

LINE IN THE SAND: PROGRESSIVE LAWYERING, “MASTER
COMMUNITIES,” AND A BATTLE FOR AFFORDABLE
HOUSING IN NEW YORK CITY

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In the fall of 2006, a real estate group led by the father and son team of Jerry and Rob Speyer completed the largest residential real estate deal in U.S. history. For \$5.4 billion, this team purchased the twin housing developments of Stuyvesant Town and Peter Cooper Village, located on the East Side of Manhattan. A small village made up of approximately twenty thousand residents, the complexes were built during the Second World War by the Metropolitan Life Insurance Company as a place where returning servicemen could settle down, start families, and build community. As a booming metropolis grew up around the properties, it became a middle-class enclave within a shining city of steel and glass. When they ultimately decided to put the complexes up for sale, the sellers of the properties touted the potential of the properties to be the “city’s most prominent market-rate master community.”¹ The Speyers and their partners took the bait. Once the investment group completed the purchase of the complexes, they sought to create an income-generating machine by replacing middle-class tenants with wealthier ones seeking a Manhattan address and willing to pay market rents.

In fact, as part of their business plan, the new landlords sought to displace thousands of rent-regulated tenants so that market rents—*Manhattan* market rents—could be charged in the units vacated by outgoing tenants. Led by a crusading elected official, who just

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¹ Brad Lander, *A Very High Stakes Deal*, SHELTERFORCE, Winter 2006, at 8, 10 (quoting the offering circular provided by MetLife), available at <http://www.nhi.org/online/issues/148/highstakes.html>.

happened to be a resident of the complexes, the members of the complexes' tenant association, supported by a host of lawyers from different sectors of the bar, pursued a range of legal avenues to resist the landlords' efforts to convert thousands of units from affordable housing into luxury, market-rate housing.

In many ways, the purchase of the properties at the height of the real estate market, and the subsequent campaign to pursue a high rate of return on the investment to satisfy the debt burden on the properties, is another example of the distortions created by the era of easy credit, which held out the promise of fabulous returns on investment fueled by that credit.² Much of the scholarship on the financial crisis focuses on the impact of the rise and collapse of an overheated home mortgage market on the broader financial system.³ What occurred in Stuyvesant Town and Peter Cooper Village is a symptom of that broader phenomenon, but one that occurred in the rental market, not the home mortgage market. It is a tale of irrational exuberance and aggressive speculation; but the ultimate demise of the landlords' efforts also tells a different story: one of a tenant association, an elected official, and a loose network of attorneys who, together, fought back the attempts of the landlords to displace thousands of rent regulated tenants, not with bulldozers, but trumped up legal claims and an aggressive business plan.

The landlords' efforts were ultimately halted by a recent decision of New York's Court of Appeals, *Roberts v. Tishman Speyer Properties, L.P.*,⁴ which will be highlighted in detail in this article. In that decision, the tenants won a resounding victory that not only barred the landlord from lifting rent regulations on many apartments, but also held that thousands of previously unregulated units will likely have to return to rent regulation.⁵ But this legal victory, as important as it is for those tenants affected by it, tells only one part of the story. The battle for Stuyvesant Town and Peter Cooper Village has been fought not only in the Court of Appeals, but also in hundreds of smaller skirmishes waged in New York City's housing court. There, members of the private bar,

² On the distortions of "easy credit" on the market, see DANIEL GROSS, DUMB MONEY: HOW OUR GREATEST FINANCIAL MINDS BANKRUPTED THE NATION 25–33 (2009).

³ See, e.g., ROBERT J. SHILLER, THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT 29–38, 87–113 (2008) (attributing the financial crisis to overheated expansion of individual home values).

⁴ 13 N.Y.3d 270, 918 N.E.2d 900, 890 N.Y.S.2d 388 (2009).

⁵ *Id.* at 283–84, 918 N.E.2d at 904–05, 890 N.Y.S.2d at 392–93.

together with legal services attorneys, have utilized a range of services—from community education and brief advice to negotiations and full representation—to support the tenants in their attempts to resist the landlords’ campaign to turn as many of the complexes’ units into market rate apartments as possible. Through this coordinated and comprehensive effort, the landlords now teeter on the brink of insolvency, their plans for market rate profits dashed on the steps of not only the state’s highest court, but also one of its “lowest”: the Housing Part of the Civil Court of the City of New York.

This article is organized as follows: Part I provides the context for the landlords’ campaign to deregulate Stuyvesant Town and Peter Cooper Village; reviews the history of the construction of the complexes; and offers an overview of rent regulations in New York City, the erosion of regulated apartments and affordable housing in the city, and the rise of the phenomenon of what some have called “predatory equity”: an influx of investment dollars into the multi-unit residential housing market in New York City that was driven by speculation and a desire for rapid and steep financial returns on those funds. Part II provides a brief overview of the scholarship of progressive lawyering for social change, and attempts to place this review of the legal campaign to stop the landlords’ efforts to deregulate the complexes within that broader scholarship. Part III outlines the elements of this legal campaign, from the brief advice provided by the attorneys involved with the campaign, to the litigation services they offered: from affirmative, impact litigation, to defensive, eviction prevention work. Part IV offers an overview and analysis of the *Roberts* litigation described above. Finally, Part V provides an empirical assessment of the success of the legal campaign in light of the scholarship described in Part II. Part V also includes some questions for future legal campaigns, whether in the housing or other contexts.

I. BACKGROUND: STUYVESANT TOWN, PETER COOPER VILLAGE, AND RENT REGULATIONS IN NEW YORK CITY

A. *Birth of a Development*

Stuyvesant Town and Peter Cooper Village were built in the 1940s to provide affordable rental housing to returning World War II veterans, among other things. Supported by tax breaks, subsidies and New York City’s master builder, Robert Moses, the Metropolitan Life Insurance Company (now MetLife) developed the

buildings to great fanfare. Built in the East Side of Manhattan, just above the Lower East Side, the complexes rose as “towers-in-the-park,” a modern approach to urban planning that was anathema to such critics as Jane Jacobs.⁶

No stranger to the courts, the complexes were embroiled in litigation from their creation. First, displaced tenants filed eminent domain claims to challenge the condemnation of the existing properties for private development⁷ (foreshadowing the fight over the use of eminent domain for private use that culminated in the Supreme Court’s decision on point from earlier in this decade).⁸ Second, once the properties were built and occupied, the developers were sued in the late 1940s for their discriminatory policies that excluded African-Americans from the buildings.⁹ Built before the enactment of the Fair Housing Act,¹⁰ and carrying out discrimination without the use of private covenants that would have been illegal under the Equal Protection Clause of the U.S. Constitution,¹¹ this discrimination was upheld as lawful by New York’s highest court.¹²

After the expiration of the initial tax benefits that helped MetLife construct the buildings, with the total cost to taxpayers of those benefits likely exceeding the cost of construction,¹³ MetLife obtained additional tax benefits from New York State through the so-called “J-51” tax benefit, to help fund repairs at the complexes.¹⁴ One of the conditions of this tax program is that buildings receiving

⁶ Stuyvesant Town and Peter Cooper Village are examples of Le Corbusier’s urban planning philosophy of building residential towers over green space. See ALEXANDER GARVIN, *THE AMERICAN CITY: WHAT WORKS, WHAT DOESN’T* 154–60 (2d ed. 2002). For a critique of the towers in the park approach, see JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 213–15 (1961).

⁷ See *Murray v. LaGuardia*, 291 N.Y. 320, 325, 332, 52 N.E.2d 884, 885, 889 (1943) (upholding use of eminent domain for development of Stuyvesant Town). On the use of eminent domain in urban redevelopment, including the development of Stuyvesant Town, see Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL’Y REV.* 1, 32–34 (2003).

⁸ *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁹ See *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 529, 87 N.E.2d 541, 547 (1949).

¹⁰ 42 U.S.C. §§ 3601–3619 (2006).

¹¹ See *Shelley v. Kraemer*, 334 U.S. 1, 18–21 (1948) (prohibiting racial covenants in housing).

¹² *Dorsey*, 299 N.Y. at 535–36, 87 N.E.2d at 551 (upholding discriminatory rental practices in Stuyvesant Town, despite extensive use of eminent domain in securing parcels on which the development was constructed, on the grounds that there was no state action involved).

¹³ ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 967–68 (1974).

¹⁴ The J-51 Tax Benefit is now codified at section 11-243 of the Administrative Code of the City of New York. N.Y. City Admin. Code § 11-243 (1996 & Supp. 2009).

benefits from it are subject to rent regulations during the life of the benefits, which typically last twenty-five years.¹⁵ But the J-51 benefits were not the only reason the complexes were subject to New York City's rent regulations, as the following discussion shows. The question of whether the complexes were subject to rent regulations, or exemptions to those regulations, would ultimately become the issue that worked its way through the courts, leading to the *Roberts* decision, discussed in greater depth in Part IV, *infra*.

B. Rent Regulations in New York City

There are two types of rent regulations in New York City: rent control and rent stabilization. Roughly half of the city's multi-unit housing is covered by one of these rent regulatory regimes.¹⁶ Rent control, which covers fewer than one-hundred thousand rental units in the city, applies to apartments in buildings with three or more units that were constructed or converted to residential use prior to February 1, 1947, and have been occupied continuously by the same tenant or his or her lawful successor since July 1, 1971.¹⁷ Rent stabilization, on the other hand, applies to buildings built before 1974 that contain six or more residential units in them.¹⁸ Since the buildings in the Peter Cooper/Stuyvesant Town developments all have six or more residential units and were constructed prior to 1971, they are subject to the city's rent regulations.

There are many reasons why units might become exempt from rent regulations, or why a family might lose the rent regulatory status of the apartment in which it resides. For the purposes of this discussion, I will refer to just a handful of these reasons, because they are germane to the Peter Cooper/Stuyvesant Town controversy: luxury decontrol, high rent/high income decontrol, and non-primary residency.

One of the amendments to the rent rules adopted by the New York State Legislature in the 1990s included mechanisms through which landlords could remove apartments from rent regulation.

¹⁵ § 11-243(t).

¹⁶ For the purposes of this discussion, I will use the term "rent regulations" when referring to the general rent protections available under the two schemes. For a description of the many features of rent control and rent stabilization, see ANDREW SCHERER, *RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK* 109–272 (2009–10).

¹⁷ See City Rent and Rehabilitation Law, N.Y. City Admin. Code §§ 26-401 to -415 (1992); see also SCHERER, *supra* note 16, at 127.

¹⁸ Rent Stabilization Law of 1969, N.Y. City Admin. Code §§ 26-501 to -520 (1992 & Supp. 2009).

The main political point the reformers attempted to make was that rent regulations should neither solely benefit the wealthy nor continue to be imposed on units where the rent is already high. As a result, the legislature created two mechanisms through which landlords could exempt certain units from rent regulations: first, so-called “luxury decontrol,” through which high-rent apartments become decontrolled once they become vacant; and, second, high rent/high income decontrol, through which apartments are subject to decontrol when they reach a certain monthly threshold (\$2,000) and the income of the family residing in that unit exceeds \$175,000 per year for two consecutive years.

