

Tenants Without Rights: Situating the Experiences of New Immigrants in the U.S. Low-Income Housing Market

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Immigrants who recently arrived in the United States generally are not able to exclusively possess rental properties in the formal market because they lack a steady source of income and credit history. Instead, they rent shared bedrooms, basements, attics, garages, and illegally converted units that violate housing codes and regulations. Their situations highlight the disconnect between tenant rights law and the deleterious conditions of informal residential tenancies. Tenant rights law confers a variety of rights and remedies to a residential tenant if the renter has exclusive possession of the premises. If the renter lacks exclusive possession, courts typically characterize the occupancy as a license, treating the renter as a transient occupant with contractual rights and remedies. Situating the experiences of new immigrants within the low-income housing affordability crisis, this Article proposes that courts should steer away from considering tenant status and its associated rights and remedies as a function of exclusive control of the premises. Instead, they should enforce informal tenants' legitimate interests, impose duties on those who rent out substandard units, and award damages when the rent paid is disproportionately high relative to the condition of the premises.

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I. INTRODUCTION

Saman,¹ an East African immigrant who came to the United States (U.S.) about a decade ago through the Diversity Visa Program,² lives with his three children, spouse, and mother-in-law in a Virginia county, in the basement of a single-family home. The basement has no kitchen or other facilities, but he has creatively customized a kitchenette, a bathroom, and a workstation for his artwork. Sebr,³ another East African immigrant, lives in the same house in a room next to the homeowner's bedroom. They share a kitchen and a fridge. The homeowner bought the house some years ago and relies partly on Saman's and Sebr's rent for his mortgage payment.⁴ Neither Saman nor Sebr have a written lease.⁵

1. Interview with Saman Tashale, in Washington, D.C. (July 18, 2019) (on file with author). [hereinafter Interview with Saman]. Names of interviewees are not real for privacy concerns.

2. The Diversity Visa Program is a random selection system that allows 50,000 immigrant visas annually for individuals from countries with low immigration rates to apply for permanent residence in the United States. For a discussion of the significance of this program for immigrants from African countries, see Andowah A. Newton, *Injecting Diversity into U.S. Immigration Policy and the Missing Discourse on its Impact on African Immigrants to the United States*, 38 CORNELL INT'L L.J. 1049 (2005).

3. Interview with Sebr Alemu, in Washington, D.C. (July 18, 2019) (on file with author). [hereinafter Interview with Sebr].

4. Interview with Tam Badhadha, in Washington, D.C. (July 18, 2019) (on file with author). [hereinafter Interview with Tam].

5. In such arrangements the rents are paid in cash and the agreements are oral. Obtaining a written lease agreement would be costly for the homeowner and of little use to the renters, given their lack of language proficiency and the cost of legal services. See Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 817–18 (1974).

Such arrangements are hardly unique in the U.S. low-income housing market. Studies show that a steadily increasing number of people are living in communal arrangements—splitting apartments and sharing bedrooms—to cope with the lack of affordable housing.⁶ Social inequality, stagnant wages, and rapidly increasing rents have contributed to this situation.⁷ A household with two adults who work full-time at minimum wage cannot rent a two-bedroom apartment in Washington, DC.⁸ A full-time minimum-wage worker cannot afford a one-bedroom rental home in most parts of the country.⁹ Immigrants rarely find housing anywhere in the formal market, not only because they lack an adequate and steady income source, but also because they cannot produce a recorded credit history and confront various restrictive laws and practices connected to their immigrant status.¹⁰ Instead, they rely on their family, acquaintances, and other social networks to rent shared bedrooms, basements, attics, garages, and illegally converted units that usually are insecure and fraught with a variety of health and safety hazards.¹¹ For many, living in such an arrangement lasts years and may never end for some immigrants.

6. See Mallika Mitra, *Forget Splitting an Apartment. These Renters Are Sharing Bedrooms*, CNBC (July 12, 2019 9:29AM), <https://www.cnbc.com/2019/07/11/forget-sharing-an-apartment-renters-are-sharing-rooms-to-save-money.html>; Kevin Simpson, *Colorado's "Doubled-up" Households Have Surged Since the Recession. That Could Prolong the Housing Crunch*, COLO. SUN (Oct. 2, 2019 5:05 AM), <https://coloradosun.com/2019/10/02/colorado-doubled-up-households/>; Richard Fry, *More Adults Now Share Their Living Space, Driven in Part by Parents Living with Their Adult Children*, PEW RSCH. CTR. (Jan. 31, 2018), <https://www.pewresearch.org/fact-tank/2018/01/31/more-adults-now-share-their-living-space-driven-in-part-by-parents-living-with-their-adult-children/>; Laryssa Mykyta, *Economic Downturns and the Failure to Launch: The Living Arrangements of Young Adults in the U.S. 1995-2011* (U.S. Census Bureau, Working Paper No. 2012-24, 2012), <https://www.census.gov/content/dam/Census/library/working-papers/2012/demo/SEHSD-WP2012-24.pdf>; see also Hope Harvey, *Experiences of Doubling-Up Among American Families with Children* (2018) (Ph.D. dissertation, Harvard University), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:39947157> showing that prevalence of shared home arrangements varies along racial lines) (“While slightly less than 20 percent of white adults over age 25 live in doubled-up households, 36 percent of Hispanic adults, 32 percent of Asian adults, and 31 percent of black adults live in doubled-up households.”).

7. See Whitney Airgood-Obrycki et al., *The Rent Eats First: Rental Housing Unaffordability in the US*, Joint Center for Housing Studies, HARVARD UNIV. 3–4 (2021), https://www.jchs.harvard.edu/sites/default/files/research/files/harvard_jchs_rent_eats_first_airgood-obrycki_hermann_wedeem_2021.pdf.

8. Laurie Ball Cooper & Ana Vohryzek, *Rethinking Rapid Re-Housing: Toward Sustainable Housing for Homeless Populations*, 19 U. PA. J.L. & SOC. CHANGE 307, 308 (2016).

9. Alicia Adamczyk, *Minimum Wage Workers Cannot Afford Rent in Any U.S. State*, CNBC (July 14, 2020, 12:16 PM), <https://www.cnbc.com/2020/07/14/minimum-wage-workers-cannot-afford-rent-in-any-us-state.html>. While the national average fair market rent for a one-bedroom home in most parts of the US is \$1,017 per month and \$1,246 for a two-bedroom home, a family of four with poverty-level income in the country cannot afford monthly rent of more than \$655. NAT’L LOW INCOME HOUS. COAL., *OUT OF REACH 2020 2* (2020), https://reports.nlihc.org/sites/default/files/oor/OOR_2020.pdf [hereinafter *OUT OF REACH 2020*].

10. See Daniel Edwardo Guzmán, *There Be No Shelter Here: Anti-Immigrant Housing Ordinances & Comprehensive Reform*, 20 CORNELL J.L. & PUB. POL’Y 399, 414–22 (2012); STEVEN BENDER, *TIERRA Y LIBERTAD: LAND, LIBERTY, AND LATINO HOUSING* 73–93 (2010); Charu A. Chandrasekhar, *Can New Americans Achieve the American Dream? Promoting Homeownership in Immigrant Communities*, 39 HARV. C.R.-C.L. L. REV. 169, 182–91 (2004) (discussing mortgage lending discrimination faced by immigrants and variations among immigrants in the U.S. based on citizenship status, length of residence, and country of origin).

11. Jill S. Litt et al., *Housing Environments and Child Health Conditions Among Recent Mexican Immigrant Families: A Population-Based Study*, 12 J. IMMIGRANT & MINORITY HEALTH 617, 617 (2010); Michael H. Schill et al., *The Housing Conditions of Immigrants in New York City*, 9 J. HOUS. RESEARCH 201, 226 (1998).

Further, as a recent study shows, low-income renters pay exploitatively high rent for substandard and even perilous properties because landlords capitalize on their superior access to the law and market forces to extract above-market rents.¹²

Tenant rights law envisions a variety of rights and remedies for residential tenants, including warranties of habitability, warranties of quiet enjoyment, and other substantive and procedural rights that promote decent, safe, and secure rental homes.¹³ Federal and state fair housing laws prohibit landlords, real estate agents, and financiers from discriminating against renters because of race, color, religion, sex, disability, familial status, or national origin.¹⁴ Some state and local laws have expanded anti-discrimination laws to protect other social groups, such as domestic violence survivors.¹⁵ However, these rights are available only for an occupant who has exclusive possession of the premises.¹⁶ If a renter lacks exclusive possession, which is the normal case in shared living arrangements among immigrants, courts typically treat the arrangement as a license, which comes with contractual and common law rights and remedies that are substantially fewer than tenant property rights.¹⁷ Licensees' rights are as good as the agreements and common law rules unless a legislative vehicle grants them greater rights than those of licensees.¹⁸ This means that renters residing in garages, lofts, basements, and illegally converted or other non-compliant units can be evicted by regulators enforcing housing codes or by the owner using self-help.¹⁹

Tenant rights law does not cover a recently arrived immigrant who rents a basement room in a single-family neighborhood and gets evicted because she tests positive for coronavirus (COVID-19).²⁰ An immigrant family that is denied heating and cooling services in an unventilated basement has no legal recourse under tenant rights law.²¹ An immigrant sharing the living room with an apartment

12. Matthew Desmond & Nathan Wilmers, *Do the Poor Pay More for Housing? Exploitation, Profit, and Risk in Rental Markets?* 124 AM. J. SOCIO. 4, 1090, 1115 (2019).

13. See JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW: RULES, POLICIES, AND PRACTICES, 815–17 (2017); MILTON FRIEDMAN, FRIEDMAN ON LEASES, *WARRANTIES OF HABITABILITY* § 10:3 (6th ed., 2017); S. WILLISTON, *Implied Conditions and Covenants in Leases—Quiet Enjoyment*, in WILLISTON ON CONTRACTS, § 48:10 (4th ed. 2020).

14. 42 U.S.C.A. §3604 (WEST).

15. See e.g., WASH. REV. CODE ANN. § 59.18.580 (West 2014). But see Joseph J. Railey, *Married on Sunday, Evicted on Monday: Interpreting the Fair Housing Act's Prohibition of Discrimination "Because of Sex" to Include Sexual Orientation and Gender Identity*, 36 BUFF. PUB. INT. L.J. 99, 120 (2019).

16. Lisa Cline, *Property: Preoccupation with Occupancy: Defining "Residential Tenant" Under Minnesota Statute Section 504b.375-Cocchiarella v. Driggs*, 44 MITCHELL HAMLIN L. REV. 236, 239–43 (2018); Michelle Maese, *Rethinking "Host" & "Guest" Relations in the Advent of Airbnb & the Sharing Economy*, 2 TEX. A&M J. PROP. L. 481, 492–95 (2015).

17. 43A C.J.S. *Inns, Hotels, and Eating Places* § 8 (2021).

18. See *Drost v. Hookey*, 881 N.Y.S.2d 839, 844 (Dist. Ct. 2009).

19. A license can be revoked at the will of the licensor, and the licensor does not need a summary removal proceeding to deny the licensee entry into the premises. See *Kimack v. Adams*, 930 S.W.2d 505, 507 (Mo. Ct. App. 1996); *Andrews v. Acacia Network*, 70 N.Y.S.3d 744 (N.Y. App. Term 2018). Some jurisdictions notice ten-day notice to evict a lodger. See *Drost*, 881 N.Y.S.2d at 844; N.Y. REAL PROP. ACTS. LAW § 713 (McKinney).

20. See generally Conor Dougherty, *Pandemics Toll on Housing: Falling Behind, Doubling Up*, The New York Times (Feb. 6, 2021), <https://www.nytimes.com/2021/02/06/business/economy/housing-insecurity.html> [hereinafter *Pandemics Toll on Housing*].

21. See generally Caitlin Dickerson, *Sleeping Outside in a Pandemic: Vulnerable Renters Face Evictions*, The New York Times (Jul. 4, 2020), <https://www.nytimes.com/2020/07/04/us/coronavirus-evictions-renters-immigrants.html>

renter can be locked out because he came home from work late at night; or, an immigrant who rents a room from a tenant in public housing, not knowing that he could not have his mail delivered to that address, has no remedy under tenant rights law.²² Further, fair housing laws do not protect people in such situations because these rules stop, as the Ninth Circuit recently declared, at “the front door” of a single-family house or apartment.²³

Commentators have casually observed that the divide between a tenant and a licensee is anachronistic and fails to reflect housing realities in modern urban settings.²⁴ A 1955 Note in the *Yale Law Journal* argued that the permanence of residence would be a better determinant of tenant status than exclusivity of possession and proposed that long-term residents be entitled to the stability of tenure, notice to quit, and other rights and remedies available under tenant rights law.²⁵ The issue recently attracted new attention in legal academia due to the steadily increasing number of renters who depend on shared or “communal living” arrangements outside the standard landlord-tenant relationship.²⁶ For example, a recent article by Professor Shelly Kreiczler-Levy looks at informality in the U.S. low-income housing markets through the lens of property law and shows that the law does not confer legal rights on the steadily increasing number of American adults who are sharing their parents’ home because of the rising scarcity and cost of housing.²⁷

This Article extends the research on informality in the housing market to the situation of newly arrived immigrants. Drawing on sociological materials, interviews, and discussions with immigrants from African countries in Washington, D.C., from 2017 to 2020, this article shows the incapacity of tenant rights law to address the deleterious conditions of recently arrived immigrants in informal housing.²⁸ The Article analyzes the precariousness of informal housing arrangements and proposes that courts steer away from considering “tenant” status and the associated rights and remedies as a function of exclusive control of the premises. Instead, they should expand fundamental tenant rights and interests to include renters occupying premises in an arrangement that does not fall under the standard landlord-tenant relationships. Courts should do this by imposing duties

22. *Id.*

23. *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1220 (9th Cir. 2012); see also Tim Iglesias, *Does Fair Housing Law Apply to “Shared Living Situations”? Or the Trouble With Roommates*, 22 J. AFFORDABLE HOUS. & CMTY. DEV. L. 111, 112 (2014).

24. 3 FRIEDMAN ON LEASES, LEASES, LICENSES, AND EASEMENTS COMPARED § 37:3, at 13.

25. *Tenant, Lodger, and Guest: Questionable Categories for Modern Rental Occupants*, 64 YALE L.J. 391, 410 (1955).

26. France Svistovski, *Burning Down the Housing Market: Communal Living in New York*, 47 FORDHAM URB. L.J. 463, 470 (2020).

27. Shelly Kreiczler-Levy, *The Informal Property Rights of Boomerang Children in the Home*, 74 MD. L. REV. 127, 128–29 (2014).

28. While legally admitted Ethiopian immigrants offer narrative evidence for my sources, immigration status is immaterial to determine tenant rights. At least according to Third Circuit (*Lozano v. City of Hazleton*, 724 F.3d 297, 314–22 (3d Cir. 2013)) and Fifth Circuit (*Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 526 (5th Cir. 2013)) jurisprudence, alienage is no longer a ground for state and local governments to confer disparate property rights and remedies among citizens, documents immigrants, and undocumented immigrants. See Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, and Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 53, 55–125 (2009).

on property owners to take account of the legitimate interests of all occupants meeting the criteria of “informal tenants.”

The term “informal tenant” is used here to describe a renter sheltered in a twilight zone of legality, outside the standard landlord-tenant relationship. The Article argues that informal tenants should have a legal right not to be evicted without adequate notice, the right to have adequate heating and cooling services, and other rights and remedies necessary for safe and secure housing. They should also have the right to damages when they are charged a disproportionately high rent compared to the condition of the housing. As informal tenancies have become ubiquitous, tenant rights law, which envisions landlord-tenant relationships narrowly and thereby renders the experiences of informal tenants legally invisible, needs to be adjusted to mitigate the precariousness of informal housing. Even during the COVID-19 pandemic, when federal and local laws have imposed a moratorium on evictions and provided other temporary relief to mitigate the impact of the pandemic, informal tenants are not covered by the legal safeguards which cover only formal tenants as defined by property law.²⁹ Part II discusses tenant/licensee distinctions and demonstrates the narrow interpretation of residential tenants in tenant rights law. Part III reviews informal housing and factors driving informality in low-income households due to the current scarcity of affordable, safe, and secure housing, while Part IV zeroes in on the conditions that exacerbate these challenges for immigrants. Part V shows that while immigrants’ experiences broadly reflect the experiences of low-income social segments in the housing market, immigrants face unique challenges because of their triple status as renters, as immigrants, and (frequently) as members of racial minorities. Part VI argues that courts should recognize fundamental rights and legitimate expectations, such as the right not to be evicted without adequate notice and the right to damages for substandard housing, particularly when the informal tenant has been evicted without a reasonably adequate notice or paid a disproportionately high rent relative to the market value or condition of the property. The Article concludes by emphasizing the disharmonies between tenant rights law and the social realities of informal housing, and the need for serious attention to tenants’ conditions and rights in informal housing arrangements.

