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Gentrification and Countermovement: The Right to Counsel and New York City's Affordable Housing Crisis

John Whitlow

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GENTRIFICATION AND COUNTERMOVEMENT: THE RIGHT TO COUNSEL AND NEW YORK CITY'S AFFORDABLE HOUSING CRISIS

*John Whitlow**

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* Associate Professor of Law, CUNY School of Law, J.D., CUNY School of Law, 2003. Thanks to Kyle Giller, Sam Kohn, Jenny Akchin, Andrea McArdle, Carmen Huertas-Noble, Missy Risser, Chris Adams, Steve Zeidman, Julia Hernandez, Nicole Smith, Amna Akbar, Liz Wagoner, Sam Stein, Jocelyn Simonson, Mike Grinthal, Matt Main, Marika Dias, Greg Louis, Stephen Loffredo, Daniela Crespo, and Raquel Namuche. Thanks also to the CUNY School of Law Professional Development Committee and the Faculty of the Maurice A. Deane School of Law at Hofstra University (as part of the Northeastern Law School Scholarship Exchange). And very belated thanks to the Center for Place, Culture and Politics. This Article is inspired by the tenants, organizers, and advocates who are fighting for more just, democratic, and equal cities.

“I wish the rent was heaven sent.”¹

INTRODUCTION

Amid an extreme affordable housing crisis in 2017,² the New York City Council passed the right to counsel, which guarantees an attorney to individuals facing eviction in Housing Court proceedings.³ The right to counsel was fought for by a coalition of tenants and advocates determined to make Housing Court a fairer place and to increase the power of the tenant movement, which, at the time of this writing, stands poised to make major redistributive legal and policy gains for the first time since the 1970s.⁴ It was also supported by the

1. LANGSTON HUGHES, *Little Lyric (of Great Importance)*, in *THE COLLECTED POEMS OF LANGSTON HUGHES* 226, 226 (1995).

2. The term “housing crisis” has been invoked repeatedly throughout the history of New York City. Arguably, the city has survived dozens of housing crises: the public health crisis of tenement housing, the post-World War II housing shortage, the wholesale destruction of neighborhoods through urban renewal, and widespread urban disinvestment in the 1970s and early 1980s, for example. As Madden and Marcuse note, “[f]or the oppressed, housing is always in crisis Housing crisis [are] not a result of the system breaking down, but of the system working as it intended.” David Madden & Peter Marcuse, *The Permanent Housing Crisis*, *JACOBIN* (Oct. 2, 2016), <https://jacobinmag.com/2016/10/housing-crisis-rent-landlords-homeless-affordability> [<https://perma.cc/L3ZZ-MFX6>]. According to Madden and Marcuse, in the current iteration of the housing crisis, “[h]ouseholds are being squeezed by the cost of living. Homelessness is on the rise. Evictions and foreclosures are commonplace. Segregation and poverty, along with displacement and unaffordability, have become the hallmarks of today’s cities.” *Id.* New York City’s current affordable housing crisis is explored in the first Section of this Article. *See infra* Section IA.

3. The right to counsel, often characterized as “universal access,” is described fully in the second Section of this Article. *See infra* Section II.A. In essence, the right to counsel is a municipal law that guarantees all income-eligible tenants in New York City an attorney in eviction proceedings in Housing Court, and in some administrative proceedings. 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/> [<https://perma.cc/C3C8-VQH2>]. The right to counsel is being phased in over a five-year period. *Id.*

4. On June 14, 2019, the New York State Legislature passed a sweeping rent regulation reform bill, the Housing Stability and Tenant Protection Act of 2019. *See* S.B. 6458, 2019–2020 Reg. Sess. (N.Y. 2019). The new legislation made dozens of reforms to the Emergency Tenant Protections Act (which governs New York’s rent regulatory framework), as well as the state’s Real Property Actions and Proceedings Law (which sets standards for housing court proceedings). *Id.* Among the most significant changes were the elimination of high rent vacancy decontrol, the mechanism through which units could be removed from rent regulation, and the vacancy bonus, under which landlords could increase rents by 20% upon each vacancy. *Id.* at 1–2. These changes, alongside others limiting rent increases,

mayoral administration of Bill de Blasio,⁵ whose market-based housing policies have contributed to the current crisis.⁶ The divergence between the political and economic development visions of those who organized for the right to counsel and the de Blasio administration signals that the right to counsel is contested terrain.⁷ The right can be interpreted in a manner that enhances tenants' organizing capacities, or it can be seen as a legitimization of housing policies that produce displacement.

This Article examines the capacity of the right to counsel to effectively intervene in the affordable housing crisis through the lens of political economy and a critique of legal rights. The theoretical thread that binds this Article together is based on the work of economic historian Karl Polanyi, which depicts an intrinsic tension between the market economy and society, with the dictates of the market cannibalizing societal institutions.⁸ In Polanyi's formulation, the market economy's tendency to commodify areas of life that are more properly social (land, labor, money) than economic leads to social disintegration and catastrophe.⁹ The application of the logic of the self-regulating market to matters of basic human sustenance results in the destruction of both society and the natural environment.¹⁰ Eventually — and inevitably — society fights back against this process of marketization, as countermovements of impacted people mobilize for social protection against austerity,

effectively remove the economic incentive for landlords to displace tenants from rent-regulated housing. Despite major legislative efforts to create protections for renters in unregulated buildings, lawmakers did not approve the so-called “Good Cause” eviction bill. See Mark Weiner, *NY Senate, Assembly Rent Reforms Leave Out ‘Good Cause’ Eviction Bill*, SYRACUSE.COM (June 12, 2019), <https://www.syracuse.com/politics/2019/06/ny-senate-assembly-rent-reforms-leave-out-good-cause-eviction-bill.html> [<https://perma.cc/C66Z-4EJ5>].

5. *Mayor de Blasio Signs Legislation to Provide Low-Income New Yorkers with Access to Counsel for Wrongful Evictions*, OFFICE OF THE MAYOR (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> [<https://perma.cc/D99P-TUUD>].

6. The de Blasio administration's market-based housing policies are outlined in Section I.D. See *infra* Section I.D.

7. See John Whitlow, *Beyond Access to Justice: Challenging the Neoliberal Roots of Hyper-Gentrification*, L. & POL. ECON. BLOG (Apr. 9, 2018), <https://lpeblog.org/2018/04/09/beyond-access-to-justice-challenging-the-neoliberal-roots-of-hyper-gentrification/> [<https://perma.cc/37K9-JFFY>].

8. See KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 74 (2d ed., 2001).

9. GARETH DALE, *KARL POLANYI: THE LIMITS OF THE MARKET* 60 (2010).

10. *Id.*

unemployment, and displacement.¹¹ These countermovements aim to subject the market economy to democratic and redistributivist interventions and can be strengthened by particular discourses of legal rights.

In terms of the political-economic frame of this Article, New York City's current housing crisis is viewed as connected to the city's neoliberal reorganization in the wake of the fiscal crisis of the mid-1970s. The resolution of the fiscal crisis circumscribed the legislative authority of the municipal government and diminished the city's famed social-democratic polity.¹² It also inaugurated a public policy common sense that is premised on an entrepreneurial conception of state power that favors market-based solutions to social problems (for example, the affordable housing crisis)¹³ and that systematically converts social goods into private luxuries.¹⁴ In the decades following the city's fiscal crisis, state-led initiatives and market forces have combined to render vast swaths of the city increasingly unaffordable.¹⁵

The neoliberalization and subsequent gentrification of New York City have been legally constituted and have unfolded along vectors of race, class, and geography. In the 1970s, the city lost home rule¹⁶ over many areas of residents' everyday lives — including housing —

11. POLANYI, *supra* note 8, at 136–37.

12. See JOSHUA B. FREEMAN, *WORKING-CLASS NEW YORK: LIFE AND LABOR SINCE WORLD WAR II* 55–71 (2000).

13. The common sense of neoliberalism is, at its core, predicated on the belief that all of our social institutions function best when they work according to the principles of the market. This has meant the erosion of policies and practices based in the common good, and the emergence of a state apparatus, the main purpose of which is to facilitate capital accumulation rather than counter the deleterious effects of marketization. See LESTER K. SPENCE, *KNOCKING THE HUSTLE: AGAINST THE NEOLIBERAL TURN IN BLACK POLITICS* 9–10 (rev. ed. 2016).

14. This particular feature of neoliberalism — that is, the transformation of social goods to private luxuries — is eloquently taken up by E. Tammy Kim in an op-ed about the debate over student debt and free college. See E. Tammy Kim, *Opinion, What Free College Really Means*, N.Y. TIMES (June 30, 2019), <https://www.nytimes.com/2019/06/30/opinion/warren-sanders-free-college.html> [<https://perma.cc/TT3J-RSF3>].

15. See SAMUEL STEIN, *CAPITAL CITY: GENTRIFICATION AND THE REAL ESTATE STATE* 47–48 (2019) [hereinafter STEIN, *CAPITAL CITY*].

16. As part of the resolution of the fiscal crisis of the mid-1970s, much of New York City's political sovereignty was ceded to the state via the creation of unelected emergency financial boards, which were responsible for reviewing the city's operations and approving city contracts. See WILLIAM K. TABB, *THE LONG DEFAULT: NEW YORK CITY AND THE URBAN FISCAL CRISIS* 28 (1982).

thereby limiting municipal officials' policymaking capacity.¹⁷ As part of the settlement of the fiscal crisis, both the city and state governments enacted harsh austerity measures that targeted working-class, Black and Brown areas of the city, starving them of critical resources and effectively devalorizing them.¹⁸ In the decades following the loss of home rule, the state legislature hollowed out rent stabilization, and the municipal government — under successive mayoral administrations — has relied on a raft of market-based approaches to create affordable housing.¹⁹ These approaches, which include tax incentives and rezonings, have operated to marshal capital into many of the same areas devalorized during and after the fiscal crisis, placing upward pressure on land values and displacing longtime residents.²⁰

In recent years, the gentrification of urban space has been a core feature of New York City's political-economic ecosystem, with real estate playing an increasingly prominent role as an engine of growth.²¹ The centrality of real estate has gone hand in hand with the intensifying commodification of housing, and is premised on the prioritization of housing's economic value above its value as home.²² While the market-based policy regime that has undergirded these processes has generated significant economic expansion, it has also dramatically reconfigured the city's urban geography, resulting in increased inequality and social dislocation, and altering the race and class composition of entire neighborhoods.²³

17. See KIM MOODY, *FROM WELFARE STATE TO REAL ESTATE: REGIME CHANGE IN NEW YORK CITY, 1974 TO THE PRESENT* 39 (2007).

18. See KIM PHILLIPS-FEIN, *FEAR CITY: NEW YORK'S FISCAL CRISIS AND THE RISE OF AUSTERITY POLITICS 207–08* (2017).

19. See TOM ANGOTTI & SYLVIA MORSE, *ZONED OUT: RACE, DISPLACEMENT, AND CITY PLANNING IN NEW YORK CITY* 13 (2016).

20. See Samuel Stein, *De Blasio's Doomed Housing Plan*, JACOBIN (Oct. 3, 2014), <https://www.jacobinmag.com/2014/10/de-blasios-doomed-housing-plan/> [<https://perma.cc/9YSH-27MY>].

21. See STEIN, *CAPITAL CITY*, *supra* note 15, at 34.

22. DAVID MADDEN & PETER MARCUSE, *IN DEFENSE OF HOUSING: THE POLITICS OF CRISIS* 16–17 (2016).

23. NYU Furman Center's State of New York City's Housing and Neighborhoods found in 2015 that:

Since the 1990s, the share of the population identifying as black or white has declined in the city as a whole, while the share identifying as Asian or Hispanic has increased. The share of the population that identified as black also declined in gentrifying neighborhoods between 1990 and 2010 (37.9% to 30.9%), but the share of population that identified as white increased (18.8% to 20.6%). The Asian and Hispanic shares also grew in gentrifying neighborhoods, but more slowly than they did in the city as a whole.

This Article examines the promises and limitations of the right to counsel against this political-economic backdrop, applying several critiques of the function of legal rights amid widening social inequalities. It concludes that although legal rights within liberalism tend to leave intact — and may even reify — these inequalities, they can also, in certain cases, be deployed in a transformative manner. This occurs when legal rights are constructed to address concrete social harms; to call into question the material sources of those harms; and to help build new political formations capable of challenging the status quo.²⁴ Polanyi's theoretical framework offers a means by which to analyze the capacity of particular legal rights to contribute to social change, as the potency of legal rights can be evaluated according to the extent to which they support countermovements that challenge society's governing values and institutions, forcing a recalibration of the relationship between the market economy and society.

The right to counsel occupies a contested place in relation to this formulation of rights. It can be viewed as a narrow, procedural right that helps individual tenants at risk of eviction. More cynically, it can be seen as a legitimization of municipal development priorities that produce displacement. But the right to counsel's design facilitates a broader interpretation: its goal of producing positive substantive outcomes for tenants and its contention with private power gesture beyond individual Housing Court eviction proceedings, to the structural sources of the affordable housing crisis. In this sense, the right to counsel forms a component part of a broader right to stay put for tenants, as well as a bulwark against the ongoing deconstruction of housing as a social good.

In practice, tenants and their advocates have interpreted the right to counsel expansively, using it as a tool to support a vibrant, tenant-led countermovement for housing justice across New York City. This countermovement works against the grain of the legally-constituted

MAXWELL AUSTENSEN ET AL., NYU FURMAN CTR., STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2015 12 (2016), http://furmancenter.org/files/sotc/NYUFurmanCenter_SOCin2015_9JUNE2016.pdf [<https://perma.cc/HP6R-VWBG>] (footnote omitted).

24. The verb "construct" is used intentionally here, as legal rights are made to be transformative when they are acted upon by people engaged in a process of collective mobilization for social change. This resonates with Lani Guinier and Gerald Torres's depiction of social movements as "sources of law." See Lani Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2745 (2014).

commodification of housing that resulted from New York City's neoliberal turn, and fights for the ability of poor, working-class, and marginalized people to remain and thrive in the places they call home, irrespective of market forces. The right to counsel is a vital piece of this countermovement, which is deploying the right to build the organizing power of tenants and to fight for policy reforms that affirm housing's value as home over its value as real estate.

This Article examines the capacity of the right to counsel to support a tenant-based countermovement that targets the structural underpinnings of state-facilitated, market-based gentrification and displacement. Part I of this Article sketches the context for the right to counsel, beginning with a description of the dynamics of Housing Court and moving on to a discussion of the structural bases of New York City's escalating affordable housing crisis. It applies Polanyi's theoretical framework to New York City's neoliberal turn in the 1970s, and then looks at the gentrification of large sections of the city in the decades that followed. Part II discusses the history and mechanics of the right to counsel and examines the extent to which the right to counsel can intervene in the housing crisis. This discussion is grounded in an exploration of theories of legal rights and their capacity to contribute to transformative social change amid structural inequalities. Part III returns to Polanyi's theoretical framework, examining how the right to counsel supports an emergent countermovement for housing justice in the context of the city's current housing crisis. It discusses the manner in which this countermovement is interpreting and using the right to counsel in combination with organizing efforts for redistributive equality, democracy, and social justice in the housing sphere. Part III concludes with a look at how the countermovement for housing justice envisions a city centered on housing as a social good rather than an agglomeration of real estate assets.

I. CONTEXTUALIZING NEW YORK CITY'S AFFORDABLE HOUSING CRISIS

*"To allow the market mechanism to be sole director of the fate of human beings and their natural environment . . . would result in the demolition of society."*²⁵

25. POLANYI, *supra* note 8, at 76.

The day before moving to New Mexico, in the summer of 2015, I took a long, meandering walk through Bedford-Stuyvesant, Brooklyn, the neighborhood where I held my first law job a decade earlier, representing low- and no-income tenants in eviction proceedings.²⁶ I began the walk aimlessly, my mind wandering to travel and work plans and a future life in the Southwest, but I soon realized that I was being guided by an internal compass: The streets I was ambling down — Jefferson Avenue, Macon Street, Malcolm X Boulevard — were where many of my clients had lived, and I found myself stopping in front of buildings I recognized from years before. As an attorney fresh out of law school, I had successfully represented a number of tenants here. For the most part, my success had little to do with my expertise or knowledge, both of which were under-formed at the time. In those years, I regularly felt as if I was acting at being an attorney, and that I was exceedingly fortunate to be doing anti-eviction work in a jurisdiction with a relatively strong system of tenant protections. Now, years later, I was slack-jawed at the extent to which the neighborhood had transformed, despite these protections. Bedford-Stuyvesant — since the mid-twentieth century a predominantly African-American, working-class neighborhood, as well as a key site of Black politics and cultural production — had become visibly wealthier and whiter: luxury condo construction was commonplace, high-end restaurants and their clientele dotted the cityscape. It is no exaggeration to say that the neighborhood felt overwhelmingly unfamiliar to me; it no doubt felt even more foreign to its longtime residents.²⁷

Walking around Bedford-Stuyvesant that day, I wondered what had happened to my former clients and their neighbors, most of whom had lived in rent-stabilized apartments in the neighborhood for many years. And I wondered about the meaning of the work I had poured myself into a decade before: How should advocates make sense of winning individual victories for poor tenants when the ground beneath them was shifting, churned by forces largely hidden from view?