The first of these, luxury decontrol, operates to exempt an apartment from the rent regulations once it becomes vacant and its rent reaches the \$2,000 monthly mark.¹⁹ When an apartment becomes vacant, there are many routes for the landlord to increase the monthly rent to reach the \$2,000 monthly figure. First, there is a vacancy increase, equal to 20% of the monthly rent, which is tacked on to the rental amount and is statutorily permitted;²⁰ second, there is an increase that the landlord can impose for improvements made to the unit. Through this mechanism, called the “1/40th” increase, landlords can increase the monthly rent by 1/40th (2.5%) of the total cost of improvements made to the apartment while the apartment remains vacant.²¹ For example, if the landlord has an apartment that becomes vacant that rented at \$1,400 a month, he or she can impose a 20% vacancy increase on the monthly rent, and then tack on 2.5% of any improvements he or she makes to the unit. In this example, if those improvements cost at least \$12,840 total, the landlord will meet the \$2,000 monthly rent threshold. Once it meets that threshold, the apartment becomes decontrolled and can be rented at the market rate to the next tenant who fills the vacancy.²²

Similarly, where a particular apartment’s monthly rent exceeds \$2,000, and the combined yearly income of the family members residing in that unit exceeds \$175,000 for two consecutive years,

¹⁹ 1997 N.Y. Laws 1814–15.

²⁰ 1997 N.Y. Laws 1823.

²¹ N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.4(a)(4) (2008).

²² The vacancy increase on an apartment that rents at \$1,400 a month would be 20% of that figure, or \$280. If the landlord makes improvements greater than \$12,840 on that unit, he or she will be able to raise the monthly rent by 2.5% of that figure, or \$321. Adding those figures together raises the rent to over \$2,001 (\$1,400 + \$280 + \$321 = \$2,001). For a further description of the vacancy decontrol mechanism, see Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 *TOURO L. REV.* 187, 199–201 (2009).

that apartment is subject to decontrol, and can then be rented out at a market rate.²³

Finally, rent regulations are supposed to apply only to apartments that are occupied by tenants using such apartments as their primary residence.²⁴ For example, protections are not to apply to individuals who maintain a *pied-à-terre* in New York City, while maintaining a permanent, primary residence elsewhere. If a rent-regulated apartment is not occupied by the tenants of that unit for at least 183 days of a calendar year, it is not considered to be the primary residence of those tenants, and the tenants are subject to eviction as a result.²⁵ The vacancy caused by that eviction allows the landlord an opportunity to push the rent above the \$2,000 threshold for decontrol through the mechanisms described above.

As the following discussion shows, due to these mechanisms, there has been a staggering loss of rent regulated and affordable units in New York City, particularly over the last decade.

C. *The Loss of Affordable Housing and the Rise of Predatory Equity*

According to New York City's Rent Guidelines Board, the city lost a net total of at least seventy-four thousand rent-stabilized units from 1994 through 2007.²⁶ The largest single reason for the loss of regulated units was the "high rent/vacancy decontrol" mechanism described above.²⁷ In 2008 alone, due to some additions to the stock of rent regulated units, a net loss of over eight thousand rent regulated units occurred in that one year.²⁸

In addition to the loss of regulated units, it comes as no surprise to learn that New York City is losing affordable units as well. In 2005, households at the median income for the city could afford only 69% of rental units in the city, a drop from 77% in just three

²³ See SCHERER, *supra* note 16, at 125. In addition to the vacancy and 1/40th increases described above, rent regulations provide for annual or bi-annual increases to the monthly rents of apartments subject to rent regulation according to formulas established by the New York City Rent Guidelines Board. See NYC Rent Guidelines Board, Vacancy Leases, <http://www.housingnyc.com/html/guidelines/vacancy.html> (last visited Apr. 14, 2010).

²⁴ 1997 N.Y. Laws 1823.

²⁵ For a description of the primary residency requirements, see SCHERER, *supra* note 16, at 138–39.

²⁶ See N.Y. CITY RENT GUIDELINES BD., CHANGES TO THE RENT STABILIZED HOUSING STOCK IN NEW YORK CITY IN 2007, at 11–12 (2008), *available at* http://www.housingnyc.com/downloads/research/pdf_reports/changes2008.pdf.

²⁷ *Id.* at 7, 12; see *supra* Part I.B.

²⁸ N.Y. CITY RENT GUIDELINES BD., CHANGES TO THE RENT STABILIZED HOUSING STOCK IN NEW YORK CITY IN 2008, at 8 (2009), *available at* http://www.housingnyc.com/downloads/research/pdf_reports/changes2009.pdf.

years.²⁹ Between 2002 and 2005, the city lost two-hundred thousand rental units affordable to families earning 80% of the city's median income.³⁰ This drop reduced the percentage of rental housing stock attainable by these lower income New Yorkers by 10% in just three years.³¹ It is estimated that another 610,000 units of rental housing will become unaffordable to this lower income population by 2015.³² Furthermore, Housing Here and Now, a coalition with the goal of demanding affordable housing in New York City, estimates that in 2002, 421,304 households in the city paid more than 50% of their monthly income on rent; by 2005, this number increased by nearly 25%, to 526,211.³³ According to more recent data released by the Furman Center at New York University School of Law, "in 2008, 80% of low-income renters in the private rental market were paying more than 30% of their income on rent, and nearly half were paying more than 50% of their income on rent."³⁴

According to the Association for Neighborhood and Housing Development, Inc. ("ANHD"), approximately one-hundred thousand units (about 10% of the regulated rental market) have been purchased by private equity-backed developers.³⁵ At the height of the home mortgage boom, which had its spillover effects on the rental housing market in overheated real estate markets like New York City, these developers were advertising a remarkable rate of

²⁹ FURMAN CTR. FOR REAL ESTATE & URBAN POLICY—N.Y. UNIV., STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS 2007, at 40 (2007) (citation omitted), *available at* http://furmancenter.org/files/sotc/SOC_2007_Final_001.pdf. "Affordability" is defined as having a monthly rent that is 30% or less of a household's gross monthly income. *See* FURMAN CTR. FOR REAL ESTATE & URBAN POLICY—N.Y. UNIV., STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS 2005, at 5 (2005), *available at* http://furmancenter.org/files/sotc/SOC2005_002.pdf [hereinafter FURMAN CTR. REPORT (2005)].

³⁰ FURMAN CTR. REPORT (2005), *supra* note 29, at 8.

³¹ *Id.*

³² HOUS. HERE AND NOW, LOSING GROUND: HOW MIDDLE CLASS, WORKING AND POOR NEW YORKERS ARE BEING PRICED OUT 5 (2007) (citation omitted), *available at* http://www.housinghereandnow.org/downloads/Losing_Ground_Report.pdf.

³³ *Id.* at 8.

³⁴ FURMAN CTR. FOR REAL ESTATE & URBAN POLICY—N.Y. UNIV., KEY FINDINGS ON THE AFFORDABILITY OF RENTAL HOUSING FROM NEW YORK CITY'S HOUSING AND VACANCY SURVEY 2008, at 4 (2009), *available at* http://furmancenter.org/files/publications/Key_Findings.pdf.

³⁵ ASS'N FOR NEIGHBORHOOD AND HOUS. DEV., PREDATORY EQUITY: EVOLUTION OF A CRISIS 7 (2009), *available at* http://www.anhd.org/resources/Predatory_Equity-Evolution_of_a_Crisis_Report.pdf [hereinafter PREDATORY EQUITY]; *see also* ASS'N FOR NEIGHBORHOOD & HOUS. DEV., THE NEXT SUBPRIME LOAN CRISIS: HOW PREDATORY EQUITY INVESTMENT IS UNDERMINING NEW YORK'S AFFORDABLE MULTI-FAMILY RENTAL HOUSING 2 (2008), *available at* <http://www.anhd.org/currentevents/the%20next%20subprime%20loan%20crisis.pdf> [hereinafter THE NEXT SUBPRIME LOAN CRISIS].

return for their investors, often ranging from 14% to 20% per year.³⁶ Such promises were based on business models that necessarily assumed the reduction of the number of rent regulated units in their portfolios, and the displacement of rent regulated tenants.³⁷ In just one 2,124-unit development in Queens subject to purchase by a private equity group, over one thousand eviction cases were filed against the tenants in those buildings over a nineteen-month period.³⁸ Even assuming a conservative strategy of eliminating 10% of the regulated units from their portfolios a year, such an approach would have resulted in a loss of about ten thousand units of affordable housing a year in just these buildings. As the following discussion shows, the sale of Peter Cooper Village and Stuyvesant Town, and the subsequent actions of the purchasers of those complexes, fits squarely within the “predatory equity” model.

D. Sale of Peter Cooper Village and Stuyvesant Town and the Landlords’ Campaign to Bring Units to Market-Rate Rents

The sale of Peter Cooper Village and Stuyvesant Town by MetLife serves as a clear example of the phenomenon of predatory equity: The purchase of a residential development at a high cost with the expectation that rapid turnover in rent-regulated units will lead to their exemption from the rent regulatory system. This exemption of units would ultimately garner the high rate of return that would be necessary to meet investors’ expectations and justify the exorbitant purchase prices for these properties.

Many of the tenants in occupancy at the time of the purchase of the complexes had lived in the buildings for decades; for many of these working- and middle-class tenants, rent regulations made affording an apartment in a Manhattan zip code possible. Once the new landlords purchased the complexes, lawyers working on behalf of those landlords commenced a wide-scale campaign to bring about vacancies in as many units as possible, to increase the percentage of market-rate apartments in the complexes, and meet their income projections through raising rents to the market rate. Attorneys for the landlords commenced investigations of the tenants to determine

³⁶ PREDATORY EQUITY, *supra* note 35, at 7.

³⁷ See Gretchen Morgenson, *Question of Rent Tactics by Private Equity*, N.Y. TIMES, May 9, 2008, at A1; see also THE NEXT SUBPRIME LOAN CRISIS, *supra* note 35, at 4 (“In residential real estate in working class neighborhoods, the major way you increase your rate of return to atypical levels, such as those pledged by private equity funds, is by pushing out low-rent paying tenants.”).

³⁸ Morgenson, *supra* note 37.

if there were arguable grounds for eviction, most often searching for evidence of non-primary residency.³⁹ This broad assault on the tenants was met with stiff resistance from the tenant association in the complexes, elected officials, and attorneys who employed a range of tactics to prevent the wholesale deregulation of units in the complexes.

The following section is a brief departure from the Peter Cooper/Stuyvesant Town story; it provides an overview of the literature on the role of progressive lawyering in bringing about social change. This discussion will serve as a necessary point of departure for analyzing the role of lawyers in preserving affordable housing in the context of the fight over Peter Cooper/Stuyvesant Town.