II. TENANTS AND TENANT RIGHTS

Modern tenant rights law is extensive and provides substantial protections; however, its reach is circumscribed by the law’s narrow definition of the term “tenant” in the landlord-tenant relationship. In each tenants’ rights case, the court must determine whether the landlord-tenant relationship exists based on elaborate criteria. The criteria includes: (a) whether the landlord has transferred absolute control and possession of a designated space to the tenant subject to rights specifically reserved to the owner and (b) whether the landlord and tenant have agreed to create an estate in the tenant either for a specified period that is less than

29. See Dickerson, *supra* note 21. See also Andrea Palumbo & Karmen McQuitty, *Tenant Rights in the Era of Covid-19*, 77 BENCH & B. MINN. 36 (2020); Michael Allan Wolf, *COVID-19 Pandemic and Real Property Law: An Early Assessment of Relief Measures for Tenants and Residential Mortgageors*, POWELL ON REAL PROP. (2020).

that which the landlord holds or a term that can be terminated at their will.³⁰ Although the technical language or characterization used in the rental agreement is not dispositive, exclusive possession of the premises is the "principal test" used to determine whether the relationship created between parties is that of landlord and tenant rather than of licensor and licensee.³¹ This possession-centered, narrow conception of tenant status denies informal tenants the rights and remedies conferred by tenant rights law. The next section further discusses the tenant/licensee distinction, explaining why licensees have substantially fewer rights and remedies than tenants.

A. Tenant Rights as a Special Legal Category

When the tenant lacks exclusive possession of the premises, courts typically treat the relationship as a license.³² A license is a contractual "authority to do a particular act, or series of acts, upon another's land without possessing an estate therein."³³ This legal category is traditionally applied to "[k]insfolk 'who are provided with board and the confines of a home'" and "non children real property occupants who are not on the deed or lease of real property,"³⁴ lodgers,³⁵ and people renting individual rooms.³⁶ In urban settings today, license arrangements cover not only traditional transient lodgers and boarders, but also roommates not included in the lease, superintendents who are given dwelling places as part of their employment, students living in university or college dormitories, farmworkers housed by their employers, and many other dwelling arrangements that do not fall under the standard tenant-landlord relationship with exclusive possession of the premises.³⁷

30. See *Am. Jewish Theatre, Inc. v. Roundabout Theatre Co., Inc.*, 610 N.Y.S.2d 256, 257 (N.Y. App. Div. 1994); *Santa Fe Trail Neighborhood Redevelopment Corp. v. W.F. Coen & Co.*, 154 S.W.3d 432, 440 (Mo. Ct. App. 2005). Despite some variations across states and exceptions within each state law, a lease agreement must be in writing, and long-term leases must be acknowledged and in a deed form. WILLIAM B. STOEBCUK & JOHN W. WEAVER, 17 WASH. PRAC., REAL ESTATE § 6.10 (2d ed. 2020).

31. Characteristic of exclusive possession and control of the premises is the fundamental criterion in distinguishing between a tenant and a guest. *Ann Arbor Tenants Union v. Ann Arbor YMCA*, 581 N.W.2d 794, 800 (Mich. Ct. App. 1998).

32. Matthew R. Hays, *Crusading for the Helpless or Biting the Hand That Feeds? Applying Landlord-Tenant Law to Residents in Shelters*, 83 NOTRE DAME L. REV. 443, 445–48 (2007).

33. *Moore v. Stetson*, 52 A. 767, 769 (Me. 1902).

34. *People v. Hyland*, 862 N.Y.S.2d 816 (Dist. Ct. 2008) (quoting *Mathews v. Mathews*, 2 N.Y.S. 121 (N.Y. Gen. Term 1888)).

35. *City of Worcester v. Coll. Hill Properties, LLC*, 987 N.E.2d 1236, 1241–46 (Mass. 2013).

36. *Ashton v. Margolies*, 129 N.Y.S. 617 (N.Y. App. Div. 1911).

37. New York law, for instance, defines a lodger "as a person who contracts for less than a landlord / tenant relationship" whereby the lodger has "unexclusive occupancy of real property" and the owner retains "dominion over the premises." *Hyland*, 862 N.Y.S.2d at 816. Massachusetts law defines lodging as "a house where lodgings are let to four or more persons not within the second degree of kindred to the person conducting it, and shall include fraternity houses and dormitories of educational institutions, but shall not include dormitories of charitable or philanthropic institutions or convalescent or nursing homes licensed under section seventy-one of chapter one hundred and eleven or rest homes so licensed, or group residences licensed or regulated by agencies of the commonwealth." MASS. GEN. LAWS ANN. CH. 140, § 22 (West, 2021). Courts have extended tenant rights to occupants of dwelling units as permanent residence even when the agreement characterized the arrangement as "lodging" exempted from tenant rights law. See Thomas

In characterizing a living arrangement as a license, courts consider numerous factors that include whether the owner retained keys to the premises; lived on the same premises as the occupant; posted a doorman or desk clerk; provided meals, utilities, cleaning services, towels, linens, utensils, and furnishings; or held the premises out to the public as a place for travelers or lodgers.³⁸ If these factors are present, the duration of the arrangement has "a heightened importance," because courts generally consider a short residence period, even with exclusive possession of the premises, as an indicator of a license arrangement rather than a lease.³⁹ Thus, a person renting a vacation home for a short period of time is a licensee, even though the renter has exclusive possession of the premises for the period.⁴⁰

Tenant status as a legal category evolved in an agrarian economy, when it was not only assumed that "the land was the most important feature of the conveyance," but also that the landlord and tenant had equal bargaining power.⁴¹ Traditional landlords had no obligation to the tenant for the condition, quality, and habitability of the premises.⁴² Agrarian renters took the land as they found it, bearing all risks associated with the property in accordance with the *caveat emptor* rule, which shifted "the responsibility of examining as to the existence of defects in the premises and of providing against their ill effects" to the tenant.⁴³ The rules absolved landlords from all responsibilities for defective conditions and also from having to repair the premises, unless they contractually agreed to assume the responsibility.⁴⁴ Even when a landlord agreed to assume the responsibility for the condition, quality, and habitability of the premises, a tenant had no right to withhold the rent when the landlord failed to fulfill that obligation.⁴⁵

While the doctrine of exclusive possession remains a key element in whether courts characterize a dwelling arrangement as conferring tenancy rights, the traditional doctrines governing tenant rights have changed in many ways. Modern courts and lawmakers considered the prevalence of asymmetric bargains between tenants and landlords in residential tenancies, professional specializations in modern economies, and the interdependency of life in modern urban settings and

v. Lenhart, 444 A.2d 246, 248 (Conn. Super. Ct. 1982) (holding that the plaintiff was entitled to protection under landlord and tenant statutes because the rental agreement described the parties as 'lodger' and 'lodging housekeeper' to avoid the application of landlord and tenant statutes).

38. Benham v. Morton & Furbish Agency, 929 A.2d 471, 475 (Me. 2007).

39. Benham, 929 A.2d at 475.

40. *Id.* at 475-76.

41. King v. Moorehead, 495 S.W.2d 65, 69 (Mo. Ct. App. 1973).

42. ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 1:1, at 2 (1980).

43. Conradi v. Arnold, 209 P.2d 491, 498-99 (Wash. 1949) (citing 32 AM JUR. *Landlord and Tenant* § 654, at 515).

44. SCHOSHINSKI, *supra* note 42, at 2.

45. Conradi, 209 P.2d at 498 (citing 32 AM JUR. *Landlord and Tenant* § 654, at 515 ("A lessee takes the hired premises, in the absence of warranty, fraud, or misrepresentation, in the condition and quality in which they are. The tenant takes the property as he finds it, with all existing defects which he knows or can ascertain by reasonable inspection. He takes the risk of apparent defects. As between himself and his landlord, where there is no fraud or false representation or deceit, and in the absence of an express warranty or covenant to repair, there is no implied contract that the premises are suitable or fit for the occupation, or for the particular use intended, or that they are safe for use. Any implied contract relates only to the estate, and not to the condition, of the property."))

rejected the *caveat emptor* rule.⁴⁶ For instance, the *Javins v. First Nat. Realty Corp.* court stated that:

The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these cases, the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package of goods and services — a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.⁴⁷

Tenants today possess nearly all the rights and privileges one can have over one's property for the duration of the lease, such as warranties of quiet enjoyment and habitability,⁴⁸ protections against evictions,⁴⁹ and nondiscrimination in the real estate markets.⁵⁰ For instance, a tenant can sue for nuisance or trespass in her own name;⁵¹ she can have guests;⁵² she can sublet the property to others;⁵³ she can seek compensation if the property is condemned.⁵⁴

The legal consequences of categorizing an occupant's status as that of a tenant entail substantially different common law rights and remedies than are available to a licensee. A leading treatise on the subject summarizes the different rights and remedies attaching to tenants and licensees as follows:

A lodger is not entitled to the notice to quit that is the right of the tenant. The lodger may not bring any possessory action, as may a tenant. A lodger is not liable for rent but may be liable for breach of contract. This being so, a landlord who sues a lodger for

46. See generally SCHOSHINISKI, *supra* note 42, at 3.

47. *Javins v. First Nat. Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970).

48. *King v. Moorehead*, 495 S.W.2d 65, 75 (Mo. App. 1973) ("In every residential lease there [is] an implied warranty by the landlord that the dwelling is habitable and fit for living at the inception of the term and that it will remain so during the entire term. The warranty of the landlord is that he will provide facilities and services vital to the life, health and safety of the tenant and to the use of the premises for residential purposes. It is an obligation which the landlord fulfills by substantial compliance with the relevant provisions of an applicable housing code.").

49. See COLLEEN K. SANSON, 44 CAUSES OF ACTION 2d 447, Westlaw (2010).

50. 42 U.S.C.A. § 3604 (West).

51. 12 A.L.R.2d 1192 (Originally published in 1950).

52. 30 No. 9 Quinlan, Landlord Tenant Law Bulletin art. 7.

53. 52 C.J.S. Landlord & Tenant § 31.

54. Thomas W. Merrill, Daniel Unumb & Victor P. Goldberg, *Bargaining in the Shadow Eminent Domain: Valuing & Apportioning Condemnation Awards Between Landlord & Tenant*, 34 UCLA L. REV. 1083, 1086-87 (1987); EDWARD D. MCKIRDY, LANDLORD-TENANT PROBLEMS 145, Westlaw (1994).

payment must seek to minimize his damages. Though traditionally a landlord was not liable to a tenant for repairs, he is so liable to a lodger.⁵⁵

In some instances, a licensee is afforded better legal protections than a tenant for injuries caused by the defective condition of the premises. While a hotel or innkeeper owes its guests a duty of reasonable care and is responsible for injuries caused by conditions of the property, the landlord is not responsible for injuries caused by defective conditions in areas within the tenant's exclusive control.⁵⁶ However, some state statutes give tenants who are injured by substandard housing conditions the right to withhold rent or claim other legal remedies.⁵⁷

The tenant/licensee distinction raises important questions about the legal position of informal tenants. Does it reflect or adequately respond to the current social reality in the country's housing market whereby a steadily growing number of people live in shared rental arrangements? Does the legal concept of tenant as a renter with exclusive possession of a definite place apply to renters in shared, informal housing? The next part considers the nature of informal housing and factors driving informality in the low-income housing market. Subsequent parts consider these questions more closely, discussing the extent and experiences of immigrants in informal housing.

III. INFORMAL HOUSING

This part reviews informal housing and explains how the combined effects of stagnant wages, steadily rising rent, and restrictive laws and practices foster informal housing in the low-income housing market. Informal housing is often considered a feature of the Global South.⁵⁸ Scholarship on informal housing in the U.S. has evolved beginning in the 1970s, when *colonias* – informal settlements by largely Hispanic communities who built houses on untitled parcels along the U.S.-Mexico border without official permits, plans, and municipal services, – gained attention in the academia and policymaking scenes.⁵⁹ At first the phenomenon was

55. 3 FRIEDMAN ON LEASES, LEASES, LICENSES, AND EASEMENTS COMPARED § 37:3, at 11–12 (6th ed. 2017).

56. See, e.g., *Benham v. Morton & Furbish Agency*, 929 A.2d 471, 474 (Me. 2007). Under common law, owners owe fewer duties to trespassers and licensees than they owe to guests and other invitees; *Cause of Action Against Hotel or Motel for Failure to Provide Guests With Safe Accommodations*, in CAUSES OF ACTION § 10 (2021). Matthew D. Lincoln, *Landowners' Duty to Guests of Invitees & Tenants: Vogt v. Murraywood Swim & Racquet Club and Goode v. St. Stephens United Methodist Church*, 57 S.C.L. REV. 387, 388–95 (2005).

57. 1 TIFFANY REAL PROP., LIABILITY OF LESSOR FOR INJURIES TO LICENSEES, INVITEES, § 107 (3d ed. 2020); Melissa T. Lonegrass, *Convergence in Contort: Landlord Liability for Defective Premises in Comparative Perspective*, 85 TUL. L. REV. 413, 425 (2010).

58. See Vinit Mukhija & Anastasia Loukaitou-Sideris, *Introduction to THE INFORMAL AMERICAN CITY: BEYOND TACO TRUCKS AND DAY LABOR* 1–17 (Vinit Mukhija & Anastasia Loukaitou-Sideris eds., 2014). Because it is closely associated to urban slums in the Global South, informal housing signifies squatting, untitled properties, and unplanned and crowded shanties without permits and infrastructure that belie the image of urban life in the popular imaginations of rich economies. See UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME (UN-HABITAT), *THE CHALLENGE OF SLUMS GLOBAL REPORT ON HUMAN SETTLEMENTS* 2003, at 6 (2003).

59. See Noah J. Durst, *Informal and Ubiquitous: Colonias, Premature Subdivisions and Other Unplanned Suburbs on America's Urban Fringe*, 56 URB. STUD. 722, 723–725 (2018).

dismissed by policymakers and scholars as a replication of immigrants' experiences from their home countries.⁶⁰ More recent scholarship, however, rejects this view and the underlying assumption that informality is antithetical to the laws and functioning of developed capitalist economies like the U.S.⁶¹ Professor Duncan Kennedy noted that “[w]ith respect to the dimensions of legality/illegality and formal/informal normative ordering, the United Statesean market is much more like typical third world metro regional markets than we United States analysts generally recognize.”⁶² Similarly, the late Professor Jane Larson argued not only that rich and democratic countries that dominate the world economy and politics have failed to house their poor, but also that informality is inherent in neoliberal economies, stating: “The colonias are a structural response to the globalization of the U.S. economy, and its parallel effects of diminishing wages for labor and discouraging public investment in both housing and income maintenance. As such, there is nothing either temporary or aberrational about this housing pattern.”⁶³

Sociologist Saskia Sassen situates informal housing within a broader sphere of “income-generating activities occurring outside the state's regulatory framework that have analogs within that framework.”⁶⁴ Such activities include sweatshops that work in the shadow of labor law and regulations,⁶⁵ or street vending in New York City that operates in the shadow of trade licensing and regulations.⁶⁶ Like these other activities and practices, informal housing emerges and evolves in response to opportunities created and constraints imposed by formal laws and markets. Informal housing exists as a survival strategy adopted in response to intrinsic inequities and fault lines of neoliberal economic structures rather than the result of immigration or other extrinsic factors, and the logic of informality applies to those who strategically evade formal laws to maximize profit and wealth, as well as to those who resort to informal ordering as a survival strategy. In Texas, for instance, domestic rather than Mexican real estate developers drove the creation of colonias by exploiting laws that created opportunities to build and sell untitled, subdivided units.⁶⁷ Women, immigrants, people of color, and other vulnerable social segments depend on informality as a survival strategy because the formal law and economy have excluded them.⁶⁸ Immigrants' experience is only a specific instance of renters' experience in the U.S. low-income housing market.

60. Jake Wegmann & Sarah Mawhorter, *Measuring Informal Housing Production in California Cities*, 83 J. AM. PLAN. ASS'N 119, 121 (2017).

61. Hernando de Soto popularized the view that irrational laws and policies in developing economies drive informality. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 1–14 (2000).

62. Duncan Kennedy, *Legal Economics of U.S. Low Income Housing Markets in Light of "Informality" Analysis*, 4 J.L. SOC'Y 71, 81 (2002).

63. Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL'Y REV. 137, 155 (2002).

64. Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289, 2289 (1994).

65. *Id.* at 2292.

66. See generally Ryan Thomas Devlin, *An Area that Governs Itself: Informality, Uncertainty, and the Management of Street Vending in New York City*, 10 PLAN. THEORY 53 (2011).