26. Each of this Article's three Parts begins with a personal reflection from the author. These reflections are intended to accentuate themes from the Sections that follow them.

27. See generally NAIMA COSTER, *HALSEY STREET* (2017) (depicting, through a fictional account of the gentrification of Bedford-Stuyvesant, the sense of alienation and loss felt by longtime residents as a result of dramatic race and class changes in their neighborhood).

Part I lays out the political-economic context of New York City's escalating affordable housing crisis, as well as the theoretical framework that supports this Article's core arguments. Section I.A describes the contours of the housing crisis and focuses on how the crisis manifests in Housing Court. The latter is examined in terms of critical disparities along the lines of race, class, gender, and legal representation between landlord and tenant litigants. Section I.B connects the housing crisis to the neoliberal reorganization of New York City's political economy in the wake of the city's fiscal crisis in the mid-1970s. It grounds this process of neoliberalization in the theoretical intervention of economic historian Karl Polanyi, using the usurpation of municipal authority by the state legislature and the whittling down of the protections of rent stabilization as examples of Polanyi's explication of the tension between the market economy and society. Section I.C examines the impact of the settlement of the fiscal crisis on the spatial reconfiguration of the city, with a focus on how policies of targeted austerity set the stage for the city's gentrification in recent decades. Section I.D discusses how, since the fiscal crisis, mayoral administrations from both major political parties, operating within a constricted policy field, have opted overwhelmingly for market-based policies that have intensified housing's commodification. It details these market-based housing policies, connecting them to rising land values and displacement.

A. The Housing Crisis and Housing Court

New York City has had an affordable housing crisis for at least a century.²⁸ In recent years, the crisis has intensified to the degree that commentators have characterized it as a humanitarian emergency.²⁹ The statistics paint a stark picture of New Yorkers' housing troubles. In a period of stagnant wage growth,³⁰ tenants, who comprise nearly 70% of all city residents,³¹ have seen their rents increase

28. 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> [https://perma.cc/8CJJ-3RD3]. See also *supra* note 2.

29. Michael Greenberg, *Tenants Under Siege*, N.Y. REV. BOOKS (Aug. 17, 2017), <https://www.nybooks.com/articles/2017/08/17/tenants-under-siege-inside-new-york-city-housing-crisis/> [https://perma.cc/ND56-C52W].

30. See Patrick W. Watson, *Real Wage Growth Is Actually Falling*, FORBES (Sept. 25, 2018), <https://www.forbes.com/sites/patrickwwatson/2018/09/25/real-wage-growth-is-actually-falling/#1b627c117284> [https://perma.cc/XH2F-39P4].

31. According to a recent analysis of census data, in 2016, 65% of New York residents were renters. Michael Kolomatsky, *Which Cities Have More Renters?*,

precipitously. According to a recent study, a worker earning a minimum wage in 2019 would have to work 111 hours per week to afford a two-bedroom apartment in the city, leaving him or her with only 57 non-working hours per week.³² From 2010 to 2018, the rents for all apartments in New York City rose from an indexed \$2093 to \$2757, an increase of 31%.³³ During the same period in Brooklyn, the site of the city's steepest rent increases, indexed rents rose from \$1839 to \$2545, an increase of 38%.³⁴

New York City residents' housing struggles are further evidenced by the city's swelling homeless shelters. In 2016, more than 127,000 people slept in shelters, and in 2015, although the city managed to move 38,000 people from shelters to permanent housing, the number of people who are homeless has increased.³⁵ The city now has more

N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/realestate/rent-increases-2017.html> [<https://perma.cc/27GX-M2VH>].

32. See *Out of Reach 2019: New York*, NAT'L LOW INCOME HOUS. COAL. (Aug. 2, 2019), <https://nlihc.org/oor/new-york> [<https://perma.cc/M5JF-D352>].

33. See Emily McDonald, *NYC Rents Are Rising This Fall, Defying the Typical Autumn Chill*, STREETEASY: ONE BLOCK OVER (Nov. 15, 2018), <https://streeteasy.com/blog/october-2018-market-reports/> [<https://perma.cc/F2NV-A85V>]. The StreetEasy rent index tracks the change in asking rent for all apartments in New York City and controls for unit quality over time.

The composition of the New York City sales or rental market may vary substantially month to month, with differing proportions of units of a given size, location, or bedroom count available at any specific time . . . [the rental index controls] for this variability by looking at the change in sale price or asking rent for each individual unit over time. Combining the change in prices of several units over time gives us a more complete picture of how prices for a given area or segment of the market change.

Grant Long, *Methodology: StreetEasy's Price and Rent Indices*, STREETEASY: ONE BLOCK OVER (July 27, 2017), <https://streeteasy.com/blog/methodology-price-and-rent-indices/> [<https://perma.cc/3PJS-WWJK>].

34. See McDonald, *supra* note 33; *American Community Survey (ACS)*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/acs> [<https://perma.cc/8T8R-GYLE>] (last visited Sept. 27, 2019). See also *Rental Burdens: Rethinking Affordability Measures*, PD&R EDGE, https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_092214.html [<https://perma.cc/9YTK-ETG9>] (last visited Oct. 4, 2019). A tenant is rent burdened when they spend over 30% of their household income on rent; severe rent burden is defined as over 50% of household income spent on rent. *Id.* With rising rents also comes displacement, but accurately measuring the number of people who have left a given place raises methodological challenges beyond the scope of this Article. In New York City, in particular, where residential turnover is high for many reasons, it is difficult to quantify the number of people who have left the city because they can no longer afford to live there. Rent as a proportion of household income, however, has been tracked by the Census Bureau for decades and provides a much more accurate measurement of the affordability crisis. See *American Community Survey*, *supra* note 34.

35. Greenberg, *supra* note 29.

homeless people than at any time since the Great Depression.³⁶ It is not an exaggeration to say that most New Yorkers live in precarious housing circumstances, struggling to make ends meet and to keep up with the rising cost of rent in a low-wage — and highly unequal — economy.

The escalating affordable housing crisis is playing out in myriad ways across the city. It takes the form of sharp rent increases (both lawful and unlawful), harassment by landlords, the withholding of necessary repairs, aggressive efforts to buy out low-income tenants, a steady stream of eviction proceedings, and overcrowded homeless shelters.³⁷ This crisis cannot be boiled down to individual landlord-tenant disputes, but such disputes can be viewed as ground battles that comprise a larger-scale war for New York City's neighborhoods. New York City Housing Court, the venue that adjudicates these disputes, is the highest volume court in the country, hearing more cases annually than the combined civil dockets of all the federal district courts.³⁸ Most of these cases are nonpayment proceedings, brought when tenants allegedly fall into rent arrears; a small fraction of all cases are holdover proceedings, which implicate a range of causes of action brought to evict on some basis other than nonpayment of rent.³⁹

The scales of justice have never been balanced in New York City Housing Court. Even though the Court was initially conceived to address substandard housing conditions,⁴⁰ very few cases are initiated by tenants who are seeking repairs in their apartments. In four of the city's five Housing Court branches,⁴¹ only one courtroom, presided over by a single judge, is devoted to adjudicating tenant-initiated

36. MADDEN & MARCUSE, *supra* note 22, at 1.

37. *See* Greenberg, *supra* note 29.

38. New York City Housing Court processes hundreds of proceedings each day. In the aggregate, it adjudicates more eviction cases annually than all the civil and criminal cases filed annually in all the federal district courts of the 50 states combined. *See* ANDREW SCHERER, *RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK* (2017–2018 ed.), §§ 1:1–1:40.

39. *See id.* §§ 9:1–9:46.

40. The 1972 law that created Housing Court was explicitly intended to enforce landlord compliance with the Housing Maintenance Code as a means of serving the public interest. *See* Dennis E. Milton, *The New York City Housing Part: New Remedy for an Old Dilemma*, 3 *FORDHAM URB. L.J.* 267, 268 (1975).

41. New York City's Housing Court system is organized geographically, with a Housing Part in each county or borough's Civil Court. The Housing Court handles both residential and commercial landlord-tenant disputes, which are adjudicated by 50 appointed judges. *See* New York City Housing Court, N.Y. UNIFIED CT. SYS., <https://www.nycourts.gov/courts/nyc/housing> [<https://perma.cc/V5AE-LA2S>].

proceedings. Meanwhile, the rest of the courtrooms, of which there are dozens, are devoted to handling all manner of landlord-initiated eviction proceedings.⁴² In most cases filed in Housing Court, tenants find themselves in a defensive posture, a misstep away from losing their homes.⁴³

Housing Court has also been unbalanced in terms of the relative attorney power brought to bear by landlords and tenants. In an area of law that has been called an “impenetrable thicket” because of its opacity and complexity,⁴⁴ 90% of landlords have historically been represented by counsel, as compared to 5–10% of tenants.⁴⁵ The imbalance in legal representation between landlords and tenants plays out in an overtly racist, classist, and sexist manner. The vast majority of tenants in Housing Court are poor women of color, while the vast majority of landlords, landlord attorneys, and judges are upper-class White men.⁴⁶ The power imbalances flowing from these disparities play a central role in the way the Court functions and is experienced by litigants and attorneys, making it feel more like a conveyor belt for predatory racial capitalism⁴⁷ than a place where justice is meted out.⁴⁸

42. See *Civil Court–New York County–Term VIII–July 15, 2019 to August 11, 2019*, N.Y. STATE UNIFIED COURT SYS., https://www.nycourts.gov/COURTS/nyc/SSI/term_sheets/nyterm.pdf [<https://perma.cc/2ZNH-GN2D>]; *Bronx Civil Court Term VIII July 15, 2019–August 11, 2019*, N.Y. STATE UNIFIED COURT SYS., https://www.nycourts.gov/COURTS/nyc/SSI/term_sheets/bxterm.pdf [<https://perma.cc/WK7R-NLXX>]; *Civil Court–Kings County Term VIII–July 15, 2019–August 11, 2019*, N.Y. STATE UNIFIED COURT SYS., https://www.nycourts.gov/COURTS/nyc/SSI/term_sheets/kingsterm.pdf [<https://perma.cc/P2PX-YL8F>]; *Civil Court of the City of New York–Queens County July 15, 2019 to August 11, 2019*, N.Y. STATE UNIFIED COURT SYS., https://www.nycourts.gov/COURTS/nyc/SSI/term_sheets/queensterm.pdf [<https://perma.cc/F2FH-MMSJ>].

43. In 2017, landlords filed approximately 230,000 residential eviction proceedings in Housing Court, including both nonpayment and holdover cases, resulting in approximately 21,000 evictions. N.Y.C. OFFICE OF CIVIL JUSTICE, 2017 ANNUAL REPORT AND STRATEGIC PLAN 18 (2017), https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2017.pdf [<https://perma.cc/29TJ-3CBX>].

44. 89 Christopher Inc. v. Joy, 318 N.E.2d 776, 780 (N.Y. 1974).

45. Harvey Gee, *From Hallway Corridor to Homelessness: Tenants Lack Right to Counsel in New York Housing Court*, 17 GEO. J. ON POVERTY L. & POL’Y 87, 88 (2010).

46. Kathryn Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J.L. & GENDER 55, 79 (2018).

47. According to historian Robin D.G. Kellev. the term “racial capitalism” was elaborated by Cedric Robinson to theorize the mutually-reinforcing, interconnected

A 2018 *New York Times* piece on housing court painted a bleak picture.⁴⁹ According to the *Times*, Housing Court long ago became a tool for landlords to push out poor and working-class tenants and to wrest apartments out of rent regulation.⁵⁰ According to the article, landlords — particularly those with expansive holdings — exploit a broken and overburdened system, inundating their tenants with court papers.⁵¹ They rely on an “eviction machine” in which landlord attorneys make money off of the volume of cases they handle each year and regularly manipulate gaps in enforcement to the detriment of tenants.⁵² In this portrayal, Housing Court appears as a space that has been weaponized by landlords intent on displacing their tenants, the vast majority of whom are left to navigate a complex legal process on their own. It is the juridical expression of an affordable housing crisis that is spreading across New York City.

historical relationship between racial differentiation and the capitalist mode of production.

Capitalism was “racial” not because of some conspiracy to divide workers or justify slavery and dispossession, but because racialism had already permeated Western feudal society The tendency of European civilization through capitalism was thus not to homogenize but to differentiate — to exaggerate regional, subcultural, and dialectical differences into ‘racial’ ones.

Robin D.G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism*, BOS. REV. (Jan. 12, 2017), bostonreview.net/race/robin-d-g-kelley-what-did-cedric-robinson-mean-racial-capitalism [<https://perma.cc/X4RD-HTDB>].

48. Anecdotally, when I started as a tenant attorney in Brooklyn Housing Court in 2004, one of the larger landlord law firms, Gutman, Mintz, Baker, and Sonnenfeldt (“Gutman Mintz”), was such a fixture in a particular room of the courthouse that court personnel, tenants, and tenant attorneys referred to the space as the “Gutman Mintz room.” When anyone needed to deal with one of the firm’s attorneys, they went — or were sent by a judge or court clerk — to the “Gutman Mintz room,” thereby giving the firm the not-so-subtle imprimatur of officialdom. *Pro se* tenants often assumed that the Gutman Mintz attorneys were affiliated with Housing Court because of their quasi-official courthouse location. For tenants and their advocates, the firm’s longtime occupation of courthouse space was a potent symbol of landlords’ relative power in the legal system, a reminder that housing court functioned overwhelmingly for the benefit of property owners.

49. See generally 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> [<https://perma.cc/D6QL-RZKP>].

50. *Id.*

51. *Id.*

52. *Id.*

B. The Neoliberalization of New York City

The current iteration of New York City's housing crisis⁵³ is an outgrowth of a sea change in governance that occurred in the 1970s, when a deep fiscal crisis ushered in a new policy and ideological paradigm. The settlement of the fiscal crisis reorganized the city's political economy along neoliberal lines, leaving critical economic sectors like real estate and finance in an enhanced position vis-à-vis the city's multi-racial and multi-ethnic working class. The shifting terrain of New York City's political economy in the 1970s has deep resonances with the theoretical intervention of economic historian Karl Polanyi, which, as explored in this Section, depicts an intrinsic tension between the market economy and society, with the imperatives of the economic sphere coming to dominate social life.

At the time of the fiscal crisis, planned suburbanization and deindustrialization had already depleted the municipal tax base,⁵⁴ calling into question the solvency of the institutions — public housing, rent regulation, public hospitals, public university system, municipal labor unions — that together formed what historian Joshua Freeman has called a social democratic polity.⁵⁵ The economy of pre-crisis New York City could be viewed as a paradigmatic example of embedded liberalism,⁵⁶ with unions and subaltern groups capable of making actionable demands for redistributive equality on the municipal government.⁵⁷ After the crisis, this situation was altered considerably, as the municipality was granted a reprieve from bankruptcy in exchange for drastic cuts to the institutions and programs comprising the social democratic polity.⁵⁸

53. MADDEN & MARCUSE, *supra* note 22, at 1.

54. See PHILLIPS-FEIN, *supra* note 18, at 21–22.

55. John Whitlow, *Beyond Access to Justice: Challenging the Neoliberal Roots of Hyper-Gentrification*, L. & POL. ECON. BLOG (Apr. 9, 2018) [hereinafter Whitlow, *Access to Justice*], <https://lpeblog.org/2018/04/09/beyond-access-to-justice-challenging-the-neoliberal-roots-of-hyper-gentrification/> [https://perma.cc/49JT-PRGY]; see also JOSHUA FREEMAN, *WORKING CLASS NEW YORK: LIFE AND LABOR SINCE WORLD WAR II* 55–71 (2000) (describing how, in the years after World War II, the ramifications of labor politics in New York City increased access to jobs, housing, healthcare, education, and culture).

56. David Harvey describes embedded liberalism as the form of political-economic organization, widely accepted in the decades following World War II, in which “the state [focuses] on full employment, economic growth, and the welfare of its citizens, and that state power should be freely deployed, alongside of or, if necessary, intervening in or even substituting for market processes to achieve these ends.” DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 10 (2007).