II. THE CHALLENGES FACING PROGRESSIVE LAWYERS

For as long as there have been progressive lawyers, there have been critics of progressive lawyers, from the right as well as the left. The early litigation of the Civil Rights Movement of the 1950s and 1960s was criticized by those from the right for its focus on advocacy through counter-majoritarian courts that were unsettling cultural mores. At the same time, the movement was criticized by those from the left for its failure to recognize the needs and interests of the entire African-American community, not just those who wanted desegregation promoted as the main focus of the litigation.⁴⁰

Over the years since the early days of the groundbreaking civil rights lawsuits that brought down Jim Crow,⁴¹ the litigation model of progressive lawyering has been used in such fields as poverty law, environmental justice, and gay and lesbian rights.⁴² At the

³⁹ See, e.g., Charles V. Bagli, *Stuyvesant Town Revenues Have Fallen, Report Says*, N.Y. TIMES, July 23, 2008, at B3; Manny Fernandez & Charles V. Bagli, *Tenants Roiled by Challenges on Residency*, N.Y. TIMES, May 27, 2008, at A1.

⁴⁰ For a critique of the litigation model used by the NAACP in the campaign to desegregate public schools, see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471–72 (1976). For a representative example of the conservative critique of the Warren Court's jurisprudence, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 69–100 (1990).

⁴¹ For a description of the legal campaigns to combat segregation, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 548–81 (1976).

⁴² For a description of the emerging field of public interest law in the 1960s, see JOEL F. HANDLER, ELLEN JANE HOLLINGSWORTH & HOWARD S. ERLANGER, *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* 24–29 (1978); Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law,"* 2005 WIS. L. REV. 455, 457–60 (2005). For a

same time, a conservative backlash, most notably in the federal judiciary and in Congress, has made litigating cases in these areas more difficult,⁴³ and has stripped some legal organizations of the federal funding necessary to carry out such litigation.⁴⁴ Moreover, emboldened by the conservative tilt of the federal judiciary, conservative legal groups have even begun to use litigation to serve their own political ends and roll back progressive gains in the courts and legislatures.⁴⁵

In addition, critics from the left have expressed concern that a focus on litigation as a means of progressive social change has meant placing a premium on what lawyers do best, and not what communities necessarily need. According to these critics, lawyer-driven, litigation-focused advocacy displaces energy from grassroots campaigns, diverts attention to lawyer-led campaigns, and ultimately brings about little lasting change.⁴⁶ Critics have argued that strategies that rely on courts alone for redress are limited by the constraints imposed on such courts by the economic, political, and social order, and little lasting change is available where such efforts do not seek to change existing power relations.⁴⁷ Worse still, some lawyer-driven advocacy actually marginalizes clients (who are

description of the “diverse network” of institutions that engage in public interest lawyering, see Scott L. Cummings & Ingrid V. Eagly, *After Public Interest Law*, 100 NW. U. L. REV. 1251, 1251–52 (2006).

⁴³ On the conservative backlash to progressive lawyering, see Michael McCann & Jeffrey Dudas, *Retrenchment . . . and Resurgence? Mapping the Changing Context of Movement Lawyering in the United States*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 45–47 (Austin Sarat & Stuart A. Scheingold eds., 2006).

⁴⁴ For a description on the restrictions on advocacy under Legal Services Corporation regulations, see David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 210–12 (2003).

⁴⁵ For a description of conservative legal movements, see Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223, 1223–25 (2005).

⁴⁶ For examples of this critique, see RICHARD DELGADO & JEAN STEFANCIC, *FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION*, at xv–1 (1994); MICHAEL W. MCCANN, *TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* 206–08 (1986); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 12 (2d ed. 2008); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 3–10 (1974); Richard Abel, *Lawyers and the Power to Change*, 7 LAW & POLY 5, 5–15 (1985); Luke W. Cole, *Empowerment as the Key to Environmental Protections: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 620–21 (1992); see also Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1067 (1970) (arguing that the object of progressive legal advocacy must be to support organizing campaigns that will bring about lasting change).

⁴⁷ For examples of scholarship that promote this critique, see Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 688–89 (1988); Steve Bachmann, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 31–33 (1985).

already rather marginalized) by co-opting the narratives of their struggles to meet the story—typically one of victimization, isolation, and disempowerment—that the lawyer wants to tell in his or her litigation, undermining a counter-narrative of empowerment, individual autonomy, and collective interests.⁴⁸

Another debate that has been waged over decades within progressive lawyering circles, particularly during difficult economic times, is how to serve the ongoing needs of marginalized clients while also pursuing longer-term tactics, like law reform, impact litigation, or community organizing.⁴⁹ While the long-term approaches might yield more lasting political change, the people the advocacy efforts are trying to serve—those on the brink of eviction or foreclosure, those threatened with the loss of their children, or those nearing the end of their unemployment benefits—may suffer real harm while a cautious and orchestrated strategy plays out. Such a strategy may fail to bring about the desired change on the ground for the most vulnerable in a time-frame that is meaningful to them.⁵⁰ Making matters worse, serial cutbacks in federal legal services funding, and restrictions on the uses to which those funds can be directed, make it more difficult to meet even the needs of a fraction of the traditional client base of such programs.⁵¹ Thus,

⁴⁸ Representational scholarship on this critique includes: GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 39 (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2110–11 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 21 (1990). For a counter-critique questioning whether giving primacy to client narratives of empowerment exaggerates their power within embedded social structures, see Frank Munger, *Rights in the Shadow of Class: Poverty, Welfare, and the Law*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 336 (Austin Sarat ed., 2004); Gary L. Blasi, *What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063, 1091–92 (1994); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1101–02 (1994).

⁴⁹ See, e.g., MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 33–34 (1993) (describing tension between law reform and direct services models of service delivery during the 1960s). For an argument that, instead of uncoordinated direct service work, legal services attorneys should use targeted, individual case representation in conjunction with organizing and legislative reform to bring about social change, see Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 122 (1977).

⁵⁰ For a description of the Workplace Project in New York State, where organizing strategies were used in an effective way to complement legal strategies and still generate day-to-day benefits to the organization's members, see JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 78–79 (2005).

⁵¹ It is estimated that eighty percent of the legal needs of the indigent, and forty to sixty percent of the legal needs of the middle class, go unmet. See, e.g., ALBERT H. CANTRIL, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE (1996) (describing legal needs of moderate income Americans), available at

discussions about failing to meet direct needs while lawyers played on law reform projects rang hollow as cutbacks and restrictions made the first difficult, and the second illegal.⁵²

Conscientious and committed progressive lawyers now struggle with these challenges: How to ensure that legal advocacy is meaningful to the lives of clients; that it is grounded in broader movements for political change; that it combines a range of tactics—direct services, mass mobilization, community education and law reform; that it is responsive to the day-to-day needs of the communities those lawyers serve; and that it takes into account the political realities in such a way that a legal victory in one arena will not be snuffed out by a political loss in another.

With these concerns in mind, a belief in the use of the law to promote social change has reemerged, but its use is tempered by and channeled through an approach that is not only tactically flexible, but also responsive and accountable to community interests and needs. This reemergence is most readily apparent in the work of attorneys supporting grassroots labor activism. Scott L. Cummings describes this reemergence as follows:

[L]abor activists have, in fact, begun to leverage a broader range of legal regimes to advance multiple labor goals, from direct worker mobilization to the protection and expansion of unionized industries. For instance, labor activists and lawyers have filed suits under international human rights law to mobilize immigrant workers, asserted claims under local land use law in an effort to block big-box retailers from entering markets dominated by unionized groceries, and

<http://www.abanet.org/legalservices/downloads/sclaid/agendaforaccess.pdf>; LEGAL SERVS. CORP., *SERVING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS: A SPECIAL REPORT TO CONGRESS 13* (2000) (describing unmet legal needs of the poor); ROY W. REESE & CAROLYN A. ELDRED, *LEGAL NEEDS AMONG LOW-INCOME AND MODERATE-INCOME HOUSEHOLDS: SUMMARY OF FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 7–17* (1994) (describing legal needs of low- and moderate-income households). For an argument that it is likely that these studies actually *underestimate* the percentage of unmet legal needs for these populations, see Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 *GEO. J. LEGAL ETHICS* 369, 397–98 (2004).

⁵² On the funding cutbacks and programmatic restrictions on Federal Legal Services grantees, see ALAN W. HOUSEMAN & LINDA E. PERLE, *SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 36–37* (2007), available at <http://www.clasp.org/admin/site/publications/files/0158.pdf> (describing restrictions); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 *STAN. L. REV.* 2027, 2038 (2008) [hereinafter Rhode, *Midlife*] (same). On the tensions over LSC-funded law reform efforts and direct services, see William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 *ST. LOUIS U. PUB. L. REV.* 241, 241–42 (1998).

threatened environmental lawsuits to gain leverage in the negotiation of community benefit agreements with labor-friendly provisions. These efforts suggest that a more fundamental reorientation is under way within the labor movement, with activists adopting a “legal pluralist” approach to organizing that takes strategic advantage of the multiple and intersecting ways in which both employee and employer activities are legally regulated to leverage the power of law to advance labor goals.⁵³

In this way, legal advocacy to support labor activism is consistent with a “more politically integrated, tactically versatile model of legal practice.”⁵⁴ Legal victories are not ends in themselves, but rather “moments in broader campaigns to stimulate collective action and leverage political reform.”⁵⁵ Litigation is “one of many problem solving tools,” and clients are “allies to be educated and empowered for future struggles.”⁵⁶

The work of legal advocates to support low-wage worker mobilization efforts has embraced this movement towards a more accountable and tactically pluralistic approach to progressive lawyering.⁵⁷ In the housing context, similar efforts to support low-income tenant movements have been highlighted by other scholar-practitioners.⁵⁸ Just as in the workers’ rights context, however, thorough empirical analyses of the successes and failures of such progressive campaigns are still lacking.⁵⁹ This analysis is an

⁵³ Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1, 4–5 (2009) (citations omitted).

⁵⁴ *Id.* at 5.

⁵⁵ *Id.* (citation omitted).

⁵⁶ *Id.*

⁵⁷ See, e.g., GORDON, *supra* note 50, at 67–112 (describing work of the Workplace Project in Hempstead, New York); Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 392–93 (2008) (describing legal advocacy with restaurant workers in New York City); Cummings, *supra* note 53, at 9–61 (describing the attempt to provide representation to sweatshop workers in Los Angeles).

⁵⁸ See, e.g., Gary Bellow & Jeanne Charne, *Paths Not Yet Taken: Some Comments on Feldman’s Critique of Legal Services Practice*, 83 GEO. L.J. 1633 app.II at 1664–68 (1995) (describing “Eviction Free Zone” in Massachusetts); Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. (forthcoming 2010) (describing legal advocacy in support of tenant association in Los Angeles); Judith E. Koons, *Fair Housing and Community Empowerment: Where the Roof Meets Redemption*, 4 GEO. J. ON FIGHTING POVERTY 75, 87–95 (1996) (describing techniques utilized to prevent housing displacement due to urban redevelopment).

