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Making the Second Pandemic: The Eviction Tsunami, Small Landlords, and the Preservation of "Naturally Occurring Affordable Housing"

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ARTICLES

Making the Second Pandemic: The Eviction Tsunami, Small Landlords, and the Preservation of “Naturally Occurring” Affordable Housing

Susan D. Bennett

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I. Introduction

The “second ghetto” did not just happen. It was willed into existence.¹

Tsunami.² Avalanche.³ Cliff.⁴ Whether geological or meteorological, the metaphors of catastrophe have flooded the discourse regarding the anticipated surge⁵ of evictions during the Pandemic of 2020. It is striking how we refer to a loss of home for so many in terms of imminent phenomena over which we have no control.

Of course, we do control this denouement to the scarcity and instability of affordable housing in this country. We built it; we broke it; we bought it. One of the many themes in Arnold Hirsch’s *Making the Second Ghetto*, to which the title of this essay alludes, is that there was nothing natural or inevitable about the violent racial segregation of mid-century inner cities. Purposeful local, state, and federal policies produced those results, and they produced what we see now.

Given our collective responsibility, one might hope that the impending evictions of thirty million tenants, and the homelessness of tens of thousands more,⁶ might focus the collective mind wonderfully. Instead, the

1. ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE & HOUSING IN CHICAGO 1940–1960*, at x (2d ed. 1998).

2. Katy O’Donnell, *Black Community Braces for Next Threat: Mass Evictions*, POLITICO (June 12, 2020) (“Unless Congress intervenes soon, the coming tsunami of evictions and homelessness will disproportionately harm black and brown people” (quoting Diane Yentel, president and CEO of the National Low Income Housing Coalition)), <https://www.politico.com/news/2020/06/12/mass-evictions-314699>.

3. Sarah Mervosh, *An ‘Avalanche of Evictions’ Could Be Bearing Down on America’s Renters*, N.Y. TIMES (May 27, 2020) (quoting Professor Emily Benfer, Columbia Law School), <https://www.nytimes.com/2020/05/27/us/coronavirus-evictions-renters.html>.

4. Talia Richman & Wilborn P. Nobles III, *Losing Homes Scares Many*, BALTIMORE SUN (July 5, 2020), https://digealedition.baltimoresun.com/infinity/article_share.aspx?guid=21bf6487-8fdf-4cc0-9d8e-6dc2b51ee0f8, (quoting Karen Wabeke, Homeless Persons Representation Project, “Every day is a day closer to this cliff when a lot of the protections and measures all will be ending.”).

5. I challenge the reader to identify all the natural disaster-related metaphors in this essay, none of them planted deliberately. They are simply impossible to avoid. In disclaiming agency for this human disaster, the discourse of natural disaster expresses the irresponsibility of this moment perfectly. Since I submitted the first draft of this article, as state-based eviction moratoria and enhanced unemployment benefits expire with no immediate hope of renewal, the trend in disaster-related characterization has become so pronounced that others have taken note. See, e.g., Conor Dougherty, *Millions of Evictions Are a Sharper Threat as Government Support Ends*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/business/economy/housing-economy-eviction-renters.html> (noting that the simultaneous lapse of the federal moratorium on evictions and of the enhanced federal unemployment benefits has contributed to experts’ reliance on metaphors of natural disaster).

6. EMILY BENFER ET AL., ASPEN INST., *THE COVID-19 EVICTION CRISIS: AN ESTIMATED 30–40 MILLION PEOPLE IN AMERICA ARE AT RISK* (Aug. 7, 2020), <https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in>

relief response so far has been jagged and uncoordinated, following the usual fault lines. States and local governments have heeded the pressing demands to postpone the obligation to pay rent. But moratoria on evictions for nonpayment of rent expire; they apply unevenly, state by state.⁷ As of this writing, prohibitions on evictions from federally supported housing expired at the end of July 2020, with extended restrictions for tenants of multifamily housing financed by federally guaranteed loans.⁸ “Cancel the rent” campaigns recognize the reality that jobs lost may not return before the rent comes due again.

The focus on forestalling evictions and mortgage defaults disregards the structural underpinnings of distress, and in doing so, guarantees that the efforts will come up short. Rent-based solutions to the horror of mass eviction avoid the question of “who pays?” Rental properties incur inexorable expenses; for some owners, rents are the primary sources of income with which to pay these expenses. While it is understandable that legislators give landlords a distant second thought, habitability costs money. So far, that relief has arrived in the form of mortgage forbearance, a remedy that is available only to those property owners with federally backed mortgages.⁹ Residential as well as commercial property owners eventually must pay property taxes, lest they push the pain along to state and local governments that are starving for funds.¹⁰

One could never claim that the pain of the owner of a rental building equals the pain of the renter who lives in it. Yet both suffer within an ecosystem of housing instability and insecurity. I will focus on the place in this ecosystem of the small landlord, the owner-manager of unsubsidized buildings of somewhere between one and five units.¹¹ According to one source, these buildings represent the majority of housing renting for less

-america-are-at-risk (estimating that, of the thirty to forty million evictions predicted, Black and Latinx renters will be disproportionately affected); *see also* COMMUNITY SOLUTIONS, ANALYSIS ON UNEMPLOYMENT PROJECTS 40-45% INCREASE IN HOMELESSNESS THIS YEAR (May 11, 2020), <https://community.solutions/analysis-on-unemployment-projects-40-45-increase-in-homelessness-this-year> (extrapolating an increase in the number of homeless persons to a total of 800,000, based on anticipated increase in joblessness).

7. EVICTION LAB, COVID-19 POLICY SCORECARD, [HTTPS://EVICTIONLAB.ORG/COVID-POLICY-SCORECARD/#SCORECARD-INTRO](https://evictionlab.org/covid-policy-scorecard/#SCORECARD-INTRO). As of this writing, in July, 2020, thirty-one states had lifted their restrictions on evictions.

8. Brittany Hutson, *As Moratoriums Start to Lift, Preparing for an Eviction Wave*, SHELTERFORCE (June 25, 2020), <https://shelterforce.org/2020/06/25/as-moratoriums-start-to-lift-preparing-for-an-eviction-wave>.

9. *See* FED. HOUS. FIN. AGENCY, FHFA PROVIDES TENANT PROTECTIONS (June 29, 2020), <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Provides-Tenant-Protections.aspx> (extending forbearance to six months for servicers of mortgages backed by Fannie Mae and Freddie Mac, with accompanying prohibitions on evictions).

10. Richman & Nobles III, *supra* note 4 (quoting Del. Kumar Barve, D. Montgomery County, Md.: “We don’t want an eviction tsunami. We don’t want to hurt the business community either”).

11. For a discussion of the elusive definition of “small,” *see* text at Section II, *infra*.

than \$750 per month.¹² They also represent the housing for a significant proportion of the renters most at risk for losing their jobs, and thus the housing most at risk for losing financial support.¹³ Owners of color and immigrants disproportionately own small buildings, and renters of color disproportionately live in them.

These properties lie within the larger category of real estate known as “Naturally Occurring Affordable Housing.” “NOAH” buildings represent both the most and the least stable of rental housing options: the most stable, because, like the poor, unsubsidized low rent housing has been always with us; the least stable for the individual renter, because NOAH units may operate outside any mandated rent structure and outside the confines of leases. I will address how this historic mainstay of affordable housing stock struggles on, perpetually at risk, maligned and ignored; how racial discrimination sustains it; and what the pandemic exposes about its fragility.