57. See MOODY, *supra* note 17, at 16–17.

58. Whitlow, *Access to Justice*, *supra* note 55.

The city's move to austerity in the wake of the fiscal crisis was legally constituted and had a wide-ranging impact on the daily lives of New York City residents. It was operationalized through the creation of state-run emergency control boards that evacuated political sovereignty from New York City to Albany.⁵⁹ Through this process, New Yorkers were effectively disenfranchised, with local electoral participation turned into "an empty ritual."⁶⁰ Following the crisis settlement, many aspects of city residents' lives that had previously been under the purview of elected city officials, from City College admissions to garbage collection and hospital expenditures, were determined by the unelected Emergency Financial Control Board (EFCB).⁶¹ The EFCB imposed harsh austerity measures, laying off 15% of all city employees between January 1, 1975 and May 31, 1976.⁶² Hospitals were closed, firehouse response times increased substantially, and conditions in jails and mental hospitals worsened.⁶³ A number of city neighborhoods, in particular those with sizable African-American and Latinx populations, were starved of municipal resources, their residents left to fend for themselves in an economy increasingly characterized by high unemployment and stagflation.⁶⁴

In the housing sphere, the city's sovereignty had already been usurped by Albany at the time the fiscal crisis broke out.⁶⁵ In 1971, the state legislature responded to the New York City Council's expansion of tenant protections by passing the Urstadt Law, which removed the city's home rule over its supply of rent-regulated housing.⁶⁶ In the years following the Urstadt Law's passage, rent stabilization, the city's most prevalent form of affordable housing,⁶⁷

59. See MOODY, *supra* note 17, at 38–39.

60. TABB, *supra* note 16, at 28.

61. *Id.*

62. *Id.* at 30.

63. See PHILLIPS-FEIN, *supra* note 18, at 207.

64. For a discussion of the economic crisis of the early 1970s, see HARVEY, *supra* note 56, 5–38. For a discussion of the ways in which working-class Black and Brown neighborhoods in New York City were starved of resources, see Deborah Wallace & Rodrick Wallace, *Benign Neglect and Planned Shrinkage*, VERSO (Mar. 25, 2017), <https://www.versobooks.com/blogs/3145-benign-neglect-and-planned-shrinkage> [<https://perma.cc/H7ZJ-858D>].

65. See John Whitlow, *Community Law Clinics in the Neoliberal City: Assessing CUNY's Tenant Law and Organizing Project*, 20 CUNY L. REV. 351, 366 (2017).

66. See Whitlow, *Access to Justice*, *supra* note 55; Joe Lamport, *Repealing the Urstadt Law*, GOTHAM GAZETTE (Jan. 25, 2005), <https://www.gothamgazette.com/demographics/2727-repealing-the-urstadt-law> [<https://perma.cc/UL97-UAUQ>].

67. According to the Rent Guidelines Board, there were approximately 950,000 rent-stabilized units in 2018. See N.Y.C. RENT GUIDELINES BD., 2019 HOUSING

has been weakened by a raft of legislatively-created loopholes that allow landlords to remove regulated units from the system.⁶⁸ For example, in 1997 the state legislature passed high-rent vacancy decontrol, which allowed rent-stabilized apartments to be removed from the regulatory system when they reach a specified rent level and are vacant.⁶⁹ This provision effectively incentivized owners of rent-stabilized buildings to increase rents to the threshold level and vacate their apartments in order to obtain higher, “market” rents.⁷⁰

In 2003, the Rent Stabilization Code was further altered to allow landlords to charge the legal, regulated rent, rather than the lower, preferential rent, upon renewal of a rent-stabilized lease.⁷¹ Prior to 2003, preferential rents remained in place for the duration of a tenancy.⁷² In many instances, the leap from a preferential rent to the legally regulated rent can amount to hundreds of dollars, an untenable increase for many rent-stabilized tenants.⁷³ These legislative loopholes have had a marked impact on the city’s supply of affordable housing. From 1994 to 2017, approximately 290,958 units left the rent regulation system.⁷⁴ This figure includes the loss of

SUPPLY REP. (2019), <https://www1.nyc.gov/assets/rentguidelinesboard/pdf/hsr19.pdf> [<https://perma.cc/2A8L-98AR>].

68. See OKSANA MIRONOVA, CMTY. SERV. SOC’Y N.Y., *A GUIDE TO RENT REGULATION IN NEW YORK CITY: HOW IT WORKS, WHAT WENT WRONG, AND HOW TO FIX IT* 8–10 (2019), https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/Rent_Reg_Explainer_V6.pdf [<https://perma.cc/QCA3-RZY2>].

69. It is worth noting that the City Council passed a version of high-rent vacancy decontrol in 1994 before the latter was codified by the State Legislature in 1997. See Steven Wishnia, *If Your Rent Is Too Damn High, Blame Anthony Weiner*, VILLAGE VOICE (May 2, 2018), <https://www.villagevoice.com/2018/05/02/if-your-rent-is-too-damn-high-blame-anthony-weiner/> [<https://perma.cc/6CW6-SJMM>].

70. See Marcelo Rochabrun & Cezary Podkul, *The Fateful Vote that Made New York City Rents So High*, PROPUBLICA (Dec. 15, 2016), <https://www.propublica.org/article/the-vote-that-made-new-york-city-rents-so-high> [<https://perma.cc/7X4X-LY82>].

71. See Amy Plitt, *How New York’s Preferential Rent Loophole Is Unfairly Used Against Tenants*, CURBED (Apr. 27, 2017, 5:32 PM), <https://ny.curbed.com/2017/4/25/15425058/nyc-rent-stabilization-loophole-landlords> [<https://perma.cc/FEM7-CHQ3>].

72. See *id.*

73. See generally Cezary Podkul, *New York Landlords Exploit Loophole to Hike Rents Despite Freeze*, PROPUBLICA (Apr. 25, 2017, 8:00 AM), <https://www.propublica.org/article/new-york-landlords-exploit-loophole-to-hike-rents-despite-freeze> [<https://perma.cc/5G57-XCHU>].

74. See N.Y.C. RENT GUIDELINES BD., *CHANGES TO RENT STABILIZED HOUSING STOCK IN NEW YORK CITY IN 2017* 9 (2018), <https://www1.nyc.gov/assets/rentguidelinesboard/pdf/changes18.pdf> [<https://perma.cc/A2WD-MHQJ>]. It is worth noting that 143,446 rent-stabilized units

155,664 units via the high-rent vacancy deregulation mechanism alone.⁷⁵ Notably, the renewal of the rent laws in June 2019 closed many of these loopholes, including high-rent vacancy decontrol and preferential rent rescission, marking the first time since the passage of the Urstadt Law that the tenant movement has made significant legislative gains at the state level.

Post-Urstadt, New York City tenants and municipal legislators have been restricted from strengthening the city's rent laws to preserve affordable housing. They find themselves in the unenviable position of looking to Albany for relief or seeking small fixes to the city's housing problems in areas where municipal sovereignty was retained.⁷⁶ As with other areas of diminished municipal sovereignty, the Urstadt Law operated to wall off property — in this case, the city's supply of rent-regulated apartments — from popular demands for redistributive equality. The loss of sovereignty left municipal policymakers with a limited menu of options to address the city's chronic shortage of affordable housing, a theme examined in Section I.D of this Article.

Overall, the fiscal crisis allowed for a recalibration of the relationship between the city's market economy and its social institutions, with the dictates of the former subordinating the commitments of the latter. Through the settlement of the crisis, elite economic interests in key sectors consolidated their power, and municipal and state policies were reshaped to impose austerity on

were added to the system during this time period. *Id.* at 9. Units being added to the system are usually due to the addition of 421-a units. *Id.* at 3. As noted later in this Article, however, units that are stabilized pursuant to a 421-a agreement generally only have stabilized status for the length of the tax abatement the owner is receiving and will become market-rate once the abatement expires. *See infra* Section I.D.

75. *See id.* at 6; MIRONOVA, *supra* note 68 (noting 1994 is used as the benchmark year because that was when high-rent vacancy decontrol became law in New York City).

76. For instance, the city retains control over the enforcement of the housing code and registration requirements for landlords. *See, e.g.*, N.Y.C. DEP'T OF HOUS. PRES. & DEV., THE ABCS OF HOUSING: HOUSING RULES AND REGULATIONS FOR OWNERS AND TENANTS (2014), https://www1.nyc.gov/portal/apps/311_literatures/HPD/ABCs-housing-singlepg.pdf

[<https://perma.cc/KW65-FZHJ>]. For example, in 2009, the New York City Council passed a law requiring corporate landlords organized as LLCs to register the names of their individual principals with the Department of Housing Preservation and Development. Aaron Short, *New Effort in Williamsburg to 'Unmask' Landlords*, BROOKLYN PAPER (Aug. 25, 2009), https://www.brooklynpaper.com/stories/32/35/williamsburg_courier_newsnhhyyth08202009.html [<https://perma.cc/7BE6-PTGB>].

workers and poor and marginalized people,⁷⁷ who were left adrift in an economy characterized by joblessness and stagnant growth.⁷⁸

The entirety of this process calls to mind Polanyi's analysis of the relation between the market economy and society.⁷⁹ According to Polanyi, instead of the economy being embedded within, and subjected to, social relations — as was the case in pre-capitalist societies — in modern capitalism the economic sphere is disembedded from society, with societal institutions operating as a corollary to the market.⁸⁰ The market economy establishes itself as hegemonic through the commodification of areas of social life (land, labor, money) that are more properly social than economic.⁸¹ This process is constituted substantially through the law, and it results in the separation of the economic and political spheres, with the former wielding disproportionate control over the latter.⁸²

When the economy is walled off from democratic intervention and veers too far in the direction of social disembeddedness — when society is substantially run according to the logic of the market — inequality, deprivation, and human suffering inevitably follow.⁸³ Ordinary people are forced to bear the costs of excessive marketization⁸⁴ in the form of austerity, unemployment, and/or displacement. According to Polanyi, the deleterious effects of the market's subjugation of social life provoke countermovements that mobilize for social protection and the re-embedding of the market in society.⁸⁵ The theme of countermovement, and its relation to discourses of legal rights, is explored in Section III.A.

In *In Defense of Housing*, David Madden and Peter Marcuse apply Polanyi's theoretical framework to New York City's current

77. See JEREMIAH MOSS, *VANISHING NEW YORK: HOW A GREAT CITY LOST ITS SOUL* 108 (2017).

78. See David Harvey, *The Enigma of Capital and the Crisis This Time*, *READING MARX'S CAPITAL WITH DAVID HARVEY* (Aug. 30, 2010), <http://davidharvey.org/2010/08/the-enigma-of-capital-and-the-crisis-this-time> [<https://perma.cc/QRH9-ST9K>].

79. "Market economy" instead refers to "an economic system controlled, regulated, and directed by market prices: order in the production and distribution of goods is entrusted to this self-regulating mechanism." POLANYI, *supra* note 8, at 71.

80. FRED BLOCK, *INTRODUCTION TO KARL POLANYI, THE GREAT TRANSFORMATION* xxiv (2d ed., Beacon Press 2001) (1944).

81. See DALE, *supra* note 9, at 60.

82. See POLANYI, *supra* note 8, at 74.

83. See generally BLOCK, *supra* note 80.

84. See *id.*

85. See Dale, *supra* note 9, at 70. See *infra* Part III.

affordable housing crisis.⁸⁶ Their focus is the commodification of housing, which has been facilitated by the settlement of the fiscal crisis and occurs when housing's social uses are subordinated to its economic value.⁸⁷ When this happens, housing becomes disembedded from traditional circuits of labor and social reproduction, and its role as an investment overtakes all other claims upon it.⁸⁸ The divergence between the use value of a dwelling as home versus its exchange value as a vehicle for capital accumulation is the central dilemma of property in a market economy. This has long animated political struggles over urban space.⁸⁹

According to Madden and Marcuse, in recent years New York City has reached the point of hyper-commodification, meaning that virtually all of housing's material and legal structures — “buildings, land, labor, property rights” — have been turned into commodities.⁹⁰ Housing's hyper-commodification is interlinked with rising inequality and has been driven by processes of deregulation, financialization, and globalization.⁹¹ As the state has cut regulations that protect tenants (for example, the aforementioned whittling down of the protections of rent stabilization following the passage of the Urstadt Law), large-scale corporate financial interests have increased their investments in urban real estate markets. These interests are increasingly transnational, as reflected in the proliferation of private equity real estate investment.⁹² They connect cities' local housing stocks to global investment circuits.⁹³ Tenants in global cities characterized by overheated real estate markets feel the brunt of housing's hyper-commodification, as their continued residence in their homes comes to be seen as a drag on property owners' right to maximize potentially high returns on their assets.⁹⁴

86. See MADDEN & MARCUSE, *supra* note 22, at 50.

87. See *id.* at 17. Madden and Marcuse define “commodification” as “the general process by which the economic value of a thing comes to dominate its other uses.” *Id.*

88. See *id.* These claims may be “based upon right, need, tradition, legal precedent, cultural habit, or the ethical and affective significance of the home.” *Id.*

89. See generally Kathe Newman & Elvin K. Wyly, *The Right to Stay Put, Revisited: Gentrification and Resistance to Displacement in New York City*, 43 URB. STUD. 23 (2006).

90. MADDEN & MARCUSE, *supra* note 22, at 26.

91. See *id.* at 28–34.

92. See *id.* at 33.

93. See RAQUEL ROLNIK, *URBAN WARFARE: HOUSING UNDER THE EMPIRE OF FINANCE* 16–17 (2019).

94. See MADDEN & MARCUSE, *supra* note 22, at 42–43.

Following the theoretical path blazed by Polanyi, New York City's affordable housing crisis comes into focus when viewed through the lens of housing's intensifying commodification, which, as discussed, is part and parcel of capitalism's tendency towards marketization. The reorganization of New York City's political economy along neoliberal lines in the 1970s enabled the deconstruction of housing as a social good in the ensuing decades. This process has been carried out through laws and policies that have reduced protections for tenants while at the same time prioritizing real estate as the predominant motor of urban capital accumulation.⁹⁵

C. From Neoliberalization to Gentrification

Gentrification is a contested term that evokes strong reactions from across the political spectrum.⁹⁶ Originally coined by the British sociologist Ruth Glass to refer to the invasion of Central London by the middle class in the 1960s,⁹⁷ gentrification has morphed substantially from its somewhat quaint origins. Echoing Madden and Marcuse's Polanyian framing of housing's hyper-commodification, Jeremiah Moss argues that in recent years, New York City has reached a phase of hyper-gentrification in which virtually the entire city has been taken over by capital.⁹⁸ If early periods of gentrification can be thought of in terms of relatively well-off individuals moving into urban areas in search of affordability and diversity, the current iteration is driven by the union of market-based public policy with

95. See STEIN, *CAPITAL CITY*, *supra* note 15, at 45.

96. For an overview of divergent frameworks for understanding gentrification, see Newman & Wyly, *supra* note 89. For Newman and Wyly, "[g]entrification is directly related to how cities experience economic transformation and policy interventions. The urban disinvestment produced by economic change and federal urban policy along with the individual desire for the suburban dream laid the groundwork for gentrification's appearance." *Id.* at 26.

97. Glass's fuller depiction of gentrification is as follows:

One by one, many of the working-class quarters of London have been invaded by the middle classes — upper and lower. Shabby, modest mews and cottages — two rooms up and two down — have been taken over, when their leases have expired, and have become elegant, expensive residences. Larger Victorian houses, downgraded in an earlier or recent period — which were used as lodging houses or were otherwise in multiple occupation — have been upgraded once again . . . once this process of 'gentrification' starts in a district it goes on rapidly until all or most of the original working-class occupiers are displaced and the whole social character of the district is changed.

RUTH GLASS ET AL., *LONDON: ASPECTS OF CHANGE* xviii–xix (1964).

98. See MOSS, *supra* note 77, at 39–40.

private real estate and finance capital.⁹⁹ In the words of Neil Smith, gentrification is best viewed as “a back-to-the-city movement by capital rather than people.”¹⁰⁰

Gentrification is bound up with how cities were caught up in and adapted to the global economic slowdown of the early 1970s. During this period, many urban economies in the advanced capitalist world experienced a dramatic loss of manufacturing jobs.¹⁰¹ Concomitantly, they found themselves deprived of much of the traditional protection of national state institutions, as deregulation, privatization, and the dismantling of the welfare state became the coin of the policy realm.¹⁰² In this context, real estate moved to the fore as an increasingly vital engine of economic growth.¹⁰³ State-facilitated, market-driven gentrification became a hallmark of the economic development strategies of emerging global cities, including New York.¹⁰⁴

The interconnected concepts of the rent gap and the revanchist city¹⁰⁵ are highly useful in understanding how the gentrification of New York City has been powered in the decades following the fiscal crisis. The rent gap represents the difference between the potential ground rent level and the actual ground rent capitalized under the present land use.¹⁰⁶ Real estate speculators invest in a particular area because they determine that there is “a gap between the rents that land currently offers and the potential future rents it might [offer] if some action were taken, such as evicting long-term tenants . . . or demolishing and reconstructing buildings.”¹⁰⁷ For purposes of this Article, rent gaps are generated by the capital devalorization of particular areas of the city, followed by urban development and expansion that leads to increased potential rent levels in the future.¹⁰⁸ The rent gap theory posits that a particular zone of the city can become profitable precisely because it has been under-resourced and devalorized in a given historical moment, provided there is a compelling indication of future profitability in a subsequent

99. *See id.* at 37.

100. NEIL SMITH, *THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY* 70 (1996).

101. *See* STEIN, *CAPITAL CITY*, *supra* note 15, at 53.

102. *See* SMITH, *supra* note 100, at 36–39.