67. Wegmann & Mawhorter, *supra* note 60, at 121.

68. Larson, *supra* note 63, at 141. See also Eric Sheppard, Tony Sparks, & Helga Leitner, *World Class Aspirations, Urban Informality, and Poverty Politics: A North–South Comparison*, 52 ANTIPODE 393, 394–95 (2020); Regina Austin, “An Honest Living”: *Street Venders, Municipal Regulations, and the*

Research in the fields of urban planning and sociology shows that informal housing in the U.S. is ubiquitous. Professors Noah J. Durst and Jake Wegmann show that housing units flouting planning and zoning codes, parcels lacking titles or permits, rentals lacking required formalities, and dwelling arrangements that violate occupancy and other standards pervade both urban and suburban locales across the U.S.⁶⁹ A 2008 survey conducted in New York City found that between 1990 and 2000, approximately 114,000 apartments were not reflected in the official number of certificates of occupancy the city granted for new construction or renovation.⁷⁰ It also indicated that after 2000, many more such “phantom apartments” were created.⁷¹ These included private homes cut into rooming houses, two-family homes with unauthorized basement apartments housing a third family, and commercial lofts converted to residential property without regulatory approval.⁷²

In some locales race and immigration shaped the legal and political conditions surrounding the development of informal housing. In Los Angeles, for instance, informal housing “began as an auspicious opportunity for working-class whites in the 1920s, took on patriotic overtones during World War II, and then was essentially racialized and criminalized by the 1980s when the area flipped from white to Latino.”⁷³ However, after facing a severe housing affordability crisis, California today has a more receptive policy toward informal housing units. The state enacted a series of Accessory Dwelling Units Laws to provide an additional income source for homeowners and affordable housing for low-income renters.⁷⁴ Other states and local governments enacted similar laws to change restrictive zoning and building standards, as well as streamline permit and licensing procedures for accessory dwelling units.⁷⁵ Such policies mark a significant step towards regularizing informal housing.

Black Public Sphere, 103 YALE L.J. 2119 (1994); Manuela Tomei, *Decent Work for Domestic Workers: Reflections on Recent Approaches to Tackle Informality*, 23 CAN. J. WOMEN & L. 185 (2011).

69. See generally Noah J. Durst & Jake Wegmann, *Informal Housing in the United States*, 41 INT’L J. URB. & REG’L RSCH. 282 (2017).

70. PRATT CTR. FOR CMTY. DEV., CONFRONTING THE HOUSING SQUEEZE: CHALLENGES FACING IMMIGRANTS TENANTS AND WHAT NEW YORK CAN DO 21 (2008), http://www.maketheroadny.org/pix_reports/PrattCenter-Confronting_the_Housing_Squeeze.pdf [hereinafter CONFRONTING THE HOUSING SQUEEZE].

71. *Id.*

72. *Id.*

73. Becky Nicolaidis, *From Resourceful to Illegal: The Racialized History of Garage Housing in Los Angeles*, BOOM CALIFORNIA (Jan. 31, 2019), https://boomcalifornia.org/2019/01/31/from-resourceful-to-illegal/#_ednref5; Brian J. Sullivan & Jonathan Burke, *Single-Room Occupancy Housing in New York City: The Origins and Dimensions of a Crisis*, 17 CUNY L. REV. 113, 121 (2013) (arguing that, in the 1970’s, reformers “informed by class biases, social prejudices, and varying degrees of xenophobia and racism” eliminated single-room occupancy housing (SRO) that housed immigrants and the working class in the New York City).

74. CAL. DEP’T OF HOUS. AND CMTY. DEV., ACCESSORY DWELLING UNIT HANDBOOK 8 (2020), https://www.hcd.ca.gov/policy-research/docs/adu_december_2020_handbook.pdf.

75. See John Infranca, *Housing Changing Households: Regulatory Challenges for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. & POL’Y REV. 53, 54, 83, 84 (2014) (discussing the regularization of ADUs such as attics, basements, backyard cottages, and units above a garage in New York, Washington, D.C., Austin, Denver, and Seattle); Margaret F. Brinig, *Grandparents and Accessory Dwelling Units: Preserving Intimacy and Independence*, 22 ELDER L.J. 381, 383 (2015) (discussing social benefits of regularizing ADUs).

A. *Housing Crisis as a Driver of Informality*

The prevalence of informal housing in the U.S. is directly connected to a severe crisis in the low-income housing market. The extent of America's housing crisis, which is particularly pronounced in major cities, is reflected in the intertwined problems of lack of affordable, stable, and secure housing.⁷⁶ The lack of affordable housing units in locales that provide suitable access to jobs, schools, and other social services for low-income social segments is a driver of the crisis.⁷⁷ While 12.5 million of the nation's nearly 43.7 million renter households have access to 46 million affordable units, the 10.9 million extremely low-income renter households have access to only 7.3 million affordable rental homes.⁷⁸ Low-income renters spend a large share of their income on housing, leaving little money for other necessities. According to the federal poverty guidelines, households spending more than thirty percent of their monthly income on housing are "cost-burdened."⁷⁹ But a recent estimate — from before the economic crisis onset by the COVID-19 pandemic —⁸⁰ showed that 12 million homeowners and renter households were "severely cost-burdened," spending more than fifty percent of their monthly incomes on housing.⁸¹ Seventy-one percent of the country's 10.9 million extremely low-income renters are especially likely to be "severely cost-burdened," spending more than half of their incomes on rent.⁸² As the following graph shows, whereas renter households who have "above-median-income" can afford and have access to 46 million units, 10.9 million "extremely-low-income"

76. Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 11 ANN. REV. L. SOC. SCI. 15, 16, 28 (2015).

77. See Quinn Mulholland, *Transportation Mobility and Housing*, NATIONAL HOUSING CONFERENCE (Mar. 11, 2020), <https://nhc.org/transportation-mobility-and-housing/>.

78. ANDREW AURAND, ET AL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES 3, NAT'L LOW INCOME HOUS. COAL. (Mar. 2020), https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2020.pdf.

79. U.S. Dep't of Hous. & Urb. Dev., *Rental Burdens: Rethinking Affordability Measures*, PD&R EDGE, https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_092214.html (last visited May 25, 2021) [hereinafter *Rental Burdens*].

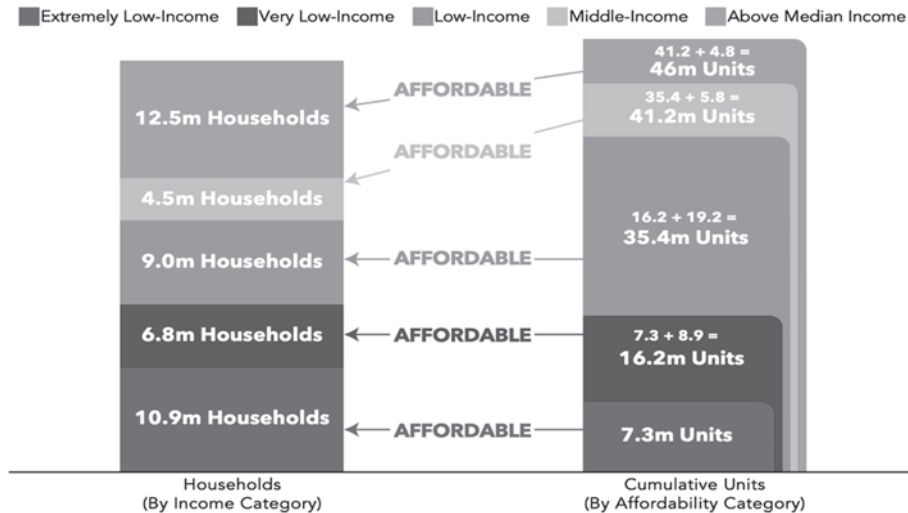
80. Matthew Haag & Conor Dougherty, *#CancelRent Is New Rallying Cry for Tenants. Landlords Are Alarmed*, N.Y. TIMES (May 1, 2020), <https://www.nytimes.com/2020/05/01/nyregion/rent-strike-coronavirus.html>.

81. Glenn Thrush, *As Affordable Housing Crisis Grows, HUD Sits on the Sidelines*, N.Y. TIMES (Jul. 27, 2018), <https://www.nytimes.com/2018/07/27/us/politics/hud-affordable-housing-crisis.html>.

82. NAT'L LOW INCOME HOUS. COAL., *supra* note 78, at 1.

renter can afford only 7.3 million units and must compete against all other renters.⁸³

The housing market in the U.S. is dictated mostly by a free market policy.⁸⁴ The belief underlying this policy is that increased demand will stimulate investment in the sector.⁸⁵ But the market supply has consistently failed to keep up with the country's low-income housing needs.⁸⁶ Regulatory practices concerning low-income housing development pose major supply-side constraints on new housing developments. According to a recent report by the Joint Center for



Source: NLIHC tabulations of 2018 ACS PUMS data.

NATIONAL LOW INCOME HOUSING COALITION

Housing Studies of Harvard University, “[t]he rising costs of construction, land, and labor, along with restrictive land use regulations, impede production of both subsidized and market-rate rental housing.”⁸⁷ Complex and costly exclusionary zoning laws and practices have also steered housing supply away from low-income

83. *Id.* at 4.

84. See David Harvey, *Forward* to RAQUEL ROLNIK, *URBAN WARFARE: HOUSING UNDER THE EMPIRE OF FINANCE*, at xi (Felipe Hirschhorn trans., Verso 2019). Globally, real estate industry investment is close to nine trillion dollars and in the U.S. one hundred sixty-two billion dollars. In 1978, the U.S. Housing and Urban Development Department had a budget of eighty-three billion dollars to provide public housing services, including limited equity co-ops with the support of cities and municipal governments for non-market solutions. The budget was reduced to eighteen billion dollars in the 1980s, and during the Clinton years, “a period of increasingly intensive neoliberal reforms, it was abolished entirely, along with almost any prospect of municipal support for non-market solutions.” *Id.*

85. See JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV. *THE STATE OF THE NATION’S HOUSING 2019* 1–6 (2019), https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2019.pdf.

86. See Vicki Been & Leila Bozorg, *Spiraling: Evictions and Other Causes and Consequences of Housing Instability*, 130 HARV. L. REV. 1408, 1408 (2017) (reviewing MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016)); Michael Allan Wolf, *HUD and Housing in the 1990s: Crises in Affordability and Accountability*, 18 FORDHAM URB. L.J. 545, 545 (1991).

87. JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *AMERICA’S RENTAL HOUSING 2020* 18 (2020), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2020.pdf.

households.⁸⁸ Regulatory barriers and “not-in-my-backyard” (NIMBY) opposition to new housing developments have contributed to the challenges facing low-income families.⁸⁹

Another aspect of the affordability crisis is the demand-side constraint. As housing policy is geared toward homeownership⁹⁰ and private sector developers target high-profit-yielding housing developments, low-income renters are priced out due to stagnant wages and aggressive cutbacks on social safety net programs.⁹¹ According to the National Low-Income Housing Coalition, a worker earning the federal minimum wage must work nearly 127 hours per week to afford a two-bedroom rental home, or 103 hours per week to afford a one-bedroom rental home at the national average fair market rent.⁹²

The Economist magazine recently summarized the phenomena as “property pathology” – “an infatuation with homeownership” rather than renting that is undermining “growth, fairness and public faith in capitalism”:

The soaring cost of housing has created gaping inequalities and inflamed both generational and geographical divides. In 1990 a generation of baby-boomers, with a median age of 35, owned a third of America's real estate by value. In 2019 a similarly sized cohort of millennials, aged 31, owned just 4%. . . . And homeowners of all ages who are trapped in declining places resent the windfall housing gains enjoyed in and around successful cities.⁹³

88. Steven P. Katkov & Jon Schoenwetter, *Minneapolis's Great Experiment: An Introduction to the Minneapolis 2040 Comprehensive Plan*, BENCH & BAR MINN. (Mar. 20, 2020), <https://www.mnbar.org/resources/publications/bench-bar/articles/2020/03/02/minneapolis-s-great-experiment-an-introduction-to-the-minneapolis-2040-comprehensive-plan> (quoting *Britton v. Town of Chester*, 595 A.2d 492 (N.H. 1991)).

89. Sara Pratt, *Civil Rights Strategies to Increase Mobility*, 127 YALE L.J. FORUM 498, 507–12 (2017).

90. See A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, 84 IND. L.J. 189, 193–96 (2009).

91. David D. Troutt, *Cities, Fair Housing, and Gentrification: A Proposal in Progressive Federalism*, 40 CARDOZO L. REV. 1177, 1183–84 (2019); Andrea J. Boyack, *Equitably Housing (Almost) Half a Nation of Renters*, 65 BUFF. L. REV. 109, 118–22 (2017).

92. NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 2019: 30TH ANNIVERSARY 1 (2019), https://reports.nlihc.org/sites/default/files/oor/OOR_2019.pdf.

93. *Home Ownership Is the West's Biggest Economic-Policy Mistake*, ECONOMIST (Jan. 16, 2020), <https://www.economist.com/leaders/2020/01/16/home-ownership-is-the-west-s-biggest-economic-policy-mistake>. See also Arlo Chase, *Rethinking the Homeownership Society: Rental Stability Alternative*, 18 J.L. & POL'Y 61, 61–62 (2009). (“For more than 85 years, the United States government has promoted homeownership through mortgage programs, tax subsidies and popular rhetoric. . . . For the past 30 years, government programs and resources have largely ignored the other dominant tenure form—renting. This neglect of rental housing and rental households has helped create a troubling situation in which nearly half of all rental households spend more than the government recommends on housing, putting such households at risk of having insufficient resources for other necessities like food, medical care, transportation and education.”).

Varieties of federal and local low-income housing assistance are available.⁹⁴ But they hardly match the demand, as only one in four qualified households receives any kind of public housing assistance.⁹⁵ For low-income families, the increasing cost of rent and associated lack of stable housing not only divert money they need for food, healthcare, childcare, and other necessities — it has also worsened their health and wellbeing. These cost increases drive low-income families to live in substandard housing conditions, exposing them to health hazards.⁹⁶

While the high cost of housing affects low-income households of all races, racial minorities face severe discrimination. For a long time government agencies, banks, and financial intermediaries in the housing market “redlined” racial minority neighborhoods to refuse lending for residents.⁹⁷ Studies have documented the structural forces fostering discrimination and racial disparities in the housing market.⁹⁸ The real estate financing industry has exploited even housing policies and programs that are intended to mitigate racial disparities in the housing market by deploying predatory lending schemes with exceptionally burdensome loan terms.⁹⁹ These practices have fostered a vicious cycle of declining property values and residential segregation,¹⁰⁰ exacerbating the racial inequality already embedded in real estate markets.¹⁰¹

Poverty in the U.S. has a racial face, affecting immigrants and natives,¹⁰² and discrimination is not limited to private market practices. Laws and public policies have created and perpetuated persistent housing discrimination against African Americans.¹⁰³ As Richard Rothstein has shown, seemingly neutral governmental policies, rules, and regulations have long underwritten exclusionary practices that segregate Americans along racial lines in the housing market.¹⁰⁴ A recent report by the U.S. Department of Housing and Urban Development (“HUD”), concerning

94. See PUB. & AFFORDABLE HOUS. RSCH. CORP., HOUSING AGENCY WAITING LISTS AND THE DEMAND FOR RENTAL ASSISTANCE 3–7 (Feb. 2016), <https://www.housingcenter.com/wp-content/uploads/2017/11/waiting-list-spotlight.pdf>.

95. *Id.* at 3 (citing Erika Poethig, *One in Four: America’s Housing Assistance Lottery*, URBAN (May 28, 2014), <https://www.urban.org/urban-wire/one-four-americas-housing-assistance-lottery>).

96. See Abraham Gutman et al., *Health, Housing, and the Law*, 11 NE. U. L. REV. 251, 253 (2019); Dayna Bowen Matthew, *Health and Housing: Altruistic Medicalization of America’s Affordability Crisis*, 81 L. & CONTEMP. PROBS. 161, 161 (2018).

97. See Charles L. Nier III, *Perpetuation of Segregation: Toward A New Historical & Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 623–27 (1999).

98. See Douglas S. Massey, *Racial Discrimination in Housing: A Moving Target*, 52 SOC. PROBS. 148, 148–51 (2005).

99. See Hila Keren, *Law and Economic Exploitation in an Anti-Classification Age*, 42 FLA. ST. UNIV. L. REV. 313, 322–31 (2015).

100. See KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 34–35 (2019).

101. See generally Vicki Been et al., *The High Cost of Segregation: Exploring Racial Disparities in High-Cost Lending*, 36 FORDHAM URB. L. J. 361, 362–74 (2009) (discussing the role of residential segregation and racial disparities in housing financial markets).

102. See Katja M. Guenther et al., *The Impact of Intersecting Dimensions of Inequality and Identity on the Racial Status of Eastern African Immigrants*, 26 SOCIO. F. 98 (2011).

