[P]eople of color disproportionately live in concentrated poverty compared with poor whites.”).

¹⁰³ “The Fair Housing Act protects people from discrimination when they are renting, buying, or securing financing for any housing. The prohibitions specifically cover discrimination because of race, color, national origin, religion, sex, disability and the presence of children.” *Fair Housing—It’s Your Right*, U.S. DEP’T HOUS. & URB. DEV., https://www.hud.gov/topics/housing_discrimination [<https://perma.cc/4AEU-NZ52>] (last visited Dec. 4, 2018).

but not economic discrimination.¹⁰⁴ While the Act has facilitated a way out of inner cities for middle-class Blacks, those of lower income have been left behind, and patterns of segregation for the poor persist.¹⁰⁵ In the fifty years since the Act's passage, it has fallen far short of its goals, as "[d]eep racial and economic segregation continues to dictate where Americans live."¹⁰⁶ The stark racial and economic divide lends itself readily to then-President Barack Obama's observation that racial segregation mirrors itself in class segregation.¹⁰⁷ Economic segregation *is* racial segregation.

U.S. public policy has long abided economic exclusion.¹⁰⁸ As a result, social scientists like Robert Putnam describe how "class apartheid" became entrenched.¹⁰⁹ In response, some have called for a "new Economic Fair Housing Act" to curb the ability of local governments to deny housing opportunities to those of low and moderate income.¹¹⁰

Economic exclusionary zoning gained a legal foothold when in 1917 the U.S. Supreme Court affirmed state and local governments'

¹⁰⁴ Elizabeth Winkler, 'Snob Zoning' is Racial Housing Segregation by Another Name, WASH. POST (Sept. 25, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/09/25/snob-zoning-is-racial-housing-segregation-by-another-name/?utm_term=.4174ba73b19f [<https://perma.cc/Y5X2-F4QA>] ("There is no class-based version of the Fair Housing Act—that is, no federal legislation that says economic exclusion is improper.").

¹⁰⁵ Alana Samuels, *Can Better Data Help Solve America's Housing Problems*, ATLANTIC (July 8, 2015), <https://www.theatlantic.com/business/archive/2015/07/new-hud-rules-fair-housing/397997> [<https://perma.cc/MWD9-4P8Q>] (chronicling how HUD has fallen short of its goals, with its efforts "perpetuating patterns of segregation by building more housing for America's poorest in America's poorest neighborhoods").

¹⁰⁶ *Id.*

¹⁰⁷ See, e.g., Kevin Liptak, *Obama Draws Line Between Racial Segregation of the Past and Class Segregation Today*, CNN POL., <https://www.cnn.com/2015/05/12/politics/obama-combat-poverty-baltimore/index.html> [<https://perma.cc/J8VE-DZAH>] (last updated May 12, 2015, 3:21 PM). In 2015, President Barack Obama stated,

What used to be racial segregation now mirrors itself in class segregation. . . . This great sorting has taken place. It creates its own politics. There are some communities where not only do I not know poor people, I don't even know people who have trouble paying the bills at the end of the month. I just don't know those people. And so there's less sense of investment in those children.

Id. (alterations omitted).

¹⁰⁸ See generally PUTNAM, *supra* note 5; DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

¹⁰⁹ PUTNAM, *supra* note 5, at 37, 39.

¹¹⁰ See, e.g., KAHLBERG, *supra* note 102, at 4.

police powers to first rank and then compartmentalize land uses into separate zones. That case, *Village of Euclid, Ohio v. Ambler Realty Co.*,¹¹¹ deemed single-family homes the most desirable and “wholesome” use and, in explicitly classist language, described apartment buildings as “parasites” that could and should exist in zones separate and apart from the “wholesome.”¹¹²

Exclusionary zoning regulations create barriers to inclusion by imposing minimum lot size requirements, requiring aesthetic uniformity, and forbidding builders from developing apartment buildings or townhouses in certain areas, thereby assuring access only to those of certain financial means.¹¹³ Entrenched race-based class differences allow economic exclusion to continue “racial segregation’s ugly work.”¹¹⁴ Because people of color remain of disproportionately lower income than whites, the absence of affordable housing in more expensive cities and towns achieves many of the same results as explicit racial zoning.¹¹⁵ Economic exclusion assures that whole swaths of the working poor and middle class are unable even to live in convenient proximity to their places of work.¹¹⁶ Economic exclusion denies those of lesser means access to the quality of education, infrastructure, recreation, health care, food, and transportation available in more affluent areas.¹¹⁷

Where one lives matters. It affects the quality of a person’s life in countless and profound ways. The segregated poor have shorter life spans and suffer from far higher rates of cardiac disease, cancer, and

¹¹¹ 272 U.S. 365 (1926).

