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### Three Cases in Point: A Comparison of Legal Access to Housing for Low-Income and Homeless Populations in Cape Town, Marseille and Miami

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## **THREE CASES IN POINT: A COMPARISON OF LEGAL ACCESS TO HOUSING FOR LOW-INCOME AND HOMELESS POPULATIONS IN CAPE TOWN, MARSEILLE AND MIAMI**

**Leila Lawlor<sup>1</sup>**

### **ABSTRACT**

Miami, Cape Town, and Marseille have taken dissimilar approaches in their attempts to legislate and supply affordable housing to those in need. One of these cities has no justiciable right whatsoever, one has a right set out in its national constitution, and one has a right set out in its national law. These cities have had different degrees of success in aiding those in need of adequate housing; however, each of these cities continues to suffer from both a lack of affordable housing and a widening income gap. Examining the frameworks and the efforts of these three port cities establishes that it is not enough merely to create a legal right to housing. There must also be concrete provisions for enforceability. And the best chances for success lie not just in passing legislation and providing more housing; the best successes also encompass adopting measures to prevent homelessness and embracing new housing production technologies.

**KEY WORDS:** affordable housing, access to housing, constitutional right to housing, socioeconomic rights, DALO, spatial segregation, Constitution of South Africa, public housing, Section 8, LIHTC, Low Income Housing Tax Credit, housing unit, homeless, homelessness, development, rehabilitation, housing law, social housing, low-income, income gap, droit au logement

### **INTRODUCTION**

Let me be clear. There is no social or moral justification, no justification whatsoever, for the lack of housing.

—Pope Francis, sharing lunch with 200 clients of Catholic Charities in Washington, D.C., 2015

Cape Town, Marseille and Miami are burgeoning, international port cities on three different continents. All three cities enjoy temperate climates and stunning

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coastlines. All three have relatively large populations: the latest census data indicates the population of the Cape Town metropolitan area is 3,740,026,<sup>2</sup> the population of the Marseille metropolitan area is 1,831,500,<sup>3</sup> and the population of the Miami metropolitan area is 5,564,635.<sup>4</sup>

All three of these metropolitan areas face significant difficulties in their attempts to provide adequate housing for their homeless and low-income populations. Interestingly, each of these cities operates under a completely different statutory framework which guides each government's efforts to provide adequate housing. Each of these frameworks also very differently limits the ability of a homeless or low-income resident to apply for and receive aid. Operating under different frameworks, Miami, Marseille and Cape Town have had different levels of success.

The positioning of a legal right to affordable, adequate housing is significant. In France, there is a national law providing a right to affordable housing.<sup>5</sup> In South Africa, there is a constitutional right to adequate housing.<sup>6</sup> In the United States, there simply is no formal legal right to housing at all.<sup>7</sup> In the United States, those in need of housing must appeal to overstretched government agencies for support or seek help from private charities and religious organizations.

Just as the positioning of laws providing access to housing is significant, so too is the phrasing of South African and French housing laws as providing a "right" to housing. Even more significant, however, are the limited resources available and legal enforceability of these two countries' rights to housing. Whereas American courts have no justiciable right to enforce, there are numerous obstacles preventing court enforcement in South Africa and France.

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<sup>2</sup> The population of the city of Cape Town without including its surrounding area is reported to be about 433,688. *City of Cape Town*, STATISTICS SOUTH AFRICA, 2011 Census, [http://www.statssa.gov.za/?page\\_id=993&id=city-of-cape-town-municipality](http://www.statssa.gov.za/?page_id=993&id=city-of-cape-town-municipality).

<sup>3</sup> The population of Marseille without including its surrounding metropolitan area is reported to be 855,393. SÉRIES HISTORIQUES DES RÉSULTATS DU RECENSEMENT – COMMUNE MARSEILLE, <https://www.insee.fr/fr/statistiques/2874200?geo=UU2010-00759>.

<sup>4</sup> The population of the city of Miami without including its surrounding metropolitan area is reported to be 399,457. *Largest Urbanized Areas with Selected Cities and Metro Areas*, U.S. CENSUS BUREAU (2010), <https://www.census.gov/dataviz/visualizations/026/508.php>

<sup>5</sup> The French law providing a right to housing is called DALO. See note 128, *infra*, and accompanying text.

<sup>6</sup> S. AFR. CONST., 1996, ch. 2, § 26 (1).

<sup>7</sup> Rhode Island, Connecticut and Illinois have passed Homeless Bills of Rights to protect the civil rights of homeless persons, i.e., to decriminalize homelessness. Eric Tars, *Housing as a Human Right*, NATIONAL LOW INCOME HOUSING COALITION (2016), [http://nlihc.org/sites/default/files/2016AG\\_Chapter\\_1-6.pdf](http://nlihc.org/sites/default/files/2016AG_Chapter_1-6.pdf).

## MIAMI

Understanding the challenges of providing adequate housing to residents of Miami requires understanding the overall housing framework in the United States as well as the specific limitations present in Miami. As previously noted, there is no formal state, federal, or constitutional right to housing in the United States. Nor is there an avenue of assistance through the court system. In a 1972 class action landlord-tenant suit, the U.S. Supreme Court rejected the tenants' interpretation of the Equal Protection Clause as encompassing a right to adequate housing,<sup>8</sup> stating: "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . ."<sup>9</sup>

Many housing advocates believe a right to housing should be incorporated in American law. In fact, the idea that adequate housing should be recognized as a fundamental right in the United States is not novel. In his 1944 State of the Union address, President Franklin Delano Roosevelt stated that the United States had adopted "a second Bill of Rights . . . [including] the right of every family to a decent home."<sup>10</sup> The United States then led the effort to draft the United Nations' 1948 Universal Declaration of Human Rights.<sup>11</sup> But the 1948 declaration was just that – a nonbinding declaration, never codified into U.S. law, thus never enforceable.<sup>12</sup> Eighteen years later, the United Nations again recognized a fundamental right to housing in its 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>13</sup> Although the United States signed the binding 1966 treaty, it was never subsequently ratified.<sup>14</sup> As a result, the United States is required only to uphold the "object and purpose" of the treaty.<sup>15</sup> Again, the United Nations'

<sup>8</sup> *Lindsey v. Normet*, 405 U.S. 56 (1972).

<sup>9</sup> *Id.* at 74.

<sup>10</sup> President Franklin Delano Roosevelt, State of the Union Address to Congress (Jan. 11, 1944), [http://www.fdrlibrary.marist.edu/archives/address\\_text.html](http://www.fdrlibrary.marist.edu/archives/address_text.html).

<sup>11</sup> "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 25, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>12</sup> Tars, *supra* note 7.

<sup>13</sup> International Covenant on Economic, Social and Cultural Rights art. 11(1), Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

<sup>14</sup> Tars, *supra* note 7.

<sup>15</sup> See Thomas Byrne & Dennis P. Culhane, The Right to Housing: An Effective Means for Addressing Homelessness? 14 U. OF PA. J. OF L. & SOC. CHANGE 379 (2011). In recent years,

recognition of housing as a fundamental right failed to translate into an enforceable American right.<sup>16</sup>

In the United States, a number of different approaches have been tried in attempts to provide adequate housing to those in need. The old way of doing things involved building and providing public housing, at government expense. The idea was initially a good one, intended to provide a “temporary home for working-class families on their way up the economic ladder.”<sup>17</sup> The notion of providing public housing first sprang out of FDR’s New Deal as part of the U.S. Housing Act of 1937.<sup>18</sup> There were three purposes: to eliminate unsafe, unsanitary housing and eradicate slums; to provide safe, sanitary dwellings; and to reduce unemployment by stimulating economic growth.<sup>19</sup>

Public housing projects, started with the best of intentions, ultimately did not fulfill the three stated purposes. Instead of providing temporary housing for families on their way up the economic ladder, public housing proved to become permanent housing for generations of families.<sup>20</sup> Many public housing projects became concentrations “of the most economically deprived families with serious social problems.”<sup>21</sup> Because of these negative results, there is now little new development in public housing.<sup>22</sup>

Another method used to alleviate the problem of insufficient affordable housing in the United States is a voucher system in which a government authority

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housing advocates have organized several supervisory visits from international organizations, including the U.N.-HABITAT Advisory Group on Forced Evictions, the U.N. Special Rapporteur on the Right to Adequate Housing, and the Special Rapporteur on the Right to Water and Sanitation. These visits have resulted in voiced concern that the United States is not honoring its obligations to uphold the object and purpose of ICESCR. *See Tars, supra* note 7.

<sup>16</sup> Although there is no formal legal right to housing in the United States, the Fair Housing Act, enforced by the United States Department of Housing and Urban Development, prohibits discrimination in housing on the basis of race, color, national origin, religion, sex, disability and the presence of children. 42 U.S.C. § 3604 (1968).

