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## Power and Possibility in the Era of Right to Counsel, Robust Rent Laws & COVID-19

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## ARTICLES

### **Power and Possibility in the Era of Right to Counsel, Robust Rent Laws & COVID-19**

Erica Braudy\* and Kim Hawkins\*\*

*New York City (NYC) finds itself in an unprecedented housing crisis as the coronavirus (COVID-19) pandemic reveals with devastating force that safe, sustainable and affordable housing is both a human right and a public health necessity. The profound humanitarian and economic devastation of COVID-19 puts millions of New Yorkers at risk of eviction—especially those within Black and Latinx communities. In addition, the pandemic hit just as the legal landscape for tenants was transformed through landmark legislation ensuring the Right to Counsel in eviction proceedings and sweeping reforms of New York’s rent laws. The unparalleled COVID-19 pandemic, the influx of hundreds of new tenant attorneys resulting from the Right to Counsel, and the robust rent law reforms fundamentally alter the role and powerful potential of housing advocacy and the very function of NYC’s Housing Court. These three forces provide an opportunity for housing attorneys representing low-income tenants to imagine new and creative ways to provide housing security and build tenant power.*

*This Article canvasses the fundamental shifts in the NYC housing landscape and the movement to expand tenants’ rights. It urges lawmakers to take bold action to avoid an eviction pandemic and shield tenants from homelessness and crushing debt. Next, it lays a blueprint for housing attorneys, both experienced and novice, to aggressively use the new tenant-friendly rent laws, creatively maximize underused tools, and leverage their collective strength to re-envision housing as a human right. The combination of the Right to Counsel, which has filled the ranks with passionate tenant attorneys, an empowered and progressive state legislature, and a vibrant tenants’ movement has created a powerful force to demand comprehensive and far-reaching*

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*housing and racial justice for all New Yorkers and redefine the housing world that lies beyond the virus.*

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## I. INTRODUCTION

New York City stands at a crossroads. In the face of a public health crisis, it has the opportunity to be bold and unrelenting in its provision of justice for low-income tenants. After decades of tenant organizing, in 2017, NYC became the first jurisdiction in the country to provide a Right to Counsel for tenants facing eviction.<sup>1</sup> This was a watershed moment for tenants and resulted in the hiring of a new army of tenant attorneys.<sup>2</sup> In June 2019, the New York State (NYS) legislature passed historic legislation extending and broadening rent laws, increasing tenant protections and providing housing lawyers new avenues to fight for tenants' rights.<sup>3</sup> March 2020 brought the destabilizing and dangerous COVID-19 pandemic, a public health and economic crisis of still-unfolding epic proportions.<sup>4</sup>

Armed with new tools, housing attorneys must continue to combat a reality where tens of thousands of New Yorkers live paycheck to paycheck and lack safe and affordable housing. The COVID-19 crisis has shown that safe, secure and affordable housing is both a human right and a public health necessity—especially in communities of color that have been hardest hit by the pandemic. Working alongside a strong tenants' movement, housing attorneys can push the newly empowered state legislature to shift power and win the fight for tenant justice. This moment invites many to reimagine housing in NYC, rethink how the system functions, and shift the common understanding of real estate from an investment for a rich few to a basic right for many.

This Article calls on New York City lawmakers to act boldly in the face of uncertainty, think expansively and act creatively to guarantee all New Yorkers secure and sustainable homes. The Article provides a blueprint for capitalizing on the dual effects of an army of new tenant attorneys and new laws to advance the legal rights of tenants. Part II locates these changes in the context of the eviction crisis and the devastating effect of the COVID-19 pandemic on the lives and livelihoods of low-income New Yorkers. Part III summarizes the history and power of the Housing Court and traces the arc of the movement to secure the Right to Counsel through tenant organizing and legislative action. Part IV charts the historic changes in New York's rent laws under the Housing Stability and Tenant

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1. *Mayor de Blasio Signs Legislation to Provide Low-Income New Yorkers with Access to Counsel for Wrongful Evictions*, THE OFFICIAL WEBSITE OF THE CITY OF N.Y. (Aug. 11, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/547-17/mayor-de-blasio-signs-legislation-provide-low-income-new-yorkers-access-counsel-for#0>.

2. See Abigail Savitch-Lew, *City Tackles Roll-Out of Right to Counsel in Housing Court*, CITY LIMITS (Jan. 17, 2018), <https://citylimits.org/2018/01/17/city-tackles-roll-out-of-right-to-counsel-in-housing-court/> (“Legal Services NYC has expanded its housing units from about 50 to about 250 attorneys and paralegals across the five boroughs over the past couple years”).

3. *New Rights for Tenants: Housing Stability and Tenant Protection Act of 2019*, LEGAL SERVICES OF THE HUDSON VALLEY (Sept. 19, 2019), [https://www.nysenate.gov/newsroom/articles/2019/new-rights-tenants-housing-stability-and-tenant-protection-act-2019-1#:~:text=%2D%20Starting%20in%20October%202019%2C%20landlords,help%E2%80%9D%20eviction%20is%20a%20crime](https://www.nysenate.gov/newsroom/articles/2019/new-rights-tenants-housing-stability-and-tenant-protection-act-2019-1#:~:text=%2D%20Starting%20in%20October%202019%2C%20landlords,help%E2%80%9D%20eviction%20is%20a%20crime.).

4. See *Coronavirus Disease 2019 (COVID-19)*, CTR. FOR DISEASE CONTROL AND PREVENTION (Feb. 6, 2021), <https://www.cdc.gov/media/dpk/diseases-and-conditions/coronavirus/coronavirus-2020.html>.

Protection Act. Against this backdrop, Part V presents underutilized tools that can be aggressively leveraged by housing attorneys to further tenants' rights. Finally, Part VI concludes with a new vision for tenants and their advocates in the fight for safe, habitable homes in this new era of tenants' rights.

## II. THE PROBLEM: THE EVICTION CRISIS

*"Eviction isn't just a condition of poverty; it's a cause of poverty."*<sup>5</sup>

The federal government defines "affordable housing" as housing that requires paying no more than 30 percent of household income toward rent.<sup>6</sup> Low-income families in the United States are increasingly "rent burdened," meaning they are paying more than half their income toward rent.<sup>7</sup> There are an estimated 30-40 million people – including essential workers and their children—who are at risk of losing their homes as COVID-19 continues to ravage the economy and health of millions.<sup>8</sup> However, the vast scale of the impending eviction crisis lays bare the precarious position that many families faced before COVID-19 hit. Nearly half of renter households were rent burdened before the pandemic—spending more than 30% of their income on rent on average.<sup>9</sup> For families living under the poverty line, a majority paid more than 50% of their income on rent, with one in four people paying an astounding 70% of their income just to keep a roof over their head.<sup>10</sup>

There is a high cost of such an extreme rent burden. Many individuals are one job loss or health crisis away from eviction. Evictions can be devastating and destabilizing for individuals and families and create long-ranging negative effects. Evidence shows that mothers who face evictions experience significantly higher rates of material hardship and depression than their peers even two years after the eviction.<sup>11</sup> Evictions can lead to high levels of stress, anxiety, depression and even post-traumatic stress disorder (PTSD).<sup>12</sup> Evictions have an especially dangerous and detrimental effect on children.<sup>13</sup> In fact, homelessness for New York City students continues at disturbingly high rates—topping 100,000 or 1 in 10 kids in

5. Matthew Desmond, *First-Ever Evictions Database Shows: 'We're In the Middle Of A Housing Crisis'*, NAT'L PUB. RADIO (Apr. 12, 2018), <https://www.npr.org/2018/04/12/601783346/first-ever-evictions-database-shows-were-in-the-middle-of-a-housing-crisis>.

6. *Defining Affordable Housing*, U.S. DEP'T OF HOUS. AND URB. DEV. (Mar. 17, 2020), <https://www.huduser.gov/portal/pdr/pdr-edge-featd-article-081417.html>.

7. Oksana Mironova & Victor Bach, *Tenants at the Edge Rising Insecurity Among Renters in N.Y.C.*, CMTY. SERV. SOC'Y, at 11 (Apr. 2018), <https://smhttp-ssl-58547.nexcesscd>.

8. Emily Benfer et al., *The COVID-19 Eviction Crisis: an Estimated 30-40 Million People in America Are at Risk*, ASPEN INSTITUTE: BUSINESS & SOCIETY (Aug. 7, 2020), <https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/>.

9. *See id.*

10. *Id.*

11. See Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, SOCIAL FORCES 1, 25 (2015), <https://scholar.harvard.edu/files/mdesmond/files/desmondkimbro.socialforces.2015.pdf>.

12. Univ. Granada, *The Enormous Impact of Home Evictions on Mental Health*, DISABLED WORLD (Jan. 19, 2018), <https://www.disabled-world.com/disability/housing/eviction.php>.

13. *See Eviction Hits Children Hardest*, THE BRIDGE FUND OF N.Y. INC., <https://thebridgefund.org/2016/06/05/eviction-hits-children-most/> (last visited May 1, 2020).

2019.<sup>14</sup> In addition to the physical, mental and emotional impacts of eviction, losing one's home has severe financial implications.<sup>15</sup>

Systemic racism and sexism also intensify the eviction epidemic. As John O. Calmore describes, “[R]acism operates so effectively that we seldom distinguish serious racist harms from a variety of other harms that categorically run from ‘bad luck’ to ‘natural catastrophes.’”<sup>16</sup> Systemic racism is deeply embedded in housing. For example, discrimination in the rental market is rampant and well-documented.<sup>17</sup> Researchers also recognize discrimination in evictions.<sup>18</sup> Studies show that the racial make-up of a neighborhood is a significant factor in eviction rates, even after controlling for income, property value, and other factors.<sup>19</sup> These studies also show that as the Black population of a neighborhood increases, the eviction rate increases. By contrast, when the share of white population increases,

14. *New Data Show Number of NYC Students who are Homeless Topped 100,000 for Fourth Consecutive Year*, ADVOCATES FOR CHILD. OF N.Y. (Oct. 28, 2019), <https://advocatesforchildren.org/node/1403>.

15. See Dyvonne Body & Financial Security Program, *A Glimpse into the Eviction Crisis: Why Housing Stability Deserves Greater Attention*, ASPEN INST. (July 24, 2019), <https://www.aspeninstitute.org/blog-posts/a-glimpse-into-the-eviction-crisis-why-housing-stability-deserves-greater-attention/> (explaining that losing a home through an eviction can have a deep impact on mental and financial well-being); see also Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J. L. & GENDER 55, 64 n.51, 54 (2018) (explaining the significance of housing on lower-income families' household income).

16. John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1073 (1998).

17. See, e.g., Ali M. Ahmed & Mats Hammarstedt, *Discrimination in the Rental Housing Market: A Field Experiment on the Internet*, 64 J. URB. ECON. 362, 362 (2008) (demonstrating the effect of “ethnic sounding” names on rental applications); Pouya Bavafa, *The Intentional Targeting Test: A Necessary Alternative to the Disparate Treatment and Disparate Impact Analyses in Property Rentals Discrimination*, 43 COLUM. J.L. & SOC. PROBS. 491, 491 (2010) (explaining how landlords rent substandard apartments to minority groups for profit); Mariano Bosch et al., *Information and Discrimination in the Rental Housing Market: Evidence from a Field Experiment*, 40 REG'L SCI. & URB. ECON. 11 (2010) (documenting the discriminatory behavior observed based on the names from various ethnic groups on rental applications); Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It?)*, 40 J. MARSHALL L. REV. 455, 455 (2007) (“...the problem of racial discrimination in rental housing [is the] painful and debilitating ailment”); see also *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 101–02 (1979) (“...Congress intended to reach *all* victims—both direct and indirect—of housing discrimination by referring generally to those ‘aggrieved.’”); *Zuch v. Hussey*, 394 F. Supp. 1028, 1046 (E.D. Mich. 1975), *aff'd* and remanded, 547 F.2d 1168 (6th Cir. 1977) (“Congress’ intention in passing the [Fair Housing Act of 1968] was to end the unfairness of racial discrimination forever”); *United States v. Youritan Const. Co.*, 370 F. Supp. 643, 647 (N.D. Cal. 1973), *aff'd* in part and remanded in part, 509 F.2d 623 (9th Cir. 1975) (finding that discriminatory instructions given to rental agents resulted in the denial of apartments to blacks because of race); U.S. DEP’T OF HOUS. AND URB. DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES (2012) [http://www.huduser.org/portal/Publications/pdf/HUD-514\\_HDS2012\\_execsumm.pdf](http://www.huduser.org/portal/Publications/pdf/HUD-514_HDS2012_execsumm.pdf), archived at <https://perma.cc/MYT4-TRXV>; Ann Choi et al., *Long Island Divided*, NEWSDAY (Nov. 17, 2019), <https://projects.newsday.com/long-island/real-estate-agents-investigation/> (documenting undercover investigation of racism in Long Island New York real estate market) (“For much of the twentieth century, discrimination by private real estate agents and rental property owners helped establish and sustain stark patterns of housing and neighborhood inequality.”).

18. Deena Greenberg et al., *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 HARV. C.R.-C.L. L. REV. 115, 115 (2016).

19. See, e.g., Benjamin F. Teresa, *The Geography of Eviction in Richmond: Beyond Poverty*, RVA EVICTION LAB, <https://cura.vcu.edu/media/cura/pdfs/cura-documents/GeographiesofEviction.pdf> (last visited Mar. 12, 2021).

the eviction rate declines.<sup>20</sup> Evictions are especially dire for Black and Latinx women who suffer the most in the eviction epidemic, even before the COVID-19 pandemic.<sup>21</sup>

In addition, unemployment filings in the early months of 2020 shattered previous records.<sup>22</sup> Pandemic-related job losses fell disproportionately on low-income households.<sup>23</sup> Black and Latinx communities have experienced exceptionally high levels of unemployment and slow rates of job recovery.<sup>24</sup> The unemployment crisis has also hit women hardest—especially Black and Latinx women.<sup>25</sup> In December 2020, the Bureau of Labor Statistics reported that all of the 140,000 jobs lost in that month were jobs held by women.<sup>26</sup> The unemployment crisis hit Asian communities in NYC especially hard as well. By May 2020, unemployment in NYC Asian communities jumped to 15% from 2.5% in February 2020, the greatest rate of increase among all racial groups across the country.<sup>27</sup> Significantly, renters represent the majority of households with at least one member in an occupation vulnerable to pandemic-related job loss.<sup>28</sup> As many as one in three renters were unable to pay rent in April and May 2020.<sup>29</sup> This trend continued throughout 2020.<sup>30</sup>

Harvard University published a study finding that Black households were the most likely to fall behind on rent payments, followed by Latinx, Asian, multiracial, and finally white households.<sup>31</sup> One critique of the study says it undercounts certain Asian community members since the study was only conducted in English and Spanish.<sup>32</sup> Vulnerable Asian community members who face language barriers, including those who are low-income, recent immigrants, undocumented, or elderly

20. *Id.*

21. Sabbeth, *supra* note 15, at 90.

22. Press Release, U.S. Bureau of Lab. Stat., Employment Situation Summary (2020), <https://www.bls.gov/news.release/empst.nr0.htm>.

23. *What are the Housing Costs of Households Most Vulnerable to Job Layoffs? An Initial Analysis*, NYU FURMAN CTR.BLOG: THE STOOP (Mar. 30, 2020), <https://furmancenter.org/thestoop/entry/what-are-the-housing-costs-of-households-most-vulnerable-to-job-layoffs-a> [hereinafter *What are the Housing Costs*].

24. ROGELIO SAENZ & COREY SPARKS, CASEY SCH. OF PUB. POL'Y, THE INEQUITIES OF JOB LOSS AND RECOVERY AMID THE COVID-19 PANDEMIC 1 (2020), <https://carsey.unh.edu/publication/inequities-job-loss-recovery-amid-COVID-pandemic>.

25. CLAIRE EWING-NELSON, NAT'L WOMEN'S L. CTR., ALL OF THE JOBS LOST IN DECEMBER WERE WOMEN'S JOBS 1 (2021), <https://nwlc.org/wp-content/uploads/2021/01/December-Jobs-Day.pdf>.

26. *Id.*

27. AAF, THE IMPACT OF COVID-19 ON ASIAN AMERICAN EMPLOYMENT IN NEW YORK CITY (2020), [https://aafcovid19resourcecenter.org/unemployment-report/?mc\\_cid=6ffdf5cf0b&mc\\_eid=ddd4d683c8](https://aafcovid19resourcecenter.org/unemployment-report/?mc_cid=6ffdf5cf0b&mc_eid=ddd4d683c8).

28. *What are the Housing Costs*, *supra* note 22.

29. Chris Morris, *One-third of American renters didn't pay in April*, FORTUNE (Apr. 9, 2020, 11:03 AM), <https://fortune.com/2020/04/09/apartment-renters-april-payments-coronavirus-unemployment-jobless/>.

30. Caroline Spivack, *As New York Hurtle Toward an Eviction Crisis, These are the Tenants Most at Risk*, CURBED NEW YORK (Aug. 19, 2020, 1:31 PM), <https://ny.curbed.com/2020/8/19/21368734/new-york-city-eviction-crisis-rent-tenants-greatest-risk>.

31. *The State of the Nation's Housing 2020*, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., 2 (2020) [https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard\\_JCHS\\_The\\_State\\_of\\_the\\_Nations\\_Housing\\_2020\\_Report\\_Revised\\_120720.pdf](https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2020_Report_Revised_120720.pdf).

32. Amy Yee, *It's a Myth That Asian-Americans Are Doing Well in the Pandemic*, SCI. AM. (Mar. 2, 2021), <https://www.scientificamerican.com/article/its-a-myth-that-asian-americans-are-doing-well-in-the-pandemic/>.

were likely excluded from the study and may be at particular risk of being displaced from their homes outside the formal court process.<sup>33</sup> As John A. Powell writes, “[R]acism need not be either intentional or individualist. Institutional practices and cultural patterns can perpetuate racial inequity without relying on racist actors.”<sup>34</sup> Put simply, there is nothing accidental about the devastating economic toll and life cost that COVID-19 and accompanying eviction crisis continue to have on Black, Latinx and Asian communities. Failing to take bold and intentional action to support those hit hardest by these crises will perpetuate racial injustice.

