"What Shall I Give My Children?": Installment Land Contracts, Homeownership, and the Unexamined Costs of the American Dream

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Gwendolyn Brooks's "The Children of the Poor" is a meditation on parenthood in times of hardship, with a particular focus on the impact of poverty and social injustice. The title of this Comment comes from the second sonnet of Brooks's tripartite poem: "What shall I give my children? who are poor, / Who are adjudged the leastwise of the land." In the poem, Brooks asks an immediate question: How will she respond to her children's requests right now for material goods and acceptance that she cannot give them? Unable to fulfill those needs, the mother in the poem instructs her children in their reality, providing lessons that will hopefully support them throughout their lives. This is the much larger question for parents, who worry not just for their children's present but also for their future. Echoing Brooks's simultaneous focus on material needs and emotional resilience, this Comment is about homeownership—the cornerstone of the American Dream and an "essential" for anyone hoping to pass on generational wealth to their children.

Historically, there can be no doubt that homeownership has allowed a great many Americans, primarily White Americans, to build wealth and provide their children with financial stability. For those Americans able to become homeowners, especially those who did so in the mid-twentieth century, the promises of homeownership have been fulfilled. But for those cut out of the primary homeownership market, especially Black Americans, those promises have largely proved empty. In fact, the financing devices available to low-income and minority communities have had significant adverse effects on those communities and their ability to pass on any kind of wealth or prosperity to their children. This Comment explores the installment land contract (ILC), one financing device that has been used in lieu of a mortgage for those who cannot qualify for traditional mortgage financing.

The ILC was especially prominent during the mid-twentieth century in Black communities shut out of the mortgage market by the Federal Housing Administration. Since 2008, the ILC has again become popular: increased regulation of the mortgage market has made it more difficult for low-income homebuyers to get mortgages, but the underlying desire to participate in the American Dream has not changed. This Comment looks at the history of the ILC and, using that as a

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backdrop, explores the best way to take advantage of the financing device while still protecting potential buyers from the worst of its associated risks. To that end, this Comment concludes that current regulation is inadequate to appropriately deal with the risks of the ILC. This Comment proposes the adoption of three protective measures: (1) imposing mandatory purchase counseling, (2) creating venue requirements that prohibit eviction courts from hearing ILC cases, and (3) making per se unconscionable all ILCs that include both an "as is" deed and a forfeiture clause.

INTRODUCTION

A white picket fence. A house in the suburbs. 2.5 kids. There may be nothing more central to the modern conception of the

American Dream[1] than homeownership.[2] John Locke theorized that everyone has the right to life, liberty, and property,[3] and the protection of those rights is at the core of the US Constitution.[4] The ability to own a home is considered a fundamental part of being American—not merely for the psychological benefits of a stable housing situation but also as a long-term investment for wealth building.[5] The pursuit of that dream, and the need to present that dream as universally attainable, has justified various policies that ultimately strip wealth from low-income and minority neighborhoods.[6] In particular, the purported benefits of homeownership have justified loose regulation of predatory contracts that offer low-income households an elusive promise of homeownership while extracting profit from those same households. One alternative form of financing for homeownership is the installment land contract, a popular financing tool for low-income homeowners which has a long history of predation, especially in low-income and minority communities. This Comment explores the historical and current uses of the installment land contract and the best ways to effectively protect buyers from this contract's most predatory qualities.

This Comment uses the term "installment land contract," or ILC, but the terminology varies across states.[7] The ILC is what is

1 It is a relatively modern phenomenon to conflate the American Dream and material success, but there is no doubt that at this time homeownership is generally considered part of the American Dream. See Robert J. Shiller, *The Transformation of the 'American Dream'* (NY Times, Aug 4, 2017), archived at https://perma.cc/53WT-4T6B.

2 See Michael Dolan, *How Did the White Picket Fence Become a Symbol of the Suburbs?* (Smithsonian, Apr 2019), archived at https://perma.cc/MGZ9-UC73.

3 *Locke's Political Philosophy* (Stanford Encyclopedia of Philosophy, Jan 11, 2016), archived at https://perma.cc/2SU3-DH58.

4 US Const Amend V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); US Const Amend XIV, § 1. James Madison, in his essay on property, stated, "Government is instituted to protect property of every sort." James Madison, *Property* (originally published 1792), in Philip B. Kurland and Ralph Lerner, eds, 1 *The Founders' Constitution* (Chicago 1986), archived at https://perma.cc/BL8Q-TTLU.

5 The Editorial Board, *Homeownership and Wealth Creation* (NY Times, Nov 29, 2014), archived at https://perma.cc/8QV4-6Y6N.

6 Ta-Nehisi Coates, *The Case for Reparations* (The Atlantic, June 2014), archived at https://perma.cc/Y8WL-2H7F. See also Christopher E. Herbert, Daniel T. McCue, and Rocio Sanchez-Moyano, *Is Homeownership Still an Effective Means of Building Wealth for Low-Income and Minority Households? (Was It Ever?)* *9–13 (Joint Center for Housing Studies of Harvard University, Sept 2013), archived at https://perma.cc/6QE5-Q66Z.

7 This Comment uses the term "ILC" because it is the term that appears most often in scholarly literature, court cases, and legislation. However, for many ILC buyers, the precise term used by the state is beside the point and any solutions directed toward dealing with ILC abuses should focus on how the contract functions, not on what label is used. This is most obviously true for labels like "ILC," "contract for deed," "bond for deed," "real

colloquially known as a rent-to-own[8] housing contract; that is, a seller-financed agreement wherein the buyer pays a relatively small down payment and then pays off the remainder of the purchase price plus interest in installments, while the seller retains title until the loan is repaid in full.[9] The many terms used to refer to the ILC rarely reflect a substantive legal difference. However, there are two types of contracts which sometimes fall under the umbrella of rent-to-own contracts and may look like ILCs but include legal provisions that make them functionally distinct from the ILC. While the terminology varies here as well, I refer to these contracts as "lease-purchase" and "lease-option" contracts. A lease-option contract functions as a typical lease with an option to buy the property at the end of a period of years—a lease-purchase contract functions similarly, but requires the buyer to purchase after the lease term expires.[10] Under these agreements, the tenant-buyer should receive all attendant landlord-tenant protections during the period of the lease.[11] However, some contracts labeled as lease-purchase are functionally indistinguishable from the typical understanding of an ILC.[12] The scope of this Comment, as well as relevant legislation, should be interpreted to extend to agreements that function as ILCs—no matter what label is used.[13]

estate contract," "land contract," and "rent-to-own"—but also for terms like "lease-option" or "lease-purchase."

8 See, for example, Matthew Goldstein, *New York State Officials Sue 'Predatory' Rent-to-Own Home Seller* (NY Times, Aug 1, 2019), archived at https://perma.cc/ZXD2-YW8E.

9 James E. Larsen, *Installment Land Contracts, Single-Family Houses and Bargaining Power*, 9 Intl J Housing Mkts & Analysis 340, 341 (2016).

10 Jean Folger, *Rent-to-Own Homes: How the Process Works* (Investopedia, July 8, 2019), archived at https://perma.cc/8ED5-VWR6.

11 Jeremiah Battle Jr, Sarah Mancini, Margot Saunders, and Odette Williamson, *Toxic Transactions: How Land Installment Contracts Once Again Threaten Communities of Color* *9 (National Consumer Law Center, July 2016), archived at https://perma.cc/8SAH-KUY5. These authors use the term "lease-purchase" to refer to what I've defined as lease-option contracts and do not distinguish between the two. I distinguish here between the two types of contracts as an attempt to clarify when a distinction in terminology might indicate a functional legal difference, but these terms are not consistent across states or even necessarily across sellers within a state.

12 Id.

13 For a defense of the use of a functional-equivalence test in this context, albeit for treating certain ILCs as leases, see Eric T. Freyfogle, *The Installment Land Contract as Lease: Habitability Protections and the Low-Income Purchaser*, 62 NYU L Rev 293, 310–19 (1987). Professor Eric T. Freyfogle's argument is a necessary corollary to this Comment: if courts do not view the agreement in question as an ILC protected by the necessary statutes, buyers should receive the protections of landlord-tenant law, including the implied warranty of habitability. See id. But see generally Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U Chi L Rev 145 (2020) (arguing based on

ILCs are unique agreements for those seeking stable housing. Unlike mortgages, as buyers pay installments, they do not become part owners of the property—that is, they do not build equity in their home. Unlike leases, the sellers have no duty to provide habitable housing and no duty to make repairs while the buyers live there. Thus, if buyers default, sellers can remove them from the home, keep all the payments that have been made, and reap the benefits of any repairs made while the buyers lived there.

This Comment argues that the interplay of "as is" deeds and forfeiture clauses is the core of what makes the ILC intolerable as a financing tool, and explains that this interplay should shape how legislatures regulate ILCs.[14] Part I provides a brief introduction to the ILC and its most pertinent characteristics. Part II explores the history of the ILC, focusing specifically on its use in majority Black neighborhoods in Chicago, Illinois, during the 1950s and '60s. I focus on the history in Chicago for two reasons: (1) the largest litigation effort challenging the use of the ILC was based in Chicago; and (2) Illinois historically had some of the weakest ILC protections in the country, but in 2018 implemented a new statute strengthening protections for ILC buyers.

Part III surveys recent legislation reforming ILCs in the wake of their resurgence in popularity after the 2008 subprime mortgage crisis. Part III also explores the effect of aggressive regulation on the ILC market in Texas, where the strongest regulations have been in place since 2000. Part IV explores why these measures either have failed or are likely to fail, with a focus on the exploitative nature of the ILC market. Finally, Part V suggests that legislatures and courts should seek to regulate the ILC by: (1) requiring sellers to provide prepurchase counseling in the mold of the Home Ownership and Equity Protection Act of 1994[15] (HOEPA); (2) mandating that ILC cases are heard in the same courts that typically hear mortgage cases, not the courts that typically hear eviction cases; and (3) finding per se unconscionable any ILC that includes both a forfeiture clause and sells the property "as is." Ideally, these actions would be taken in conjunction

empirical evidence that the implied warranty of habitability has failed to offer meaningful protections to tenants).

14 Since ILC purchasers tend to be low income, this Comment accepts that these contracts are riskier for sellers and that sellers may therefore apply much higher interest rates.

15 Pub L No 103-325, 108 Stat 2190, codified in various sections of Title 15.

with the Consumer Financial Protection Bureau (CFPB), ensuring that buyers in all states receive appropriate protection.

I. BACKGROUND ON THE ILC

Most ILCs share certain characteristics. Perhaps the defining characteristic of the ILC is that, unlike a traditional mortgage, buyers do not build equity in the house over time. The inability to build equity, and thus an ownership interest, creates a large risk for buyers—who are at risk of simultaneously losing both their housing and any investment they have attempted to make in the property. ILCs generally require a lower down payment than a traditional mortgage.[16] To speed up the timeline of the loan, it is typically partially amortizing[17] with a balloon payment[18] completing loan repayment.[19] Interest rates on ILCs are typically substantially higher than interest rates on traditional loans; one study of ILCs in Montgomery County, Ohio, found that of 1,427 ILCs examined, 1,077 had "above-market" interest rates as compared to the average Federal Housing Administration–insured loan offered during the same period.[20] The *Chicago Reader* recently published a study showing that the three big ILC lenders selling in Chicago in the post–Great Recession era offer contracts with interest rates between 8 and 10 percent.[21]

However, one of the key difficulties with the ILC is that, as a creature of state law, it is treated disparately across the United States. This can be seen just in the terminology that is used. States variously refer to ILCs as bonds for title,[22] real estate contracts,[23] bonds for deed,[24] land installment contracts,[25] contracts

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16 Larsen, 9 Intl J Housing Mkts & Analysis at 341 (cited in note 9).

17 *Black's Law Dictionary* 36 (West 3d Pocket Ed 2006) (defining "amortization" as "[t]he act or result of gradually extinguishing a debt . . . by contributing payments of principal each time a periodic interest payment is due").

18 Id at 528 (defining a "balloon payment" as "[a] final loan payment that is [usually] much larger than the preceding regular payments and that discharges the principal balance of the loan").

19 Larsen, 9 Intl J Housing Mkts & Analysis at 341 (cited in note 9).

20 Id at 343–44.

21 Rebecca Burns, *The Infamous Practice of Contract Selling Is Back in Chicago* (Chi Reader, Mar 1, 2017), archived at https://perma.cc/NUZ9-E6NN. The three companies examined by Burns were Harbour Portfolio Advisors, Vision Property Management, and Battery Point Financial.

22 See *Gay v Tompkins*, 385 S2d 973, 977 (Ala 1980); *Southern Land & Cattle Co v Simmons*, 415 SE2d 329, 329–30 (Ga App 1992).

23 See Iowa Code § 656.1 et seq.

24 See La Rev Stat Ann § 2941 et seq; 14 Me Rev Stat Ann § 6203-F.

25 See 33 Me Rev Stat Ann §§ 481–82; Md Real Prop Code Ann § 10-101 et seq.

for deed,[26] and executory contracts.[27] Some sources refer to them simply as land contracts[28] or real estate contracts.[29] A buyer might say they have entered into a rent-to-own agreement, though such terminology rarely appears in statutes or court cases.[30]

The different names for the ILC reflect that it is treated drastically different from state to state. For example, Oklahoma has treated the ILC as a mortgage since 1976.[31] At the time of writing, Oklahoma is the only state that has legislatively decided to treat the ILC as a mortgage—the solution recommended by the Third Restatement of Property.[32] Treating the ILC as a mortgage provides more stringent protections for buyers, but also makes the financing device indistinguishable from others. Thus, it decreases the likelihood that sellers will offer these contracts.