II. The World We Know So Little About: Small-Scale Rental Property Owners and the Housing They Provide

A. Why a Look at Small Landlords and Small Buildings

There is no official definition of “small” building. Researchers note that buildings of between one and five units are commonly characterized as “small.”¹⁴ Small buildings sometimes are defined in the negative: by what they are exempt from. Rental buildings of one to four units may be exempt from rent stabilization, and even from local measures to provide relief to renters during the pandemic.¹⁵

The importance of small buildings in this discussion relates back to their prominence in the affordable housing ecosystem. They constitute a subset

12. Whitney Airgood-Obrycki & Alexander Herrman, *Covid-19 Rent Shortfalls in Small Buildings*, JT. CTR. HOUSING STUD., HARV. U. (May 26, 2020), <https://www.jchs.harvard.edu/blog/covid-19-rent-shortfalls-in-small-buildings>; JT. CTR. FOR HOUSING STUD., HARV. U., *AMERICA’S RENTAL HOUSING 2020*, at 17 (June 2020), https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_Americas_Rental_Housing_2020.pdf (noting that two-to-four unit buildings constitute a “disproportionate share of the low- and moderate-cost housing stock,” with nineteen percent of units renting at \$600 or less, and twenty-one percent of units renting between \$600 and \$799).

13. Airgood-Obrycki & Herrman, *supra* note 12 (noting that households in thirty-one percent of single-family rental dwellings, and in twenty-nine percent of small multi-family buildings, are at risk for job loss as a result of the pandemic; and that fifty-one percent of households renting in small multi-family buildings are headed by people of color).

14. PHILIP GARBODEN ET AL., HUD USER, URBAN LANDLORDS AND THE HOUSING CHOICE VOUCHER PROGRAM: A RESEARCH REPORT 9 n.13 (May 2018), <https://www.huduser.gov/portal/publications/UrbanLandlords.html>.

15. *See, e.g.*, D.C. CODE §42-3502.05(a)(3)(A)(2020)(exempting buildings of four or fewer units, owned by four or fewer “natural persons,” from registration under rent stabilization); D.C. ACT 23-317, §8(g)(2) (May 13, 2020), https://lims.dccouncil.us/downloads/LIMS/44622/Signed_Act/B23-0750-SignedAct.pdf (limiting to owners of five or more units the requirement that landlords offer payment plans to tenants).

of NOAH stock. As there is no institutional or governmental definition of “small” building, there is no obvious point of origin for “NOAH.” The acronym has appeared in newspaper articles¹⁶ and in affordable housing publications.¹⁷ Writers have characterized NOAH as unsubsidized, bare-bones rental housing of at least two decades vintage.¹⁸ Others refer to it as “missing middle” housing, affordable to those who are neither very rich nor very poor.¹⁹

Numbers of NOAH units are hard to pin down, just as are definitions of affordability. One estimate from over a decade ago situates these units as representing seventy-five percent of the United States’ affordable rental housing stock.²⁰ As I note ahead, this mainstay of affordable housing stock is disappearing: at risk before the pandemic hit, and further weakened by the worsening economic instability of the renters who occupy it.

B. Who Are the Small Landlords?

Small landlords are defined variously, usually in relationship to the number or configuration of units that they own in total, or to the importance of the owner’s housing investment portfolio to the owner’s income. Owners of buildings of one to five units are overwhelmingly individual investors. Single-family homes in Baltimore and Cleveland constitute over sixty percent of properties owned by landlords interviewed for a small study of property owners in Baltimore, Cleveland, and Dallas, with eighty percent of the properties built before 1960.²¹ Most small landlords own directly, and they are less likely to have sheltered themselves from personal liability

16. See, e.g., Conor Dougherty, *Tenants Largely Stay Current on Rent, for Now*, N.Y. TIMES (May 31, 2020) (citing lower collection rates for “NOAH” buildings with poorer tenants; describing anecdotally the plight of an individual owner of rental single-family homes in Boston, who rented at below-market rates, and had to sell her units because she could not keep up with mortgage, tax and maintenance without rent).

17. Paul Brophy & Carey Shea, *Opinion: Naturally Occurring Affordable Housing is Hiding in Plain Sight*, SHELTERFORCE (July 22, 2019), <https://shelterforce.org/2019/07/22/opinion-naturally-occurring-affordable-housing-is-hiding-in-plain-sight>.

18. Haisten Willis, *Preserving Affordable Housing: A Look at Programs Designed to Stabilize Communities*, WASH. POST (Mar. 19, 2020), https://www.washingtonpost.com/realestate/the-noah-conundrum-maintaining-the-lifeboat-for-affordable-rental-housing/2020/03/18/e3e18aa6-12ba-11ea-bf62-eadd5d11f559_story.html.

19. Brophy & Shea, *supra* note 17.

20. Willis, *supra* note 18 (referring to Harvard’s Joint Center on Housing Studies as the source for this figure); see JT. CTR. FOR HOUSING STUD., HARV. U., AMERICA’S RENTAL HOUSING—MEETING CHALLENGES, BUILDING OPPORTUNITY 24, fig.18 (2011), <https://www.jchs.harvard.edu/sites/default/files/americasrentalhousing-2011.pdf>. A contact at the Joint Center confirmed that this was the last time that the Joint Center had published figures on the proportion of affordable housing that is unsubsidized. E-mail from James Chaknis, Harv. Jt. Ctr. for Housing Studies (June 22, 2020) (on file with author).

21. GARBODEN ET AL., *supra* note 14, at 4.

through adoption of an entity.²² To some degree, small landlords resemble their tenants in race and ethnicity, with a slight edge in Black, Latinx, and immigrant ownership.²³ Data are hard to come by on whether small landlords enjoy the huge advantage over tenants in representation in landlord-tenant court that their larger counterparts do.²⁴

Small owners in general probably rest somewhere in between one description of them as the “battered but unsung heroes of the fight to preserve housing for the poor,”²⁵ and the prototypically predatory, profit-seeking owner. Matthew Desmond and Nathan Wilmers characterize the landlord-tenant relationship in segregated neighborhoods of concentrated poverty as historically exploitative, with owners who profit from charging near-market rents for housing of last resort, for properties with minimal physical maintenance and low tax burdens.²⁶ Small landlords do not escape their critique. In *Evicted*, Desmond writes memorably of Sherrena Tarver, a Milwaukee landlord, “small” in the size of her company (herself and her husband) but closer to midrange in her portfolio (thirty-six single family homes, some split up into apartments rented to multiple families at one time). Her tenants wrangle concessions from her, such as reduced rent in return for performing amateur unlicensed maintenance jobs. But whenever Sherrena decides that it is no longer in her interest to let the rent slide, the tenant is gone.²⁷

Until recently, Desmond’s depiction of Sherrena Tarver notwithstanding, not much has been written in academic literature about landlords in

22. AMERICA’S RENTAL HOUSING 2020, *supra* note 12, at 17–18 (attributing 77% of ownership of buildings with 2-4 units to individual owners, and 59% of large multi-family buildings to pass-through entities).