<sup>17</sup> BARRY C. JACOBS, HANDBOOK OF HOUSING AND DEVELOPMENT LAW ¶ 2.01[1] (2001).

<sup>18</sup> *Id.* at ¶ 2.01.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at ¶ 2.01[1].

<sup>21</sup> *Id.* at ¶ 2.03[2][a].

<sup>22</sup> “The federal government used to build its own public housing, which still houses more than 2 million people today. The model was simple: The government built the apartment and became the landlord. Some of the big, concrete high-rises became infamous for high rates of crime and their concentration of poverty. The government banned public housing construction in 1968 and began demolishing many of the buildings in the 1990s. But while direct federal construction went away, the need for new buildings did not.” Laura Sullivan, *Affordable Housing Program Costs More, Shelters Fewer*, NAT’L PUB. RADIO (May 9, 2017), <https://www.npr.org/2017/05/09/527046451/affordable-housing-program-costs-more-shelters-less>.

pays a percentage of rent for a low-income person in need of housing. The idea behind development of this Section 8<sup>23</sup> rental assistance program was that no household should have to spend more than 30 percent of its income on rent.<sup>24</sup> If an individual qualifies for Section 8 housing by proving low income, the government then provides a voucher for the cost of housing exceeding thirty percent of that person's income.<sup>25</sup>

There are several problems with this voucher system. First, landlords may be reluctant to rent properties through the voucher system, even though they would be guaranteed government rental income, because of prejudice against the poor and because receiving Section 8 funding subjects rental properties to strict government safety and maintenance inspections.<sup>26</sup> Second, the waiting lists are generally very long, and in desirable urban areas like Miami, the lists may be so long that officials find it necessary to close the lists. In fact, the Section 8 list is currently closed for the Miami-Dade County Public Housing and Community Development Department.<sup>27</sup> It is not unusual for a low-income person to wait many years before being provided Section 8 housing, especially in popular American cities. For example, when the Section 8 list for Los Angeles, California, opened for a mere two weeks in October 2017, after being closed for thirteen years, authorities anticipated 600,000 applicants.<sup>28</sup>

In 1986, an ingenious approach to financing low-income housing was developed – the Low-Income Housing Tax Credit (LIHTC) program.<sup>29</sup> This public-private program has been so successful in terms of sheer numbers that it now accounts for about ninety percent of the development and rehabilitation of

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<sup>23</sup> The Section 8 voucher system was created by passage of the Housing and Community Development Act of 1974. Pub. L. No. 93-383, tit. II, § 201(a), 88 Stat. 633, 662-66 (codified as amended at 42 U.S.C. 1437f (2012)).

<sup>24</sup> See Alana Semuels, *How Housing Policy Is Failing America's Poor*, THE ATLANTIC (June 24, 2015), <https://www.theatlantic.com/business/archive/2015/06/section-8-is-failing/396650/>; JACOBS, *supra* note 17, at ¶ 3.02[2][d].

<sup>25</sup> Voucher recipients pay the greatest of these amounts: thirty percent of their monthly adjusted income, ten percent of their monthly income, the welfare rent, or Public Housing Authority minimum rent. JACOBS, *supra* note 17, at ¶ 3.02[2][d].

<sup>26</sup> See Semuels, *supra* note 24.

<sup>27</sup> *Public Housing and Community Development*, MIAMI-DADE COUNTY GOVERNMENT, <http://www.miamidade.gov/housing/waiting-list-hcv.asp>.

<sup>28</sup> Doug Smith, *Up to 600,000 Expected to Apply when L.A. Reopens Section 8 Housing List This Month After 13 Years*, L.A. Times, Oct. 1, 2017, <http://www.latimes.com/local/lanow/la-me-ln-section-8-waiting-list-20170922-htmllstory.html>.

<sup>29</sup> LIHTC was created under the Tax Reform Act of 1986, (Pub. L. No. 99-514, 100 Stat. 2085 (codified at 26 U.S.C. § 1 et seq.) (1986)).

affordable housing.<sup>30</sup> LIHTC is intended to fund mixed income developments and rehabilitation projects, avoiding the problem of concentrating “the most economically deprived families with serious social problems.”<sup>31</sup>

The reason for LIHTC’s success is simple: Under the LIHTC program, equity investors, often financial institutions, receive a dollar-for-dollar tax credit for investing in the rehabilitation of old housing units or the development of new housing units.<sup>32</sup> This ingenious incentive, providing financial institutions with valuable investments in new developments and rehabilitations, has funded more than 2.2 million units of affordable housing.<sup>33</sup> Here is how the LIHTC program works:

Congress allocates tax credits to states based on population . . . . In turn, states allocate tax credits through a competitive process, often administered by the state’s housing finance agency . . . . Properties must meet one of two criteria to qualify for tax credits: either a minimum of 20 percent of the units must be occupied by tenants with incomes less than 50 percent of Area Median Income (AMI), or 40 percent of units must be occupied by tenants with incomes less than 60 percent of AMI. These affordability restrictions stay in place for fifteen years.<sup>34</sup>

LIHTC tax credits are allocated to developers who in turn generally sell them to equity investors.<sup>35</sup>

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<sup>30</sup> See Press Release, Senator Maria Cantwell, Bipartisan Senators and Advocates Agree: Cantwell Proposal Is the “Primary Tool” to Combat Affordable Housing Crisis (Aug. 1, 2017), <https://www.cantwell.senate.gov/news/press-releases/bipartisan-senators-and-advocates-agree-cantwell-proposal-is-the-primary-tool-to-combat-affordable-housing-crisis>; Julie Littman, *LIHTC Program Now Funds About 90% Of U.S. Affordable Housing Projects*, BISNOW (Mar. 16, 2017), [https://www.bisnow.com/national/news/affordable-housing/how-affordable-housing-can-work-for-investors-](https://www.bisnow.com/national/news/affordable-housing/how-affordable-housing-can-work-for-investors-72200?__hssc=63760176.1.1524273901354&__hstc=63760176.ea6bfc6299b54aaff0a46ebb70e54cdb.1524273901354.1524273901354.1524273901354.1&__hsfp=908707084&hsCtaTracking=0f8b139a-2311-43b3-93d1-2afe3d2e3474%7C51113333-c03e-4ab6-b768-f4342329a46d)

72200?\_\_hssc=63760176.1.1524273901354&\_\_hstc=63760176.ea6bfc6299b54aaff0a46ebb70e54cdb.1524273901354.1524273901354.1524273901354.1&\_\_hsfp=908707084&hsCtaTracking=0f8b139a-2311-43b3-93d1-2afe3d2e3474%7C51113333-c03e-4ab6-b768-f4342329a46d.

<sup>31</sup> JACOBS, *supra* note 17, at ¶ 2.03[2][a]. Although LIHTC was intended to promote development of truly mixed-income properties, some critics believe that objective has failed. See, e.g., Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 993 (2010) (citing ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 92 (2006)).

<sup>32</sup> U.S. DEP’T OF HOUSING & URB. DEV., WHAT HAPPENS TO LOW-INCOME HOUSING TAX CREDIT PROPERTIES AT YEAR 15 AND BEYOND? xi (Aug. 2012), [https://www.huduser.gov/publications/pdf/what\\_happens\\_lihtc\\_v2.pdf](https://www.huduser.gov/publications/pdf/what_happens_lihtc_v2.pdf)

<sup>33</sup> *Id.* at xi.

<sup>34</sup> *Id.* at 1-2.

<sup>35</sup> *Id.* at 2.

LIHTC's goal of creating mixed-income housing rather than concentrations of low-income housing has met with some success.<sup>36</sup> An example is Atlanta, Georgia's Centennial Place. When Atlanta was selected to host the 1996 Centennial Olympic Games, politicians and urban planners perceived an immediate need to eliminate the city's urban blight, and certain public housing projects were slated for demolition.<sup>37</sup> Techwood Homes in downtown Atlanta was identified as one of the projects needing to be eradicated.<sup>38</sup> Techwood Homes was the first federally funded public-housing development in the United States; it was built in 1935 and FDR himself dedicated the development.<sup>39</sup> In 1935, the development of Techwood Homes had replaced inner-city slums with new buildings, but sixty years later, in 1995, Techwood Homes itself had become a crime-infested slum.<sup>40</sup> The buildings were razed to ready Atlanta for international visitors and global media attention. The land became the site of a new, mixed-income development named Centennial Place in honor of the upcoming Centennial Olympic Games.<sup>41</sup> Critics warned that the new project would fail to attract residents who were not low-income,<sup>42</sup> but the critics were proved wrong. Clever planners included attractive amenities in Centennial Place's design, and these amenities, coupled with the location of the project near downtown businesses and universities, brought renters of all income levels. Centennial Place is not segregated by income level. On the contrary, market-rate renters live next door to Section 8 renters, who in turn live next door to persons provided public housing.<sup>43</sup> Neighbors do not know each

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<sup>36</sup> Some scholars have found LIHTC's stated purpose of promoting mixed-income housing to be a failure. See, e.g., Shilesh Muralidhara, *Deficiencies of the Low-Income Housing Tax Credit in Targeting the Lowest-Income Households and in Promoting Concentrated Poverty and Segregation*, 24 LAW & INEQ. 353 (2006); Ellickson, *supra* note 31. However, a study by two Stanford University professors found that LIHTC developments in low-income areas promoted both racial and income diversity. "LIHTC development revitalizes low-income neighborhoods, increasing house prices 6.5%, lowering crime rates, and attracting racially and income diverse populations." Rebecca Diamond and Tim McQuade, *Who Wants Affordable Housing in their Backyard? An Equilibrium Analysis of Low Income Property Development* (Stan. Graduate Sch. of Bus., Working Paper, Dec. 2017), [https://web.stanford.edu/~diamondr/LIHTC\\_spillovers.pdf](https://web.stanford.edu/~diamondr/LIHTC_spillovers.pdf).