¹¹² *Id.* at 394; *accord* *Pierro v. Baxendale*, 118 A.2d 401, 408 (N.J. 1955).

¹¹³ KAHLBERG, *supra* note 102, at 3–4.

¹¹⁴ See Kimberly Quick, *Exclusionary Zoning Continues Racial Segregation’s Ugly Work*, CENTURY FOUND. (Aug. 4, 2017), <https://tcf.org/content/commentary/exclusionary-zoning-continues-racial-segregations-ugly-work/?agreed=1> [<https://perma.cc/22EV-S37S>].

¹¹⁵ KAHLBERG, *supra* note 102, at 6.

¹¹⁶ See Alana Semuels, *The Barriers Stopping Poor People from Moving to Better Jobs*, ATLANTIC (Oct. 12, 2017), <https://www.theatlantic.com/business/archive/2017/10/geographic-mobility-and-housing/542439> [<https://perma.cc/BK8M-RQF5>]; see also Emily Dreyfuss, *The Year in Housing: The Middle Class Can’t Afford to Live in Cities Anymore*, WIRED (Dec. 31, 2016, 7:00 AM), <https://www.wired.com/2016/12/year-housing-middle-class-cant-afford-live-cities-anymore> [<https://perma.cc/727F-59B6>].

¹¹⁷ KAHLBERG, *supra* note 102, at 2; Winkler, *supra* note 104.

substance abuse.¹¹⁸ Children of lesser means start school at a disadvantage—fewer than half of children born into poverty are ready for school at age five, compared to seventy-five percent of children from families with moderate and high incomes.¹¹⁹ Schools located in high-poverty neighborhoods fail their students,¹²⁰ with lower standardized test scores and some of the most drastic teacher attrition and shortage challenges.¹²¹ Selective policing leads to higher incarceration rates, further contributing to poverty rates.¹²²

The antidote to economic exclusionary zoning is inclusionary zoning. In the 1990s, HUD implemented, on a small scale, an experimental Moving to Opportunity for Fair Housing program¹²³

¹¹⁸ Julia Belluz, *What the Dip in US Life Expectancy is Really About: Inequality*, VOX (Jan. 9, 2018, 9:50 AM), <https://www.vox.com/science-and-health/2018/1/9/16860994/life-expectancy-us-income-inequality> [<https://perma.cc/C25A-K3X4>].

¹¹⁹ Julia B. Isaacs, *Starting School at a Disadvantage: The School Readiness of Poor Children*, in THE SOCIAL GENOME PROJECT 3 (Brookings Inst., 2012), https://www.brookings.edu/wp-content/uploads/2016/06/0319_school_disadvantage_isaacs.pdf [<https://perma.cc/HYK2-7T7D>].

¹²⁰ Javeria Khan, Opinion, *Too Many Poor, Minority Kids Attend Low-Performing Schools. That Doesn't Mean Their Parents Don't Care About Their Education*, 74 (Feb. 12, 2018), <https://www.the74million.org/article/khan-too-many-poor-minority-kids-attend-low-performing-schools-that-doesnt-mean-their-parents-dont-care-about-their-education> [<https://perma.cc/MV6K-NP84>]; see also *The Cycle of Educational Failure and Poverty*, STAND TOGETHER (Jan. 24, 2017), <https://www.stand-together.org/cycle-educational-failure> [<https://perma.cc/A9LJ-PREK>]; Megan McArdle, Opinion, *We're Not Doing Enough to Truly Integrate American Cities*, WASH. POST (Aug. 17, 2018), https://www.washingtonpost.com/opinions/were-not-doing-enough-to-truly-integrate-american-cities/2018/08/17/fd60c020-a17b-11e8-83d2-70203b8d7b44_story.html?noredirect=on&utm_term=.69b60b5fa870 [<https://perma.cc/743K-8AQP>] (“The neighborhoods where we spend our childhoods shape our life outcomes profoundly. . . . [B]lack children are much less likely than white ones to live in the sorts of places that boost kids up the economic ladder. Until that changes, the divide won’t close.”).