A number of state courts have exhibited some reluctance to fully enforce the harshest terms of ILCs, particularly with regard to the fact that buyers do not build equity in the property. Thus, those courts have attempted to apply equitable principles of laws, meaning that they have attempted to determine what the most "fair" result would be by weighing the buyer's interest in the property and payments made against the seller's interest in the property and payments not yet made. Such a consideration may

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26 See Minn Stat Ann § 559.202; Mont Code Ann § 70-20-115; NC Gen Stat Ann § 47H; 16 Okla Stat Ann § 11A.

27 See SD Cod Laws § 21-50; Tex Prop Code Ann § 5.062; Va Code Ann § 55.1-3000.

28 See, for example, N. William Hines, *Forfeiture of Installment Land Contracts*, 12 U Kan L Rev 475, 476 (1964).

29 See generally, for example, Kathryn Stryker, Note, *Vendor and Purchaser—Real Estate Contracts—The Future of the Real Estate Contract in New Mexico:* Huckins v. Ritter, 14 NM L Rev 531 (1984).

30 Journalists commonly refer to Vision Property Management as a rent-to-own operator. See, for example, Goldstein, *New York State Officials Sue 'Predatory' Rent-to-Own Home Seller* (cited in note 8); Ben Lane, *Rent-to-Own Operator Vision Property Management Shut Down in Wisconsin* (HousingWire, Oct 11, 2017), archived at https://perma.cc/WAX3-QFU8.

31 16 Okla Stat Ann § 11A ("All contracts for deed for purchase and sale of real property . . . shall to that extent be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.").

32 Restatement (Third) of Property § 3.4 (1997) (arguing that "[t]he answer to the credit problem lies not in perpetuating an unpredictable and problematic financing device that often falls far short of being efficient and inexpensive," but instead in treating all real estate security transactions as mortgages). The Restatement lists a number of states which have case law suggesting that courts will treat ILCs as mortgages. Such judicial doctrines are of dubious assistance to buyers, given the inconsistency with which these protections are applied. See Lisa A. Danielson, Note, *Installment Land Contracts: The Illinois Experience and the Difficulties of Incremental Judicial Reform*, 1986 U Ill L Rev 91, 101–09.

include an examination of whether the buyer has made significant repairs, how many payments have been made, and whether the default was willful on the part of the buyer.[33] Other states, including Illinois before its 2018 legislation,[34] have enforced ILCs even where buyers made equitable arguments to keep their housing.[35] When states have legislatively regulated ILCs, they have typically used some combination of mandatory disclosures, recording requirements, and a statutory equitable right of redemption. These approaches are surveyed thoroughly in Part III.

For the purposes of this Comment, the two most important characteristics of a typical ILC are the requirement to purchase the property "as is," which is a contractual requirement that buyers purchase the property in its existing condition with no further repairs by the seller,[36] and the infamous forfeiture clause, which allows sellers to take back the property through the eviction process and retain all the payments already made on the home.[37] The *Chicago Reader* found that all three big companies currently selling ILCs in Chicago "require customers to purchase properties 'as is' and make all repairs in addition to paying property taxes and home owner's insurance."[38] The combination of these clauses forms the core of the concern about the predatory nature of ILCs, which "combine[ ] all the responsibilities of homeownership with

33 See *Jenkins v Wise*, 574 P2d 1337, 1341 (Hawaii 1978) ("[W]here the vendee's breach has not been due to gross negligence, or to deliberate or bad-faith conduct on his part, and the vendor can reasonably and adequately be compensated for his injury, courts in equity will generally grant relief against forfeiture and decree specific performance."). See also, for example, *Curry v Tucker*, 616 P2d 8, 13 (Alaska 1980); *Skendzel v Marshall*, 301 NE2d 641, 644–46 (Ind 1973); *Stoltz v Grimm*, 689 P2d 927, 929–30 (Nev 1984); *McLacklan v Thompson*, 122 Misc 2d 239, 241–42 (NY Sup 1983). For other cases applying these principles, see *Lewis v Premium Investment Corp*, 568 SE2d 361, 364 (SC 2002).

34 See Part III.

35 See, for example, *Eade v Brownlee*, 193 NE2d 786, 789 (Ill 1963) ("[I]t was the intention of the parties that no equitable conversion would be made and that the purchaser would take no title in the premises until delivery of deed or full payment.").

36 *Black's Law Dictionary* (West 11th ed 2019) (defining "as is" and explaining that "[g]enerally, a sale of property 'as is' means that the property is sold in its existing condition, and use of the phrase *as is* relieves the seller from liability for defects in that condition") (emphasis in original).

37 *Black's Law Dictionary* 297 (West 3d Pocket Ed 2006) (defining "forfeiture clause" as "[a] contractual provision stating that, under certain circumstances, one party must forfeit something to the other").

38 Burns, *The Infamous Practice of Contract Selling* (cited in note 21).

all the disadvantages of renting—while offering the benefits of neither."[39]

The forfeiture clause is, arguably, the defining feature of an ILC, generating both the most litigation and the most scholarly debate.[40] This clause "allows the seller to declare the contract terminated, retain all payments as liquidated damages, and retake possession of the premises without legal process upon the buyer's default."[41] As harsh as the clause appears—and often is in practice—scholars have long defended it as the primary reason sellers continue to enter into these kinds of contracts.[42] Still, recognizing the risk of serious inequity, especially if a buyer has paid off a good portion of the total price, legislatures and courts have worked to limit the reach of the forfeiture clause. Some statutes implement grace periods, most courts tend to weigh the equities before strictly enforcing forfeiture, and some states have eliminated the remedy entirely or for residential properties.[43] With this legal background in mind, Part II explores the history of the ILC in practice, focusing on its use in minority neighborhoods.

II. HISTORY OF THE ILC

Focusing on the Midwest, and Chicago specifically, this Part explores the history of the ILC. Part II.A examines how this history intersects with the civil rights movement and historical housing discrimination against Black Americans.[44] As discussed in

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[39] Coates, *The Case for Reparations* (cited in note 6). The combination of clauses means that ILC buyers must pay for repairs, pay property taxes and insurance, and pay the seller on time. Failure to pay the seller on time triggers the forfeiture clause.

[40] See Stacy Purcell, *The Current Predatory Nature of Land Contracts and How to Implement Reforms*, 93 Notre Dame L Rev 1771, 1772 n 14 (2018) (collecting sources).

[41] Juliet M. Moringiello, *A Mortgage by Any Other Name: A Plea for the Uniform Treatment of Installment Land Contracts and Mortgages Under the Bankruptcy Code*, 100 Dickinson L Rev 733, 740 (1996).

[42] See id at 741. See also Hines, 12 U Kan L Rev at 481 (cited in note 28) (arguing that "[i]f we did not have the installment land contract, we would very likely have to invent it"); Thomas Leo McKeirnan, *Preserving Real Estate Contract Financing in Washington: Resisting the Pressure to Eliminate Forfeiture*, 70 Wash L Rev 227, 246 (1995); Eric T. Freyfogle, *Vagueness and the Rule of Law: Reconsidering Installment Land Contract Forfeitures*, 1988 Duke L J 609, 649–50 (noting that "foreclosure largely eliminates the installment contract as a distinct financing option, at least so long as purchasers realize their right to demand a foreclosure sale"); James Geoffrey Durham, *Forfeiture of Residential Land Contracts in Ohio: The Need for Further Reform of a Reform Statute*, 16 Akron L Rev 397, 401 (1983).

[43] Moringiello, 100 Dickinson L Rev at 741–43 (cited in note 41) (reviewing various state methods to protect buyers from the forfeiture clause).

[44] This Comment explores briefly how these patterns of discrimination were created and maintained by specific government policies. For a more complete look at this history,

Part II.B, because of this discrimination, the ILC further contributed to the wealth gap between White and Black communities in the 1950s and '60s. However, the predatory concerns of the ILC were less pressing in the second half of the twentieth century because the Fair Housing Act of 1968[45] prohibited the de jure discrimination that blocked Black Americans from entire sections of the housing market. Because of this protection, Black Americans were able to access traditional mortgages. Finally, Part II.C explores how the 2008 subprime mortgage crisis revived the ILC and its associated predatory risks when used in low-income communities.[46]

A. The "Poor Man's Mortgage": The Midwest, Farming, and Railroads

The ILC has "generally experienced a cyclical popularity in the midwest."[47] It first became popular in the second half of the nineteenth century, when railroads began selling off the land they had acquired in the course of building.[48] Then, during the Great Depression, lending institutions used the ILC to resell land they took through the foreclosure process.[49] During this period, ILCs tended to be more buyer-friendly because these companies were eager to get rid of the land.[50] After World War II, the ILC once again surged in popularity due to an increased demand for low-equity financing, increased secondary financing by landowners, and income tax savings.[51] In Kansas alone, the number of farms purchased on contract more than tripled between 1946 and 1960.[52] Courts generally enforced these contracts, favoring freedom of contract and laissez-faire policies.[53]

This history of the ILC led at least one jurist to call it the "poor man's mortgage,"[54] reflecting its status as a replacement financing device for those who may not qualify for traditional mortgages

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see generally Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (Liveright 2017) (arguing that the federal government, and the Supreme Court in particular, sanctioned unconstitutional housing discrimination against Black Americans throughout the United States in the twentieth century).

45 Pub L No 90-284, 82 Stat 81, codified as amended at 42 USC § 3601 et seq.

46 See Burns, *The Infamous Practice of Contract Selling* (cited in note 21).

47 Hines, 12 U Kan L Rev at 476 (cited in note 28).

48 Id.

49 Id at 476–77.

50 Id at 477.

51 Hines, 12 U Kan L Rev at 477 (cited in note 28).

52 Id.

53 Purcell, Note, 93 Notre Dame L Rev at 1773–74 (cited in note 40).

54 *Ellis v Butterfield*, 570 P2d 1334, 1336 (Idaho 1977).

and thus are more likely to agree to riskier contracts.[55] That judge explained that "the vendor, as with a mortgage, finances the purchaser's acquisition of the property by accepting installment payments on the purchase price over a period of years, but the purchaser does not receive the benefit of those remedial statutes protecting the rights of mortgagors."[56]

The early uses of the ILC attracted some concern about the harshness of the ILC forfeiture clause: In 1937, the New York Legislature proposed a bill[57] to protect the rights of the purchaser, and by 1957, sixteen states had passed similar statutes.[58] By 1950, California courts had read into the law strong protections against forfeiture.[59] As the next sections explore, these protections did very little to safeguard communities from the most insidious aspects of the ILC, which became especially prevalent in minority communities that were shut out from other homeownership markets.

B. Racial Discrimination and the Contract Buyers League

By the 1950s, the ILC gained prominence in urban centers as a result of racial discrimination by both private and government actors.[60] As a sign of how widespread and notorious the ILC became in this period, Ta-Nehisi Coates's *The Case for Reparations* framed its narrative through the history of the ILC in Chicago.[61] For example, between 1934 and 1968, an estimated 85 percent of homes purchased by Black Americans in Chicago were purchased via ILC.[62] A major reason for the ILC's prominence among Black Americans was the Federal Housing Administration's discriminatory policies. The Federal Housing Administration's practices left the door open for lenders looking to profit off hopeful Black homebuyers. In response, private actors were able to offer

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55 See Hines, 12 U Kan L Rev at 476 (cited in note 28).

56 *Ellis*, 570 P2d at 1336.

57 *Act, Recommendation, and Study Relating to Installment Land Contracts*, NY State Law Revision Commission, Legislative (1937).

58 Richard K. Jacoby, Note, *Forfeiture of Payments Under a Land Purchase Contract in Montana*, 19 Mont L Rev 50, 51 (1957).

59 See, for example, *Barkis v Scott*, 208 P2d 367, 371–72 (Cal 1949) (holding that buyers who negligently defaulted were still entitled to specific performance, having paid a substantial portion of the contract price).

60 Rothstein, *The Color of Law* at 77 (cited in note 44) ("[T]he [Federal Housing Administration] sponsored whites-only suburbanization in the mid-twentieth century.").

61 Coates, *The Case for Reparations* (cited in note 6).

62 Cameron Custard, Comment, *Installment Land Contracts & Low-Income Homebuyers in Chicago: A Call for Legislative Reform*, 67 DePaul L Rev 527, 534–35 (2018).

extraordinarily predatory terms to Black Americans who were simply looking to share in the American Dream. What happened was in stark contrast to that dream: "Blacks were herded into the sights of unscrupulous lenders who took them for money and for sport."[63] These Black Americans, in seeking to create a foundation of prosperity for their children, were shut out from the new mortgage market which would become the foundation for many White families to build wealth for generations to come.

The Federal Housing Administration, founded in 1934, was widely celebrated for making homeownership accessible—though this success was, by design, limited to White people.[64] Thus, "the [Federal Housing Administration] *explicitly* refused to back loans to black people or even other people who lived near black people."[65] The government's Home Owners' Loan Corporation (HOLC) used data and evaluations from local real estate professionals to assign grades to community areas. The grades ranged from "A" to "D." Neighborhoods that were considered minimal risk in terms of mortgage security and therefore were safe investments for homebuyers and lenders alike received "A" grades, whereas neighborhoods that were considered "hazardous" received "D" grades.[66] This is now commonly known as "redlining," because the "D" areas were colored in red on the HOLC's maps.