<sup>37</sup> Irene v. Holliman, *Techwood Homes*, NEW GEORGIA ENCYCLOPEDIA (June 20, 2008), <https://www.georgiaencyclopedia.org/articles/arts-culture/techwood-homes>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Interview with Jan Haber, General Counsel, U.S. Dep't of Housing & Urb. Dev. (Mar. 4, 2018).

<sup>43</sup> *Id.*



other's rental status. The next person in line for a vacancy gets the next vacant unit, regardless of that person's income status.<sup>44</sup>

One difficulty in the LIHTC program is that the application and financial reporting processes are quite sophisticated. This complexity poses a particular challenge for charitable organizations that must navigate the application process in their efforts of developing or rehabilitating housing for low-income renters.<sup>45</sup> Sometimes it is in the best interest of an applicant to hire a consultant to help navigate the complicated application process, even though these consultants generally command high fees. For charitable organizations, hiring a consultant reduces financial resources that could otherwise be applied to philanthropic work. Another potential problem with the LIHTC program is that, fifteen years after development or rehabilitation, when the affordability restrictions are lifted, there is danger that many properties could be removed from the stock of affordable housing.<sup>46</sup>

Despite the successes of the LIHTC program, the problem of providing housing to low-income individuals and families in the United States is far from being solved. Waiting lists in the United States for government-subsidized housing remain long, and waiting lists are generally longer in densely populated urban areas like Miami than they are in sparsely populated rural areas.<sup>47</sup> If you find yourself homeless in the United States, your best bet is still trying to find space in a homeless shelter supported by philanthropy or government subsidies until your name rises to the top of the list of low-income persons seeking housing.<sup>48</sup> Sadly, by the time a

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<sup>44</sup> *Id.*

<sup>45</sup> See Ben Nichols, Whit Spencer and My Trinh, *Building Sustainable Organizations for Affordable Housing and Community Development Impact: Lessons and Recommendations from the Field*, ENTERPRISE COMMUNITY INV. (2011), <https://www.enterprisecommunity.org/download?fid=8271&nid=4587>.

<sup>46</sup> WHAT HAPPENS TO LOW-INCOME HOUSING TAX CREDIT PROPERTIES AT YEAR 15 AND BEYOND?, *supra* note 32, at xi. "The law requires units to be rent-restricted and occupied by income-eligible households for at least 15 years, called the 'compliance period,' with an 'extended use period' of at least another 15 years, for a total of 30 years. . . . Where states do not mandate longer restricted-use periods, an owner may submit a request to the HFA [Housing Finance Agency] to sell a project or convert it to market rate during year 14 of the 15-year compliance period." Ed Gramlich, *2018 Advocates' Guide*, ch. 5-30, NAT'L LOW INCOME HOUSING COALITION, [http://nlihc.org/sites/default/files/AG-2018/2018\\_Advocates-Guide.pdf](http://nlihc.org/sites/default/files/AG-2018/2018_Advocates-Guide.pdf).

<sup>47</sup> See, e.g., Yvonne Wenger, *Thousands Sign Up as City's Section 8 Wait List Opens for First Time in a Decade*, BALTIMORE SUN, Apr. 8, 2018, <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-section-8-20141022-story.html>; Smith, *supra* note 28.

<sup>48</sup> See Alana Semuels, *How Can the U.S. End Homelessness?* THE ATLANTIC (Apr. 25, 2016), <https://www.theatlantic.com/business/archive/2016/04/end-homelessness-us/479115/>.

person gets to the top of a list, his or her whereabouts and contact information may have changed, making it sometimes impossible for authorities to provide the needed housing.

The challenges of providing affordable housing in the United States are easily identified but seemingly insurmountable. We need more. Forty-one percent of low-income renters spend more than fifty percent of their income on rent.<sup>49</sup> This affordability crunch was exacerbated during the foreclosure crisis in the United States, when millions of higher income Americans lost their homes and entered the rental market, competing with lower income renters.<sup>50</sup> A relatively recent survey of the U.S. Conference of Mayors of major American cities reported the top cause of homelessness among families to be lack of affordable housing.<sup>51</sup> In 2017, it was estimated that 554,000 homeless persons were living in the United States.<sup>52</sup> Among those 554,000 homeless persons, 193,000 had no nightly shelter at all and were instead living in tents, cars, or on the streets.<sup>53</sup> Between 2015 and 2017, the number of unsheltered homeless in the United States grew by nine percent.<sup>54</sup> In 2016, the Florida Coalition for the Homeless reported 6,537 homeless persons were living in metro Miami.<sup>55</sup> Meanwhile, the income gap in the United States has increased dramatically in the last several decades.<sup>56</sup> In 2014, the top ten percent of earners

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<sup>49</sup> U.S. DEP'T OF HOUSING & URB. DEV., WORST CASE HOUSING NEEDS 2009: A REPORT TO CONGRESS vii (2011), available at [https://www.huduser.gov/portal/publications/worstcase\\_HsgNeeds09.pdf](https://www.huduser.gov/portal/publications/worstcase_HsgNeeds09.pdf); “The number of households that spend more than half of their income on rent has grown roughly 25 percent since 2007, according to an analysis by the Joint Center for Housing Studies of Harvard University.” Priyanka Boghani, *A Housing Affordability Crisis That’s Worse for the Lowest Income Americans*, PUB. BROADCASTING SERV. (May 9, 2017), <https://www.pbs.org/wgbh/frontline/article/a-housing-affordability-crisis-thats-worse-for-the-lowest-income-americans/>.

<sup>50</sup> Boghani, *supra* note 49.

<sup>51</sup> *U.S. Conference of Mayors Hunger and Homelessness Survey: A Status on Hunger And Homelessness in America’s Cities – A 25-City Survey 2* (Dec. 2014), <https://www2.cortland.edu/dotAsset/655b9350-995e-4aae-acd3-298325093c34.pdf>.

<sup>52</sup> Christopher Weber & Geoff Mulvihill, *America’s Homeless Population Rises for First Time in Years*, U.S. NEWS & WORLD REP., Dec. 6, 2017, <https://www.usnews.com/news/us/articles/2017-12-06/us-homeless-count-rises-pushed-by-crisis-on-the-west-coast> (citing U.S. Department of Housing and Urban Development’s annual Point in Time count).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Michael D. Ullman, *State of Florida Report: 2016 Homeless Census Estimates and Funding Need to End Chronic Homelessness*, NAT’L HOMELESS INFO. PROJECT (Oct. 2016), [http://www.nhipdata.org/local/upload/file/Florida%20Homeless%20Report%202016%20%2009\\_30\\_16%20-%20final%20report.pdf](http://www.nhipdata.org/local/upload/file/Florida%20Homeless%20Report%202016%20%2009_30_16%20-%20final%20report.pdf). (The tally of 6537 includes Dade County and Broward County.)

<sup>56</sup> Daniel Bachman, *Income Inequality in the United States: What Do We Know and What Does It Mean?* DELOITTE INSIGHTS (July 2017),

took home about half of the total income earned in the United States, whereas the bottom fifty percent of earners shared a mere thirteen percent of income earned that year.<sup>57</sup> Couple this widening income gap with the recent boom in real estate prices,<sup>58</sup> and it is easy to understand how adequate housing is currently out of reach for many Americans and sadly is becoming increasingly unobtainable for many more.

## CAPE TOWN

Separateness, or apartheid, was a way of life in South Africa even before it became an enforced policy.<sup>59</sup> Apartheid was the official policy under South African law from 1948 to 1994.<sup>60</sup> Two years after apartheid became law, the Population Registration Act was passed, requiring the entire South African population to be classified into three groups – black,<sup>61</sup> white, and colored.<sup>62</sup> Thus, racial discrimination was institutionalized in South Africa, stripping nonwhites of many fundamental rights, including the rights to travel freely and live where they chose.