23. URB. INST., SMALL MULTIFAMILY UNITS 13 (May 2020), https://www.urban.org/sites/default/files/2020/05/15/small_multifamily_units_0.pdf. A study of 127 landlords in Baltimore, Cleveland, and Dallas, many of them owners of single-family rentals and small buildings, found that forty percent of the landlords in the three-city cohort were Black, and thirteen percent were non-Black minorities. GARBODEN, ET AL., *supra* note 14, at 10. For more on this study, see *infra* notes 30–33 and accompanying text.

24. Comparisons of use of counsel for landlords and for tenants tend to focus on data city by city. See, e.g., STOUT RISIUS ROUS, LLC, THE ECONOMIC IMPACT OF AN EVICTION RIGHT TO COUNSEL IN BALTIMORE CITY 10 (May 8, 2020) https://www.abell.org/sites/default/files/files/Baltimore%20RTC%20Report_FINAL_5_8_2020.pdf (stating that tenants lack representation in eviction case filings in Baltimore City ninety-nine percent of the time, and landlords lack representation four percent of the time).

25. Irving Welfeld, *Poor Tenants, Poor Landlords, Poor Policy*, 92 PUB. INT. 110, 116 (1988).

26. Matthew Desmond & Nathan Wilmers, *Do the Poor Pay More for Rental Housing? Exploitation, Profit, and Risk in Rental Markets*, 124 AM. J. SOC. 1090, 1103 (2019) (defining “exploitation rates” as ratio of rent to property tax assessment); *id* at 1112 (noting that owners’ profits increase in low-cost markets with high poverty rates, where properties rank in the tenth percentile of value).

27. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 10–13 (2016) (describing Sherrena Tarver’s shrewd assessment of the inner-city housing market as a profitable business investment).

general, or small landlords in particular.²⁸ The controlling narratives about landlord-tenant relationships, and about landlords as rational, profit-seeking market actors, are drawn from decades-old information about urban housing markets.²⁹ This picture changed slightly in 2018, when HUD published a study to which I have referred earlier, that was based on interviews with 127 landlords and property owners in Baltimore, Cleveland, and Dallas, many of them “mom-and-pop” owners.³⁰ Several articles that have ensued from this data set reach different conclusions and somewhat complicate the stock narrative.

The authors of the inaugural study characterized the owners in Baltimore and Cleveland as “small, amateur landlords with limited access to capital and limited business acumen”³¹ who entered into real estate ownership as a hedge against insecure employment and uncertain retirements. They do their own repairs, a problematic practice given the age of the housing stock. Their incomes from their properties are only as stable as the unstable incomes of their tenants. To cope with the escalating costs of utilities, especially water, some skimp on all but the most essential maintenance.³² Evictions mean a fallow period of turnover, without rent and with the hazards attendant on vacant properties. These owners appreciate paying, quiescent tenants and value stability beyond all else. They will accept some rent rather than none. The authors describe their situation as one in which “instability and fear of the future . . . is endemic.”³³

That said, the very same owners, depicted by one study as floundering amid ad hoc strategies to keep tenants in place, have been characterized in a subsequent assessment as engaged in serial eviction filings as a calculated business practice.³⁴ Serial evictions, defined as multiple filings against individual tenants, with compounding late fees and court fees, have been attributed to larger owners in other markets as a means of enforcing rental discipline.³⁵ So whether as a business model or an ad hoc practice, small landlords employ this device as well, to exact rental pay-

28. Desmond and Wilmer acknowledge as much. Desmond & Wilmer, *supra* note 26, at 1093 (commenting that landlords are “conspicuously absent” from sociologists’ studies of urban rental housing markets).

29. GARBODEN ET AL., *supra* note 14, at 8.

30. *Id.* at 3.

31. *Id.* at 10.

32. *Id.* at 17 (noting that the cost of water service increased by fifty percent nationally between 2010 and 2017, and that the landlords in this study compensated for turnover and other escalating costs by stinting on maintenance and ramping up their screening of prospective tenants).

33. *Id.* at 14.

34. Philip Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & Cmty. 638 (2019).

35. Michelle D. Layser, Edward W. DeBarbieri, Andrew J. Greenlee, Tracy A. Kaye & Blaine G. Saito, *Mitigating Housing Instability During a Pandemic* (Univ. Ill. Coll. Law Legal Stud., Rsch. Paper No. 20-15 (forthcoming), <https://papers.ssrn.com/sol3/papers>

ment short of actually taking tenants to court. Studies of selected housing markets suggest that larger owners engage in other significantly destabilizing landlord-tenant practices in which small landlords may less conspicuously take part. Larger owners benefit from most tenants' unfamiliarity with landlord-tenant procedures by claiming default money judgments against tenants for fees and costs, and then garnishing tenants' wages.³⁶ Large owners take greater advantage of corporate ownership forms, which have earned opprobrium as enabling, or emboldening, owners to get away with poor maintenance.³⁷ LLCs also obscure owners' and investors' identities, a benefit which some larger landlords have gone to great lengths to conserve.³⁸

It is possible that property managers acting on behalf of larger owners account for their use of a range of predatory strategies.³⁹ It is also possible that, most of the time, it is simply too difficult to identify and document small owners who do the same. One small study does not a generalization make. At the very least, findings from HUD's three-city study imply that residential rental property ownership varies enormously from locality to locality and that owners vary from distressed to ruthlessly profit-taking. Combined with information from other studies on the race and income of tenants in small unsubsidized buildings, these findings suggest a housing supply that was already tenuous is now even more at risk.

.cfm?abstract_id=3613789 (describing large landlords as more likely to use techniques such as serial evictions to regulate tenants).

36. Any large-scale rental owner who wants to evade notoriety for questionable real estate practices likely should not have married the daughter of the President of the United States. The Kushner Companies' extensive mid-range residential rental housing stock takes advantage of a market for low-wage workers in Baltimore County, Maryland, which does not have a housing authority or public housing. Alec McGillis, *Jared Kushner's Other Real Estate Empire in Baltimore*, N.Y. TIMES, May 23, 2017 (Magazine), <https://www.nytimes.com/2017/05/23/magazine/jared-kushners-other-real-estate-empire.html> (describing the Kushner Companies' strategy of buying deteriorating mid-range residential rental properties, and treating tenancies as an income stream derived from late fees, costs, and wage garnishments).

37. See Adam Travis, *The Organization of Neglect: Limited Liability Companies and Housing Disinvestment*, 84 AM. SOC. REV. 142 (2019); James Horner, *Code Dodgers: Landlord Use of LLCs and Housing Code Enforcement*, 37 YALE L. & POL'Y REV. 647 (2019).

38. Alec McGillis, *Kushner Companies Loses a Key Motion in Class Action Filed by Baltimore Tenants*, PROPUBLICA (July 23, 2018), https://www.propublica.org/article/kushner-companies-loses-a-key-motion-in-class-action-filed-by-baltimore-tenants?utm_source=citylab-daily&silverid=MzEwMTkyMjY1MjQzS0 (describing the denial of a motion to seal ownership records filed by Westminster Management, the real estate management arm of the Kushner Companies. Westminster Management sought to remove a lawsuit brought by its tenants in Baltimore from Circuit Court for Baltimore City to federal district court in Manhattan, a strategy for which it needed to reveal the identity and location of investors in order to prove diversity jurisdiction).

39. See, e.g., Daniel Immergluck et al., *Evictions, Large Owners, and Serial Filings: Findings from Atlanta*, 35 HOUSING STUD. 903, 907 (2020).