### A. New York’s Eviction Crisis

Anyone who lives in New York City knows the “Rent is Too Damn High.”<sup>35</sup> Even before the pandemic, tenants in NYC, like those around the country, experienced a convergence of factors that exacerbated the eviction crisis: increasingly unaffordable rents, stagnant wages, inadequate housing conditions and increased landlord harassment.<sup>36</sup> According to a 2017 report, of the 373,000 New Yorkers earning below the federal poverty level,<sup>37</sup> seventy-eight percent of those were severely rent burdened.<sup>38</sup> New York City has lost over 280,000 rent stabilized units since 1993, further leading to an unaffordability crisis in the city.<sup>39</sup> In a blistering four-part report published in 2018, the New York Times highlighted the eviction crisis and the travesty that tenants experience in their homes and in Housing Court, “often-overlapping modes of harassment: by landlords’ fraudulent or exaggerated claims, by disrepair and by overall court dysfunction.”<sup>40</sup>

In 2017, as New York City was on the cusp of passing the groundbreaking right to counsel law to provide attorneys for low-income tenants in Housing Court, the eviction crisis was in full swing.<sup>41</sup> That year, landlords evicted approximately 21,000 families and individuals.<sup>42</sup> Once evicted, the barriers to finding another

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33. *Id.*

34. John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 795 (2008).

35. RENT IS TOO DAMN HIGH, <http://www.rentistoodamnhigh.org/index.html> (last visited Jan. 24, 2021). Rent Is Too Damn High is a political party that was founded in New York by Jimmy McMillan. See Janell Ross, *Breaking: The Rent is Indeed Too Damn High*, WASH. POST (Jul. 8, 2015, 11:36 AM), <https://www.washingtonpost.com/news/the-fix/wp/2015/07/08/breaking-the-rent-is-indeed-too-damn-high/>.

36. Mironova & Bach, *supra* note 7; Desmond, *supra* note 5.

37. Rachel B. Morgan, *2017 Federal Poverty Level Guidelines*, NAT’L CONF. OF STATE LEGISLATURES (May 30, 2017), <https://www.ncsl.org/research/health/2014-federal-poverty-level-standards.aspx>.

38. Mironova & Bach, *supra* note 7.

39. Kim Barker, *Behind New York’s Housing Crisis: Weakened Laws and Fragmented Regulation*, N.Y. TIMES (May 20, 2018), <https://www.nytimes.com/interactive/2018/05/20/nyregion/affordable-housing-nyc.html>, (“Since city and state lawmakers started gutting the rent laws in 1993, the city has lost over 152,000 regulated apartments because landlords have pushed the rent too high. At least 130,000 more have disappeared because of co-op and condo conversions, expiring tax breaks and other factors.”).

40. Kim Barker et al., *The Eviction Machine Churning Through New York City*, N.Y. TIMES (May 20, 2018), <https://www.nytimes.com/interactive/2018/05/20/nyregion/nyc-affordable-housing.html>.

41. Mironova & Bach, *supra* note 7.

42. N.Y.C. RENT GUIDELINES BOARD, 2018 HOUSING SUPPLY REPORT 3 (2018), <https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/18HSR.pdf>.



safe and affordable apartment are nearly insurmountable.<sup>43</sup> The rise in gentrification and the flat-lining of affordable housing created a competitive and shrinking housing market with a low city-wide vacancy rate.<sup>44</sup> During a decade and a half of population growth, the number of families in homeless shelters tripled,<sup>45</sup> further evidence of the intractable nature of the eviction crisis in New York City.

### *B. The Impact of COVID-19*

New York's eviction crisis was made exponentially more dire by COVID-19. In the early months of 2020, the pandemic hit New York City with devastating and disproportionate force. At one point during the height of the crisis, NYC was the global epicenter of the pandemic.<sup>46</sup> From late February 2020—the start of daily case tracking by the NYC Department of Health of known COVID-19 cases—through May 22, 2021, at least 2,091,142 New Yorkers tested positive for the virus and 52,555 died.<sup>47</sup> Rates of hospitalization and death have been highest among the city's poorest neighborhoods.<sup>48</sup>

Communities of color, especially Latinx and Black communities, have been ravaged by the virus,<sup>49</sup> with the highest death rates in the city.<sup>50</sup> The disproportionate health effects of COVID-19 are compounded by the patchwork public health system in low-income neighborhoods, the history of discrimination and unequal access to housing, overburdened hospitals and medical centers, and the lack of appropriate personal protective equipment (PPE) for essential workers living and working in those neighborhoods.<sup>51</sup> Essential workers such as transit workers, healthcare workers, food service workers and others have continued to work and risk daily exposure to COVID-19. Essential workers are disproportionately low-income and from communities of color.<sup>52</sup> Thus, these New

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43. Barker et al., *supra* note 41; Oksana Mironova, *Addressing the Eviction Epidemic- Analysis of 2017 Data*, CMTY. SERV. SOC'Y, Sept. 12, 2018, [https://www.cssny.org/news/entry/addressing-the-eviction-epidemic-2017-analysis#\\_ednref1](https://www.cssny.org/news/entry/addressing-the-eviction-epidemic-2017-analysis#_ednref1).

44. Mironova & Bach, *supra* note 7, at 4.

45. *Id.*

46. Ben Guarino & Shayna Jacobs, *New York City, Once the U.S. Epicenter of the Coronavirus, Begins to Reopen*, WASH. POST (June 8, 2020, 7:22 PM), <https://www.washingtonpost.com/nation/2020/06/08/new-york-city-once-us-epicenter-coronavirus-begins-reopen/>.

47. *New York Coronavirus Map and Case Count*, N.Y. TIMES (May 22, 2021, 1:31 PM), <https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html>.

48. *Id.*

49. Jake Dobkin & Zach Gottehrer-Cohen, *The Very Unequal Impact of COVID-19 On NYC Neighborhoods*, GOTHAMIST (Apr. 13, 2020), <https://gothamist.com/news/very-unequal-impact-covid-19-nyc-neighborhoods>.

50. *COVID-19: Data Summary*, N.Y.C. HEALTH (2020), <https://www1.nyc.gov/site/doh/covid/covid-19-data.page>.

51. David Madland et al., *How the Federal Government Can Protect Essential Workers in the Fight Against Coronavirus*, CTR. AM. PROGRESS, (Apr. 8, 2020), <https://www.americanprogress.org/issues/economy/news/2020/04/08/482881/federal-government-can-protect-essential-workers-fight-coronavirus/>.

52. See, e.g., Governor Cuomo Issues Guidance on Essential Services Under The 'New York State on PAUSE' Executive Order, N.Y. STATE (Mar. 20, 2020), <https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order>; Celine

Yorkers who lack the option to work from home have had little choice but to continue working, while putting themselves at heightened risk of infection and the resulting health care costs.<sup>53</sup>

Apartment overcrowding—which often affects low-income communities and communities of color—is creating increasingly negative consequences during the COVID-19 pandemic. Overcrowding, defined as more than one person per room, is a symptom of an unsustainable housing affordability crisis.<sup>54</sup> The number of people per shared bedroom has become a more reliable indicator of increased infection than housing density.<sup>55</sup> Reports show that crowded conditions within homes, rather than housing density in a community, can better explain why some urban areas see higher infection rates.<sup>56</sup> Overcrowding is not a new phenomenon in New York City—the pandemic just shines deadly focus on the issue.<sup>57</sup> The problem of overcrowding is particularly acute in the Bronx and Brooklyn, and especially in areas of Queens, including Elmhurst and Corona where there are large working-class and immigrant populations.<sup>58</sup>

The staggering scale of the pending eviction crisis, as well as the risk to public health presented by the courts themselves, forced the closure of NYC Housing Courts on March 16, 2020.<sup>59</sup> On March 20, 2020, Governor Andrew Cuomo issued

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McNicholas & Margaret Poydock, *Who are essential workers? A comprehensive look at their wages, demographics, and unionization rates*, ECON. POL'Y INST., tbls. 2, 3 (2020), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates/>; E. Tammy Kim, *When You are Paid 13 Hours for a 24-Hour Shift*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/30/opinion/coronavirus-nursing-homes.html?action=click&module=Opinion&pgtype=Homepage>.

53. Adie Tomer & Joseph W. Kane, *How to Protect Essential Workers During COVID-19*, BROOKINGS (Mar. 31, 2020), <https://www.brookings.edu/research/how-to-protect-essential-workers-during-covid-19/>.

54. This definition is provided by the NYC Department of Housing Preservation and Development N.Y. BUR. FISCAL & BUDGET STUDS., NYC HOUSING BRIEF: HIDDEN HOUSEHOLDS 3 (2015), [https://comptroller.nyc.gov/wp-content/uploads/documents/Hidden\\_Households.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/Hidden_Households.pdf); Janaki Chadha, *New York City's most crowded neighborhoods are often hardest hit by coronavirus*, POLITICO N.Y. (Apr. 11, 2020, 12:29 PM EDT), <https://www.politico.com/states/new-york/albany/story/2020/04/11/new-york-citys-most-crowded-neighborhoods-are-often-hardest-hit-by-coronavirus-1274875>.

55. Conor Dougherty, *12 People in a 3-Bedroom House, Then the Virus Entered the Equation*, N.Y. TIMES (Aug. 1, 2020), <https://www.nytimes.com/2020/08/01/business/economy/housing-overcrowding-coronavirus.html>; Haru Coryne, *In Chicago, Urban Density May Not Be to Blame for the Spread of the Coronavirus*, PROPUBLICA (Apr. 30, 2020, 2:00 PM CDT), <https://www.propublica.org/article/in-chicago-urban-density-may-not-be-to-blame-for-the-spread-of-the-coronavirus>.

56. Coryne, *supra* note 53; *COVID-19 Cases in New York City, a Neighborhood-Level Analysis*, NYU FURMAN CTR.: THE STOOP (Apr. 10, 2020), <https://furmancenter.org/thestoop/entry/covid-19-cases-in-new-york-city-a-neighborhood-level-analysis>.

57. Kirk Semple, *When the Kitchen is Also a Bedroom: Overcrowding Worsens in New York*, N.Y. TIMES (Feb. 29, 2016), <https://www.nytimes.com/2016/03/01/nyregion/overcrowding-worsens-in-new-york-as-working-families-double-up.html> (A 2015 report by NYC Comptroller Scott Stringer found that between 2005 - 2013, overcrowding rose 19% to nearly a quarter million apartments. In 2016, the New York Times reported that about 9 percent of all households or nearly 280,000 units in NYC were overcrowded.).

58. *Id.*

59. Caroline Spivack, *New York Halts Evictions Due to Coronavirus Pandemic*, CURBED N.Y. (Mar. 20, 2020, 12:51 PM), <https://ny.curbed.com/2020/3/16/21180842/coronavirus-new-york-state-eviction-moratorium>.

a 90-day state-wide moratorium on evictions,<sup>60</sup> which was extended to August 20, 2020.<sup>61</sup> The Office of Court Administration extended the eviction moratorium through October 1, 2020,<sup>62</sup> but made clear that any additional eviction moratorium would need to be authorized by the governor or the state legislature.<sup>63</sup> The order did not relieve tenants of the obligation to pay rent during the period of the moratorium,<sup>64</sup> thus many tenants fear a huge wave of evictions as soon as the moratorium is lifted.<sup>65</sup>

It is not an overstatement to describe the effects of the COVID-19 pandemic on the landscape of affordable housing and Housing Court as unprecedented. Further, time is of the essence, as one study shows that lifting eviction moratoriums without sufficient help for renters leads to increased COVID-19 cases and deaths.<sup>66</sup> In May 2020, NYS passed a stop-gap bill, which created a \$100 million voucher program for individuals financially affected by COVID-19 making less than 80 percent of the median income.<sup>67</sup> The relief would be paid directly to landlords, but the legislation is widely seen as insufficient to avert an eviction crisis.<sup>68</sup>

On June 30, 2020, the NYS Legislature passed the Tenant Safe Harbor Act.<sup>69</sup> This law provides protections against eviction by allowing landlords to seek only monetary judgments for rent accruing during the pandemic – not possessory judgments.<sup>70</sup> In other words, tenants who lost their jobs during the citywide shutdown and cannot pay their rent will go into debt for the unpaid rent payments that have been accruing since the start of the pandemic, but will not be forcibly evicted from their homes. The forecast was that by the end of 2020, approximately 1.3 million renter households will accrue \$7.2 billion in unpaid rent due to

60. N.Y. Exec. Order No. 202.8 (Mar. 20, 2020), <https://www.governor.ny.gov/news/no-2028-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

61. N.Y. Exec. Order No. 202.28 (May 7, 2020), <https://www.governor.ny.gov/news/no-20228-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

62. Emma Whitford, *NY Courts Extend Residential Eviction Hold at Least to Oct. 1*, LAW 360 (Aug. 12, 2020, 3:44 PM), <https://www.law360.com/articles/1300646/ny-courts-extend-residential-eviction-hold-at-least-to-oct-1>.

63. Emma Whitford, *NY Courts Say State Has 1 Month to Act on Eviction Hold*, LAW 360 (Sept. 1, 2020, 3:09 PM), [https://www.law360.com/newyork/articles/1306310/ny-courts-say-state-has-1-month-to-act-on-eviction-hold?nl\\_pk=8472e572-d914-4884-9504-9938a98a1842&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=newyork&read\\_more](https://www.law360.com/newyork/articles/1306310/ny-courts-say-state-has-1-month-to-act-on-eviction-hold?nl_pk=8472e572-d914-4884-9504-9938a98a1842&utm_source=newsletter&utm_medium=email&utm_campaign=newyork&read_more).

64. *Id.*

65. Matthew Haag, *A Moratorium on Eviction Ends, Leaving Thousands of Tenants Fearful*, N.Y. TIMES (May 4, 2021), <https://www.nytimes.com/2020/06/22/nyregion/nyc-evictions-moratorium-coronavirus.html>

66. Leifheit et al., *Expiring Eviction Moratoriums and Covid-19 Incidence and Mortality* (Nov. 30, 2020) (unpublished article) (on file with SSRN), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3739576](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3739576).

67. Emergency Rent Relief Act of 2020, S. 8419, 116th Cong. (2020), <https://www.nysenate.gov/legislation/bills/2019/s8419> (To be eligible tenants must meet the income threshold, spend more than 30 percent of their monthly income on rent and be able to document lost income since March.).

68. Brian Kavanagh, *Forwarding: Application for Emergency Rent Relief Act Funding Available Starting July 16*, N.Y. STATE SENATE, (July 14, 2020), <https://www.nysenate.gov/newsroom/press-releases/brian-kavanagh/forwarding-application-emergency-rent-relief-act-funding> (“This rental assistance program, while still not enough to meet the tremendous need that exist, is a step forward to lifting a financial burden off our most vulnerable families”).

69. Tenant Safe Harbor Act, S. 8192B, 116th Cong. (2020) [hereinafter Tenant Safe Harbor Act].

70. *Id.*

pandemic-related job losses.<sup>71</sup> This growing rental debt will disproportionately affect Latinx households, Black households and one-adult family households headed by women.<sup>72</sup> In New York City, although the Rent Guidelines Board voted to freeze rent for one year for rent-stabilized tenants in light of the COVID-19 crisis,<sup>73</sup> this offers no respite for renters who are struggling with current rent obligations. According to the global advisory firm Stout Risius Ross, a jaw-dropping 1.2 million NYC renters face risk of eviction due to the pandemic.<sup>74</sup> A recent report shows that over 222,135 tenants have active, ongoing cases in housing courts across New York State and can face swift eviction once the NYS moratorium is lifted.<sup>75</sup>

On December 28, 2020, the NYS Legislature passed the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020,<sup>76</sup> which stayed most proceedings and evictions for sixty days.<sup>77</sup> It allowed tenants to submit a ‘Hardship Declaration’ to further stay their cases through May 1, 2021.<sup>78</sup> The Legislature further stayed the eviction moratorium through August 31, 2021.<sup>79</sup> The law bought time for struggling tenants, but it did not address the underlying issues of mounting debt and the risk of future evictions.

Although the Tenant Safe Harbor Act is keeping people in their homes for the time being, it will create a generation of tenants carrying crippling debt even after the COVID-19 pandemic is behind us. As such, this Article calls on the NYS Legislature to take bolder action to cancel all rent accruing during this national crisis. Nearly every industry in NYC has been ordered to close its doors and asked

71. Eileen Divring & Davin Reed, *Household Rental Debt During Covid-19*, FED. RSRV. BANK PHILADELPHIA, (Oct. 2020), <https://www.philadelphiafed.org/community-development/housing-and-neighborhoods/household-rental-debt-during-covid-19>.

72. See *id.*

73. NYC Rent Guidelines Board, Summary of Guidelines Adopted on June 17, 2020 (2020), <https://rentguidelinesboard.cityofnewyork.us/2020-summary-of-guidelines/>.

74. Sydney Pereira, *Looming Eviction Crisis Has NYC Renters Fearing The Worst*, GOTHAMIST (July 30, 2020, 12:11 PM), <https://gothamist.com/news/looming-eviction-crisis-has-nyc-renters-fearing-worst>; <https://www.nytimes.com/2020/12/28/nyregion/new-york-eviction-ban.html#:~:text=As%20many%20as%201.2%20million,for%20at%20least%2060%20days;see%20Estimation%20of%20Household%20Experiencing%20Rental%20Shortfall%20and%20Potentially%20Facing%20Eviction,%20Stout,%20https://app.powerbi.com/view?r=eyJrIjoiNzRhYjg2NzAtMGE1MC00NmNjLTllOTMtYjM2NjFmOTA4ZjMyIiwidCI6Ijc5MGJmNjk2LTE3NDYtNGE4OS1hZjI0LTc4ZGE5Y2RhZGE2MSIsImMiOiN9> (last visited Jan. 24, 2021).

75. Lucy Block, *22,000 Tenants on the Brink and Counting*, ASSOC. FOR NEIGHBORHOOD & Hous. Dev. (Mar. 17, 2021), <https://anhd.org/blog/220000-tenants-brink-and-counting>.

76. Emergency Eviction Prevention Act, S. 9114, 2019 Leg. (N.Y. 2020).

77. *Id.* Part A § 9. (The eviction stay provisions of the Act created a ‘Nuisance Exception’ and do not apply where a pending or new petition alleges that the tenant is “persistently and unreasonably engaging in behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others.”)

78. *Id.* (Tenants need to submit the form stating that they or someone in the household lost income or had increased costs during the pandemic, or if moving would pose a significant health risk for the tenant or their family.); See *The COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020*, N.Y. COURTS (Dec. 28, 2020), <https://www.nycourts.gov/covid-eeffa.shtml>.

79. Sarah Taddeo, *Cuomo Signs Bill Extending Eviction Moratorium to Aug. 31*, DEMOCRAT & CHRONICLE (May 4, 2021, 6:00 PM EST), <https://www.democratandchronicle.com/story/news/2021/05/03/ny-state-eviction-moratorium-extended-to-aug-31/4925995001/>.

to sacrifice financially in the name of public health and safety.<sup>80</sup> Big landlords and real estate management companies that have continued to profit over the past decade<sup>81</sup> should be asked to endure the same financial sacrifice as other industries without putting a generation of people in insurmountable debt.