Under apartheid, nonwhites were cruelly removed from their central Cape Town homes and communities.<sup>63</sup> The land in the city center was far more valuable

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<https://www2.deloitte.com/insights/us/en/economy/issues-by-the-numbers/july-2017/rising-income-inequality-gap-united-states.html>.

<sup>57</sup> *Id.*

<sup>58</sup> See Cicely Wedgeworth, *10 Years After the Crash, the Boom Times Are Back in Real Estate – but Way Different*, REALTOR.COM (Nov. 13, 2017), <https://www.realtor.com/news/trends/10-years-recession-boom-times-back-real-estate/>.

<sup>59</sup> *The History of Separate Development in South Africa*, SOUTH AFRICAN HISTORY ONLINE, <http://www.sahistory.org.za/article/history-separate-development-south-africa> (last updated May 9, 2016); see also Oliver Wainwright, *Apartheid Ended 20 Years Ago, So Why Is Cape Town Still 'a Paradise for the Few'?* THE GUARDIAN, Apr. 30, 2014, <https://www.theguardian.com/cities/2014/apr/30/cape-town-apartheid-ended-still-paradise-few-south-africa>.

<sup>60</sup> Pdraig O'Malley, *The National Party, Apartheid and the Anatomy of Repression in South Africa, 1948-1994*, NELSON MANDELA CTR. OF MEMORY, <https://www.nelsonmandela.org/omalley/index.php/site/q/031v02167/041v02264/051v02303/061v02304/071v02305/081v02310.htm>.

<sup>61</sup> Blacks were also referred to as “African” or “native.” See Pdraig O'Malley, *1950 Population Registration Act No. 30*, NELSON MANDELA CTR. OF MEMORY, <https://www.nelsonmandela.org/omalley/index.php/site/q/031v01538/041v01828/051v01829/061v01838.htm>.

<sup>62</sup> “Colored persons” were defined as mixed race, Indian or Asian. See *id.* The “colored” group was often further subdivided.

<sup>63</sup> The largest displacement was from District 6, a valuable piece of land within Cape Town’s central business district. The displacement caused 60,000 forced moves to slums outside the city.

than the land where the nonwhites were resettled. Under the Group Areas Act of 1950, blacks, Asians, Indians and mixed-race persons were forced to live in segregated communities.<sup>64</sup> “Cape Town was conceived with a white-only centre, surrounded by contained settlements for the black and coloured labour forces to the east, each hemmed in by highways and rail lines, rivers and valleys, and separated from the affluent white suburbs by protective buffer zones of scrubland.”<sup>65</sup>

Evidence of past discrimination is still very observable in South Africa today. While no longer official policy, spatial segregation in housing remains glaringly obvious. Nonwhites continue to live outside of cities in segregated communities, shantytowns, which are euphemistically called townships or informal housing.<sup>66</sup> Millions of South Africans live in these townships, in shanties which lack electricity, running water, toilets, and safe walkways to provide access to water and toilet facilities. About fourteen percent of the population of South Africa still lives in informal housing.<sup>67</sup> Under apartheid, these townships were intentionally located far from city centers, the hubs of employment. Because there were no jobs near their homes, and because the commute to the city center was lengthy and costly, many township residents left their loved ones to work as live-in domestic servants for white families.<sup>68</sup> Today, the situation remains about the same for an estimated 1.1 million South Africans who work as domestic servants in a country with a total population of about fifty-two million.<sup>69</sup> Living far outside the city

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Approximately 150 families moved back to District 6 following passage of the Land Restitution Act in 1995. Bonita Bennett, Director of District 6 Museum, Address at Study Space IX, Sponsored by Ga. St. U. C. of L. and U. of Cape Town Afr. Ctr. For Cities, Cape Town, S. Afr. (June 30, 2016).

<sup>64</sup> Michael Pearson & Tom Cohen, *Life under Apartheid: Demeaning, Often Brutal*, CNN (Dec. 6, 2013), <http://www.cnn.com/2013/12/06/world/africa/mandela-life-under-apartheid/>.

<sup>65</sup> Oliver Wainwright, *Apartheid Ended 20 Years Ago, So Why Is Cape Town Still 'a Paradise for the Few'?* THE GUARDIAN, Apr. 30, 2014, <https://www.theguardian.com/cities/2014/apr/30/cape-town-apartheid-ended-still-paradise-few-south-africa> (quoting Edgar Pieterse, Director of the African Centre for Cities at the University of Cape Town).

<sup>66</sup> This system of segregated housing actually was begun in colonial times under the pretense of controlling urban disease outbreaks. Lisa Findley & Liz Ogbu, *South Africa: From Township to Town*, PLACES J. (Nov. 2011), <https://placesjournal.org/article/south-africa-from-township-to-town/>.

<sup>67</sup> *Understanding Living Conditions*, STATISTICS SOUTH AFRICA, [http://www.statssa.gov.za/?page\\_id=595](http://www.statssa.gov.za/?page_id=595).

<sup>68</sup> Zackie Achmat, Address at Study Space IX, Sponsored by Ga. St. U. C. of L. and U. of Cape Town Afr. Ctr. For Cities, Cape Town, S. Afr. (June 28, 2016).

<sup>69</sup> Maria Hengelvel, *South Africa's Domestic Workers: Invisible Labor in Plain Sight*, AFR. IS A COUNTRY (Mar. 12, 2015), <http://africasacountry.com/2015/03/south-africas-domestic-workers-bonded-labor-in-plain-sight/> (citing Mariam Seedat-Khan et al, *A New Form of Bonded Labour: A Comparative Study between Domestic Workers of South Africa and India*, KRE PUBLISHERS, [Published by Reading Room, 2017](http://www.krepublishers.com/06-Special%20Volume-Journal/JSSA-00-Special%20Volume/JSSA-SV-04-14-Singh-Anand/JSSA-SV-04-057-031-14-Seedat/JSSA-SV-</a></p>
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center still restricts access to good jobs. For those township residents who do undertake lengthy and costly commutes into the city centers for work, there is scant free time left for their own families.<sup>70</sup>

In the last decade, there has been a significant increase in first-generation black entry into South Africa's middle class;<sup>71</sup> however, many of the poorest South Africans are still stuck living in the old black and colored townships. Some stay because moving would force separation from loved ones and established communities, and some stay because they cannot afford to move to formerly all-white communities.<sup>72</sup> It is commendable that almost four million new, improved housing units have been built under South Africa's post-apartheid Reconstruction and Development Program; it is regretful that these housing units have largely been built in or near old townships, perpetuating spatial separation of races and keeping the poorest residents on the peripheries of cities.<sup>73</sup>

South Africa's income gap and hugely disproportionate unemployment rates are further legacies of apartheid.<sup>74</sup> Although the situation is improving,<sup>75</sup> the World Bank as recently as 2013 reported that South Africa had the highest income gap in the world.<sup>76</sup> Using the widely accepted Gini economic inequality index to measure income gap, with zero reporting perfect equality and 100 indicating perfect inequality, South Africa stood at an exceptionally high 63.1.<sup>77</sup> In 2014, a white South African employee could expect to earn approximately four times the income

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04-057-031-14-Seedat-Tx[5].pdf. The 2011 population of South Africa was approximately 51.8 million. It is estimated that the population grew to 55.7 million between 2011 and 2016.

*Population*, STATISTICS SOUTH AFRICA, <http://www.statssa.gov.za/>; *People*, STATISTICS SOUTH AFRICA, [http://www.statssa.gov.za/?page\\_id=595](http://www.statssa.gov.za/?page_id=595).

<sup>70</sup> Achmat, *supra* note 68.

<sup>71</sup> South Africa's First Generation Middle Class, FUTUREFACT (Mar. 12, 2014), <http://www.futurefact.co.za/futurefact/south-africa%E2%80%99s-first-generation-middle-class>.

<sup>72</sup> Findley & Ogbu, *supra* note 66.

<sup>73</sup> Wainwright, *supra* note 65 (reporting that the location of the 3.6 million homes built since Mandela's declaration in his inaugural address that "[t]he time to build is upon us" has sadly reinforced apartheid-era segregation).

<sup>74</sup> See Gavin Keeton, *Inequality in South Africa*, J. OF THE HELEN SUZMAN FOUND. (Nov. 2014), <file:///C:/Users/llawlor/Downloads/5.%20Inequality%20in%20South%20Africa%20-%20G%20Keeton.pdf>.

Activist Zackie Achmat stated that official reports show a conservative 24% unemployment rate, but the actual rate is closer to 34%. Achmat said the very highest rate of unemployment occurs in South Africa's poor black communities. Achmat, *supra* note 68.