¹²¹ Eric Westervelt, *Frustration. Burnout. Attrition. It's Time to Address the National Teacher Shortage*, NPR ED (Sept. 15, 2016, 9:38 AM), <https://www.npr.org/sections/ed/2016/09/15/493808213/frustration-burnout-attrition-its-time-to-address-the-national-teacher-shortage> [<https://perma.cc/KZR5-LR5F>]. One in five teachers in high-minority schools and high-poverty schools is unprepared for teaching, and ninety percent of high-poverty schools are struggling to find enough qualified special education teachers. *Id.*

¹²² See Inimai M. Chettiar, *A National Agenda to Reduce Mass Incarceration*, BRENNAN CTR. JUST. (Apr. 27, 2015), <https://www.brennancenter.org/analysis/national-agenda-reduce-mass-incarceration> [<https://perma.cc/K5PF-5DNE>]. Nearly two-thirds of the 600,000 people who exit prisons each year face long-term unemployment. *Id.*

¹²³ *Moving to Opportunity for Fair Housing*, U.S. DEP'T HOUSING & URB. DEV., <https://www.hud.gov/programdescription/mto> [<https://perma.cc/642L-62BQ>] (last visited Oct. 28, 2018).

aimed at assisting low-income residents with moving into higher income neighborhoods.¹²⁴ The program was met with significant resistance driven primarily by concerns for the burdens that it would impose on municipalities.¹²⁵ Others have opposed federally-imposed mandates for economic inclusion for fear that such directives will deplete reserves best allocated to restoring disadvantaged areas and replacing the most run-down affordable housing units everywhere.¹²⁶

It may well be that realizing the aims of economic inclusion in housing are best achieved by state and local governments. *Mount Laurel*,¹²⁷ New Jersey's great social experiment, is instructive here. Over forty years ago, the New Jersey Supreme Court first tackled the issue of exclusionary zoning in what would become a series of seminal fair housing cases. In 1975, in *South Burlington County NAACP v. Mount Laurel (Mount Laurel I)*,¹²⁸ the state's highest court ruled that, as a matter of state constitutional law,¹²⁹ each developing municipality must provide its fair share of the overall regional need for low- and moderate-income housing.¹³⁰

The *Mount Laurel I* ruling was heralded by some¹³¹ and decried by others.¹³² It wrought considerable study but little action.¹³³ In response to widespread municipal noncompliance, the New Jersey Supreme

¹²⁴ See McArdle, *supra* note 120.

¹²⁵ *Id.*

¹²⁶ See, e.g., Corianne Payton Scally, *Who, Why, and How Communities Oppose Affordable Housing*, SHELTERFORCE (Apr. 23, 2014), https://shelterforce.org/2014/04/23/who_why_and_how_communities_oppose_affordable_housing [<https://perma.cc/RTS2-98KD>].

¹²⁷ *Mount Laurel* refers, here, to the New Jersey Supreme Court's series of rulings that oblige qualifying municipalities to provide their fair share of the regional need for low- and moderate-income housing. See *infra* notes 128–56 and accompanying text.

¹²⁸ *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) [hereinafter *Mount Laurel I*].

¹²⁹ *Id.* at 725.

¹³⁰ *Id.* at 724–25.

¹³¹ Bob Hennelly, *Decades After Mount Laurel Decision, New Jersey's Housing Affordability Crisis Continues to Deepen*, INSIDER NJ (May 20, 2018, 9:57 PM), <https://www.insidernj.com/decades-mount-laurel-decision-new-jerseys-housing-affordability-crisis-continues-deepen> [<https://perma.cc/DN7E-WGYV>].

¹³² Jake Blumgart, *The Fight for The Mount Laurel Doctrine*, NEXT CITY (Feb. 4, 2013), <https://nextcity.org/daily/entry/the-fight-for-the-mount-laurel-doctrine> [<https://perma.cc/EW5U-6VEA>].

¹³³ *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 456 A.2d 390, 410 (N.J. 1983) [hereinafter *Mount Laurel II*].