103. See, e.g., RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 18, 20, 25, 42, 44, 51, 65–67, 70, 82, 102 (2017).

104. See *id.* at 59–60, 179–80, 188–93; Priya S. Gupta, *Governing the Single-Family House: A (Brief) Legal History*, 37 UNIV. HAW. L. REV. 187, 204–11 (2015).

housing discrimination against racial and ethnic communities, shows that discrimination is common across American cities.¹⁰⁵ Regardless of class, white home-seekers are far more likely than Black home-seekers and people of other races to receive adequate information about available units, a timely appointment to meet with real estate agents, the ability to inspect potential units, and the time/ability to negotiate favorable terms of rent.¹⁰⁶

B. Housing Insecurity

The affordable and fair housing crisis produces complex tenure insecurity, exposing a steadily increasing number of low-income households to evictions.¹⁰⁷ For example, in North Charleston, South Carolina, there were 3,660 evictions in just one year—that is 10.03 low-income households evicted every day, or 16.5 percent of renters per year.¹⁰⁸ Evictions in urban areas are not about the housing supply falling short of the demand. A complex and path-dependent phenomenon has produced spiraling effects of poverty among low-income households.¹⁰⁹ These households frequently face unstable housing conditions due to poverty, and their unpredictable housing conditions feed into it, exacerbating a vicious, intergenerational poverty cycle.¹¹⁰ According to research on housing and poverty, the oppressive reality facing the poor in the housing market works as follows: if you are poor, you are likely to be evicted as a consequence of the steadily increasing gap between working class wages and rent.¹¹¹ If you are evicted, you are not likely to find a stable place to live because credit history screening and eviction record surveillance work against you.¹¹² Without a stable and decent place to live, you will not have a steady job or income to maintain your health because you need a place to live to be a productive worker. In addition, your children will not have reliable access to education and health services. Without proper education and health, they are also likely to be poor in the future.¹¹³ Hence, the

105. See U.S. DEP'T OF HOUS. AND URB. DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012, at xi, 69 (2013), https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf.

106. See *id.* at 39–64.

107. See Karen Tokarz et al., *Addressing the Eviction Crisis & Housing Instability Through Mediation*, 63 WASH. U. J. L. & POL'Y 243, 243–44 (2020); Judith Fox, *The High Cost of Eviction: Struggling to Contain A Growing Social Problem*, 41 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 167, 169–81 (2020); Breezy A. Schmidt, *N. Dakota Case Study: The Eviction Mill's Fast Track to Homelessness*, 92 N.D. L. REV. 595, 623–29 (2017).

108. *Eviction Rankings: Top Evicting Large Cities in the United States*, EVICTION LAB, <https://evictionlab.org/rankings/#/evictions?r=United%20States&a=0&d=evictionRate&l=0> (last visited May 25, 2021).

109. See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 4–5 (2016).

110. See *id.* at 15–16, 24–26, 69–70, 76, 257, 295–99.

111. See Terrence McCoy, *Eviction isn't Just About Poverty. It's also About Race – and Virginia Proves It*, THE WASHINGTON POST (Nov. 10, 2018), https://www.washingtonpost.com/local/social-issues/eviction-isnt-just-about-poverty-its-also-about-race--and-virginia-proves-it/2018/11/10/475be8ae-d7bd-11e8-aeb7-ddcd4a0a54e_story.html.

112. *Id.*

113. UNDP, *Center for Housing Policy Looks at Mobility's Effect on Children*, 39 NO. CD-8 HDR CURRENT DEVS. 11 (Apr. 18, 2011).

intergenerational cycle of poverty and lives and livelihoods on the edge of homelessness continues, especially for the poor-and-Black.¹¹⁴

Landlords evict tenants for a number of reasons, including delay or default in paying rent, reporting domestic violence, complaining about housing code violations, overcrowding (which could be as simple as having guests), and drug abuse.¹¹⁵ Some grounds are not lawful causes for eviction,¹¹⁶ but landlords deploy informal mechanisms such as the threat of eviction to coerce tenants to vacate their premises.¹¹⁷

C. Eviction Record and Credit History Screening

The immediate effect of eviction for low-income households can be homelessness. According to Matthew Desmond, most evicted families have no idea where their next home will be.¹¹⁸ Eviction can also lead to a record that will foreclose a tenant's prospect for finding another rental house. Whether or not they win the dispute, tenants involved in an eviction dispute are often blacklisted in the rental market.¹¹⁹ Because landlords screen out tenants with an eviction record, a tenant involved in an eviction proceeding will have a near permanently tarnished record and markedly diminished prospects for renting a home in the market.¹²⁰

Credit history records produce similar blacklisting effects.¹²¹ Realtors and other commodity vendors gauge consumers' moral and financial prudence based on their recorded credit histories. In today's economy, one cannot have a meaningful economic existence without having established a credible financial identity.¹²² Financial identity is legally formalized as an integral dimension of individual identity, and relentless technological surveillance works to make consumers "morally responsible, obedient, predictable, and profitable."¹²³

In the housing market, real estate agents and landlords look at credit histories to gauge a potential renter's likelihood of defaulting on her rental

114. See Been & Bozorg, *supra* note 86, at 1408–09, 1412, 1415–16.

115. *Id.* at 1413–15, 1430 n.75.

116. See David A. Dana, *An Invisible Crisis in Plain Sight: The Emergence of the "Eviction Economy," Its Causes, and the Possibilities for Reform in Legal Regulation and Education*, 115 MICH. L. REV. 935, 950–52 (2017).

117. See Kennedy, *supra* note 62, at 80, 83.

118. See Desmond, *supra* note 109, at 97. See also Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income and Minority Tenants*, 24 GEO. J. ON POVERTY L. & POL'Y 59, 69 (2016).

119. Gary Williams, *Can Government Limit Tenant Blacklisting?*, 24 SW. U. L. REV. 1077, 1082–84 (1995).

120. Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1356–64 (2007).

121. See Shivangi Bhatia, *To "Otherwise Make Unavailable": Tenant Screening Companies' Liability Under the Fair Housing Act's Disparate Impact Theory*, 88 FORDHAM L. REV. 2551, 2553, 2559 (2020); Erin Graves, *Rooms for Improvement: A Qualitative Metasynthesis of the Housing Choice Voucher Program*, 26 HOUS. POL'Y DEBATE 346, 352, 354–55 (2016).

122. See Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. SOC. JUST. 319, 319–23, 337–38 (2010).

123. JOSH LAUER, CREDITWORTHY: A HISTORY OF CONSUMER SURVEILLANCE AND FINANCIAL IDENTITY IN AMERICA 4 (2017).

responsibilities.¹²⁴ Landlords use credit history reports with negative information dating as far back as seven years as a predictor to determine whether a rental applicant is a suitable tenant.¹²⁵ More than seventy-two percent of landlords rely on credit history screenings,¹²⁶ which shows that having a robust credit score is one of the standard prerequisites to rent a house in major cities across the U.S.. Companies providing renters' background reports advertise credit screening as a means to demonstrate that the tenant has a history of responsible borrowing and paying her debts on time and that she can afford the rent.¹²⁷ Landlords set the required baseline credit score quite high and reject tenants with credit history reports containing "too many inquiries," "derogatory accounts or public records," and "insufficient debt experience."¹²⁸

Even though credit reports can be inaccurate and difficult to correct,¹²⁹ for many renters a lack of credit history or a bad credit score means that they may have no place to live. Dunn and Grabchuk reported that individuals and families in Washington denied housing due to inaccurate or misleading background reports lacked the practical means to correct them.¹³⁰ Potential renters often cannot afford to pay the repeated screening fees demanded when they are forced to make serial applications in their quest for housing.¹³¹

While technologies have revolutionized the ways rental housing providers deploy credit history to screen tenants by, supplementing or even replacing traditional tenant-screening tools with computer programs,¹³² many low-income citizens are "credit invisibles."¹³³ According to the Consumer Financial Protection Bureau (C.F.P.B.), about 45 million Americans lack either a credit file with a consumer credit reporting agency or enough credit information in their record to

124. Claudia DiGirolamo, *The Scarlet E: A Call to New Jersey Lawmakers to Regulate Tenant Screening Practices*, 43 SETON HALL LEGIS. J. 487, 488–89 (2019).

125. See *The Renter's Guide to Tenant Privacy Rights*, PRIV. RTS CLEARINGHOUSE (Mar. 21, 2017), <https://privacyrights.org/consumer-guides/renters-guide-tenant-privacy-rights> [hereinafter *The Renter's Guide*].

126. Bhatia, *supra* note 121, at 2559.

127. See, e.g., *7 Best Tenant Screening Services of 2021*, RENTSPREE (Dec. 21, 2020), <https://www.rentspree.com/best-tenant-screening-services-2020/>; Tyler Nicely, *How to Run a Tenant Credit Check*, ZILLOW (Jan. 28, 2020), <https://www.zillow.com/rental-manager/resources/credit-reports-for-landlords/>.

128. See Anna Reosti, "We Go Totally Subjective": *Discretion, Discrimination, and Tenant Screening in a Landlord's Market*, 45 L. & SOC. INQUIRY 618, 640–42 (2020); *Karim-Panahi v. 4000 Massachusetts Apartments*, 302 F. Supp. 3d 330, 337 (D.D.C. 2018), *aff'd*, No. 18-7054, 2018 WL 6167393 (D.C. Cir. Nov. 1, 2018).

129. See Angela Littwin, *Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence*, 161 U. PA. L. REV. 363, 384 (2013).

130. Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. SOC. JUST. (SYMPOSIUM ISSUE) 319, 320 (2010).

131. See *id.*

132. *Id.*

133. "Credit invisibles" refers to people who don't have a recorded financial history or scorable financial record. See Kenneth Brevoort et al., *Credit Invisibles and the Unscored*, 18 CITYSCAPE 9, 9–10 (2016).

generate a credit score.¹³⁴ These credit invisible individuals are trapped in a ‘Catch-22’ that is hard to escape because they need credit to qualify for a loan.¹³⁵

The effects of having an eviction record or a bad credit history are not limited to one's rental opportunities in the private market. Housing agencies administering public or assisted housing programs also look at eviction records when screening out applicants for public or assisted housing.¹³⁶ Federal housing laws explicitly authorize landlords to screen out tenants receiving housing assistance based on their credit history and other background checks.¹³⁷ Only one in four among those eligible for public or assisted housing receive housing support, usually after waiting for years.¹³⁸ A low-income family with an eviction record could be denied public housing assistance.¹³⁹ Keeping renters' eviction and late rent payment history as key limitations on housing access in the private market is unforgivingly rigorous in enforcing and reinforcing consumer surveillance in the housing market.¹⁴⁰

Courts have held that screening out renters who have a poor credit history does not trigger fair housing or anti-discrimination laws.¹⁴¹ But some states have introduced regulations to enhance the accuracy of credit history reporting used by landlords to screen out tenants. New York, Minnesota, and Oregon have adopted various statutes to promote the accuracy of credit reports and limited safeguards against their adverse effects.¹⁴² Unfortunately, such state laws are rare.

Credit history screening has severe consequences for new immigrants looking for housing. It effectively excludes them from the formal rental market which requires them to have a recorded financial history. Yet for the majority of renters, such a history is necessary to establish the address and income to open a bank account. For refugees and immigrants coming from developing countries, where

134. OFF. OF POL'Y DEV. & RSCH, U.S. DEP'T. OF HOUS. & URBAN DEV., POTENTIAL IMPACTS OF CREDIT REPORTING PUBLIC HOUSING RENTAL PAYMENT DATA 9 (2019), <https://www.huduser.gov/portal/sites/default/files/pdf/Potential-Impacts-of-Credit-Reporting.pdf>.

135. *Id.*

136. For a list of the requirements, see HUD's Public Housing Program, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/topics/rental_assistance/phprog#:~:text=WHO%20IS%20ELIGIBLE%3F,citizenship%20or%20eligible%20immigration%20status (last visited May 25, 2021).

137. *Pasquince v. Brighton Arms Apartments*, 876 A.2d 834, 840 (N.J. Super. Ct. App. Div. 2005).

138. Desmond, *supra* note 109, at 59.

139. *Id.* at 296.

140. Even if landlords do not charge renters fee for a background check, the cost of surveillance is transferred to renters in general. See Been & Bozorg, *supra* note 86, at 1412–13. Late rent payments may show up on one's credit report if the landlord or management company has subscribed to the credit bureau for this service. Late payments may also “be revealed if the landlord refers the matter to a collection agency or if a civil court action, the first step toward eviction, is filed against the tenant.” *The Renter's Guide*, *supra* note 125.

141. See Daniels v. Brooklyn Estates & Props. Realty, No. 07 CIV. 3626, 2010 WL 11537456, at *3 (E.D.N.Y. Mar. 29, 2010), *aff'd*, 413 Fed. Appx. 399 (2d Cir. 2011) (concluding the plaintiff could not establish a *prima facie* case for discrimination because defendants had a “legitimate, nondiscriminatory rationale” for denying the renter's application).

142. N.Y.C. DEP'T OF HOUS. PRES. AND DEV. ET AL., IMPROVING ACCESS TO AFFORDABLE HOUSING OPPORTUNITIES 8 (2017) (“The City recently revised its policies regarding the use of credit scores and debt in the affordable housing screening process. Under the new policies, applicants cannot be denied because of a low credit score alone; developers must take multiple factors into account when reviewing the credit worthiness of an applicant.”); see also Gold, *supra* 118, at 81–82.

the practice of recording financial histories is absent or uncommon, it is counter-intuitive that having borrowed money from a formal financial body and paid it off in time is better than never being indebted to such lenders.¹⁴³

Aside from “amenity migrants”¹⁴⁴ and those who have an employer, a family, a sponsoring charity, or other means of arranging a dwelling place, few new immigrants are likely to have the recorded financial history or steady income source necessary to rent a home anywhere in a major city through the formal market.¹⁴⁵ Only those admitted through overseas refugee processing agencies receive temporary “reception and placement” support that includes interest-free loans covering their transportation cost from a refugee camp to the U.S.¹⁴⁶ Those seeking asylum on arrival may receive emergency shelter and unstructured support from communities and charities. For example, when Congolese refugees arrived in Portland, Maine, in 2019, they sheltered in a basketball arena converted into an emergency shelter.¹⁴⁷

For the most part, until recent immigrants find a job, save enough, and build a credit history that will allow them to rent a home in the formal market, they have to rely on their friendship and kinship networks.¹⁴⁸ Instead of visiting the internet for housing advertisements, calling an apartment agent to inquire about open units, or dropping by an apartment complex for a visit, they search for a place to live by reaching out to their social contacts (often before arriving in the U.S.) or visiting a café or community center frequented by their kinfolk.¹⁴⁹ This search frequently results in informal housing in single-family homes, illegally converted units, unventilated basement rooms, a shared room in a rented apartment, or a sleeping space in the apartment renter's living room.¹⁵⁰ In places where the

143. Interview with Sebr. See also ANNA PAULSON ET AL., FINANCIAL ACCESS FOR IMMIGRANTS: LESSONS FROM DIVERSE PERSPECTIVES 22, 26, 34 (2006), https://www.brookings.edu/wp-content/uploads/2016/06/20060504_financialaccess.pdf.

144. Jan G. Laitos & Heidi Ruckriegle, *The Problem of Amenity Migrants in North America and Europe*, 45 URB. LAW. 849, 852–53 n.13 (2013) (“Amenity migrants” refers to those settling in the U.S. or other wealthy countries as investors or retirees buying a home).

145. See Sally French, *The Best Ways for Immigrants to Build Credit*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/wirecutter/money/immigrants-build-credit/>; Dara Duguay, *Another Barrier for Immigrants: Their Credit History*, HILL (Sept. 6, 2019, 1:30 PM), <https://thehill.com/blogs/congress-blog/politics/460243-another-barrier-for-immigrants-their-credit-history>. Refugees and asylees who come from developing countries are particularly unlikely to have a recorded financial history or credit record. The U.S. admitted about 85,000 refugees in 2016 alone and 76,000 over the last three years. See Jens Manual Krogstad, *Key Facts About Refugees to the U.S.*, PEW RSCH. CTR. (Oct. 7, 2019), <https://www.pewresearch.org/fact-tank/2019/10/07/key-facts-about-refugees-to-the-u-s/>. NADWA MOSSAAD, U.S. DEPT. OF HOMELAND SEC. OFF. OF IMMIGR. STAT., ANNUAL FLOW REPORT: REFUGEE AND ASYLEES 6 (2018) (Asylum applicants in the U.S. were about 115,356 in 2016, 139,777 in 2017, and 105,472 in 2018).

146. Steven Sacco, *Indebted Asylum: Why the Travel Loan Requirement for Refugees Is A Failure of the United States to Meet Its Obligations Under the Convention on the Status of Refugees*, 19 GONZ. J. INT'L L. 1, 5–6 (2016).