No one keeps records on small landlords' rent collections, in or out of crisis. So we do not know for sure how they are weathering the pandemic.⁴⁰ We can extrapolate their degree of pain from anecdotes and from what we know about how small landlords run their businesses. Some small landlords have attempted to work with their tenants, a behavior we have seen as landlords favor stability over eviction even in more normal times.⁴¹ Some landlords have evaded the eviction moratoria altogether;⁴² some have defied them in court.⁴³ National data confirm that small landlords rely heavily on the rental income from their units.⁴⁴ As observed in the Baltimore-Cleveland-Dallas study, when tenants are at risk, small landlords are at risk: more than half of the renters at risk of losing jobs during the pandemic rent in single-family homes or small buildings.⁴⁵ Small landlords often manage their own buildings, older housing stock for which repairs mount up.⁴⁶ As owners without employees, small landlords were ineligible

40. Christie Moffatt, *Small Multifamily Owners Struggle with Eviction Moratorium as Tenants Face An Uncertain Future*, BISNOW (July 14, 2020), <https://www.bisnow.com/national/news/multifamily/small-multifamily-owners-struggle-with-eviction-moratorium-as-tenants-face-an-uncertain-future-105182> (noting that small landlords do not belong to trade associations such as the National Multifamily Housing Council, so they are not included in its tracking of its members' losses in rental income); *see also* D.C. ACT 23-317, *supra* note 15 (exempting owners of fewer than five units from mandatory extension of payment plans to delinquent tenants).

41. Moffatt, *supra* note 40 (quoting owners and managers of variously sized properties as saying that they would not evict tenants as long as tenants communicated their situations to them).

42. Matthew Goldstein, *Landlords Jump the Gun as Eviction Moratorium Wanes*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/07/23/business/evictions-moratorium-cares-act.html>.

43. *See* Complaint and Request for Preliminary Injunction, Apartment Ass'n of Los Angeles County, Inc. v. Garcetti, No: 2:20-cv-05193 (C.D. Cal. filed June 11, 2020), <https://aagla.org/wp-content/uploads/2020/06/Complaint-for-Declaratory-Injunctive-Relief.pdf> (alleging that the city's moratorium on evictions and on rent increases violates the Contracts and Takings Clauses of the U.S. Constitution, among other causes of action); *see also* Christie Moffatt, *Texas Multifamily Owners File Lawsuit Against CARES Act Eviction Moratorium*, BISNOW (June 29, 2020), <https://www.bisnow.com/houston/news/multifamily/texas-multifamily-owners-file-lawsuit-against-cares-act-eviction-moratorium-105009> (describing suit filed on June 24, 2020, for declaratory relief, alleging that the moratorium on evictions imposed by the CARES Act, Section 4024, violates constitutionally guaranteed rights of access to state courts, of contract, of due process, and of equal protection).

44. Sanheep Bordia, Jasraj Vadya & Aleksandra Firstenko, *Covid-19 Relief Helps Some, Leaves Other Households Vulnerable* (2020), <https://www.amherstcapital.com/documents/20649/0/Amherst+Market+Commentary+-+May+2020+Issue/b6520038-308f-4708-8ed5-3b678d8ed560>.

45. Airgood-Obrycki & Hermann, *supra* note 12.

46. GARBODEN ET AL., *supra* note 14, at 10; BUREAU OF THE CENSUS, RENTAL HOUSING FINANCE SURVEY, TABLE CREATOR, 2018 NATIONAL—OWNERSHIP AND MANAGEMENT (2018).

for support from the Paycheck Protection Program, though they may have qualified for assistance from state and local governments. Threatened with loss of income, they have joined the chorus for enhanced rent supplements to the Covid-unemployed.⁴⁷

Assuming that many owners on the low end need any rent, rather than none, Ron Lieber addresses the “cliff” head-on by prescribing “Ten Steps to Take to Try to Prevent Your Own Eviction.” The key message for tenants is that help is not on the way, but that features of the tenant-landlord relationship itself offer many points for self-help and leverage. Steps 4 and 5 involve negotiation with the landlord, focusing on small landlords in particular. Lieber advises tenants in small buildings owned by individual landlords to focus on a source of power that renters do not assume that they have: that their rent constitutes “a significant percentage of someone’s income.”⁴⁸ His recommendation reflects what the studies confirm: the pandemic sealed a pre-existing unhealthy relationship, trapping owners and renters in a dance in which neither can afford to let go.

III. The Housing Crisis Before the Housing Crisis: The Predicate to Precarity

The pandemic is frequently described as exposing and exacerbating every gulf, divide, and inequity in American society, almost all of them race and ethnicity-based: between those who zoom at home to those who work in fulfillment centers, nursing homes, and meat-packing plants;⁴⁹ between those who pick up curbside carryout and those who wait in line at food banks.⁵⁰ Persons of color, already disproportionately under-employed and

47. See, e.g., Nena Perry-Brown, *A Small Landlords Trade Group Calls for Emergency Rental Assistance in DC*, URBANTURF (July 24, 2020), <https://dc.urbanturf.com/articles/blog/dcs-small-landlords-trade-group-calls-for-emergency-rental-assistance/17100> (describing the newly organized D.C. Small Multifamily Owners Association, representing owners of between four and fifty units, which has joined the chorus requesting rent supplements for tenants, relief from the emergency obligation to extend a statutory payment plan, and the creation of an Emergency Eviction Diversion Program).

48. Ron Lieber, *Your Money: Ten Steps to Take to Try to Prevent Your Own Eviction*, N.Y. TIMES (July 11, 2020), <https://www.nytimes.com/2020/07/11/your-money/coronavirus-eviction-prevention-renters-landlord.html> (quoting Whitney Airgood-Obrycki, Urban Institute, that a loss of small-scale ownership of small buildings will endanger a major source of affordable housing).

49. See, e.g., Eric Schlosser, *America’s Slaughterhouses Aren’t Just Killing Animals*, ATLANTIC (May 12, 2020), https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpacking-coronavirus/611437/?utm_source=newsletter&utm_medium=email&utm_campaign=masthead-newsletter&utm_content=20200530&silverid-ref=MzEwMTkyMjY1MjQzS0.

50. See, e.g., Malia Wollan, *At the San Antonio Food Bank, the Cars Keep Coming*, N.Y. TIMES (May 26, 2020) (Magazine), <https://www.nytimes.com/interactive/2020/05/26/magazine/coronavirus-san-antonio-unemployment-jobs.html> (describing residents lining up in their cars at 8:30 pm the night before the San Antonio Food Bank would start

under-housed, were positioned to be disproportionately injured.⁵¹ Pre-pandemic, that injury was already acute in the distribution of housing that is “affordable” and “available.”⁵²

A. “Affordable” and “Available”: The Housing That Exists
for the Increasingly Few

“Affordable” is widely accepted as meaning a rent set at 30% of household income.⁵³ A renting household paying more than 30% is “cost-burdened,” a designation that applied to 47.5% of all renters before the pandemic. Also preceding the pandemic: 25% of renters in the United States spent more than 50% of their income on rent.⁵⁴ According to the studies, 52.9% of renters with “worst case housing needs,”⁵⁵ the most severely burdened of all, were persons of color.⁵⁶ While Black households account for 19% of all rental households, they represent 26% of all renters at “extremely low income,” that is, with household income below 30% of the area median.⁵⁷

Forecasts of the evictions likely to be precipitated by the pandemic draw from these predictors of housing instability, all of which were well in place in the “before times”: source and amount of income, housing cost burden, and race. They also take into account the impact of stimulus, enhanced

distributing groceries at 9:00 am; the Bank distributed 1.5 million pounds of food to residents in 10,000 cars).