⁵⁹ As Scott Cummings points out:

While there are a growing number of stories of legal mobilization campaigns outside of the NLRA context, the evidence of their short-term impact and transformative legacy is less developed. Nor is there a detailed empirical picture of the variables that impact success and failure or a comparative analysis of which variables matter across contexts.

attempt to build on the growing efforts to assess the successes and failures of transformative lawyering by analyzing a legal campaign that is being waged to preserve the affordability of housing for a mixed income community in New York City.⁶⁰

In an overheated economy, with an aggressive, well-heeled, and wealthy opponent determined to reap greater profits from its investment, resistance to the forces aligned against the tenants may have seemed futile at the outset. As the following analysis shows, aggressive, comprehensive, strategic, and tactically pluralistic lawyering proved successful in defending this community and defeating the attempts to displace thousands of families from their homes. While this campaign is still underway, some landmark victories have been achieved. It is in analyzing these victories that we may be able to dissect and assess the critical elements of those victories to explain those successes, while also seeking out ways that those victories may have fallen short of the desired or optimal outcomes for the tenants.

With this goal in mind, the following is an analysis of the campaign to preserve Peter Cooper Village and Stuyvesant Town as affordable housing for its residents. As this discussion shows, the attorneys involved in this campaign came from different sectors and utilized different tactics in a comprehensive—though not always coordinated—effort. Through an analysis of this campaign, it is my sincere hope that some critical lessons from the victories and shortcomings of this campaign will emerge to help inform future efforts, in similar but also more far-ranging contexts.

III. ANATOMY OF A CAMPAIGN

A. *Elected Official Leadership*

The campaign to preserve the affordability of the complexes for their residents would not have happened without the leadership of Daniel Garodnick, the member of the City Council of the City of New York whose district included all buildings in the complex.⁶¹ For Garodnick, this fight was personal: he had lived in Stuyvesant

Cummings, *supra* note 53, at 6 (footnote omitted).

⁶⁰ See Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths From Rhetoric to Practice*, 1 CLINICAL L. REV. 157, 160 (1994) (outlining a methodology for “mov[ing] from a rhetorical endorsement of collaborative lawyering toward practical wisdom about how to work with community groups in ways that enhance social justice”).

⁶¹ Telephone Interview with Harvey Epstein, Dir., Urban Justice Ctr., at 16–17 (Dec. 11, 2009) (on file with author).

Town as a child and moved back in as an adult in a market rate apartment in 2004.⁶²

Just six months after Garodnick took office, MetLife announced that it was putting the complexes up for sale. For Garodnick, this had a great impact on his district: roughly 20% of his constituents reside in Peter Cooper Village and Stuyvesant Town.⁶³ Once it became known that the complexes were for sale by MetLife, Garodnick attempted to pull together potential partners who could purchase the complexes with the tenants.⁶⁴ Tishman Speyer's purchase price was too steep for the tenants, whose bid ultimately failed.⁶⁵ Soon after Tishman Speyer purchased the properties, the landlords began asserting claims that many of the rent-regulated tenants in the complexes no longer deserved rent protections and that those apartments should be deregulated.⁶⁶ Garodnick began to work with the tenant association in the complexes to formulate a response to these efforts.⁶⁷ That response had several features: providing tenants with information about their rights, seeking representation of tenants facing eviction, and exploring affirmative litigation to protect tenant interests.

B. Community Education

Garodnick and the tenants organized mechanisms for getting tenants information about both legal developments and their legal rights as tenants. These efforts included the following: a Web-presence, both for the tenant association as well as Garodnick's office, through which information was regularly posted in an effort to communicate information throughout the campaign; newsletters from the tenant association and the council member's office, which routinely gave updates about ongoing developments; and community fora, at which tenants received know-your-rights information and regular updates of the status of negotiations, legislative efforts, and litigation.⁶⁸

In my capacity as a legal services attorney at the time, I spoke at

⁶² Interview with Daniel Garodnick, Member, N.Y. City Council, in N.Y., N.Y., at 1 (Dec. 15, 2009) (on file with author).

⁶³ *Id.*

⁶⁴ *Id.* at 2.

⁶⁵ *See id.*

⁶⁶ *Id.* at 3.

⁶⁷ *Id.*

⁶⁸ *Id.* at 7; Interview with Alvin Doyle, President, Stuyvesant Town-Peter Cooper Village Tenants Ass'n, in N.Y., N.Y., at 5-7 (Dec. 15, 2009) (on file with author).

one of the early tenant meetings after the sale of the complexes to Tishman Speyer.⁶⁹ Over the course of my legal career, I estimate that I have spoken at well over five hundred tenant association meetings. Some have been spirited. Some have been quiet affairs. Some have been held in building lobbies with dozens of tenant association members cramming into a small and crowded space. Some have been in tenant leaders' apartments, with three or four members sitting around a coffee table. This one was palpably different. Well over a thousand tenants filled a local public school auditorium to capacity. The mood was boisterous but anxious, with a low level of tension and unease permeating the room. A number of speakers addressed different features of the predicament facing the tenants: some placed the fight to preserve the complexes' affordability in the larger context of the fight to preserve rent regulations and affordability at the state level; others gave an update on affirmative litigation.

In my presentation, I addressed the rights of the tenants in rent regulated units, and told them what to expect should the landlords attempt to target them for eviction. A common claim asserted by the landlords was that many tenants did not use their apartments in the complexes as their primary residence, i.e., that their city apartment was a secondary home used less than half of the year. I described the law in the area and the evidence they should think about gathering to prove that the apartment was, in fact, their primary residence: proof that they had no interest in a second home; proof of full-time employment in New York City; travel logs showing infrequent travel to a modest vacation home or time share, if they had either. I also addressed the issue of high income/high rent vacancy decontrol and the procedures that the landlords would have to follow to assert that type of claim against a tenant.

I was peppered with questions both during my session and afterwards, by a long line of nervous tenants. Some showed defiance, welcoming a landlord's challenge to their tenancies. Some were fearful, concerned that even a successful defense of their home would cost them thousands of dollars in attorney's fees. Some were terrified, and the anxiety of facing a challenge by the landlord, for them, was enough to make them consider moving, even if it meant

⁶⁹ I joined the faculty of Albany Law School in July 2007, in the early days of the Stuyvesant Town-Peter Cooper Village campaign, but after some of its key features had already been put into place. The descriptions of the tenant association meeting are based on my personal experiences and observations.

surrendering their rent-regulated apartment.

Throughout the campaign, the tenant association and the council member's office coordinated regular meetings like this one, as a means by which tenant association members and other residents could receive ongoing information about developments in the campaign.⁷⁰ An estimated one thousand tenants attended a recent meeting following the successful decision in the *Roberts* litigation, discussed below, at which tenants were informed about what the decision meant for the preservation of affordable housing in the complexes.⁷¹

C. *Walk-in Legal Clinics and Warm Line*

Another key feature of the campaign, which developed as a response to the efforts on the part of the landlords to target tenants for deregulation, was a group of interventions to identify tenants in need of legal assistance and communicate legal advice to them: first, a series of walk-in legal clinics was started by a group of legal services providers; second, a legal telephone "warm line" was set up for tenants to call in for legal advice and referrals.

The walk-in legal clinics were created by a team of non-profit legal services providers⁷² so that tenants would have quick, easily-accessible, and effective advice on how to handle any efforts by the landlords to challenge those tenants' rent regulated status or deregulate their apartments.⁷³ The clinics were held monthly beginning in the spring of 2007. They occurred in the evenings—so that working tenants would not have to miss work to attend the sessions—in classrooms in a public school building close to the complexes. At these clinics, as many as six teams of lawyers would meet with tenants who either had received from the landlords' legal papers challenging their tenancies or had feared they would one day face such a challenge. The tenants would gather in a nearby classroom and sign in with staff members of Council Member Garodnick's office. They were seen in the order of their arrival. The waiting room would be buzzing with conversations as neighbors and

⁷⁰ Interview with Alvin Doyle, *supra* note 68, at 6–7.

⁷¹ *Id.* at 13.

⁷² The team comprised of members of the Legal Services for the Working Poor coalition: CAMBA Legal Services, Housing Conservation Coordinators, Northern Manhattan Improvement Corporation, and the Urban Justice Center.

⁷³ The description of these walk-in legal clinics comes from my observations and experiences staffing these clinics in the spring and early summer of 2007, when I was a staff member at the Urban Justice Center.

fellow tenants would share their own stories and fears. Tensions would sometimes run high as anxiety over busy schedules, child care concerns, and frayed nerves were exacerbated by long waits to meet with the attorneys.

In the classroom where the tenants would meet with the lawyers, groups of lawyers and tenants met in separate clusters of school desks set up a respectful distance from each other. Tenants would present the papers they received from the landlord for review by the attorneys. Tenants who had not yet received papers would share their concerns and ask how they could protect themselves. Residents from all walks of life would cycle through the sessions: individuals on disability insurance, retirees on fixed incomes, public school teachers, attorneys, and diplomatic staff from the United Nations (the U.N. headquarters are within walking distance of the northernmost buildings in the complexes), to name a few.

For many of those tenants who had received legal notices, the notices alleged that the tenants did not maintain their apartments in the complexes as a primary residence, an allegation that, if true, would result in their eviction. For some of these tenants, such as snowbird retirees who spent just a few months out of the year in New York City and the majority of their time in warmer climates, the allegations were legitimate. For the overwhelming majority of the tenants who came through the clinic, however, the allegations were wildly off the mark. For some tenants, the landlords' search of property records found an individual with the same or similar name owning property in another borough or state; for the landlord, this was enough to generate a challenge to those tenants' tenancies. For others, the ownership of an unweatherized, summer beach cottage in working class beach communities in Queens or New Jersey was enough to be targeted by the landlords. Still others might have co-signed a rental lease or a mortgage for a child leaving college; again, this was enough "evidence" for the landlords to pursue eviction actions against them.

At these initial conferences with the tenants who had received legal papers, the lawyers would help tenants think about what evidence they might need to refute the landlords' claims, and advise them to start gathering what evidence they could: drivers' license information, voter registration data, employment verification, and other forms of evidence that would tend to prove a tenant's use of an apartment as his or her primary residence. Similarly, tenants who had not yet received legal papers threatening their tenancy, but who feared they soon would, were given similar advice: start

thinking about and gathering evidence that might refute any claims challenging tenancies. For tenants who just wanted legal advice to put them at ease, the lawyers would assess the strength of potential cases against such tenants to determine if any such challenge might be colorable. Sometimes such information would ease the tenants' fears; if it appeared that the landlord might actually have a viable claim against such tenants, it would exacerbate those fears.

After conducting these sessions for several months, the Urban Justice Center ("UJC"), concerned that the monthly clinics were not convenient for all tenants, established a "warm line"—a telephone call-in number through which tenants seeking assistance could leave a message for an attorney, who would return the call and provide the same type of advice that was being dispensed at the walk-in clinics.⁷⁴ In this way, tenants could call when it was convenient for them, and hopefully receive a call back at a time that was similarly convenient. Soon, the clinics were discontinued and resources were directed towards the warm line.⁷⁵ In fact, Council Member Garodnick was instrumental in securing funding for the warm line through the City Council's appropriations process. As of December 2009, this warm line was still in operation. Throughout 2008 and into 2009, the UJC received an estimated one hundred calls per month.⁷⁶ Since the *Roberts* decision—and after the landlords had identified all of the tenants whose tenancies they wished to challenge,⁷⁷—the number of calls received a month has diminished considerably.⁷⁸

The legal advice and information tenants received at the walk-in sessions and from the warm line put them at ease. They gained confidence that, although they might face a legal challenge to their tenancies, the law favored their side and the landlords' claims lacked merit. While they might face an eviction proceeding, their chief fear—that they would lose their regulated apartment and face eviction from their home—seemed unfounded. For some tenants,

⁷⁴ Telephone Interview with Harvey Epstein, *supra* note 61, at 5–6.