Congress earmarked approximately \$50 billion in rental assistance money to help struggling renters.<sup>82</sup> In its 2021 budget, New York State announced that it received \$2.3 billion in federal funding, and approved an additional \$400 million to expand eligibility, to assist tenants to pay up to one year of rent arrears and three prospective months of rent for tenants affected by the pandemic who earn at or below 80% of the area median income (“AMI”).<sup>83</sup> To that end, NYS has created the Emergency Rental Assistance Program (“ERAP”) to administer applications and distribute funds to landlords.<sup>84</sup> While this allocation of money is positive and substantial, it will likely fall short of assisting all tenants in need.<sup>85</sup> According to a comprehensive report, an estimated 800,000 – 1.2 million households will owe between \$2.5-3.4 billion in unpaid rent by January 2021.<sup>86</sup> While the large influx of financial assistance will help many struggling New Yorkers, it may not go far enough to stop a large wave of evictions caused by the COVID-19 economic crisis.

Given the dramatic impact of the eviction crisis, New York must take quick and decisive action to assist struggling tenants and keep them in their homes without asking them to endure generational debt. NYS leaders must reimagine, strengthen and establish laws and policies to ensure all New Yorkers have affordable and sustainable housing, especially in the communities of color that have been hardest hit by years of structural inequities and the newest assault of COVID-19.

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80. *COVID-19: New York and Connecticut Among States Ordering Non-Essential Businesses Closed*, NAT’L L. REV. (Mar. 25, 2020), <https://www.natlawreview.com/article/covid-19-new-york-and-connecticut-among-states-ordering-non-essential-businesses>.

81. N.Y.C Rent Guidelines Board, *2020 Income and Expense Study*, (Apr. 15, 2020), <https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/04/2020-IE.pdf>

82. Chris Arnold, *Landlords Struggling to Stay Afloat See Lifeline in Covid-19 Relief for Renters*, NPR (Mar. 17, 2021 5:00AM), <https://www.npr.org/2021/03/17/977441157/landlords-struggling-to-stay-afloat-see-lifeline-in-covid-19-relief-for-renters>.

83. Press Release, New York State Senate Brent Kavanaugh, Senate Majority Budget Resolution Provides for Huge Investments in Housing and Homelessness Prevention (Mar. 15, 2021) <https://www.nysenate.gov/newsroom/press-releases/brian-kavanagh/senate-majority-budget-resolution-provides-huge-investments>.

84. <https://otda.ny.gov/programs/Emergency-Rental-Assistance>

85. NAT’L COUNCIL STATE HOUS. AGENCIES, ANALYSIS OF CURRENT AND EXPECTED RENTAL SHORTFALL AND POTENTIAL EVICTIONS IN THE U.S. (Sep. 25, 2020), [https://www.ncsha.org/wp-content/uploads/Analysis-of-Current-and-Expected-Rental-Shortfall-and-Potential-Evictions-in-the-US\\_Stout\\_FINAL.pdf](https://www.ncsha.org/wp-content/uploads/Analysis-of-Current-and-Expected-Rental-Shortfall-and-Potential-Evictions-in-the-US_Stout_FINAL.pdf).

86. *Id.*

### III. AN ARMY OF HOUSING RIGHTS ATTORNEYS: THE RIGHT TO COUNSEL

The Right to Counsel law represents a dramatic shift in tenants' rights that can upend the status quo and infuse fundamental fairness through the halls of Housing Court. In the Spring of 2017, New York City became the first jurisdiction in the country to provide a Right to Counsel for tenants in eviction proceedings.<sup>87</sup> The shift to guaranteeing attorneys to tenants in Housing Court significantly levels the playing field and expands tenant power.<sup>88</sup>

The idea that equal justice for low-income tenants in civil cases required the assistance of counsel emerged soon after the Supreme Court extended the right to counsel for defendants in criminal proceedings in *Gideon v. Wainwright*.<sup>89</sup> Following that case, many hoped that the Court would also recognize that due process and fundamental fairness in civil cases were compromised in a system where one party appeared with counsel and the other appeared *pro se*, and apply the right to counsel where basic liberties were at stake.<sup>90</sup>

In the years following the *Gideon* decision, however, it became clear that the path to a civil right to counsel would not arrive via the Supreme Court; rather, it would be up to states and municipalities to create structures and processes for appointing counsel in civil cases.<sup>91</sup> In New York, the victory for tenants was decades in the making and the result of a broad coalition of housing advocates, tenants, community organizers, legal services attorneys, and elected officials.<sup>92</sup> This section discusses the history of the Housing Court and examines how NYC's Right to Counsel legislation led to the hiring of a new army of housing lawyers.

87. Mayor de Blasio Signs Legislation to Provide Low-Income New Yorkers with Access to Counsel for Wrongful Evictions, OFF. WEBSITE OF CITY OF N.Y. (Aug. 11, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/547-17/mayor-de-blasio-signs-legislation-provide-low-income-new-yorkers-access-counsel-for/0>. The legislation uses the term “universal access” to counsel. The terms “universal access law” and “right to counsel law” are used interchangeably in the literature and will be used interchangeably here.

88. *Id.*

89. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that the Sixth Amendment right to counsel in federal court applies to state court criminal proceedings, and that the appointment of counsel is fundamental to a fair trial); see also Laura Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 40 CLEARINGHOUSE REV. J. OF POVERTY L. AND POL'Y 271, 271 (2006); John Pollock, *It's All About Justice: Gideon and the Right to Counsel in Civil Cases*, 39 ABA HUMAN RIGHTS 5, 5 (2013), See generally, Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J. L. & GENDER 55 (2018); John Pollock & Mary Deutsch Schneider, *A Retrospective on the National Coalition for a Civil Right to Counsel*, 47 CLEARINGHOUSE REVIEW, J. OF POVERTY L. AND POL'Y 35, 37 (2013).

90. Sabbeth, *supra* note 91; Rachel Kleinman, Comment, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L. J. 1507 (2004); Pamela Cardullo Ortiz, *How a Civil Right to Counsel Can Help Dismantle Concentrated Poverty in America's Inner Cities*, 25 STAN. L. & POL'Y REV. 163 (2014).

91. John Pollock, *It's All About Justice: Gideon and the Right to Counsel in Civil Cases*, 39 ABA HUMAN RIGHTS 5, 5 (2013); Sabbeth, *supra* note 91.

92. Legal scholars have been writing about the need for a right to counsel in housing court for over thirty years. See Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARVARD C.R.-C.L. L. REV. 557 (1988). The right to counsel in housing court would not have happened if not for the work of tenant organizers and tenant organizations working in the context of the tenant's rights movement in New York City. See generally RIGHT TO COUNSEL NYC COALITION, NYC TENANT MOVEMENT HISTORY (2018), [https://www.righttocounselnyc.org/nyc\\_tenant\\_movement\\_history](https://www.righttocounselnyc.org/nyc_tenant_movement_history).

### A. *Brief History of NYC's Housing Court*

Before 1972, tenants, attorneys and civil court judges were powerless to enforce housing standards to ensure safe, secure and humane housing in New York courts.<sup>93</sup> While violations of the housing maintenance code were within the purview of the state's criminal court, the NYS Legislature decried the "ineffectiveness of criminal sanctions against owners as a means of securing compliance."<sup>94</sup> The miniscule fines imposed by overburdened and uninterested criminal court judges became the "cost of doing business" for New York City's landlords.<sup>95</sup> A tenant averaging four repair violations in their home would have to brave the maze of criminal court proceedings where a judge would order an average fine of \$3.00 per violation.<sup>96</sup> Thus, \$12.00 became the average fine for a landlord unwilling to upkeep an apartment.<sup>97</sup> This process made it easier and cheaper for landlords to ignore repair violations than to provide a safe and sanitary apartment. At the same time, landlords had substantial power to use the civil courts to evict tenants for withholding or failing to pay their rent or for an alleged breach of the landlord/tenant relationship.<sup>98</sup> The small fines and the unequal power dynamic between tenants and landlords systemically benefited landlords to the detriment of tenants.

Heeding the call by the tenant movement for safe and secure housing and to address this judicial fragmentation, the Legislature created the Housing Court in 1972.<sup>99</sup> That year, the NYS Legislature amended Section 110 of the New York City Civil Court Act ("CCA")<sup>100</sup> to create a Housing Part (referred to in this Article as the "Housing Court") for the "establishment and maintenance of housing standards."<sup>101</sup> The legislation expanded the power and jurisdiction of the civil courts to maintain and preserve a deteriorating housing stock.<sup>102</sup> In passing the Act, the NYS Legislature also intended to help balance the rights and needs of tenants with those of landlords who long held a monopoly of power in the courts.<sup>103</sup>

The new Housing Court was granted "broad powers in landlord-tenant proceedings" and the ability to enforce housing standards to ensure tenants lived in safe and secure homes.<sup>104</sup> In crafting the legislation, lawmakers authorized the Housing Court to enforce local and state laws to establish and maintain housing

93. Leonard N. Cohen, *The New York City Housing Court—An Evaluation*, 17 URB. L. ANN. 27, 28 (1979).

94. Leo Zucker, *The New York City Civil Housing Court: Consolidation of Old and New Remedies*, 47 ST. JOHN'S L. REV. 483 (1973) (internal quotation marks omitted).

95. *Id.* at 485 (internal quotation marks omitted); Cohen, *supra* note 95.

96. Zucker, *supra* note 96, at 489.

97. *Id.* at 489 (internal quotation marks omitted).

98. Cohen, *supra* note 95.

99. *Tenant Movement History*, RIGHT TO COUNSEL NYC, [https://www.righttocounselnyc.org/nyc\\_tenant\\_movement\\_history](https://www.righttocounselnyc.org/nyc_tenant_movement_history) (last visited Mar. 14, 2021).

100. Zucker, *supra* note 96, at 488.

101. City Civ. Ct. Act § 110(a) (2019) ("A part of the court shall be devoted to actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standard, including but not limited to, the multiple dwelling law and the housing maintenance code, building code and health code of the administrative code of the city of New York...").

102. Cohen, *supra* note 95, at 27.

103. *Id.* at 34.

104. *Prometheus Realty Corp. v. City of N.Y.*, 911 N.Y.S.2d 299, 300–301 (App. Div. 2010).

standards. Lawmakers chose expansive language—“including, but not limited to”—in granting the Court broad authority to enforce the multiple dwelling and other laws to protect the rights, health and safety of tenants.<sup>105</sup> The law further imbued the Housing Court with expansive power to “recommend or employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest.”<sup>106</sup> Courts have upheld the expansive power of the Housing Court’s jurisdiction.<sup>107</sup> In 2006, the legislature further expanded the Housing Court’s authority, broadening the court’s equity powers in summary proceedings and its injunctive power to ensure compliance with state and local housing codes to promote the public interest.<sup>108</sup> As part of the Court’s equity powers, it can issue orders to enforce housing standards and impose civil penalties for violations of the multiple dwelling law, the housing maintenance code and other laws.<sup>109</sup>

Despite the ambitious goals that drove the creation of the Housing Court, within a few short years critics noted how it fell far short of achieving these goals.<sup>110</sup> Calls to reform the Housing Court began not long after it was created,<sup>111</sup> and advocates recognized that the court was failing tenants and enriching landlords at the tenants’ expense.<sup>112</sup> Seven years after the Court’s creation, a study showed that in Manhattan only fifty-five tenant-initiated actions seeking repairs were commenced in the Court.<sup>113</sup> One commenter noted that rather than acting to preserve and improve the housing stock in the city, Housing Court “function[ed] merely to expedite rent collection” and operated as “a rent collection agency.”<sup>114</sup> Moreover, in a forum where there is usually a huge wealth imbalance between the parties, it quickly became the norm for most landlords to be represented by counsel, and most tenants to appear *pro se*. Unsurprisingly, the absence of legal representation for tenants was a major contributor to the fundamental lack of due process at every stage of the proceedings.<sup>115</sup> Every aspect of the Court’s evolution

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105. *Id.* (citing *Missionary Sisters of Sacred Heart v. Meer*, 517 N.Y.S.2d 504, 507 (App. Div.1987); CCA § 110(a)).

106. *D’Agostino v. Forty-Three E. Equities Corp.*, 842 N.Y.S.2d 122, 123 (App. Div. 2007) (quoting CCA § 110) (internal quotations omitted).

107. CCA Section 110; *Prometheus Realty Corp.*, 911 N.Y.S.2d at 301 (upholding the constitutionality of laws to stop tenant harassment and the Housing Court’s power to enforce them); *Espino v. N.Y.C Hous. Auth. Patterson Houses*, 78 N.Y.S.3d 872, 874–875 (Civ. Ct. 2018) (ordering the New York City Housing Authority to install a wheelchair ramp on its property to ensure the comfort and security of a disabled tenant to enforce City building codes).

108. *Unif. City Ct. Act* § 203; *Tardibone v. Hopkins*, 842 N.Y.S.2d 864, 865 (City Ct. 2007).

109. *City Civ. Ct. Act* §§ 110(a), 110(a)(1); *Espino*, 78 N.Y.S.3d at 874; *Schanzer v. Vendome*, 801 N.Y.S.2d 242, \*2 (Civ. Ct. 2005).

110. *See generally* Emily Jane Goodman, *Housing Court: The New York Tenant Experience*, 17 URB. L. ANN. 57, 57 (1979).

111. Zucker, *supra* note 96, at 484-85; *See* Goodman, *supra* note 112.

112. Goodman, *supra* note 112.

113. *Id.* at 59, n. 5 (citing MONITORING REPORT ON THE PERFORMANCE ANALYSIS OF THE NEW YORK CITY HOUSING COURT (1979)).

114. *Id.* at 59.

115. *Id.* at 60.



in the years since its inception took place on this fundamentally uneven playing field, and the Court struggled to provide justice for tenants.<sup>116</sup>

### *B. The Right to Counsel*

The Housing Court's inequities cried out for redress. In 2012, Community Action for Safe Apartments (CASA) launched a campaign to reform the Bronx Housing Court, and later formed the Right to Counsel NYC Coalition in 2014, with the explicit mission of securing representation for tenants in Housing Court.<sup>117</sup> The Right to Counsel legislation was introduced in March of 2014, and after three years of tenant-led actions and pressure from various stakeholders, the law passed in the spring of 2017.<sup>118</sup> The law provides "full legal representation" free to income-eligible<sup>119</sup> New Yorkers in Housing Court.<sup>120</sup> It also provides "brief legal assistance" to otherwise eligible tenants who do not meet the income requirements<sup>121</sup> and to tenants in termination proceedings in NYC public housing.<sup>122</sup> The law has a five-year implementation timeline to allow for a staged roll-out by zip code. As of March 2021, the Right to Counsel program formally covered twenty-five NYC zip codes.<sup>123</sup> In May 2021, the NYC Council passed two bills to strengthen and expand the Right to Counsel by accelerating the rollout by more than a year, making it take full effect by June 1, 2021<sup>124</sup> and obligating NYC's civil justice coordinator to work with community groups and organizers to educate tenants about their rights in housing court.<sup>125</sup>

116. OFF. CIV. JUST., N.Y.C. HUM. RES. ADMIN. & OFF. EVALUATION & RSCH, N.Y.C. DEP'T OF SOC. SERV., NYC OFFICE OF CIVIL JUSTICE 2016 ANNUAL REPORT (2016), [https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ\\_Annual\\_Report\\_2016.pdf](https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2016.pdf); NEW YORK CITY'S HOUSING COURT AT 40: CONTROVERSIES, CHALLENGES, AND PROSPECTS FOR THE FUTURE (2013), [https://s3.amazonaws.com/documents.nycbar.org/files/2007336-NYC\\_Housing\\_Court\\_at\\_40\\_HOUCOURT\\_3.11.13.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/2007336-NYC_Housing_Court_at_40_HOUCOURT_3.11.13.pdf).

117. *Campaign for Justice in Housing Court*, CMTY. ACTION FOR SAFE APARTMENTS, <https://nsacasa.wordpress.com/campaign-to-reform-housing-court-2> (last visited February 24, 2021).

118. Brian Bieretz, *A Right to Counsel in Eviction: Lessons from New York City*, URB. INST., (Dec. 31, 2019), <https://housingmatters.urban.org/articles/right-counsel-eviction-lessons-new-york-city#:~:text=In%202017%2C%20New%20York%20City,other%20cities%20considering%20similar%20legislation>.

119. Income eligibility is defined as having an annual gross household income not to exceed 200 percent of the federal poverty guidelines. N.Y.C. ADMIN. CODE § 26-1301 (2017).

120. N.Y.C. ADMIN. CODE § 26-1302(a)(2) (2017).

121. *Id.* § 26-1302(a)(1).

122. *Id.* § 26-1302(b).

123. See Oksana Mironova, *Right to Counsel and Stronger Rent Laws Helped Reduce Evictions in 2019*, CMTY. SERV. Soc'y (Feb. 24, 2020), <https://www.cssny.org/news/entry/right-to-counsel-and-stronger-rent-laws-helped-reduce-evictions-in-2019> ("RTC is being rolled out on a zip code by zip code basis, with full implementation expected by 2022. Since January 2020, the law covers 25 zip codes.").

124. N.Y. Local Law 54 of 2021 (Int. No. 2050-2020-A); See N.Y. City Council, *Legislation Detail (Int 2050-2020)*, N.Y. LEG. RES. CTR., <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4624861&GUID=FEF6E3D8-8BFA-4281-AABF-F36EF7A2BC40&Options=ID%7CText%7C&Search=2050> (last visited May 26, 2021).

125. N.Y. Local Law 53 of 2021 (Int. No. 1529-2019-A); See N.Y. City Council, *Legislation Detail (Int. No. 1519-2019-A)*, N.Y. LEG. RES. CTR., <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3923900&GUID=93564381-0704-43F3-9599-244BA2545155&Options=ID%7CText%7C&Search=> (last visited May 26, 2021).

The effect of infusing the Housing Court system with tenant attorneys has been abundantly clear: within the law's first year of implementation, 87,000 New Yorkers received free legal services and 21,955 tenants "were able to stay in their homes."<sup>126</sup> Evictions in Right to Counsel zip codes have declined by 29% since 2017, with a decline of 15% in 2019 alone.<sup>127</sup> Additionally, in 2019, eviction filings have dropped by 20% since 2018 and by 30% since 2017.<sup>128</sup> "[T]he default rate for evictions . . . has dropped by roughly 35% from 2016 to 2019."<sup>129</sup>

After the passage of the Right to Counsel legislation, it became clear that law schools needed to respond to the demand for new housing lawyers by creating new pathways into the profession.<sup>130</sup> In fall 2017, New York Law School ("NYLS") established the Housing Rights Clinic.<sup>131</sup> The clinic operates in conjunction with Manhattan Legal Services as a "hybrid" clinic.<sup>132</sup> Other New York area law schools have either revived dormant clinics or created new courses to support the training necessary to prepare law graduates for the field.<sup>133</sup> Filling out the ranks of tenant attorneys is a significant step toward greater justice for tenants.