147. Kate Taylor, *Maine Needed New, Young Residents. African Migrants Began Arriving by the Dozens*, N.Y. TIMES (June 23, 2019), <https://www.nytimes.com/2019/06/23/us/portland-maine-african-migrants.html>.

148. See Wei Li & Carlos Teixeira, *The Housing and Economic Experiences of Immigrants in Canada and the United States*, in THE HOUSING AND ECONOMIC EXPERIENCES OF IMMIGRANTS IN U.S. AND CANADIAN CITIES 3, 7–9 (Carlos Teixeira & Wei Li eds., 2015).

149. Interview with Tam.

150. *Id.*

affordable housing shortage is acute, new immigrants may end up staying in homeless shelters for as long as two or more years.¹⁵¹

Even when immigrants succeed in finding work, they have difficulty providing evidence of a steady source of income.¹⁵² Landlords require such evidence and screen out potential renters with income that is less than three times the monthly rent.¹⁵³ Renters usually fulfill this requirement by presenting paystubs or employment letters, but these are rarely available for new immigrants, who have difficulty finding steady paying jobs before having a work permit and a place to live.¹⁵⁴ When they secure the necessary papers, new immigrants usually work in minimum wage jobs such as serving in gas stations, local convenience stores, and other service businesses that barely provide the income necessary to rent a safe and decent place.¹⁵⁵

IV. INFORMAL HOUSING AMONG IMMIGRANTS

As a consequence of the housing affordability crisis, about half a million people in the U.S. are homeless, and nearly twelve million are "cost-burdened" or "severely-cost-burdened."¹⁵⁶ Whether one is a member of a low-income household, a local youth, a migrant from another state, or an immigrant from another country, obtaining affordable, safe, and decent shelter as envisioned by tenant rights law can be nearly impossible. Affordable and secure rental housing is particularly scarce in cities where there are jobs, easily accessible public transit systems, and schools.¹⁵⁷ The degree of difficulty in securing housing varies depending on one's race and socioeconomic background.¹⁵⁸ Any low-income person seeking rental accommodation must prove a steady income source, supply a reference from a previous landlord, demonstrate a robust credit history, and have

151. SERENA XIONG, KEY HOUSING ISSUES FACING IMMIGRANT COMMUNITIES IN THE TWIN CITIES: INTERVIEW WITH LEADERS FROM THE HMONG, LATINO, AND SOMALI COMMUNITIES 13 (2017), https://www.mnbudgetproject.org/docs/default-source/default-document-library/key_housing_issues_facing_immigrant_communities_in_the_twin_cities.pdf?sfvrsn=95423b70_8

152. See *infra* note 149 and accompanying text.

153. Interview with Addis Arga, in Washington D.C. (Jan. 5, 2020) (on file with author) [hereinafter hereinafter Interview with Addis Arga] [Note: The name of my sources and specific locations of the interview are anonymized]. See also *Comm'n on Hum. Rts. & Opportunities v. Sullivan Assocs.*, 739 A.2d 238, 251–55 (Conn. 1999).

154. Interview with Addis Arga.

155. *Id.*

156. See *State of Homelessness: 2020 Edition*, NAT'L ALL. TO END HOMELESSNESS <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2020/> (last visited May 25, 2021). According to Federal Poverty Guidelines, a household paying 30% of their income on rent is cost burdened and a household paying 50% or more is severely cost burdened. *Rental Burdens*, *supra* note 79.

157. For further discussion, see CONOR DOUGHERTY, *GOLDEN GATES: FIGHTING FOR HOUSING IN AMERICA XII-XIII* (Penguin Press 2020); Evelyn Blumenberg et al., *Transportation Access, Residential Location, and Economic Opportunity: Evidence from Two Housing Voucher Experiments*, 17 *CITYSCAPE* 89, 94–95 (2015).

158. See generally Andrew Hanson & Zackary Hawley, *Do Landlords Discriminate in the Rental Housing Market? Evidence From an Internet Field Experiment in U.S. Cities*, 70 *J. URB. ECON.* 99 (2011).

a clean eviction and criminal record.¹⁵⁹ Compounding the housing market's wage-rent gap,¹⁶⁰ these requirements present particularly severe challenges for recently arrived immigrants, forcing them to seek shelter in the informal market.¹⁶¹

Immigrant renters are more prone to live in informal housing, as they face severe challenges because of their triple status as renters, racial minorities, and immigrants.¹⁶² According to a study on immigrants' housing conditions in New York City, immigrants are more likely to pay high portions of their income for rent than native-born tenants and more likely to live in overcrowded, illegal, and substandard conditions.¹⁶³

Informal housing arrangements are often good enough for a temporary stay. An immigrant coming from a less well-off economic background may resign herself to sharing an unventilated basement or loft with ten other immigrants. A refugee from an overseas refugee camp is unlikely to think that an overcrowded, unventilated, and substandard room in a U.S. city is the worst place to live. However, as a citizen-to-be, anyone coming as an immigrant with big dreams and ambitions would certainly be disenchanted by the experience. Informally rented units flout building codes, occupancy regulations, and health and safety standards, and the tenancies in such units are tenuous, overcrowded, unsanitary, hazardous, and sometimes fraught with abuse and violence.¹⁶⁴ Hidden homelessness—sleeping in closets or on their hosts/landlords' living room couches—is prevalent

159. See Laura Agadoni, *The Requirements to Rent a House*, SFGATE (Nov. 28, 2018), <https://homeguides.sfgate.com/requirements-rent-house-38824.html>.

160. See OUT OF REACH 2020, *supra* note 9; PETER TEMIN, *THE VANISHING MIDDLE CLASS: PREJUDICE AND POWER IN A DUAL ECONOMY* 27–40 (MIT Press 2017); Wes Rivers, *Going, Going, Gone: DC's Vanishing Affordable Housing*, FISCAL POL'Y INST. (Mar. 12, 2015), <https://www.dcfpi.org/wp-content/uploads/2015/03/Going-Going-Gone-Rent-Burden-Final-3-6-15format-v2-3-10-15.pdf>.

161. While the low-income housing crisis is widely recognized, it is rarely one of the top issues discussed among housing challenges confronting immigrants. An exception is a body of scholarship that emerged in response to local ordinances deployed by officials to deter the presence of undocumented immigrants in their localities by tying rental regulation to the renters' immigration status. These ordinances placed undocumented immigrants' housing conditions in the country's politico-legal spotlight, resulting in federal lawsuits that produced mixed outcomes. Jenna Christophel, *Immigrant Survivor Housing Issues*, J. KAN. B. ASS'N., 87 Sept. 2018, at 38–39 (2018); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, and Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L.R. 55, 59–60 (2009). The issues raised by those ordinances and the lawsuits raised have positioned housing in the intersection of alienage and property laws, attracting considerable attention among property law scholars and immigration law scholars. Allison Brownell Tirres, *Ownership without Citizenship: The Creation of Noncitizen Property Rights*, 19 MICH. J. RACE & L. 1, 52 (2013) (recounting property law's ambivalence toward alienage, argued that U.S. courts have failed to articulate a principled, rights-based approach to noncitizen property and proposed an increased and formalized protection for noncitizen property rights as a step towards humane treatment of noncitizens and modernization of property law). Bender, *supra* note 5. California, Illinois, and other states have also proactively legislated to secure housing rights irrespective of the tenants' alienage status and prevent property from being weaponized in battles over immigration policy. See *Illinois Governor Pritzker Signs Immigrant Tenant Protection Act into Law*, 96 INTERPRETER RELEASES 1, 1 (2019).

162. CONFRONTING THE HOUSING SQUEEZE, *supra* note 70, at 20.

163. *Id.* at 3, 14.

164. See TOM WATERS & VICTOR BACH, CMTY. SERV. SOC'Y, *HOUSING THE CITY OF IMMIGRANTS* 12–13 (Mar. 2011), https://b3cdn.net/nycss/6174637efe14b4c944_12m6b8b6d.pdf; Meaghan Fitzpatrick & Leslye E. Orloff, *Abused, Abandoned, or Neglected: Legal Options for Recent Immigrant Women and Girls*, 4 PENN ST. J.L. & INT'L AFFS. 614, 641–42 (2016); Suketu Mehta, *The Asylum Seeker*, NEW YORKER (July 25, 2011), <https://www.newyorker.com/magazine/2011/08/01/the-asylum-seeker>.

among recently-arrived immigrants.¹⁶⁵ The U.S. may welcome immigrants, or it used to, "but its housing does not."¹⁶⁶

Since the late 1960s, when a new law discarded the "national origins" quota system,¹⁶⁷ the country's immigration system and immigrants' racial, economic, and professional profiles have significantly changed. As popular culture depicts, immigrants historically assimilated into the U.S. economy and society by moving up the social ladder.¹⁶⁸ This representation reflected the experiences of European immigrants, who faced on arrival a variety of social and economic barriers that limited their access to housing to rundown tenements in industrial towns before they eventually moved up the social ladder.¹⁶⁹

Recent immigrants are more diverse in terms of race, national origin, education, and other social identifiers than the pre-1960s mostly European immigrants.¹⁷⁰ In 2017, foreign-born immigrants represented about 13.6 percent of the U.S. population.¹⁷¹ A quarter came from Mexico, with the next largest groups being from China (six percent), India (six percent), the Philippines (four percent) and El Salvador (three percent), with the rest coming from almost every country in the world.¹⁷² They have encountered a new economy and labor market. As sociologists Emily Rosenbaum and Samantha R. Friedman describe, "today's economy is shaped more like an hourglass, with many low-paying jobs requiring little education at the bottom, many high-paying job [sic] requiring advanced degrees at the top, and far fewer jobs in between."¹⁷³ The middle range jobs have disappeared, presenting an insurmountable barrier to the prospect of an affordable, decent, safe, secure home and upward mobility in the economy.

Further, while Europeans experienced spatial assimilation,¹⁷⁴ recent immigrants assimilate through "segmented assimilation," whereby structural factors such as race and economic class play a more significant role than individual

165. See JENNIFER SIMMELINK, CTR. FOR URB. AND REG'L AFFS., HIDDEN HOMELESSNESS: REFUGEES AND HOUSING IN THE TWIN CITIES 22 (2009), <https://conservancy.umn.edu/handle/11299/195645>.

166. Nikita Stewart et al., *Underground Lives: The Sunless Lives of Immigrants in Queens*, N.Y. TIMES (Oct. 23, 2019), <https://www.nytimes.com/interactive/2019/10/23/nyregion/basements-queens-immigrants.html>.

167. Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2019/06/17/key-findings-about-u-s-immigrants/>.

168. EMILY ROSENBAUM & SAMANTHA R. FRIEDMAN, THE HOUSING DIVIDE: HOW GENERATIONS OF IMMIGRANTS FARE IN NEW YORK'S HOUSING MARKET 39 (New York University Press, 2007).

169. *Id.* at 34–35.

170. Abby Budiman et al., *Facts on U.S. Immigrants, 2018*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/hispanic/2020/08/20/facts-on-u-s-immigrants/> ("In 1960, 84% of immigrants living in the U.S. were born in Europe, Canada or other North American countries, while only 6% were from Mexico, 4% from Asia, 3% from the rest of Latin America and 3% from other areas. Immigrant origins now differ drastically, with European, Canadian and other North American immigrants making up only a small share of the foreign-born population (13% in 2018)").

171. *Id.*

172. Budiman et al., *supra* note 170. Among immigrants ages five and older, Spanish is the most commonly spoken language. Some 43% of immigrants in the U.S. speak Spanish at home. The top five languages spoken at home among immigrants outside of Spanish are English (17%), followed by Chinese (6%), Hindi (5%), Filipino/Tagalog (4%) and French (3%). *Id.*

173. ROSENBAUM & FRIEDMAN, *supra* note 168, at 39.

174. *Id.* at 34–36.

qualities.¹⁷⁵ While the European immigrants of the pre-1960s ascended the economic and social ladders in an immigrant-friendly law and policy setting, recent immigrants confront a restrictive law and policy environment that severely impedes their access to the formal housing market and integration into the broader economy and society.¹⁷⁶

A. The Public Charge Rule and the Immigrant Sponsorship Program

Over the last several decades, laws and policies concerning immigrants have created and fostered informality in the housing market. The Housing and Community Development Act of 1980 and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 have restricted access to public or assisted housing to a limited category of "qualified aliens."¹⁷⁷ This category includes permanent residents, refugees, asylees, parolees paroled for a period of at least one year, and noncitizens whose deportations are being withheld based on prospective persecution.¹⁷⁸ Because of a chronic shortage,¹⁷⁹ eligible and qualified immigrants rarely access public or assisted housing.¹⁸⁰

From an immigration law standpoint, the policy is to exclude those who could not afford housing from admission into the country.¹⁸¹ As a condition of admission, immigration law requires that immigrants prove they are not likely to be a "public charge" by presenting evidence to immigration officers showing that they have sufficient resources to support themselves when they arrive in the U.S.¹⁸² The public charge concept has played some role in immigration law since the late nineteenth century, but the idea that aliens must be self-sufficient was solidified in immigration law in 1996 and further extended in 2019 to restrict the admission of immigrants.¹⁸³

The public charge rule applies to all immigrants except refugees, asylees, Afghans and Iraqis with special immigrant visas, individuals applying under the Violence Against Women Act, Special Immigrant Juveniles, and the members of

175. Alejandro Portes & Min Zhou, *The New Second Generation: Segmented Assimilation and Its Variants*, 530 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 83–85, 96 (1993).

176. See generally JooHee Han, *Does Skin Tone Matter? Immigrant Mobility in the U.S. Labor Market*, 57 DEMOGRAPHY 705 (2020); Zoua M. Vang, *The Limits of Spatial Assimilation for Immigrants' Full Integration: Emerging Evidence from African Immigrants in Boston and Dublin*, 641 ANNALS AM. ACAD. POL. & SOC. SCI. 220 (2012).

177. Gregory T. W. Rosenberg, *Alienating Aliens: Equal Protection Violations in the Structures of State Pub.-Benefit Schemes*, 16 U. PA. J. CONST. L. 1417, 1424–29 (2014).

178. MAGGIE MCCARTY & ALISON SISKIN, CONG. RSCH. SERV., RL31753, IMMIGRATION: NONCITIZEN ELIGIBILITY FOR NEEDS-BASED HOUSING PROGRAMS 1–2 (2018).

179. See Ericka Petersen, *Building A House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 63, 72–74 (2020); AURAND ET AL., *supra* note 78, at 10–12.

180. See Jason Dzubow, *HUD Shuts the Door: Restrictions on Housing Assistance to Noncitizens*, 9 GEO. IMM. L.J. 801, 803–06 (1995).

181. See Joseph Daval, *The Problem with Pub. Charge*, 130 YALE L.J. 998 (2021).

182. Stephanie L. Tang, *Arguing Affidavits of Support*, 105 ILL. B.J. 34, 34–38 (2017).

183. See Tania Morris Diaz & Marie S. Nelson, *The New Pub. Charge Immigration Rule & Its Impact*, 99 MICH. B.J. 24 (2020); Linton Joaquin & Braden Cancilla, *Protecting Immigrants and the Community: A New Approach to Public Charge Determinations*, 76 NO. 22 INTERPRETER RELEASES 887 (1999). President Biden's administration has recently reversed the 2019 Public Charge Rule. Exec. Order No. 14012, 86 Fed. Reg. 8277, 8277 - 8280 (Feb 2, 2021).

a few other categories.¹⁸⁴ In evaluating the financial circumstances of an immigrant, consular officers have some discretion.¹⁸⁵ Those who do not have enough resources may fulfill the requirement by providing an affidavit of support signed by a U.S. citizen who undertakes to sponsor the immigrant.¹⁸⁶ All family-based immigrants and most employment-based immigrants must have at least one U.S. citizen or permanent resident sponsor who has signed Form I-864.¹⁸⁷ This affidavit is mandatory and legally enforceable, binding the sponsor towards the government as well as the sponsored immigrant.¹⁸⁸ The sponsor's principal obligation is to provide "whatever support is necessary to maintain the sponsored immigrant at an annual income that is at least 125% of the federal poverty level annual guideline."¹⁸⁹ The obligation lasts until the sponsored immigrant is credited with forty qualifying quarters of work, which is about ten years unless the sponsor or the sponsored immigrant dies, the sponsored immigrant becomes a U.S. citizen, or the sponsored immigrant permanently departs the U.S.¹⁹⁰ The sponsored immigrant is not required to seek employment or other means of mitigating damage to seek the support from the sponsor.¹⁹¹ Immigrants who are not legally required to file Form I-864, such as Diversity Visa immigrants, but who may be inadmissible on the public charge grounds, file Form I-134. This form is not legally enforceable.¹⁹² But Diversity Visa and some other immigrants usually overcome the public charge requirement by having a sponsor file this form to show that they will not become a public charge.