⁷⁵ *Id.* at 5.

⁷⁶ *Id.* at 6.

⁷⁷ In order to evict a tenant believed not to be using his or her apartment as a primary residence, the landlord must serve the tenant with a notice in advance of the termination of the lease currently in effect. Since many tenants are on two-year lease cycles, once the landlord has spent two years identifying all tenants he or she believes are not using their apartments as their primary residence, he or she would have gone through all the tenants in a given building. See SCHERER, *supra* note 16, at 635, 655–56; Telephone Interview with Harvey Epstein, *supra* note 61, at 6; Interview with Daniel Garodnick, *supra* note 62, at 4.

⁷⁸ Telephone Interview with Harvey Epstein, *supra* note 61, at 1.

the fear of facing court without representation, the anxiety of living under a cloud of uncertainty about the status of their tenancy, or the expense that paying an attorney to defend their home might entail, was enough to drive them to begin to look for other housing options and consider surrendering their apartments. Before the walk-in legal clinics and the availability of information through community education settings, tenants most likely abandoned their apartments without the knowledge that they had defenses to the landlords' allegations against them. With information about their rights, they were empowered to stay and resist the landlords' efforts to evict them.⁷⁹

At the time, although these measures were helpful, brief advice alone would not suffice to protect those tenants facing legal challenges to their tenancies and the prospect of eviction cases being filed in court. Accordingly, the legal services attorneys developed a comprehensive eviction prevention strategy to ensure, to the fullest extent possible, that every tenant facing eviction would benefit from having access to an attorney in an eviction proceeding.

D. Eviction Prevention

A critical component of the campaign to preserve the tenancies of residents of the complexes was making legal representation available for tenants facing formal eviction proceedings. Due to the household income of many of the complexes' residents, many did not qualify for services under Legal Services Corporation income restrictions.⁸⁰ Fortunately, the Legal Services for the Working Poor ("LSWP") coalition received funding from the City Council to serve clients whose income exceeded traditional legal services income restrictions.⁸¹ For example, this funding permitted them to serve a family comprised of an individual tenant earning as much as \$40,000 per year, or one where the combined income in the household was as much as \$77,000 per year for a family of four with

⁷⁹ Harvey Epstein described the initial impact of the advice provided as follows:

So they saw an initial exit of some stabilized units. But after that people just became educated, weren't scared and fought. . . . People who couldn't afford a lawyer got free lawyers, people who could afford a lawyer had access to private lawyers who were good and knew what they were doing. So the whole system was put into place to protect those tenants.

Telephone Interview with Harvey Epstein, *supra* note 61, at 8.

⁸⁰ Legal Services Corporation restrictions limit representation to families whose income does not exceed 125% of the federal poverty line. 45 C.F.R. § 1611.3 (2009).

⁸¹ Telephone Interview with Harvey Epstein, *supra* note 61, at 11.

two school-aged children.⁸² For the many tenants whose income exceeded even these broader limits, the legal services providers assembled a list of private landlord-tenant lawyers who represented tenants in eviction proceedings.⁸³ If one of the LSWP attorneys determined that a tenant's income exceeded the LSWP income restrictions, he or she would receive a referral to the private attorneys on the list.⁸⁴

In this way, the walk-in legal clinics and the warm line served an additional function, beyond simply giving legal advice. These outlets served as avenues through which tenants could be screened for their income eligibility for full representation by the legal services attorneys, or could be referred (if they did not qualify for legal services due to their income) to private attorneys. With this dual-pronged strategy—representation for those who qualified and referrals for those who did not—the campaign was able to ensure that everyone who needed an attorney would at least have access to one. The cost associated with securing counsel might have been prohibitive for those who did not qualify for free legal assistance due to their income.⁸⁵ Others might have decided to forgo representation or abandon any defense of their apartment, either because of the cost of defending against the claim or their belief in the weakness of their position.⁸⁶ Nevertheless, tenants visited the clinics or called the warm line seeking legal representation or were referred to private attorneys.

For some tenants, brief assistance was sufficient. In fact, Harvey Epstein estimates that in 80% of the eviction cases in which the UJC provided assistance, the legal services attorneys were able to force the landlords to abandon proceedings against the tenants—or not formally file them in the first place.⁸⁷ And after just the first year of providing assistance to tenants in the complex, as many as one thousand tenants were given assistance, with an additional five hundred to one thousand receiving assistance by the end of 2009.⁸⁸

⁸² DIANA PEARCE, THE SELF-SUFFICIENCY STANDARD FOR THE CITY OF NEW YORK 2004, at 80 tbl.4 (2004), available at <http://www.unitedwaynyc.org/?id=69>. The Urban Justice Center contract to perform these services is pegged to the self-sufficiency standard set forth in this report. See Contract between New York City and Urban Justice Center, at Exhibit A(1)(A) (Apr. 22, 2009) (on file with author).

⁸³ Telephone Interview with Harvey Epstein, *supra* note 61, at 10.

⁸⁴ *Id.* at 11.

⁸⁵ Telephone Interview with James B. Fishman, Senior Partner, Fishman & Neil, LLP, at 4 (Jan. 18, 2010).

⁸⁶ *See id.*

⁸⁷ Telephone Interview with Harvey Epstein, *supra* note 61, at 3.

⁸⁸ *Id.* at 8 (one thousand tenants assisted in first year); *id.* at 12 (total of one thousand five

Private attorney James Fishman worked out an approach with attorneys for the landlord under which the landlord could review evidence of tenants' primary residency and could even conduct pre-litigation depositions or hold more informal face-to-face meetings with tenants to probe the strength of their evidence.⁸⁹

Where full representation was necessary, attorneys were able to represent tenants in these cases if they were eligible for representation by the UJC or could afford an attorney. Some tenants who were over income for legal services assistance, yet could not afford an attorney, could try to proceed pro se or had to abandon the defense of their homes because the cost associated with defense was prohibitive.⁹⁰ Even if they were victorious in that defense, they could not recover the cost of the litigation because the leases in the complexes did not provide for fee shifting at the conclusion of litigation arising under the lease.⁹¹ As a result, at least some tenants abandoned the defense of their home, either because of the merit of the landlords' claims or that the defense was too costly.

E. Affirmative Litigation

The final piece of the puzzle was the affirmative litigation brought by non-regulated tenants pursuing rent regulatory status for all units in the complexes, despite several exemptions from the rent regulations that arguably applied there. The main claim of the litigation was that because the complexes were still receiving J-51 tax breaks, the landlords could not take advantage of those exemptions. According to Council Member Garodnick, the issues that the lawsuit would raise were first identified while the tenants were exploring whether to put together an offer to purchase the complexes.⁹² The litigation that ultimately ensued is described, in detail, in the next section.

hundred to two thousand tenants assisted through campaign).

⁸⁹ Telephone Interview with James B. Fishman, *supra* note 85, at 3.

⁹⁰ James Fishman would often inform tenants that they could expect to pay between \$10,000 and \$20,000 to defend against an eviction proceeding. *Id.* at 4.

⁹¹ *Id.* at 3.

⁹² Interview with Daniel Garodnick, *supra* 62, at 4.

IV. VICTORY AT THE COURT OF APPEALS AND ITS IMPACT

A. *The Legal Issues*

At the crux of the affirmative litigation was whether landlords enjoying J-51 tax breaks could remove apartments from rent regulations in the buildings they owned that were covered by those tax breaks.⁹³ Amendments to the rent laws that were passed in the 1990s provided for the removal of apartments from rent protections in two scenarios: first, when an apartment's rent level reached over \$2,000 per month through the rent increase process and the tenants in the unit had a combined annual income of \$175,000 per year over two consecutive years; and second, when the rent in a vacant apartment reached over \$2,000 per month through the rent increase process.⁹⁴ If an apartment qualified for either of these two exemptions, the apartment could be rented out free of all restrictions at whatever price the market would bear. Lawyers for the tenants argued that, by the express terms of the tax breaks that the original landlords had applied for and received—and which were still in effect—the landlords were barred from removing any apartments in the complexes from the rent regulations, despite the mechanisms described above.⁹⁵

The J-51 tax benefit program creates incentives for landlords to pursue certain major capital improvements in their buildings by offering tax exemptions or tax abatements for a period of years. While those tax benefits are in force, however, the regulations provide that buildings receiving the tax benefits shall be subject to rent regulations. Specifically, the authorizing language of the tax exemption program provides in relevant part, with respect to rent regulation, as follows:

Rent regulatory requirements. (1) Rent regulation generally mandatory. In order to be eligible to receive tax benefits under the Act and for at least so long as a building is receiving the benefits of the Act . . . all dwelling units in

⁹³ J-51 tax breaks were authorized by section 489 of the Real Property Tax Law. N.Y. REAL PROP. TAX LAW § 489 (McKinney 2008).

⁹⁴ Rent Regulation Reform Act of 1997, 1997 N.Y. Laws 220. The original Rent Regulation Reform Act, passed in 1993 and which instituted these two exemptions, set the income threshold of \$250,000 per year per household. 1993 N.Y. Laws 2667–2681; N.Y. City Admin. Code §§ 26-504.1 to 504.2 (1996 & Supp. 2009). That threshold was lowered in 1997 to the \$175,000 figure. 1997 N.Y. Laws 218.

⁹⁵ Consolidated Class Action Complaint at ¶ 41, *Roberts v. Tishman Speyer Props., L.P.*, No. 100956/07 (Sup. Ct. N.Y. County Mar. 6, 2007), 2007 WL 6883629.

buildings or structures converted, altered or improved shall be subject to rent regulation pursuant to:

- (i) the City Rent and Rehabilitation Law (§ 26-401 et seq. of the Administrative Code); or (ii) the Rent Stabilization Law of 1969 (§ 26-501 et seq. of the Administrative Code); or (iii) the Private Housing Finance Law; or (iv) any federal law providing for rent supervision or regulation by HUD or any other federal agency; or (v) the Emergency Tenant Protection Act of 1974.⁹⁶

In addition to this language, the 1993 amendments to the rent laws carved out an exemption to its decontrol provisions for buildings covered by J-51 tax breaks as follows: “[T]his exclusion shall not apply to housing accommodations which became or become subject to this law (a) by virtue of receiving tax benefits pursuant to section . . . four hundred eighty-nine of the real property tax law.”⁹⁷

Several years after passage of the 1993 amendments to the rent regulations, the Division of Housing and Community Renewal (“DHCR”) issued an advisory opinion which stated that the exemption from the decontrol provision of the 1993 amendments only applied “where the receipt of [J-51] benefits is the sole reason for the accommodation being subject to rent regulation.”⁹⁸ In 2000, DHCR amended the Rent Stabilization Code (the regulations governing rent stabilization) to conform with the prior advisory opinion. With those amendments, the regulations provided that luxury decontrol did not apply to buildings receiving J-51 tax benefits “solely by virtue of the receipt of [J-51] tax benefits.”⁹⁹

The critical issue for the application of these exemptions was whether the legislature intended them to extend to buildings that received J-51 tax benefits. Critical to this determination was the question of what the legislature meant when it said the exemptions would not apply to buildings that were subject to rent regulation “by virtue of” receiving tax benefits. Some buildings, most notably buildings built after 1974, are generally exempt from rent regulation. The main reason why they would not be exempt from rent regulations is if they receive a J-51 tax benefit, or other similar

⁹⁶ 28 R.C.N.Y. § 5-03(f) (2008). The regulations provide an exemption from coverage for buildings that are either cooperatives or condominiums or newly constructed cooperatives and condominiums. 28 R.C.N.Y. § 5-03(f)(2) (2008).