103. *See id.*

104. *See id.*

105. *See id.* at 49–71, 206–27.

106. *See id.* at 65.

107. STEIN, *CAPITAL CITY*, *supra* note 15, at 49.

108. *See* SMITH, *supra* note 100, at 67–68.

moment.¹⁰⁹ State action is operative at both ends of the rent gap cycle because public policy can devalorize urban space and later revalorize it.

Rent gaps operate at varying scales — within a city, neighborhood, block, and even a single building — and have been directly impacted by the laws and policies that have constituted housing's increasing commodification. For example, the rent regulations that cover nearly half the private rental units in New York have kept hundreds of thousands of apartments at below-market rents for decades.¹¹⁰ This phenomenon creates a rent gap that landlords are actively seeking to close through a range of tactics, including evictions, buyouts, and harassment of working-class tenants.¹¹¹ As rent regulations have been whittled down in recent decades,¹¹² these rent gaps can more readily be closed by landlords and speculators, who can increase rents, displace tenants, and deregulate rent-stabilized units through lawful means.¹¹³

Just as the rent gap is indispensable in understanding how state and private forces have contributed to the gentrification of New York City, the concept of the revanchist city¹¹⁴ is useful in exploring gentrification's interlocking race and class dimensions. For Smith, revanchism — the French word for revenge — refers to the all-out attack, in the post-crisis period, on the social policy structures of the New Deal.¹¹⁵ In New York City during and after the fiscal crisis, revanchism played out through the construction of blame for the

109. *Id.*

110. See STEIN, *CAPITAL CITY*, *supra* note 15, at 50.

111. *Id.*

112. See generally Craig Gurian, *Let Them Rent Cake: George Pataki, Market Ideology, and the Attempt to Dismantle Rent Regulation in New York*, 31 FORDHAM URB. L.J. 339 (2004) (discussing the process through which the protections of rent stabilization have been scaled back).

113. This Article highlights the lawful means used by owners of rent-stabilized properties. It should also be noted that unlawful tactics are common and are given unofficial sanction by the lack of regulatory oversight in this area. Anecdotally, when I was representing tenants in the gentrifying neighborhood of Bushwick, Brooklyn in the 2000s, it was common to see landlords aggressively raising rents to the high-rent vacancy decontrol threshold — then \$2000 a month — through lawful and unlawful mechanisms so as to deregulate rent-stabilized units.

114. See SMITH, *supra* note 100, at 45.

115. See *id.* at 42–44; see also JORDAN CAMP, *INCARCERATING THE CRISIS* 9 (2016) (writing about the emergence of the carceral-security state as a response to the gains of the Black freedom movement, and arguing that “[r]evanchism is reproduced through the common-sense notions of race, class, gender, and sexuality underpinning neoliberalization, and through the depiction of labor, civil rights, feminist, and socialist movements as the enemies of the nation”).

city's dire economic predicament.¹¹⁶ The causes of this economic predicament were distorted and racialized by politicians and media outlets,¹¹⁷ which cast Black and Brown residents and a largely minority municipal workforce as undeserving beneficiaries of profligate social spending.¹¹⁸ In this way, "[t]he cultural ideologies of the crisis . . . inculcated a supposedly unruly populace that wasted municipal resources and brought disrepute to the formerly glittering metropolis."¹¹⁹ The post-crisis racialized blame game served as the ideological basis for the targeted cuts to the city's social democratic polity that this Article described in the previous Section.

In the wake of the fiscal crisis, revanchist policies operated along vectors of race, class, and geography, leading to the near ruination of predominantly Black and Latinx working-class sections of the city.¹²⁰ In a 1976 *New York Times* op-ed, Housing and Development Administrator Roger Starr advocated for a policy of "planned shrinkage," which refers to the removal of social services from the city's most impoverished neighborhoods.¹²¹ Even though it was not official city policy, shrinkage offered a rationale for making cuts, a way to see them as part of a plan that dovetailed with a pared-down,

116. SMITH, *supra* note 100, at 207. According to Smith:

Revanchist antiurbanism represents a reaction against the supposed "theft" of the city, a desperate defense of a challenged phalanx of privileges, cloaked in the populist language of civic morality, family values, and neighborhood security. More than anything the revanchist city expresses a race/class/gender terror felt by middle- and ruling-class whites who are suddenly stuck in place by a ravaged property market, the threat and reality of unemployment, the decimation of social services, and the emergence of minority and immigrant groups, as well as women, as powerful urban actors. It portends a vicious reaction against minorities, the working class, homeless people, the unemployed, women, gays and lesbians, immigrants.

Id.

117. *See generally* MOODY, *supra* note 17, at 49.

118. *See id.*

119. HILLARY MILLER, *DROP DEAD: PERFORMANCE IN CRISIS, 1970S NEW YORK 2* (2016).

120. *See* TABB, *supra* note 16, at 38–39.

121. *See generally* Roger Starr, Opinion, *Making New York Smaller*, N.Y. TIMES (Nov. 14, 1976), <https://www.nytimes.com/1976/11/14/archives/making-new-york-smaller-the-citys-economic-outlook-remains-grim.html> [<https://perma.cc/VLA7-LED3>]. Starr also said:

Stop the Puerto Ricans and the rural blacks from living in the city . . . reverse the role of the city . . . it can no longer be the place of opportunity . . . our urban system is based on the theory of taking the peasant and turning him into an industrial worker. Now there are no industrial jobs. Why not keep him a peasant.

MOSS, *supra* note 77, at 76–77.

austere vision of urban life.¹²² During and after the crisis, in a state-led move that has been characterized as “organized abandonment,”¹²³ many city neighborhoods were starved of essential public services, like firehouses and health clinics, and their residents’ public benefits were slashed.¹²⁴ Land values in these neighborhoods declined to such an extent that it was sometimes considered more profitable for landlords to abandon their buildings rather than continue to rent them.¹²⁵

Read together, the concept of revanchism and the rent gap theory are key to understanding how the neoliberal political-economic reorganization of New York City in the 1970s paved the way for the city’s subsequent gentrification. The post-crisis turn to a politics of targeted austerity, implemented in a climate of racialized blame for the economic downturn, fed into substantial public and private disinvestment from vast swaths of the city.¹²⁶ In the 1970s and 1980s, neighborhoods like the South Bronx, Bushwick, and Bedford-Stuyvesant were starved of resources and effectively devalorized by revanchist state practices. This process of devalorization contributed to the emergence, in the ensuing decades, of rent gaps in many of these same areas, which would become magnets for capital investment when the economy rebounded. The diminished, austere New York City of the crisis and post-crisis years is inextricably linked to the waves of state-facilitated, market-driven gentrification and displacement that have operated to reorganize urban space in recent decades.

D. Market-Based Approaches to Affordable Housing

Successive mayoral administrations, operating within a policymaking field constricted by the terms of the crisis settlement, have relied overwhelmingly on market-based strategies to preserve and create affordable housing.¹²⁷ Due to their limited ability to

122. See PHILLIPS-FEIN, *supra* note 18, at 208.

123. Ruth Wilson Gilmore, *Forgotten Places and the Seeds of Grassroots Planning*, in *ENGAGING CONTRADICTIONS: THEORY, POLITICS, AND METHODS OF ACTIVIST SCHOLARSHIP* 32 (Charles R. Hale ed., 2008).

124. See PHILLIPS-FEIN, *supra* note 18, at 208.

125. See MADDEN & MARCUSE, *supra* note 22, at 174.

126. See PHILLIPS-FEIN, *supra* note 18, at 207.

127. See Jason Hackworth & Neil Smith, *The Changing State of Gentrification*, 92 *TIJDSCHEFT VOOR ECONOMISCHE EN SOCIALE GEOGRAFIE* 464, 464–65, 469, 471–72 (2000). Although a reliance on market-based policies has been a through-line of New York City’s municipal governance since the crisis settlement, the gentrification of urban space has taken different forms. See *generally id.* Neil Smith and Jason

strengthen rent protections and create public housing, municipal officials have focused on incentivizing capital investment in many of the same neighborhoods devalorized during and immediately after the fiscal crisis.¹²⁸ This approach has had the dual effect of elevating land values and increasing displacement.¹²⁹ This Section describes several key state-sponsored, market-based programs that are representative of this dynamic: the J-51 tax abatement, the 421-a tax abatement, and rezoning. It will then connect these programs to the current affordable housing crisis.

The J-51 tax abatement program was designed to incentivize the rehabilitation of older buildings by tying a tax exemption and abatement to the cost of the rehabilitation.¹³⁰ This program has helped to revitalize the city's aging housing stock and has also contributed to displacement.¹³¹ New York City enacted the J-51 program in 1955, but it came into widespread use decades later, as

Hackworth have developed a comprehensive theory of gentrification's stages, in which cycles of investment and disinvestment continually reconfigure urban space. *See generally id.* In Hackworth and Smith's formulation, the first wave of gentrification, which occurred in the 1970s, is sporadic and mainly state-led. *Id.* at 466. In its second wave, which occurred in the 1980s, gentrification was integrated into a wider range of economic and cultural processes at the global and national scales. *Id.* at 468. The third wave of gentrification, which began in the 1990s, has been characterized by an intensification of the scale of investment and the level of corporate, as opposed to smaller-scale capital. *Id.*

128. *See* Adele Oltman, *Zoning for the 1*, *DISSENT MAG.* (Nov. 3, 2018), https://www.dissentmagazine.org/online_articles/inwood-rezoning-bill-de-blasio-mih [https://perma.cc/749N-DHVS].

129. *See* Samuel Stein, *Gentrification Is a Feature, Not a Bug, of Capitalist Urban Planning*, *JACOBIN* (Mar. 12, 2019), <https://www.jacobinmag.com/2019/03/gentrification-is-a-feature-not-a-bug-of-capitalist-urban-planning> [https://perma.cc/Q9SV-BRU3].

130. *See* N.Y.C. Admin. Code § 11-243 (2006); *Directory of NYC Housing Programs*, NYU FURMAN CTR., <https://furmancenter.org/coredata/directory/entry/j-51-tax-incentive> [https://perma.cc/4RKB-YT64] (last visited Aug. 30, 2019). The program offers a 14-year exemption and 4-year phase-out of the benefit for "gut" building rehabilitation (a more comprehensive form of rehabilitating a building) and a 32-year exemption and 4-year phase-out for "moderate" rehabilitation of an occupied residential multiple dwelling by awarding the owner a 32-year exemption in tax increases. *See* Debra S. Vorsanger, *New York City's J-51 Program: Controversy and Revision*, 12 *FORDHAM URB. L.J.* 103, 112, 113-14, 117 (1984). The "moderate" rehabs grew to encompass most rehabs that owners would do, and includes many of the same rehabilitations an owner would perform as a Major Capital Improvement including a new boiler, new elevator (or substantial rehab of the elevator), new piping for gas or water, and a new water storage tank. *See id.* at 113.

131. *See J-51 Tax Break Adds Up to Millions in Lost Revenue to Upgrade Fewer Apartments*, *COMTY. SERV. SOC'Y* (Jun. 7, 2012), <https://www.cssny.org/news/entry/css-report-reveals-j-51-tax-breaks-add-up-to-millions-in-lost-revenue-to-up> [https://perma.cc/6RGK-KK4X].

part of Mayor Ed Koch's "In-Rem Foreclosure" program.¹³² Koch's 1986 Ten-Year Plan invested city resources in the rehabilitation of housing, and the J-51 tax abatement became the main tool through which the city incentivized landlords to repair dilapidated buildings.¹³³ The J-51 program contains an affordability component — units in participating buildings must remain rent-stabilized for the duration of the program's benefits.¹³⁴ The rehabilitation component of the program has led to increased land values, but the program's temporary nature has meant that rent-stabilized tenants often become vulnerable when the tax abatement runs its course.¹³⁵ This confluence of forces has resulted in a tendency toward displacement in former J-51 buildings,¹³⁶ a tendency that is particularly pronounced in a perpetually overheated real estate market.

While the J-51 program promotes the rehabilitation of already-existing buildings, the 421-a tax abatement program is meant to encourage new residential development.¹³⁷ Under 421-a, property owners are taxed on the initial value of land for a discrete time, rather than the subsequent increased value after the land is developed.¹³⁸ In general, tenants residing in a building that is receiving 421-a tax benefits should have a rent-stabilized lease.¹³⁹ An amendment to the law in 2006 requires all affordable units in a 421-a building to be rent-stabilized for 35 years, regardless of whether a tenant has vacated the

132. Dennis Hevesi, *Transforming City's Housing: Act 2*, N.Y. TIMES (May 2, 2004), <https://www.nytimes.com/2004/05/02/realestate/transforming-city-s-housing-act-2.html> [<https://perma.cc/U77P-JZB8>].

133. See Alex Schwartz, *New York City and Subsidized Housing: Impacts and Lessons of the City's \$6 Billion Capital Budget Housing Plan*, 10 HOUSING POL'Y DEBATE 839, 840, 843 (1999).

134. See N.Y. STATE HOMES & COMTY. RENEWAL, DHCR J-51 REGISTRATION AND RENT-REVISION INITIATIVE: LIST OF BUILDINGS THAT MAY HAVE BEEN OUT OF COMPLIANCE AT SOME POINT(S) FROM 2012 TO 2017 DUE TO LISTING MULTIPLE APARTMENTS AS PERMANENTLY EXEMPT FROM STABILIZATION, <https://hcr.ny.gov/system/files/documents/2019/03/j-51list3explanation.pdf> [<https://perma.cc/L4RV-FASV>].

135. See Cezary Podkul, *New York Isn't Telling Tenants They May Be Protected from Big Rent Hikes*, PROPUBLICA (July 6, 2016), <https://www.propublica.org/article/new-york-isnt-telling-tenants-they-may-be-protected-from-big-rent-hikes> [<https://perma.cc/SY2H-ZPTW>].

136. See *id.*

137. See Seth B. Cohen, *Teaching an Old Policy New Tricks: The 421-A Tax Program and the Flaws of Trickle-Down Housing*, 16 J.L. & POL'Y 757, 764-66 (2009).

138. See *id.* at 765.

139. See *id.*

unit.¹⁴⁰ Market rate units are only covered under rent stabilization for the duration of the tax abatement.¹⁴¹ Regardless of when the tax benefits expire or whether a unit is market rate or affordable, an owner may only remove a unit from rent stabilization when the tenant vacates the apartment.¹⁴²

The 421-a program was enacted in 1971 by the state legislature in response to high levels of vacancies and the loss of tax revenue stemming from White, middle-class flight to the suburbs,¹⁴³ but now operates in a vastly different context. The city is in the midst of a long real estate boom, and 421-a continues to provide developers of luxury real estate enormous tax exemptions, including in neighborhoods that have thoroughly gentrified and no longer require tax incentives to foster development.¹⁴⁴

The amount of affordable housing produced by 421-a has been minimal, since rental amounts are primarily pegged to Area Mean Income (AMI)¹⁴⁵ and, for most of the program's existence, the only requirements for affordable development have fallen within specified exclusion zones.¹⁴⁶ But the impact of both the 421-a and J-51 programs on New York City's tax revenue has been substantial. In the most recent fiscal year, the city has foregone tax revenue for 72,390 projects under 421-a, with a total assessed value of \$11.2 billion, and an actual loss of tax revenue of \$1.4 billion.¹⁴⁷ During this same period, the J-51 program has resulted in \$215 million in lost tax revenue.¹⁴⁸

140. N.Y. REAL PROP. TAX § 421-a(7)(e) (2017).

141. See Cohen, *supra* note 137, at 776.

142. N.Y. STATE DIV. OF HOUS. & CMTY. RENEWAL, FACT SHEET #41 TAX ABATEMENTS (2010), <http://www.nyshcr.org/Rent/FactSheets/orafac41.pdf> [<https://perma.cc/GM5C-4BU5>].

143. See Cohen, *supra* note 137, at 764.

144. See *generally* PRATT CTR. FOR CMTY. DEV., STILL SUBSIDIZING LUXURY DEVELOPMENT: 50 HIGH-END CONDO DEVELOPMENTS THAT WOULD STILL BE ELIGIBLE FOR 421-A TAX BREAKS EVEN AFTER PROPOSED EXCLUSION ZONE EXPANSION AND REFORM (2006), http://prattcenter.net/sites/default/files/rpt_-_421a-still_subsidizing_luxury_development.pdf [<https://perma.cc/YGY3-VST7>].

145. See HOUS. N.Y., MANDATORY INCLUSIONARY HOUSING (MIH), <https://www1.nyc.gov/assets/planning/download/pdf/plans-studies/mih/mih-summary-adopted.pdf> [<https://perma.cc/SE69-S7B7>] (last visited Aug. 29, 2019).

146. See N.Y.C. LOCAL LAW 58 (2006).

147. CITY OF N.Y. DEP'T OF FIN., ANNUAL REPORT ON TAX EXPENDITURES 17–18 (2018), https://www1.nyc.gov/assets/finance/downloads/pdf/reports/reports-tax-expenditure/ter_2018_final.pdf [<https://perma.cc/LB2P-8DQX>].