The HOLC used explicitly racial and racist criteria in evaluating neighborhoods. The HOLC codes for the maps described green areas as "hot spots" that were "homogeneous"; blue areas were "completely developed" but "still good"; yellow areas had "expiring restrictions or lack of them[, and] infiltration of a lower grade population"; and red areas had "detrimental influences" such as "undesirable population or infiltration of it."[67] The North Lawndale neighborhood in Chicago—a neighborhood that looms prominently in the history of the ILC in Chicago as explored below—was a collection of C ("Definitely Declining") and D ("Hazardous") grade

63 Coates, *The Case for Reparations* (cited in note 6). Coates further provided a quote from a housing attorney: "It was like people who like to go out and shoot lions in Africa. It was the same thrill. . . . The thrill of the chase and the kill." Id.

64 Alexis C. Madrigal, *The Racist Housing Policy That Made Your Neighborhood* (The Atlantic, May 22, 2014), archived at https://perma.cc/TN9C-W5RR. See also Rothstein, *The Color of Law* at 63–67 (cited in note 44) (exploring the policies of the Federal Housing Administration and the Home Owners' Loan Corporation (HOLC) and their racial implications).

65 Madrigal, *The Racist Housing Policy* (cited in note 64) (emphasis in original).

66 *Introduction*, in Robert K. Nelson, et al, *Mapping Inequality: Redlining in New Deal America* (Digital Scholarship Lab of University of Richmond), archived at https://perma.cc/H2GL-FBFA.

67 Madrigal, *The Racist Housing Policy* (cited in note 64) (emphasis omitted).

areas.[68] North Lawndale's demographics changed drastically in the middle of the twentieth century. In 1930, 99.6 percent of its residents were White.[69] In 1946, North Lawndale was home to approximately one quarter of Chicago's Jewish population.[70] By 1960, 91.1 percent of North Lawndale's residents were Black.[71] The description of one area in North Lawndale is emblematic of the racial concerns of the HOLC:

> The future of this area is most uncertain. About 50% of the houses are pressing for sale by institutions who have been dumping their holdings in the neighborhood during the past year. Demand is very weak and limi[te]d to low-class Italian[s] who will buy only at sacrifice prices. The few Jewish buyers will not pay normal prices either, and rents obtainable are not sufficient to meet operating expenses. Vandalism is prevalent and vacant units must maintain a caretaker. Negro [sic] is filtering in, first as caretakers, and then moving in their families to occupy basement rooms not equipped as living quarters. . . . *No sales [ha]ve been made to Negroes [sic] yet, but it is doubtful that they can be held out long*. Streets and alleys are full of filth and properties poorly maintained.[72]

Another area description worried about what was to become of the neighborhood: it noted that "less desirable populace from closer to town areas are spreading into this section," that "[c]osmopolitan population is definitely adversely affecting prices and general desirability," and that the locality "gives the appearance of becoming a slum area."[73] Yet another section indicated that "Neg[r]o encroachment is threatening."[74] A fourth note describing a North Lawndale area stated that "Jewish [sic] moving from east

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68 *Chicago, IL*, in Nelson, et al, *Mapping Inequality* (cited in note 66), online at https://dsl.richmond.edu/panorama/redlining/#loc=9/41.944/-88.32&city=chicago-il (visited May 17, 2020) (Perma archive unavailable).

69 Amanda Seligman, *North Lawndale* (Encyclopedia of Chicago), archived at https://perma.cc/HS7C-SE22.

70 Id.

71 Id.

72 *Chicago, IL: Area D35* (emphasis added), in Nelson, et al, *Mapping Inequality* (cited in note 66), online at https://dsl.richmond.edu/panorama/redlining/#loc=9/41.944/-88.32&city=chicago-il&area=D35 (visited May 17, 2020) (Perma archive unavailable).

73 *Chicago, IL: Area D36*, in Nelson, et al, *Mapping Inequality* (cited in note 66), online at https://dsl.richmond.edu/panorama/redlining/#loc=9/41.944/-88.32&city=chicago-il&area=D36 (visited May 17, 2020) (Perma archive unavailable).

74 *Chicago, IL: Area C161*, in Nelson, et al, *Mapping Inequality* (cited in note 66), online at https://dsl.richmond.edu/panorama/redlining/#loc=9/41.944/-88.32&city=chicago-il&area=C161 (visited May 17, 2020) (Perma archive unavailable).

side of Pulaski into this neighborhood, but area continues to hold many original owners," and that the "[p]roperties [are] fairly priced . . . but buyers are largely Jewish and sharp bargainers."[75]

Based on grades and descriptions like these, the Federal Housing Administration refused to provide insurance for mortgages in majority Black neighborhoods.[76] Sellers stepped into the gap, offering seller-financed ILCs with predatory terms.[77] The end result was huge windfalls for those who "sold" houses via ILC and devastating, long-lasting effects for the neighborhoods deemed undesirable.[78] According to Coates, "[c]ontract sellers became rich. North Lawndale became a ghetto."[79] Sellers made huge profits because they forced the buyers to be responsible for repairs, taxes, and insurance—all on top of their monthly payments. They also used the forfeiture clauses to remove buyers quickly if and when they defaulted.[80] Sellers then resold the home on contract, starting the cycle again.

In the 1960s, these practices led to the formation of the Contract Buyers League (CBL) in North Lawndale.[81] The group was a "coalition of socially progressive Catholics, black members of the Lawndale neighborhood in Chicago, where [50] percent of the homes were purchased on installment contracts, and white college students."[82] The CBL engaged in several campaigns to combat the predatory ILC market: they picketed, instituted a strike on making their monthly payments, raised money to appeal evictions if an eviction order had been put in place, and, ultimately, physically resisted eviction if necessary.[83] But when these attempts were unsuccessful, the CBL turned to the courts.

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75 *Chicago, IL: Area C160*, in Nelson, et al, *Mapping Inequality* (cited in note 66), online at https://dsl.richmond.edu/panorama/redlining/#loc=9/41.944/-88.32&city=chicago-il&area=C160 (visited May 17, 2020) (Perma archive unavailable).

76 Custard, Comment, 67 DePaul L Rev at 535 (cited in note 62).

77 See Megan S. Wright, *Installment Housing Contracts: Presumptively Unconscionable*, 18 Berkeley J Afr Am L & Pol 97, 100–04 (2016).

78 See Coates, *The Case for Reparations* (cited in note 6) (noting that some scholars have compared the influx of sellers to people who go hunting lions for the thrill).

79 Id.

80 Wright, 18 Berkeley J Afr Am L & Pol at 102 (cited in note 77).

81 Coates, *The Case for Reparations* (cited in note 6). The group formed in 1968 to challenge predatory ILCs in North Lawndale. James Alan McPherson, *"In My Father's House There Are Many Mansions—And I'm Going to Get Me Some of Them Too": The Story of the Contract Buyers League*, 229 Atlantic Monthly 51, 54–59 (Apr 1972).

82 Wright, 18 Berkeley J Afr Am L & Pol at 105 (cited in note 77).

83 Id.

In a pair of cases, the CBL alleged that sellers offering ILCs discriminated against them on the basis of race.[84] The first case, *Contract Buyers League v F&F Investments*,[85] made complaints under a number of civil rights statutes, and both the Thirteenth and Fourteenth Amendments.[86] Relying on the Supreme Court's decision in *Jones v Alfred H. Mayer Co*,[87] which held that the Civil Rights Act of 1866 prohibited private discrimination in real estate sales, a district court in Chicago determined that there was "no reason to distinguish a refusal to sell on the ground of race and a sale on discriminatory prices and terms."[88] The court therefore denied a motion to dismiss with respect to the claims under the Civil Rights Act of 1866.[89] However, the CBL was ultimately unable to convince a jury that discrimination had occurred.[90] Specifically, the CBL was unable to show that Whites had received comparatively better contracts because some businesses sold only to Blacks, which made it difficult to prove that similarly situated White buyers received better contracts.[91] These contract sellers didn't sell to White people—they didn't have to, and White people were generally able to qualify for traditional mortgage financing due to the support of the federal government. Further, some scholars have indicated that juries might have been less sympathetic because housing prices rose between the time the contracts were written and the cases were heard, which made the prices seem reasonable by comparison.[92]

In the second case, *Clark v Universal Builders, Inc*,[93] the CBL proposed two theories of discrimination: a traditional theory of discriminatory intent, and a novel "exploitation" theory of discrimination.[94] The novel theory, which parallels modern disparate impact claims, alleged "1) that during the relevant time period a 'dual housing market' existed as a result of residential segregation and 2) that defendants unlawfully took advantage of this

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84 Id at 106. See generally *Contract Buyers League v F & F Investment*, 300 F Supp 210 (ND Ill 1969); *Clark v Universal Builders, Inc*, 706 F2d 204 (7th Cir 1983).

85 300 F Supp 210 (ND Ill 1969).

86 Id at 213.

87 392 US 409 (1968).

88 *Contract Buyers League*, 300 F Supp at 216.

89 Id.

90 Wright, 18 Berkeley J Afr Am L & Pol at 107 (cited in note 77).

91 Id at 107 n 73.

92 Beryl Satter, *Family Properties: Race, Real Estate, and the Exploitation of Black Urban America* 367 (Metropolitan 2009).

93 706 F2d 204 (7th Cir 1983).

94 Id at 206.

situation by demanding unreasonable prices and terms of sale from plaintiffs."[95] Ultimately, the Seventh Circuit concluded that the plaintiffs had not proven either theory and upheld the district court's judgment in favor of the defendant.[96] The Seventh Circuit noted that "plaintiffs succeeded in painting a deplorable picture of the discrimination reflected in Chicago housing patterns," but the court did not find such evidence sufficient to establish the alleged "dual housing market."[97] However, the Seventh Circuit determined that the exploitation theory could create a legally cognizable injury, but that in this case, the CBL had failed to fully prove their case.

Though the CBL was unsuccessful in its litigation efforts, its work helped to end the predatory use of ILCs in Black neighborhoods. It drew attention from the public, creating enough pressure that ultimately many buyers had the leverage to renegotiate the terms of their ILCs.[98] The publicity around these cases also contributed to public pressure to end redlining, opening the traditional mortgage market to Black Americans to some extent.[99] Additionally, the CBL's formation coincided with the passage of the Fair Housing Act in 1968.[100] This timing was coincidental, a national response to the recently published Kerner Commission Report, which had warned of the increasing separation between White and Black communities in the United States.[101] As such, the use of exploitative predatory lending and redlining was prohibited by both federal and state legislation.[102] The ILC did not entirely disappear during this time, but it was no longer the only way for many Black Americans to seek homeownership.

However, the effects of these policies and exploitative practices have not disappeared. As Coates notes, "North Lawndale is now on the wrong end of virtually every socioeconomic indicator."[103] This is reflective of a larger pattern: Black families are less

95 Id at 210.

96 Id at 213.

97 *Clark*, 706 F2d at 211.

98 Wright, 18 Berkeley J Afr Am L & Pol at 107 (cited in note 77).

99 Id.

100 See id at 105–07.

101 For background on the passage of the Fair Housing Act, see Emily A. Vernon, Comment, *Exclusionary Advertising?: The Case for Cautious Enforcement of 42 USC § 3604(c) Against Minority-Language Housing Advertisements*, 87 U Chi L Rev 223, 232–37 (2020).

102 Custard, Comment, 67 DePaul L Rev at 536 (cited in note 62).

103 Coates, *The Case for Reparations* (cited in note 6).

wealthy than White families.[104] They are less likely to be homeowners.[105] And in the wake of the Great Recession of 2008, the ILC is once again a concern for Black, minority, and low-income communities.[106]

C. The Subprime Mortgage Crisis and Return of the ILC

In this Section, I explore the reemergence of the ILC as an increasingly popular financing tool in lieu of subprime mortgages after the 2008 housing crisis. First, I explore how and why the 2008 crisis led to an increase in ILCs in the United States. Second, I briefly describe the unique concern the "as is" deed raises in the modern ILC market. Finally, I explain how the reemergence of the ILC continues to be a threat to minority communities in particular, both in light of the history above and the ripple effects of the subprime mortgage crisis.

The exact forces that led to the 2008 financial crisis are beyond the scope of this Comment. The *Washington Post* summarized the relevant details: "The housing market was ground zero of the crisis. The market crashed as homeowners with subprime and other troublesome loans defaulted at record levels. Home prices dropped, and millions lost their homes to foreclosure."[107] These subprime loans were targeted at minority borrowers.[108] The practices of lenders and banks during the lead-up to the 2008 crisis has been referred to by scholars as "reverse redlining," that is the "targeting of families in [formerly redlined] neighborhoods for high-risk loans."[109] This practice arose as minority homebuyers were able to access mortgage financing, and "took the form of targeting racial or ethnic minorities for higher priced and risky

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[104] Id.

[105] US Census Bureau, *Quarterly Residential Vacancies and Homeownership, Third Quarter 2019* *9 (Oct 29, 2019), archived at https://perma.cc/6JTA-UB4G.

[106] Burns, *The Infamous Practice of Contract Selling* (cited in note 21); Wright, 18 Berkeley J Afr Am L & Pol at 120 (cited in note 77) (showing that Black and Latinx Americans are most likely to enter into ILCs).

[107] Renae Merle, *A Guide to the Financial Crisis – 10 Years Later* (Wash Post, Sept 10, 2018), online at https://www.washingtonpost.com/business/economy/a-guide-to-the-financial-crisis--10-years-later/2018/09/10/114b76ba-af10-11e8-a20b-5f4f84429666_story.html (visited May 18, 2020) (Perma archive unavailable).