<sup>75</sup> *South Africa Economic Update: Fiscal Policy and Redistribution in an Unequal Society*, THE WORLD BANK (Nov. 2014), <http://www.worldbank.org/en/country/southafrica/publication/south-africa-economic-update-fiscal-policy-redistribution-unequal-society>.

<sup>76</sup> *Income Inequality in South Africa*, VAND. U. (Sept. 9, 2013)

[http://www.worldbank.org/depweb/beyond/beyondco/beg\\_05.pdf](http://www.worldbank.org/depweb/beyond/beyondco/beg_05.pdf) (citing *Income Inequality*, WORLD BANK (2013))

<sup>77</sup> *Id.*

of a black South African employee.<sup>78</sup> South Africa is, however, headed in the right direction through increased government and private sector investment in education and other human capital development to ease these inequalities.<sup>79</sup>

One consequence of the huge income gap is that only about fifteen percent of South African households can qualify for mortgages;<sup>80</sup> thus, the poorest of South Africans are not alone in their need for adequate housing. About twenty-five percent of South African households earn too much to qualify for state housing aid, but too little to qualify for a mortgage.<sup>81</sup> This is the dilemma of new entrants into South Africa's rapidly growing middle class: they earn too much for free services and housing assistance, but their inadequate earnings do not enable them to make it on their own.<sup>82</sup> This group includes many teachers, police officers and nurses,<sup>83</sup> those who are essential to the survival of communities.

The acute shortage of adequate housing in South Africa is tragically paradoxical to the mandates of the country's highest source of law. The current, post-apartheid Constitution of the Republic of South Africa came into effect in 1997, during the presidency of Nelson Mandela.<sup>84</sup> The document represents the first time in global history that socioeconomic rights were incorporated into a national constitution.<sup>85</sup> It is a beautiful document which seemingly creates enforceable human rights. In fact, University of Chicago constitutional law expert Cass Sunstein called the South African Constitution "the most admirable constitution in the history of the world."<sup>86</sup> U.S. Supreme Court Justice Ruth Bader Ginsburg also praised the South African Constitution. During a 2012 interview on Egyptian television, Ginsburg was asked whether the post-Arab Spring Egyptian constitution should be modeled after other countries' constitutions, and Ginsburg

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<sup>78</sup> *Labour Market Dynamics in South Africa, 2014 Reports*, STAT. S. AFR., <http://www.statssa.gov.za/?p=4445>.

<sup>79</sup> See Gavin Keeton, *supra* note 74.

<sup>80</sup> Robert Brand & Mike Cohen, *Where the Heart Is: South Africa's Post-Apartheid Housing Failure*, MAIL & GUARDIAN, Aug. 2, 2013, <https://mg.co.za/article/2013-08-02-where-the-heart-is-south-africas-post-apartheid-housing-failure>.

<sup>81</sup> Clarissa A. Wertman, *There's No Place Like Home: Access to Housing for All South Africans*, 40 BROOK. J. INT'L L. 719, 720 (2014).

<sup>82</sup> Robert Brand & Mike Cohen, *supra* note 80.

<sup>83</sup> *The Housing Crisis in South Africa*, S. AFR. CATH. BISHOPS CONF. PARLIAMENTARY LIAISON OFF. (July 2014), <http://www.cplo.org.za/wp-content/uploads/2014/02/BP-357-The-Housing-Crisis-in-South-Africa-July-2014.pdf>

<sup>84</sup> *Mandela Signs SA Constitution into Law*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/dated-event/mandela-signs-sa-constitution-law>.

<sup>85</sup> Clarissa A. Wertman, *supra* note 81 (citing Mark S. Kende, *The South African Constitutional Court's Construction of Socioeconomic Rights: A Response to Critics*, 19 CONN. J. INT'L L. 617, 626 (2004)).

<sup>86</sup> Cass R. Sunstein, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 261 (2001).

replied, “I might look at the Constitution of South Africa. That was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights, had an independent judiciary. It really is, I think, a great piece of work that was done.”<sup>87</sup>

Unlike citizens of the United States, South Africans possess a constitutional right to “adequate housing.”<sup>88</sup> South Africa’s Bill of Rights also provides, among other things, the right to “freedom and security of the person,” including the right “to be free from all forms of violence,”<sup>89</sup> the right to “freedom of movement,” and the right to “sufficient food and water.”<sup>90</sup> South African children are guaranteed additional rights to “basic nutrition, shelter . . . and social services.”<sup>91</sup>

In addition to providing that “[e]veryone has the right to have access to affordable housing,”<sup>92</sup> the South African Constitution also provides that “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”<sup>93</sup> Therein lies the critical difficulty; the state’s ability to provide affordable housing is limited by its available resources, and government officials are charged with determining the outlay of resources available for housing, which should be meted out “progressively,” rather than within a certain deadline, and with government officials having responsibility merely to act “reasonably” rather than with best efforts or expeditiously.

In 2000, the Constitutional Court of South Africa, the country’s highest constitutional authority, decided a landmark case regarding access to adequate housing – *Government of the Republic of South Africa v Grootboom*.<sup>94</sup> The facts of *Grootboom* were, in the words of the Constitutional Court, “lamentable.”<sup>95</sup> Irene Grootboom was living in intolerable conditions in a township outside Cape Town called Wallacedene. The township residents had “no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area [was] partly waterlogged and l[ay] dangerously close to a main thoroughfare.”<sup>96</sup> The township

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<sup>87</sup> David Weigel, *Ruth Bader Ginsburg Makes Banal Point, Destroys the Republic*, SLATE (Feb. 3, 2012), [http://www.slate.com/blogs/weigel/2012/02/03/ruth\\_bader\\_ginsburg\\_makes\\_banal\\_point\\_destroys\\_the\\_republic.html](http://www.slate.com/blogs/weigel/2012/02/03/ruth_bader_ginsburg_makes_banal_point_destroys_the_republic.html).

<sup>88</sup> S. AFR. CONST., 1996, ch. 2, § 26 (1).

<sup>89</sup> S. AFR. CONST., 1996, ch. 2, § 29.

<sup>90</sup> S. AFR. CONST., 1996, ch. 2, § 27.

<sup>91</sup> S. AFR. CONST., 1996, ch. 2, § 28.

<sup>92</sup> S. AFR. CONST., 1996, ch. 2, § 26 (1).

<sup>93</sup> S. AFR. CONST., 1996, ch. 2, § 26 (2).

<sup>94</sup> *Gov’t of the Republic of S. Afr. v. Grootboom*, 2001 (1) SA 46 (CC) (S. Afr.).

<sup>95</sup> *Grootboom*, 2001 (1) SA at para. 7.

<sup>96</sup> *Id.*

also suffered a high rate of crime.<sup>97</sup> Many of the residents had tried to escape these intolerable conditions by applying for low-cost, government-subsidized housing but had not received it. Some had been waiting for as long as seven years for adequate housing.<sup>98</sup> Because of their intolerable living conditions, Grootboom and about 900 others, including many children, set up shanties on a piece of privately owned land adjacent to Wallacedene, land that had ironically been ear-marked for new development of low-cost housing.<sup>99</sup> They were squatters, illegally living on the private land, and thus eventually they were forcibly evicted and rendered homeless.<sup>100</sup> Grootboom and the 900 other evictees filed an urgent application with the Cape of Good Hope High Court asking the court to intercede.<sup>101</sup> The High Court ordered they be supplied with the bare minimum – tents, latrines, and transported water.<sup>102</sup> The government then filed an appeal in the Constitutional Court of South Africa.<sup>103</sup>

The basis of the *Grootboom* claimants' application for relief in the Cape of Good Hope High Court had been the government's failure to provide them immediate housing which they contended was a violation of their constitutional right to access adequate housing, as well as a violation of the constitutional right of their children to shelter.<sup>104</sup> On appeal, the Constitutional Court of South Africa agreed. Grootboom and the 900 other homeless claimants were again victorious. The court "require[d] the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution[,] . . . includ[ing] the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need."<sup>105</sup> The court found that, while the different spheres of government were doing a fine job taking care of medium and long-term housing needs in the country, these government spheres had failed to address the "immediate needs and the management of crises."<sup>106</sup> "A programme that excludes a significant segment of society cannot be said to be reasonable,"<sup>107</sup> said the court, and the South African Constitution required the state to "take reasonable legislative and other measures,

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<sup>97</sup> See Frieda le Roux, *Divide on 'Apartheid Wall,'* NEWS 24 ARCHIVES (July 4, 2002), <https://www.news24.com/xArchive/Archive/Divide-on-apartheid-wall-20020704>.

<sup>98</sup> *Grootboom*, 2001 (1) SA at para. 8.