51. See, e.g., Richard A. Oppel, Jr., Robert Gebeloff, K.K. Rebecca Lai, Will Wright & Mitch Smith, *The Fullest Look Yet at the Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html> (summarizing data—extracted through litigation—from the Centers for Disease Control and Prevention, showing that Black and Latinx residents were three times as likely as whites to be infected with the virus, and almost two times as likely to die from it).

52. NICOLE ELSASSER WATSON ET AL., HUD OFFICE OF POL’Y, DEV. & RES., WORST CASE HOUSING NEEDS: 2019 REPORT TO CONGRESS 21 (June 2020), <https://www.huduser.gov/portal/sites/default/files/pdf/worst-case-housing-needs-2020.pdf> (defining “affordable” as based on thirty percent of income, and “available” as actually occupied by a renter at very low income). The usable housing supply is further reduced by the paucity of units that also meet the definition of “adequate,” as including physical characteristics such as plumbing, electricity and heat. For further explanation of “adequate,” see *id.* at 81, App. E.

53. *Id.* at 21.

54. AMERICA’S RENTAL HOUSING 2020, *supra* note 12 at 26.

55. Renters with “worst case housing needs” are those with household incomes below fifty percent of area median, referred to as “very low income”; who do not receive rental assistance, who pay more than fifty percent of household income for rent, or who live in inadequate housing conditions. WORST CASE HOUSING NEEDS, *supra* note 52, at vii.

56. *Id.* at 6.

57. ANDREW AURAND, DAN EMMANUEL, DANIEL THREET, IKRA RAFI & DIANE YENTEL, NAT’L LOW INC. HOUSING COALITION, THE GAP: A SHORTAGE OF AFFORDABLE HOMES 2 (Mar. 2020), https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2020.pdf.

and state unemployment payments, and their expiration.⁵⁸ Imperfectly delivered as they were, these massive income supplements forestalled loss of home for many.⁵⁹ Once these supports lapse, the most vulnerable renters will return, jobless, to the steady state of precarious situations. These households had no rainy-day funds to shore up their balance sheets, even before their earners lost their jobs.

“Available” defines a shrinking subset of affordable housing. In the years immediately leading up to the pandemic, housing insecurity became more egalitarian: it began to affect renters previously considered to be “middle class.”⁶⁰ This phenomenon resulted from an increased supply of high-end, amenity-rich rentals, with higher income households reverting to rentership in significant numbers between 2010 and 2018.⁶¹ None of this increase in supply has “trickled down.” Much of it has exhausted the capacity of the home-building industry to expand the housing supply. Middle-income renters now crowd out low-income renters in units that lie at the edge of affordability for low-income renters, but that fit somewhat comfortably within middle incomes.⁶²

Housing researchers have documented a vertiginous loss in housing affordable to households with incomes at 30% and 50% of area median income. Under one definition, the housing economy lost four million “affordable” units—units renting at under \$600 a month and therefore affordable to households with annual incomes of under \$24,000—between 1990 and 2017. Three of the four million dropped out between 2012 and 2017. Between 1990 and 2017, units renting at over \$1000 accounted for 95% of the growth in all rental housing stock.⁶³

58. See Benfer et al., *supra* note 6 (explaining the basis for the authors’ estimate of numbers of renters likely to be evicted in the next few months).

59. See, e.g., Zachary Parolin, Megan A. Curran & Christopher Wimer, *The CARES Act and Poverty in the Covid-19 Crisis*, 4 POVERTY & SOC. POL’Y BRIEF, no.8, at 8 (June 21, 2020), <https://static1.squarespace.com/static/5743308460b5e922a25a6dc7/t/5eefa3463153d0544b7f08b4/1592763209062/Forecasting-Poverty-Estimates-COVID19-CARES-Act-CPSP-2020.pdf> (finding that, if distributed to all residents who qualify for them, the CARES Act’s Recovery Rebates and enhanced unemployment benefits would reduce the poverty rate to pre-pandemic levels).

60. AMERICA’S RENTAL HOUSING 2020, *supra* note 12, at 4.

61. *Id.* at 8–9.

62. AURAND ET AL., *supra* note 57, at 4 (stating that of 7.3 million homes affordable to renters with very low incomes, middle income renters are occupying 400,000, and renters with incomes above the median are occupying 900,000).

63. ELIZABETH LA JEUNESSE ET AL., JT. CTR. FOR HOUSING STUD. HARV., DOCUMENTING THE LONG-RUN DECLINE IN LOW COST HOUSING UNITS IN THE UNITED STATES 4 (Sept. 2019), https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_loss_of_low_cost_rental_housing_la_jeunesse_2019_0.pdf.

B. Double Precarity: Small Landlords, Their Tenants, and Their Ecosystem of Instability

The Alexa Mall in Berlin is open for business. Toni Kehler is shopping for a new HD-TV. Toni is not concerned about whether he has the wherewithal to cover this discretionary purchase. Since the beginning of the pandemic, the German government and other governments in the Eurozone have paid employers directly to keep their workers on at reduced salaries.⁶⁴

Alexis Herdez was laid off, after one day of work, from her job at a bridal clothing store. She filed for unemployment compensation in Kentucky. Kentucky's automated phone system directed her to a queue, from which she never received any human contact or information. After two months, she received an appointment to meet with staff at the unemployment agency in August. She and her husband are struggling with rent and car payments.⁶⁵ John Jolley slept in his car to be first in line to receive a ticket, which would gain him entry to an appointment in a convention center at a mass claims processing event held by the Oklahoma Employment Security Commission. His unemployment claim was approved in March, but he has yet to see a check.⁶⁶ Ms. Herdez and Mr. Jolley are facing the "cliff."

We know why landlords have not received rent. Our state-based unemployment compensation is one of many faltering remnants of the New Deal's cooperative federalism, which gave states two types of leeway: (1) to set levels of support to beneficiaries, and (2) to manage the offices that are supposed to serve them. States stint on both.⁶⁷ We underfund and make bureaucratically punishing the mechanisms of unemployment compensation that could provide a buffer against this instability. To tie income security to laid-off wage earners' ability to navigate an opaque unemployment insurance bureaucracy on their own, rather than automatically to

64. Liz Alderman, *As Europe's Economies Reopen, Consumers Go on a Spending Spree*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/07/14/business/as-europes-economies-reopen-consumers-go-on-a-spending-spree.html?searchResultPosition=1>.

65. Eli Rosenberg, *Workers Are Pushed to the Brink As They Continue to Wait for Delayed Unemployment Payments*, WASH. POST (July 13, 2020), <https://www.washingtonpost.com/business/2020/07/13/unemployment-payment-delays>.

66. Annie Gowen, *A Very Dark Feeling: Hundreds Camp out in Oklahoma Unemployment Lines*, WASH. POST (July 20, 2020), https://www.washingtonpost.com/national/a-very-dark-feeling-hundreds-camp-out-in-oklahoma-unemployment-lines/2020/07/20/44d59cb6-c77a-11ea-a99f-3bbdff1af38_story.html.