[108] Emily Badger, *The Dramatic Racial Bias of Subprime Lending During the Housing Boom* (CityLab, Aug 16, 2013), archived at https://perma.cc/P8KJ-ZL9M (noting that Black and Latinx homebuyers were more than twice as likely to receive subprime loans).

[109] Brief of Housing Scholars as Amici Curiae in Support of Respondent, *Bank of America Corp v City of Miami*, Nos 15-1111, 15-1112, *3 (US filed Oct 7, 2016) (available on Westlaw at 2016 WL 5940647).

loans."[110] Due to these practices, minority borrowers were more likely than White borrowers to receive risky loans and thus were more likely to be foreclosed upon and lose their homes in the 2008 housing crisis.

In the aftermath of the financial crisis, the state and federal governments both acted against subprime lenders. A number of cities and municipalities brought suit under the Fair Housing Act against banks that offered subprime mortgages.[111] The federal government passed the Dodd-Frank Act,[112] which among other things required lenders to verify that a buyer would be able to repay the mortgage.[113] This increased regulation has had an unintended side effect: it has made it more difficult for low-income, low-credit-score Americans to obtain traditional mortgages.[114] Those who were foreclosed upon have the additional concern of a mark on their credit reports, making it even more difficult for these individuals to try again at homeownership.[115] With new regulations designed to prevent reverse redlining, sellers were once again looking for alternative financing options for those who did not qualify for a traditional mortgage.

This new market of potential homeowners who were effectively shut out of the traditional mortgage market helped lead to the resurgence of ILCs. Moreover, for sellers, the number of foreclosures put homes on the market for relatively cheap.[116] The combination of homes for sale at low prices and individuals unable to access traditional mortgages created a new investment market: seller-financed contracts using the ILC.[117] Matthew Goldstein and Alexandra Stevenson of the *New York Times* reported that "[b]efore the housing crisis, low-income buyers got too much of a house that they couldn't afford. Now, they are getting too little of a house that they can't afford to repair."[118]

110 Id at *5.

111 See, for example, *Bank of America Corp v City of Miami*, 137 S Ct 1296, 1301–03 (2017); *County of Cook v HSBC North America Holdings Inc*, 136 F Supp 3d 952, 956–57 (ND Ill 2015).

112 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L No 111-203, 124 Stat 1376 (2010).

113 Custard, Comment, 67 DePaul L Rev at 537 (cited in note 62).

114 Merle, *A Guide to the Financial Crisis* (cited in note 107).

115 Custard, Comment, 67 DePaul L Rev at 537 (cited in note 62).

116 Matthew Goldstein and Alexandra Stevenson, *Market for Fixer-Uppers Traps Low-Income Buyers* (NY Times, Feb 20, 2016), archived at https://perma.cc/9FCG-DE34.

117 Alexandra Stevenson and Matthew Goldstein, *Wall Street Veterans Bet on Low-Income Home Buyers* (NY Times, Apr 17, 2016), archived at https://perma.cc/KGN9-SPSV.

118 Goldstein and Stevenson, *Market for Fixer-Uppers* (cited in note 116).

In 2009, the last year for which this data is available, more than three million people lived in homes that they were paying for via an ILC.[119] There are good reasons to think this number has increased in the years since, though nationwide data does not exist. Local data supports this conclusion. In 2015, in Detroit, more homebuyers entered into ILCs than traditional mortgages.[120] Data from the three large investment firms that dominate the modern ILC market—Harbour Portfolio Advisors, Vision Property Management, and Battery Point Financial—also indicate that the number of ILCs has increased since the mortgage crisis.[121] Since 2010, Harbour has purchased about seven thousand homes nationwide.[122] These ILCs all contain terms that have been termed predatory by scholars. The *Chicago Reader* completed an analysis of Chicago contracts from each of these three companies, and concluded that all include the following terms: requirements that buyers purchase “as is”; forfeiture clauses; and interest rates between 8 and 10 percent, which is roughly twice the current interest rate for federally backed bank loans. Further, they overwhelmingly involve properties in minority neighborhoods.[123]

The “as is” nature of the contracts has become an increasing concern in the modern market, as many of the houses being sold were vacated in the housing crisis and have since fallen into disrepair.[124] The homes being sold via ILC are often substandard—rotting wood, black mold, broken windows, and failing foundations are just a few of the concerns faced by ILC buyers.[125] Some buyers enter into the contract only to discover that they must quickly remedy property code violations, or that the house is already condemned.[126] Either because of increased media coverage of the ILC’s use or because of the shocking level of housing quality, the “as is” clause in these contracts has come to be seen as one

119 Battle Jr, et al, *Toxic Transactions* at *2 (cited in note 11).

120 Joel Kurth, *Land Contracts Trip Up Would-Be Homeowners* (Detroit News, Feb 29, 2016), archived at https://perma.cc/399U-XBGP.

121 Burns, *The Infamous Practice* (cited in note 21).

122 Id.

123 Id. Some of the Vision Property contracts are seven-year lease-option contracts. See Alexandra Stevenson and Matthew Goldstein, *Rent-to-Own Homes: A Win-Win for Landlords, a Risk for Struggling Tenants* (NY Times, Aug 21, 2016), archived at https://perma.cc/J455-EGVG.

124 Goldstein and Stevenson, *Market for Fixer-Uppers* (cited in note 116).

125 Id.

126 Alexandra Stevenson and Matthew Goldstein, *Seller-Financed Deals Are Putting Poor People in Lead-Tainted Homes* (NY Times, Dec 26, 2016), archived at https://perma.cc/G5RR-T9KC.

of the primary predatory terms included in ILCs. Though the prevalence of "as is" deeds in ILCs had been a concern before this most recent upswing in usage, this concern is heightened now, especially as the homes sold via ILCs are often homes that have been vacant since the 2008 foreclosure crisis.

Moreover, the racial concerns highlighted in Part II.B continue to raise alarms in the modern market. There are reports that the market for ILCs is aimed at Black and Latinx homebuyers,[127] both because they are disproportionately lower income and because of the historical housing policies discussed above. Given the racial discrimination concerns surrounding the subprime mortgage crisis, the ILC market is likely centered in minority neighborhoods.[128] Ultimately, the revival of the ILC appears poised to continue to target minority communities.

III. CURRENT APPROACHES: STATUTORY SOLUTIONS AND MANDATORY DISCLOSURE

Since 2010, a number of states have committed to renewed legislative attempts to deal with the various issues posed by the ILC.[129] These newer laws largely recognize the predatory concerns outlined in Part II, but seek to balance effective regulation with maintaining the market for ILCs. This Part surveys these laws, focusing on certain provisions that appear across several regulatory schemes or that are particularly innovative. For most commentators, statutory reforms are the preferred solution to the risks posed by the ILC.[130] Scholars arguing for such reforms have

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[127] Matthew Goldstein and Alexandra Stevenson, '*Contract for Deed' Lending Gets Federal Scrutiny* (NY Times, May 10, 2016), archived at https://perma.cc/BF79-9LTE.

[128] For an in-depth analysis of the geographic focus of Harbour's purchasing practices and its relation to race, see Dan Immergluck, *Old Wine in Private Equity Bottles?: The Resurgence of Contract-for-Deed Home Sales in US Urban Neighborhoods*, 42 Intl J Urban & Regional Rsrch 651, 659–63 (2018).

[129] See Cal Civ Code § 2985 et seq; 765 ILCS 67/1 et seq; Minn Stat Ann §§ 507.235, 559.202; NC Gen Stat Ann § 47H-1 et seq; Tex Prop Code Ann § 5.061 et seq; Va Code § 55.1-3000 et seq. These statutes deal with the ILC specifically and have either been passed or amended since 2010.

[130] See Sarah Mancini and Margot Saunders, *Land Installment Contracts: The Newest Wave of Predatory Home Lending Threatening Communities of Color*, 28 Communities & Bank 9, 11 (2017); Custard, Comment, 67 DePaul L Rev at 544 (cited in note 62); Purcell, Note, 93 Notre Dame L Rev at 1784 (cited in note 40). But see Freyfogle, 62 NYU L Rev at 310–15 (cited in note 13); Wright, 18 Berkeley J Afr Am L & Pol at 122–25 (cited in note 77). Both Professors Freyfogle and Megan S. Wright propose judicial solutions to certain ILC concerns. Freyfogle proposes reading the implied warranty of habitability into certain ILCs to protect buyers from substandard housing, and Wright proposes considering ILCs presumptively unconscionable in light of their history as a tool for discrimination. But

focused on certain types of reforms: (1) mandatory disclosures of repair and tax obligations and provision of regular accounting statements of what is owed on the property; (2) independent inspections and appraisals; (3) requiring sellers to record contracts to ensure that there is a public record of the contract; and (4) default provisions that grant buyers protections similar to those available in eviction settings, such as cure periods. This Comment argues that legislatures and judges should be more aggressive in regulating the ILC, especially in regard to eliminating the forfeiture clause and protecting buyers from “as is” deeds for uninhabitable homes.[131] In sum, my approach relies on much stronger legislative protections, while attempting to think seriously about the complications of ensuring those protections are meaningful on the ground.

This Part begins by exploring common legislative reforms passed to protect ILC buyers, many of which have been proposed by scholars over the years. It is focused on reforms that have been enacted since 2010 and thus are more likely animated by concerns relevant to the modern ILC market. Of particular interest is Texas, because extensive ILC legislation has been on the books since 1995, with various reforms passed over the last two decades.[132] With the exception of Oklahoma, which has treated the ILC as a full mortgage since 1976,[133] Texas has been the most aggressive state in legislating protections for ILC buyers.

I also include comparisons of provisions from other states that have passed comprehensive ILC legislation in an attempt to provide as nationwide a picture as possible. Along with Texas, I survey comprehensive ILC legislation from California, Illinois, North Carolina, and Virginia. Unfortunately, it is not possible to indicate how most states treat the ILC—legislation varies widely across the country, and where there is not legislation, state courts have established various judicial rules regarding the ILC. Thus,

judicial reform has its detractors, and despite various attempts at equitable balancing in the twentieth century, judicial reform largely failed to protect consumers. See Danielson, Note, 1986 U Ill L Rev at 101–09 (cited in note 32).

131 See Mancini and Saunders, 28 Communities & Bank at 11 (cited in note 130) (“States have the power to ban these transactions altogether. That is the cleanest and most effective way to eradicate land contract abuses.”).

132 Tex Prop Code Ann § 5.061 et seq. The most significant reforms were passed in 2001.

133 16 Okla St Ann § 11A (“All contracts for deed for purchase and sale of real property . . . shall to that extent be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.”). This is the form of regulation promoted by the Third Restatement of Property. See Restatement (Third) of Property § 3.4 (1997).

this Part focuses on types of provisions that are especially common in legislation. Part III.A surveys provisions which protect buyers at the time of signing the ILC, including mandatory disclosures and cooling-off periods. Part III.B looks at legislative provisions that attempt to counteract the more insidious effects of "as is" deeds. Part III.C provides an overview of terms that legislatures have defined as per se unconscionable in every ILC. The last Section focusing on statutory reforms, Part III.D, explores legislative provisions designed to protect ILC buyers who default, focusing on cure periods and alternative dispute resolution proceedings. Finally, since Texas's statute has been on the books for more than two decades, Part III.E concludes by exploring the impact this legislation has had on ILCs in the state, with a specific discussion of their use in colonias, Spanish-language communities on the Mexican border that tend to be low income.[134]

A. Signing the Contract: Mandatory Disclosures, Cooling-Off Periods, and Mandatory Recording

The statutes examined in this Comment include a number of provisions intended to educate and inform the buyer at the time the contract is entered into. These provisions might require a seller to certify that the property is in compliance with property and building codes,[135] disclose certain legal rights of the buyer[136] and the seller's legal interest,[137] perform appraisals or inspections, or provide mandatory cooling-off periods for the buyer to exit the contract without penalty.[138] These provisions are designed to deal with the fact that most buyers entering into these contracts will do so without legal assistance.

The efficacy of these provisions is doubtful. As Professors Omri Ben-Shahar and Carl E. Schneider have explored, mandatory disclosures rarely provide true protection or education for

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[134] See generally Peter M. Ward, Heather K. Way, and Lucille Wood, *"The Contract for Deed Prevalence Project": A Final Report to the Texas Department of Housing and Community Affairs (TDHCA)* (University of Texas at Austin, Aug 2012), archived at https://perma.cc/JQK7-DU94.

[135] 765 ILCS § 67/10(c)(24); NC Gen Stat Ann § 47H-2(b)(14a); Cal Civ Code § 2985.51.

[136] Tex Prop Code Ann § 5.071; NC Gen Stat Ann § 47H-2(b)–(c).

[137] 765 ILCS § 67/10(c) (requiring disclosure of, among other things, any unpaid property taxes, the seller's interest in the property, and any known encumbrances on the property); NC Gen Stat Ann § 47H-2(b)(15).