An equally pressing concern with the implementation of the Right to Counsel is the precious few supervisors available to provide adequate, quality supervision for this new army of tenant attorneys. With the addition of hundreds of new housing attorneys, it was clear that a more substantial and wide-reaching supervisor training program was necessary. Thus, the Housing Justice Leadership Institute (HJLI) was born in 2019.<sup>134</sup> Housed at NYLS, HJLI is a ten-day supervisor training program that seeks to ensure high-quality supervision in the

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126. *Evictions*, NEW YORK CITY COUNCIL, <https://council.nyc.gov/data/evictions/> (last visited May 6, 2021).

127. Mironova, *supra* note 125.

128. *Id.*

129. *All About the Right to Counsel for Eviction in NYC*, NAT'L COAL. FOR CIV. RT. TO COUNS. (May 14, 2020), [http://civilrightstocounsel.org/major\\_developments/894](http://civilrightstocounsel.org/major_developments/894).

130. The New York State Unified Court System's Permanent Commission on Access to Justice has stressed the need for additional law school commitment to preparing law students for this work. *See* PERMANENT COMMISSION ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 32-33 (2017), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-03/2017-ATJ-Commission-Report.pdf>.

131. *Housing Rights Clinic*, N.Y. L. SCH., <https://www.nyls.edu/housing-rights-clinic/> (last visited May 6, 2021).

132. *Id.* Students in the clinic work in teams of two and are supervised by an adjunct faculty member on staff with MLS, as well as under the supervision of a full-time NYLS faculty member. The students work directly with MLS clients, and participate in a weekly seminar covering a range of doctrinal and skills-related topics.

133. *See, e.g., Housing Law Externship – The Legal Aid Society*, NYU LAW, <https://www.law.nyu.edu/academics/clinics/semester/housinglaw> (last visited May 6, 2021); *Community & Economic Development: Anti-Displacement Project*, CUNY L. SCH., <https://www.law.cuny.edu/academics/clinics/ced/> (last visited May 6, 2021); *Clinic – Housing Rights*, BROOKLYN L. SCH., <https://www.brooklaw.edu/Courses/Clinic---Housing-Rights> (last visited May 6, 2021).

134. *See David Brand, NY Law School Launches New Housing Justice Leadership Institute*, QUEENS DAILY EAGLE (Jan. 15, 2019), <https://queenseagle.com/all/2019/1/15/ny-law-school-launches-new-housing-justice-leadership-institute>; *See also New York Law School Announces Housing Justice Leadership Institute*, N.Y. L. SCH., [https://images.law.com/contrib/content/uploads/documents/389/7593/cn\\_nyls\\_training2019x.pdf](https://images.law.com/contrib/content/uploads/documents/389/7593/cn_nyls_training2019x.pdf); *Housing Justice Leadership Institute* N.Y. L. SCH., <https://www.nyls.edu/academics/specialty-areas/centers-and-institutes/impact-center-for-public-interest-law/housing-justice-leadership-institute/>.

right to counsel era.<sup>135</sup> The curriculum, developed in collaboration with the Shriver Center on Poverty Law, allows cohort members to develop leadership and supervision skills, sharpen their understanding of the mission, vision and values of the Right to Counsel movement and the intersectional fight for racial justice, while building collaboration between new housing supervisors.<sup>136</sup> The Right to Counsel is a fundamental shift toward justice and the tenant attorneys at the forefront have the creative potential to expand tenants' rights for years to come.

#### IV. HISTORIC CHANGES TO THE RENT LAWS: HOUSING STABILITY AND TENANT PROTECTION ACT (HSTPA)

A second major force in the transformation of New York tenant advocacy is the passage of historic changes to rent regulation and other NYS housing laws. The tenant movement scored this significant legislative victory on June 14, 2019, when the newly empowered, progressive NYS legislature passed the Housing Stability and Tenant Protection Act of 2019 ("HSTPA"), touching virtually all aspects of the regulatory scheme governing over a million apartments in New York City.<sup>137</sup> The meaning and effect of the rent law changes are unfolding with ongoing litigation; it is clear, however, that the new laws have ushered in a new era of possibility for tenants' rights. For the purposes of this Article, this section will summarize a few significant changes in the law and highlight the new opportunities available in the fight for justice for tenants.

First, HSTPA makes rent regulation permanent.<sup>138</sup> Previously, the rent regulatory rules expired every few years, creating opportunities to remove or significantly weaken tenant protections at each renewal period.<sup>139</sup> The groundbreaking legislation removes most financial incentives for landlords to evict

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135. Brand, *supra* note 135.

136. Topics covered over the course of the ten-week Housing Justice Leadership Initiative (HJLI) program include providing effective constructive feedback on lawyering skills and legal writing, nurturing talent, systems thinking and strategic intent, working and supervising across difference, handling difficult conversations, dealing with contract-driven performance goals, addressing motivation and burnout, and time management.

137. Vivian Wang, *New Rent Laws Pass in N.Y.: 'The Pendulum Is Swinging' Against Landlord*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/nyregion/rent-laws-ny-deal.html>. See Gerald Lebovits et al., *New York's Housing Stability and Tenant Protection Act of 2019: What Lawyers Must Know—Part I*, 91 N.Y. STATE BAR ASS'N J. 35, 36-45 (Sept./Oct. 2019) [hereinafter *Lebovits Part I*] (explaining the significant changes in the regulatory scheme under HSTPA); Gerald Lebovits et al., *New York's Housing Stability and Tenant Protection Act of 2019: What Lawyers Must Know—Part II*, 91 N.Y. STATE BAR ASS'N J. 26, 28 (Nov. 2019) [hereinafter *Lebovits Part II*] (noting the reach of the HSTPA to over one million apartments).

138. Christopher Schwartz, *6 Things to Know About the New NYC Housing Stability and Tenant Protection Act*, CITY BAR JUSTICE CENTER (Feb. 11, 2020), <https://www.citybarjusticecenter.org/news/6-things-to-know-about-the-new-nyc-housing-stability-and-tenant-protection-act/>.

139. See *Summary of Housing Stability and Tenant Protection Act of 2019*, REBNY: NEWSROOM 2019 (June 25, 2019) ("In prior years, the rent regulation law was up for examination and renewal, based on whether a housing crisis still existed, every 4-8 years."), [https://www.rebny.com/content/rebny/en/newsroom/in-the-news/2019/Housing\\_Stability\\_Tenant\\_Protection\\_Act\\_2019.html/](https://www.rebny.com/content/rebny/en/newsroom/in-the-news/2019/Housing_Stability_Tenant_Protection_Act_2019.html/).

rent-stabilized tenants.<sup>140</sup> The new law repeals the so-called “vacancy bonus,”<sup>141</sup> which allowed landlords to raise the rent in rent-stabilized apartments by twenty percent when a tenant vacated, a powerful incentive for landlords to evict longtime renters.<sup>142</sup> The law repeals “high-rent vacancy” provisions that authorized the deregulation of a rent-stabilized apartment once the rent reached a certain threshold amount, another incentive for landlords to push out rent-stabilized tenants.<sup>143</sup>

The new law significantly strengthens protections against sudden, large rent increases by prohibiting the scheme of “preferential rent,” thus ensuring affordability for low-income tenants.<sup>144</sup> If a tenant received a “preferential rent” prior to the law, HSTPA now forbids substantially raising a tenant’s “preferential rent” as the tenant remains in possession.<sup>145</sup> The new law also upends the scheme utilized by many landlords to deregulate rent-stabilized units, causing the city to shed at least 152,000 rent-stabilized units since 1993.<sup>146</sup> The often-fraudulent scheme usually involved “Individual Apartment Improvement” increases or “IAIs.”<sup>147</sup> IAIs allowed owners to renovate apartments once they became vacant—with zero oversight and incentives to exaggerate costs—and increase the rent of stabilized units by often hundreds of dollars, with the goal of deregulating the unit.<sup>148</sup> The new law overhauls the mechanisms for passing on the costs of IAIs to rent-stabilized tenants, limiting the percentage that can be charged to tenants,

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140. *See Lebovits Part II*, *supra* note 139, at 30 (discussing the impact of the permanent preferential rent provisions in HSTPA).

141. Harvey Epstein, *Summary of the Housing Stability and Tenant Protection Act of 2019*, [https://nyassembly.gov/write/upload/member\\_files/074/pdfs/20191021\\_0089365.pdf](https://nyassembly.gov/write/upload/member_files/074/pdfs/20191021_0089365.pdf); *See also* Housing Stability and Tenant Protection Act (HSTPA) S. 6458, N.Y. State S., 2019-2020 Leg. Sess., Part B (N.Y. 2019) [hereinafter HSTPA].

142. *See Lebovits Part II*, *supra* note 139, at 28.

143. *Id.* *See also* HSTPA, *supra* note 143, at Part D.

144. Preferential Rent is a rent charged below the legal, registered rent, and was allegedly set based on “market” forces, but often lulled tenants into inaction and away from challenging their legal rents. Preferential rents were often removed by landlords at the end of a lease term causing large rent increases. *See id.* (HSTPA “[p]rohibits owners who offer tenants a ‘preferential rent,’ or rent below the legal regulated rent, from discontinuing the use of preferential rent or raising the rent to the full legal amount upon lease renewal.”).

145. HSTPA, *supra* note 143, at Part E. A “preferential rent” is a rent lower than the legal rent. It is often offered to tenants in circumstances where the landlord cannot secure a tenant willing to pay the higher rent. Under the old rules, upon lease renewal, landlords could raise the rent up to the legal rent, often resulting in huge increases that essentially operated like a de facto eviction. *See Amy Plitt, How N.Y.’s preferential rent loophole is unfairly used against tenants*, CURBED N.Y. (Apr. 25, 2017), <https://ny.curbed.com/2017/4/25/15425058/nyc-rent-stabilization-loophole-landlords>.

146. Barker, *supra* note 40.

147. ASS’N. FOR NEIGHBORHOOD & HOUS. DEV., *THE \$20,000 STOVE: HOW FRAUDULENT RENT INCREASES UNDERMINE NEW YORK’S AFFORDABLE HOUSING* 2 (Jan. 2009), [https://anhd.org/sites/default/files/the\\_20000\\_stove\\_how\\_fraudulent\\_rent\\_increases\\_undermine\\_new\\_yorks\\_affordable\\_housing.pdf](https://anhd.org/sites/default/files/the_20000_stove_how_fraudulent_rent_increases_undermine_new_yorks_affordable_housing.pdf).

148. AARON CARR, ASS’N. FOR NEIGHBORHOOD AND HOUS. DEV., *HOW WIDESPREAD IS ABUSE OF THE INDIVIDUAL APARTMENT IMPROVEMENT INCREASE LOOPHOLE?* 6 (2019), <https://anhd.org/report/how-widespread-abuse-individual-apartment-improvement-increase-loophole>.

capping them under \$100.<sup>149</sup> Moreover, HSTPA requires that costs be “reasonable and verifiable” and the work be completed by licensed contractors.<sup>150</sup>

For rent controlled tenancies, HSTPA eliminated the steep 7.5% yearly rent increase and fuel charge pass-alongs.<sup>151</sup> Rent increases are now based on the average of the last five years of Rent Guideline Board increases and are not automatic.<sup>152</sup> HSTPA also changed the ability of owners to raise tenants’ rents through “Major Capital Improvements” or “MCIs.”<sup>153</sup> The legislature set clear limits on MCIs—permitting only a 2% rent increase instead of 6%, removed retroactive lump sum charges, and made MCIs temporary to expire after 30 years.<sup>154</sup> MCIs are not available in buildings with less than thirty-five percent rent regulated tenants or in buildings with outstanding class B and C repair violations.<sup>155</sup> HSPTA tasked the NYS Division of Housing and Community Renewal with establishing a reasonable cost schedule so expenditures can no longer be wildly inflated, and the agency must audit and inspect twenty-five percent of citywide MCI approvals.<sup>156</sup> Finally, tenants now have sixty days to challenge to MCI applications in their building.<sup>157</sup>

HSTPA was intended to empower tenants to fight rent overcharges by extending the statute of limitations for overcharge claims and availability of treble damages.<sup>158</sup> It expanded the court’s ability to analyze the entire rent history and any proof of alleged IAIs to determine whether a rent overcharge occurred.<sup>159</sup> However, in April 2020, the Court of Appeals narrowed the reach of the section that governed these changes, specifically Part F, stating that the retroactive application of the law was unconstitutional.<sup>160</sup> In essence, the decision puts tenants seeking to challenge illegal deregulation and rent overcharges in the same place they were prior to the passage of HSPTA, with a four year statute of limitation, unless the tenant can show indicia of fraud.<sup>161</sup> Importantly, where the rent

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149. HSTPA, *supra* note 143, at Part K. Under HSTPA, building owners are limited to three individual apartment increases (IAIs) over fifteen years and a spending cap of \$15,000. *Id.* Rent can only increase by 1/168 of the cost of work on up to 35 units and by 1/180 of the cost of work on more than thirty-five units. *Id.* Therefore, rent increases based on IAIs will not exceed \$90 for work on 35 units or less or \$84 for work on more than thirty-five units. Frank Fortino, *New York State Passes Sweeping Rent Regulation Reform*, METROPOLIS GRP. INC. (July 1, 2019), <https://metropolisny.com/2019/07/new-york-state-passes-sweeping-rent-regulation-reform>.

150. Epstein, *supra* note 143.

151. HSTPA, *supra* note 143, at Part H; Epstein, *supra* note 143.

152. HSTPA, *supra* note 143, at Part H; Epstein, *supra* note 143.

153. *Id.* MCIs are a system where an owner provides a building-wide installation or improvement and passes the cost on to tenants.

154. HSTPA, *supra* note 143, at Part K.

155. *Id.*

156. *Id.*

157. *Id.*

158. See *Lebovits Part II*, *supra* note 139, at 32 (“The new law extends the statute of limitations on overcharge claims from four to six years and increase [sic] the treble-damages period from two to six years”).

159. HSTPA, *supra* note 143, at Part F § 1.

160. *Regina Metro. Co. v. N.Y. State Div. of Hous. and Cmty. Renewal*, 154 N.E.3d 972, 1005 (N.Y. 2020).

161. See *id.* at 985.

stabilized status of the apartment is at issue, the courts still permit a tenant to challenge a deregulation as far back as necessary, beyond the four years.<sup>162</sup>

Many of the groundbreaking changes of HSTPA have real effects in Housing Court. One powerful way is in litigation over warranty of habitability violations, which can result in rent abatements for tenants suffering from unsafe apartment conditions.<sup>163</sup> The warranty of habitability is a statutory creation to ensure that a landlord provides a tenant with a habitable apartment.<sup>164</sup> The legislature believed this law would place a “tenant in parity legally with the landlord.”<sup>165</sup> The warranty of habitability requires a landlord to provide an apartment that is “fit for human habitation” and “for the uses reasonably intended by the parties” and must ensure the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety.<sup>166</sup> If a landlord fails in this obligation and breaches the warranty of habitability, the tenant is entitled to damages, more commonly known as an abatement.<sup>167</sup> The abatement is available as a percentage reduction of the rent, either as a rent credit or as a money judgment awarded in a plenary action.<sup>168</sup>

HSTPA provides new opportunities to bring abatement claims without fear of the dreaded “5-day rule.”<sup>169</sup> Historically, judges could only statutorily provide five days to pay a judgment after trial.<sup>170</sup> The result was that tenants who fell behind on their rent were foreclosed from raising abatement claims out of fear of eviction due to the unreasonably short time to pay after trial. This also had implications for the NYC Human Resources Administration (HRA) because tenants who were pressured to forgo meritorious abatement claims would have to seek the entire

162. *Id.* at 1014 (Wilson, J., dissenting) (“Tenants may still bring an action to declare that a unit was unlawfully deregulated at any time . . .”).

163. See Gerald Lebovits, John. S. Lansden & Damon P. Howard, *New York’s Housing Stability and Tenant Protection Act of 2019: What Lawyers Must Know—Part III*, 91 N.Y. STATE BAR ASS’N J. 33, 35 (Dec. 2019) [hereinafter *Lebovits Part III*] (“Previously, the law covered only complaints of housing-code violations to enforcement agencies. HSTPA now covers habitability complaints, too.”).

164. N.Y. REAL PROP. LAW § 235-b (McKinney 2021).

165. *Park W. Mgmt. Corp. v. Mitchell*, 391 N.E.2d 1288, 1293 (N.Y. 1979) (quoting remarks of Senator Barclay, 1975).

166. N.Y. REAL PROP. LAW § 235-b (McKinney 2021). Breach of warranty of habitability should be raised as a defense and counterclaim in the housing court case and can also be raised affirmatively in a plenary action. Tenants are entitled to a rent abatement for the entire time the condition existed, up to six years and is not limited to the amount of rent sought in a nonpayment petition. The contract rent comprises the basis of the rent abatement. Thus, even if a tenant’s rent share is lower because of Section 8, the Senior Citizen Rent Increase Exemption (“SCRIE”) or Disability Rent Increase Exemption (“DRIE”), the abatement is determined by the amount on the lease, not the lower rent actually paid by the tenant.

167. NEW YORK CITY CIVIL COURT RESOURCE CTR., NEW YORK COURTS: LANDLORD/TENANT ANSWER IN PERSON FACT SHEET #10: WARRANTY OF HABITABILITY 4 (2006), <https://nycourts.gov/courts/nyc/housing/pdfs/warrantyofhabitability.pdf>.

168. *Park W. Mgmt. Corp.*, 391 N.E.2d at 1295.

169. RPAPL § 747(a) required that where more than 5 days had passed since judgment, a respondent who has previously appeared in a non-payment proceeding could not receive a stay of the warrant of the warrant or of reletting unless tenant proved that the full money judgment was paid or deposited in full. See *Lang v. Pataki*, 176 Misc.2d 676, 691 (N.Y. Sup. Ct. 1998); *Jones v. Allen*, 185 Misc.2d 443, 445 (N.Y. App. Term 2000).