148. *Id.* at 15.

Another key tool that New York City has used to attempt to stimulate the construction of affordable housing is inclusionary zoning. Inclusionary zoning policies incentivize private developers to incorporate a percentage of below-market-rate units in new developments by altering zoning laws to allow for taller structures.¹⁴⁹ Beginning with the Bloomberg administration, the city has used its considerable authority over the zoning process to dictate what kinds of new developments are permitted in specific areas of the city.¹⁵⁰ During the Bloomberg years, development was focused in and around Manhattan, with few affordability requirements.¹⁵¹ Under Bloomberg, 37% of land in the city was rezoned in almost 140 separate zoning actions.¹⁵² Bloomberg's approach allowed for a voluntary "inclusionary zoning" approach, which granted developers an extra 20% floor area in exchange for 20% "affordable" units (based on NYC AMI).¹⁵³ Some developments elected for this approach, but it produced few affordable units.¹⁵⁴

Although the de Blasio administration expressed a commitment to addressing issues of inequality and affordable housing,¹⁵⁵ it continues to operate squarely within Bloomberg's market-based policy framework.¹⁵⁶ It has also expanded neighborhood-wide rezoning to the outer boroughs and attached affordability requirements.¹⁵⁷ As

149. See THOMAS ANGOTTI, *NEW YORK FOR SALE: COMMUNITY PLANNING CONFRONTS GLOBAL REAL ESTATE* 54 (2008).

150. See MOODY, *supra* note 17, at 215.

151. See *id.*

152. ANGOTTI & MORSE, *supra* note 19, at 32.

153. See *id.* at 69.

154. *Id.* Voluntary inclusionary zoning, which had existed since 1987 in some form, only produced approximately 7000 units prior to the de Blasio administration. See *Creating Affordable Housing Out of Thin Air: The Economics of Mandatory Inclusionary Zoning in New York City*, NYU FURMAN CTR. (Mar. 2015), https://furmancenter.org/files/NYUFurmanCenter_CreatingAffHousing_March2015.pdf [<https://perma.cc/D8KV-GBXH>].

155. See *Text of Bill de Blasio's First State of the City Address*, N.Y. TIMES (Feb. 10, 2014), <https://www.nytimes.com/2014/02/11/nyregion/text-of-bill-de-blasios-first-state-of-the-city-address.html> [<https://perma.cc/2MCY-V4UZ>] ("Because the truth is, the state of our city, as we find it today, is a Tale of Two Cities — with an inequality gap that fundamentally threatens our future.").

156. See generally Vincent Michael, *New York Is Still a Tale of Two Cities*, SOCIALIST WORKER (Mar. 14, 2017), <https://socialistworker.org/2017/03/14/new-york-is-still-a-tale-of-two-cities> [<https://perma.cc/TNA8-LYZG>].

157. See generally Mayor de Blasio Unveils 'Housing New York': A Five-Borough, 10-Year Housing Plan to Protect and Expand Affordability, NYC.GOV (May 5, 2014), <https://www1.nyc.gov/office-of-the-mayor/news/199-14/mayor-de-blasio-housing-new-york-five-borough-10-year-housing-plan-protect-and/#/0> [<https://perma.cc/T9B3-4UW2>].

every mayor since Koch has done, de Blasio crafted a housing plan soon after entering office.¹⁵⁸ Released in May 2014, the plan aims to build or preserve 200,000 units of affordable housing by 2024 — the most ambitious plan by a New York City mayor yet.¹⁵⁹ The plan specifically calls for preserving 120,000 stabilized units — mainly through right to counsel funding — and constructing 80,000 new units by up-zoning outer borough neighborhoods and creating Mandatory Inclusionary Housing (MIH) provisions for new construction in rezoned areas.¹⁶⁰ This approach has focused on under-developed neighborhoods in the city like East New York in Brooklyn, East Harlem in Manhattan, and Far Rockaway in Queens.¹⁶¹

The case of East New York is illustrative of how de Blasio's economic development plan impacts the city's affordable housing crisis. East New York was a telling choice for the first neighborhood to be upzoned under the de Blasio plan, as it is an example of a redlined, disinvested, and "blockbusted" neighborhood that remained Black and working-class as much of the rest of the borough became whiter and wealthier.¹⁶² Immediately after the 2014 announcement of the neighborhood's rezoning, real estate speculation in the neighborhood spiked, driving up land values, which in turn drove up rents.¹⁶³ In the two years after the rezoning plan was announced,

158. See STEIN, *CAPITAL CITY*, *supra* note 15, at 100.

159. See Mayor de Blasio *Unveils 'Housing New York'*, *supra* note 157.

160. See CITY OF N.Y., HOUSING NEW YORK: A FIVE-BOROUGH, TEN-YEAR PLAN 29 (2014), https://www1.nyc.gov/assets/hpd/downloads/pdf/housing_plan.pdf [<https://perma.cc/L3RM-VH7T>]. Under de Blasio's plan, any new development that is created as a result of the zoning process, whether as a result of a city-sanctioned neighborhood rezoning or "spot zoning" of a single site, gives developers the option of including either 25% affordable units at roughly 60% of AMI (\$47,000 for a family of three), or 30% of affordable at roughly 80% AMI (\$62,200 for a family of three). See *id.* at 19. For reference, the median household income in East Harlem in 2017 was \$37,471 — well below even the 60% AMI standard. *New York City Neighborhood Data Profiles, MN11: East Harlem*, NYU FURMAN CTR., <https://furmancenter.org/neighborhoods/view/east-harlem> [<https://perma.cc/N3K7-AT3E>] (last visited Aug. 30, 2019).

161. See generally Abigail Savitch-Lew, *A New Year's Update on the de Blasio Rezoning*, CITYLIMITS (Dec. 28, 2017), <https://citylimits.org/2017/12/28/a-new-years-update-on-the-de-blasio-rezonings/> [<https://perma.cc/BT4T-ULNQ>].

162. See STEIN, *CAPITAL CITY*, *supra* note 15, at 101.

163. See generally Samar Khurshid, *The East New York Rezoning, One Year Later*, *GOTHAM GAZETTE* (Mar. 23, 2017), <http://www.gothamgazette.com/city/6825-the-east-new-york-rezoning-one-year-later> [<https://perma.cc/E5Q8-YXBV>]; see also SCOTT M. STRINGER, CITY OF N.Y. OFFICE OF THE COMPTROLLER, *MANDATORY INCLUSIONARY HOUSING AND THE EAST NEW YORK REZONING: AN ANALYSIS* (Dec. 2, 2015), <https://comptroller.nyc.gov/wp->

prices for lots with small buildings (six units or fewer) jumped 63%.¹⁶⁴ And home prices increased by 13.7% in 2015 after increasing a total of 15.5% from 2011 to 2015.¹⁶⁵ East New York has also become one of the primary neighborhoods in the city for “flipping” homes by investors — in 2015, the area led the city with 94 homes flipped.¹⁶⁶ The increase in land values produced by the rezoning continues to incentivize the harassment and eviction of longtime tenants in the neighborhood.¹⁶⁷ East New York was one of the first zip codes in the city to receive guaranteed tenant representation under the Right to Counsel, but there were 1671 evictions from 2017 to 2018 in zip codes 11207 and 11208.¹⁶⁸

Mainstream critiques of market-based approaches to affordable housing tend to focus on the relatively small quantity of affordable units produced.¹⁶⁹ While these critiques are useful, they miss the deeper, more structural flaw: market-based housing policies marshal significant capital into places that are already experiencing gentrification and, as a result, place upward pressure on an area’s land values, ultimately incentivizing speculation and contributing to gentrification.¹⁷⁰ In other words, market-based approaches to affordable housing tend to exacerbate the problem they target by making housing more expensive and rendering poor and working-class tenants vulnerable to displacement. In the context of a decades-long weakening of the rent laws, described in Section I.B, this risk has

content/uploads/documents/Mandatory_Inclusionary_Housing_and_the_East_New_York_Rezoning.pdf [https://perma.cc/FMA6-UQSY].

164. See Samuel Stein, *New York City Has the Power to Do Better Than de Blasio’s Housing Plan*, NEW POLITICS (Mar. 20, 2016), <https://newpol.org/new-york-city-has-power-do-better-de-blasios-housing-plan/> [https://perma.cc/XPL6-HHAU].

165. See Abigail Savitch-Lew, *Some Suspect East New York Rezoning Has Triggered Speculation*, CITYLIMITS (Mar. 10, 2016), <https://citylimits.org/2016/03/10/some-suspect-east-new-york-rezoning-has-triggered-speculation/> [https://perma.cc/T9YG-4BJA].

166. See *The Impact of Property Flipping on Homeowners and Renters in Small Buildings*, CTR. FOR NYC NEIGHBORHOODS, <https://cnycn.org/wp-content/uploads/2016/04/CNYCN-NYC-Flipping-Analysis.pdf> [https://perma.cc/CAJ9-3JR8] (last visited Aug. 30, 2019).

167. See generally Kathleen Culliton, *Brownsville Primed for Gentrification, New Map Shows*, PATCH (Mar. 22, 2019), <https://patch.com/new-york/brownsville/brownsville-primed-gentrification-new-map-shows> [https://perma.cc/4WCE-FMQ4].

168. See generally *Evictions*, N.Y.C. COUNCIL (2018), <https://council.nyc.gov/public-advocate/evictions/> [https://perma.cc/BHV6-3BYR].

169. See STEIN, *supra* note 15, at 96–97.

170. See generally Stein, *supra* note 20.

been particularly pronounced for both regulated and unregulated tenants.

In terms of the theory of gentrification elaborated in Section I.C,¹⁷¹ the results of the market-based approach are predictable. According to Smith:

[O]nce the rich arrive, rent gaps will appear in the surrounding area; landlords will seek to close them through rent hikes and evictions; neighborhood stores will close; more working class people will be displaced by gentrification than will ever be housed in the new inclusionary complexes; a few somewhat-affordable apartments will be built in neighborhoods that are suddenly and severely transformed.¹⁷²

These dynamics are unfolding in gentrifying neighborhoods throughout New York City, including neighborhoods severely impacted by the targeted austerity of the post fiscal-crisis period, described in the previous Section, underscoring the point that state policies can function to devalorize urban space in one historical moment and in a subsequent moment can act to revalorize it. Overall, the union of state and market forces that are driving up land values attests to the structural basis of the affordable housing crisis. The latter has been facilitated by legal and policy initiatives — made possible by the city’s neoliberal restructuring in the 1970s — that have intensified housing’s commodification, elevating its value as real estate above its value as home.

II. THE RIGHT TO COUNSEL AND CRITIQUES OF LEGAL RIGHTS

“Rights function to articulate a need, a condition of lack or injury, that cannot be fully redressed or transformed by rights, yet within existing political discourse can be signified in no other way.”¹⁷³

When I began working as a New York City tenant attorney in 2004,¹⁷⁴ the right to counsel was a pipedream. Virtually every tenant in Housing Court appeared pro se and nearly every landlord was represented by an attorney. With my horizons extending barely

171. Smith’s theory of gentrification is discussed *supra*, Section I.C.

172. STEIN, *CAPITAL CITY*, *supra* note 15, at 99.

173. Wendy Brown, *Suffering the Paradoxes of Rights*, in *LEFT LEGALISM/LEFT CRITIQUE* 431 (Wendy Brown & Janet Halley eds., 2002).

174. In my first job out of law school, I worked as a Staff Attorney in the Eviction Prevention Unit of Bedford Stuyvesant Legal Services (BSLS) in the Bedford-Stuyvesant section of Brooklyn. BSLS was a legal services corporation-funded entity that provides free legal services to low- and no-income individuals.

beyond my docket of eviction defense cases in any given week, I assumed that this representational imbalance would always remain in place. I was wrong. After a few years living and working in New Mexico, I returned in 2018 to a very different legal landscape in New York City. The affordable housing crisis had reached a fever pitch, leaving huge swaths of neighborhoods nearly unrecognizable from just a few years before, and the right to counsel had become the law of the city. Since my return to New York, I have tried to make sense of the right to counsel in the context of the city's intensifying gentrification — to understand the forces that led to the right to counsel becoming law and to think through the limits and possibilities of this kind of legal right amid widening social inequalities.

Part II of this Article explores the capacity of the right to counsel to intervene in New York City's affordable housing crisis. Section II.A examines the history and mechanics of the right to counsel, grounding its advent in the decades-long organizing efforts of tenants and their advocates. Section II.B draws distinctions between the right to counsel in eviction proceedings and criminal proceedings. These distinctions — which revolve around the right to counsel's focus on positive substantive outcomes and its contention with private power — facilitate an expansive construction of the right to counsel that moves beyond the confines of Housing Court. Further, they extend to mobilizations that target the structural forces underlying the affordable housing crisis, outlined in Part I. Section II.C situates the right to counsel in the context of progressive critiques of legal rights. It addresses the question of how legal rights discourses can operate to legitimize rather than undermine structural inequalities, before turning to transformative formulations of legal rights that can animate countermovements for social change.

A. The Right to Counsel — History and Mechanics

In the face of crowded eviction dockets, a complex governing body of law, a stark disparity in legal representation between landlords and tenants, and an oppressive court culture, tenant advocates have long agitated for enhanced due process and fairness for tenants facing eviction. As early as five years after Housing Court was created in 1973, observers were already casting it as a failure in no small part because of its insufficient procedural protections for tenants.¹⁷⁵ From

175. See Emily Jane Goodman, *Housing Court: The New York Tenant Experience*, 17 URB. L. ANN. 57, 59–60 (1979).

the outset, the Court was said to have morphed from a place where tenants could petition for the enforcement of housing standards into a tool for landlords to collect rent arrears from tenants through expedited proceedings.¹⁷⁶

The first legal arguments for a right to counsel in eviction proceedings entered the literature in the late 1980s. In his 1988 article, *Gideon's Shelter*, Andrew Scherer grounded the early critiques of Housing Court in due process arguments for a civil right to counsel.¹⁷⁷ Scherer based his argument on *Mathews v. Eldridge's* property interest analysis to assert that a person facing eviction has a constitutionally protected property interest in their apartment that they cannot be deprived of without due process of law.¹⁷⁸ Scherer argued that the property interest was strong enough that due process could not be adequately guaranteed without access to counsel in an eviction proceeding.¹⁷⁹ This reasoning became the salient line of argumentation in subsequent literature on the right to counsel in eviction proceedings.¹⁸⁰ To bolster their due process arguments, scholars marshaled empirical studies of eviction cases to show that legal representation in Housing Court resulted in better outcomes for tenants and a significant decrease in evictions.¹⁸¹

176. *See id.* at 62. Housing courts in cities across the country were falling short of their objectives as well. *See* Anthony J. Fusco et al., *Chicago's Eviction Court: A Tenants' Court of No Resort*, 17 URB. L. ANN. 93, 101 (1979). *See generally* Russell Engler & Craig S. Bloomgarden, Summary Process Actions in the Boston Housing Court: An Empirical Study and Recommendations for Reform (May 20, 1983) (unpublished manuscript), [https://student.nesl.edu/userfiles/file/Center 20for 20law 20and 20social 20responsibility/Engler_Bloomgarden.pdf](https://student.nesl.edu/userfiles/file/Center%20for%20law%20and%20social%20responsibility/Engler_Bloomgarden.pdf) [<https://perma.cc/P5NZ-6JGN>].

177. *See* Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 558 (1988).

178. In determining the amount of process due under the *Mathews* test, courts must balance three factors: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of the interest through procedures currently in place and the probable value, if any, of additional or substitute procedural safeguards; and (3) the administrative burdens that additional or substitute procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

179. *See* Scherer, *supra* note 177, at 563.

180. *See* Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J.L. & SOC. PROBS. 527, 544–47 (1991); Rachel Kleinman, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507, 1508 (2004).

181. *See* Steven Gunn, *Eviction Defense for Poor Tenants*, 13 YALE L. & POL'Y REV. 385, 385–86 (1995); Karl Monsma, *20 Years of Representation Before a Public Housing Eviction Board*, 26 L. & SOC'Y REV. 627, 647 (1992); Carroll Seron, *The*

By the mid-2000s, the voices calling for a right to counsel in Housing Court were growing louder. The legal arguments had cohered around due process, and advocates turned their attention to policy and logistics. A right to counsel, they argued, would reduce the high cost of evictions to the city and individual tenants by cost savings on shelters and other social services required when people lose their homes.¹⁸² It would also soften the indirect costs of homelessness, including hospitalization for related physical and medical conditions, and incarceration for petty crimes.¹⁸³ Supporters of the right to counsel further argued that it would help to preserve New York's affordable housing stock by keeping vulnerable tenants in apartments protected by the state's rent regulation laws.¹⁸⁴

The movement for the right to counsel received an infusion of energy in 2012, when members of the Bronx-based Community Action for Safe Apartments (CASA)¹⁸⁵ launched a campaign to reform the Bronx Housing Court.¹⁸⁶ In support of its campaign, CASA published a participatory research report, *Tipping the*

Impact of Legal Counsel on Outcomes for Poor Tenants in NYC's Housing Court, 35 L. & SOC'Y REV. 419, 419–20 (2001).