Court upped the ante.¹³⁴ In *Mount Laurel II*,¹³⁵ decided eight years later, the court announced vigorous enforcement mechanisms to compel municipal compliance with the obligation to include affordable housing opportunities within financially-prohibitive cities and towns. The court appointed judges to monitor and enforce municipal compliance.¹³⁶ Builders were armed with a “builder’s remedy” that provided an incentive for developers to sue non-compliant townships by awarding density bonuses to those who succeeded.¹³⁷ Density bonuses allow developers to build, notwithstanding local caps on new developments, provided that they set aside a percentage of new construction for those of low and moderate income.¹³⁸

To a certain extent, the court’s determination to “put some steel”¹³⁹ into the *Mount Laurel* mandate worked. Shortly after *Mount Laurel II* was announced, New Jersey passed its Fair Housing Act.¹⁴⁰ The law affirmed the court’s mandate and created an administrative agency, the Council on Affordable Housing (COAH), to enforce the requirement that developing municipalities provide their fair share of affordable housing.¹⁴¹ In *Mount Laurel III*, the court upheld that statute’s constitutionality.¹⁴²

The *Mount Laurel* cases have resulted in the successful inclusionary construction of more than 60,000 affordable homes throughout the State,¹⁴³ with more planned.¹⁴⁴ Still, municipal resistance abounds¹⁴⁵ and

¹³⁴ See *id.*

¹³⁵ See *id.* at 418–19.

¹³⁶ See *id.* at 418.

¹³⁷ *Id.* at 452.

¹³⁸ See *id.* at 487–88.

¹³⁹ *Id.* at 410–11.

¹⁴⁰ See Fair Housing Act, 1985 N.J. Laws 966, c. 222 (N.J. 1985) (codified as amended at N.J. STAT. ANN. §§ 52:27D-301–29) [hereinafter NJ Act]. The NJ Act was intended to establish “reasonable fair share housing guidelines and standards” as well as “State review of the local fair share study and housing element, and continuous State funding for low and moderate income housing to replace the federal housing subsidy programs which have been almost completely eliminated.” N.J. STAT. ANN. § 52:27D-302(d) (West 2018).

¹⁴¹ See N.J. STAT. ANN. § 52:27D-305(a) (West 2018); N.J. STAT. ANN. § 52:27D-307(c)(1) (West 2018); see also *Hills Dev. Co. v. Twp. of Bernards in the Cty. of Somerset*, 510 A.2d 621, 630–31, 632 (N.J. 1986) [hereinafter *Mount Laurel III*].

¹⁴² *Mount Laurel III*, 510 A.2d at 632.

¹⁴³ *Mount Laurel Doctrine*, FAIR SHARE HOUSING CTR., <http://www.fairsharehousing.org/mount-laurel-doctrine> [<https://perma.cc/Q2LN-UQQU>] (last visited Oct. 28, 2018).

¹⁴⁴ *Id.*; David O’Reilly, *With 20-Year Plan, Mount Laurel Writes ‘New Chapter’ in Long Affordable-Housing Saga*, PHILA. INQUIRER (Dec. 7, 2016), <https://fairsharedevelopment.org/>

compliance with the mandate remains an uphill battle. Upwards of 150 of New Jersey's more than 565 qualifying townships have yet to comply.¹⁴⁶

In 2015, COAH was dismantled by a governor strenuously opposed to its very mission.¹⁴⁷ With COAH gone, the judiciary re-entered the fray to assure vindication of the inclusionary housing requirement.¹⁴⁸ In 2017, the state's Supreme Court reaffirmed the duty imposed on economically homogeneous residential domains to add to stocks of low- and moderate-income housing within their borders and remediate deficiencies in existing stocks.¹⁴⁹ Today, judges once again oversee local compliance.¹⁵⁰

The "not in my backyard" or NIMBY syndrome is most often at the core of local efforts to block inclusive affordable housing.¹⁵¹ A significant part of residents' resistance to inclusion is predicated on fear of "the other" and stereotypes about the poor and those of lesser means. Affordable housing is thought to bring increased crime, drugs, blight,

files/The_Philadelphia_Inquirer_Mount_Laurel_12_2016.pdf [https://perma.cc/XZ9U-9GCD] ("Fair Share calculates that municipalities statewide must zone for 200,000 more units in the decade ahead . . . About 300 towns . . . have joined forces to convince the courts that those numbers should be closer to 40,000.").

¹⁴⁵ Salvador Rizzo, *N.J. Supreme Court: Towns Must Have Affordable Housing*, NORTHJERSEY.COM (Jan. 18, 2017, 11:36 AM), <http://www.northjersey.com/story/news/new-jersey/2017/01/18/nj-supreme-court-ramps-up-towns-affordable-housing-obligations/96712760> [https://perma.cc/EMN2-WNVC].