170. See e.g., *Lang*, 176 Misc.2d at 691; *Jones*, 185 Misc.2d at 445.

amount of alleged arrears from HRA, instead of the correct amount, reduced by the violation of the warranty of habitability.<sup>171</sup>

The tenant-friendly HSTPA provides more discretion to judges to allow time after trial for a tenant to pay their rent arrears. This significant change in the law gives the court discretion to stay the issuance of a warrant for up to one year.<sup>172</sup> The legislature specifically included non-payment proceedings in this section of the law.<sup>173</sup> The new statute instructs judges to take into account tenants' ill health, exacerbation of an ongoing condition, child's enrollment in a local school, extreme hardship, or any other extenuating life circumstance affecting the ability of the tenant or their family to relocate and maintain quality of life.<sup>174</sup>

It is important to note that Real Property Actions and Proceedings Law (RPAPL) Section 753(2) states that for a stay period, the judge can order the tenant to deposit rent for the occupation of the premises,<sup>175</sup> but also extend the time that the amount could be paid.<sup>176</sup> Thus, at the judge's discretion, if the court determines after trial that arrears are still owed once the rent abatement is justly provided, the court can order judgment in that amount and provide the tenant sufficient time to pay—for example, thirty or sixty days to apply for HRA assistance—while asking the tenant to deposit one month of rent for the duration of the stay. This is likely not a hurdle for a tenant since HRA generally requires proof of future ability to pay, including payment of the upcoming month of rent. HSPTA's repeal of the draconian "5-day rule" is a huge shift and should allow tenant attorneys more freedom and confidence to litigate horrific conditions that their clients had to endure. Finally, the court also has the power to render a final judgment, stating the earliest date for execution of the marshal's notice.<sup>177</sup> This is another opportunity

171. Ben Max, *City Increasingly Paying Back Rent to Keep Tenants from Homelessness*, GOTHAM GAZETTE (Nov. 16, 2017), <https://www.gothamgazette.com/city/7326-city-increasingly-paying-back-rent-to-keep-tenants-from-homelessness>.

172. N.Y. REAL PROP. ACTS. LAW § 753(1) (McKinney 2021); *Lebovits Part III*, *supra* note 165 ("[HSTPA] doubled the length of the discretionary stay to one year and made it available for nonpayment proceedings across New York State").

173. The HSTPA amendment to N.Y. Real Prop. Acts. Law § 753(1) eliminated the phrase limiting relief "upon the ground that the occupant is holding over and continuing in possession of the premises after the expiration of his term and without the permission of the landlord," allowing for stay in a nonpayment proceeding. John Zhuo Wang & Massimo F. D'Angelo, *NYC Nonpayment Proceedings Post-HSTPA: From 'Good Cause' to 'Extreme Hardship'*, N.Y.L.J. (Mar. 4, 2020, 11:45 AM), <https://www.law.com/newyorklawjournal/2020/03/04/nyc-nonpayment-proceedings-post-hstpa-from-good-cause-to-extreme-hardship/>.

174. N.Y. REAL PROP. ACTS. LAW § 753(1) (McKinney 2021) ("...the court shall consider serious ill health, significant exacerbation of an ongoing condition, a child's enrollment in a local school, and any other extenuating life circumstances affecting the ability of the application or the applicant's family to relocate and maintain quality of life.").

175. *Id.* at § 753(2) (McKinney 2021) ("Such stay shall be granted and continue effective only upon the condition that the person against whom the judgment is entered shall make a deposit in court of the entire amount . . . for the occupation of the premises for the period of the stay . . .").

176. *Id.* ("The amount of such deposit shall be determined by the court upon the application for the stay . . . and the amount thereof shall be paid into court, in such manner and in such installments, if any, as the court may direct.").

177. *Id.* at § 749(1) ("Upon rendering a final judgment for petitioner, the court shall issue a warrant directed to the sheriff of the county . . . stating the earliest date upon which execution may occur pursuant to the order of the court . . .").

for judges to exercise discretion and order that a notice of eviction be delayed thirty to sixty days to allow a tenant sufficient time to pay outstanding arrears.<sup>178</sup>

In another big change, HSTPA heralds the death of rent deposits as a prerequisite for sustaining tenants' rights and claims.<sup>179</sup> The legislature did not mince words in drafting RPAPL Section 745, stating, "under no circumstances shall the respondent's failure or inability to pay use and occupancy as ordered by the court constitute a basis to dismiss any of the respondent's defenses or counterclaims, with or without prejudice to their assertion in another forum."<sup>180</sup> Practically speaking, this means that a tenant can no longer have their defenses or counterclaims stripped for failure to pay use and occupancy during a case. All too often under the old law, tenant attorneys would be on the defensive, notwithstanding their client's strong defenses and meritorious claims, spending valuable time and resources defending against motions seeking to strike the tenants' entire Answer, solely because the tenant was unable to pay rent ordered by the court during the proceeding. This strong legislative directive makes it clear that money does not outweigh justice in a tenant's case.

The statute includes additional provisions to advance tenants' rights. These include requiring landlords to make written applications for use and occupancy prospective from the date of the motion instead of orally and retroactively to the petition date.<sup>181</sup> Defenses to such motions now include affirmative defenses, such as warranty of habitability, rent overcharge, and violations of the certificate of occupancy.<sup>182</sup> The statute clarifies that any order for use and occupancy cannot exceed the legally regulated rent or the tenant's share under a subsidy program.<sup>183</sup> It also cannot exceed thirty percent of any fixed income, expanded from beyond just Supplemental Security Income (SSI).<sup>184</sup> Further, the court can extend the time to comply with the order for good cause shown.<sup>185</sup> The unceremonious death of the daunting rent deposit law is a welcome change and will allow attorneys to aggressively fight for tenants' rights without fear that their clients' inability to pay will result in them losing their claims and defenses.

HSTPA also improves a tenant's ability to fight retaliation by their landlord. Tenants now have an affirmative defense against retaliation when they make complaints about health or safety violations in their apartments or challenge the regulation of their apartments.<sup>186</sup> The law shifts the burden to the landlord and creates a rebuttable presumption of retaliation if the landlord brings a case after the tenant engages in a protected action and then requires the landlord to "establish" a

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178. *Id.*

179. *Id.* § 745.

180. *Id.* at § 745(2)(f).

181. HSTPA, *supra* note 143, at Part M (amending RPAPL §745(2)(a)).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. Before HSPTA only complaints made to governmental agencies, such as the NYC Department of Housing Preservation & Development (HPD), about conditions served as a defense for the retaliation statute. The new law adds complaints to the landlord or agent about warranty of habitability claims as sufficient to raise the claim. *Lebovits Part III*, *supra* note 165, at 35; N.Y. REAL PROP. LAW § 223-b(1)(a) (McKinney 2021); HSTPA, *supra* note 143, at Part M; *see, e.g.* *Barr v. Huggins*, 971 N.Y.S.2d 397, 401 (Civ. Ct. 2013); 601 W. 160 Realty Corp. v. Henry, 731 N.Y.S.2d 581, 581 (N.Y. App. Term 2001).



non-retaliatory motive.<sup>187</sup> It expands the time period from six months to one year from the protected action that led to the retaliatory case filing.<sup>188</sup> Finally, if the tenant can show retaliation, the landlord is subject to damages, attorney's fees and costs, and the court can order injunctive relief and "other equitable remedies,"<sup>189</sup> including a one-year lease renewal to the tenant.<sup>190</sup>

Finally, HSTPA extends notice periods for rent demands and eviction warrants, creates new civil and criminal penalties for unlawful eviction, and expands protections for tenants throughout NYS with increased notice requirements.<sup>191</sup> It also outlaws a landlord's ability to sue for fees other than rent,<sup>192</sup> prohibits oral rent demands,<sup>193</sup> expands the law to ensure tenants receive their security deposits once they vacate,<sup>194</sup> and prohibits the use of the infamous "Tenant Blacklist."<sup>195</sup> It reduces the scope of owner occupancy cases, requiring landlords to show "immediate or compelling necessity," and orders landlords to find comparable apartments for seniors, disabled tenants, and those living in the

187. The landlord must now establish as opposed to the previous requirement to "give a credible explanation of." *Lebovits Part III*, *supra* note 165, at 35 (Section 223-b prohibits landlords from commencing a summary proceeding against a tenant for (a) a good faith complaint by the tenant, or on the tenant's behalf, to the landlord, the landlord's agent or governmental authority, such as HPD about any violation of a health or safety law, regulation or code, or the warranty of habitability; (b) "actions taken in good faith to secure ... rights under the lease", the warranty of habitability or the landlord's duty to repair or that "has as its objective the regulation of the premises; or (c) for "a tenant's participation in a tenant organization.").

188. HSTPA, *supra* note 143, at Part M; *Lebovits Part III*, *supra* note 165, at 35.

189. N.Y. REAL PROP. LAW § 223-b(3) (McKinney 2021); *601 W. 160 Realty Corp.*, 731 N.Y.S.2d at 581 (owner liable for \$3,000 in damages to tenant for retaliatory non-payment proceedings against tenant).

190. *Lebovits Part III*, *supra* note 165, at 35–36 ("A landlord that fails to rebut the presumption of retaliation can be required to offer a new lease or lease renewal of up to a year with only a 'reasonable' rent increase.").

191. HSTPA, *supra* note 143, at Part M.

192. *Id.* ("No fees, charges or penalties other than rent may be sought in a summary proceeding pursuant to this article..."); *Lebovits Part I*, *supra* note 139, at 41 (explaining that HSTPA defined residential rent narrowly to include only the amount charged in consideration for the "use and occupation" of the space).

193. HSTPA, *supra* note 143, at Part M (amended RPAPL §711 to require a written demand for rent by the landlord); *Lebovits Part III*, *supra* note 165, at 38 ("HSTPA amended RPAPL 711 to abolish oral rent demands and to increase the notice period for written rent demands to 14 days").

194. HSTPA, *supra* note 143, at Part M (amended section 7-108 of the general obligations law to include subdivision 1-a which provides, inter alia, "(b) [t]he entire amount of the deposit or advance shall be refundable to the tenant upon the tenant's vacating of the premises," "(d) [i]f the tenant requests such an inspection [before vacating the premises], the inspection shall be made...no later than one week before the end of the tenancy," "(e) [w]ithin fourteen days after the tenant has vacated the premises, the landlord shall provide the tenant with an itemized statement indicating the basis for the amount of the deposit retained, if any, and shall return any remaining portion of the deposit to the tenant.").

195. The "Tenant Blacklist" is "a series of reporting services that purchase the names of all tenants who have had eviction cases brought against them in housing court, and then sell checks against those names to prospective landlords for a service fee." Christopher Schwartz, *6 Things to Know About the New NYC Housing Stability and Tenant Protection Act*, CITY BAR JUST. CTR. (Feb. 11, 2020), <https://www.citybarjusticecenter.org/news/6-things-to-know-about-the-new-nyc-housing-stability-and-tenant-protection-act/>. HSTPA Part M amended subdivision 1 of section 212 of the judiciary law by adding a new paragraph prohibiting the unified court system to sell any data regarding judicial proceedings related to residential tenancy, rent, or eviction to any third party. *Lebovits Part I*, *supra* note 139 ("[a] rental application may not be refused on the basis of a past or present landlord-tenant action or summary proceeding under RPAPL Art. 7," "Attorney General has enforcement power; no private cause of action").

residence more than fifteen years.<sup>196</sup> The law also requires the owner to use the apartment as their primary residence and creates a cause of action for tenants who vacated due to landlord fraud.<sup>197</sup>

The scope and breadth of the law is a testament to the newly empowered, progressive NYS legislature. The passage of HSTPA is worth commending. However, additional protections for tenants suffering under the weight of the COVID-19 pandemic are needed, and this Article calls on the legislature to take immediate action to expand protections for tenants.

## V. THE FIERCE TENANT ATTORNEY: RE-ENVISIONING THE HOUSING ATTORNEY'S ROLE AND AGGRESSIVELY USING UNDERUTILIZED TOOLS

The COVID-19 crisis and the recent passage of the Right to Counsel and HSTPA have created a new world for NYC housing advocates. The world has further been transformed by the ongoing racial reckoning, which has highlighted the racial disparities in housing. In order to create a Housing Court that is fairer and more just, NYC housing advocates must reimagine what it means to be a housing attorney. For decades, tenants' rights attorneys were on the defensive. There were few attorneys, scarce resources, and years of legislative setbacks from a Republican-controlled NYS Senate backed by the real estate lobby. Now, this transformative moment, and the combined effects of the Right to Counsel and HSTPA present the chance to strengthen the role of the tenant attorney, change the way Housing Court functions, and combat systemic racism. The dual effect of the COVID-19 eviction crisis and related economic devastation create an urgent need to act aggressively to keep people in their homes and out of crushing debt.

This section highlights how to re-envision the role of tenants' counsel and exploit underutilized tools that can be aggressively employed by the growing number of new housing attorneys. It also describes various tools available to tenants seeking to defend their rights to safe and secure housing that can be re-examined as the Right to Counsel era provides collective strength in tenant advocacy.

### *A. Address Systemic Racism*

Structural racism in New York courts is a grave concern and a deeply embedded problem that must be addressed. It is the role of the tenants' attorney to both fight structural racism in Housing Court and hold the Court and landlords' attorneys accountable to do the same. Current research, bolstered by the lived experiences of Black, Indigenous, and people of color ("BIPOC") litigants and BIPOC attorneys and legal workers, show that Black and Latinx people, especially women, are the most likely to be sued and summoned to Housing Court and therefore the most likely to fall victim to eviction and its catastrophic

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196. HSTPA Part I amended NYC Admin. Code §§ 26-511(b), 26-408 (1) to require landlords to show an "immediate and compelling necessity" to recover the apartment or provide an equivalent or superior housing accommodation at the same or lower stabilized rent in a closely proximate area.

197. HSTPA Part I amended NYC Admin Code § 26-408 (1) to include the language "as his or her primary residence."

consequences.<sup>198</sup> According to a sample study of nearly 200,000 non-payment cases filed in New York City housing court between 2007 and 2016, Black and Latinx tenants were disproportionately targeted in eviction filings, and seventy percent of the households were women-led.<sup>199</sup> This over-representation in Housing Court and subsequent evictions is compounded with the history of redlining and segregation in New York City<sup>200</sup> and the racism and discrimination BIPOC continue to face when looking for housing.<sup>201</sup> The structural and institutionalized racism at the heart of redlining and segregation led to the dangerously disproportionate impact in health, job loss, and income reduction.<sup>202</sup> These disparities are alive and well today.

The deaths of George Floyd, Breonna Taylor, Ahmaud Arbery, Tony McDade, Rayshard Brooks, Daniel Prude, Atatiana Jefferson, and so many others,<sup>203</sup> at a time when a global pandemic is killing Black and Latinx people at a rate more than double that of their white counterparts, has awoken a call for justice at all levels of our society.<sup>204</sup> These deaths have amplified calls of “Black Lives Matter” and

198. Robert Collinson & Davin Reed, *The Effects of Evictions on Low-Income Households* 10, 14 (Working Paper, 2019), [https://www.law.nyu.edu/sites/default/files/upload\\_documents/evictions\\_collinson\\_reed.pdf](https://www.law.nyu.edu/sites/default/files/upload_documents/evictions_collinson_reed.pdf).

199. *Id.*

200. *Segregated by Design*, UNITED NATIONS INT’L SCH. HUM. RTS. PROJECT (Jan. 9, 2020), <https://www.unhumanrightsproject.org/segregation>.

201. Shawn Grant, *Black Woman with \$90k Salary Blocked from Living in Black, but Gentrifying NYC Enclave*, GRIO (Sept. 4, 2019), <https://thegrio.com/2019/09/04/black-woman-high-paid-denied-housing-brooklyn/>; Claudia Irizarry Aponte, *Housing Bias Fight Carries on Case by Case While Citywide Response Waits*, THE CITY (Dec. 5, 2019, 4:05 AM), <https://thecity.nyc/2019/12/housing-bias-fight-carries-on-while-citywide-response-waits.html>.

202. *Segregated by Design*, *supra* note 202.

203. Alia Chughtai, *Know Their Names: Black People Killed by the Police in the US*, AL JAZEERA (2020) <https://interactive.aljazeera.com/aje/2020/know-their-names/index.html> (last visited May 6, 2021); George Floyd: *What Happened in the Final Moments of His Life*, BBC (July 16, 2020), <https://www.bbc.com/news/world-us-canada-52861726> (discussing the death of George Floyd in Minneapolis, MN where a white police officer, Derek Chauvin, knelt on Mr. Floyd’s neck for 7 minutes and 46 seconds after receiving a report that Mr. Floyd had used a \$20 bill believed to be counterfeit); Richard A. Oppel Jr. et al., *Here’s What You Need to Know About Breonna Taylor’s Death*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> (discussing the death of Breonna Taylor, an African-American emergency room technician, in Louisville, KY where police officers entered Ms. Taylor’s apartment to execute a “no-knock” search warrant and fired several shots, striking her); *Ahmaud Arbery: What Do We Know About the Case?*, BBC (June 5, 2020), <https://www.bbc.com/news/world-us-canada-52623151> (discussing the death of Ahmaud Arbery in Brunswick, GA, where he was jogging when a neighborhood resident, Gregory McMichael, pursued Mr. Arbery after and fired three shots at him after reporting to police that Mr. Arbery resembled a suspect of a series of break-ins); Gwen Aviles, *Black Transgender Man Fatally Shot by Florida Police*, NBC News (May 29, 2020, 4:15 PM), <https://www.nbcnews.com/feature/nbc-out/black-transgender-man-fatally-shot-florida-police-n1218156> (discussing the death of Tony McDade, an African-American transgender man, in Tallahassee, FL who was fatally shot by a police officer after being identified as a suspect in a stabbing).

204. The struggle for racial justice in America is not new and Black and brown people have been leading the fight for justice for centuries; the current moment has seen a broadening of this fight to other sectors of society. Maneeh Arora et al., *What Helps Non-Black People Support Black Lives Matter? A Signal from Someone in Their Own Ethnic Group*, WASH. POST, (June 18, 2020, 6:00 AM), <https://www.washingtonpost.com/politics/2020/06/18/what-helps-non-black-people-support-black-lives-matter-signal-someone-their-own-ethnic-group/> (explaining that NFL quarterbacks and NFL commissioner, Roger Goodell, celebrities, and cross-racial groups have offered public support for Black Lives Matter); Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests->

highlighted the long-overdue need to dismantle systemic racism.<sup>205</sup> The rising violence against Asian communities during the pandemic,<sup>206</sup> which took the horrific form of deadly violence against eight people, including the targeting and murder of six Asian women in Atlanta,<sup>207</sup> highlights the need for our society and court system to root out deeply ingrained white supremacist hatred at all levels.