182. See Raymond Brescia, *Sheltering Counsel: Towards a Right to a Lawyer*, 25 TOURO L. REV. 187, 236 (2009); Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699, 711 (2006).

183. See Gee, *supra* note 45, at 97.

184. See Scherer, *supra* note 182, at 707.

185. According to CASA:

Community Action for Safe Apartments (CASA) is New Settlement Apartments' housing organizing initiative. CASA began in 2005, out of the need in the community to improve the poor housing conditions that persist for many families in our densely populated and underserved area of the Southwest Bronx. CASA is made up of community residents who work together to improve the living conditions in our neighborhood and maintain affordable housing through collective action. CASA's multifaceted work combines building-specific efforts to improve housing conditions with neighborhood-wide campaigns focused on tenants' rights to a safe, healthy and stable home. CASA also heavily participates in the work of other coalitions that advocate for legislation to preserve affordable housing and better protect tenants.

CMTY. ACTION FOR SAFE APARTMENTS & CMTY. DEV. PROJECT, *TIPPING THE SCALES: A REPORT OF TENANT EXPERIENCES IN BRONX HOUSING COURT*, at i (2013), https://cdp.urbanjustice.org/sites/default/files/CDP.WEB.doc_Report_CASA-TippingScales-full_201303.pdf [<https://perma.cc/BYC4-PGUU>].

186. *History of the Right to Counsel NYC Coalition*, RIGHT TO COUNSEL NYC COALITION, https://d3n8a8pro7vhm.cloudfront.net/righttocounselnyc/pages/10/attachments/original/1517948094/history_of_RTC.pdf?1517948094 [<https://perma.cc/65DB-6S8N>].

Scales,¹⁸⁷ written from the perspective of low-income tenants at risk of eviction. Unsurprisingly, the report found that, in many respects, Housing Court overwhelmingly favored landlords — from the disparity in legal representation¹⁸⁸ to byzantine rules and procedures.¹⁸⁹ The report concluded with a list of recommendations to improve the Bronx Housing Court, including establishing a right to counsel.¹⁹⁰

In 2014, the right to counsel moved closer to political reality. That year, New York City Councilmembers Mark Levine and Vanessa Gibson introduced Intro 214-B, local legislation that required the city to provide low-income tenants with representation in eviction proceedings.¹⁹¹ At around the same time, a number of city-wide tenant advocacy organizations, tenants, academics, and legal services providers came together to form the Right to Counsel (RTC) Coalition. According to the group’s website, the RTC Coalition is “rooted in principles of equity, humanity, diversity and justice that honored the advocates and attorneys and tenant organizing groups who had been working on this issue for decades while re-igniting the urgency to finally make it happen.”¹⁹² The RTC Coalition drew from a long history of tenant advocacy concerning the uneven playing field in Housing Court, embarking on a multi-pronged organizing campaign to win public support for a right to counsel.¹⁹³

While the RTC Coalition was organizing for the right to counsel, the de Blasio administration was dramatically increasing funding for eviction defense legal services. Between 2013 and 2016, funding for tenant-side legal services increased from \$6 million to \$62 million.¹⁹⁴

187. CMTY. ACTION FOR SAFE APARTMENTS, *supra* note 185, at ii–iv.

188. The disparity in legal representation between landlords and tenants in housing court is discussed *supra* Section I.A.

189. *See generally* CMTY. ACTION FOR SAFE APARTMENTS, *supra* note 185.

190. *See id.* at 23–24.

191. *See* RIGHT TO COUNSEL NYC COALITION, *supra* note 186, at 1.

192. *Id.*

193. The RTC Coalition’s efforts included: organizing a daylong forum on right to counsel at New York Law School and a follow-up report entitled “What the Experts Are Saying”; holding a series of town hall events for tenants in four of the city’s five boroughs; developing an implementation plan for right to counsel; gathering signatures on a petition to the Mayor and the City Council Speaker in support of right to counsel; making presentations to community boards throughout the city; and holding rallies and press conferences. *See id.* at 2–3.

194. *See* Jimmy Tobias, *These Cities Are About to Make it Harder for Landlords to Evict People*, NATION (Aug. 28, 2017), <https://www.thenation.com/article/these-cities-are-about-to-make-it-harder-for-landlords-to-evict-people/> [<https://perma.cc/WGN7-J2NT>].

In 2017, the right to counsel became law with the passage of Intro 214-B by the New York City Council. Intro 214-B commits \$155 million over a period of five years¹⁹⁵ to ensure full legal representation for income-eligible respondents in eviction proceedings and limited legal services for other tenant-respondents.¹⁹⁶ The guarantee of full legal representation for income-eligible tenants¹⁹⁷ covers “ongoing legal representation . . . and all advice, advocacy, and assistance associated with the representation . . . including, but not limited to, filing a notice of appearance in [the relevant eviction proceeding].”¹⁹⁸ In effect, under Intro 214-B, every poor person being evicted from private housing in New York City is legally entitled to free, full representation by an attorney in Housing Court.¹⁹⁹

B. Distinguishing the Right to Counsel in Housing Court from *Gideon*

There are clear parallels between the rationale for the right to counsel in eviction proceedings and criminal proceedings, the latter

195. See Kriston Capps, *Ensures Right to Counsel for All Eviction Cases*, CITYLAB (Aug. 14, 2017), <https://www.citylab.com/equity/2017/08/nyc-ensures-eviction-lawyer-for-every-tenant/536508/> [<https://perma.cc/7E2K-SWLQ>].

196. See N.Y.C. ADMIN. CODE § 26-1301 (2017).

197. Income eligibility is defined as annual gross household income at or below 200% of the federal poverty guidelines. See *id.*

198. Sabbeth, *supra* note 46, at 82.

199. Despite this guarantee, there remains some dispute as to whether the right to counsel in Housing Court is actually a right at all. This is manifest in the difference in the way the right to counsel is characterized by activists and organizers on the one hand and by politicians on the other. Organizers pushed for a right to counsel in public forums and advocated for it using that term, but as Intro 214-B worked its way toward passage, its political sponsors almost exclusively referred to its protections as “universal access” rather than as a right. The language of Intro 214-B itself reflects this hedging in two places in particular. First, subsection (a) opens with the words “subject to appropriation,” indicating that the services provided are subject to the availability of funds. N.Y.C. ADMIN. CODE § 26-1302(a) (2017). Second, subsection (e) states that “[n]othing in this chapter or the administration or application thereof shall be construed to create a private right of action on the part of any person or entity against the city or any agency, official, or employee thereof.” *Id.* § 26-1302(e). This language precludes any tenant action to compel the city to provide an attorney in Housing Court should the city fail to do so for whatever reason. While the significance of the characterization of the right to counsel — as a right or as something less than that — is a subject worth exploring, it is beyond the scope of this Article. This Article follows the lead of the tenant advocacy community as well as recent legal scholarship and uses the term right to counsel, as that characterization accurately reflects the content and functionality of the law, notwithstanding the above-mentioned limitations. See Sabbeth, *supra* note 46.

established by the Supreme Court in *Gideon v. Wainwright*.²⁰⁰ The life-altering consequences of eviction include the loss of one's home and community ties, homelessness, employment hardship, adverse effects on children who change schools, and more.²⁰¹ These consequences are so severe that they trigger a right to legal representation, just as the potential deprivation of liberty does in criminal legal proceedings.²⁰² Further, both the right to counsel in criminal proceedings and in Housing Court are rooted in dignitary considerations, as it is widely held that access to an attorney increases the likelihood that a litigant will be heard and treated fairly when appearing before a tribunal.²⁰³

But there are critical distinctions between the right to counsel in criminal proceedings and in Housing Court as well. Kathryn Sabbeth recognizes that the right to counsel in Housing Court is unique in that it emphasizes positive substantive outcomes for tenants, as opposed to formal due process.²⁰⁴ These positive substantive outcomes include preventing displacement, decreasing homelessness, and preserving affordable housing.²⁰⁵ The municipal legislators who drafted and voted for Intro 214-B envisioned it as an intervention in the affordable housing crisis.²⁰⁶ Council Member Mark Levine, one of the bill's co-sponsors and most outspoken supporter, made clear that the main goal of the right to counsel legislation was to address the city's housing crisis by preventing evictions: "We're here to address a crisis. That crisis is the threat of eviction faced by tens of thousands of tenants."²⁰⁷ Levine added, "[i]t is going to be transformative It will entirely change the tenant-landlord relationship in this city The potential benefits of this are just massive."²⁰⁸ Councilmember

200. 372 U.S. 335 (1963).

201. The social costs of eviction are meticulously described in Matthew Desmond's book *Evicted*. See generally MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2017).

202. See Scherer, *supra* note 177, at 567–69.

203. See Alan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 130 (David Luban ed., 1984).

204. See Sabbeth, *supra* note 46, at 83–84. In addition to these distinctions, Sabbeth also notes the right to counsel's impact on poor women of color, who bear the disproportionate brunt of eviction proceedings. See *id.* Further, the right to counsel is distinct from *Gideon* in that it was created by a legislative body, the New York City Council, rather than through a court's constitutional interpretation. See *id.*

205. See *id.* at 85–88.

206. See *id.* at 87.

207. *Id.* at 85.

208. Tobias, *supra* note 194.

Laurie Cumbo went as far as to frame the right to counsel in terms of gentrification-prevention.²⁰⁹ Overall, there is little doubt that supporters of the right to counsel viewed it from the outset as an important tool in the fight for affordable housing and against displacement.²¹⁰

The right to counsel's other departure from *Gideon* is its contention with private power, rather than public power.²¹¹ The right to an attorney in Housing Court cases initiated by private landlords is a tacit recognition of the high-stakes outcomes of eviction proceedings. It is also an acknowledgment that private power — in this case, the power of private landlords and their attorneys in an unbalanced and oppressive court system — leads to evictions and contributes to the affordable housing crisis. In this respect, the right to counsel can be viewed as a check on the disproportionate power of landlords in the context of Housing Court proceedings.

C. Legal Rights Amid Structural Inequality

The question at the heart of this Article is the extent to which the right to counsel in eviction proceedings can intervene in New York City's affordable housing crisis, the roots of which lie outside of Housing Court, in the neoliberal restructuring — and subsequent gentrification — of the city. Answering this question is challenging, as rights typically operate as guarantors of formal, rather than substantive, equality within the liberal legal tradition.²¹² That is, legal

209. See Sabbeth, *supra* note 46, at 87. Council Member Cumbo emphasized the law's potential to curb gentrification and displacement:

As a city grappling with gentrification and homelessness, it is paramount that we provide tenants facing eviction with vital resources such as the right to counsel to remain in their homes. Intro 214-B is groundbreaking legislation that could help curtail the displacement of everyday New Yorkers while preserving our socioeconomic diversity.

NYC to Become First Jurisdiction in U.S. That Will Guarantee Free Legal Representation for Low-Income Tenants in Housing Court, BRONX BUREAU PRESIDENT (Aug. 28, 2019), <http://bronxboropres.nyc.gov/2017/07/20/nyc-free-legal-representation-housing-court-low-income/> [<https://perma.cc/8HJV-GMQ5>].

210. According to Sabbeth, “[t]he Justices who decided *Gideon* and the cases leading up to it were motivated by a desire for substantive justice — they sought to protect African American men from abusive states operating under Jim Crow. The Justices, however, pursued their substantive aim indirectly and relied on the language and logic of procedure.” Sabbeth, *supra* note 46, at 62.

211. The right to counsel in criminal proceedings adheres when the state, rather than private interests, is the opposing party. *See id.* at 63.

212. For an overview of the development of economic and social, as opposed to civil, rights within the context of U.S. politics, see Frank Deale, *The Unhappy History*

rights by and large fail to disturb the structural arrangements that underpin social inequalities. The political emancipation that theoretically flows from liberal rights regimes is located squarely within a prevailing social order that is highly unequal and stratified.²¹³ A narrow focus on legal rights in this type of context tends to individualize such inequality and stratification, and in the process legitimizes the status quo by failing to contend with how power is distributed in society.²¹⁴ Wendy Brown has put this set of concerns about legal rights succinctly: “Rights in liberalism . . . tend to depoliticize the conditions they articulate.”²¹⁵

Scholars have applied Brown’s assertion to the interplay between the crisis of mass incarceration and the right to counsel in criminal proceedings. In his seminal article, *Poor People Lose: Gideon and the Critique of Rights*, Paul Butler argues that an over-investment in rights in this context diverts attention from necessary political-economic and racial critiques of the criminal justice system, as well as the critical solidarity-building and organizing efforts that are required to change it.²¹⁶ In the decades following the *Gideon* decision, low-income African Americans in the criminal justice system are considerably worse off than before.²¹⁷ The reason for this is that the causes of the crisis of mass incarceration are structural and implicate the broader social and legal apparatus in which “poor people become losers in criminal justice.”²¹⁸ In Butler’s analysis, the procedural

of Economic Rights in the United States and Prospects for Their Creation and Renewal, 43 HOWARD L. REV. 281, 306–20 (2000).

213. See Brown, *supra* note 173, at 432.

214. See *id.* at 422.

215. *Id.* at 431.

216. See Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2196–97 (2013).

217. *Id.* at 2178.

218. *Id.* at 2183–85. Butler breaks down mass incarceration’s “process of control” into five elements:

- 1) The spaces that poor people, especially poor African Americans, live in receive more law enforcement in the form of police stops and arrests.
- 2) The criminal law deliberately ignores the social conditions that breed some forms of law-breaking. Deprivations associated with poverty are usually not “defenses” to criminal liability, although they may be factors considered in sentencing.
- 3) African Americans, who are disproportionately poor, are the target of explicit and implicit bias by key actors in the criminal justice system, including police, prosecutors, and judges.
- 4) Once any person is arrested, she becomes part of a crime control system of criminal justice, in which guilt is presumed. Prosecutors, using the legal apparatus of expansive criminal liability, recidivist statutes, and mandatory minimums, coerce guilty pleas by threatening defendants with vastly disproportionate punishment if they go to trial.
- 5) Repeat the cycle. A criminal case is created. Two-thirds

fairness guaranteed by *Gideon* obscures that reality, legitimizing a broken system and diffusing political resistance to it.²¹⁹ What is needed to address the crisis of mass incarceration is not an increase in rights, but a social movement that takes aim at the material sources of the crisis and mobilizes for decarcerating reforms.²²⁰

Following Butler's critique of *Gideon*, a well-intentioned reliance on legal rights to address the harms faced by systematically subordinated people identifies those harms as problems but fails to grapple with how they are produced. In other words, discourses of legal rights may name social harms as such, but they tend to leave intact the political economics and institutional conditions that underlie them.²²¹ From this vantage point, a legal right, like the one derived from *Gideon*, targets inequities in the criminal justice system and, in the process, brings about concrete and meaningful benefits for subordinated individuals. A guarantee of a defense attorney when the state is threatening one's liberty is no small thing, but it fails to address the material conditions — like race and class inequality in a deindustrialized economy, targeted austerity, particular modes of policing, prosecution, and sentencing — that have driven the crisis of mass incarceration.²²²

This is not to say, however, that a discourse of rights cannot play a significant role in the formation of a radically democratic and transformative political project.²²³ As Kimberlé Williams Crenshaw

of freed prisoners are rearrested, and half return to prison, within three years of their release.

Id.

219. *See id.* at 2178.

220. *See generally* Steven Zeidman, *Several Roads to Decarceration, All of Which Should Be Taken*, *GOTHAM GAZETTE* (Dec. 6, 2018), <https://www.gothamgazette.com/opinion/8123-several-roads-to-decarceration-all-of-which-should-be-taken> [<https://perma.cc/Z54K-245G>]. Decarceration describes strategies for reducing the number of people who are sent to prison “with the ultimate aim of dismantling the prison system as the dominant mode of punishment.” ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 110 (2003).

221. *See* Brown, *supra* note 173, at 431–32.

222. Ruth Wilson Gilmore addresses these conditions in *Golden Gulag*, which analyzes the political and economic forces that have come together to produce California's prison boom. Gilmore examines how prison expansion developed from surpluses of finance capital, labor, land, and state capacity. She argues that defeats of radical political struggles and the labor movement, as well as shifting patterns of capital investment, set the stage for prison growth. This process has resulted in a vast and expensive prison system, a huge number of incarcerated poor people and people of color, and the intensification of punitive paradigms of justice. *See generally* RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007).