¹⁴⁶ *Id.*

¹⁴⁷ Colleen O'Dea, *Christie's No Friend to Housing for Poor and Middle-Income New Jerseyans*, NJ SPOTLIGHT (May 6, 2015), <http://www.njspotlight.com/stories/15/05/05/christie-s-no-friend-to-housing-for-poor-and-middle-income-new-jerseyans> [https://perma.cc/9UXX-6REJ].

¹⁴⁸ Blumgart, *supra* note 132.

¹⁴⁹ *In re Declaratory Judgment Actions Filed by Various Municipalities*, 152 A.3d 915, 918 (N.J. 2017). The court looked to "constitutional compliance, specifically as it concerns municipal responsibility to address the housing need that arose during the past sixteen-plus years, to the extent that it still exists today." *Id.*

¹⁵⁰ Colleen O'Dea, *NJ Court Determines How Many Affordable-Housing Units Needed by 2025*, NJ SPOTLIGHT (Mar. 12, 2018), <http://www.njspotlight.com/stories/18/03/11/nj-superior-court-determines-how-many-affordable-housing-units-needed-by-2025> [https://perma.cc/ABQ5-54EP].

¹⁵¹ *NIMBY (Not in My Backyard)*, HOMELESS HUB, <http://homelesshub.ca/solutions/affordable-housing/nimby-not-my-backyard> [https://perma.cc/2UH3-DWQW] (last visited Oct. 28, 2018).

higher taxes, and diminished property values.¹⁵² But compelling empirical studies reveal that those fears yield to fact, and that inclusion redounds to the benefit of *all* residents.¹⁵³

In the town of Mount Laurel itself, the inclusion of low- and moderate-income housing has had no adverse effects on more affluent residents, and crime rates dropped while property values rose.¹⁵⁴ Over time, families moving into Mount Laurel housing achieved higher incomes and lower rates of welfare dependency.¹⁵⁵ Their children did well academically after having moved into more competitive schools.¹⁵⁶

Other states have devised their own initiatives to enhance housing inclusion. Massachusetts adopted the Anti-Snob Zoning Act¹⁵⁷ to “require that no less than ten percent of the housing stock within every city and town be subsidized with or by a federal or state subsidy.”¹⁵⁸ Recently, the Massachusetts legislature amended the state’s zoning laws by creating a new starter home initiative for those with income levels at or below 100 percent of the given areas’ median income.¹⁵⁹

California approves or denies land-use regulations according to the city or county’s general plan.¹⁶⁰ A prospective ordinance is consistent

¹⁵² See Len Albright, Elizabeth S. Derickson & Douglas S. Massey, *Do Affordable Housing Projects Harm Suburban Communities? Crime, Property Values, and Taxes in Mount Laurel, NJ*, 12 CITY & COMMUNITY 89 (2013).

¹⁵³ See generally DOUGLAS S. MASSEY ET AL., *CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB* (2013) (noting the salutary effects of affordable housing development in Mount Laurel township); David L. Kirp, Opinion, *Here Comes the Neighborhood*, N.Y. TIMES (Oct. 19, 2013), <https://www.nytimes.com/2013/10/20/opinion/sunday/here-comes-the-neighborhood.html> [https://perma.cc/AQC3-QEFA].

¹⁵⁴ MASSEY ET AL., *supra* note 153, at 30; Kirp, *supra* note 153.

¹⁵⁵ Editorial, Opinion, *The Mount Laurel Doctrine*, N.Y. TIMES (Jan. 28, 2013), <https://www.nytimes.com/2013/01/29/opinion/the-mount-laurel-doctrine.html> [https://perma.cc/E2VF-LABA].

¹⁵⁶ *Id.*

¹⁵⁷ Jonathan Douglas Witten, *The Cost of Developing Affordable Housing: At What Price?*, 30 B.C. ENVTL. AFF. L. REV. 509, 525–26 (2003).

¹⁵⁸ *Id.* at 527.

¹⁵⁹ “At least 20 percent of the homes in the district must be affordable and occupied by households with incomes at or below 100% of Area Median Income.” Brian C. Levey, *Recent Changes to the Massachusetts Zoning Act and Smart Growth Zoning*, NAT’L L. REV. (Sept. 27, 2016), <https://www.natlawreview.com/article/recent-changes-to-massachusetts-zoning-act-and-smart-growth-zoning> [https://perma.cc/74MF-Y77R].