⁹⁷ N.Y. City Admin. Code §§ 26-504.1 to 504.2 (1996 & Supp. 2009).

⁹⁸ *Roberts v. Tishman Speyer Props., L.P.*, No. 0100956/07, 2007 WL 2815093, at *6 (Sup. Ct. N.Y. County Aug. 16, 2007) (quoting DHCR Opinion Letter).

⁹⁹ Rent Stabilization Code, N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.11 (2000).

benefit, that might continue the coverage of rent regulations. Other buildings are covered by rent regulations for other reasons: e.g., they were built before 1974 and have six or more residential units. If such buildings qualify for rent regulations and receive J-51 benefits there would be *two* reasons why they would be covered by rent regulations. The key question, then, is whether by saying that luxury decontrol in buildings is subject to rent regulation “by virtue of” receiving J-51 benefits, the legislature only intended to exempt those buildings from luxury decontrol where those buildings were only subject to rent regulations because of the J-51 tax benefits. In other words, did the legislature intend to apply luxury decontrol in buildings that might have another basis for rent regulation, in addition to J-51, but also received the J-51 benefits?

This interpretation—that the luxury decontrol provisions would only apply to buildings that had other bases of rent regulation other than J-51 (but that also enjoyed J-51 benefits)—was consistent with DHCR’s interpretation, found first in its 1996 advisory opinion and then enshrined in the rent regulations themselves. Because of this administrative agency’s interpretation of the law, in order for the plaintiffs to be successful in their action challenging that interpretation, they would not only have to show that the defendants had misinterpreted the law, but also that the agency’s interpretation of the law was not entitled to deference by the courts.

B. The Decisions of the Lower Courts

Two months after the complexes were purchased by the landlords, a small group of current and former tenants of the complexes filed suit in New York State Supreme Court, alleging that units that were previously subject to rent regulation were improperly deregulated through the process of luxury decontrol.¹⁰⁰ The plaintiffs argued that the J-51 tax benefits that still applied in the buildings prevented the prior and new landlords from deregulating units pursuant to luxury decontrol or high rent/high income decontrol.¹⁰¹ While Metropolitan Life had originally obtained twenty-five-year tax benefits when it constructed the buildings, it had applied for and received additional benefits, pursuant to the J-51 program, that extended tax benefits through 2017.¹⁰² The

¹⁰⁰ Consolidated Class Action Complaint, *supra* note 95, ¶¶ 57–59; *see also Roberts*, 2007 WL 2815093, at *4.

¹⁰¹ Consolidated Class Action Complaint, *supra* note 95, ¶¶ 57–59.

¹⁰² *Id.* ¶¶ 26, 30.

plaintiffs alleged that an estimated three thousand units, or more than 25% of the complexes, had been improperly deregulated using the luxury decontrol mechanisms.¹⁰³ The plaintiffs further alleged that these mechanisms were not available to the landlords (both the old and new) due to the fact that the buildings were still receiving J-51 benefits.¹⁰⁴ The plaintiffs sought to recover rent that was charged and collected from tenants in excess of the legal regulated rents for those deregulated apartments, going back as far as the statute of limitations on such charges would allow, attorneys fees, and a declaratory judgment that the complexes should remain subject to rent regulation for the life of the J-51 benefits still in place.¹⁰⁵

The defendants moved to dismiss the action on the grounds that the plaintiffs had failed to state a cause of action.¹⁰⁶ The defendants argued that, consistent with the agency's interpretation, the exemptions to the luxury decontrol provisions only applied to buildings that were subject to rent regulation solely because of their receipt of J-51 benefits.¹⁰⁷ Those exemptions did not apply if a building was subject to rent regulation for another reason. Because Peter Cooper Village and Stuyvesant Town were both subject to rent regulation based on the fact that each building in the development was built prior to 1974 and contained six or more units in each building, the J-51 benefits that the landlords enjoyed for those buildings were not the "sole" reason for the application of rent regulations to those buildings. As a result, the defendants argued, the exemptions to the luxury decontrol provisions were fully applicable to the complexes, and the deregulation of apartments in those complexes was consistent with both the law and the agency interpretation of that law.¹⁰⁸ The judge hearing the matter agreed.¹⁰⁹

In an opinion issued in August 2007, Justice Lowe of the state supreme court sided with the defendants.¹¹⁰ Finding that the complexes had become subject to rent regulation in 1974—eighteen years prior to applying for the J-51 tax benefits which they

¹⁰³ *Id.* ¶ 45.

¹⁰⁴ *Id.* ¶ 43.

¹⁰⁵ *Id.* at ad damnum clause (containing the relief sought).

¹⁰⁶ *Roberts v. Tishman Speyer Props., L.P.*, No. 0100956/07, 2007 WL 2815093, at *3 (Sup. Ct. N.Y. County Aug. 16, 2007).

¹⁰⁷ *Id.* at 5.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 6.

¹¹⁰ *Id.*

presently enjoyed—they were not subject to rent regulation solely “by virtue of receiving J-51 tax benefits.”¹¹¹ The court went on to note that the state legislature had not amended the rent statutes after DHCR issued the regulations which adopted the use of the term “solely” in assessing when the luxury decontrol provisions would apply, and this failure to correct DHCR’s interpretation constituted an endorsement of that interpretation.¹¹²

The plaintiffs appealed Justice Lowe’s decision to the Appellate Division, First Department. There, the plaintiffs were ultimately successful in convincing the appellate panel that the defendants’ and DHCR’s interpretation of the luxury decontrol statute was erroneous.¹¹³ The panel chose not to defer to the agency’s interpretation of the luxury decontrol statute, finding that in this instance “the question is one of pure statutory reading and analysis, dependent only on an accurate apprehension of legislative intent.”¹¹⁴ As a result, “there is little basis to rely on any special competence or expertise of the administrative agency.”¹¹⁵ “On such occasions,” the court added, “the courts are free to ascertain the proper interpretation from the statutory language and intent and may undertake the function of statutory interpretation without any deference to the agency’s determination.”¹¹⁶ As a result, “[s]ince . . . the interpretation of the provisions in question requires no special competence, or understanding of underlying practices on the part of the DHCR, we find unavailing defendants’ reliance on the DHCR’s regulations and opinion letter and conclude that the agency’s construction of the statute is not entitled to deference.”¹¹⁷

Turning to the statute itself, the court concluded that the language “by virtue of” in the luxury decontrol legislation means “because of” or “by reason of”, but “does not, in ordinary language, mean that only a single cause or reason exists.”¹¹⁸ The court referenced other instances where the legislature uses the phrase “only by virtue of” or “solely by virtue of” when it intended to restrict

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Roberts v. Tishman Speyer Props., L.P.*, 62 A.D.3d 71, 83, 874 N.Y.S.2d 97, 106 (App. Div. 1st Dep’t 2009).

¹¹⁴ *Id.* at 80, 874 N.Y.S.2d at 104 (quoting *Kurcsics v. Merchs. Mut. Ins. Co.*, 49 N.Y.2d 451, 459, 403 N.E.2d 159, 167, 426 N.Y.S.2d 454, 461 (1980)).

¹¹⁵ *Id.*

¹¹⁶ *Id.* (citations omitted).

¹¹⁷ *Id.* at 80–81, 874 N.Y.S.2d at 105.

¹¹⁸ *Id.* at 81, 874 N.Y.S.2d at 105 (citation omitted).

a provision to a single cause.”¹¹⁹ The court also cited a decision of the U.S. Fifth Circuit Court of Appeals, which held in a different context that the language “by virtue of” does not imply exclusivity.”¹²⁰ The court also concluded that the plaintiffs’ interpretation of the statute was more consistent with the overall statutory scheme of rent regulations, which “makes no distinction based on whether a J-51 property was already subject to regulation prior to receipt of such benefits.”¹²¹ Finally, the court found that to exempt from luxury decontrol buildings which would not be subject to rent regulation but for their J-51 status, while permitting buildings that had other, independent bases of rent regulation to become subject to luxury decontrol “is to invite absurd and irrational results.”¹²² In the end, the appellate division panel concluded that “[s]ince there is no basis for limiting the scope of the [J-51] exemption [from luxury decontrol], the motion court’s insertion of the word ‘solely’ into the statute was impermissible.”¹²³

C. *The Decision of the Court of Appeals*

The landlords turned quickly to the Court of Appeals to seek review of the appellate division’s ruling, and were able to obtain expedited consideration of their appeal. The high court summarized the statutory argument of the defendants as follows:

PCV/ST and MetLife argue principally that the relevant exception to luxury decontrol applies only to accommodations that “became or become” subject to the RSL “by virtue of receiving tax benefits pursuant to section . . . four hundred eighty-nine of the real property Tax Law [J-51 benefits].” And since the word “become” means to “pass from a previous state or condition” or to “take on a new role, essence, or nature,” a rental unit can “become” subject to the RSL only when it passes from being unregulated to being regulated—i.e., when its status changes on account of the owner’s receipt of J-51 benefits. By contrast, a rental unit does not “become” subject to the RSL by virtue of receiving J-51 benefits if it was already subject to rent stabilization. According to

¹¹⁹ *Id.*

¹²⁰ *Id.* at 83, 874 N.Y.S.2d at 106 (quoting *Demette v. Falcon Drilling Co.*, 280 F.3d 492 (5th Cir. 2002))

¹²¹ *Id.* at 83, 874 N.Y.S.2d at 106.

¹²² *Id.*

¹²³ *Id.* at 84, 874 N.Y.S.2d at 107.