[138] NC Gen Stat Ann § 47H-2(c) (providing a cooling-off period of three business days); 765 ILCS § 67/70 (same); Tex Prop Code Ann § 5.074 (providing a cooling-off period of fourteen days).

consumers.[139] Mandated disclosures are nonetheless popular, because they appear to be relatively simple solutions to the concerns about predatory contract terms.[140] They also appeal to free-market preferences of many Americans, who think that it is better to ensure people truly know the risks of their contracts than to paternalistically ban the contracts altogether.[141]

Of course, some of these provisions go beyond simply informing buyers of their rights. Mandatory cooling-off periods provide a period of time during which buyers can rescind their acceptance of the contract with no penalty.[142] The idea behind cooling-off periods is to give buyers a certain amount of time to ensure they actually want to enter into these contracts. It also provides them time to fully review the contract they have signed—though it is less than clear that this is any more effective than simply informing a buyer of their rights and responsibilities.[143] Cooling-off periods only protect consumers to the extent that they take advantage of them to seriously consider the contract they have entered into.[144] They can never be more than a partial protection.[145]

Perhaps the most effective of these provisions are those requiring sellers to record a contract within a certain period of time.[146] Recording land contracts ensures that the legal interest

139 Omri Ben-Shahar and Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U Pa L Rev 647, 665 (2011).

140 Id at 682.

141 Id at 681 ("It supposes that people make better decisions for themselves than anyone can make for them and that people are entitled to freedom in making decisions.").

142 See Federal Trade Commission, Cooling-Off Period for Door-to-Door Sales, 37 Fed Reg 22934, 22935 (Oct 26, 1972) ("This will serve as a cooling-off period during which any consumer, who may be subjected to the unfair pressures resulting from the deceptions we have discussed or similar deceits, may reevaluate and cancel her purchase."). The cooling-off period is a popular consumer protection device, which ostensibly seeks to allow buyers to make rational choices by giving them time to reconsider the contract they have signed.

143 A study from Australia indicated that "[w]hen customers are offered a 'cooling off' period, they don't change their minds, even when the alternative is considered subjectively better." Paul Harrison, *Cooling-Off Periods for Consumers Don't Work: Study* (The Conversation, Nov 28, 2016), archived at https://perma.cc/A2YB-5RHG.

144 Id ("In the context of cooling-off periods (and thus changing our minds), research shows it takes a significant amount of cognitive resources to admit we made a mistake. Again, this is not a conscious use of resources, but happens regardless of how rational we think we are.").

145 37 Fed Reg at 22935 (cited in note 142) (noting that a comprehensive UCLA Law Review report that surveyed the direct selling industry "concluded that the cooling-off concept should be encouraged, although it recognized that it would not provide a complete remedy for all of the consumer problems").

146 765 ILCS § 67/20 (requiring the seller record the contract within ten business days of sale); Tex Prop Code Ann § 5.076 (requiring the seller record within thirty days of sale); NC Gen Stat Ann § 47H-2(d) (requiring recordation within five business days of signing);

of the buyer is public information. As such, if a buyer is subject to an eviction, it ensures that any lawyer would be aware of the ILC and, in theory, it also makes that information available to judges.[147] If a legal aid lawyer is able to analyze the contract because it has been recorded, the lawyer will be able to appropriately defend the buyer and determine what, if any, additional rights a buyer may have beyond the eviction statutes. In theory, if the judge has access to the contract as well, the judge can appropriately apply any ILC law; in practice, this is unlikely to happen.

Further, recording limits the ability of the seller to further encumber the property, by placing "a cloud on the property's title, giving notice of the buyer's interest in the property to potential subsequent purchasers and rendering the title unmarketable."[148] The purpose of this protection is to ensure that sellers are not transferring the property multiple times or getting loans based on the property. This ensures that if buyers pay off their installments under the contract, they can actually receive marketable title, rather than title encumbered by other liens or interests that the seller placed on the property. Many commentators have advised requiring recording contracts,[149] though it is less than clear that recordation protects against any of the most concerning aspects of the ILC. Recording does, however, protect buyers in the event a seller files for bankruptcy, fails to pay taxes or liens, or attempts to sell the property to a third party.[150]

B. Managing "As Is" Deeds: Landlord-Tenant Law and Other Solutions

"As is" deeds are common in ILCs and are the source of many of the predatory aspects of these contracts. As Professor Eric T. Freyfogle explored in the 1980s, many of the biggest concerns about the ILC involve issues of substandard housing and the repair obligations of buyers and sellers.[151] These concerns continue to haunt the ILC, as explored in Part II.C. Statutory solutions

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Cal Civ Code § 2985.2 (making it a public offense to fail to record a contract and then cause the property to be encumbered without notice to other parties); Va Code Ann § 55.1-3002(C) (allowing ILCs to be recorded, but not requiring such).

147 However, the fact that housing court judges have access to information does not at all guarantee they will access and use that information. See Summers, *The Limits of Good Law*, 87 U Chi L Rev at 202 (cited in note 13).

148 Custard, Comment, 67 DePaul L Rev at 545 (cited in note 62).

149 See id; Mancini and Saunders, 28 Communities & Bank at 11 (cited in note 130).

150 Custard, Comment, 67 DePaul L Rev at 546 (cited in note 62).

151 Freyfogle, 62 NYU L Rev at 304–10 (cited in note 13).

seek to resolve these issues in a variety of ways. Some states use disclosures to ensure that buyers are aware of the risks as well as statements that clearly divide responsibility for repairs between buyers and sellers.[152] Other states apply landlord-tenant law to ILCs.[153] In a novel approach, Illinois provides that sellers shall credit any costs that buyers incurred repairing issues that existed presale to buyers' debt in the event of a default.[154]

All these provisions target the same concern: that "as is" deeds allow sellers to avoid any repair costs that they would be liable for if they rented out the property, while also avoiding the costs associated with regulated mortgages. Some states have turned to their landlord-tenant laws for guidance on how to protect ILC buyers, since every state has developed some amount of habitability protections for tenants. Freyfogle advocated for such an approach, but he appeared to rely on an optimistic view of the protections afforded by landlord-tenant law.[155] Freyfogle proposed that in certain situations, ILCs should be treated as leases, and he thus provided a functional-equivalence test that would have applied the implied warranty of habitability to those ILCs.[156] The implied warranty of habitability seeks to protect tenants by creating a floor of acceptable housing and allowing tenants to either deduct the cost of repairs from rent or to defend themselves in an eviction case by asserting that the housing was below the applicable standard.[157] It has not been as successful in protecting tenants as initially hoped and is thus unlikely to protect ILC buyers.[158]

Perhaps the best of these provisions attempting to deal with the insidious effects of "as is" deed clauses is the requirement that buyers be allowed to credit repair costs toward their default.[159] Such a provision theoretically protects buyers from the choice

152 765 ILCS § 67/10(c)(20) (mandating the seller be in charge of any repairs not specifically made the responsibility of the buyer in the original contract); NC Gen Stat Ann § 47H-2(b)(12).

153 Tex Prop Code Ann § 5.0621 (incorporating by reference the lease protections at Tex Prop Code Ann § 92); Va Code Ann § 55.1-3002(A).

154 765 ILCS § 67/80.

155 See Summers, 87 U Chi L Rev at 208–10 (cited in note 13) (finding that without the aid of a lawyer, the implied warranty of habitability provides little protection to tenants); Kim Barker, Jessica Silver-Greenberg, Grace Ashford, and Sarah Cohen, *The Eviction Machine Churning Through New York City* (NY Times, May 20, 2018), archived at https://perma.cc/VNK3-FCKZ (noting that eviction court rarely protects the interests of tenants).

156 Freyfogle, 62 NYU L Rev at 312 (cited in note 13).

157 See Summers, 87 U Chi L Rev at 159–60 (cited in note 13).

158 Id at 210.

159 765 ILCS § 67/80.

between repairing their home and defaulting on their monthly payments, which was a big concern for many of the contract buyers in the CBL.[160] But such a provision cannot be successful if buyers are unaware of their legal rights—a concern which underlies many of these statutory protections that fall short of totally banning the ILC.

C. Unconscionable Terms: Prepayment, Arbitration, and Waiving Protections

Legislatures have also passed laws directed at ILCs which deem certain contract terms per se unconscionable. This Section surveys the provisions that have been deemed by certain legislatures to be problematic enough so as to void them entirely as contrary to public policy.[161] The surveyed legislation is particularly likely to ban any provisions requiring the buyer to pay a prepayment penalty—that is, any term that requires the buyer to pay an additional fee if they pay off any portion of their loan early.[162] Additionally, most of the statutes void any terms that would waive the law's protective provisions, thus ensuring sellers cannot contract around the law.[163] Further, Illinois specifically voids certain arbitration provisions for fear of inequitable resolution,[164] and Texas and North Carolina limit the late fees that may be assessed, which is a popular provision to ensure that late fees do not become unduly burdensome.[165] North Carolina's law includes a provision that requires sellers hold title to any property they seek to convey via ILC, thus ensuring that sellers are not selling property they do not own and not selling the property at a later date to a third party.[166]

These statutes seek to address terms that the legislature has deemed contrary to public policy. However, they are only effective if they can be thoroughly enforced by the courts, which may well require buyers to retain counsel, or for courts to be more

160 Coates, *The Case for Reparations* (cited in note 6).

161 All states considered in Part III have passed at least one provision in legislation that certain terms are to be considered per se unconscionable in ILCs.

162 Tex Prop Code Ann § 5.071(6); 765 ILCS § 67/60; Va Code Ann § 55.1-3002(B)(1); Cal Civ Code § 2985.6(a) (providing buyers with a right to prepay the balance, with an exception allowing the buyer to prohibit prepayment for the first twelve months after the sale).

163 765 ILCS § 67/50; Tex Prop Code Ann § 5.073(b); Cal Civ Code § 2985.6(b); Va Code Ann § 55.1-3002(D).

164 765 ILCS § 67/55.

165 Tex Prop Code Ann § 5.073(a)(1); NC Gen Stat Ann § 47H-7.

166 NC Gen Stat § 47H-6(a).

aggressive when dealing with ILC cases. This Comment suggests that courts and legislatures should consider the combination of "as is" conveyances via ILC and forfeiture clauses unconscionable and unenforceable. Such aggressive legislation substantially decreases the rights of the seller and could be criticized for disincentivizing sellers from offering these contracts. As explored in Part IV, to the extent that sellers will only offer ILCs if they are predatory, the law should not protect their right to prey on low-income communities.

D. Protecting the Buyer in Default: Cure Periods and Alternative Dispute Resolution

Arguably, the most important provisions in any of these statutes are those that deal with forfeiture clauses and what occurs when a buyer fails to make a payment or defaults in some other way. Most of these laws draw on eviction statutes to create some amount of protection for defaulting buyers. Thus, most statutes create a cure period. This is a period of time after default when buyers are able to "cure" their default by paying what they owe to avoid forfeiture. Illinois, North Carolina, Texas, and Virginia have all passed laws which provide a mandatory cure period for ILC buyers who default.[167] Curiously, neither Illinois nor Virginia requires the seller to provide the buyer with a notice of default. The failure to include a notice provision is surprising because it is unclear if a buyer, who has not received notice of their default, will actually be motivated to cure their default. Generally, states require that landlords provide renters with notice that they have failed to pay rent on time and then provide a cure period during which the renter may pay off the rent that is owed. Virginia's statute merely states the seller "*may* serve notice of [ ] default," and that purchasers are entitled to a thirty-day cure period after notice when default is based on a failure to pay.[168] Illinois simply created a ninety-day cure period that begins on the "date of the default" and fails to require any notice to the purchaser.[169] A cure period without any kind of notice requirement is relatively

[167] 765 ILCS § 67/40 (creating a ninety-day cure period); Tex Prop Code Ann §§ 5.065, 5.066(b) (creating a thirty-day or sixty-day cure period for buyers under certain conditions); Va Code Ann § 55.1-3002(B)(2) (creating a thirty-day cure period for default based on failure to pay); NC Gen Stat Ann § 47H-4(a)(5) (creating a thirty-day cure period).

[168] Va Code Ann § 55.1-3002(B)(2) (emphasis added).

[169] 765 ILCS § 67/40.

toothless—a buyer could default and be entirely unaware of their right to cure.

Because the laws in both Virginia and Illinois lack notice requirements, the more effective cure periods exist in the North Carolina and Texas statutes. North Carolina has a series of notice requirements that must be provided to the buyer before the seller may exercise their right to forfeiture.[170] If the buyer fails to cure, the purchaser's interest in the ILC is terminated by either a mutual termination executed by both parties and recorded,[171] or by a final judgment from a court.[172]

The Texas statute effectively destroys the forfeiture clause after the first thirty days of the contract.[173] It does not do this by plain statement, but rather by requiring ILCs to be recorded within the first thirty days[174] and prohibiting the use of the forfeiture remedy if a contract has been recorded.[175] Further, if the buyer has made the equivalent of forty-eight monthly payments or paid more than 40 percent of the total amount, the buyer has a right to a sixty-day cure period rather than the typical thirty-day period.[176]

The Texas statute has created a complex alternative post-default process for ILCs, which does not rely either on Texas landlord-tenant law or Texas mortgage foreclosure law. But even this aggressive alternative process has failed to meaningfully protect buyers, as explored in Part III.E. After the contract has been recorded or the buyer has made the appropriate payments, if the buyer defaults and fails to cure within the required cure period, there is a statutory sale process, which goes through a seller-appointed trustee.[177] Any sale proceeds that exceed the total amount due to the seller go to the purchaser.[178] The creation of this trustee provision ensures that a third party is involved in the process, which should theoretically protect the buyer more than the typical forfeiture process. Of course, as with all these provisions, this requires that regulators or courts enforce the various requirements of this statute—none of these protections are any

170 NC Gen Stat Ann § 47H-3 (incorporating by reference NC Gen Stat § 47H-4).

171 NC Gen Stat Ann § 47H-2(e)(1).

172 NC Gen Stat Ann § 47H-2(e)(2) (also indicating that such judgment must be recorded).

173 Compare Tex Prop Code Ann § 5.064, with Tex Prop Code Ann § 5.066.

174 Tex Prop Code Ann § 5.076.

175 Tex Prop Code Ann § 5.064(4).

176 Tex Prop Code Ann § 5.066.

177 Tex Prop Code Ann § 5.066.

178 Tex Prop Code Ann § 5.066(e).

good if buyers are unaware of their rights. Nor are these protections helpful if courts are unaware of them when they are dealing with an ILC and subsequently fail to provide the necessary dispute resolution mechanisms prescribed by statute, including ensuring that the forfeiture clause is not enforced. Thus, even though the Texas statute provides extensive protection, its failure to clearly outlaw the use of the forfeiture clause creates a risk that buyers will be unable to take advantage of these protections.