¹⁶⁰ CAL. GOV’T CODE §§ 65860(a), 65867.5(c) (West 2018).

with a general plan if it is compatible with the plan's objectives.¹⁶¹ Those objectives require the provision of decent housing.¹⁶² The Sustainable and Affordable Housing Act¹⁶³ was recently introduced in California to provide incentives for affordable housing construction that include awarding density bonuses to compliant developers.¹⁶⁴

In 2017, New York City rolled out an Affordable Housing Plan. The plan uses inclusionary zoning regulations to require new residential developments to set aside a certain percentage of units for people of low and moderate income.¹⁶⁵ It aims to assure the construction of 200,000 affordable units by 2022.

Throughout the country, “[l]ocal land use regulations [can] constrain new housing development and contribute to rising housing costs.”¹⁶⁶ Federal measures have been introduced to relieve the significant diminution across the nation of stocks of affordable housing. The Housing, Opportunity, Mobility, and Equity (HOME) Act—introduced in the Senate in August 2018—would promote more inclusive zoning policies in an effort to make housing more affordable and less segregated.¹⁶⁷ The law would mandate states, cities, and counties receiving funding under the federal Community Development Block Grant (CDBG) program to develop strategies to reduce barriers to

¹⁶¹ *Id.* § 65860(a).

¹⁶² See, e.g., *Planning & Development*, CITY OF BERKELEY, https://www.cityofberkeley.info/Planning_and_Development/Home/General_Plan__A_Guide_for_Public_Decision-Making.aspx [<https://perma.cc/CP9L-VM7A>] (last visited Nov. 25, 2018).

¹⁶³ *Gloria Bill to Create Affordable Housing Opportunities for All Passes State Assembly*, ASSEMBLY DISTRICT 78 (May 17, 2018), <https://a78.asmdc.org/press-releases/gloria-bill-create-affordable-housing-opportunities-all-passes-state-assembly> [<https://perma.cc/7WVC-KLA2>].

¹⁶⁴ *Assembly Member Gloria Introduces Legislation to Increase Supply of Affordable Housing*, ASSEMBLY DISTRICT 78 (Feb. 14, 2018), <https://a78.asmdc.org/press-releases/assemblymember-gloria-introduces-legislation-increase-supply-affordable-housing> [<https://web.archive.org/web/20181222003434/https://a78.asmdc.org/press-releases/assemblymember-gloria-introduces-legislation-increase-supply-affordable-housing>].

¹⁶⁵ *Mayor de Blasio to Complete Affordable Housing Plan 2 Years Ahead of Schedule, Accelerate Pace and Expand Goals*, CITY OF N.Y. (Oct. 24, 2017), <http://www1.nyc.gov/office-of-the-mayor/news/682-17/mayor-de-blasio-complete-affordable-housing-plan-2-years-ahead-schedule-accelerate-pace-and/#/0> [<https://perma.cc/FB5N-WVPM>].

¹⁶⁶ Jenny Schuetz, *HUD Can't Fix Exclusionary Zoning by Withholding CDBG Funds*, BROOKINGS INST. (Oct. 15, 2018), <https://www.brookings.edu/research/hud-cant-fix-exclusionary-zoning-by-withholding-cdbg-funds> [<https://perma.cc/GPN6-NC7L>].

¹⁶⁷ Housing, Opportunity, Mobility, and Equity Act of 2018, S. 3342, 115th Cong. (referred to S. Comm. on Finance, Aug. 1, 2018).

inclusive housing development and increase the supply of housing.¹⁶⁸ These initiatives could include allowing additional high density and multifamily zoning or amending lot size restrictions.¹⁶⁹ The end goal is to ensure that affordable housing units do not comprise less than twenty percent of new housing stock.¹⁷⁰ Another bill would require the federal government to give tax credits to renters who earn less than \$100,000 per year and spend more than thirty percent of their income on rent.¹⁷¹

Still, resistance to housing inclusion persists.¹⁷² At bottom, achieving the aims of inclusive housing policies requires correctives to the misperceptions created about the poor. Too often, poverty is deemed a character defect. The thinking goes, if only “those people” had stronger work ethics, healthier habits, and better values, they would be able to “pull themselves up by the bootstraps.”¹⁷³ But poverty is not a pathology and bootstraps do not pull people up. To conclude otherwise is to grossly misunderstand the complexities and array of intersecting factors that determine one’s economic status. Entrenched, multigenerational systems of impoverishment wrought by denied opportunity are difficult to escape. Notwithstanding even the best efforts of those who find themselves within the struggling ranks of the poor and working classes, widening chasms between the affluent and those scraping by continue to grow as upward mobility becomes more myth than fact.¹⁷⁴

¹⁶⁸ Richard Kahlenberg, *Taking on Class and Racial Discrimination in Housing*, AM. PROSPECT (Aug. 2, 2018), <http://prospect.org/article/taking-on-class-and-racial-discrimination-housing> [https://perma.cc/KT56-5WVZ].