PCV/ST and MetLife, if the legislature had intended to preclude luxury deregulation for all rent-stabilized apartments receiving J-51 benefits, it would have omitted the phrases “became or become” and “by virtue of” from the statute, and simply written that the exception did not apply to accommodations “receiving” such tax benefits. They note that the legislature used this latter phraseology in RSL § 26-504(c) (referring to “Dwelling units in a building or structure receiving the benefits of [J-51]”).¹²⁴

The Court of Appeals, like the appellate division below, chose not to defer to the interpretation of the statute by the DHCR, agreeing with the lower court that the question before the court was one of pure statutory interpretation, not one that required any special expertise that a regulatory agency might have.¹²⁵ Moreover, the court cited its own precedent for the proposition that a regulatory interpretation that “runs counter to the clear wording of a statutory provision . . . should not be accorded any weight.”¹²⁶

Turning to the statute itself, the Court of Appeals found that the defendants’ interpretation of the terms “became or become” subject to rent regulation and “by virtue of receiving” J-51 benefits “conflicts with the most natural reading of the statute’s language.”¹²⁷ It summarized its disagreement with the defendants’ as follows:

Defendants essentially read these words as recognizing two categories of J-51-benefitted buildings—those, like the properties, that were rent-stabilized prior to receiving J-51 benefits, for which luxury decontrol became available in 1993; and those that only became rent-stabilized as a condition of receiving J-51 benefits, for which luxury decontrol is unavailable (at least during the benefit period). But there is no language anywhere in the statute delineating these two supposed categories, and we see no indication that the Legislature ever intended such a distinction—one that never occurred to anyone, so far as this record shows, until after the present lawsuit was brought. Contrary to PCV/ST’s and MetLife’s argument, there is nothing impossible, or even

¹²⁴ *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270, 284, 918 N.E.2d 900, 905, 809 N.Y.S.2d 388, 393 (2009) (citations omitted).

¹²⁵ *Id.* at 285–86, 918 N.E.2d at 905–06, 890 N.Y.S.2d at 393–94.

¹²⁶ *Id.* at 285, 918 N.E.2d at 906, 890 N.Y.S.2d at 394 (quoting *Kurcsics v. Merchs. Mut. Ins. Co.*, 49 N.Y.2d 451, 459, 403 N.E.2d 159, 167, 426 N.Y.S.2d 454, 461 (1980)).

¹²⁷ *Id.* at 286, 918 N.E.2d at 906, 890 N.Y.S.2d at 394.

strained, about reading the verb ‘become’ to refer to achieving, for a second time, a status already attained.¹²⁸

The court then turned to the legislative history of the Rent Regulation Reform Act and found that the Senate sponsor, Senator Hannon, was asked about the extent to which a landlord who received J-51 tax benefits to construct a building would be able to benefit from the luxury decontrol provisions of the RRRRA. In response, Sen. Hannon remarked as follows: “[S]hould the exemptions contained in section 489 end, that’s—those J.51s and 489s end, then they would be subject so that at no point do you have the [luxury] decontrol provisions applying to the buildings which have received the tax exemptions that I just mentioned.”¹²⁹

The dissent noted that since this response was to a question about buildings *built* with J-51 tax credits (i.e., buildings that would not otherwise be subject to rent regulation), certainly this meant that the sponsor of the legislation was speaking to the issue only of buildings that would not otherwise be subject to rent regulation if not for the J-51 tax benefits.¹³⁰ The majority opinion dismisses this reading, however. It notes that since Sen. Hannon stated that “at no point” would buildings subject to J-51 tax benefits be subject to luxury decontrol, “it cannot be argued that the thrust of that statement indicates otherwise”; in other words, clearly the Senate sponsor meant the phrase “at no point” to refer to any building subject to J-51 tax benefits, not just those made subject to rent regulations solely because of their tax benefit status.¹³¹

The court agreed with the appellate division that legislative inaction in the face of the DHCR’s interpretation of the statute, erroneous as it may have been, should not indicate legislative acquiescence in that interpretation. Indeed, the court found that “[l]egislative inactivity is inherently ambiguous and ‘affords the most dubious foundation for drawing positive inferences.’”¹³² Nevertheless, the court determined that although the legislature has reviewed the rent rules since the DHCR amendment to the regulations, it would not read anything into its silence with respect to the agency’s interpretation because “there is no indication that the specific question presented here—that DHCR’s interpretation is

¹²⁸ *Id.*

¹²⁹ *Id.* (citation omitted).

¹³⁰ *Id.* at 291–92, 918 N.E.2d at 910–11, 890 N.Y.S.2d at 398–99 (Read, J., dissenting).

¹³¹ *Id.* at 287, 918 N.E.2d at 906–07, 890 N.Y.S.2d at 394–95.

¹³² *Id.* at 287, 918 N.E.2d at 907, 890 N.Y.S.2d at 395 (quoting *Clark v. Cuomo*, 66 N.Y.2d 185, 190–91, 486 N.E.2d 794, 495 N.Y.S.2d 936 (1985)).

improper and conflicts with the plain language of the statute—had been brought to the Legislature’s attention.”¹³³

Finally, the court took into account the fact that the defendants urged the judges to consider the potential effects of a ruling adverse to the defendants. The court noted that there were still many issues left to be resolved in the litigation; more importantly, the court could not turn away from its interpretation of the statute:

Defendants predict dire financial consequences from our ruling, for themselves and the New York City real estate industry generally. These predictions may not come true; they depend, among other things, on issues yet to be decided, including retroactivity, class certification, the statute of limitations, and other defenses that may be applicable to particular tenants. If the statute imposes unacceptable burdens, defendants’ remedy is to seek legislative relief. Moreover, the dissent predicts that our decision will cause “years of litigation over many novel questions to deal with the fallout from today’s decision.” That the courts and litigants may experience some additional burden, however, is no reason to eschew what we view as the only correct interpretation of the statute.¹³⁴

D. The Impact of the Decision of the Court of Appeals

The decision of the Court of Appeals has had a powerful impact on the campaign to protect the complexes from deregulation. For the thousands of units believed to have been decontrolled through either the high rent/high income or through high rent/vacancy mechanisms, the rents on those units will likely have to be rolled back to below-market rents, as if the rent regulations were never lifted. As the Court of Appeals pointed out, however, there are many unresolved issues, such as the impact of the statute of limitations on rent overcharge claims and whether the ruling is to be applied retroactively.¹³⁵ Nevertheless, the litigants are moving

¹³³ *Id.* (citation omitted).

¹³⁴ *Id.* (citation omitted).

¹³⁵ It is hard to imagine that the ruling would not be applied retroactively, so it is unclear why the Court of Appeals mentioned the issue of retroactivity. The court made clear that the statute is unambiguous in its meaning; and thus, any apartment that has been deregulated under it, despite the J-51 tax benefit presently in place, certainly cannot be considered a market rate apartment at this time. When mentioning retroactivity, then, perhaps the court was referring to, and not ruling upon, the potential retroactive effect of the ruling in terms of supporting a rent overcharge claim for tenants who have seen their rents exceed what are

forward and seeking to resolve these and other outstanding issues without further litigation.

In the beginning of December 2009, Justice Lowe issued an interim order on consent of the parties that set rents temporarily for all members of the putative class at the lower of two amounts: the good faith estimate of the rent regulated rent for those members' apartments or the contract rent (in the unlikely event a tenant reached an agreement for a rent that was lower than the regulated monthly rent for that tenant's unit).¹³⁶ The order also stayed all proceedings in the action so that the parties may pursue a settlement of the matter. A key component of the order is the appointment of an independent consultant who will have a range of responsibilities, including the following:

[The consultant will] among other things, issue a report calculating the rent for each unit subject to the litigation as if that unit had been rent stabilized and the differential, if any, between those rents and the negotiated rents in the leases for such units, and to perform such further calculations and to prepare such further reports as the parties may mutually agree should be done during the term of the Consultant's retention.¹³⁷

This consultant will be charged with trying to resolve the outstanding question of what each tenant covered by the decision of the Court of Appeals should be paying as rent.

It is now evident that the Court of Appeals's decision, which handed the plaintiffs a resounding victory, represents a watershed moment in the campaign to preserve the affordability of apartments within the complexes. With this tenant victory, the ability of the landlord to realize its goal of removing thousands of units from rent protections appears unattainable. Because the complexes are now subject to rent regulation through 2017—the year the benefits are set to expire—the anticipated rental income is now greatly reduced and the properties have dropped in value precipitously. But the decision also has wide-ranging impacts beyond the corners of the complexes' tidy confines.

Indeed, if the landlord of a building that is subject to rent

now considered to be illegal—that is, market—rents.

¹³⁶ Order at ¶ 1, *Roberts v. Tishman Speyer Props., L.P.*, No. 100956/07 (Sup. Ct. N.Y. County Dec. 10, 2009) (granting motion for order temporarily setting rents for all members of putative class), available at <http://online.wsj.com/public/resources/documents/StuyTown1214.pdf>.

¹³⁷ *Id.* ¶ 8.

regulation, for reasons other than receiving a J-51 tax benefit, received a J-51 benefit and removed units from rent regulation through the decontrol process, the landlord will likely be forced to reset rents on those units as if the rent regulations had never been lifted.¹³⁸ While this may not affect many apartments found outside of Manhattan or parts of Brooklyn, where the rent for market rate apartments likely exceeds what a landlord could charge if rent regulation was in place, there are still many buildings within certain neighborhoods where the *Roberts* decision could mean that a significant number of units will return to rent regulation. The following section explores these issues in greater depth.

E. Outstanding Issues

1. Retroactivity, Treble Damages, and Attorney's Fees

Two lingering issues are left unresolved by the Court of Appeals' decision in *Roberts*: first, whether tenants can seek rent overcharges for any payments they made to their landlords that exceeded what should have been the regulated monthly rent for their units; and second, whether tenants can pursue treble damages for their rent overpayments. Such treble damages are provided for by the statute when a rent overcharge is considered to have been "willful" by the landlord.¹³⁹ There is a presumption of willfulness whenever a tenant files an overcharge claim, but the landlord can rebut that presumption.¹⁴⁰ The question then remains: How will DHCR respond to overcharge claims? Will landlords be able to rebut the presumption of willfulness by saying that they were simply following DHCR's advisory opinion and the revised regulations? Will DHCR automatically review rents in all buildings in which J-51 benefits are in place or will each tenant seeking to benefit from the *Roberts* decision have to file a separate overcharge claims? These are some of the outstanding legal questions that flow from the decision of the Court of Appeals as it impacts the community beyond Peter Cooper Village and Stuyvesant Town and only time, agency action and—no doubt—more litigation, will tell how these questions will ultimately be resolved.

¹³⁸ Indeed, this decision is already starting to have ripple effects in other cases. See *Ade v. Riverview Redev. Co.*, No. 307909/09, 2010 WL 06141, at *4 (Sup. Ct. Bronx County Jan. 7, 2009) (finding that a building's receipt of J-51 tax breaks prevents decontrol of apartments in that building, consistent with *Roberts*).

¹³⁹ SCHERER, *supra* note 16, at 251–52.

¹⁴⁰ *Id.*

Even with the Court of Appeals' decision against them, the landlords, and others similarly situated, are certainly not without their potential responses. First, they can resist any efforts on the part of DHCR to institute across-the-board rent rollbacks and try to force tenants who might be protected by the *Roberts* decision to bring separate complaints with DHCR. If tenants were left to this lone mechanism, certainly many claims will go unfilled, either because of ignorance of the law, lack of interest and energy, lack of sophistication, or lack of representation. Ensuring that all tenants affected by the *Roberts* decision receive the benefits to which they are entitled should be a top priority for DHCR and the tenant bar.