The sponsorship program generates practices among immigrant communities that deviate from legal expectations. The law requires that the sponsor support the sponsored immigrant financially, by paying for healthcare, housing, and any other needs.¹⁹³ In practice, however, the immigrants' family and the immigrant community in the U.S. do not expect the sponsor to fulfill his or her obligation. A generous sponsor might host a sponsored immigrant for a week or two. Well-off sponsors with children may provide housing and other benefits in return for

184. For a list of exempt noncitizens, see 8 CFR § 212.23 (2019). See also Mark C. Weber, *Of Immigration, Public Charges, Disability Discrimination, and, of All Things, Hobby Lobby*, 52 ARIZ. ST. L.J. 245, 246–58 (2020).

185. Daval, *supra* note 181, at 1003–04.

186. See *Affidavit of Support*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-processes-and-procedures/affidavit-of-support> [hereinafter USCIS Affidavit of Support].

187. Charles Wheeler, *The New Affidavit of Support and Sponsorship Requirements*, 74 INTERPRETER RELEASES 1581, 1582 (1997); 8 U.S.C. § 1183 ("An alien inadmissible under [section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4)] may, if otherwise admissible, be admitted in the discretion of the Attorney General (subject to the affidavit of support requirement and attribution of sponsor's income and resources under section 1183a of this title) upon the giving of a suitable and proper bond")

188. John T. Burger, *Contract Rights Under the I-864 Affidavit of Support: Seventh Circuit's Reasoning Binds Courts' Hands in a Shifting Landscape for Public Charge Doctrine*, 93 ST. JOHN'S L. REV. 509, 509–10, 515 (2019).

189. Shumye v. Felleke, 555 F. Supp. 2d 1020, 1024 (N.D. Cal. 2008).

190. 8 U.S.C. § 1183a(a)(2).

191. *In re Marriage of Kumar*, 220 Cal. Rptr. 3d 863, 870–71 (Cal. Ct. App. 2017); *California Court Holds That Sponsored Immigrant Has Standing to Enforce Affidavit of Support in State Court, and No Duty to Mitigate Damages*, 94 INTERPRETER RELEASES, 47, 47 (2017).

192. *Rojas-Martinez v. Acevedo-Rivera*, No. CIV. 09-2048 (PG), 2010 WL 2404437, at *2-3 (D.P.R. June 8, 2010).

¹⁹³ See USCIS Affidavit of Support, *supra* note 186.

domestic labor, especially when the sponsored immigrant is a woman.¹⁹⁴ If a sponsored immigrant were to sue his or her sponsor and thereby violate the ethical norm that “you do not bite the hand that fed you,” it would be a scandal. A sponsored immigrant who complains against the sponsor would be shunned by kinfolk here and at home. Also, as those who are well-off among immigrant communities are usually expected to co-sign the affidavits, any such complaint would be an incentive or excuse to decline future requests. Thus, there is intense pressure against seeking support from one's sponsor, and disputes involving sponsorship agreements rarely end up in court, except in cases involving spouses, which usually occur only after a divorce.¹⁹⁵

V. INFORMALITY AS THE ONLY ROUTE TO RENT A HOME

Discussions with immigrants and people familiar with their situation reveal that a new immigrant starts looking for a place to live by finding a contact who might have a place to accommodate her or be able to refer her to someone else.¹⁹⁶ The referral process occurs within a community of common acquaintances or “home” places. One's social bond within such a community is indispensable to generate the chains of referrals leading to an affordable dwelling arrangement. The formation of socially “enclaved”¹⁹⁷ immigrant settlements, often along the lines of ethnicity, partly reflects people's dependency on social contacts rather than on the formal law and market in seeking accommodation.¹⁹⁸ The settlement pattern of immigrants confirm the significance of informal, social interdependence for housing. According to PEW Research Center, almost half of the 44.4 million immigrants to the U.S. in 2017 live in just three states: California, Texas, and New York.¹⁹⁹ California had the largest immigrant population of any state, at 10.6 million.²⁰⁰ About twenty nine million immigrants lived in just twenty major metropolitan areas.²⁰¹ According to the PEW Research Center, African immigrants are likely to settle as follows: thirty-nine percent in the South, twenty-

194. One of my interviewees, Sebr, knew of several instances among Ethiopian and other African immigrants where a sponsored woman immigrant had stayed for years under despicable conditions (without adequate pay, unable to access language schools or to open a bank account) raising sponsor's children. Interview with Sebr.

195. *See, e.g.*, *Shumye v. Felleke*, 555 F. Supp. 2d 1020, 1022–29 (N.D. Cal. 2008).

196. Interview with Addis Arga.

197. Sociologists use the term ‘enclave’ in a technical sense to refer to “advanced” socializations whereby specific groups foster business and employment in a defined area of a town/city. *See* SARAH J. MAHLER, *AMERICAN DREAMING: IMMIGRANT LIFE ON THE MARGINS* 11–14 (1995). Here the term is used in a loose sense to describe settlement within which networks of families, friends, and acquaintances provide housing referrals, chains, and platforms.

198. Informalities contribute to shaping immigrants' settlement pattern in the U.S. along the lines of ethnic cleavages in the home country. Among Ethiopian immigrants—Oromos and Somalis reside largely in the Minneapolis area, Amhara in D.C., Los Angeles, and Tigrians in Denver.

199. Jynnah Radford & Luis No-Bustamante, *Facts on U.S. Immigrants, 2017*, PEW RSCH. CTR. (June 17, 2019), <https://www.pewresearch.org/hispanic/2019/06/03/facts-on-u-s-immigrants-2017-data/>.

200. *Id.*

201. *Id.*

five percent in the Northeast, eighteen percent in the Midwest, and seventeen percent in the West.²⁰²

Texas, New York, California, Maryland, New Jersey, Massachusetts, and Virginia are home to at least 100,000 African immigrants.²⁰³ In Minnesota and South Dakota, African immigrants represent the largest number of foreign-born residents.²⁰⁴ The data below illustrates where African immigrants settle in specific counties suggesting strong correlation between settlement, social ties, and housing.

**Sub-Saharan African Immigrant Population
in the U.S. (2015–2019): 2,151,400**

By State and County (more than 2000)	
Harris County, Texas	66,000
Los Angeles County, California	56,800
Bronx County, New York	56,100
Montgomery County, Maryland	54,200
Hennepin County, Minnesota	52,000
Prince George's County, Maryland	51,400
Dallas County, Texas	41,400
Franklin County, Ohio	39,400
Cook County, Illinois	39,400
King County, Washington	39,200
Fairfax County, Virginia	39,200
Kings County, New York	32,200
Tarrant County, Texas	31,900
Suffolk County, Massachusetts	25,900
DeKalb County, Georgia	25,000

*Source: Migration Policy Institute*²⁰⁵

202. Monica Anderson, *African Immigrant Population in the U.S. Steadily Climbs*, PEW RSCH. CTR. (Feb. 14, 2017), <https://www.pewresearch.org/fact-tank/2017/02/14/african-immigrant-population-in-u-s-steadily-climbs/>.

203. *Id.*

204. *Id.*

205. *U.S. Immigrant Population by State and County*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/us-immigrant-population-state-and-county?width=850&height=850&iframe=true> (last visited May 25, 2021).

Ethiopian Immigrants in the U.S. (2015–2019): 242,600

State and County (more than 2000)	
Montgomery County, Maryland	15,400
King County, Washington	13,300
Fairfax County, Virginia	11,700
Clark County, Nevada	9,000
Dallas County, Texas	8,800
Hennepin County, Minnesota	8,200
DeKalb County, Georgia	8,100
Alexandria city, Virginia	7,800
Los Angeles County, California	7,300
Washington, District of Columbia	5,800
Ramsey County, Minnesota	5,400
Prince George's County, Maryland	4,400
Harris County, Texas	4,300
Arapahoe County, Colorado	4,200
Gwinnett County, Georgia	3,900

*Source: Migration Policy Institute*²⁰⁶

A. Specific Modes of Informality

Within such communities, informal dwelling arrangements can vary. In a common type of informal housing arrangement, new immigrants rent a room as a group from someone who owns a house or an apartment. These homes or apartments are typically not in areas zoned for such leasing arrangements, as they are in off-rental, single-family neighborhoods with occupancy and other local regulations.²⁰⁷ Specific rooms or spaces rented to new immigrants in such houses often lack proper ventilation, heating, and cooling facilities, flouting health and safety codes.²⁰⁸ As described in my introductory example, this type of rental arrangement is especially popular among new homebuyers, who use the rent to pay the mortgage repayment.

The homeowner earns rental income higher than the market rate because of the apparent economies of scale. Despite the resulting overcrowding, renting a place

206. *Id.*

207. Interview with Addis Arga.

208. *Id.*

as a group works by lowering the rent per individual.²⁰⁹ Nonetheless, the total rent in such situations can be higher than the formal market rent for similar premises.²¹⁰ A room that is meant for one person could be shared by several new immigrants. Location—access to public buses and transit systems—and the amount of rent per individual are the most critical considerations determining decisions to rent a place.²¹¹

In such dwelling arrangements, the relations between the landlord and tenants are informal in the sense that they are unwritten and often violate zoning, occupancy, and health and safety codes. In theory, new immigrants dwelling in such arrangements can claim tenant rights as tenants at will—i.e., tenants in a lease that can be terminated at the volition of either the tenant or the landlord.²¹² However, when several new immigrants share the homeowner's living quarters, no single tenant has exclusive possession, raising questions about the applicability of tenant rights. Further, because such units are often illegal, flouting building codes and occupancy permits, courts have sometimes rejected the enforcement of such tenant rights claims as “contracts with illegal subject matter.”²¹³

Another type of informal arrangement occurs between new immigrants and renters. This is exemplified by the case of Habte,²¹⁴ an immigrant from Ethiopia, who rented a two-bedroom apartment in a private rental market with a friend and proceeded to host two new immigrants who were referred to him by an acquaintance. Habte did not conclude a rental agreement with them. Instead, he reached an understanding with them that they would pay a “fair” amount of rent in accordance with their income. Every morning the newcomers packed up their sleeping mattresses and stored them away in a closet, leaving no evidence of their presence in case Habte's landlord visited. When I spoke with him in January 2020, he was hoping that the arrangement would be temporary. As his guests worked most of the time, nights as well as days, their presence was not a serious problem except for occasional disagreements concerning the use of furniture, the kitchen, and the living room.

In this kind of arrangement, the renter of the house or apartment effectively acts as a landlord sub-renting a room or a sleeping space. The practice is prevalent and has many variations. Documenting one such variation among the Hispanic immigrant community on Long Island, anthropologist Sarah J. Mahler provides an ethnography of the *encargado* (“the person in charge”) whereby entrepreneurs among the Hispanic immigrants rent homes from white middle-class property owners and then sub-rent the houses to more recently arrived immigrants as boarders.²¹⁵

209. See Conor Dougherty, *12 People in a 3-Bedroom House, Then the Virus Entered the Equation*, N.Y. TIMES (Aug. 1, 2020), <https://www.nytimes.com/2020/08/01/business/economy/housing-overcrowding-coronavirus.html>.

210. Rents in informal rentals are higher than the rents in formal market. See Desmond & Wilmers, *supra* note 12, at 1093–96.

211. Interview with Addis Arga.

212. 1 TIFFANY REAL PROP., NATURE OF TENANCY, § 155 (3d ed. 2020).

213. *Fazio v. Kelly et al.*, No. 35214/03, 2003 WL 22227363, at *4–6 (N.Y. Civ. Ct. Sept. 10, 2003) (holding that “since the basement apartment is illegal, there is no landlord tenant relationship between the plaintiff and defendant . . .”).

214. Interview with Habte Selamu, in Washington, D.C. (Jan. 6, 2020) (on file with author).

215. MAHLER, *supra* note 197, at 188, 207; see also Durst & Wegmann, *supra* note 69, at 289.

This arrangement is generally akin to room-sharing. Nonetheless, immigrants who live in these situations have much less control over space than those renting from homeowners. In many cases, the practice of renting out leased premises to new immigrants raises questions of legality. Renters of a house, apartment, or room often do not have the authority to sub-rent the place.²¹⁶ This is the case, for instance, for tenants in public or assisted housing or for a renter in a private rental market where subletting to multiple sub-renters violates local occupancy rules. One of my sources, Aman Maru, lived in a public housing unit that had a living room and three bedrooms on the second floor.²¹⁷ The housing agency rented the house to AM's sister before she moved to a different part of the town. AM rented out the three bedrooms to new immigrants and slept in the living room when he took a break from his taxi driving business. He advised his tenants not to have their mail delivered to the address and cautioned them that if anyone asked, they should never admit to residing at the address.²¹⁸ He was wary of the inspections by housing officials regarding occupants and occupancies.

B. The Precariousness of Informal Housing

Informal housing is overcrowded, unsanitary, and fraught with uncertainties, insecurities, and sometimes abuse and violence. Even in standard tenancies, low-income tenants burdened with little education or language barriers are often uninformed of their rights, and so suffer numerous abuses at the hands of their landlords. They “may go weeks without heat or water, or their stairways and hallways may remain for long periods in dire need of repair.”²¹⁹ Ann Aurelia Lopez documented a case in which a family housed as many as ten people in a deteriorating unit with less than 400-square-feet of living space, and another case in which a couple shared a bedroom apartment with eight children.²²⁰ In still another case, a couple was residing in a 300-square-foot unit consisting of a living room, kitchen, and a sleeping area, their three daughters sharing a hide-a-bed in the living room.²²¹ A recent study concerning the housing conditions of Hmong, Latino, and Somali immigrants in the Twin Cities, Minnesota, reported not only that these communities experienced a pervasive lack of affordable and decent

216. 24 C.F.R. § 982.551(h)(7) (2016) (stating that tenants in the Housing Choice Voucher Program may not sublet their units); *see also* Williams v. D.C. Hous. Auth., 213 A.3d 1275, 1279–80 (D.C. 2019). Tenants who rent out public housing units could be criminally prosecuted. *See, e.g.*, Manny Fernandez, *Tenant Accused of Cheating Subletters in Public Housing*, N.Y. TIMES (Oct. 8, 2010), <https://www.nytimes.com/2010/10/09/nyregion/09arrest.html>.

217. Interview with Aman Maru, in Washington, D.C. (Jan. 14, 2020) (on file with author).

218. Housing authorities often terminate benefits if tenants permit an unauthorized occupant without the consent of the authorities. *See, e.g.*, Norwich Hous. Auth. v. Majewski, No. CV 219883, 2000 WL 73034, at *4–5 (Conn. Super. Ct. Jan. 13, 2000).

219. Michele Cortese, *Property Rights and Human Values: A Right of Access to Private Property for Tenant Organizers*, 17 COLUM. HUM. RTS. L. REV. 257, 257–58 (1986); *see also* Hope Harvey, *When Mothers Can't "Pay the Cost to Be the Boss": Roles and Identity within Doubled-Up Households*, SOC. PROBS. 1, 1–3 (2020) (discussing subordinate conditions of mothers in shared “doubled-up” homes and their struggles to assert their social roles); Marc L. Roark, *Under-Propertied Persons*, 27 CORNELL J.L. & PUB. POL'Y 1, 1 (2017) (discussing how the materially impoverished are invisible in property law).

220. BENDER, *supra* note 10, at 37 (2010) (citing ANN AURELIA LOPEZ, *THE FARMWORKERS' JOURNEY* 151 (Berkeley: University of California Press, 2007)).

221. *Id.*

housing and faced severe overcrowding and discrimination, but also that race had considerable significance in determining their housing conditions.²²² In the neighborhoods with Somali populations, a major concern was racial profiling and complaints by white neighbors.²²³

In some places, immigrants' presence creates tensions with homeowners who report housing-code violations, often stirring up racially imbued conflicts.²²⁴ In 2014, officials in Fairfax County, VA, reported that housing agencies received as many as 20,000 complaints per year, leading to about 9,000 investigations that included investigations into places that had been illegally converted into apartments or that were otherwise too crowded.²²⁵ Immigrants' tenure under such conditions is one step away from a phone call to a housing agency, since the law does not protect tenants in illegal units.²²⁶

Tensions between immigrants and low-income renters who are citizens sometimes appear on the legal scene, as the latter may experience conflicts with immigrant neighbors and sue the landlords. In *Jarvis v. Burnt Mills Crossing, LLC*, for instance, a "Black Native American" claimed that the landlord had violated his rights under the Fair Housing Act by refusing to renew his rental agreement because he had complained about "African and Hispanic immigrant tenants" making noise.²²⁷ In *DelRio-Mocci v. Connolly Properties Inc.*, the plaintiff claimed that apartment managers sought immigrants as renters to avoid paying for the upkeep of the apartment.²²⁸ Although neither of these claims succeeded, they reveal horizontal social tensions connected to housing and immigration.