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Jeff Stein, *Housing for All: Democrats Push for Big Government Response to Soaring Rents*, WASH. POST (July 19, 2018), https://www.washingtonpost.com/business/2018/07/19/rents-soar-democrats-push-new-policies-affordable-housing/?noredirect=on&utm_term=.7b1b47f1626c [https://perma.cc/CZ8H-LDQY].

¹⁷² See generally Victoria Basolo, *Viewpoint: Inclusionary Housing: The Controversy Continues*, 82 TOWN PLAN, REV. i (2011).

¹⁷³ Noliwe M. Rooks, *The Myth of Bootstrapping*, TIME (Sept. 7, 2012), <http://ideas.time.com/2012/09/07/the-myth-of-bootstrapping> [https://perma.cc/P4W6-J7YM].

¹⁷⁴ Jodie T. Allen & Michael Dimock, *A Nation Of “Haves” And “Have-Nots”?*, PEW RES. CTR. (Sept. 13, 2007), <http://www.pewresearch.org/2007/09/13/a-nation-of-haves-and-havenots> [https://perma.cc/86S2-PZ2N].

Inclusive housing redounds to the benefit of those in the lower economic strata with children,¹⁷⁵ the disabled,¹⁷⁶ seniors,¹⁷⁷ veterans,¹⁷⁸ millennials laden with tuition debt,¹⁷⁹ and baby boomers (particularly women) facing retirement with exceedingly limited cash reserves.¹⁸⁰ The construction of affordable housing creates jobs, adds tax revenue, and boosts local economies.¹⁸¹ Affordable housing subsidized by federal tax

¹⁷⁵ Nearly 15 million children in the United States live in families with incomes below the federal poverty threshold. See *Child Poverty*, NAT'L CTR. FOR CHILDREN POVERTY, <http://www.nccp.org/topics/childpoverty.html> [https://perma.cc/B23N-UEN5] (last visited Oct. 28, 2018). On average, families with children require an income of “twice that level to cover basic expenses.” *Id.*

¹⁷⁶ Over seventy percent of people with disabilities do not work and instead receive benefits through the Social Security Administration. *The State of Housing for People with Disabilities*, ACCESS LIVING (Oct. 3, 2008), <https://www.accessliving.org/fair-housing-old> [https://perma.cc/2RKC-QDWV]. Studies have found that “there is not one single housing market in U.S. in which a person on [Social Security Income] (without a subsidy) could afford even a modest efficiency unit.” *Id.* (“[I]f you link the need for affordability with the need for accessibility the search for housing becomes like finding a needle in a haystack.”).

¹⁷⁷ The elderly are more likely than any other population to spend more than thirty percent of their income on rent. Alisha Sanders, *Affordable Housing: Senior Housing and Supportive Services*, GRANTMAKERS AGING, <https://www.giaging.org/issues/affordable-housing> [https://perma.cc/J4R3-2H8H] (last visited Oct. 28, 2018). Nearly half of the poorest seniors spend over half of their income on housing. *Id.* “For every unit of Section 202 housing (a federal-assisted housing program targeted to seniors) that becomes available, ten seniors are waiting.” *Id.*

¹⁷⁸ Over twenty-six percent of the twenty million veteran households experience a housing cost burden, and over 1.5 million veteran households are “severely cost burdened,” and spend over fifty percent of their income on housing. See ALTHEA ARNOLD, MEGAN BOLTON & SHEILA CROWLEY, *HOUSING INSTABILITY AMONG OUR NATION’S VETERANS 1* (2013), <http://nlihc.org/sites/default/files/NLIHC-Veteran-Report-2013.pdf> [https://perma.cc/UX2D-LNHP].