<sup>99</sup> *Id.*

<sup>100</sup> *Grootboom*, 2001 (1) SA at para. 3.

<sup>101</sup> *Grootboom*, 2001 (1) SA at para. 4.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Grootboom*, 2001 (1) SA at para. 3.

<sup>105</sup> *Grootboom*, 2001 (1) SA at para. 96.

<sup>106</sup> *Grootboom*, 2001 (1) SA at para. 68.

<sup>107</sup> *Grootboom*, 2001 (1) SA at para. 43.



within its available resources, to achieve the progressive realisation”<sup>108</sup> of the right to housing.

The Constitutional Court decided Grootboom’s case in 2000, and Irene Grootboom then became known around the world as the woman who would force the South African government to follow its own constitutional mandate to provide its citizens their guaranteed socioeconomic rights. But eight years later, Irene Grootboom died penniless and homeless.<sup>109</sup> Ultimately, the system failed her and others in need of housing.

The weakness of the *Grootboom* decision is its lack of concrete and clear direction to the South African government spheres tasked with providing adequate housing. The court did not go so far as to define the “minimum core” that should be provided to the homeless claimants.<sup>110</sup> Additionally, the court deferred to the other branches of government to determine the best use of limited resources available for providing housing.<sup>111</sup> No timeline was imposed, but rather the court merely required the government to act “progressively” and “reasonably,” not expeditiously. The guidance was vague rather than concrete. There were no benchmarks of expectation set, nor was there explanation of what minimum government action would be considered reasonable. In Irene Grootboom’s case, the lack of government expeditiousness translated to a hollow legal victory. She never did receive her constitutional due – a roof over her head.

The housing shortage in South Africa is acute; thus, the task of divvying limited resources is daunting. Of the fifty-two million people living in South Africa, 55.5 percent of them are living in poverty,<sup>112</sup> and fourteen percent live in informal housing – slums.<sup>113</sup> The sheer magnitude of the problem can seem insurmountable. But there is hope that South Africa will someday fulfill the aspirations set in its post-apartheid Bill of Rights. The Government Immovable Asset Management Act of 2007 has given legal strength to the battle for building or reclaiming affordable housing in the central business districts; under the act, public land generally may not be sold if it can meet a public objective, like affordable housing.<sup>114</sup> South African activist Zackie Achmat, whom *The New Yorker* has called the “most important dissident in the country since Nelson

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<sup>108</sup> S. AFR. CONST., 1996, ch. 2, § 26 (2).

<sup>109</sup> Pearlie Joubert, *Grootboom Dies Homeless and Penniless*, MAIL & GUARDIAN, Aug. 8, 2008, <https://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless>.

<sup>110</sup> *Grootboom*, 2001 (1) SA at paras. 30-33.

<sup>111</sup> *Grootboom*, 2001 (1) SA at paras. 39-41.

<sup>112</sup> POVERTY TRENDS IN SOUTH AFRICA ¶2.1, STATISTICS SOUTH AFRICA (2015), <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf>.

<sup>113</sup> *Understanding Living Conditions*, STATISTICS SOUTH AFRICA, [http://www.statssa.gov.za/?page\\_id=595](http://www.statssa.gov.za/?page_id=595).

<sup>114</sup> Government Immovable Asset Management Act 19 of 2007.

Mandela,”<sup>115</sup> thinks the solution to the housing crisis lies in ending spatial segregation.<sup>116</sup> To accomplish that goal, affordable housing must be built or reclaimed in South Africa’s city centers rather than on the peripheries of cities, so Achmat and other community organizers are determinedly working to attain affordable city housing for poor South Africans.<sup>117</sup>

In a recent legal case with facts extremely similar to *Grootboom*, a judge in the Western Cape High Court took a different, somewhat radical approach to the issue of squatters who have nowhere else to go. Since 2012, about 60,000 people have moved into a slum called Marikana near Cape Town’s airport.<sup>118</sup> The residents have no streetlights, no running water, and no sewer services.<sup>119</sup> The settlement plunges into darkness at night, and crime is rampant.<sup>120</sup> The settlement lies on privately owned land, so the residents have no legal claim to live in Marikana, but like the claimants in *Grootboom*, the Marikana squatters have nowhere else to go.<sup>121</sup> The squatters are represented by attorneys working for the Socio-Economic Rights Institute of South Africa, a human rights nonprofit organization.<sup>122</sup> The judge hearing the case came to a somewhat radical solution. In August 2017 the judge ordered the city to negotiate to buy the privately-owned land upon which the 60,000 Marikana squatters live.<sup>123</sup> The court-ordered negotiation now seems an obvious answer to this specific quandary, as the property owners concede that evicting 60,000 squatters would be nearly impossible.<sup>124</sup> The judge was attempting to balance the constitutional rights to adequate housing of the 60,000 Marikana squatters and the landowners’ rights to own private property. The case is expected to be heard by the Constitutional Court of South Africa in 2018

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<sup>115</sup> Samantha Power, *The Aids Rebel*, THE NEW YORKER (May 19, 2003), <http://www.newyorker.com/magazine/2003/05/19/the-aids-rebel>.

<sup>116</sup> Zackie Achmat, Address at Study Space IX, Sponsored by Ga. St. U. C. of L. and U. of Cape Town Afr. Ctr. For Cities, Cape Town, S. Afr. (June 28, 2016).

<sup>117</sup> *Id.*

<sup>118</sup> Vera Haller, *Cape Town Settlement Dares to Hope for Water and Light After Landmark Ruling*, THOMSON REUTERS FOUND. (Nov. 27, 2018), <https://www.reuters.com/article/us-safrica-capetown-housing/cape-town-settlement-dares-to-hope-for-water-and-light-after-landmark-ruling-idUSKBN1DR1PRidUSKBN1DR1PR>. The settlement is named for the 2012 Marikana Massacre in which police opened fire on striking workers at a South African platinum mine, killing 34 and injuring another 78. Nick Davies, *Marikana Massacre: The Untold Story of the Strike Leader Who Died for Workers’ Rights*, THE GUARDIAN (May 19, 2015), <https://www.theguardian.com/world/2015/may/19/marikana-massacre-untold-story-strike-leader-died-workers-rights>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

and could produce landmark precedent with far-reaching consequences.<sup>125</sup> Squatters around South Africa may someday soon be able to enforce their constitutional rights to adequate housing by forcing, through the court process, the government to buy private land. Marikana residents are now hopeful that city ownership of the land upon which they have settled may someday bring streetlights, running water, permanent toilets, and a much-needed sense of security.<sup>126</sup> This hopefulness is badly needed in Marikana and other informal settlements throughout South Africa.

## MARSEILLE

The French have a national law which provides a right to affordable housing. More precisely, the French have a justiciable right incorporated into their civil code. This right to housing, in effect for ten years, has proved not to overwhelm their court system.<sup>127</sup> The law – DALO – was enacted in March 2007.<sup>128</sup> DALO is an acronym for “droit au logement opposable,” which is roughly translated to “the inalienable right to housing that a court cannot deny you.”<sup>129</sup>

The right to housing is especially needed in the beautiful port town of Marseille. Like Cape Town, Marseille has an extreme income gap. In 2013, it was reported that in the Aix-Marseille metropolitan region, the median household income of the top ten percent was 8.4 times higher than the bottom ten percent.<sup>130</sup> The housing projects on the northern side of the city are notorious for crime and violence.<sup>131</sup> Homelessness is especially prevalent in the city center and in the northern part of Marseille.<sup>132</sup>

Like in South Africa, the courts in France have grappled with balancing individual rights to property ownership against the right to housing. In 1994,

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Kyra Olds, *The Role of Courts in Making the Right to Housing a Reality throughout Europe: Lessons from France and the Netherlands*, 28 WIS. INT’L L.J. 170, 178 (2010).

<sup>128</sup> DALO was passed March 5, 2007. Jean Michel David, *The DALO Law is 10 Years Old*, HOUSING RIGHTS WATCH (June 26, 2017), <http://www.housingrightswatch.org/content/dalo-law-10-years-old>.

<sup>129</sup> *Want Housing? Come to France*, THE BRUSSELS JOURNAL (JUNE 11, 2008), <http://www.brusselsjournal.com/node/3333>.

<sup>130</sup> HOW’S LIFE IN YOUR REGION? MEASURING REGIONAL AND LOCAL WELL-BEING FOR POLICY MAKING 2007 (OECD Publishing 2014).

<sup>131</sup> William Kornblum, *La Visitation: Inequality and the Social Fabric of Marseille*, 673 ANNALS AM. ACAD. POL. & SOC. SCI. 296, 299-300 (Sept. 1, 2017).