On June 9, 2020, Chief Judge Janet DiFiore took steps toward addressing institutional racism in the courts when she announced an independent review of the NYS court system, led by Secretary Jeh Johnson.<sup>208</sup> The evaluation reviewed policies, practices, and structures and sought to address racial bias in the courts and training programs for judges and non-judicial staff.<sup>209</sup> It also reviewed the selection process for judicial nominees and court appointments.<sup>210</sup> One day after the announcement, on June 10, 2020, more than 100 judges of color in NYS, led by Court of Appeals Associate Judges, Hon. Jenny Rivera and Hon. Rowan D. Wilson, signed onto a letter committing to ensure racial equity in court.<sup>211</sup> The judges stated that “there is much work to be done, and we like all judges must be mindful of the impact of systemic racism or bias in fulfilling the court’s responsibility to ensure equal justice to all under the law.”<sup>212</sup>

Secretary Johnson’s report, published on October 1, 2020, was deeply troubling, and, sadly, unsurprising.<sup>213</sup> The report states that, over and over again, the special commission heard complaints of the “dehumanizing” and “demeaning cattle-call culture” in high-volume courts, such as Housing Court.<sup>214</sup> It also states

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crowd-size.html (“[T]here’s been a big shift in public opinion about the movement as well as broader support for recent protests. A deluge of public support from organizations like the N.F.L and NASCAR for Black Lives Matter may have also encouraged supporters who typically would sit on the sidelines to get involved.”); Mercey Livingston, *These Are the Major Brands Donating to the Black Lives Matter Movement*, CNET (June 16, 2020, 4:00 AM), <https://www.cnet.com/how-to/companies-donating-black-lives-matter/> (discussing the technology companies, big box stores, gaming companies, and other businesses that have donated and expressed support for Black Lives Matter); Charlotte Alter, *How Black Lives Matter Could Reshape the 2020 Elections*, TIME (June 17, 2020, 5:40 PM), <https://time.com/5852534/black-lives-matter-2020-elections-voting/>.

205. Buchanan et al., *supra* note 206.

206. ASIAN AM. BAR ASS’N OF N.Y. & PAUL WEISS, A RISING TIDE OF HATE AND VIOLENCE AGAINST ASIAN AMERICANS IN NEW YORK DURING COVID-19: IMPACT, CAUSES, SOLUTIONS 1–7 (2021), [https://cdn.ymaws.com/www.aabany.org/resource/resmgr/press\\_releases/2021/A\\_Rising\\_Tide\\_of\\_Hate\\_and\\_Vi.pdf](https://cdn.ymaws.com/www.aabany.org/resource/resmgr/press_releases/2021/A_Rising_Tide_of_Hate_and_Vi.pdf).

207. Richard Fausset & Neil Vigdor, *8 People Killed in Atlanta-Area Massage Parlor Shootings*, N.Y. TIMES (March 19, 2021), <https://www.nytimes.com/2021/03/16/us/atlanta-shootings-massage-parlor.html>.

208. Press Release, N.Y. State Unified Court System, Aiming to Advance Equal Justice in the Courts, Chief Judge DiFiore Announces Independent Review of Court System Policies, Practices and Initiatives (June 9, 2020), [https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR20\\_24.pdf](https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR20_24.pdf).

209. *Id.*

210. *Id.*

211. *Voices: NYS Judges of Color Statement Regarding Duties as Jurist and Commitment to Equal Treatment*, URBAN CNY NEWS (July 9, 2020), <https://www.urbancny.com/voices-nys-judges-of-color-statement-regarding-duties-as-jurist-and-commitment-to-equal-treatment/>.

212. *Id.*

213. N.Y. STATE UNIFIED COURT SYSTEM, REPORT FROM THE SPECIAL ADVISER ON EQUAL JUSTICE IN N.Y. STATE COURTS 2-3 (2020), <http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf> [hereinafter REPORT FROM THE SPECIAL ADVISER].

214. *Id.* at 3.

that, “[t]he sad picture that emerges is, in effect, a second-class system of justice for people of color in New York State.”<sup>215</sup> Little has changed since 1991, when a court-appointed “Minorities Commission” declared “there are two justice systems at work in the courts of New York State, one for [w]hites, and a very different one for minorities and the poor.”<sup>216</sup> The 2020 report contains multiple commonsense recommendations to the Chief Judge that should be implemented immediately.<sup>217</sup>

First and foremost, in response to the multitude of complaints about the “under-resourced, over-burdened court system,” the “dehumanizing effect it has on litigants and the disparate impact all this has on people of color,”<sup>218</sup> Secretary Johnson made clear that these issues can only be addressed by “expanded investment in resources, technology, people and infrastructure” and focused his recommendations on “operational issues that lie within the power of the court system to implement administratively and unilaterally, rather than on proposals for legislative practices.”<sup>219</sup> The report called for the Office of Court Administration (“OCA”) leadership to “embrace a “zero tolerance” policy for racial bias and stated that “the duty to uphold this policy extends to all those working within the New York State court system – from judges to interpreters to court officers.”<sup>220</sup>

That type of zero tolerance policy would go a long way in protecting BIPOC litigants, attorneys, court staff, and legal workers. Such efforts would support the ongoing work of courageous attorneys who have come forward to make formal complaints against racist and sexist behavior by opposing attorneys. In the *Matter of Denenberg*, Brooklyn Legal Services Senior Staff Attorney, Chavette Jackson, made a formal complaint against attorney Seth Denenberg after he leveled disparaging racist and sexist comments against her in the halls of housing court.<sup>221</sup> Ms. Jackson stated in the complaint, “I felt like the comments were racist like the comments were sexist, and I feel like if I was a white man, no matter what my years of experience in this practice, he would not have said that. And so, I think that my position as a young black woman enabled him to — made him feel comfortable talking down to me and in treating me like I am not too — a licensed attorney practicing in this state.”<sup>222</sup> Mr. Denenberg did not deny his actions against Ms. Jackson, nor a 2015 complaint for similar misconduct against a litigant, but instead tried to blame the cause of his disgusting, racist behavior on the “‘atmosphere’ at Brooklyn Housing Court.”<sup>223</sup> As a result of Ms. Jackson stepping forward to hold Mr. Denenberg accountable, the Court barred him from practicing

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215. *Id.*

216. N.Y. State Judicial Commission on Minorities, *Report of the New York State Judicial Commission on Minorities*, 19 FORD. URB. L. J. 181, 187 (1992).

217. REPORT FROM THE SPECIAL ADVISER, *supra* note 215, at 4–8.

218. *Id.* at 54.

219. *Id.* at 79.

220. *Id.* at 80. Secretary Johnson’s report cites a point of comparison, stating that “interviewees frequently cited the ‘zero tolerance’ approach mandated by the legislature for all state personnel when it comes to sexual harassment over the last several years, leading to a ‘culture shift’ and increased reporting of complaints of sexual harassment.” *Id.*

221. *Matter of Denenberg*, 192 N.Y.S.3d 363, 364–65 (N.Y. App. Div. 2020).

222. *Id.*

223. *Id.* at 365.

law for three months and required him to attend a year of anger management and diversity counseling.<sup>224</sup>

Secretary Johnson's report called for the strengthening of current institutions fighting against white supremacy in the court system. The report noted that few interviewees knew about or understood the scope of active institutions such as the Williams Commission<sup>225</sup> or OCA's Office of Diversity and Inclusion.<sup>226</sup> The report called on OCA to give these institutions a larger platform, incorporate their work into broader OCA initiatives, provide additional funding for their efforts, and promulgate a resource guide for OCA personnel, litigants and partner organizations to make this work more transparent.<sup>227</sup>

Next Secretary Johnson's report called for the expansion of mandatory bias training for all judicial and non-judicial personnel across the court system, stating that current training efforts were both inconsistent and insufficient.<sup>228</sup> The report further stated that "[j]udges are not above the reach of the implicit racial and cultural biases that pervade our society, yet equality before the law requires them to be," and cited a study showing that "training judges 'can reduce and/or mitigate the prospect that implicit bias will affect judicial decision-making and outcomes.'"<sup>229</sup> Secretary Johnson's report also called for more "robust racial bias and cultural sensitivity training for non-judicial personnel, particularly the court officer community," based on the "innumerable stories of dehumanizing language by court officers towards litigants of color."<sup>230</sup> Expanding on Secretary Johnson's calls for bias training for court staff, OCA should increase and mandate these trainings for attorneys who practice in its courts. As Secretary Johnson's report states, these "training[s] must acknowledge that issues of racial and cultural bias are intersectional – addressing that discrimination on the basis of race often overlaps with those relating to class, gender, sexual orientation, immigration status, and beyond."<sup>231</sup>

The report shares other suggestions that OCA should implement immediately. These include initiatives to adopt a comprehensive social media policy for court staff and to strengthen the process for bias complaints.<sup>232</sup> Secretary Johnson's report notes that many interviewees were unaware of the process for making bias complaints and calls on OCA to "engage in a robust campaign to educate court

224. *Id.* at 367.

225. The Franklin H. Williams Judicial Commission is a permanent commission in the New York State court system promoting racial and ethnic fairness in the courts. It has been in practice for thirty years.

226. REPORT FROM SPECIAL ADVISER, *supra* note 215 at 59.

227. *Id.* at 80.

228. *Id.* at 81.

229. REPORT FROM THE SPECIAL ADVISER, *supra* note 215, at 81 (citing Sharon Price-Cates, *Implicit Bias New Science in Search of New Legal Strategies Toward Fair and Impartial Criminal Trials*, 313 N.J. L. REV. 65, 66 (2018) (citing Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?* 84 NOTRE DAME L. REV. 1195, 1196–97 (2009))).

230. *Id.* at 54.

231. REPORT FROM THE SPECIAL ADVISER, *supra* note 215, at 82 ("The term 'intersectional' was coined by celebrated legal scholar Kimberlé Crenshaw over thirty years ago to refer to the compounding discrimination that black women face on account of both their race and their gender, however, in popular discourse today, it encompasses a variety of crosshatched identities, such as those listed above."); *see also* Merrill Perlman, *The Origin of the Term 'Intersectionality'*, COLUM. JOURNALISM REV. (Oct. 23, 2018), [https://www.cjr.org/language\\_corner/intersectionality.php](https://www.cjr.org/language_corner/intersectionality.php).

232. REPORT FROM THE SPECIAL ADVISER, *supra* note 215, at 84.

system participants about the existence and purpose of . . . [the] offices and the procedures to lodge a bias complaint,” and protect complainants from retaliation.<sup>233</sup>

OCA must take seriously these comprehensive recommendations and implement them immediately. Tenants’ attorneys have an important role on the ground in Housing Court to disrupt the systemic racism inherent in the court system, hold the court accountable at all levels, and, following the lead of senior staff attorney, Ms. Chavette Jackson, to call out racist and sexist behavior wherever and whenever possible.

Attorneys have the opportunity to aggressively use many underutilized tools to protect and defend tenants’ rights. The following paragraphs highlight available yet underused legal tools that attorneys can creatively use to expand tenants’ rights.

### *B. Fight Landlord Neglect and Ensure Safe and Habitable Housing*

All tenants have the right to live in a safe, secure, and habitable apartment. Yet, receiving proper repairs, especially for long-term rent-stabilized tenants can be unnecessarily difficult. While the Department of Housing Preservation and Development (“HPD”) is tasked with ensuring that the city’s 2.2 million rental apartments are safe and habitable, and with levying fines against landlords who refuse to repair apartment conditions, its punishments are often toothless.<sup>234</sup> Data shows that of 126 cases filed for serious building-wide issues in Manhattan in 2017, in more than two-thirds of the cases, the city settled for an average of 10 percent of the fines owed.<sup>235</sup> This has become the cost of doing business for NYC landlords who refuse to provide repairs to older, rent-stabilized tenants as a form of harassment.<sup>236</sup> In addition to demanding abatements, the following subsections offer strategies to consider when a landlord refuses to provide a safe, habitable apartment.

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233. REPORT FROM THE SPECIAL ADVISER, *supra* note 215, at 87.

234. Grace Ashford, *Leaks, Mold and Rats: Why N.Y.C. Goes Easy on Its Worst Landlords*, N.Y. TIMES (Dec. 26, 2018), <https://www.nytimes.com/2018/12/26/nyregion/nyc-housing-violations-landlords-tenants.html>.

235. *Id.*

236. *Tenants Sue Brooklyn Slumlord for Harassment, Dangerous Living Conditions, and Illegally Renting Units on Airbnb*, LEGAL SERVS. NYC (Apr. 16, 2019), <https://www.legalservicesnyc.org/news-and-events/press-room/1460-tenants-sue-brooklyn-slumlord-for-harassment-dangerous-living-conditions-and-illegally-renting-units-on-airbnb>.

### 1. Prohibit Landlords from Collecting Rent if Documented Repair Conditions Exist for More than Six Months.

Multiple Dwelling Law 302-a can remove a tenant's obligation to pay rent where there exists a "rent impairing" violation that remains uncorrected for six months or more.<sup>237</sup> A rent impairing violation is one which "if not promptly corrected, will constitute a fire hazard or a serious threat to the life, health or safety" of apartment occupants.<sup>238</sup>

To seek a full rent abatement under this statute, the tenant must show that HPD issued a violation for a rent impairing condition and provided notice to the building owner, and the violation must remain for six months after the notice date.<sup>239</sup> An owner's failure to file a certification that it corrected the violation establishes a *prima facie* case that the violation has not been timely corrected.<sup>240</sup> Once established, the owner is prohibited from collecting any rent until the condition is remedied.<sup>241</sup>

Importantly, the tenant must deposit the arrears sought in the petition with the clerk of the court.<sup>242</sup> While the statute states that rent must be deposited at the time a litigant files an Answer, the court has found that "failure to timely comply with the formal rent deposit requirement of the statute should not serve to preclude [the tenant] from pursuing an otherwise facially meritorious, 'fundamental' defense."<sup>243</sup> Upon written agreement between the parties, the tenant can deposit the rent in an attorney escrow account in lieu of filing it with the clerk of the court.<sup>244</sup> A tenant may also seek punitive damages, but he or she must show that a landlord acted with "actual malice or such wantonness or recklessness as to imply or permit the inference of malice."<sup>245</sup>

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237. N.Y. MULT. DWELL. LAW § 302-a (McKinney 2021); 50 Manhattan Ave. LLC v. Powell, 2018 N.Y.L.J. LEXIS 777 at \*1–\*3 (N.Y. Civ. Ct. 2018) (tenant granted full rent abatement and prohibition on the collection of rent payments because of serious rent-impairing conditions, including a leaking roof that the landlord failed to fix for years).

238. N.Y. MULT. DWELL. LAW § 302-a(2) (McKinney 2021). HPD determines what conditions constitute a "rent impairing" violation and maintains a list in the Rules of the City of New York. Definitions of Rent Impairing Violations found at 28 RCNY § 25-191.

239. *Id.* at § 302-a(3) (McKinney 2021) (the defense must be plead affirmatively).

240. N.Y. ADMIN. CODE § 27-2115(f) (2015); *see* Dep't of Hous. Pres. and Dev. of N.Y. v. Knoll, 467 N.Y.S.2d 468, 468–69 (N.Y. App. Term 1983).

241. N.Y. MULT. DWELL. LAW § 302-a (McKinney 2021); 50 Manhattan Ave., 2018 N.Y.L.J. LEXIS 777 at \*1–\*3.

242. N.Y. MULT. DWELL. LAW § 302-a(3)(c) (McKinney 2021).

243. 221 E. 78th Tenants Corp. v. Cohen, 957 N.Y.S.2d 267, 267 (N.Y. App. Term 2012) (internal citations omitted).

244. 50 Manhattan Ave. LLC v. Powell, 2018 N.Y.L.J. LEXIS 777 at \*1–\*3 (N.Y. Civ. Ct. 2018) (tenant granted full rent abatement and prohibition on the collection of rent payments because of serious rent-impairing conditions, including a leaking roof that the landlord failed to fix for years).

245. Kipsborough Realty Corp. v. Goldbetter, 367 N.Y.S.2d 916, 920 (N.Y. Civ. Ct. 1975) (landlord willfully and openly violated the Multiple Dwelling Law by failing to repair the roof thus rendering the apartment uninhabitable); *see also* 2301 7th Avenue HDfC v. Hudgen-Grace, 2010 NY Slip Op. 51874(U), 2010 WL 4368115, at \*1 (N.Y. App. Term Nov. 4, 2010) (citing *Ross v. Louise Wise Services, Inc.*, 868 N.E.2d 189 (N.Y. 2007)).



## 2. Put Non-Payment Cases on Hold Where a Landlord Refuses to Repair Apartment.

Section 755 provides an opportunity for a tenant to stay a non-payment proceeding where the landlord fails to make repairs in their apartment.<sup>246</sup> The statute can assist tenants who are withholding rent due to uninhabitable conditions in their apartments and seek to compel their landlords to make repairs. The statute requires that a tenant deposit their rent with the court clerk.<sup>247</sup> Section 755 was more heavily utilized by tenants between the 1970s and 1990s.<sup>248</sup> Since 2007, courts citing to Section 755 are mostly courts from outside of New York City.<sup>249</sup>

## 3. Force Landlords to Repair Apartment Through an Affirmative HP Case

Housing Part actions, or “HPs,” offer a tool for tenants to secure safe, habitable housing. The Housing Court is authorized to enforce local and state laws and “housing standards.”<sup>250</sup> These tenant-initiated cases can also set forth harassment claims. Through HP actions, tenants can seek court orders requiring owners to complete necessary repairs or stop harassment.

However, HP actions have real limitations. Significantly, HPs currently do not provide a remedy for tenant damages or abatements. Penalties may be assessed against the landlord, but they are payable to HPD and not to the tenant individually.<sup>251</sup> While the current lack of individual relief granted in HP actions may be disheartening, there is still some leeway for courts to expand the relief available in such actions. Section 110(c) of the New York City Civil Court Act (CCA) provides that “[r]egardless of the relief originally sought by a party, the court may recommend or employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest . . . .”<sup>252</sup> HP actions provide courts with relatively broad discretion over the type of equitable relief they may award or the amount of civil penalties, sanctions and damages that may be utilized to enforce “housing standards.”

246. N.Y. REAL PROP. ACTS. LAW § 755 (McKinney 2021).

247. *Id.*

248. *See, e.g.,* Ellabee Realty Corp. v. Beach, 340 N.Y.S.2d 8, 9 (N.Y. Civ. Ct. 1972); Morbeth Realty Corp. v. Rosenshine, 323 N.Y.S.2d 363, 366 (N.Y. Civ. Ct. 1971); Malek v. Perdina, 297 N.Y.S.2d 14, 17 (N.Y. Civ. Ct. 1969). It is possible the decline in use corresponds to the 2006 amendments to the Uniform City Court Act in 2006, which expanded the court’s injunctive power and permitted the court to order a landlord to make building and apartment repairs in compliance with the City’s housing codes, which may have proved more effective to ensure landlords make necessary repairs than staying the proceedings pursuant to Section 755.

249. *See e.g.,* Revelation Church of God In Christ v. Mason, 26 N.Y. Misc. LEXIS 3484, at \*1–\*6 (N.Y. City Ct. 2015); 3 Green St., LLC v. Caceres, 115 N.Y.S.3d 831, \*1 (N.Y. Just. Ct. 2019).