¹⁷⁹ Student loan debt has “become a major barrier to home ownership.” Annie Nova, *Why Are Nearly 1 in 4 Millennials Still Living with Mom? Lack of Affordable Housing*, USA TODAY (May 28, 2018, 1:00 PM), <https://www.usatoday.com/story/money/personalfinance/real-estate/2018/05/28/affordable-housing-why-millennials-living-mom/638430002> [https://perma.cc/YE6N-3DX8]. According to the National Association of Realtors, over eighty percent of people between twenty-two and thirty-five with student debt and who do not own a home claim that this is due to their educational loans. *Id.*

¹⁸⁰ A startling percentage of women who are sixty-five or older live at or below poverty levels. See Adam Allington, *Women More Likely than Men to Face Poverty During Retirement*, PBS NEWSHOUR (July 10, 2016, 9:19 AM), <https://www.pbs.org/newshour/economy/women-more-likely-than-men-to-face-poverty-during-retirement> [https://perma.cc/F44J-APHH]. During their working years, women earn less than men, resulting in a lack of financial security upon retirement. *Id.* “The National Institute on Retirement Security . . . reports that women are 80 percent more likely than men to be impoverished at age 65 and older.” *Id.*

¹⁸¹ Colleen O’Dea, *Rethinking NJ’s Housing Market to Meet Needs of Suburbanites, City Dwellers*, NJ SPOTLIGHT (Oct. 12, 2017), <http://www.njspotlight.com/stories/17/10/11/rethinking-nj-s-housing-market-to-meets-needs-of-suburbanites-city-dwellers> [https://

credits “raises property values and lowers crime.”¹⁸² The use of federal tax credits to build housing in otherwise economically homogeneous residential areas decreases racial segregation.¹⁸³

Myths about affordable housing must be debunked, and the promise of inclusion can be taught. We are reaching a tipping point moment in this country. The consequences of “two Americas”—one for those of privilege and another for those without—are dire. Politics and economics are indivisible.¹⁸⁴ Renowned economist Joseph Stiglitz notes persuasively that even one person one vote—“rather than one dollar one vote”—is threatened by economic inequality, and its survival depends on reforms unlikely to be enacted “within an economic system that is characterized by the degree of inequality that marks ours.”¹⁸⁵

Michael Sandel observes that rising inequality means that those of means and those of little or modest means “lead increasingly separate lives. We live and work and shop and play in different places. Our children go to different schools. . . . It’s not good for democracy, nor is it a satisfying way to live.”¹⁸⁶ He adds that while “[d]emocracy does not require perfect equality,” it does depend on people sharing “in a common life.”¹⁸⁷ It is important to the work of connection and civic engagement that “people of different backgrounds and social positions . . . bump up against one another, in the course of everyday life. For this is how we learn to negotiate and abide our differences, and how we come to care for the common good.”¹⁸⁸ Stated most succinctly,

perma.cc/GUE5-B4HS] (“Affordable-housing development and community revitalization work done by the state’s community development organizations added \$12 billion to the state’s economy over the past quarter century.”).

¹⁸² Tracy Jan, *A Surprising Way to Increase Property Values: Build Affordable Housing*, WASH. POST (July 6, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/06/a-surprising-way-to-increase-property-values/?utm_term=.22c9b94af3b1 [<https://perma.cc/5S8V-CA3F>] (“In neighborhoods where median incomes fell below \$26,000 a year, the researchers saw home values appreciate 6.5 percent within a tenth of a mile of the housing development.”).

¹⁸³ *Id.* (“[T]he use of federal tax credits for affordable housing is linked to declines in racial segregation in cities.”).

¹⁸⁴ JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* 288 (2012).

¹⁸⁵ *Id.* at 288–89.

¹⁸⁶ MICHAEL J. SANDEL, *WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS* 203 (2012).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

when we know better about “the other,” however conceived, we do better.

CONCLUSION

Fair, safe, and affordable housing is about much more than housing. It is about human dignity. It is about access to health care, wellness, quality education, transportation, career opportunity, security, longer life expectancy, and overall quality of life. It is about creating opportunities through inclusionary mechanisms for the sort of proximity that allows our innate capacity for empathy to build bridges to those whose stories and circumstances might be different from our own, so that we might come to see the thousand strands that connect our hopes, dreams, and disappointments. What we do for others we do for ourselves. What we do *to* others we do to ourselves.

People thrive when given a fair chance.¹⁸⁹ The burdens of our own struggles and preoccupations do not relieve us of the responsibility to reach beyond our literal and metaphorical borders to answer the call of those who continue to be left out of the promise of decent and inclusive housing. It has been fifty years since the Fair Housing Act and its sponsors issued their clarion call to action, exhorting a weary nation to do better for those without a safe place to call home. That call resounds with just as much urgency today. It can and must be answered.

¹⁸⁹ See MASSEY ET AL, *supra* note 153 and accompanying text.