<sup>132</sup> See Maeva Jego et al, *Improving Access and Continuity of Care for Homeless People: How Could General Practitioners Effectively Contribute? Results from a Mixed Study*, 6 BMJ OPEN 1, 1-2 (Nov. 30, 2016), <http://bmjopen.bmj.com/content/bmjopen/6/11/e013610.full.pdf>.

France's Constitutional Council recognized the right to housing as inferior to the right to property,<sup>133</sup> but since that time the Council has shifted its position somewhat. Under French constitutional law, there is a distinction between *droits-libertés*, rights which require protection but no affirmative action by the French government, and *droits-créances*, which are socioeconomic rights requiring government action.<sup>134</sup> The right to property is a *droit-liberté*, and the right to housing is a *droit-créance*. In 1998, the Constitutional Council upheld the validity of a statute which allowed government taking of private property which had lain vacant for more than eighteen months.<sup>135</sup> The statute was necessary, held the Constitutional Council, because of the acute housing shortage; thus, in effect, the *droit-créance* of adequate housing constrained the *droit-liberté* of property ownership.<sup>136</sup>

The Constitutional Council's recognition of the right to adequate housing served as the backdrop to enactment of DALO, but the French right to housing law was enacted not because of political or judicial sentiment but because of legislative reaction to public outrage. In April 2005, a horrific fire broke out in the Opera Hotel in Paris.<sup>137</sup> It was the worst fire in Paris in decades.<sup>138</sup> Most of the twenty-two families who were living in the Opera Hotel were poor immigrants who had been sent there by SAMU Social, a humanitarian service.<sup>139</sup> The fire was accidentally started by the girlfriend of the building's night watchman, who in a fit of rage threw some clothing onto candles on the floor of their sleeping quarters.<sup>140</sup> Twenty-four people perished, including eleven children.<sup>141</sup> Authorities who responded to the blaze reported seeing bodies "rained down on the street, and panicked people throwing children out of windows."<sup>142</sup> The building was

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<sup>133</sup> Jane Ball, *Insiders and Outsiders in French Social Housing Allocation: How Conflicting Rights Exclude Disadvantaged People*, 9 EUR. J. OF HOUSING POL'Y 313, 323 (2009) (citing SYLVIE HORVATH & JEAN-LOUIS RADIGON, *EXPULSION ET DROIT AU LOGEMENT* (2002)).

<sup>134</sup> Eric S. Tars, Julia Lum & E. Kieran Paul, *The Champagne of Housing Rights: France's Enforceable Right to Housing and Lessons for U.S. Advocates*, 4 NE. U. L.J. 429, 443 (Nov. 2012) (citing Laurent Pech, *France: Rethinking "Droits-Créances,"* in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* 267, 268 (Malcolm Langford ed., 2008)).

<sup>135</sup> Tars, Lum & Paul, *supra* note 134, at 443-44.

<sup>136</sup> *Id.* (citing Conseil Constitutionnel [CC] [Constitutional Court] decision No. 98-403DC, July 29, 1998, J.O. 11710 [hereinafter Constitutional Court decision No. 98-403DC]).

<sup>137</sup> Joshua Melvin, *Woman Jailed for Paris Hotel Blaze that Killed 24*, THE LOCAL (Jan. 23, 2014), <https://www.thelocal.fr/20140123/four-on-trial-over-paris-hotel-blaze-that-left-dead>.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

authorized to house sixty-two people, but at the time of the fire, eighty-two were housed there and seventy-seven of them were present.<sup>143</sup>

A second event leading up to passage of DALO was the brutal eviction, by police, of approximately 700 squatters who had occupied an abandoned building since 2003.<sup>144</sup> This mass eviction occurred in August 2006, and was covered extensively by French media.<sup>145</sup> Housing activist groups were galvanized in reaction to the Opera Hotel fire and the brutal mass eviction.

One such group, the Enfants de Don Quichotte – Children of Don Quixote – was pivotal in the introduction of the DALO legislation.<sup>146</sup> The founder of the Children of Don Quixote, activist Augustin Legrand, set up almost 200 red tents on the banks of the Saint Martin canal in Paris, where he lived “a homeless person’s life” and encouraged others to camp outside with him to experience the plight of homelessness.<sup>147</sup> Tent cities then sprang up to express solidarity with the homeless in numerous other cities in France, including Marseille.<sup>148</sup> Legrand was invited to Parliament and to meet with the Social Cohesion Minister in January 2007, and a right-to-housing bill was soon thereafter introduced.<sup>149</sup> Two months later, DALO was passed into law unanimously.<sup>150</sup>

Under DALO, the French central government has the primary responsibility of carrying out the housing law.<sup>151</sup> In France, individuals need not be homeless to exercise their right to housing. The following persons are eligible for housing under DALO:

1. Individuals who have applied for social housing and have been waiting for an unreasonably long time, a period which is set by each prefect (in different districts)
2. Homeless persons
3. Persons under threat of eviction without rehousing
4. Persons in temporary conditions for eighteen months
5. Persons in dangerous, unhealthy or substandard housing

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<sup>143</sup> Claire Lévy-Vroelant, *The Right to Housing in France: Still a Long Way to Go from Intention to Implementation*, 24 J. OF L. AND SOC. POL’Y 88, 89 (2015).

<sup>144</sup> Tars, Lum & Paul, *supra* note 134, at 445.

<sup>145</sup> *Id.* (citing Corinne Nativel, *The Politics of Housing Under France’s New Right*, in WHERE THE OTHER HALF LIVES: LOWER INCOME HOUSING IN A NEOLIBERAL WORLD 152, 162 (Sarah Glynn ed., 2009)).

<sup>146</sup> Marie Loison, *The Implementation of an Enforceable Right to Housing in France*, 1 EUR. J. OF HOMELESSNESS 185, 188 (Dec. 2007).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 189.

<sup>149</sup> *Id.*

<sup>150</sup> Tars, Lum & Paul, *supra* note 134, at 449.

<sup>151</sup> Byrne & Culhane, *supra* note 15, at 384.

6. Persons in overcrowded or indecent housing who have a child, a disability, or a disabled dependent
7. Persons who have applied for temporary housing but have received no offer<sup>152</sup>

These persons in need of housing are eligible to appeal for housing to a committee made up of central, regional, and local government authorities, social landlords, and representatives from temporary housing and hostel associations, among others.<sup>153</sup> If this committee deems the case to be a priority, a local government representative must devise a housing solution within three to six months, depending on the housing supply in the relevant market, or within six weeks for short-term accommodations.<sup>154</sup> If any of these deadlines are not met, the individual in need of housing may seek relief under DALO in an administrative court. The administrative judge may then order the state to provide housing.<sup>155</sup> The judge may also order the state to pay damages to a national fund which finances social programs. The individual in need of housing can also seek compensation from the regional representative for “material, physical or moral damage issuing from the lack of an offer of rehousing.”<sup>156</sup>

While DALO appears to have necessary teeth, unlike the South African constitutional right to housing, there are still problems with enforcement of DALO. The two main obstacles to providing affordable housing to those in need in France are lack of available housing units and administrative procedures that are difficult to navigate. There simply are not enough housing units to supply the need. It has been predicted that to meet the anticipated number of DALO applications, 500,000 new units will need to be produced each year.<sup>157</sup> Additionally, those most in need of housing are likely to be those who are least able to successfully apply; they may not know the enforceable right exists, or they may be unable to navigate the relatively complex administrative process.<sup>158</sup> Moreover, overlapping and numerous levels of bureaucracy with differing responsibilities of obligation and execution are likely to make implementation difficult.<sup>159</sup>

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<sup>152</sup> Marie Loison-Leruste & Deborah Quilgars, *Increasing Access to Housing: Implementing the Right to Housing in England and France*, 3 *Eur. J. of Homelessness* 75, 85 (Dec. 2009).

<sup>153</sup> *Id.* at 85 n. 16.

<sup>154</sup> *Id.* at 85-86.

<sup>155</sup> Julie Clauzier, *The DALO Law: A Step Towards Making the Right to Housing a Reality*, HOUSING RIGHTS WATCH (July 6, 2017), <http://www.housingrightswatch.org/content/dalo-law-step-towards-making-right-housing-reality>.

<sup>156</sup> *Id.*

<sup>157</sup> Byrne & Culhane, *supra* note 15, at 385 (citing FONDATION ABBÉ PIERRE, *L'ÉTAT DU MAL-LOGEMENT EN FRANCE [THE STATE OF HOUSING EXCLUSION IN FRANCE]* 139 (2011)).

<sup>158</sup> *See* Byrne & Culhane, *supra* note 15, at 385.

<sup>159</sup> *See* Tars, Lum & Paul, *supra* note 134, at 459-60.