Immigrants often face abuse and violence in informal housing. Diversity Visa immigrants face particularly challenging conditions. One of my sources, Temeg,²²⁹ had a typical immigrant experience. When he came as a Diversity Visa immigrant, he lived with Tad, who lived in a rented one-bedroom apartment. Temeg slept in the living room while working at Dulles International Airport for over a year. He then moved to St. Louis, Missouri, where he worked as an information technology expert and sponsored his wife to come from Ethiopia. Now, in 2021, Temeg lives in Virginia with his wife and child. Last year, his wife heard about Chalag, a young man who had just moved to the Washington, D.C., area after an altercation with his sponsor in Michigan. Chalag is also a Diversity Visa immigrant and planned to settle in Michigan in the vicinity of his sponsor, whom he met through a family contact before he left Ethiopia. However, he left his sponsor's home after a short while because the sponsor wanted Chalag to marry and sponsor a relative of his who wished to emigrate to the U.S. Chalag refused as he had a fiancée, and the

222. See CURA, MINN. BUDGET PROJECT, & MINN. HOUS. P'SHIP, KEY HOUSING ISSUES FACING IMMIGRANT COMMUNITIES IN THE TWIN CITIES: INTERVIEW WITH LEADERS FROM THE HMONG, LATINO, AND SOMALI COMMUNITIES 14 (2017), <https://www.mhponline.org/images/Immigrant-research-final.pdf>.

223. See *Id.*

224. Antonio Olivo, *In Fairfax, Housing-Code Complaints Stir Up Tensions as Some Immigrants Feel Targeted*, WASH. POST (Mar. 29, 2014) https://www.washingtonpost.com/local/virginia-news/2014/03/29/88e6dc96-b5e1-11e3-8cb6-284052554d74_story.html.

225. *Id.*

226. CONFRONTING THE HOUSING SQUEEZE, *supra* note 70, at 21.

227. *Jarvis v. Burnt Mills Crossing, LLC*, No. CIV.A. TDC-14-3477, 2015 WL 5092029, at *1–2 (D. Md. Aug. 27, 2015).

228. See *DelRio-Mocci v. Connolly Prop. Inc.*, 672 F.3d 241, 244–45 (3d. Cir. 2012).

229. Interview with Temeg Bacha, in Washington, D.C., (Jan. 8, 2020) (Interview on file with author).

sponsor responded by withholding his immigration documents. Chalag now lives with Temeg and his wife in a room of their two-bedroom rented apartment, sharing a “modest” portion of the rent. In a process involving protracted and bitter negotiations with the Michigan sponsor, Temeg helped Chalag retrieve his Permanent Residence Card and some other official immigration-related mail that had been delivered to the sponsor's address.

Gender also plays a considerable role in shaping insecurities and violence in informal dwelling arrangements. Research on low-income women renters in U.S. cities suggests that violence is pervasive among those who face housing insecurity.²³⁰ For example, Professor Rigel Oliveri's recent pilot survey in Columbia, Missouri, found evidence of widespread sexual harassment, ranging from requests for sexual favors in exchange for a rent discount to unwanted physical advances and forced entry into the rental premises.²³¹ If native-born citizens confront widespread harassment and violence in rented homes, it is safe to conclude that immigrants in informal housing with precarious economic conditions, social vulnerabilities, and extremely limited access to law and law enforcement resources confront pervasive harassment and violence.²³² Selamawit's experience is a case in point.²³³ She emigrated from Ethiopia, and while her asylum application in the U.S. was pending, she lived as a roommate with four male Ethiopian immigrants in a high-rise apartment in Prince George's County, MD. She made this arrangement with the help of her social contacts, as she lacked the steady income and credit history necessary to rent a safe and decent place. One of her roommates attacked her with sulfuric acid, resulting in severe burns to her body.²³⁴

C. Claiming Rights in Informal Tenancies

Would the problems now facing informal tenants go away if state legislatures enacted statutes to collapse the tenant/licensee distinction and confer tenant rights on all residential renters? This section shows that the precariousness of informal housing is partly connected to unequal access to justice and other structural problems. Since housing informality operates in a twilight zone of legality whose inhabitants enjoy only ambiguous rights and remedies, conferring tenant rights on informal tenants could signal formal equality and produce important symbolic value. However, rights must be practically actualized by courts, government agencies, and a broad set of economic and social practices to be a means of

230. See Louise Fitzgerald, *Unseen: The Sexual Harassment of Low-Income Women in America*, 39 EQUAL., DIVERSITY & INCLUSION: INT'L J. 1, 5, 6–7 (2020).

231. Rigel C. Oliveri, *Sexual Harassment of Low-Income Women in Housing: Pilot Study Results*, 83 MO. L.R. 597, 615, 620–21 (2018).

232. Sarah C. Pricer, *When Home Is A Living Hell: Vulnerable Women & Sexual Harassment in Housing*, 6 TEX. A&M J. PROP. L. 115, 125–30 (2020). For a discussion of unique vulnerabilities of immigrant women, see generally Jeanne Murphy et al., “They Talk Like That, But We Keep Working”: *Sexual Harassment and Sexual Assault Experiences Among Mexican Indigenous Farmworker Women in Oregon*, 17 J. IMMIGRANT & MINORITY HEALTH 1834 (2015).

233. See Salem Solomon & Mestawet Aragaw, *After Horrific Attack, Ethiopian Immigrant Rebuilds Her Life*, VOA (Sept. 15, 2018, 8:26 PM), <https://www.voanews.com/usa/after-horrific-attack-ethiopian-immigrant-rebuilds-her-life>.

234. *Id.*

claiming secure and affordable housing. And the practice of claiming tenant rights in the country's low-income housing market shows that social inequality, unbalanced access to justice, and deep structural problems have marred the capacity of tenants to claim rights.²³⁵ These problems require deeper changes than conferring rights in informal settings.

To be sure, courts have occasionally protected the rights of occupants even in the absence of a standard landlord-tenant relationship or formal lease.²³⁶ In *Vasquez v. Glassboro Serv. Ass'n, Inc.*, the court ruled that a labor camp service company could not use self-help to evict a farmworker without a judicial process.²³⁷ In reaching its decision, the court relied on implied contractual rights and public policy considerations.²³⁸ In *State v. Shack*, the court ruled that property owners cannot deny a farmworker the right to be visited by a social worker and an attorney providing services on the premises.²³⁹ In *State v. Coles*, the court protected the privacy rights of an informal tenant, holding that "the formality or informality of a rental arrangement does not grant a landlord the authority to consent to a search of the tenant's apartment."²⁴⁰

Notwithstanding these victories, tenant rights and remedies lack practical force for a variety of reasons. One is the unequal power between tenants and landlords to claim rights in the legal process. 'Landlord' and 'tenant' are generic terms. A landlord can be an unemployed homeowner renting out a room or a multibillion-dollar real estate company. Similarly, a tenant can be a single, middle-class young professional or an immigrant living in an illegal slum rental, bed-sharing with fifteen others in an unventilated basement room.²⁴¹ Nonetheless, abundant empirical evidence shows that landlords generally wield greater power to mobilize resources and win litigation.²⁴² Professor Russell Engler's review of recent litigation data shows that in high-volume housing courts, few cases go to trial.²⁴³ Tenants rarely have access to a lawyer, but up to eighty-five to ninety percent of landlords obtain professional legal representation.²⁴⁴ "The typical case pits a represented landlord against an unrepresented tenant."²⁴⁵ Given the bleak chances of winning in court and the negative impact of having a record of eviction, low -

235. See Desmond & Bell, *supra* note 76, at 21.

236. See STOEBUCK & WEAVER, *supra* note 30, at § 6.11.

237. *Vasquez v. Glassboro Serv. Ass'n, Inc.*, 415 A.2d 1156, 1167 (N.J. 1980). Leases for fixed terms violating statutes of fraud have been enforced by "estoppel" and "part performance" doctrines without turning the tenancy into an informal periodic tenancy.

238. *Id.* at 1164–66.

239. *State v. Shack*, 277 A.2d 369, 374 (N.J. 1971). In a few other cases, courts have granted tenant status to farmworkers living in labor camp boarding rooms. See, e.g., *State v. Fox*, 510 P.2d 230, 232 (Wash. 1973) ("The workers paid for the right to live in the camp and enjoyed the status of tenants.")

240. *State v. Coles*, No. A-2954-10T2, 2012 WL 1192053, at *6 (N.J. Super. Ct. App. Div. Apr. 11, 2012), *aff'd as modified*, 95 A.3d 136 (2014).

241. Olly Grender, *Reform in the Private Rented Sector*, in USING EVIDENCE TO END HOMELESSNESS 37, 39 (Lígia Teixeira & James Cartwright eds., 2020).

242. Ericka Petersen, *Bldg. A House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 63, 75–80 (2020); Cf. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

243. Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L. J. 37, 47 (2010).

244. *Id.*

245. *Id.*

income tenants are unlikely to seek legal remedies for housing conditions that violate laws and regulations.

Further, courts require high standards to prove liability for housing code violations. To establish liability for injuries linked to unsafe or substandard housing conditions, the tenant must show that the landlord was affirmatively negligent.²⁴⁶ To win against a regulatory agency for such conditions, the tenant must prove selective enforcement or nonenforcement of regulatory codes and discriminatory intent.²⁴⁷ These standards are too high to provide a realistic remedy for housing code violations, even with legal representation.

The case of *Rosario v. Town of Mount Kisco* offers insights on the obstacles tenants face in vindicating rights and claiming remedies with respect to housing code and safety standard violations.²⁴⁸ In this case, Ramona J. Rosario sued Mount Kisco, a town located in Westchester County, NY, and her landlord for the wrongful death of her son, Haniel Reyes-Rosario, who died of burn injuries after being trapped by a fire in his rented basement apartment.²⁴⁹ The basement had no smoke detectors, fire extinguisher, or adequate emergency exit or rescue openings.²⁵⁰ Rosario claimed that the town failed to take steps to increase affordable housing, regulate the rentals of substandard buildings, and “prosecute landlords who charge unreasonable amounts of rent for unhealthy, unsafe and illegal basements, attics and rooms.”²⁵¹

This case arose against the backdrop of an earlier conflict between town officials and immigrant communities. In the 1990s, in response to tensions between immigrants and native residents, the town aggressively regulated occupancies by unrelated people and restricted immigrants from soliciting work.²⁵² Housing regulation became the town’s leading agenda as a growing presence of immigrants, combined with a shortage of housing, “created the perfect conditions for landlords to demand high rents for rented basements, attics, and other rooms.”²⁵³ The policy led to lawsuits, and eventually, the town ceased the aggressive regulations following a consent decree.²⁵⁴ The plaintiff in *Rosario* charged that the town shifted its policy from aggressive enforcement to not enforcing safety and health housing codes, which contributed to the death of her son.²⁵⁵ She also claimed nonfeasance and affirmative negligence by the landlord for creating the dangerous conditions leading to her son’s death.²⁵⁶ The court ruled that she did not provide enough evidence to establish discriminatory intent on the part of the town or to

246. See *Lennon v. Oakhurst Gardens Corp.*, 645 N.Y.S.2d 652, 653 (N.Y. App. Div. 1996).

247. See *Rosario v. Town of Mount Kisco*, 16-CV-8766 (NSR), 2020 WL 764280, at *7–8 (S.D.N.Y. Feb. 14, 2020), *withdrawn sub nom.* *Rosario v. Vill. of Mount Kisco*, 20-956, 2020 WL 3250485 (2d Cir. June 9, 2020).

248. *Rosario v. Town of Mount Kisco*, No. 16-CV-8766 (NSR), 2018 WL 2209487, at *1–3 (S.D.N.Y. May 11, 2018).

249. *Id.*

250. *Id.*

251. *Id.* This is not unique to *Mount Kisco*. Many other local governments deployed ordinances to inhibit the presence of immigrants. For a dispute concerning a local overcrowding ordinance, see *Young Apartments, Inc. v. Town of Jupiter, FL*, 529 F.3d 1027, 1033 (11th Cir. 2008)

252. *Rosario*, 2018 WL 2209487, at *1.

253. *Id.*

254. *Id.*

255. *Id.* at *2.

256. *Id.* at *3.

establish affirmative negligence and exclusive control of the property on the part of the landlord.²⁵⁷

Recently arrived immigrants living in an informal rental arrangement are less likely than low-income tenants to seek legal remedies for housing code violations or other tenant rights because of lack of resources, language barriers, and other vulnerabilities.²⁵⁸ In theory, informal tenants can claim damages for injuries caused by the defective condition of a premises. The elements required to establish a property owner's liability in such cases are lower than what is required for liability in a landlord-tenant relationship, because property owners owe a duty of reasonable care toward licensees or licensee's guests.²⁵⁹ But in practice, new immigrants are unlikely to claim rights against landlords because finding alternative housing is difficult, and language and lack of financial resources limit their ability to seek legal recourse.

VI. REGULARIZING INFORMAL TENANCIES

As immigrants' housing conditions are closely linked to the crisis in the low-income housing market, policies that address the crisis can also mitigate the housing problems facing immigrants. However, while everyone agrees that the challenges facing low-income people in the housing market are grave,²⁶⁰ there is no consensus on the solutions. Those who advocate market-based approaches recommend deregulating the sector and giving incentives to private sector developers to address the lack of housing.²⁶¹ "Supply skeptics" highlight that luxury houses and apartments are glutting select neighborhoods, as private sector developers cater to middle- and upper-income people, sidelining low-income households trapped in a vicious cycle of poverty.²⁶² They argue that the housing crisis should be considered first and foremost a matter of public policy.²⁶³ Some low-income housing advocates recommend increasing the supply of housing while simultaneously boosting the demand-side support programs to steer new housing developments and existing stock toward low-income households' needs.²⁶⁴ The

257. *Id.* at *9, *11, *12 (The ruling was on a motion to dismiss and problems with the plaintiff's complaint.).

258. See Deena Greenberg et al., *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 HARV. CIV. RTS. CIV. LIBERTIES L. REV. 115, 135–40 (2016); Robert L. Bach, *Building Community Among Diversity: Legal Services for Impoverished Immigrants*, 27 U. MICH. J.L. REFORM 639, 649 (1994).

259. See, e.g., *Benham v. Morton & Furbish Agency*, 929 A.2d 471, 474 (Me. 2007).

260. See, e.g., *America's Affordable Housing Crisis: Challenges and Solutions: Hearing Before the S. Comm. on Finance*, 115th Cong. 3 (2017) (opening statement of Sen. Wyden, describing affordable housing crisis as a "five-alarm fire").

261. See, e.g., COUNCIL OF ECONOMIC ADVISORS, *THE STATE OF HOMELESSNESS IN AMERICA* 10–12 (2009), <https://www.nhipdata.org/local/upload/file/The-State-of-Homelessness-in-America.pdf>; Thomas E. Walls, *Affordable Housing: Plenty of Demand, But No Supply to Be Found*, 24 N.C. BANKING INST. 417, 428–34 (2020).

262. For a review of the "supply skeptics" arguments, see Vicki Been et al., *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL'Y DEBATE 25, 28–34 (2019).

263. *Id.*

264. For proposed remedies to address racial and class injustice in housing, see, e.g., Jonathan Rosenbloom, *Reducing Racial Bias Embedded in Land Use Codes*, 26 CITYLAW 49, 57–64 (2020); Andrea J. Boyack, *Sustainable Affordable Housing*, 50 ARIZ. STATE L.J. 455, 485–96 (2018).

recommendations in this vein include regulating restrictive occupancy rules²⁶⁵ and local zoning regulation.²⁶⁶ But given the neoliberal political current and the clout of the real estate industry in housing policymaking,²⁶⁷ the kinds of significant policy changes required to develop a housing policy that addresses the needs of low-income people are unlikely to materialize.²⁶⁸ A country that has failed to house its poor, voting citizens is unlikely to house non-voting immigrants through the political process.

Even if radical changes in public policy are beyond reach, can tenant rights law be extended from its current focus on the rights of renters with exclusive possession of the premises to give meaningful protection for renters sharing shelters or living in a property violating housing codes and regulations? The conventional legal remedies proposed to address informal housing include regulation, deregulation, and regularization.²⁶⁹ While some studies suggest that deregulation is a desirable way to address the health, safety, and wellbeing of tenants in substandard housing,²⁷⁰ regulation has attracted more attention.²⁷¹ A regulatory approach could prevent informal housing if regulators strictly enforced building codes and health and safety standards.²⁷² Nonetheless, strictly implementing such common regulatory tools as “red-tagging” buildings that lack proper permits or violate health and safety standards, penalizing property owners, and expelling tenants in substandard housing, creates trade-offs.²⁷³ In particular, it risks disrupting tenants’ lives and livelihoods. Given the acute shortage of affordable housing, they would be exposed to homelessness if landlords were to respond by removing units from the informal market or hedged their regulatory risk by increasing rents. As Professor Duncan Kennedy explains, informality is sensitive to neighborhood changes resulting from “a complex interaction between the strategies of rival groups with conflicting interests.”²⁷⁴ Also, as *Rosario*

265. See, e.g., Brian J. Sullivan & Jonathan Burke, *Single-Room Occupancy Housing in New York City: The Origins and Dimensions of a Crisis*, 17 CUNY L. REV. 113, 138–43 (2013).