250. CCA § 110, housing standards include violations of the Multiple Dwelling Law, Housing Maintenance Code, Building Code, and any other legislative standard affecting the health and safety of building occupants. Prometheus Realty Corp., 911 N.Y.S.2d at 303 (citing Missionary Sisters of Sacred Heart, 517 N.Y.S.2d at 507 and CCA § 110(a)); GERALD LEBOVITS, NEW YORK CITY CIVIL COURT, HOUSING PART, HOUSING PART PROCEEDINGS: A PRIMER 5 (2007), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1299746](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1299746).

251. Dominguez v. Zinnar, 2009 WL 3813771 (N.Y. Sup. Ct. Oct. 29, 2009).

252. N.Y. CITY CIV. CT. ACT § 110(c) (McKinney 2019).

#### 4. Organize Tenant Takeover of Buildings Effectively Abandoned by Owners

RPAPL Article 7A provides a remedy for tenants in buildings that have been “abandoned” by their owners.<sup>253</sup> It allows a group of one-third or more tenants in a building to petition the Housing Court to put in place an administrator or receiver to collect rents, address emergency code violations, and improve the living conditions of the building.<sup>254</sup> HPD also has statutory power to petition the court to appoint an administrator in a 7A proceeding.<sup>255</sup>

The proceeding can be maintained where a building lacks heat, running water, light, electricity, or adequate sewage disposal facilities, has an infestation of rodents, or is otherwise “dangerous to life, health or safety” of tenants for at least five days.<sup>256</sup> In addition, the suit is maintainable where the court finds a “course of conduct by the owner or his agents of harassment, illegal eviction, continued deprivation of services or other acts dangerous to life, health and safety.”<sup>257</sup>

#### *C. Combat Tenant Harassment*

Since 2008, the NYC Council has expanded protections for tenants who face harassment by their landlords with anti-tenant harassment statutes. The law provides tenants a cause of action to pursue cases against their landlords for harassment.<sup>258</sup> Harassment includes behavior by a landlord to force a tenant to vacate or surrender their apartment or tenancy rights, using force or threats against a tenant, providing false or misleading information relating to the tenancy or the rent stabilization status of the apartment, creating repeated or extended interruptions or disruptions to essential services, commencing repeated baseless or frivolous court proceedings, or removing the door or changing the locks to an apartment.<sup>259</sup>

The anti-tenant harassment law sought to provide greater protections to tenants, especially long-term rent-stabilized tenants who are particularly vulnerable to the effects of gentrification and pushout by their landlords.<sup>260</sup> Before the passage of the law, there was no private right of action for harassment in the NYC Administrative Code.<sup>261</sup> Since its enactment, tenants have been provided “a judicial forum to pursue harassment defenses or claims.”<sup>262</sup> The law was challenged and upheld as constitutional in 2010, with the Appellate Division citing

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253. N.Y. REAL PROP. ACTS. LAW § 770 (McKinney 2021).

254. *Id.* at § 770 (1).

255. *Id.* If an action is commenced by HPD, one-third of the tenants may seek at any time to substitute themselves as petitioners in place of HPD, even after a final judgment has been rendered.

256. *Id.*

257. *Id.*

258. N.Y. ADMIN. CODE §§ 27-2005(d); 27-2115(h) (2020).

259. *Id.* at § 27-2004(a)(48)(a)-(e) (2020).

260. *See* Prometheus Realty Corp., 911 N.Y.S.2d at 303 (finding the legislature's interest in preventing landlords from “forcing tenants out” to be rationally related to the remedies memorialized in N.Y.C. Admin. Code § 27-2005(d)); *Aguaiza v. Vantage Props., LLC*, 893 N.Y.S.2d 19, 20 (N.Y. App. Div. 2010) (noting that the legislature enacted a harassment statute to address, in part, “a perceived effort by landlords to empty rent-regulated apartments,” using such tactics as the commencement of baseless or frivolous eviction proceedings).

261. *Prometheus*, 911 N.Y.S.2d at 301.

262. *Aguaiza v. Vantage Properties, LLC*, 2009 WL 1511791, at \*9 (N.Y. Sup. Ct. May 21, 2009).

the Housing Court's expansive powers under CCA 110.<sup>263</sup> In 2015, the Administrative Code was amended to include a cause of action for an additional form of harassment relating to buy-out offers.<sup>264</sup>

A finding of harassment gives rise to injunctive relief against an owner, including a court order restricting the owner from engaging in harassing conduct, placing an immediately hazardous violation of the NYC Housing Maintenance Code, civil penalties against the owner payable to the NYC Commissioner of Finance of between \$2,000 and \$10,000, and compensatory damages for the tenant or at the election of the tenant, \$1,000 and reasonable attorneys' fees and costs.<sup>265</sup> Generally, the Court interprets compensatory damages to be akin to a rent abatement.<sup>266</sup> Since the passage of the statute, the law has been effective in protecting tenants from harassment. Attorneys can and should use it to secure such protections.<sup>267</sup>

263. *Prometheus*, 911 N.Y.S.2d at 301.

264. The statute made it unlawful to contact a tenant and offer money to vacate or surrender rights to a unit for 180 days after the owner is notified, in writing, that a person does not wish to receive such offers. N.Y. ADMIN. CODE § 27-2004(a)(48)(f-1) (The statute reads, "contacting any person lawfully entitled to occupancy of such dwelling unit, or any relative of such person, to offer money or other valuable consideration to induce such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, for 180 days after the owner has been notified, in writing, that such person does not wish to receive any such offers, except that the owner may contact such person regarding such an offer if given express permission by a court of competent jurisdiction or if notified in writing by such person of an interest in receiving such an offer.").

265. N.Y. ADMIN. CODE § 27-2115(m)(2); 226-228 E. 26th St. LLC v. Rhodes, No. 56577/08, 2008 N.Y. Misc. LEXIS 7516, at \*9 (N.Y. Civ. Ct. Dec. 26, 2008); 13 E. 9th St. LLC v. Seelig, No. 84987/2016, 63 Misc.3d 1218(A), at \*6 (N.Y. Civ. Ct. Apr. 8, 2019); T & G Realty Co. v. Hawthorn, No. 78990/2017, 2019 WL 3070982, at \*6 (N.Y. Civ. Ct. July 15, 2019) (citing N.Y.C. Admin. Code §27- 2115(o)).

266. *Hawthorn*, No. 78990/2017, 2019 WL 3070982, at \*6 (citing N.Y.C. Admin. Code §27- 2115(o)).

267. The courts have held landlords liable for illegally locking tenants out, threatening tenants, failing to provide repairs, destroying a tenant's property, making misstatements of law about a tenant's status as a rent stabilized tenant, and aggressively and repeatedly pursuing an out-of-court buy-out offer. The law prohibits an owner "commencing repeated baseless or frivolous court proceedings," which is generally defined as at least more than one court proceeding, but the law also protects a tenant if repeated baseless or frivolous court proceedings were commenced against other tenants in the building. *E.g.*, N.Y.C., N.Y. ADMIN. CODE § 27-2004(a)(48)(d)(d-1) (2020); *Dani Lake LLC v. Torres*, No. 34838/2018, 2019 WL 4049138, at \*8-\*10 (N.Y. Civ. Ct. Aug. 13, 2019) (finding that the actions of the petitioner were intended to illegally force the respondent out of possession of the premises and constituted prohibited harassment, and directing the petitioner to restrain from any further conduct in violation of N.Y.C. Admin. Code § 27-2004(a)(48)); *Santo v. Rose Associates, Inc.*, No. 113297/2005, 2010 WL 3293716, at \*2 (N.Y. Sup. Ct. June 9, 2010) (citing N.Y.C. Admin. Code § 27-2004(a)(48)(g)); 226-228 E. 26th St. LLC v. Rhodes, No. 56577/08, 2008, N.Y. Misc. LEXIS 7516, at \*6 (N.Y. Civ. Ct. Dec. 26, 2008) (discussing the Tenant Protection Act); *Hawthorn*, No. 78990/2017, 2019 WL 3070982, at \*6-\*7 (directing the petitioner to restrain from engaging in conduct constituting harassment in violation of the statute and imposing a civil penalty); *Truglio v. VNO 11 E. 68th St. LLC*, No. 57103/12, 2012 WL 1849659, at \*15 (N.Y. Civ. Ct. May 21, 2012) (ordering that the landlord was to rebuild the subject apartment after the landlord was found to illegally lock out the tenant and demolish the subject premises); *Tivoli Bi LLC v. Lee*, No. 51168/2017, 2017 N.Y.L.J. LEXIS 2094, at \*14-15 (N.Y. Civ. Ct. July 27, 2017) (finding that the landlord unlawfully harassed the tenant by bringing repeated, baseless proceedings against the tenants, and ordering the landlord to pay fines); *Hua Hong Indus. U.S. LLC v. Diaz*, No. 66795/17, 2018 N.Y.L.J. LEXIS 1739, at \*4-5 (N.Y. Civ. Ct. May 4, 2018) (finding that the landlord violated the harassment statute by commencing baseless proceedings against the tenant, and fining and enjoining the landlord from bringing additional baseless claims); *Hilltop 161 LLC v. Philbert*, No. L&T 68521/18, 2019 N.Y. Misc. LEXIS 327, at \*14-

### *D. Challenge Unethical Behavior in Court with Sanctions*

New York State has long provided a mechanism for curbing and punishing frivolous or baseless conduct in litigation.<sup>268</sup> “Rule 130” of the NYCRR authorizes the Housing Court to award costs, including sanctions and reasonable attorney’s fees, when either party has engaged in frivolous conduct.<sup>269</sup> “Frivolous” is defined as conduct “completely without merit in law,” “undertaken primarily to delay . . . the litigation, or to harass or maliciously injure another” or that “asserts material factual statements that are false.”<sup>270</sup> Housing Court judges are specifically granted the power, under the statute, to impose Rule 130 sanctions.<sup>271</sup>

### *E. Hold Landlords Accountable for Failing to Act*

Contempt is a powerful tool that is woefully underutilized by the courts and tenant advocates.<sup>272</sup> Where a landlord fails to comply with a so-ordered

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15 (N.Y. Civ. Ct. Jan. 28, 2019) (finding that petitioner engaged in an ongoing course of conduct meant to “interfere with or disturb the comfort, repose, peace or quiet” of respondent in the subject premises, and intended to deprive respondent of her rights as a rent stabilized tenant by sending threatening letters and engaging in other unlawful conduct); *Pinchback v. Foreman*, No. 3178/16, 2017 N.Y.L.J. LEXIS 3401, at \*1 (N.Y. Civ. Ct. Dec. 6, 2017) (ordering civil penalties against the landlord for failing to provide repairs and unlawfully harassing the tenant); *Emmitt v. Ferrarie*, No. L&T 52575/16, 2017 N.Y.L.J. LEXIS 2297, at \*14 (N.Y. Civ. Ct. Aug. 16, 2017) (ordering the landlord to be fined \$5,000 for harassment after the landlord refused to adequately maintain essential services, changed the locks on the building’s front door, and removed kitchen appliances); *363-367 Neptune Ave., LLC v. Neary*, 917 N.Y.S.2d 544, 556 (N.Y. Sup. Ct. 2010) (ordering the landlord to cease harassment of rent stabilized tenants); *S&S Agric. U.S. v. Maldonado*, No. 060040/15, 2016 N.Y.L.J. LEXIS 4536, at \*9 (N.Y. Civ. Ct. Jan. 11, 2017) (finding that the landlord was unlawfully harassing the tenant for bringing a frivolous non-payment case after failing to provide overcharge judgment and correct rent records); *659 Vt. St. Tenants’ Ass’n v. Vt. Realty*, No. 3213/16, 2018 N.Y.L.J. LEXIS 4413, at \*13 (N.Y. Civ. Ct. June 6, 2018) (holding that new building owner failed to correct violations and harassed tenants, and ordering owner to pay \$717,700.00 in fines); *Leprovost v. Pitts*, No. 1515/14, 2015 WL 518420, at \*6–\*7 (N.Y. Civ. Ct. Feb. 6, 2015) (finding that the landlord was liable for harassment against the tenant for breaking down her door, breaking into her room, destroying her property, having others intimidate her, tampering with her mail, and denying her essential services); *Seelig*, No. 84987/2016, 63 Misc.3d 1218(A), at \*5 (finding that the owner unlawfully harassed the tenant with unwanted buyout offers); *ABJ Milano LLC v. Howell*, 86 N.Y.S.3d 389, 391 (N.Y. Civ. Ct. 2018) (explaining that the owner engaged in unlawful harassment when he initiated an out-of-court buy-out agreement after an agent had called and visited the elderly and disabled tenant numerous times in three-week period and untruthfully claimed that the tenant’s rent-stabilized lease would not be renewed).

268. N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1 (2020).

269. *Id.* § 130-1.1(c).

270. *Id.*

271. *Id.* § 130-1.4; *see Bldg Mgmt. Co. Inc. v. Schwartz*, 773 N.Y.S.2d 242, 246 (N.Y. Civ. Ct. 2004) (ordering sanctions after landlord’s attorney issued three subpoenas and directed delivery of evidentiary materials *only* to the petitioner’s attorney’s office, and not to the court or respondent’s counsel, stating that this “back door discovery” was frivolous and lacked basis in law); *see also* N.Y.C. Hous. Auth. v. Various Tenants, No. 802957/17, 2018 N.Y. Misc.3d 1210(A), at \*3 (N.Y. Civ. Ct. Feb. 22, 2018) (granting sanctions against NYCHA and ordered the payment of reasonable costs and expenses for the tenants for suing three different tenants in multiple proceedings seeking the same, overlapping rent in different proceedings).

272. Armen H. Merjian, *Righting the Scales of Justice: The Critical Need for Contempt Proceedings against Lawless Landlords*, 52 COLUM. HUM. RTS. L. REV. 592, 592–93 [http://hrlr.law.columbia.edu/files/2021/02/592\\_Merjian.pdf](http://hrlr.law.columbia.edu/files/2021/02/592_Merjian.pdf) (arguing that while nationwide, between 2011 and 2016, courts have yielded 117,952 evictions, they have issued fewer than fifty contempt rulings for

Stipulation or Order of the court, the court can hold landlords in contempt for failing to comply.<sup>273</sup> The contempt remedy is governed by Judiciary Law Section 753 (civil contempt) and Section 750 (criminal contempt), and can be sought whenever a party in a case fails to comply with an order of the court.<sup>274</sup> Tenants may move for contempt in the common scenario in which a landlord fails to provide repairs or comply with other obligations pursuant to a ‘so-ordered’ Stipulation of Settlement, Court Order or HP consent order.<sup>275</sup>

Civil contempt aims to vindicate the rights of a litigant and compensate the party for any loss or interference with that right.<sup>276</sup> On the other hand, criminal contempt is designed to vindicate an offence against “public justice” and an effort to protect and compel respect for the judicial system.<sup>277</sup> The same act may be punishable by both civil and criminal contempt, and it may be elevated from civil to criminal based upon the willfulness of the act.<sup>278</sup>

A court finding contempt can order fines, damages, costs, attorneys fees, and, in some egregious cases, imprisonment.<sup>279</sup> The elements necessary for a cause of action for contempt under the Judiciary Law are: (1) a lawful order of the Court expressing a clear mandate, (2) notice to the contemnor of the mandate, (3) disobedience of the mandate, and (4) prejudice to the other party.<sup>280</sup> A motion for criminal contempt must be served on the party and their attorney.<sup>281</sup> Contempt is a powerful tool to hold landlords accountable to comply with their legal obligations.

## VI. THINKING BIGGER: HOUSING AS A HUMAN RIGHT

The COVID-19 crisis has caused many to rethink societal rules and norms—including Housing Court practice and procedure. The crisis has painfully demonstrated that housing is a human right and a public health necessity. Now is the time for big ideas and bold action, not incremental change or band-aid solutions. The global health crisis exacerbated the flaws of a system that was already unsustainable for many tenants living on limited incomes. The crisis offers an opportunity to think broadly about how to establish real, sustainable

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failure to obey court orders to repair hazardous conditions, despite landlords’ chronic and widespread flouting of such orders. Merjian argues that contempt proceedings “can remedy this injustice, including (1) establishing deadlines for the completion of ordered repairs, with either imprisonment or fines for each day that the landlord continues to flout the court’s authority; (2) awarding damages to the aggrieved tenant, including damages for emotional distress and diminished habitability; and (3) awarding attorneys’ fees and costs to tenants’ counsel.”).

273. N.Y. JUD. LAW §§ 750, 753 (McKinney 2019).

274. *Id.* The remedy is not limited to orders issued by the court; contempt may also be charged when a party violated the terms of a so-ordered stipulation of settlement.

275. *N.Y. v. Quadrozzi*, No. 8442/10, 99 N.Y.S.3d 84, at \*86 (N.Y. App. Div. 2019) (explaining that plaintiffs moved to enforce a so-ordered stipulation of settlement and to hold defendant in civil contempt of court after defendant failed to make certain repairs agreed upon in the stipulation).

276. *McCormick v. Axelrod*, 453 N.E.2d 508, 512 (N.Y. 1983).

277. *Id.*

278. *Id.*

279. N.Y. JUD. LAW §§ 750, 751, 753 (McKinney 2019).

280. *Id.* at §§ 750, 753; *McCormick*, 453 N.E.2d at 512–13.

281. *Lu v. Betancourt*, 496 N.Y.S.2d 754, 756 (N.Y. App. Div. 1986) (“Where the penalty of criminal contempt is sought, failure to personally serve the alleged contemnor constitutes a jurisdictional defect requiring dismissal” (citing *People v. Balt*, 312 N.Y.S.2d 587 (N.Y. App. Div. 1970)).

opportunities and protections for tenants to live in safe, secure and affordable homes. This section sets out concrete steps toward achieving these goals.

### *A. Cancel Rent*

The public health crisis led to a state-wide shutdown and put thousands of New Yorkers out of work. Many people are choosing between feeding their children, paying for medical care and paying rent.<sup>282</sup> To ease this burden, the first step is to cancel all rent for those people financially affected by COVID-19. The New York State legislature can pass a bill to cancel rent.<sup>283</sup> One option is the “Relief for All” Act, introduced by Senator Julia Salazar, which aims to help renters and homeowners by canceling or reducing rent for tenants while providing state and federal funding for small property owners and non-profit housing providers who lost rental income during the crisis.<sup>284</sup> The bill would provide rent and mortgage relief starting in March 2020 and ending 90 days after the governor declares the end to New York’s ongoing State of Emergency. It is likely that the most vocal critics of the bill will claim that such relief runs afoul of the Fifth Amendment’s Takings Clause. While a full legal analysis is necessary, it is highly unlikely a court would strike down the “Relief for All” bill because of the temporary nature of the relief, its emergency justification, and the fact that the relief provided would not rise to the level necessary under the Takings Clause. Further, the legislation provides compensation to any landlord who can sufficiently show injury under the Takings Clause.<sup>285</sup>

Alternatively, the governor can take executive action to cancel rent for struggling tenants who risk losing their homes due to the pandemic.<sup>286</sup> All rent that accrued between March 2020 and the end of the pandemic should be universally forgiven without the requirement that tenants prove financial hardship. Putting the onus on tenants to prove the documented income loss will prejudice many vulnerable groups, including undocumented individuals and those working in informal economies. Relief should be provided to small landlords who rely on monthly rents to pay mortgage and taxes. Large corporate landlords who have

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282. See Desiree Rios, *Nearly 1 in 4 New Yorkers Needs Food as Pandemic Persists*, N.Y. TIMES (May 21, 2020), <https://www.nytimes.com/2020/05/21/nyregion/coronavirus-ny-update.html>.