223. *See* Brown, *supra* note 173, at 20.

has persuasively argued, social movements have deployed legal rights as a central organizing feature, insofar as the use of a rhetoric of rights becomes a potent movement-building act for people who have been constructed as right-less.²²⁴ In addition to rights signaling a sense of belonging to those who have been excluded from the body politic, a discourse of legal rights can mobilize group action, as well as provide an agenda for group mobilization.²²⁵ The civil rights movement stands as an exemplar of this, as civil rights activists strategically deployed a framework of legal rights to help galvanize a political community — comprised of historically oppressed people — that was seeking to transform society’s governing values and institutions in relation to race, equality, and citizenship.²²⁶

The challenge for advocates seeking to amplify the valence of legal rights vis-à-vis social movements is to formulate and deploy them to take aim at the structural causes of inequities and injustices, as Butler and Brown’s critiques suggest, and to do so in a manner that builds the collective power of subordinated people, as Crenshaw asserts. The concept of non-reformist reforms is useful in this endeavor. A non-reformist reform refers to a kind of political demand that addresses social problems in a manner that is suggestive of fundamental transformation.²²⁷ This type of reform helps shift the balance of power between competing social groups and helps bring about a broadening of the popular imagination and the creation of new political formations.²²⁸

For a legal right to function as a non-reformist reform, it must gesture towards a reorganization of the structures underlying social harms, and — at the same time — facilitate the collective mobilization of subordinated people. In this regard, the project of

224. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1365 (1988). For Crenshaw, there is also a strategic-instrumentalist dimension to a reliance on rights: “As demonstrated in the civil rights movement, engaging in rights rhetoric can be an attempt to turn society’s ‘institutional logic’ against itself — to redeem some of the rhetorical promises and the self-congratulations that seem to thrive in American political discourse.” *Id.* at 1366. Further, “[p]eople can only demand change in ways that reflect the logic of the institutions that they are challenging. Demands for change that do not reflect the institutional logic — that is, demands that do not engage and subsequently reinforce the dominant ideology — will probably be ineffective.” *Id.* at 1367.

225. See Guinier & Torres, *supra* note 24, at 2748.

226. See Crenshaw, *supra* note 224, at 1356.

227. See ANDRÉ GORZ, STRATEGY FOR LABOR 7–8 (Martin A. Nicolaus & Victoria Ortiz trans., Beacon Press 1967) (1964).

228. See *id.*

transformative legal rights is two-fold: it relates to the design and content of the legal right in question, for example, whether the right contends meaningfully with the material sources of social subordination and inequality; and it also relates to the way in which the right is interpreted and deployed by groups of people who are organizing for social change. In other words, the contestation of material deprivation is, to some degree, sown into the fabric of the right itself, which calls into question the distribution of political and economic power in society. Further, the right is amenable to being deployed expansively to build the power of subordinated people, in keeping with their lived experiences and political desires.²²⁹ A legal right that combines these features has the capacity to be wielded as a catalyst for social change.

In determining how the right to counsel fits into this matrix, it should be noted that it is open to competing interpretations. When interpreted narrowly, the right to counsel is individualized and cast in due process terms that aim mainly to balance the representational playing field in eviction cases and to ameliorate the more abusive dynamics of Housing Court. In a court that is widely regarded as disfavoring tenants,²³⁰ the majority of whom are poor women of color,²³¹ these improvements are welcome. More cynically, the right to counsel can also be interpreted as an explicit acknowledgment of the social costs of the de Blasio administration's economic development plan. As the latter contributes to rising land values and gentrification, it produces displacement.²³² In this framing, the right to counsel can be seen as a measure, taken by the de Blasio administration, to contain the damage wrought by its market-based approach to the housing crisis.

229. Lani Guinier and Gerald Torres describe the process through which rights are constructed from below, by people mobilizing for social change, as *demosprudence*:

Demosprudence is not an adversary of jurisprudence. Rather it is an analysis of how social power circulates and finds its expression in law. Demosprudents examine the collective expressions of resistance (whether through counter-narratives or paradigm-shifting mobilizations) that test the democratic content of the formal institutions of lawmaking studied by jurisprudents and legisprudents. Demosprudence looks for the answers in the people themselves when organized as dynamic constituencies and not as isolated individual preference holders. We are most concerned with law and the meaning-making potential of mobilized constituencies.

Guinier & Torres, *supra* note 24, at 2755.

230. *See supra* Section I.A.

231. *See supra* Section I.A.

232. *See supra* Section I.D.

Notwithstanding these points, as seen in the preceding Section, the right to counsel's purpose and design are unique, facilitating its interpretation in expansive terms. The tenants and advocates who organized for the right to counsel to become law have taken up this broadened interpretation, which takes seriously the notion that the right to counsel was intended to intervene substantively in the affordable housing crisis and to contend with the private power of the real estate industry. Under this construction, the right to counsel connects with struggles to build the organizing power of tenants and to systematically address the material deprivations they suffer. Though these material deprivations often manifest in Housing Court, where the right to counsel is directly operative, their roots reside in the political-economic and legal forces that have furthered housing's commodification in neoliberal New York City.

III. TOWARDS HOUSING JUSTICE

*"What needs defending is the use of housing as home, not as real estate."*²³³

In mid-October of 2018, I was invited to a meeting of the Ridgewood Tenants' Union (RTU), a tenant-led, anti-displacement group based in the gentrifying neighborhood of Ridgewood, Queens. I accompanied three law students from CUNY School of Law's Community and Economic Development Clinic²³⁴ to a legal training on tenants' rights. The training was held in a public square in Ridgewood, and the audience was an eclectic mix of longtime neighborhood residents, who were mostly older and Latinx, and newcomers, who were mostly younger and White. Everyone in attendance was concerned enough about the increasing risk of displacement to devote precious time on a weekend to venture out in the cold, listen to our presentation, and share their stories with their neighbors.

233. MADDEN & MARCUSE, *supra* note 22, at 11.

234. CUNY School of Law's Community and Economic Development Clinic (CEDC) addresses structural inequalities in New York City through legal support for democratic economic entities and neighborhood institutions. The CEDC employs transactional representation, strategic litigation, community legal education, and policy reform and works in the following practice areas: Economic Democracy, Worker Justice, and Anti-Displacement. *Community & Economic Development Clinic*, CUNY SCH. L., <https://www.law.cuny.edu/academics/clinics/ced/> [<https://perma.cc/2G38-FW2P>] (last visited Sept. 6, 2019).

The training was unlike any I had ever attended. While the location of the event — public and outdoors — and the racial and generational diversity of its participants were both notable, something else gave it a unique feel: RTU’s lead organizer, Raquel Namuche, began and ended the meeting by eliciting commitments from everyone in the crowd — “I pledge to support my neighbors” and “I pledge to defend Ridgewood.” These commitments were not about individual evictions or bad conditions in a particular building. Rather, they were an exhortation to protect an entire neighborhood from the incursions of real estate capital. Listening to the crowd that day helped solidify a conclusion I have been working towards since the beginning of my legal career: That housing justice requires more than a robust defense of individual tenants’ homes or targeted actions against bad landlords. It also necessitates a collective project to defend urban space against the social dislocations wrought by state-facilitated, market-driven gentrification.

This Article has put forth the argument that the current affordable housing crisis is, at its core, an outgrowth of housing’s legally-constituted hyper-commodification in the context of post-fiscal crisis, neoliberal New York City. Part III of this Article examines the right to counsel’s capacity to strengthen tenant-led organizing for housing justice in this context. Section III.A returns to the theoretical framework laid out by Polanyi — specifically, the concept of countermovement²³⁵ — examining the latter’s relation to transformative constructions of legal rights.²³⁶ It argues that legal rights can provide vital support for a countermovement for housing justice, to the extent they can be deployed to target the material sources of tenants’ deprivation and to assist in the formation of new political solidarities. Section III.B focuses on the organizing efforts of the RTC Coalition, in particular how the right to counsel is being combined with redistributive rights, laws, and policies to strengthen a tenant-led countermovement that takes aim at the structural underpinnings of gentrification and displacement.²³⁷ Section III.C examines efforts to undo the neoliberal model of urban economic development and governance inaugurated by the settlement of New York City’s fiscal crisis, averring that such efforts must necessarily be

235. See generally POLANYI, *supra* note 8.

236. See *supra* Section II.C.

237. See *supra* Part I.

based in the prioritization of housing's value as home over its value as real estate.

A. Countermovements and Transformative Rights

The intensifying commodification of housing in New York City in recent years is in keeping with Polanyi's depiction of the process through which the market economy overpowers society, with catastrophic human consequences. This Section focuses on how society mobilizes against the harmful effects of excessive marketization — for example, displacement, poverty, and inequality, — and how legal rights fit into such mobilizations. As described in Section I.B, Polanyi concluded in *The Great Transformation* that marketization produces widespread social dislocation, which in turn provokes countermovements²³⁸ for social protection. Polanyi referred to the entirety of this process — the erosion of social life by advancing marketization and the collectivist response to reassert social control over the economy — as the “double movement.”²³⁹ For purposes of this Article, countermovement refers broadly to social mobilizations and reform efforts that seek to re-embed the market in society through the imposition of the instruments of democratic governance over the economy.²⁴⁰ In this sense, countermovements necessarily involve a measure of redistributive equality, and, in the context of New York City's affordable housing crisis, relate to the decommodification of housing in the name of a more equitable, accessible, and democratic city.

Polanyi's notion of countermovement is at odds with the neoliberal political-economic and legal framework that emerged out of the settlement of New York City's fiscal crisis. Since the neoliberal turn,

238. For Polanyi, countermovements are organic and collectivist responses to the social destructiveness of market forces, which themselves are legally constructed. They can take a number of forms and can be politically regressive or progressive. See DALE, *supra* note 9, at 60.

239. *See id.* at 62.

240. *See* BLOCK, *supra* note 80, at xxxviii. The concept of countermovement is related to, but distinguishable from, the depiction of social movements in the literature on law and community organizing. In the latter context, “[t]he movement has focused on fostering grassroots participation in local decision making, coordinating the strategic deployment of community resources to achieve community-defined goals, and building community-based democratic organizations led by local leaders who advocate for social and economic change.” Scott Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 *UCLA L. REV.* 443, 460–61 (2001). This type of movement may be oriented around contesting the harmful social effects of marketization — i.e. it may constitute a countermovement, in Polanyi's terminology — but that is not necessarily the case.

markets have increasingly been walled off from state projects of egalitarian redistribution.²⁴¹ This process is on display in New York in the removal of municipal home rule over key areas of social life and the subsequent diminution of the institutions comprising the social democratic polity, including rent regulation.²⁴² Countermovements work against such currents, aiming to restore a measure of humanity and social justice to the economic sphere.²⁴³ Over the years, the signal achievement of countermovements has been “to empower the state in its roles as regulator of the economy and as guarantor of basic social welfare and a modicum of equality.”²⁴⁴ Historically, successful countermovements have resulted in significant social protections that have correlated with relative redistributive equality and increased democratic control over the economy.²⁴⁵

An example of a countermovement for social protection is the case of so-called Red Vienna, the place where much of Polanyi’s analysis of the relationship between the market economy and society was formed. Following World War I, Vienna faced a profound housing crisis, which prompted the government to engage in a massive, publicly-funded investment and infrastructure program. This program included initiatives to expropriate vacant buildings and to tax wealthy landowners,²⁴⁶ as well as limits on real estate speculation and increased public land ownership.²⁴⁷ Through its newfound tax revenue, the municipal government organized emergency housing and built over 60,000 new apartments, which also served as an engine for job growth.²⁴⁸ Multi-story apartment complexes with green inner courtyards became the favored construction style. These complexes, which were not run to make a profit, were connected to local infrastructure — like consumer cooperatives and schools — so as to

241. See QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* 19 (2018).

242. See *supra* Section I.B.

243. SLOBODIAN, *supra* note 241, at 19.

244. Dale, *supra* note 9, at 61.

245. See Robert Kuttner, *The Man from Red Vienna*, N.Y. REV. BOOKS (Dec. 21, 2017), <https://www.nybooks.com/articles/2017/12/21/karl-polanyi-man-from-red-vienna/> [<https://perma.cc/5HRZ-ATYL>] (reviewing GARETH DALE, *KARL POLANYI: A LIFE ON THE LEFT* (2016)).

246. See Veronika Duma & Hanna Lichtenberger, *Remembering Red Vienna*, JACOBIN (Feb. 10, 2017), <https://jacobinmag.com/2017/02/red-vienna-austria-housing-urban-planning> [<https://perma.cc/KT4D-4VRC>].

247. See *id.*

248. See *id.*

reduce residents' travel and shopping time. Rents in the apartments were calculated to cover operating costs and nothing more — in 1926, they averaged about 4% of a worker's monthly wage.²⁴⁹ Overall, Vienna's municipal administration intervened in the post-World War I economic crisis via a systematic effort to re-embed the market economy in society. At the core of this state-led effort, which was backed by strong social movements, including well-organized workers and feminists, was the decommodification of key areas of social life, including housing.²⁵⁰

Closer to home, New York City has a long history of tenant mobilizations and countermovements that have been connected to left political movements and characterized by a range of goals, strategies, and tactics.²⁵¹ Intermittently — and particularly at moments of political and economic crisis — these mobilizations have intensified, coalescing around neighborhood-wide actions like rent strikes and eviction blockades, and provoking redistributive legal and policy concessions from municipal and state lawmakers. In practice, though tenant-based countermovements in New York City have been heterogeneous and complex, they have historically been animated by the defense of the value of housing as home (for tenants) as opposed to real estate (for landlords).²⁵²

The countermovements that have erupted episodically in reaction to the market economy's destruction of social life — from post-World War I Vienna to neoliberal New York City — are connected to the discussion of transformative rights taken up in Part II of this Article. For a legal right to operate in a transformative manner, it must move beyond an acknowledgment of social harms and gesture toward the

249. *See id.*

250. *See* Kuttner, *supra* note 245.

251. In the earliest documented instance of organized direct action by tenants, in 1904 the Lower East Side's immigrant Jewish quarter erupted in protest against the neighborhood's landlords, who had recently increased tenement house rents by 20–30%. As a result of the tenant protests, which included a rent strike, the overwhelming majority of Lower East Side landlords rolled back rents to prestrike levels. The largest and most radical wave of tenant mobilization in the city lasted from 1917 to 1920, when a series of left labor-connected tenant unions formed across the city, pressuring the municipal government to pass the Emergency Rent Laws, which imposed price controls and provided some protections against eviction. During the Depression, tenant activists, drawing energy from left political parties and labor organizations, organized rent strikes and eviction blockades, leading to the adoption of rent control and the creation of public housing. *See* MADDEN & MARCUSE, *supra* note 22, at 156–62.

252. *See generally* RONALD LAWSON & MARK D. NAISON, *THE TENANT MOVEMENT IN NEW YORK CITY, 1904 TO 1984* (1986).

reorganization of society's fundamental economic and political arrangements, while at the same time facilitating the construction of new, emancipatory political formations.²⁵³ Polanyi devotes scant attention to the nature of particular countermovements for social protection or how they may be bolstered by particular conceptions of legal rights.²⁵⁴ But his analytical framework suggests that countermovements can be advanced by an expansive construction of rights.

It is no stretch to say that transformative formulations of legal rights can help energize countermovements, provided these formulations call into question the material underpinnings of the harms they target and help bring about political mobilizations to re-embed the market in society. The following Section explores the ways in which the right to counsel is being deployed by tenants and their advocates in New York City in service of a growing countermovement for housing justice. Ultimately, the right to counsel, in practice, is a piece of a broader reform effort that seeks to assert housing's function as home and to diminish the power of real estate in the political economy of New York City.

B. From Right to Counsel to Redistribution

The coalition of grassroots groups that organized for the right to counsel to become law is in the process of constructing the right expansively to build the power of tenants and to push for redistributive and democratizing policy reforms in the sphere of housing.²⁵⁵ Susanna Blankley of the RTC Coalition articulates the expansive view of the right to counsel, describing its trajectory as follows:

They [the tenants who organized for the right to counsel] . . . saw the courts as institutions that hold up larger systems of oppression, specifically white supremacy, capitalism and patriarchy. They also knew that one of the results of a million New Yorkers experiencing

253. This resonates with Gorz's notion of non-reformist reforms. *See supra* Section II.C.

254. *See generally* DALE, *supra* note 9, at 87.