266. See, e.g., Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667, 1688–95 (2016).

267. See John Whitlow, *Community Law Clinics in the Neoliberal City: Assessing CUNY’s Tenant Law and Organizing Project*, 20 CUNY L. REV. 351, 363–69 (2017).

268. See Alana Semuels, *When Wall Street Is Your Landlord*, ATLANTIC (Feb. 13, 2019), <https://www.theatlantic.com/technology/archive/2019/02/single-family-landlords-wall-street/582394/>

269. See, e.g., Larson, *supra* note 63, at 143.

270. See, e.g., Richard A. Epstein, *The Moral and Practical Dilemmas of an Underground Economy*, 103 YALE L.J. 2157, 2172–73 (1994); Edward H. Rabin, *Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 578–584 (1984).

271. See Larson, *supra* note 63, at 157–69.

272. See generally Richard S. Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976); Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971).

273. See generally H. Laurence Ross, *Housing Code Enforcement and Urban Decline*, 6 J. AFFORDABLE HOUS. & CMTY. DEV. L. 29 (1996) (discussing how housing code enforcement encouraged landlords to abandon buildings); James Horner, *Code Dodgers: Landlord Use of LLCs and Housing Code Enforcement*, 37 YALE L. & POL’Y REV. 647 (2019) (discussing how landlords manipulate corporate law alternatives to evade housing code enforcement).

274. Kennedy, *supra* note 62, at 91–92.

shows,²⁷⁵ regulatory agencies are not immune to pressures from the real estate industry and those with an immigration agenda.²⁷⁶

As a middle path between deregulation and regulation, regularization could produce better health, safety, and security outcomes for dwellers in informal housing. An example of regularization is Larson's proposal to regularize *colonias* settlements in Texas.²⁷⁷ Larson recounts the experiences of colonia settlers who were caught between the Texas legislature's well-intended efforts to standardize informal land and housing conditions and the cost of complying with those standards, which according to the colonia residents and low-income housing activists presented the choice between having a decent home or no home.²⁷⁸ To ameliorate this situation, Larson proposes "a progressive realization" of the standards, adopting the notion from international human rights policies and practices and marrying market and regulatory strategies.²⁷⁹

Another example of regularization is Professor Krecizer-Levy's proposal to confer the right to adult children to be consulted when their parents terminate their joint living arrangement.²⁸⁰ She draws on the reliance theory of property within a broader understanding of property as social relations²⁸¹ to argue that adult children living with a parent have legitimate expectations that must be recognized by property law.²⁸² Property law doctrines often protect reasonable, actual expectations that are based on informal arrangements rather than formal ones.²⁸³ Thus, a solution for informal tenants could be to impose duties on owners to provide adequate notice when they evict informal tenants and to provide safe facilities and amenities.

Courts can build on existing law and jurisprudence to mitigate health, safety, and security problems facing informal housing tenants. As in *State v. Shack*, which

275. *Rosario*, 2018 WL 2209487, at *1–3.

276. See John Whitlow, *Community Law Clinics in the Neoliberal City: Assessing Cuny's Tenant Law and Organizing Project*, 20 CUNY L. REV. 351, 363–69 (2017); Stefan H. Krieger, *A Clash of Cultures: Immigration and Housing Code Enforcement on Long Island*, 36 HOFSTRA L. REV. 1227, 1229–38 (2008).

277. Jane E. Larson, *Negotiating Informality Within Formality: Land and Housing in the Texas Colonias*, in LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY 140–57 (César A. Rodríguez Garavito & Boaventura de Sousa Santos eds., Cambridge Univ. Press 2005).

278. *Id.* at 154.

279. Larson's proposals include regularizing land title held under contract for deed into mortgages, making credit available at market rates to low-income households for land purchase, home construction, and home improvement, adopting policies supporting self-help housing and abandoning current "no-growth" policies directed at colonias, enacting minimal but appropriate land use regulations that apply both to new and existing housing in the colonias, and mandating extension of municipal water and sewer service to high-density population areas in unincorporated areas outside of city limits. Jane E. Larson, *Free Market Deep in the Heart of Texas*, 84 GEO. L. J. 179, 238–58 (1995). Objections to these proposals include the view that a legalized two disparate categories – one legal standard with a lessor set of health and safety safeguards for the poor, immigrant, or racial minority informals and another standard with adequate housing requirements – would legitimize inequality and the stereotypical "othering." See Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO L. J. 667, 677, 688 (1997). For review and responses to these objections, see Larson, *supra* note 63.

280. Krecizer-Levy, *supra* note 27, at 129–130.

281. See JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOX OF PROPERTY 133–39 (Yale Univ. Press 2000) (hereinafter ENTITLEMENT); Krecizer-Levy, *supra* note 27, at 159.

282. Krecizer-Levy, *supra* note 27, at 129–130.

283. See JOSEPH WILLIAM SINGER, PERSUASION: GETTING TO THE OTHER SIDE 107–110 (Carolina Acad. Press 2019).

held that farmworkers have the right to be visited by health and legal services providers, even if the dwelling arrangement does not fall under the standard tenancy,²⁸⁴ courts could steer away from considering ‘tenant’ status as a function of exclusive control of premises and begin enforcing the fundamental rights and interests of informal tenants without affording them the standard tenant status. Such a shift could protect immigrants in shared residence against arbitrary evictions or other precarity associated with informal dwelling arrangements.

When people’s permanent residence is at stake, rather than a transient accommodation such as a hotel or lodging, protecting their rights in informal housing is essential. As the COVID-19 pandemic has made clear, while students and guests could leave for their homes when universities and hotels shut down their premises, immigrants renting living rooms and basements have been left at the mercy of their landlords/hosts without any pandemic-related “tenant” protection programs to assist them.²⁸⁵ Similarly, an immigrant sharing a room with a tenant in public housing has no legal protection. Other than charities that reach out to immigrant communities, there are no official programs that address tenants living in informal dwellings without formal tenant status.²⁸⁶

To properly protect the rights and interests of renters in informal dwellings, courts could give less weight to the requirement of “exclusive possession” in characterizing a tenancy as a landlord-tenant relationship. They could respond to the harsh realities of sharing a home in substandard conditions by shifting the attention away from the physicality of the premises to a relational view of tenant rights.²⁸⁷ The law should value rent in residential tenancies according to whether the competing interest is a home, which is a basic human need, or a license that can be for leisure, convenience, or other transient use. If the law were to confer the right not to be arbitrarily evicted on a new immigrant renting a room from a tenant in public housing or in an illegally constructed basement of a single-family homeowner, she could have adequate security to work and transition into the economy and society. Such protection would be consistent with the idea of “home” as an interest that is more than capital and investment.²⁸⁸

A. The Problem of “Unintended Consequence”

Extending tenant rights to include tenants living in an informal rental arrangement raises some problems. First, conferring tenant status in informal

284. *Shack*, 277 A.2d at 374.

285. *50 State Statutory Surveys: COVID-19, LANDLORD/TENANT EVICTIONS*, THOMPSON REUTERS (Mar. 8 2021); Ron Lieber, *The New Eviction Moratorium: What You Need to Know*, N.Y. TIMES (Sept. 2, 2020), <https://www.nytimes.com/2020/09/02/your-money/eviction-moratorium-covid.html>; Dougherty, *supra* note 20.

286. See Zoe Greenberg, ‘People Are Falling Through the Cracks’: Many with Informal Housing Are Blocked From Mass. Rental Aid Programs, BOSTON GLOBE (Feb. 26, 2021, 4:56 PM), <https://www.bostonglobe.com/2021/02/26/metro/they-need-help-paying-rent-they-cant-prove-they-renters/>; Alana Semuels, *Renters Are Being Forced From Their Homes Despite Eviction Moratoriums Meant to Protect Them*, TIME (Apr. 15, 2020, 2:47 PM), <https://time.com/5820634/evictions-coronavirus/>.

287. For relational view of property, see SINGER, *supra* note 281.

288. Lorna Fox O’Mahony & James A. Sweeney, *The Idea of Home in Law: Displacement and Dispossession*, in LAW, PROPERTY AND SOCIETY 1–12 (Loran Fox O’Mahony & James A. Sweeney eds., Ashgate Publ’g Ltd. 2011).

housing arrangements could discourage people who rent out places to new immigrants. The renter of a one-bedroom apartment hosting an immigrant in her living room for payment might be reluctant to enter such an arrangement if she had to provide adequate utilities or could not terminate the arrangement at will. A homeowner in a single-family occupancy neighborhood who relied on rent collected from immigrants living in the basement might increase the rent or hesitate to enter the arrangement in the first place.

A more feasible alternative to protect renters in informal housing and gradually regularize substandard housing would be to give the occupants the right to claim damages from the landlord when the rent is high relative to the condition of the premises. By allowing a renter in an informal housing arrangement to recover damages for rents paid in excess of the fair market value of the property, courts could help to palliate the injustice of rent extraction in the informal housing and inhibit owners from renting out substandard and dangerous accommodations and overcharging new immigrants.²⁸⁹ Under existing law, tenants in premises violating housing codes and standards can seek remedies based on the doctrine of illegality or warranty of habitability.²⁹⁰ While warranty of habitability claims apply, where there is a tenant-landlord relationship but the premises substantially flout building, health, and safety standards, some courts have applied the doctrine of illegality to such situations on the ground that “no landlord-tenant relationship can exist where there is an illegal apartment.”²⁹¹ Numerous courts have rendered a residential rental agreement “illegal and unenforceable” when the property violated a building code requiring a valid rental permit.²⁹² When courts apply the doctrine of illegality to rental premises violating housing codes, the renter can withhold rent and claim damages upon terminating the tenancy.²⁹³ But she cannot recover the entire rent if she had a constructive notice of the illegality,²⁹⁴ as the landlord is entitled to a reasonable amount based on the specific circumstances of the case. The court in *King v. Moorehead* reasoned that:

We prefer to base our decision openly on the hard reality that if, under existing conditions, landlords were deprived of all rents because of noncompliance with housing codes there would be far fewer low-income housing units available—landlords would find it to their economic advantage to abandon their properties rather than spend their separate resources to restore them to habitability.²⁹⁵

289. Duncan Kennedy, *Law Distributes II: 1 Housing and Credit in Poor Black Neighborhoods 2* (Mar. 18, 2021) (unpublished manuscript) (on file with the author).

290. *See King v. Moorehead*, 495 S.W.2d 65, 72–79 (Mo. Ct. App. 1973).

291. *Acquino v. Ballester*, 953 N.Y.S.2d 818, 820 (N.Y. Civ. Ct. 2012).

292. *See Acquino*, 953 N.Y.S.2d at 820; *Ader v. Guzman*, 135 A.D.3d 671, 674 (N.Y. App. Div. 2016).

293. *Guzman*, 135 A.D.3d at 674 (N.Y. App. Div. 2016) (the court reasoned that “it would be against public policy to permit [the landlord] to retain [the tenants’] rental payments and to profit from his wrongdoing,” and there was no indication that tenants “were raising the argument of illegality for personal gain.”).

294. *Acquino*, 953 N.Y.S.2d at 821–822.

295. *Moorehead*, 495 S.W.2d at 79.

Adjusting the doctrine of illegality, courts could protect immigrants paying rent that greatly exceeded what the condition of the premises would justify by allowing them to recover the excess amount if the accommodation was illegal and the immigrant was unaware of the illegality of the premises.²⁹⁶ This logic could apply whether the immigrant was living in an illegally converted unit, unventilated basement, or the living room of another renter. Renters in an illegal apartment would recover, for example, a proportional amount of the rent paid for inadequate water and electricity services against landlords who denied these services to save on their utility bills.

One concern raised by this suggestion is that landlords would exit the informal market if renters could claim damages. Awarding damages to an informal tenant who has paid high rent for an inhabitable basement could, in effect, amount to *post facto* judicial rent control, raising questions about the chilling effect of such control on the supply and other standard economic analysis objections that beleaguered rent control laws.²⁹⁷ This remedy, however, would be more akin to redressing unjust or unlawful enrichment than to rent control.²⁹⁸ A judicial regulation of rent exploitation would be unlikely to produce a significant disincentive for landlords in informal market settings. Just as the court reasoned in *Moorehead* with respect to tenants in a standard tenant-landlord relationship,²⁹⁹ courts could allow landlords in an informal rental arrangement to retain a reasonable share of the rent. After all, under existing local housing codes, regulators can fine such landlords for housing code violations, though they are often unable or reluctant to do so. Giving informal tenants the right to claim damages is unlikely to disincentivize landlords more than the existence of local housing codes, but such a right could inhibit the exploitative extraction of rent from informal tenants.

Another concern is that immigrants and other renters have minimal access to courts and legal resources. Thus, granting them legal remedies for exploitative rent

296. If the renter has knowledge of illegality of the premises, courts applying the doctrine of illegal contract treat the tenant as culpable. *Acquino*, 953 N.Y.S.2d at 821. The court explained the policies of not enforcing residential rental agreements of noncompliant building, the courts stated, with the New York City Administrative Codes “placing substantial financial penalties on persons engaged in violating the building code, why would it be permissible to reward a landlord by letting him collect rent on an illegal apartment? Because under that scenario, a landlord could obtain a money judgment and either have that judgment enforced through the legal process allowing him to collect rent on an apartment existing in violation of the law or, if the tenant paid the rent due, that tenant could remain in possession of an apartment which by definition is not in compliance with the building code. The court would be participating in the continuance of the illegal and by definition unsafe occupancy. That cannot be the law. To make sense the law has to be that the tenant must vacate the illegal unit as soon as possible, immediately if a vacate order is issued, and the landlord is prohibited from collecting any rent. Otherwise, there is no reason for anyone to correct the illegal conditions.” *Id.*

297. Major economic analysis objections against rent control include the view that rent control chills the construction of housing and reduces the long-term supply of *existing* low-income housing by inducing landlords to abandon their units, convert rental units to more lucrative uses, or maintain their properties inadequately. *Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 HARV. L. REV. 1835, 1844 (1988). For a list of objections against rent control, see William A. Fischel, *Panel Discussion: Redistribution and Regulation of Housing*, 32 EMORY L.J. 767, 767-801 (1983).

298. See *Developments in the Law: Unjust Enrichment*, 133 HARV. L. REV. 2062 (2020); *The Intellectual History of Unjust Enrichment*, 133 HARV. L. REV. 2077 (2020); Elise Bant et al., *The Evolution of Unjust Enrichment Law: Theory and Practice*, in RESEARCH HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION, 2, 2–27 (Elise Bant et al. eds., 2020).

299. *Moorehead*, 495 S.W.2d at 72–79.

for informal tenancies could have limited social significance even if the courts were to extend tenant rights. This is a form of the classic problem of the gap between rights as legal promises and rights as practical realities. Nonetheless, if renters in illegal housing could recover the portion of their rent paid in excess of the fair value of the premises, charities and advocacy organizations that provide legal services for immigrants and low-income households could extend support. In addition, the potential social force of a rule that protected informal tenants could potentially spur the bargaining power of informal tenants and deter landlords from charging new immigrants exorbitant rent for substandard living conditions.

VII. CONCLUSION

Tenant rights law evaluates the landlord's interest in rent according to whether the competing interest is a tenant's interest in a home or a transient living arrangement, such as for leisure and other uses. Residential tenants enjoy legal warranties of habitability and judicial protections against evictions, whereas licensees can be removed by owners entitled to use self-help. The condition of a new immigrant living in an informal arrangement is not transient. However informal and shared her dwelling place may be, it is her home where she cooks, eats, sleeps, gets her mail, and keeps her belongings. Unlike the hotel guest, lodger, or transient roomer, she is unlikely to have a home somewhere else. Yet, according to property law's conception of the tenant with rights and remedies, her legal status is tenuous, akin to a licensee or lodger with contractual rights and remedies rather than property rights. This legal disharmony traps immigrants in the inequities and fault lines of the low-income housing market, undermining their potential to work and become full-fledged members of American society. Renters in informal housing are factually tenants; hence they need to have some basic tenant rights by law. If courts would attenuate the primacy accorded to exclusive possession in characterizing a tenancy, they could mitigate the most deleterious conditions of informal housing. This Article has offered concrete suggestions toward that goal.