283. S.B. S8125A, N.Y. State S., 2019-2020 Leg. Sess. (N.Y. 2020) (relating to suspending rent payments for certain residential tenants and small business commercial tenants and certain mortgage payments for ninety days in response to the outbreak of COVID-19), <https://www.nysenate.gov/legislation/bills/2019/s8125>.

284. Ophelia Xie, *Bill Would Protect Renters and Homeowners During COVID-19 Crisis*, LEGISLATIVE GAZETTE (May 5, 2020), <https://legislativegazette.com/bill-would-protect-renters-and-homeowners-during-covid-19-crisis/>.

285. U.S. CONST. amend. V, cl. 5 (prohibiting the federal government from taking “private property . . . for public use, without just compensation.”).

286. Press Release, New York State Senate Michael Ginaris, Senate Deputy Leader Gianaris Calls on Governor Cuomo To #CancelRent By Executive Order (April 08, 2020), <https://www.nysenate.gov/newsroom/press-releases/michael-ginaris/senate-deputy-leader-gianaris-calls-governor-cuomo>.

continued to see their total incomes increase should be asked to concede to the short-term financial loss.<sup>287</sup>

### *B. Expand Right to Counsel, Eviction Prevention & Access to Affordable Housing*

Reforms to this broken system, once unthinkable, are now part of the mainstream conversation. In this moment of crisis, there is opportunity to reexamine long-held assumptions about the social contract around housing and the landlord/tenant relationship. The Right to Counsel in Housing Court, pioneered in NYC, has now been adopted in many large cities, including San Francisco, Philadelphia, Newark, Boulder, and Cleveland.<sup>288</sup> Similar programs are being considering in Connecticut, Indiana, Maryland, Minnesota, Nebraska, Oklahoma, South Carolina, Washington State and Wisconsin.<sup>289</sup> Advocates in NYS are now pushing to extend the right to counsel state-wide, and it has now become a reality in Rochester, NY.<sup>290</sup>

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287. See Sofia Lopez & Sara Myklebust, *Make Corporate Landlords Pay the Bills During the Pandemic*, INEQUALITY.ORG (Aug. 17, 2020), <https://inequality.org/research/corporate-landlords-pandemic-evictions/> (“These corporations are sitting on billions of dollars and will keep getting richer through tax breaks and giveaways, including in the federal stimulus packages. They can easily afford to cancel monthly housing-related expenses and debts for millions of Americans whose jobs and incomes have been destroyed by Covid-19.”).

288. HEIDI SCHULTHEIS & CAITLIN ROONEY, CTR. FOR AM. PROGRESS RIGHT TO COUNSEL IS A RIGHT TO A FIGHTING CHANCE 8–9 (2019),

<https://www.americanprogress.org/issues/poverty/reports/2019/10/02/475263/right-counsel-right-fighting-chance/>; see *All About Cleveland’s Eviction Right to Counsel*, NAT’L COAL. FOR A CIV. RIGHT TO COUNS. (Feb. 5, 2021), [http://civilrighttocounsel.org/major\\_developments/1382](http://civilrighttocounsel.org/major_developments/1382); see also *City of Cleveland Creates Right to Counsel in Cleveland Housing Court*, LEGAL AID SOC’Y OF CLEV. (Oct. 1, 2019 2:58 PM), <https://lasclev.org/20191001/>; Matt Bloom, *How a Voter-Approved Program in Boulder Could Drastically Reduce Evictions*, KUNC (Nov. 4, 2020, 4:08 PM), <https://www.kunc.org/2020-11-04/how-a-voter-approved-program-in-boulder-could-drastically-reduce-evictions>; Robert D. Lane Jr. et al., *Philadelphia Enacts ‘Right to Counsel in Evictions’ Law*, THE NAT’L L. REV. (Nov. 19, 2019), <https://www.natlawreview.com/article/philadelphia-enacts-right-to-counsel-evictions-law#:~:text=On%20November%2014%2C%202019%2C%20the,income%20residents%20facing%20eviction%20proceedings>.

289. Doug Donovan, *Lawmakers Seek Legal Aid for Tenants Facing Eviction in Baltimore*, BALTIMORE SUN (July 3, 2017 6:41 PM), <https://www.baltimoresun.com/news/investigations/bs-md-tenant-lawyers-reaction-20170703-story.html>; Doug Donovan, *Solution to Help Tenants Avoid Eviction Lags in Maryland*, BALTIMORE SUN (July 3, 2017 12:54 PM), <https://www.baltimoresun.com/news/investigations/bs-md-tenant-attorneys-20170701-story.html>; MN HF450, 92nd Leg., 2021–2022 Leg. Sess. (Minn. 2021), <https://legiscan.com/MN/bill/HF450/2021>; *Right to Counsel Pilot Proposed in Milwaukee*, NAT’L COAL. FOR A CIV. RIGHT TO COUNS. (Mar. 5, 2021), [http://civilrighttocounsel.org/major\\_developments/1514](http://civilrighttocounsel.org/major_developments/1514); Resolution No. 20083, City Council, City of Tulsa, Okla. (Okla. 2020), [http://civilrighttocounsel.org/uploaded\\_files/273/Tulsa\\_RTC\\_resolution.pdf](http://civilrighttocounsel.org/uploaded_files/273/Tulsa_RTC_resolution.pdf); H 3072, S.C. H.R., Sess. 124 (S.C. 2021), <https://legiscan.com/SC/bill/H3072/2021>; S.B. 531, Conn. Gen. Assembly, Sess. Year 2021 (Conn. 2021), <https://legiscan.com/CT/bill/SB00531/2021>; S.B. 350, Ind. State S., 2021 Sess. (Ind. 2021), <https://legiscan.com/IN/bill/SB0350/2021>; LB419 – Require Appointment of Counsel in Eviction Proceedings and Provide for a Filing Fee, 107th Leg., 2021–2022 Sess. (Neb. 2021), <https://legiscan.com/NE/bill/LB419/2021>; S.B. 5160, Wash. State Leg., Reg. Sess. (Wash. 2021), <https://legiscan.com/WA/bill/SB5160/2021>.

290. See, e.g. Gino Fanelli, *Rochester Tenants Facing Eviction Would Get Free Legal Counsel Under New Bill*, ROCHESTER CITY NEWSPAPER (Aug. 3, 2020), <https://www.rochestercitynewspaper.com/rochester/rochester-tenants-facing-eviction-would-get-free-legal-counsel-under-new-bill/Content?oid=12087059> (explaining that the Volunteer Legal Services

Protections against evictions, similar to those built into New York City's rent regulation scheme, should also be expanded statewide. One of the most significant tenant protections enjoyed by rent-stabilized tenants is the right to a renewal lease unless the tenancy can be terminated for cause.<sup>291</sup> The statewide shift to sanctioning evictions only "for cause" would provide security and peace of mind to tenants living in non-regulated apartments. The NYS legislature is currently considering a bill to ensure evictions for "good cause" only.<sup>292</sup> The "Good Cause" bill would extend the right to a lease renewal and protections from unconscionable rent increases to all tenants across NYS, except those living in owner-occupied buildings with four or fewer units.<sup>293</sup>

Finally, the State should aggressively expand the ability of low-income tenants to access affordable housing. One huge leap would be the creation of a reliable and comprehensive housing voucher program.<sup>294</sup> The program proposed by the NYS legislature—the Housing Access Voucher Program—would create a rental assistance program for New Yorkers who are currently homeless or at risk of losing their homes, including undocumented individuals who are not currently eligible for public assistance.<sup>295</sup>

### *C. Invest in Community Land Initiatives & End Apartment Warehousing*

One powerful way to flip the narrative of real estate and property as a monetary investment instead of a human right is to invest in community land initiatives throughout NYC. City leaders should follow the lead of non-profits such as the NYC Community Land Initiative.<sup>296</sup> This group works to advance Community Land Trusts ("CLTs") and pushes for policies to give tenants and community organizations a first right to purchase multifamily properties, abolish NYC's tax lien sale, and to prioritize CLTs for public land disposition.

CLTs are non-profit entities that present a different ownership model that is community-led and community-controlled. The CLT stewards a building and/or land with the goal of ensuring permanently affordable housing.<sup>297</sup> It is a community ownership model that gained momentum before the pandemic<sup>298</sup> and

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Project has been operating a program in Irondequoit, New York to provide legal representation to low-income residents facing eviction, and it "is working to expand it to Greece and East Rochester.").

291. See S. 2892B, N.Y. State S., 2019-2020 Leg. Sess. (N.Y. 2020),

<https://www.nysenate.gov/legislation/bills/2019/s2892>. Other pending legislation, S3693/A6322, seeks elimination of Major Capital Improvements (MCIs). MCIs essentially allow landlords to pass the cost of building repairs and major improvements onto tenants, many of whom may not be in possession for the life of the improvement.

292. S. 2892B, *supra* note 293.

293. *Id.*

294. S. 2804A, N.Y. State S., 2021-2022 Leg. Sess. (N.Y. 2021),

<https://www.nysenate.gov/legislation/bills/2021/S2804>.

295. *Id.*

296. *About Us*, NYC CMTY. LAND INITIATIVE, <https://nyccli.org/> (last visited Mar. 28, 2021).

297. *Frequently Asked Questions*, NYC CMTY. LAND INITIATIVE, <https://nyccli.org/resources/elts-and-mhas-frequently-asked-questions/> (last visited Mar. 28, 2021) [hereinafter NYC CMTY. LAND INITIATIVE FAQ].

298. Press Release, New Economy Project, Victory! NYC Funds Community Land Trusts in City Budget (June 25, 2019), <https://www.neweconomynyc.org/2019/06/nyc-takes-bold-action-to-address-the-affordable-housing-crisis-by-supporting-community-land-trusts/>.



can be a powerful force in post-pandemic New York City that can lead to more affordable homes, jobs, and free community space.<sup>299</sup>

The NYS Legislature should take decisive action to ensure the availability of affordable housing. It can follow the lead of Barcelona, Spain, which recently expanded the prohibition on the warehousing of empty apartments.<sup>300</sup> The new Barcelona law permits the city to assume ownership of apartments that have been vacant for more than two years and compensate the owners at 50% of the market rate.<sup>301</sup> New York should expand its attempts to crack down on warehousing apartments and pass the proposed bill that would fine landlords who leave apartments vacant for more than three months and use the money collected to fund housing vouchers for homeless New Yorkers.<sup>302</sup>

#### *D. Abolish Summary Proceedings & Possessory Judgments in Housing Court*

The very nature of the “summary proceeding” in Housing Court creates and perpetuates fundamental inequities.<sup>303</sup> Currently, housing disputes between landlords and tenants are litigated in fast-paced “summary proceedings” instead of in plenary actions like other civil actions.<sup>304</sup> That proceedings resolving such humanly vital questions related to whether one loses a roof over one’s head are fast-tracked while other contract disputes are not is inherently unfair and likely a result of racist and classist policies. This “expedited” form of legal proceeding has its origins in New York in a statute passed in 1820 which sought to offer landlords an alternative to an ejectment action to recover possession of real property.<sup>305</sup> By its very nature, such a proceeding privileges property over personhood by depriving tenants of a forum to fully seek comprehensive resolution of their legal claims, a right afforded to other civil litigants. While in 1820 this procedure was a more generous alternative to landlords physically ejecting tenants, self-help evictions have long been outlawed as inhumane and unjust.<sup>306</sup> It is time the procedural aspects of housing law caught up. While challenges to summary

299. Mark Hallum, *Housing Advocates in NYC Look to Budget to Help Curb Post-Pandemic Gentrification*, AMNY (June 25, 2020), <https://www.amny.com/politics/housing-advocates-in-nyc-look-to-budget-to-help-curb-post-pandemic-gentrification/>; NYC CMTY. LAND INITIATIVE FAQ, *supra* note 299.

300. Feargus O’Sullivan, *Barcelona’s Latest Affordable Housing Tool: Seize Empty Apartments*, BLOOMBERG: CITYLAB (July 16, 2020, 12:48 PM), <https://www.bloomberg.com/news/articles/2020-07-16/to-fill-vacant-units-barcelona-seizes-apartments>

301. *Id.* (The law expands 2016 efforts to fine landlords and/or assume temporary control of vacant apartments for us as affordable housing but returns it to the owners after 4-10 years.).

302. A9966, N.Y. State Assembly, 2019-2020 Leg. Sess. (N.Y. 2020), <https://www.nysenate.gov/legislation/bills/2019/A9966>.

303. Mary B. Spector, *Tenants’ Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137 (2000).

304. *Id.*

305. *See Reich v. Cochran*, 201 N.Y. 450, 453–56 (N.Y. 1911) (providing an overview of the history of New York’s summary proceedings statutes).

306. Press Release, N.Y. State Office of the Attorney General, Attorney General James Issues Tenant Guidance for New Yorkers During Coronavirus Pandemic (Apr. 16, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-issues-tenant-guidance-new-yorkers-during-coronavirus> (explaining that “self-help evictions,” which includes your landlord locking you out or trying to evict you, are unlawful in New York State).

proceedings on federal constitutional grounds have not succeeded,<sup>307</sup> the newly emboldened tenants' rights movement along with the growing number of impassioned tenant attorneys working together could craft a legislative response to retire this outmoded conception of justice for tenants.

In addition to abolishing summary proceedings, the State should prohibit possessory judgments. The State should decouple the obligation to pay rent with the violent remedy of eviction. The contractual obligation to pay rent can be enforced through money judgments for the unsecured debt, so that a landlord can collect on a monetary judgment, but a person cannot be made homeless because of the debt. This is exactly what our legislature did in the Tenant Safe Harbor Act, and there is no reason it cannot become the new norm in housing litigation.

### *E. Reimagine Housing as a Human Right*

It is time to rethink the role of government in providing and regulating it housing. Why not consider housing a human right? If housing were a human right, then the government would have the moral and legal obligation to provide it for every citizen. New York State is constitutionally obligated to care for its citizens in need. Article XVII of the NYS Constitution provides that "the aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions . . ."<sup>308</sup> This constitutional provision grounds the state's obligation to provide shelter for the homeless, as first recognized for homeless single men in the consent decree entered in *Callahan v. Carey*,<sup>309</sup> and then extended to women and homeless families in subsequent litigation.<sup>310</sup> Significantly, this constitutional provision has not yet been interpreted to mandate that the state provide housing, but instead have a role only as providing shelter.

Since the adoption of the Universal Declaration of Human Rights in 1948, the right to adequate housing has become a universally accepted part of human rights law and has been reaffirmed in a wide range of human rights instruments.<sup>311</sup> It is time to bring to fruition the promises of the Universal Declaration of Human Rights for New Yorkers. New York should provide a right to housing, not just a right to shelter, but a right to an adequate home, and to re-order the State's priorities accordingly.

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307. See, e.g., *Lindsey v. Normet*, 405 U.S. 56, 64–74 (1972).

308. N.Y. CONST., art. XVII.

309. Consent Decree, *Callahan v. Carey*, No. 42582/79 (N.Y. Sup. Ct. Aug. 26, 1981), available at <https://www.coalitionforthehomeless.org/wp-content/uploads/2014/06/CallahanConsentDecree.pdf>.

310. *Eldredge v. Koch*, 459 N.Y.S.2d 960, 961 (N.Y. Sup. Ct. 1983) (extending the right to shelter to homeless women); *McCain v. Koch*, 484 N.Y.S.2d 985, 987–88 (N.Y. Sup. Ct. 1984) (extending the right to shelter to families).

311. UNITED NATIONS, FACT SHEET NO. 21, THE HUMAN RIGHT TO ADEQUATE HOUSING 15–19 (2009), <https://www.un.org/ruleoflaw/files/FactSheet21en.pdf>.

## VII. CONCLUSION

COVID-19 has caused many to rethink housing as a human right and public health need and has underscored the intersectionality of housing justice and racial justice. The effects of the Right to Counsel, the strong Democratic-led state legislature that passed HSPTA, along with a committed and vibrant tenants' rights movement, places more power in the hands of tenants and advocates than at any other point in our history. These elements create a powerful and coordinated movement that stands ready to demand far-reaching housing justice for New Yorkers.

The Right to Counsel offers an army of new lawyers a fresh way to see their role as housing attorneys. Attorneys can pivot from the longtime defensive posture to use their collective strength to push for creative litigation strategies and disrupt an inherently unjust and racist housing system which, for far too long, has prioritized profit over people. In one of the richest cities in the world there is no reason that anyone should be un-housed, especially the majority of NYC apartments are owned by large, corporate landlords,<sup>312</sup> and many companies are making record profits, even during the pandemic.<sup>313</sup> Advocates must continue to fight and imagine greater opportunities and protections for tenants. At the same time, we can use the tools currently at our disposal to fight as aggressively for renters.

The COVID-19 crisis has lifted a veil from the severe inequities faced by low-income tenants in NYC. Before COVID-19, the affordable housing crisis was real and well-documented, but the pandemic has created an emergency situation that must be handled in the short term and confronted creatively and aggressively in the long term. New York is well-situated to take broad steps to protect tenants. The tenant movement is robust, HSTPA strengthened tenant protections and removed many of the financial incentives for landlords to evict tenants, and the Right to Counsel has flooded the system with hundreds of new and passionate tenant attorneys. This article is a call to action for stakeholders to think expansively and boldly to make New York City a place where working people can live and thrive.

This Article acknowledges how much more work there is to do in the fight for fairness, to dismantle the systemic racism inherent at all levels of housing and disrupt the eviction mill. It also recognizes that NYC's housing attorneys have the power to start to unravel the system as we know it and create something new built on the belief that housing is a human right. A place to lay one's head is necessary for all of us.

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312. Sam Rabiya, *Examining the Myth of the "Mom-and-Pop" Landlord*, MEDIUM (Mar. 4, 2020), <https://medium.com/justfixnyc/examining-the-myth-of-the-mom-and-pop-landlord-6f9f252a09c>

313. *Cashing in On Our Homes: Billionaire Landlords Profits as Millions Face Eviction*, INST. FOR POL'Y STUD., <https://ips-dc.org/cashing-in-on-our-homes/>; <https://www.cbsnews.com/news/eviction-moratorium-landlord-record-profits/> (last visited Apr. 26, 2021).