E. The Texas Solution: The Impact of ILC Regulation on the ILC Market

Given the Texas statute's roundabout way of nearly eradicating the forfeiture clause, this Section examines the effect of this legislation on the use of ILCs in Texas. In August 2012, the University of Texas at Austin published a study examining the use of the ILC in the state, specifically in border colonias.[179] There are 2,294 colonias in Texas, where "the term has come to refer to unincorporated makeshift communities in rural areas beyond the municipal boundaries of the nearest cities and towns."[180] "Colonias are among the most poverty-stricken communities" in Texas in which the median household income is less than $30,000 a year and more than 40 percent of residents live under the poverty line.[181] For comparison, the national average of people living under the poverty line is 14.3 percent.[182] The study found that, across ten counties from 1989–2010, the number of ILCs recorded each year peaked in 2000–01 at 1,226, but then leveled out to around 450 contracts recorded each year.[183] Counties where colonias were common had the largest numbers of recorded ILCs.[184]

The study noted that ILC buyers have very low success rates—in one county the researchers found that, since 1989, fewer than one-fifth of ILC buyers had managed to own their home.[185] Forty-five percent of those contracts had been cancelled at the time of the study, with the remainder still active as ILCs.[186] This is in stark contrast to the traditional mortgage. Of mortgages

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179 Ward, Way, and Wood, *CFD Prevalence Project* at *II (cited in note 134).

180 Patrick Strickland, *Living on the Edges: Life in the Colonias of Texas* (Al Jazeera, Nov 5, 2016), archived at https://perma.cc/8WN5-7VZ3.

181 Id.

182 Id.

183 Ward, Way, and Wood, *CFD Prevalence Project* at ch 3 *8 (cited in note 134).

184 Id.

185 Id at ch 3 *13.

186 Id.

originated between 2004 and 2008, only 6.4 percent of mortgagors nationwide had lost their homes through foreclosure by February 2011.[187] The study further found that despite recording requirements, unrecorded ILCs are still prevalent throughout Texas.[188]

Ultimately, despite claims about the law destroying the market for ILCs in Texas, the ILC continues to be prevalent in low-income and Latinx communities.[189] Notably, when the Texas legislation was first passed in 1995 it only applied to border counties,[190] indicating the legislature was specifically concerned about its usage in these communities. However, in spite of this intent, the ILC "remains in active use in many border counties,"[191] and in some counties, its usage has remained the same or even increased since the regulations were passed.[192] The continued popularity of the ILC in these communities is due to a number of factors, from the incredible poverty that defines these colonias to the inability to access traditional mortgage financing to the lack of information about rights and protections under ILC regulations.[193] The ILC is common in Texas "wherever there is poverty, limited infrastructure, and shoddy housing conditions."[194] This study bears out the concerns addressed above about the limits of statutory reform—without enforcement provisions that do not rely on complex legal defenses, ILC statutory reform cannot protect low-income and minority communities from the risks posed by the ILC. Given the established failure of ILC regulation in Texas, Part IV explores some of the reasons behind why these regulations have failed. Part IV also provides an explanation for why I do not recommend the eradication of the ILC as a financing tool in spite of its history and risks. Finally, Part V uses this information to propose effective reforms to more fully protect consumers.

IV. EXPLOITATION, EXTRACTIVE MARKETS, AND THE ILC

Given the failure of ILC regulation to meaningfully protect consumers, the easiest answer would appear to be entirely outlawing ILCs. This is the "cleanest and most effective way to

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187 Ward, Way, and Wood, *CFD Prevalence Project* at ch 3 *14 (cited in note 134).

188 Id at ch 4 *1–2.

189 Id at ch 1 *1.

190 Id at ch 3 *10.

191 Ward, Way, and Wood, *CFD Prevalence Project* at ch 3 *11 (cited in note 134).

192 Id at ch 3 *15.

193 Id at ch 6 *1–4.

194 Id at ch 6 *4.

eradicate land contract abuses."[195] For the reasons explored in this Part, I reject that solution as too simplistic given the concerns currently permeating the modern housing market. Thus, Part IV.A begins by briefly exploring the myriad features of the US housing market, with a specific focus on comparing the low-income rental and homeownership markets and their relationships to wealth building. Having examined this, Parts IV.B and IV.C then examine two reasons that ILC reforms fail: (1) overprotection of the seller, and (2) behaviorally unsophisticated reforms that fail to actually address problems on the ground. Part IV.B draws on Professor Matthew Desmond's seminal work in eviction to explore these housing markets as "extractive markets,"[196] and notes how this nature of these markets clearly indicates why the current reforms are insufficient to counteract the predatory nature of ILCs. Finally, Part IV.C explains two particular problems with the legislative reforms explained in Part III: (1) the documented failure of mandated disclosure, and (2) the failure of complex legal schemes to protect unsophisticated actors. This leads into Part V, where I propose three reforms which take into account these realities of the housing market and human behavior.

A. The Illusory Dream: Homeownership and Its Alternatives

Desmond points out that "[t]he distinctly American desire to own a home is just as pronounced among the poor as it is among the middle class."[197] The American Dream is now largely associated with homeownership as a symbol of success, sign of stability, and promise of generational wealth. In Desmond's words, "Since the pioneer days, freedom and citizenship and landholding have advanced in lockstep in the American mind. *To be American was to be a homeowner*."[198] The widespread societal impulse to become a homeowner is so strong that people are willing to enter into risky contracts to achieve it. ILC sellers are happy to make that deal. What makes this desire to be a homeowner even more pronounced is the widespread disdain for long-term tenancy. In 1820, Senator Thomas Hart argued that tenancy was "unfavorable to freedom" because "[i]t lays the foundation for separate orders in

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195 Mancini and Saunders, 28 Communities & Bank at 11 (cited in note 130).

196 Matthew Desmond, *Evicted: Poverty and Profit in the American City* 305 (Broadway 2016).

197 Id at 349 n 3.

198 Id (emphasis added).

society, annihilates the love of country, and weakens the spirit of independence."[199] This Section seeks to challenge the American assumption that homeownership is unequivocally better than renting. Rather, I propose looking at the housing issue as a holistic concern—to focus on how to ensure safe, habitable housing in the low-income housing market as a whole by creating effective regulations for both renters and hopeful homebuyers.

Policies promoting homeownership as "an essential stepping-stone to accumulating wealth"[200] have recently started to receive well-deserved criticism. In January 2020, *The Economist* called homeownership "the West's biggest economic-policy mistake."[201] Among the criticisms is that such policies have "created gaping inequalities and inflamed both generational and geographical divides."[202] Though those promoting homeownership argue that it encourages better citizenship and that it is a way for low-income people to build generational wealth,[203] some studies suggest that any benefits from homeownership for low-income households are limited at best.[204]

As noted in Part II, Black Americans were systemically shut out of the mortgage market by the Federal Housing Administration, while White Americans received federally backed loans. As historian Richard Rothstein has shown, the current wealth gap between White and Black Americans exists in part because of these policies.[205] But in contrast to the strong belief that homeownership inherently leads to generational wealth, some scholars now posit that the primary advantage of homeownership is that it forces people to save money they would otherwise spend

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199 Id.

200 Custard, Comment, 67 DePaul L Rev at 533 (cited in note 62).

201 *The Horrible Housing Blunder: Home Ownership Is the West's Biggest Economic-Policy Mistake* (The Economist, Jan 16, 2020), online at https://www.economist.com/leaders/2020/01/16/home-ownership-is-the-wests-biggest-economic-policy-mistake (visited May 19, 2020) (Perma archive unavailable).

202 Id.

203 Id.

204 See Anne B. Shlay, *Low-Income Homeownership: American Dream or Delusion?*, 43 Urban Stud 511, 519 (2006); William N. Goetzmann and Matthew Spiegel, *Policy Implications of Portfolio Choice in Underserved Mortgage Markets*, in Nicolas P. Retsinas and Eric S. Belsky, eds, *Low-Income Homeownership: Examining the Unexamined Goal* 257, 272 (Brookings Institution 2002) ("In fact, encouraging homeownership among low-income families will only increase the wealth gap in the United States.").

205 Rothstein, *The Color of Law* at 153 (cited in note 44) ("[W]e cannot understand the income and wealth gap that persists between African Americans and whites without examining governmental policies that purposely kept black incomes low throughout most of the twentieth century.").

elsewhere.[206] Moreover, although there is good evidence of correlation between homeownership and positive social effects like stability, self-esteem, and participation in the community, these studies focus exclusively on *high- and middle-income families*.[207] There are fewer studies on low-income homeownership itself. Some studies have shown "limited although positive [social] effects."[208] These studies cast doubt on the argument that because homeownership has historically created generational wealth for White families, the government should implement policies that focus on increasing homeownership among low-income and minority communities.

Homeownership's limited benefits for low-income households indicate that Desmond's concern that "[e]xploitation thrives when it comes to the essentials" is especially relevant in the ILC context.[209] Desmond argues: "If the poor pay more for their housing, food, durable goods, and credit, and if they get smaller returns on their educations and mortgages (if they get returns at all), then their incomes are even smaller than they appear. This is fundamentally unfair."[210]

The combination of the basic need for housing and a strong societal preference for homeownership makes the ILC particularly exploitable by profit-seeking private actors. Thus, as explored in Part II.B, the ILC has been incredibly profitable for sellers. Given that the one comprehensive study of ILCs showed that, in one Texas county, 45 percent had been cancelled without leading to homeownership,[211] this suggests that the return on ILCs for low-income buyers is very low and leads to an even greater risk of exploitation.

Given this failure rate, the most important factor in determining whether traditional views of homeownership can justify the continued existence of the ILC in its current form is whether there are real economic benefits for low-income homeowners.

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206 Eli Beracha, Alexandre Skiba, and Ken H. Johnson, *A Revision of the American Dream of Homeownership*, 26 J Housing Rsrch 1, 2–3 (2017) ("That is, even though renting can generate more wealth than buying, buying a home can result in more wealth because it forces households to save more than they would otherwise.").

207 Shlay, 43 Urban Stud at 517–18 (cited in note 204).

208 Id at 519.

209 Desmond, *Evicted* at 306 (cited in note 196).

210 Id.

211 Ward, Way, and Wood, *CFD Prevalence Project* at ch 3 *13 (cited in note 134).

However, such economic benefits are ambiguous at best.[212] Scholars cannot say with certainty that homeownership is an effective or even beneficial way for low-income households to build assets and accumulate wealth. According to Professor Anne B. Shlay, "The question is whether homeownership is a good asset-building strategy for low-income families compared with renting. And the answer is, we do not know."[213]

Professors William N. Goetzmann and Matthew Spiegel are even more critical of policies that promote homeownership among low-income households. Their study concluded: "Overinvestment in housing by families with modest savings means underinvestment in financial assets that will grow and provide income for retirement. In fact, encouraging homeownership among low-income families will only increase the wealth gap in the United States."[214] Goetzmann and Spiegel argue that homeownership rates in underserved areas will not change until the current tax code changes.[215] Homeownership can be a valuable part of a diversified financial portfolio, but it is dangerous as a primary investment because of "low historical return[s] and a serious risk of loss over multiple-year horizons."[216] Thus, the economic benefits of low-income homeownership should not be expected to outweigh the risks of predatory ILCs.

This research indicates merely that policymakers should not consider homeownership an unequivocal good that can outweigh the many sins of exploitative contracts. This is perhaps the strongest argument for destroying the ILC as it currently exists and refusing to enforce them at all. But the ILC should not be considered in a vacuum. The ILC has returned to prominence because federal regulations of the mortgage market have made it that much harder for low-income households to become homeowners. If regulators completely eradicate the ILC, the only alternative will be renting. If there were clear evidence that renting was better for low-income households, this would be the obvious solution. However, the rental market is rife with its own issues: eviction courts are extremely busy and hearings are often pro

212 Shlay, 43 Urban Stud at 519 (cited in note 204) ("But, as noted by Nicolas Retsinas and Eric Belsky (2002a), there is not clear evidence that homeownership delivers economic gains to low-income households.").

213 Shlay, 43 Urban Stud at 519 (cited in note 204).

214 Goetzmann and Spiegel, *Policy Implications of Portfolio Choice* at 272 (cited in note 204).

215 Id.

216 Id.

forma;[217] the law has much stronger protections for landlords than tenants;[218] legal representation for tenants is limited at best;[219] and even where tenant protections have been written into the law, there is good evidence indicating that on the ground those protections do little to change the outcome of cases.[220]

All this makes clear that there is unlikely to be a single, simple solution to protect low-income individuals from exploitation in housing markets. Instead, legislators, jurists, and scholars should think creatively about how to best combat the legacy of discriminatory housing policies while simultaneously protecting current low-income households. ILCs can be part of this solution.[221] Appropriately regulated, the ILC may provide low-income populations with a number of benefits. It is a path to homeownership that grants them the control over their housing situation that they lack when renting. The ILC could provide the financial discipline that has been shown to be the one unequivocal advantage of owning over renting.[222] Finally, allowing the ILC to continue to exist avoids entirely cutting low-income households out of the homeownership market. Given the uncertainty in how to best

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217 See Desmond, *Evicted* at 94–107 (cited in note 196) (describing the experience of one day at the eviction court); N.R. Kleinfield, *Where Brooklyn Tenants Plead the Case for Keeping Their Homes* (NY Times, May 20, 2018), archived at https://perma.cc/SM6A-74T2 ("The steady stream of people trickling into this maze of courtrooms gives the impression that an entire small town is perpetually being cleared of its citizens. The pace of evictions has slowed recently . . . but it remains high.").