67. *Id.* (noting that Oklahoma's Employment Security Commission processes claims through a 1978 mainframe computer); GEORGE WENTWORTH, NAT'L EMP. L. PROJECT, CLOSING DOORS ON THE UNEMPLOYED 1 (Dec. 2017), https://s27147.pcdn.co/wp-content/uploads/Closing-Doors-on-the-Unemployed12_19_17-1.pdf (noting, as of 2017, that since the Great Recession, states had cut back sharply on unemployment compensation through a combination of decreased benefits, decreased number of weeks of benefits, and more frequent denials of claims for technical reasons).

subsidize employers to avoid laying employees off at all, is a policy that passively follows past practice, and that guarantees instability.

Our economy of work in the United States is constructed to generate and perpetuate instability. Employment has become inherently unstable. Kathryn Edin and Luke Shaefer have chronicled a prepandemic sociology of work, a bare survival mode in which unpredictable fluctuations in hours prevent low-wage and middle-class workers from setting any money aside for emergencies.⁶⁸ Without resources for an emergency, workers were left vulnerable to physical displacement and personal upheaval through eviction or foreclosure. Desmond and Gershenson have described low-wage workers as suffering from a “double precarity,” in which unstable housing and its loss link to loss of income.⁶⁹

These conditions have continued as the terms of shelter and work for the “essential worker” of the pandemic. While the abrupt tumble of millions of Americans into joblessness this spring may be anomalous, the prepandemic truth is that housing stability for millions of Americans teetered from paycheck to precarious paycheck. The instability of the affordable housing market compounds the instability of low-wage work. The households with “worst-case housing needs” got that way as a result of the stew of historical racial disparity in wealth and assets, and of the fluctuations in income that make putting something aside for emergencies impossible.⁷⁰

This brings us back to the one universally acknowledged, and universally acknowledged to be scarce, remedy for housing precarity: the income-based rental subsidy. The importance of vouchers, public housing, and state-based housing supplements derives from their predictability: income may fluctuate, but rent will rarely be more than what, by accepted calculations, a household can afford to pay without stinting on food, heat, or water. Subsidy ties rent directly to a tenant’s income. Stability for the renter also means stability for the landlord. As the researchers in the three-city HUD study noted, small owners, in particular, value housing choice vouchers for the predictability that they offer in terms of income. When they reject voucher holders, they primarily are rejecting the relationship with the housing authority’s bureaucracy, with its unpredictable inspections and opaque standards for housing quality.⁷¹

68. KATHRYN J. EDIN & H. LUKE SHAEFER, \$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA 35–42 (2015) (describing how a mother of two traveled by bus from her family’s third homeless shelter in ten months to report by 7 a.m. to her job cleaning vacant, unheated apartment buildings, offices, and foreclosed homes; and how her hours were cut to nothing as illness from exposure to cold and mold forced her to miss work).

69. Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity Among the Working Poor*, 63 SOC. PROBS. 46, 47 (2016).

70. AURAND ET AL., *supra* note 57, at 7 (describing how a family of four, with monthly income of \$1,928, has \$87 remaining after spending \$1194.50 for fair-market rent for a two-bedroom apartment, and \$647 on the USDA’s thrifty food budget).

71. GARBODEN ET AL., *supra* note 14, at 26.

Yet the funds, and the will, to bridge the gap between incomes and rent, are lacking. Of every four low-income households that are eligible for some federal housing subsidy, one gets that subsidy.⁷² Put another way: the three out of four renter households that do not receive subsidies are subject to the full force of precarity. Rental assistance carries with it the security not only of knowing that one's rent will not (or should not) outrun one's resources, but of knowing that the renter may predict some stability in place over time.

IV. Cancel the Rent? Rather, Some Modest Proposals for Bolstering the "NOAH" Sector of Affordable Housing

As Amna Akbar has noted, the campaigns to "cancel the rent" arise from more than a perception of what is needed, now, to meet the current emergency. "Cancel the rent" means cancel the contract: justice requires society's acknowledgment that housing is too foundational to be left as "the product of a private contract about private property."⁷³ More than a slogan, "cancel the rent" is a policy that recognizes the straight line between commodification of housing and housing insecurity.

Who among the primary providers of unsubsidized, below-market rate housing can absorb a cancellation, not merely a deferral, of the predominant source of funds for maintenance of that housing? "NOAH" units are an afterthought of U.S. housing policy. Our system provides largely affirmative incentives to the large owner-investors for creating or sustaining affordable units. We offer tax relief, in the form of credits and property tax abatements. This option provides affordability, but not stability; without the imposition of other controls, the compulsion to maintain affordable rents expires within ten to fifteen years. We offer release from density, height, and other restrictions in exchange for a small percentage of units to be made affordable to renter households with incomes at a percentage of the area median. But we provide few or no incentives to the smallest landlords to continue, with modest rents and adequate maintenance.

When we subsidize investors with little or no tie to the physical plant in which they are investing, we get affordability that is ephemeral and expensive. Here are a couple of examples of investment, direct and indirect, that

72. WORST CASE HOUSING NEEDS, *supra* note 52, at 18; Will Fischer & Barbara Sard, *Chartbook: Federal Housing Spending Is Poorly Matched to Need*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 8, 2017), <https://www.cbpp.org/research/housing/chart-book-federal-housing-spending-is-poorly-matched-to-need>. These sources do not distinguish federal subsidies from state or local. Note that eligibility for below-market units financed by the Low Income Housing Tax Credit (LIHTC) ties to a tenant's income, but a tenant's rent in that unit does not. Rents in LIHTC units concededly are not affordable to the poorest of the poor.

73. Amna Akbar, *The Left is Remaking the World*, N.Y. TIMES (July 11, 2020), <https://www.nytimes.com/2020/07/11/opinion/sunday/defund-police-cancel-rent.html>.

stabilize low to moderate income households, in small buildings and in their communities.

A. Fund Plant, Not Profits: Keeping Small Landlords Afloat

A few localities have propped up small landlords directly, by subsidizing the cost of physical plant. The District of Columbia's Small Buildings Grant Program pays up to \$25,000 per rental unit, for buildings of five to twenty units, for "essential repairs": to replace heating and cooling systems, roofs, windows, and plumbing. The goal is to prevent, not punish, housing code violations. Seventy-five percent of the units must be occupied, and half of the units must be affordable to residents with incomes below eighty percent of the area median, requirements that covenants will enshrine in the property's deeds for five years. Successful applicants must attend a day-and-a-half-long property-management course.⁷⁴

Pittsburgh's Small Landlord Fund is for the truly "small": it covers buildings of between one and five units. Applicants receive three-percent loans for the rehabilitation of existing rental units, or for the conversion of vacant units for rental. Owners must commit themselves to renting to households with incomes under eighty percent of area median, or to households holding vouchers. The payout period is ten to fifteen years, with the longest term reserved for units currently rented by residents whose income is below eighty percent of area median and who do not hold vouchers.⁷⁵

B. Getting from NOAH to NORC: Supporting the Owner-Occupants of Limited Equity Cooperatives as Providers of Affordable Housing

Several of my colleagues and I began our legal careers as litigation attorneys with civil legal aid offices, representing low-income tenants in eviction defense. We are concluding our legal careers, in part, as transactional attorneys, representing small landlords in their business affairs. If you had told me forty years ago that this change would happen, I never would have believed you.