Despite the struggles of enforcement of DALO, the French have had some distinct successes which are now enabling better implementation of the law. To encourage new building of affordable housing, French law requires that plans for new residential projects include twenty percent affordable housing.<sup>160</sup> Hefty fines are imposed upon noncompliant cities, and this tactic has proven to be quite effective at encouraging development of affordable housing.<sup>161</sup>

The French have done a better job of preventing homelessness than either South Africa or the United States. In Paris, about forty percent of hostel rooms are rented by the French government as temporary subsidized housing.<sup>162</sup> Additionally, about fifty percent of renters in France receive a government subsidy for rent.<sup>163</sup> It is estimated that between 2005 and 2010 “approximately 133,000 or 0.22% of French residents experienced homelessness.”<sup>164</sup> Compare that to the 1.56 million homeless persons in the United States during the twelve-month period of October 2008 to September 2009, a figure representing about 0.5 percent of the U.S. population.<sup>165</sup> Census data on the number of homeless in South Africa is almost nonexistent,<sup>166</sup> but the number of South Africans lacking adequate housing is estimated at 7.5 million.<sup>167</sup>

## HOPEFUL OPPORTUNITIES FOR PROVIDING ADEQUATE HOUSING IN MARSEILLE, MIAMI, AND CAPE TOWN

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<sup>160</sup> Jean-Bernard Auby, Professor of Public Law at Sciences Po, Address at Study Space X, Sponsored by Ga. St. U. C. of L., Marseille, France (June 21, 2017).

<sup>161</sup> *Id.*

<sup>162</sup> Tars, Lum & Paul, *supra* note 134, at 438 (. (citing Corinne Nativel, *The Politics of Housing Under France’s New Right*, in *WHERE THE OTHER HALF LIVES: LOWER INCOME HOUSING IN A NEOLIBERAL WORLD* 152, 157 (Sarah Glynn ed., 2009)).

<sup>163</sup> Tars, Lum & Paul, *supra* note 134, at 442 (citing Alan Mallach, *Social Inclusion, Fair Share Goals, and Inclusionary Housing*, in *INCLUSIONARY HOUSING IN INTERNATIONAL PERSPECTIVE* 203, 204 (Nico Calavita & Alan Mallach eds., 2010).

<sup>164</sup> Tars, Lum & Paul, *supra* note 134, at 438 (citing *Être sans domicile, avoir des conditions de logement difficiles* [Without a Domicile, with Difficult Housing Conditions], INSTITUT NATIONAL DE LA STATISTIQUE ET DES ÉTUDES ÉCONOMIQUES [NAT’L INST. OF STATISTICS & ECON. STUDIES], [http://www.insee.fr/fr/themes/document.asp?ref\\_id=ip1330](http://www.insee.fr/fr/themes/document.asp?ref_id=ip1330)).

<sup>165</sup> U.S. DEP’T OF HOUSING & URB. DEV., *THE 2010 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS* 11 (June 2010), <https://www.hudexchange.info/resources/documents/2010HomelessAssessmentReport.pdf>.

<sup>166</sup> The number of street homeless in South Africa in 2008 was estimated to be between 100,000 and 200,000. *More Than Just a Roof: Unpacking Homelessness*, HUMAN SCIENCES RESEARCH COUNCIL, <http://www.hsrc.ac.za/en/review/hsrc-review-march-2015/unpacking-homelessness>.

<sup>167</sup> *Global Homelessness Statistics, Africa*, HOMELESS WORLD CUP FOUNDATION, <https://homelessworldcup.org/homelessness-statistics/> (citing Jacques du Toit, *Local Metropolitan Government Responses to Homelessness in South Africa*, 27 DEV. S. AFR.111 (2010)).

All three cities could learn lessons from the experience of England in addressing its homelessness crisis. The experience of England suggests that adoption of a legally enforceable right to housing is likely to decrease homelessness because of preventative efforts.<sup>168</sup> In other words, rather than only trying to pump out new housing units, the underlying causes of the need for those housing units should be addressed. Even when a city has ample housing for its residents, the city may still have a critical issue with access to housing because of the residents' inability to afford rent. This problem is occurring in all three of the examined port cities as income gaps widen.

Novel approaches to increasing the supply of affordable housing should be adopted. The State of Utah reduced its rate of chronic homelessness by ninety-one percent by trying a different approach to the problem.<sup>169</sup> Rather than requiring housing applicants to beat drug and alcohol addictions before receiving shelter, Utah adopted a model called "Housing First," in which housing is provided prior to services.<sup>170</sup> Denver, Colorado, has taken a two-pronged approach to supplying more affordable housing; Denver has a significant, newly created housing fund and is also piloting a program called "buy-down" to turn existing but vacant high-end apartments into affordable housing units.<sup>171</sup>

Another novel approach has proven quite successful in the port town of Iquique, Chile. Architects were tasked with building homes for 100 families to replace a thirty-year old slum.<sup>172</sup> Their greatest challenge was that the allotted budget was a mere \$7,500 per unit, which was not nearly enough to build comfortably spacious homes.<sup>173</sup> Their solution was to build just half a home for each family. They built the half that included the most difficult construction, and then they left the home for the family members to complete on their own, as they became able.<sup>174</sup> The houses were habitable while undergoing improvements made

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<sup>168</sup> See Byrne & Culhane, *supra* note 15, at 385.

<sup>169</sup> Kelly McEvers, Utah Reduced Chronic Homelessness By 91 Percent; Here's How, NAT'L PUB. RADIO (Dec. 10, 2015), <https://www.npr.org/2015/12/10/459100751/utah-reduced-chronic-homelessness-by-91-percent-heres-how>.

<sup>170</sup> *Id.*

<sup>171</sup> Patrick Sisson, *Solving Affordable Housing: Creative Solutions Around the U.S.*, CURBED (July 25, 2017), <https://www.curbed.com/2017/7/25/16020648/affordable-housing-apartment-urban-development>.

<sup>172</sup> Hallie Busta, *Quinta Monroy Housing*, ARCHITECT MAG. (Jan. 13, 2016), [http://www.architectmagazine.com/project-gallery/quinta-monroy-housing\\_o](http://www.architectmagazine.com/project-gallery/quinta-monroy-housing_o).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*



by the families.<sup>175</sup> Interestingly, property values tripled in one year, but not one of the families chose to move.<sup>176</sup>

Perhaps the most promising solutions lie in new technology. Certainly, the most unusual solution has just been unveiled in Nantes, France. Researchers at the University of Nantes have unveiled a house built by a robot using 3D-print technology.<sup>177</sup> The house, built onsite in just eighteen days, was constructed from a special polymer material which renders the walls extremely insulating and the whole house energy efficient.<sup>178</sup> And, because the walls are printed, there is virtually no waste.<sup>179</sup> Professor Benoit Furet of the University of Nantes declared the printed house to be the future of waste-free construction.<sup>180</sup> The home will be occupied in June 2018 by a family qualifying for social housing.<sup>181</sup> Next up in Nantes will be 3D-print construction of a housing estate and a public reception building.<sup>182</sup>

## CONCLUSION

Miami, Cape Town, and Marseille have taken different approaches in their attempts to legislate and supply affordable housing to those in need. One of these cities has no justiciable right whatsoever, one has a right set out in its national constitution, and one has a right set out in its national law. No statutory right to housing exists in the United States, and Miamians in need of adequate housing must sometimes wait many years to find aid or may even find waiting lists for housing closed, shutting the door on the possibility of aid. While the Constitution of South Africa provides a right to adequate housing, those living in informal housing have thus far had little luck enforcing this right. France has a national law providing a right to housing and a statutory scheme providing an enforcement mechanism, so those in need of housing in Marseille have a means of seeking aid from the state. But that presupposes that those in need know about the legal right, that they have the ability to apply for the aid, and that there are sufficient housing units available.

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Feyi Adegbite, *3D-printed Public Housing Unveiled in France*, PLACE (Apr. 10, 2018), <http://www.thisisplace.org/i/?id=55b5ac96-504d-4df0-8f17-d89af7fd5673>.

<sup>178</sup> *3D-printed House Unveiled in France*, REUTERS TELEVISION (Apr. 12, 2018), <https://www.reuters.com/video/2018/04/12/3d-printed-house-unveiled-in-france?videoId=417032386>.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *World's First 3D-printed House Unveiled in France*, REUTERS TELEVISION (Apr. 11, 2018), <https://www.rt.com/news/423769-3d-printed-house-france/>.

<sup>182</sup> *Id.*

Examining the frameworks and the efforts of these three port cities establishes that it is not enough merely to create a legal right to housing. There must also be concrete provisions for enforceability and some kind of communication and support mechanism to inform potential recipients of the options. Additionally, because each of these cities has a dearth of affordable housing units, the best chances for success lie not just in passing legislation and providing more housing; the best successes also encompass adopting measures to prevent homelessness and embracing new housing production technologies.