255. *See* Susanna Blankley, *The Right to Counsel Is an Important Victory*, SOCIALIST WORKER (June 25, 2018), <https://socialistworker.org/2018/06/25/the-right-to-counsel-is-an-important-victory> [https://perma.cc/5DLL-AC6K]. Blankley's explication of the right to counsel points to the contingent and contested quality of legal rights. Although the latter may be authored by a court or a legislature, they are also subject to interpretation and construction by people engaged in collective mobilization and social change efforts. This resonates with Lani Guinier and Gerald Torres' notion of demosprudence. *See generally* Guinier & Torres, *supra* note 24.

housing court, feeling humiliated, intimidated, powerless and patronized, was that the experience of court alone was either politicizing or an incredible deterrent to organizing. Tenant groups in the Bronx and Brooklyn began campaigns to reform the courts, to reclaim them, but also to build tenant power and to remove a key tool from the landlords' arsenal — control of the courts.²⁵⁶

Blankley's analysis moves beyond concerns over due process in individual eviction proceedings, politicizing Housing Court as a site within racial capitalism where landlords assert control over tenants. In this way, the RTC Coalition sees Housing Court as a piece of a broader political-economic puzzle that is structured by deep-seated power imbalances. For the RTC Coalition, the right to counsel is more than a means to protect tenants from eviction, although that is important. It is a tool to help subordinated people articulate a collective narrative of their systematic mistreatment by a legal system that favors landlords, in a political economy dominated by real estate.²⁵⁷ Through the expansive framework of the right to counsel that is deployed by the RTC Coalition, tenants come to see their grievances as commonly held, and they can consequently build solidarities that enhance their organizing capacity.²⁵⁸

This enhanced capacity reverberates outside of individual eviction proceedings, contributing to the law and policy reform efforts of a broader tenant-based movement²⁵⁹:

Tenants across the city who are part of the coalition, haven't stopped organizing because we won this law — to the contrary! Tenants are organizing to use this new tool to build power and reinvigorate the tenant movement! We need an entirely different social, political and economic system to meet our needs. To win bolder housing demands in New York City that change the structures of power, we need a movement (organized and aligned) of hundreds of thousands if not millions, of tenants.²⁶⁰

256. Blankley, *supra* note 255.

257. *See id.*

258. Michael Grinthal defines organizing “as the processes by which people build and exercise power by collecting and activating relationships. These processes may come under the rubrics of community organizing, the labor movement, political campaigns and movements, organization of counter-institutions, etc.” Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 34 (2011). According to Grinthal, organizing refers to “those processes by which power is created from multiplied relationships.” *Id.*

259. *See* Blankley, *supra* note 255.

260. *Id.*

In other words, the tenants who organized for the right to counsel did not stop when the law was passed. Rather, the victory emboldened them, and they now stand poised to contribute their collective energy to further organizing efforts for housing justice that are redistributive in nature, aiming to shift the balance of power between tenants and real estate.

The right to counsel, as it is being constructed by the RTC Coalition, is part of a growing countermovement to transform housing's place in the political economy of New York City²⁶¹ and to reverse the wave of legally-constituted commodification that issued from the neoliberal turn of the 1970s. The current countermovement for housing justice is comprised of tenants and advocates from around the city and draws from a deep well of local activism.²⁶² The right to counsel is bound up, theoretically and organizationally, with the broader tenant movement's attempts to subject property to democratic and redistributive intervention, as evidenced by organizing efforts around the renewal of the rent laws in the summer of 2019.²⁶³ A number of the RTC Coalition's members have spearheaded this organizing effort, and the RTC Coalition itself has supported strengthening the protections of rent stabilization.²⁶⁴ In keeping with Blankley's above description of the capacity of the right to counsel to energize the tenant movement, the right to counsel has drawn in tenants who increasingly see their problems — eviction, harassment, lack of repairs, skyrocketing rents — as shared, the result of a structurally flawed system that works for the benefit of property owners.²⁶⁵ The right to counsel, in this framing, flows into — and

261. *See id.*

262. For a comprehensive treatment of the history of the tenant movement in New York City, see LAWSON & NAISON, *supra* note 252.

263. It should be noted that this theoretical overlap is reflected in the organizational overlap between the RTC Coalition and the coalition of tenant groups organizing to strengthen the rent laws, as a number of the same groups, including the Flatbush Tenant Coalition and the Community Service Society, are members of both coalitions. *See Who We Are*, HOUSING JUSTICE FOR ALL, <https://www.housingjusticeforall.org/who-we-are-1> [<https://perma.cc/7BEC-4RUD>].

264. A number of RTC Coalition members and supporters took on key roles in the 2019 rent laws organizing efforts through the Housing Justice for All and No More MCIs coalitions. For a list of the RTC Coalition's members, see *About*, RIGHT TO COUNS. NYC COALITION, <https://www.righttocounselnyc.org/about> [<https://perma.cc/GDU4-FLUA>].

265. As Susanna Blankley, Coordinator of the RTC Coalition notes in an op-ed for *City Limits*, the community connection fostered through RTC is all the more important following the right to counsel's implementation, as landlords shift and amplify tenant harassment tactics:

buoys — redistributivist efforts like the one to shore up the protections of rent stabilization.

Framing the right to counsel as integrally connected to a range of tenant protections, such as enhanced rent stabilization, as the RTC Coalition does, recasts the right to counsel as a piece of what Chester Hartman called “the right to stay put.”²⁶⁶ The right to stay put is expressly based on principles of equity and refers to the right of tenants to remain in their homes irrespective of market forces.²⁶⁷ It is, therefore, particularly applicable to cities characterized by market-based gentrification and displacement. In articulating the right to stay put, Hartman notes that our legal system already places several limits — such as zoning regulations, housing and building codes, eminent domain laws, and rent regulation — on the absolute right of property owners to do with their property as they see fit.²⁶⁸ In places with rapidly rising land values, according to Hartman, a further step — such as strict just cause eviction and tight rent controls — must be taken to secure a right to remain for poor and working-class tenants at risk of displacement.²⁶⁹

While Hartman does not include a right to counsel in this scaffolding of tenant protections, it is a useful and common-sense addition to the right to stay put. New York City Housing Court, despite its original purpose,²⁷⁰ has historically functioned as a tool wielded by property owners to reclaim their assets, the latter doubling as tenants’ homes.²⁷¹ As the discussion throughout this Article has shown, the representational field in Housing Court has been widely skewed towards landlords, leaving the vast majority of tenants to

[T]enants need to be connected to members of community groups so that they can continue to organize against the various forms of harassment, intimidation, and neglect that landlords already employ and which are likely to intensify or adapt in response to right to counsel. Organized tenants can also connect to and build a larger movement for social justice because they aren’t just tenants — they’re workers, moms, elders — they are people, and organized people are powerful.

Susanna Blankley, *CityViews: New York Now Has ‘Right to Counsel,’ but Tenant Organizing Still Matters*, CITY LIMITS (Nov. 27, 2018), <https://citylimits.org/2018/11/27/cityviews-new-york-now-has-right-to-counsel-but-tenant-organizing-still-matters/> [https://perma.cc/4YY4-5AHC].

266. Chester Hartman, *The Right to Stay Put*, in *LAND REFORM, AMERICAN STYLE* 302 (Charles C. Geisler & Frank J. Popper eds., 1984).

267. *See id.*

268. *See id.* at 307.

269. *See id.* at 312–14.

270. *See* Milton, *supra* note 40.

271. For a discussion of New York City Housing Court, see *supra* Section I.A.

navigate a complex legal landscape on their own.²⁷² In this sense, Housing Court — as Blankley suggests — should be viewed as a piece of a larger system that operates to alienate and disempower tenants at the expense of landlords, against the backdrop of a rapidly gentrifying city.

Reforming that system in a meaningful way requires a range of efforts, including the right to counsel, that, taken collectively, build the organizing capacity of tenants and decenter the role of real estate in the city's political economy. Conceiving of the right to counsel in this way — as rooted in considerations of power-building and enmeshed in a web of redistributive policy interventions on behalf of tenants — is in concert with how the right is being constructed by the RTC Coalition: actively using the right to counsel to build the organizing capacity of tenants, with the ultimate aim of reconstituting housing as a social good.²⁷³

The right to counsel, in its expansive construction, is a component of a broader, transformative right to stay put that works against the grain of housing's legally-constituted commodification in neoliberal New York City by affirming housing's value as home. The right to counsel is connected to efforts to build solidarities among tenants and to fight for policy reforms that place concrete checks on property owners' ability to maximize the return on their real estate assets in a global, gentrifying city. This framework resonates deeply with the theoretical intervention of Polanyi, as it springs from the premise that unfettered marketization in the sphere of housing produces dislocation and inequality, eventually leading to a countermovement for social protection. In concert with Polanyi's notion of countermovement,²⁷⁴ the transformative rights framework described here aims to turn back the harmful effects of marketization by re-embedding the economy in society via democratically imposed protections against housing's commodification.²⁷⁵ Grassroots mobilizations of tenants from around the city who see their grievances as collective, and their enemy as shared, are driving these efforts, which are animated in part by a constellation of legal rights that places a premium on housing's social use. The right to counsel,

272. For a discussion of the representational dynamics of Housing Court, see *supra* Section I.A.

273. For a discussion of how the RTC Coalition is deploying the right to counsel, see *supra* Section III.B.

274. For a discussion of Polanyi's theory of countermovement, see *supra* Section III.A.

275. See *supra* Section III.B.

as it has been constructed by the tenants and organizers who fought for its passage, forms part of this constellation of rights.

C. Towards a Post-Neoliberal City

Strengthening rent regulation is a vital redistributive policy tool for maintaining a modicum of affordable and secure housing in New York City.²⁷⁶ But it is unlikely to add many new units of affordable housing. When it comes to this task, society has been conditioned by the market-based common sense of the post-fiscal crisis era to resort to the kinds of tax subsidies and re-zonings described in Section II.C, initiatives that raise land values and incentivize speculation and displacement. There are, however, alternatives to the market-based housing policy that has been a centerpiece of every mayoral administration from Koch to de Blasio. These include robust public support for community land trusts, sweeping changes to the policy of inclusionary zoning, and the state facilitation of the transfer of private land to the public.²⁷⁷

Adopting these measures would almost certainly require a fundamental shift in the thinking of policymakers. This shift in policy common sense is summed up well by Samuel Stein, who notes that what is required to address our housing crisis is “changing the default actions for city agencies from their current objectives of raising property values and selling off land and buildings to another program altogether: disincentivizing evictions and decommmodifying land.”²⁷⁸ In short, this kind of policy transformation would require that our urban political-economic and governance priorities be turned on their head: instead of using the levers of state power to promote landlords’ right to extract rents, those levers would be deployed primarily to protect tenants’ right to stay put. This framework would be explicitly grounded in principles of economic and racial equity.²⁷⁹

Historically, dramatic changes in policymaking common sense occur when a vibrant countermovement successfully contests the social costs of excessive marketization. There are currently signs that New York City is living through a moment of intensifying popular mobilization and ideological change around housing’s place in the

276. For a discussion of rent regulation, see *supra* Section I.B.

277. See STEIN, *supra* note 15, at 179–220.

278. *Id.* at 163.

279. ANGOTTI & MORSE, *supra* note 19, at 147.

city's political economy.²⁸⁰ Recently, in a kind of flashpoint moment, labor, housing, and immigrant rights activists came together to turn away Amazon, which had received an incentive-laden deal from the state that included \$3 billion in tax subsidies.²⁸¹ The defeat of Amazon was substantially related to concerns about displacement,²⁸² and can be read as a repudiation of the market economy's domination of our society and politics, in the very place where some commentators have argued that the neoliberal project was inaugurated.²⁸³

Around New York City — from Ridgewood, Queens to Crown Heights, Brooklyn — formations of tenants, most of which are led by women, people of color, and immigrants, are coming together to fight back against the real estate takeover of their neighborhoods. Groups like the Crown Heights Tenant Union,²⁸⁴ Take Back the Bronx,²⁸⁵

280. In a sign of the uniqueness of our current moment, *The New York Times* editorial board, which has historically been opposed to rent regulation, came out in support of legislative efforts to strengthen the regulatory system. The *Times's* support for stronger rent regulation signals an ideological shift about the need to check, via the levers of the state, the power of real estate and, in the process, to affirm housing's use value as home. *Compare* Editorial, *End Rent Control*, N.Y. TIMES (May 12, 1987), <https://www.nytimes.com/1987/05/12/opinion/end-rent-control.html> [<https://perma.cc/69JE-XGET>] (“There’s probably nothing that distorts a city worse than rent regulation.”) *with* Editorial, *Albany Can Make History for Tenants*, N.Y. Times (Jun. 9, 2019), <https://www.nytimes.com/2019/06/09/opinion/new-york-rent-stabilization-laws.html> [<https://perma.cc/76JV-YLMX>] (urging the New York State Legislature to provide further protections to New York City tenants through rent control legislation).

281. *See* Samuel Stein, *New York's Dance with Amazon Shows Us How to Fight for a City's Future*, GUARDIAN (Feb. 23, 2019), <https://www.theguardian.com/commentisfree/2019/feb/23/amazon-new-york-headquarters-corporate-power-balance> [<https://perma.cc/94RG-MC5D>].

282. *See* Kristen Capps, *Without Amazon HQ2, What Happens to Queens?*, CITYLAB (Feb. 15, 2019), <https://www.citylab.com/equity/2019/02/amazon-hq2-queens-long-island-city-condo-rent-real-estate/582847/> [<https://perma.cc/PT6Z-KSU5>].

283. Harvey notes that “[t]he management of the New York fiscal crisis pioneered the way for neoliberal practices both domestically under Reagan and internationally through the IMF in the 1980s.” HARVEY, *supra* note 56, at 48. *See also* Joshua Freeman, *If You Can Make It Here*, JACOBIN (Oct. 3, 2014), <https://www.jacobinmag.com/2014/10/if-you-can-make-it-here> [<https://perma.cc/WG9G-REZX>].

284. CROWN HEIGHTS TENANT UNION, <https://crownheightstenantunion.org> [<https://perma.cc/F34A-DPMQ>] (last visited Sept. 30, 2019).

285. *About Us*, BRONX SOC. CTR., <http://www.bronxsocialcenter.org/about-us/> [<https://perma.cc/3WTY-3QD3>] (last visited Sept. 30, 2019).

and the Ridgewood Tenants Union²⁸⁶ have emerged to defend urban space against the dislocating effects of excessive marketization. Their analysis of problems of eviction and displacement is rooted in a critique of housing's hyper-commodification within neoliberal capitalism.²⁸⁷ These groups, through their everyday engagement with tenants at risk of displacement, are constructing a vision of housing that revolves around residents' right to stay put irrespective of market forces.

The emerging tenant countermovement of which these groups are a part is oriented around addressing the concrete manifestations of the housing crisis: evictions, rent increases, landlord harassment, and lack of repairs. And at a deeper level, this countermovement is taking on the economic development and governance framework underlying state-facilitated, market-driven gentrification in neoliberal New York City. This countermovement seeks to undo the laws and policies that have facilitated housing's increasing commodification in the decades following the resolution of New York City's fiscal crisis, and it seeks to construct a new kind of city — one that is first and foremost a home to its residents rather than an agglomeration of real estate assets.

CONCLUSION

This Article evaluates the capacity of the right to counsel to intervene in New York City's escalating affordable housing crisis. Conceived in narrow, procedural terms, the right to counsel is limited to balancing the legal representational playing field in Housing Court eviction proceedings. While this is a concretely valuable intervention that will benefit individual tenants, it leaves intact and may even legitimate the material sources of tenants' economic deprivation. The purpose and design of the right to counsel, however, lead to a more expansive interpretation, as its goal of producing positive substantive outcomes and its contention with private power gesture towards a challenge to the structural forces underlying the housing crisis. This

286. See e.g., Ridgewood Tenants Union (@RidgwdTenantsU), TWITTER, <https://twitter.com/ridgewdtenantsu?lang=en> [<https://perma.cc/6KNH-7KLX>] (last visited Sept. 23, 2019).

287. Representatives from the Crown Heights Tenant Union, Take Back the Bronx, and the Ridgewood Tenant Union outlined their housing and economic development visions at an event entitled *Gentrification and the Real Estate State* on February 25, 2019. See *Gentrification and the Real Estate State*, VERSO (Feb. 25, 2019), <https://www.versobooks.com/events/1883-gentrification-and-the-real-estate-state> [<https://perma.cc/J3N2-3LGP>].

expansive interpretation has been put into practice by the tenants, advocates, and organizers who fought for the right to counsel to become law, and who continue to organize for redistributive and democratizing policy reforms in the sphere of housing.

The current housing crisis has its roots in the post-fiscal crisis neoliberal reorganization of New York City, which circumscribed the city's home rule and inaugurated a mode of governance that has favored market-based solutions to social problems. Seen through the prism of Karl Polanyi's theoretical framework, the neoliberal turn has facilitated the increased separation of the market from society, with the dictates of the former overpowering the institutions of the latter. This process has been constituted legally — for example, by the diminished home rule powers of New York City and the subsequent hollowing out of rent stabilization — resulting in the increased commodification and inaccessibility of housing. It has unfolded along vectors of race, class, and geography, with neoliberal state actors selectively targeting working-class, Black and Brown areas of the city for austerity in the years immediately following the crisis, then effectively revalorizing those same areas in recent years through a raft of initiatives intended to attract private real estate investment.

Against this backdrop, a countermovement of tenants and advocates has come together to organize for social protection against the intensifying inequality and dislocation unleashed by decades of excessive marketization. This countermovement is animated by an expansive framework of legal rights that asserts housing's value as home over its value as real estate. The right to counsel is a component of this rights framework, as organizers have constructed and deployed this right as a means to build the capacities of tenants who are engaged in a struggle for redistributive reforms intended to reverse housing's commodification.

This Article began with a quote from Langston Hughes: "I wish the rent was heaven sent." Hughes suggests, playfully, that salvation — the rent — comes from a higher power. For New York City residents, it will come from everyday people organizing for a city whose development and housing priorities are socially driven, placing property within the reach of redistributive and democratic intervention. The right to counsel, as conceived by the growing, tenant-based countermovement for housing justice, is vital to that task.