But then I never would have believed that tenants could become owners and that tenant-owners could manage their homes by the consent and direction of the owner-managed. A network of tenant-owners, non-profit housing providers and technical support specialists, attorneys, organizers, lawyers, housing counselors, and law students supports limited equity housing cooperatives (LECs), a lode of affordable housing in the District of Columbia.⁷⁶ The District's ninety-six LECs contain 4300 units of housing

74. D.C. Dep't Hous. & Cmty. Dev., Small Building Program, <https://dhcd.dc.gov/page/small-building-program> (last visited July 24, 2020).

75. Urban Redevelopment Authority of Pittsburgh, *Small Landlord Fund Application*, <https://www.ura.org/media/W1siZiIsIjIwMjAvMDMvMTkvN2hxYmZrM2FldF9TbWFSbF9MTF9GdW5kX0FwcC5GaWxsYWJsZV8xXy5wZGYiXV0/Small%20LL%20Fund%20App.Fillable%20%281%29.pdf> (last visited July 20, 2020).

76. For a study of the networking and support among actors within the D.C. Preservation Network, in which members of this group participate, see Kathryn Howell,

affordable to shareholder-owners with incomes of under eighty percent of the area median. The average size of each LEC-owned building is forty-four units, but over half the buildings have fewer than twenty-five. LECs enable residents with moderate incomes to live in upper income neighborhoods: forty-five percent of the buildings and thirty percent of the units of LECs are located in census tracts with incomes greater than the District's median.⁷⁷ The residents are economically, racially, and ethnically diverse.⁷⁸

The majority of these buildings converted to cooperative tenant ownership as a result of the District of Columbia's Tenant Opportunity to Purchase Act (TOPA).⁷⁹ As part of the legislative response to tenant activism against mass evictions and increases in rent during the 1970s, TOPA was designed to provide stability: to give residents first call at purchasing their dwellings, a hedge against apartment-flipping in the 1970s.⁸⁰ TOPA proved to be a sturdy mechanism to stabilize low income rental households once again, in the early 2000s, when the District poured funds into subsidizing the infrastructure and retail near the new Columbia Heights Metro station. Tenants' use of TOPA was instrumental in preserving 2100 units of housing affordable to households at thirty percent of area median income.⁸¹

The working definition of LEC—"resale restricted housing in which occupants hold an ownership stake"⁸²—sets de-commodification of housing as the groundwork for this stability. The agency in the District that is the primary public funder of the purchase and rehabilitation of these TOPA-inspired homeownership units enforces income limitations through affordability covenants;⁸³ the cooperatives' boards impose resale restrictions

Housing and the Grassroots: Using Local and Expert Knowledge to Preserve Affordable Housing, 38 J. PLANNING, EDUC. & RES. 437 (2018).

77. For these data points about LECs in the District of Columbia, see KATHRYN HOWELL, SCOTT BRUTON & ANNA CLEMENS, CREATING AND SUSTAINING LIMITED EQUITY COOPERATIVES IN THE DISTRICT OF COLUMBIA 10–16 (Feb. 2020) https://www.cnhed.org/wp-content/uploads/2020/03/Creating-and-Sustaining-Limited-Equity-Cooperatives-in-Washington-DC_FINAL.pdf.

78. *Id.* at 28 (describing members' meetings at which as many as three languages are spoken).

79. D.C. CODE §42.3404.01-13 (2020); HOWELL ET AL., *supra* note 77, at 1.

80. For an overview of the history of the tenants' campaign which produced the Rental Housing Act of 1980, of which TOPA was a part, see Amanda Huron, *Creating a Commons in the Capitol: The Emergence of Limited-Equity Cooperatives in Washington, D.C.*, 26 WASH. HIST. 56, 59–60 (2014); see also Aaron O'Toole & Benita Jones, *Tenant Purchase Laws as a Tool for Affordable Housing Preservation*, 18 J. AFFORDABLE HOUS. & CMTY. DEV. L. 367 (2009) (describing the rationale for and mechanics of the District's Tenant Opportunity to Purchase Program).

81. Kathryn Howell, *Building Empowerment in Market-Based Redevelopment: Changing Paradigms for Affordable Housing and Community Development in Washington, DC*, 52 CMTY. DEV. J. 573, 574 (2017).

82. JOHN EMMAEUS, NAT'L HOUSING INST., SHARED EQUITY HOMEOWNERSHIP 2 (2006).

83. See D.C. CODE § 42-2802.2(a), (b) (requiring a forty-year affordability restriction on rental units, and a 180-month restriction on sales units, built with the Housing Production

through their subscription agreements, occupancy agreements, and corporate bylaws.⁸⁴ It is common to see not only “NOAHs” among the District’s ninety-six LECs, but NORCs (Naturally Occurring Retirement Communities). These are the buildings whose residents have aged in place, some living there since, as tenants, they organized to purchase them, some since the activation of TOPA itself. Several members of one of our LEC client boards have resided in their units, first as renters and then as owners, since 1979. They are all retired now, managing on their fixed incomes, keeping the corporate account balance just high enough to pay for taxes and utilities.

LECs give low- to moderate-income households both managerial and economic control of where they dwell. The cooperative corporation is the owner, with each resident shareholder a member. Each member’s cooperative share buys the right to occupancy, a vote, and a stake in the welfare of the cooperative enterprise. As my colleague Professor Louise Howells, a leader in the movement to support LECs, has written, when tenants take ownership of their housing, the transformation “creates a structural reversal of the tenants’ subordinated role.”⁸⁵

When the District adopted the LEC as its predominant vehicle for tenant ownership, it brought owners of cooperative units into economic interdependence. Owners of an LEC own not a unit, which was likely unaffordable to them individually, but an ownership share in the cooperative corporation that took out the blanket mortgage for the building. This plan means that one member’s failure to pay monthly carrying charges puts everyone’s tenure at risk. The law and principles of cooperative governance ensure that the burdens and benefits of management decisions are shared equally. If owners vote not to increase their monthly carrying charges, they retain more money to meet their individual needs of food and health care. If they vote to do so, they avoid the consequences of underfunded reserves, deferred maintenance, and, eventually, deteriorating physical plant.⁸⁶ The choice is theirs.

Trust Fund, the District’s dedicated fund based on annual yields from recordation and transfer taxes).

84. D.C. MUN.REGS. tit.14, §2702.3 (2020) (requiring tenants’ associations seeking gap financing for the First Right to Purchase Program to “demonstrate the intent to operate as a low-yield cooperative, condominium, or tenant-controlled rental property” in their articles of incorporation or bylaws).

85. Alicia Alvarez, Susan Bennett, Louise Howells & Hannah Lieberman, *Teaching and Practicing Community Development Poverty Law: Lawyers and Clients as Trusted Community Problem Solvers*, 23 CLIN. L. REV. 201, 218 (2017).

86. The theme of unmet physical needs of aging buildings recurs with small LECs in D.C., as it does with small buildings elsewhere. HOWELL ET AL., *supra* note 77, at 42–43; see also DePillis, Lydia, *Owning a Building with All Your Friends: Life in a Limited Equity Coop*, WASH. CITY PAPER (May 5, 2011), <https://www.washingtoncitypaper.com/news/housing-complex/blog/13121846/owning-a-building-with-all-your-friends-life-in-a-limited-equity-coop> (describing experience of being forced to eject friends and neighbors after their failure to pay carrying charges endangered the financial future of the cooperative).