218 Desmond, *Evicted* at 307 (cited in note 196) ("Large-scale historical and structural changes have given urban landlords the opportunity to make good money, sometimes spectacular money, by providing housing to struggling families at a cost the law has deemed fair and just."); Barker, et al, *The Eviction Machine Churning Through New York City* (cited in note 155) (exploring how housing court is leveraged by landlords to get around rent control laws and avoid repairing apartments).

219 Desmond, *Evicted* at 303 (cited in note 196) ("[I]n many housing courts around the country, 90 percent of landlords are represented by attorneys, and 90 percent of tenants are not.").

220 See Summers, 87 U Chi L Rev at 181–205 (cited in note 13) (providing empirical data to indicate that the implied warranty of habitability has failed to meaningfully protect tenants by either ensuring they have higher quality housing or providing them a defense in certain eviction cases).

221 For example, in the right circumstances, it is possible that ILCs lower the stakes of homeownership just enough to combat some of the most prevalent concerns in the housing market. Professor Lee Anne Fennell has suggested that ILCs may be a useful tool in combatting segregation and furthering fair housing goals. See Lee Anne Fennell, *Searching for Fair Housing*, 97 BU L Rev 349, 417–18 (2017).

222 Beracha, Skiba, and Johnson, 26 J Housing Rsrch at 2–3 (cited in note 206) ("That is, even though renting can generate more wealth than buying, buying a home can result in more wealth because it forces households to save more than they would otherwise.").

combat the myriad current housing market problems, it does not make sense to entirely eliminate the ILC as a tool.

B. Winners and Losers: Poverty and Exploitation

It is not just that homeownership has ambiguous benefits for low-income households that should caution legislatures about strong protections and rights for ILC sellers. Reforms fail for two reasons: (1) overprotection of sellers' rights to ensure the ILC market continues to exist (explored in this Section), and (2) over-reliance on behaviorally unsophisticated reforms which provide little-to-no actual protection to buyers on the ground (examined in Part IV.C). Desmond's *Evicted: Poverty and Profit in the American City* posits that the low-income housing market is an "extractive market[ ]."[223] That is, society does not recognize housing as "a basic right of all Americans."[224] Instead, our system privileges "the right to make as much money as possible by providing families with housing—and especially to profit excessively from the less fortunate."[225] More simply, in our housing markets, "[t]here are losers because there are winners."[226] It is perhaps inevitable that in the distribution of rights, the law must unequally benefit some and burden others. Our current system privileges the rights of landlords and ILC sellers over the rights of those living in these homes and apartments—and to the extent that this continues to happen, poverty cannot be eradicated merely by increasing the incomes of those experiencing it.[227]

Desmond's discussion of extractive markets is instructive because it indicates what is at the core of the ILC debate: "There are two freedoms at odds with each other: the freedom to profit from [ILCs] and the freedom to live in a safe and affordable home."[228] Historically, especially when it comes to minority communities, the United States has fiercely protected this freedom to profit. During the height of the ILC market in Chicago's majority Black neighborhoods in the 1960s, a contract seller told the *Saturday Evening Post*: "If anybody who is well established in this business

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223 Desmond, *Evicted* at 305 (cited in note 196).

224 Id.

225 Id.

226 Id ("Exploitation. Now, there's a word that has been scrubbed out of the poverty debate.").

227 Desmond, *Evicted* at 305 (cited in note 196) ("[P]overty is not just a product of low incomes.").

228 Id at 308. Of course, Desmond is not speaking about ILCs here—but his point is easily transferrable from one part of the housing market to another.

in Chicago doesn't earn $100,000 a year, . . . he is loafing."[229] But this history and the inequality it perpetuates indicates that perhaps the law has so far failed to strike the right balance between these freedoms.

The purpose of this discussion is to demonstrate why legislatures, jurists, and scholars should not shy away from aggressive regulation. This Comment's proposals work from the assumption that the scales could be tipped further in the direction of protecting buyers without entirely removing the incentive to offer ILCs. To be exact, this Comment rejects the conventional wisdom that any actual restriction on the rights of ILC sellers—restricting the use of the forfeiture clause, requiring sellers to repair their own properties before sale, or reducing the interest rates that may be charged—will entirely destroy the ILC market. Instead, this Comment argues that, to the extent that ILC sellers will only offer such contracts when they can make an exorbitantly high profit, the law should not protect their right to such profit over the right of buyers to seek stable housing. Thus, using this lens, the rest of this Part explores why the currently accepted reforms fail to strike an appropriate balance, before Part V proposes a series of stronger reforms.

C. Behavioral Problems: Why Current Reforms Fail

Current reforms fail for two primary reasons: (1) they fail to appropriately protect the interests of the buyer because they overprotect the interests of the seller, and (2) they fail to appropriately address how buyers and sellers actually interact in the market. This Section explores two common criticisms that address this second point. Thus, here I briefly mention Professors Ben-Shahar and Schneider's critiques of mandatory disclosure, and explore more fully Desmond's condemnation of complex legal schemes designed to protect legally unsophisticated consumers.

1. No one reads the fine print anyway.

As discussed in Part III.A, Ben-Shahar and Schneider have written extensively on the failure of mandatory disclosure as consumer protection. As they write, "disclosures have been mandated with ardent hopes of liberating people from ignorance, freeing them to be autonomous, and equipping them to make well-considered

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229 Coates, *The Case for Reparations* (cited in note 6) (quotation marks omitted).

decisions."[230] Yet, they have shown that mandatory disclosures rarely, if ever, meaningfully protect consumers. Specifically, "disclosees often do not read disclosed information, do not understand it when they read it, and do not use it even if they understand it."[231] Ultimately, they suggest "the repeal of all useless disclosures, not just because they are pointless, but because they aggravate the accumulation problem."[232] While Ben-Shahar and Schneider refuse to provide a one-size-fits-all solution to replace the regulatory scheme of mandatory disclosure, they do suggest a few paths to explore as regulators seek to replace failed mandatory disclosure regimes.[233] The two recommendations they provide are to keep any disclosures/warnings "brief, simple, and easy"[234] and moving toward providing actual advice, rather than simply providing information.[235]

This Comment responds to these criticisms of mandatory disclosure in the ILC market. In proposing my suggested alternatives to current regulation in Part V, I draw on the efforts to combat predatory loans in the mortgage context. Thus, some of the provisions in the statutes discussed in Part III that prohibit certain terms, such as prepayment penalties and unfair mandatory arbitration provisions, are a step in the right direction for actual regulation of the ILC. This Comment suggests that effective regulation must be stronger, even if it risks making the market for ILCs less palatable for sellers. If sellers are not interested in providing fair ILCs, then, given the high risk of exploitation, lawmakers should not protect their right to create these predatory financing tools.

2. Remedies too complicated to understand and too time-consuming to be effective.

Desmond's work on evictions has clearly shown that, often, the law as written and the law on the ground are very different—

[230] Omri Ben-Shahar and Carl E. Schneider, *Coping with the Failure of Mandated Disclosure*, 11 Jerusalem Rev Legal Stud 83, 83 (2015).

[231] Ben-Shahar and Schneider, 159 U Pa L Rev at 665 (cited in note 139).

[232] Ben-Shahar and Schneider, 11 Jerusalem Rev Legal Stud at 93 (cited in note 230).

[233] Ben-Shahar and Schneider, 159 U Pa L Rev at 742–49 (cited in note 139) (recommending that reforms focus on providing simple information and focusing on advice over purely factual information).

[234] Id at 743.

[235] Id at 746 ("When we abandon the unreal world of mandated disclosure and ask how people really make decisions, we see that they generally seek—and that the market often supplies—not data, but advice.").

and this consideration should animate all reforms that are passed to protect actors who are unlikely to have legal representation. Desmond has illustrated clearly that because of the differences in how landlord-tenant law is written and how it is enforced, the various protections provided by statutes and judicial decisions are nearly meaningless for most tenants.[236] Professor Nicole Summers recently completed a survey of housing decisions in New York City which further reinforced this concern in regard to the implied warranty of habitability.[237] Her survey suggested that without legal representation, the implied warranty of habitability provides essentially no protection.[238]

This lesson from the rental market should instruct lawmakers as they seek to effectively regulate the ILC. Like renters, ILC buyers are unlikely to have legal representation. Regulation therefore must and should be drafted with pro se buyers in mind. The lack of legal representation compounds the failure of mandatory disclosures in ILC legislation and suggests a reason why the complex dispute resolution procedures created by the Texas statute have failed. Professors Peter M. Ward, Heather K. Way, and Lucille Wood suggest in their study of the ILC in Texas that ILC buyers "face a number of exploitative practices through their participation in a market that still lacks regulatory oversight and contains limited consumer protections."[239] They suggest that part of the failure of the Texas statute is that there is no agency responsible for enforcing its provisions, and thus there is a need for stronger oversight.[240] This Comment proposes that lawmakers should consider these issues from the outset.

236 Desmond, *Evicted* at 304 (cited in note 196) ("Every housing court would need to be adequately funded so that it could function like a court, instead of an eviction assembly line: *stamp*, *stamp*, *stamp*.") (emphasis in original).

237 *Black's Law Dictionary* 773 (West 3d Pocket Ed 2006) (defining "implied warranty of habitability" as "[i]n a residential lease, a warranty from the landlord to the tenant that the leased property is fit to live in and that it will remain so during the term of the lease").

238 Summers, 87 U Chi L Rev at 208–10 (cited in note 13). This evidence suggests that Professor Freyfogle's suggestion to apply a three-part functional-equivalence test to determine if the implied warranty of habitability should apply to ILCs will also fail to meaningfully protect buyers. If the implied warranty does not work in the eviction context, there is little reason to believe that it will be more effective if judges have to walk through a three-part test to determine if it should even apply. See Freyfogle, 62 NYU L Rev at 310–19 (cited in note 13).

239 Ward, Way, and Wood, *CFD Prevalence Project* at ch 6 *1 (cited in note 134).

240 Id at ch 6 *11.

V. STRIKING A BALANCE BETWEEN ELIMINATION AND EXPLOITATION

This Comment accepts the prevailing argument that at least some ILCs are desirable as a path for low-income homeownership, provided that there are meaningful protections from the most predatory version of the ILC. In the eviction context, Professor Ezra Rosser notes that "if the process were less efficient, landlords might see eviction as more of a last resort."[241] Thus, this Comment considers ways to make the process of removing defaulting ILC buyers more difficult for ILC sellers. As the *New York Times* notes, "[t]he [ILC] home dweller has more limited protections than a person buying a house with a mortgage, and evictions are quicker than a foreclosure."[242] This Comment suggests ways to slow down the forfeiture process to allow buyers time to fully advocate for their rights, and seeks to give judges more tools beyond judicially created protections to effectively protect these homebuyers.[243]

This Part outlines the three reforms to ILC legislation that should be enacted. In Part V.A, I propose that, following HOEPA's lead, states should institute mandatory purchase counseling for ILC buyers. This would ensure that ILC buyers are able to understand the information that has been disclosed to them and that they are fully aware of the risks they are taking on. In Part V.B, I indicate that ILC cases should be treated more like mortgage cases and thus heard in the same court that hears mortgage cases, rather than in the court that hears eviction cases. The reason for this is twofold: (1) as a financing device, ILCs are more analogous to mortgages than rental agreements; and (2) it has become increasingly clear that eviction courts are overwhelmed just in terms of hearing the number of eviction cases that come before them. This reform would lessen the pressure on such courtrooms and give ILC buyers a more effective hearing. Finally, in Part V.C, I argue that any ILC that includes both an "as is" deed and a forfeiture clause should be declared per se unconscionable and voidable by the buyer. This will guarantee either that sellers will have to ensure the houses they sell are in habitable condition

[241] Ezra Rosser, Book Review, *Exploiting the Poor: Housing, Markets, and Vulnerability*, 126 Yale L J F 458, 464 (2017).

[242] Goldstein and Stevenson, *Market for Fixer-Uppers* (cited in note 116).

[243] In the ILC context, judicial reform alone has failed to protect consumers. See Danielson, Note, 1986 U Ill L Rev at 101–09 (cited in note 32).

or they will have to enforce their rights through the state's mortgage process.

A. Mandatory Purchase Counseling

The statutes surveyed in Part III generally seek to slow down the process of committing to an ILC by providing buyers with a mandatory cooling-off period. In theory, this period should allow buyers time to think about the full consequences of their decision and seek advice about their potential investment. In practice, it is unclear if these cooling-off periods are effective. Having entered into the contract, potential buyers may be more excited about the possibility of participating in the American Dream of homeownership than worried about the costs if the investment falls through.

Thus, this Comment proposes that states impose purchase counseling requirements on ILC transactions. This proposal is inspired by the HOEPA requirements that most loans secured by the borrower's primary residence require the borrower to undergo pre-loan counseling.[244] Preferably, a provision for this kind of counseling would require potential buyers to speak to a financial counselor about the risks and benefits of an ILC before entering into any agreement. Given the clear concerns about mandatory disclosure, it is unlikely that written disclosures about risks or information about best practices on a government website—a reform implemented by the Virginia act[245]—will effectively protect consumers.

If states cannot mandate in-person counseling provisions, which are costly in both manpower and enforcement mechanisms, states should require sellers to provide a list of financial

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244 For an explanation of HOEPA pre-loan counseling and its possible impacts on the mortgage market, see Christopher K. Seide, *Consumer Financial Protection Post Dodd-Frank: Solutions to Protect Consumers Against Wrongful Foreclosure Practices and Predatory Subprime Auto Lending*, 3 U Puerto Rico Bus L J 219, 240 (2012).

245 Va Code Ann § 55.1-3003. The "best practices" published by the Virginia Board of Housing and Community Development are one page and addressed to sellers, not buyers. Virginia Department of Housing and Community Development, *Best Practices for Residential Executory Real Estate Contracts*, archived at https://perma.cc/Q8SA-TMHN. A better provision might look something like the mortgage information provided by the CFPB, which outlines legal protections for buyers. See generally, for example, Consumer Financial Protection Bureau, *Shopping for a Mortgage? What You Can Expect under Federal Rules* (Jan 2014), archived at https://perma.cc/QCJ8-ZX82. Providing this kind of information in clear, plain language that interested ILC buyers can access with a mere Google search is more likely to be helpful than a one-pager of best practices for sellers which has no legal effect.

counselors with whom potential ILC buyers can speak for little-to-no cost. Such a provision would go alongside the current cooling-off periods, giving buyers direction for places to go for advice regarding the financial decision that they are making.

Moreover, since buyers typically use ILCs as a mortgage replacement, it makes sense to present buyers with similar protections as those provided to mortgage holders. Given the concern surrounding high risk mortgages after the 2008 crisis, the CFPB has sought to ensure that more people receive advice before entering into these loans. The ILC is not a loan per se, but it does function in similar ways. The risks to ILC buyers are more like the risks to mortgagors than the risks to tenants—the end goal is homeownership. Homeownership, at least in part, is a financial investment with clear risks that go beyond the risks associated with eviction.

The cost of these counseling measures should be imposed on the seller, who is far more likely to be represented by counsel and more likely to be a sophisticated market actor. The post-Dodd-Frank regulatory rules from the CFPB can provide guidance for how to draft these kinds of provisions. Dodd-Frank specifically requires lenders to "provide a list of homeownership counselors to applicants for federally related mortgage loans."[246] At the very least, states should consider passing provisions for homeownership counseling for potential ILC buyers that reflect the CFPB's final rule codified at 12 CFR § 1024.20. If homeownership counselors are not prepared to counsel ILC buyers, states should consider providing trainings on ILCs, the unique risks they pose, and any state-specific protections.

B. Enforcing Legal Protections: Venue and State Enforcement

On its own, counseling will only protect buyers so far. In order to counteract the problems Desmond observed in eviction courts, explored in Part IV, I next propose that legislation should create venue provisions to provide more tangible protections for buyers than they can hope to receive in eviction court. When the Third Restatement of Property proposed treating the ILC as a mortgage, the writers argued that "[a] growing number of states hold

[246] Consumer Financial Protection Bureau, High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X), 78 Fed Reg 6856, 6863 (Jan 31, 2013), amending 12 CFR §§ 1024, 1026.

that the [ILC] should be treated as a mortgage, at least in those cases where the purchaser's payments have been more than nominal."[247] This was written in 1997, but so far, only Oklahoma has actually enacted this suggestion—and the state did so long before the Restatement was written. The Restatement provides multiple cites to specific cases where various state courts ostensibly created an equity of redemption[248] that applied to ILCs, essentially creating a mortgage. However, the current state of the ILC market indicates such judicially created rules fail to protect consumers across the board. My approach to the venue question indicates that, while simply eliding ILCs and mortgages as one and the same is probably too simplistic, courts that deal with mortgages are far more likely to be experienced in equitable principles and less likely to be overwhelmed by the sheer number of cases they see each year.

Thus, this Comment proposes two changes to assist in the enforcement of ILC protections. First, this Comment argues that regardless of the number or amount of payments the buyer had made, all ILC cases should be heard in the same courts that typically hear mortgage cases, rather than eviction cases. Evictions are efficient—perhaps fatally so—and ILCs are more complex than a typical lease in terms of the property interest they create. Thus, even when forfeiture is a viable remedy, legislatures should mandate that ILC sellers may not leverage the typical eviction process to remove buyers from the home.

Instead, if a buyer defaults (and fails to cure under the state's cure period), and the seller seeks to legally remove them from the home, the seller should be forced to bring the case in a mortgage court, not an eviction court. Judges who typically handle mortgage foreclosures are more prepared to navigate the various defenses that a buyer may bring—either regarding the amount of payments already made or substantial repairs paid for by the buyer that may have resulted in default. To avoid the complications of the whole judicial foreclosure, lawmakers could choose to implement an alternative method of sale.[249]

247 Restatement (Third) of Property § 3.4 (1997).

248 Black's Law Dictionary (West 11th ed 2019) (defining "equity of redemption" as "[t]he right of a mortgagor in default to recover property before a foreclosure sale by paying the principal, interest, and other costs that are due").

249 Two possibilities already exist in the law. The first is "strict foreclosure":

> A rare procedure that gives the mortgagee title to the mortgaged property—without first conducting a sale—after a defaulting mortgagor fails to pay the mortgage debt within a court-specified period. The use of strict foreclosure is

Second, ILC statutes should include a provision allowing attorneys general to bring suit against any ILC vendor they find to be regularly providing predatory ILCs contrary to state law. This will help bridge the gap Professors Ward, Way, and Wood observed in Texas regarding the law on the books and the law in practice.[250] They noted that in spite of strong protections established in Texas law, designed specifically to protect residents in colonias, the law on the ground has failed to meaningfully protect buyers in part because they lack information about their legal rights.[251] The ability for attorneys general to bring suits against ILC sellers would mean that even if buyers lacked meaningful opportunities or the information to protect their interests, a third-party state actor could step in and ensure the law was followed. This will create a path for enforcement that does not rely on private, pro se litigants to be aware of their rights.

Lawmakers must ensure that ILC forfeiture cases are not heard in the same courts that typically hear eviction proceedings. They must also create state causes of action such that the attorney general's office can seek to enforce the statute if/when case-by-case adjudication fails. The goal of such provisions would be to ensure that each ILC case is not treated as a typical eviction scenario and to give states the power to enforce their laws against particularly large companies. Such provisions may be especially useful given that the contemporary market is dominated by a handful of large companies.[252] An alternative to these kinds of provisions would be for attorneys general to bring Fair Housing Act disparate impact claims[253] against large ILC vendors whose ILCs disproportionately impact minority communities. This may be an effective way for attorneys general to seek to protect consumers in the absence of regulation by legislators, but to meaningfully

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> limited to special situations, except in those few states that permit this remedy generally.

Black's Law Dictionary (West 11th ed 2019). The second has been enacted by Texas, which has created a relatively complex legal scheme for the enforcement of rights under ILCs after the first thirty days. This approach is surveyed in Part III.D.

250 Ward, Way, and Wood, *CFD Prevalence Project* at ch 6 *11 (cited in note 134).

251 Id at ch 6 *3.

252 Goldstein and Stevenson, *Market for Fixer-Uppers* (cited in note 116) ("Harbour, which raised more than $60 million from wealthy investors, was the single largest buyer of foreclosed homes from Fannie Mae's bulk sale program from 2010 to 2014, which the mortgage giant used to unload more than 20,000 homes that were hard to sell.").

253 See *Texas Department of Housing and Community Affairs v Inclusive Communities Project, Inc*, 135 S Ct 2507, 2516–18 (2015).

change the practices of ILC vendors, statewide or, ideally, nationwide regulation is necessary.

C. Eliminating the Combination of "As Is" Deed and the Forfeiture Clause

Finally, and most importantly, lawmakers should create statutory provisions making per se unconscionable any contract for real property that combines an "as is" deed and a forfeiture clause. Failing that, any contract that includes both should be treated as a mortgage, subject to all mortgage protections. This will create a strong defense against what is arguably the biggest flaw in the ILC system: that it allows sellers to market substandard housing and profit from any repairs the buyer makes. But this proposal stops short of entirely eliminating the ILC: where buyers continue to be protected by the duty to disclose defects,[254] forfeiture clauses remain in force. This solution strikes a balance between accepting that sellers will need incentives to enter into riskier loans while also seeking to improve protections for low-income buyers. This solution forces sellers to choose between two of the most concerning aspects of the ILC, thus either encouraging sellers to ensure the homes they sell are habitable or ensuring that buyers will have greater protections if they are forced to spend lots of money on repairs and subsequently default on their payments.

Further, lawmakers should consider creating a warranty of quality[255] specifically for ILCs. Such a warranty would be similar to the implied warranty of habitability, but would apply to ILCs specifically. This would go further than simply prohibiting ILCs to be sold under "as is" deeds, but rather would impose an affirmative duty on sellers to ensure that the homes they offer are habitable and safe for potential buyers. Generally, warranties of quality have been implied for consumer goods but not for real property. This Comment proposes changing that, at least for real property sold under an ILC. This would protect buyers from prohibitive repair costs of which they may be unaware when they enter into the initial contract.

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[254] For an example of an affirmative duty to disclose, see *Johnson v Davis*, 480 S2d 625, 629 (Fla 1985).

[255] Black's Law Dictionary defines "implied warranty of merchantability" as "[a] merchant seller's warranty—implied by law—that the thing sold is fit for its ordinary purposes." *Black's Law Dictionary* (West 11th ed 2019).

Defenders of the ILC typically argue that without the forfeiture clause, sellers will refuse to offer ILCs.[256] If this is the case, and forfeiture is essential for the continued existence of ILCs, legislatures should seek to create ILCs that are tolerable in other ways. This Comment focuses on the substandard nature of many of the homes sold via ILC, and suggests that if legislatures want to preserve forfeiture, they should not preserve forfeiture alongside "as is" deeds. It is the combination of these provisions that make the ILC particularly dangerous to buyers, because they may be unaware of the repair costs associated with the house they are purchasing. Since the forfeiture remedy prevents ILC buyers from building equity in the home as they make repairs, there is a powerful argument that ILC buyers should have stronger protections than mortgagors in terms of covenants of habitability and warranties of quality.

The goal of such a provision holding certain ILCs unconscionable or treating them as a mortgage would be to reduce the exploitative potential of the ILC market. If the forfeiture clause is as beneficial to sellers as scholars have argued, there is little reason to think that sellers need the additional incentive of a right to disclaim any obligation to ensure that the homes they sell are habitable. As noted in Part II.C, the housing defects in these homes can be quite severe.

To the extent that the ILC acts as a profit machine for vendors, lawmakers need not protect the existence of contracts filled with multiple predatory terms. They should certainly not do so under the guise of promoting low-income homeownership as a means of wealth accumulation. The history of ILCs shows that it has been a tool to drain wealth from minority communities to the advantage of ILC sellers, as the North Lawndale contracts effectively illustrated.

CONCLUSION

This Comment proposes a fundamental shift in how lawmakers view ILCs. When making laws regarding regulation of ILCs, lawmakers should consider strong buyer protections like those created by the Dodd-Frank Act and the CFPB in the wake of the subprime mortgage crisis. Unlike the current statutory schemes,

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[256] "Many have argued that abolition of the forfeiture remedy would end the use of the installment land contract as a financing device." Moringiello, 100 Dickinson L Rev at 741 & n 31 (cited in note 41) (collecting sources).

lawmakers should cease relying on mandatory disclosures and complex legal schemes that require legal counsel to fully protect buyers. Lawmakers should consider every provision from the perspective of the low-income buyers most likely to enter into ILCs, and should not hesitate to create powerful protections that limit the number of disadvantageous provisions a seller may include in a standard ILC.

This Comment focuses on the forfeiture clause, "as is" deeds, and enforcement mechanisms. It suggests a path for maintaining the forfeiture clause, while combatting the detrimental combination of being forced to spend money on substantial repairs and failing to build equity in the home. Considering the ILC as a whole, there are compelling arguments for stronger habitability protections, venue changes, and the complete elimination of certain especially predatory ILCs. Habitability protections would ensure that if ILC buyers still choose to enter into riskier contracts, their chosen home would be—at the very least—in compliance with housing codes. Lawmakers, judges, and scholars should not continue to support the ILC and all its potentially predatory provisions. To the extent that sellers are only interested in offering ILCs if the law allows them predatory terms—"as is" clauses justifying substandard housing, uniquely high interest rates, and forfeiture clauses which deny the ability to build equity—the ILC should not continue to exist.

However, modified ILCs could be a beneficial tool to provide low-income households with access to affordable, habitable housing. Thus, this Comment proposes three reforms for ILC legislation that take into account the realities of the low-income housing market. First, following the HOEPA example, legislatures should mandate that all ILC purchasers have access to pre-purchase counseling. Second, legislatures should ensure that ILC disputes are heard in the courts that deal with mortgages, not the courts that deal with evictions. Third, and most important, ILCs that include both a forfeiture clause and an "as is" deed must be deemed per se unconscionable to ensure buyers receive adequate protection from predatory sellers. As it stands now, the ILC exists as a uniquely exploitative tool for sellers. Lawmakers should not—and the research indicates they cannot—rely on vague defenses of homeownership in the abstract to defend its continued use.