As of this writing, no one has analyzed whether the District's LECs are at financial risk of default because their owners have lost their jobs or have fallen ill. Given the demographics from which LEC shareholder-owners come, it is likely that they are vulnerable to the impacts of the pandemic. But the one vulnerability that they do not suffer is housing precarity. The interconnectedness of members of an LEC means that they know that they rise and fall together and that they cannot not let their neighbors sink. Up to the point of endangering their mortgage and their tax payments, they have the option of deferring monthly charges, if not cancelling them. The position of owners of an LEC illustrates Desmond's proposition: that between employment and housing instability, housing is the more disastrous.

C. Modest Proposals to Support the Right to Stay in Place

The interventions that I have just described for the stabilization of small buildings and NOAH units are just that—interventions. Market forces do not keep small buildings both habitable and affordable. In a commodified economy of housing, no “affordable, available, and adequate” units are “naturally occurring.” TOPA opens the space for tenant purchase to occur, but it does not go so far as to mandate owners to sell to tenants at below-market prices.⁸⁷ Therefore, LECs in the District and elsewhere exist thanks to the city's low-interest loans, bonds, and grants. LECs maintain their affordability not only because the city's funds have brought the monthly cost to shareholders down, but also because the covenants in their loan documents require them to observe income limits for new residents and, occasionally, to limit carrying charges. The District also provides tax abatements and other breaks to LECs, including eligibility for the District's Small Building Grant.⁸⁸

Grants and low interest loans to maintain the habitability of small buildings are targeted, and work at a small scale. These measures could promote housing stability for renters even more effectively if they were tied not only to income eligibility restrictions, but to best practices. Funders could exact an enhanced “clean hands” requirement for applicants, beyond proof of basic compliance with taxes, corporate renewals, and registration requirements. Non-resident owners of small buildings should demonstrate that they do not engage in serial filings against tenants. Transparency would

87. See D.C. CODE § 42-3404.03(1) (2020) (requiring that an owner's offer of sale include the “asking price and material terms of the sale”). *But see* Parcel One Phase One Associates, LLP v. Museum Square Tenants' Ass'n, 146 A.3d 394,405 (D.C. 2016) (rejecting the owner's offer in 2014 to tenants of the projected value of their apartment complex in 2021, after demolition and reconstruction, as not reasonable to any third-party purchaser).

88. See D.C. CODE § 47-3503(a)(2) (exempting deeds transferred to housing cooperatives from deed recordation tax); *id.* §47-3503(b)(2) (exempting sales of property to housing cooperatives from transfer tax); *id.* §47-3503(c) (3, 4) (exempting housing cooperatives from property taxes for five years from creation, if half of the households qualify by federal income guidelines).

favor priority selection of individual owners, not entities, unless the principals are disclosed in corporate registration or renewal filings.⁸⁹

These interventions are place-based. To build stability into owner-landlords' physical plant is to acknowledge that there will never be enough vouchers to stabilize owner-landlords' incomes. Nothing is more quintessentially place-based than the tenant association that buys its building, so that no one ever has to move. That said, the place has to be worth staying in. There is an enormous literature about the historic role that portable vouchers have played in enabling tenants to "move to opportunity,"⁹⁰ away from the entrenched poverty and racial segregation that we now know determine life outcomes at the level of a city block.⁹¹ But portability only works as an opportunity strategy when vouchers pay enough in hot housing markets and when landlords accept them.⁹²

89. In an action preceded by lapsed legislation to require full disclosure of the names of investors in any housing-related entity, the District of Columbia modified its corporate code to require entities to disclose, upon initial registration and renewal, the names, resident and legal addresses of 10% owners, or of investors with control over financial or day to day operations. See D.C. ACT 22-616, §3(a) (Jan. 30, 2019) (amending D.C. CODE § 29-102.01, 102.11).

90. For a recent reassessment of the outcomes of the Moving to Opportunity program of the 1990s, see Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016); see also MARGERY AUSTIN TURNER, AUSTIN NICHOLS & JENNIFER COMEY, URB. INST., BENEFITS OF LIVING IN HIGH-OPPORTUNITY NEIGHBORHOODS (Sept. 2012), <https://www.urban.org/sites/default/files/publication/32821/412648-Benefits-of-Living-in-High-Opportunity-Neighborhoods.PDF> (speculating on why improvements in outcomes seemed limited after families moved from neighborhoods of high concentrations of poverty).

91. See, e.g., OPPORTUNITY INSIGHTS, <https://opportunityinsights.org/paper-category/neighborhoods/#resource-listing> (last visited July 24, 2020) (cataloguing the work of Raj Chetty, Nathaniel Hendren, and others on the impacts of neighborhoods and race on intergenerational mobility).

92. As of August 2020, eighteen states and ninety-five cities had enacted legislation prohibiting housing discrimination based on the tenant's source of income. POVERTY & RACE RESEARCH ACTION COUNCIL, EXPANDING CHOICE: PRACTICAL STRATEGIES FOR BUILDING A SUCCESSFUL HOUSING MOBILITY PROGRAM, APPENDIX B: STATE, LOCAL, AND FEDERAL LAWS BARRING SOURCE-OF-INCOME DISCRIMINATION (Aug. 2020), <https://www.prrac.org/pdf/AppendixB.pdf>. That states and localities have laws prohibiting landlords from refusing to rent to tenants who want to pay with vouchers does not mean that landlords do not refuse to rent to them. See, e.g., ALISON BELL, BARBARA SARD & BECKY KOEPNICK, CTR. ON BUDGET & POL'Y PRIORITIES, PROHIBITING DISCRIMINATION AGAINST RENTERS USING HOUSING VOUCHERS IMPROVES RESULTS: LESSONS FROM CITIES AND STATES THAT HAVE ENACTED SOURCE OF INCOME LAWS 8 (Dec. 20, 2018), <https://www.cbpp.org/sites/default/files/atoms/files/10-10-18hous.pdf> (noting that landlords widely ignore Philadelphia's source of income discrimination law); Office of the Attorney General for the District of Columbia, *AG Racine Sues 16 Real Estate Companies and Professionals for Illegal Housing Discrimination Against District Voucher Holders* (July 23, 2020), <https://oag.dc.gov/release/ag-racine-sues-16-real-estate-companies-and> (announcing the filing of

If TOPA succeeds, it is because a city-state once committed itself to stabilizing low to moderate income tenants in places across the city. Under the pressure of advocacy, and the recognition of the needs of the moment, that support continues, even as those places become increasingly affluent. Other jurisdictions have recognized the value of supporting tenant-ownership, a value that underscores opportunity as the right to stay put, not as a rapidly appreciating investment.⁹³ If we will not support tenants individually so that they can stay in place, then we have to think, again, about what it means to support housing stock in which they can afford to live, and to support them collectively.

eight lawsuits alleging that defendants openly advertised rental units as unavailable to tenants using housing vouchers).

93. Steve Dubb, *Tenant First Option to Buy Bills Advance in Bay Area*, NONPROFIT QTLY (Feb. 24, 2020), <https://nonprofitquarterly.org/tenant-opportunity-to-purchase-bills-advance-in-san-francisco-bay-area> (describing the introduction of TOPA legislation in the Berkeley and Oakland City Councils).