2. Strategic Default and the Potential Deterioration of Services

As this article goes to print, it appears that the landlords have assessed their commitment to the development—no doubt in part due to the loss at the Court of Appeals—and are now defaulting on their loan obligations, essentially surrendering the complexes to their creditors.¹⁴¹ As of September 2009 (i.e., before the *Roberts* decision from the Court of Appeals), the property was valued at \$2.13 billion, less than half the 2006 purchase price.¹⁴² The question now arises: what happens next? Will the tenants make a successful purchase bid? Will the properties join the ranks of real estate owned properties on the market, to be managed by the lender? Will a vulture fund step in to purchase the properties at a discount, in the hopes of exacting as much income from the buildings in a short amount of time, only to sell the properties for a quick gain?

After an increase of real estate speculation in New York City in the late 1980s, the recession that hit in the early 1990s devastated many low income communities in the city that had seen some of the most aggressive speculation.¹⁴³ Investors purchased buildings in communities with depressed housing stock in the belief that those communities were on the rise and, when their properties did increase in value, they could sell them off for a tidy profit. When

¹⁴¹ Charles V. Bagli, *Buying Landmarks? Easy. Keeping Them? Maybe Not.*, N.Y. TIMES, Jan. 17, 2010, at BU1.

¹⁴² Charles V. Bagli, *Buyers of Huge Manhattan Complex Face Default Risk*, N.Y. TIMES, Sept. 9, 2009, at A1.

¹⁴³ For a description of the speculative bubble that led to disinvestment and abandonment in New York City in the late 1980s and early 1990s, see VICTOR BACH & SHERECE Y. WEST, HOUSING ON THE BLOCK: DISINVESTMENT AND ABANDONMENT RISKS IN NEW YORK CITY NEIGHBORHOODS 1–10 (1993).

the recession hit, and rosy projections turned out to be false, many landlords sought to extract as much income from their buildings, and provided the fewest services possible to cut their losses. This had devastating effects on the housing stock; as routine repairs were ignored, they turned into systemic problems.¹⁴⁴

Do the grand complexes in Manhattan's East Side face the same prospects? Will a bank or a vulture fund step in and fail to provide essential services, threatening the health and safety of the tenants?¹⁴⁵ Could the legacy of *Roberts* be that it replaced ambitious landlords with greedy, less responsible ones? Only time will tell. The tenant association, elected officials, DHCR, and the city agency responsible for monitoring housing code enforcement, the Department of Housing Preservation and Development, must remain vigilant to guard against such a decline in essential services.

3. Potential Legislative Backlash

Landlords could take up the invitation by the Court of Appeals to pursue a legislative solution that either could codify DHCR's interpretation of the exemption language or roll back rent regulations altogether. The present system of rent regulations is set to expire in 2011, and it is likely that there will be a fierce battle in Albany over the future of rent regulation in New York State.¹⁴⁶ While a total repeal of the rent laws may be unlikely, it is certainly possible that landlords could secure what, in effect, would be an overturning of the *Roberts* decision through legislation that confirmed DHCR's original interpretation of the statute. Such legislation would, perhaps, permit the deregulation of apartment buildings that are subject to rent regulations for reasons other than receiving J-51 benefits, through the luxury and high rent/high income decontrol mechanisms. In other settings—firearms litigation and marriage equality advocacy being just two examples—progressive victories in the courts have been rolled back through legislative interventions by conservative legislatures.¹⁴⁷

¹⁴⁴ *Id.* at 1.

¹⁴⁵ See Sam Dolnick, *Problems Mount at a Bronx Building Bought in a Bubble*, N.Y. TIMES, Jan. 19, 2010, at A22 (describing disturbing downturn in services in Bronx building purchased at height of most recent real estate bubble).

¹⁴⁶ TIMOTHY L. COLLINS, AN INTRODUCTION TO THE NEW YORK CITY RENT GUIDELINES BOARD AND THE RENT STABILIZATION SYSTEM 13 tbl.II (rev. ed. 2006) (noting expiration of New York State's rent laws in 2011), available at <http://www.housingnyc.com/html/about/intro%20PDF/historyoftheboard.pdf>.

¹⁴⁷ On the legislative backlash to firearms litigation, see Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in*

While the New York State Legislature is presently controlled by Democrats, who tend to be more receptive to the interests of tenants, it is entirely possible that the elections in 2010 could change both the personnel and the tenor of the legislature, leaving the future of rent regulation uncertain at best.

V. LESSONS LEARNED AND ISSUES TO CONSIDER FOR FUTURE CAMPAIGNS

The legal and organizing campaign to preserve the affordability of the Stuyvesant Town/Peter Cooper developments had many features, and the successful campaign offers many lessons to advocates who may wish to replicate it in the housing context or other similar fields. As stated earlier, the challenge faced by progressive lawyers hoping to use legal advocacy to promote progressive social change is to develop a “more politically integrated, tactically versatile model of legal practice.”¹⁴⁸ To what extent do the features of this campaign comport with that challenge? The use of a multi-faceted legal approach; the coordinated organizing and community education efforts; the narrow use of impact litigation; the array of attorneys paid through a range of sources: these were all critical elements of the campaign, and can serve as a model for future efforts. Before some of the tactical features of the campaign are addressed, however, it is important to identify and discuss one of the primary pitfalls of progressive lawyering and how it played out in this campaign.

A. *Progressive Lawyering and the Stuyvesant Town/Peter Cooper Village Campaign*

One common critique of progressive lawyering is that it runs the risk of subverting the needs of clients to the interests of the lawyers. Lawyers who are focused on the skills they are trained to wield are sometimes oblivious to the real world implications of their actions and the long- and short-term needs of their clients. This tension

Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits, 86 TEX. L. REV. 1837, 1860–61 (2008). In the second edition of his earlier work, *The Hollow Hope*, Gerald Rosenberg devotes considerable attention to the fight for marriage equality, concluding that the effort to secure such rights through the courts has resulted in a legislative backlash against such efforts. ROSENBERG, *supra* note 46, at 341. For a response to Rosenberg on the issue of marriage equality, see Dara E. Purvis, *Evaluating Legal Activism: A Response to Rosenberg*, 17 BUFF. J. GENDER L. & SOC. POL'Y 3, 6–7 (2009).

¹⁴⁸ Cummings, *supra* note 53, at 6.

often plays itself out when lawyers and clients do not share the same goals for the work to be done.

These tensions can occur in many different settings where progressive lawyers do their work. In the workers' rights context, tensions can arise between a worker organizing group and lawyers representing individual workers in affirmative litigation. This is especially so if the organizing group wants to launch a broad, industry-wide campaign against a group of employers, but the attorneys wish to file discrete actions against individual employers on a case-by-case basis. When those cases can take years to wind their way through the courts, they will offer little fuel to the fire driving the organizing campaign.¹⁴⁹

Tensions can also arise between the lawyer, an organizing group, and individual members of that group. In the housing organizing context, individual members of a tenant association may wish to relocate from an apartment building with housing code violation, despite the fact that it is in the best interests of the tenant association to maintain a large tenant base. A lawyer for the organization will feel conflicted loyalties in such situations: if she formally represents the tenant association, she must pursue the associations' goals and not advocate for relocation, even where relocation out of the building may be in the best interests of the individual tenant. Without relocation, that tenant might have to endure serious housing violations that might take months or years to remedy.¹⁵⁰

In the Stuyvesant Town/Peter Cooper Village campaign, as in many campaigns, there were ample opportunities for tensions between goals, strategies, and tactics. Were the interests of tenants in regulated units—typically, those who had been living in the complexes for a greater number of years and were paying lower rents—consistent with the goals of newer, unregulated tenants paying market-rate rents? Would the focus on preventing the eviction of tenants in regulated units distract efforts to preserve the affordability of non-regulated units? Did some tenants welcome the new landlords and appreciate the notion that those new landlords

¹⁴⁹ For examples of the tensions that can arise in the context of providing legal services to worker rights campaigns, see Cummings, *supra* note 53, at 51–64.

¹⁵⁰ On some of the ethical tensions arising in progressive lawyering for groups, see Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1104–11 (1992); Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147, 149 (2000); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1101–04 (1990).

were going to create a “two-tier[ed] society,” one with concierge and other services to those tenants willing to pay for them?¹⁵¹ Would tensions develop between newer tenants, who might be disruptive college students and families with small children or seniors?¹⁵²

With this campaign, in the words of Council Member Garodnick, the community was “pretty unified,”¹⁵³ and the overarching strategy was clear: prevent the eviction of tenants in the complexes, preserve the affordability of those complexes, and maintain some sense of housing stability for the tenants residing in them.¹⁵⁴ These were goals that all of the tenants, regardless of their socio-economic background, could get behind; moreover, in the words of the tenant association president, the tactics of the landlords helped to galvanize and organize the tenants around a “common enemy . . . out to get us all.”¹⁵⁵

Indeed, the unregulated tenants supported the efforts to prevent the eviction of regulated units, and everyone stood to benefit from a successful outcome in the *Roberts* litigation. As the Council Member explained:

[E]verybody feels that [the *Roberts* decision] serves to their benefit because . . . there is no more incentive for Tishman or anyone else to go after rent stabilized tenants, because they will only replace them with another rent stabilized tenant. The folks who are subject to high income de-control are no longer subject to high-income de-controls for as long as the J51 benefit exists. And of course the market rate tenants . . . both have the opportunity to see their rents reduced and potentially see damages for retroactive rent overcharges. So everybody stands to benefit in one way or another from the *Roberts* decision.¹⁵⁶

Furthermore, potential tensions were avoided because each section of the bar, focusing on its own particular expertise,¹⁵⁷ helped combine forces to achieve the overall goal of preserving the affordability of the complexes. Lawyers experienced in eviction defense work—from both the private sector and from legal services offices—provided both brief advice as well as full representation to

¹⁵¹ Interview with Alvin Doyle, *supra* note 68, at 4.

¹⁵² *Id.* at 2.

¹⁵³ Interview with Daniel Garodnick, *supra* note 62, at 9.

¹⁵⁴ Telephone Interview with Harvey Epstein, *supra* note 61, at 18; Interview with Daniel Garodnick, *supra* note 62, at 9–10.

¹⁵⁵ Interview with Alvin Doyle, *supra* note 68, at 11.

¹⁵⁶ Interview with Daniel Garodnick, *supra* note 62, at 6.

¹⁵⁷ Telephone Interview with Harvey Epstein, *supra* note 61, at 18.

tenants threatened with eviction, and lawyers from a private, plaintiff-side firms specializing in class action work took on the affirmative litigation that culminated in the *Roberts* decision. As a result, a clear goal of the tenants was pursued through a range of tactics that were executed by attorneys using their particular expertise in carrying out those tactics.

Another key feature of the campaign was the coordination of these efforts. As Council Member Garodnick explained, “making sure that everyone [was] on the same page and operating in concert” was critical to the campaign’s success, “as opposed to doing things piecemeal or having every individual interested party go out and take their own separate course of action.”¹⁵⁸ This coordinating role was one embraced by the Council Member and his staff, and it served the campaign well.

In some ways, then, this campaign sidestepped some of the thornier problems that arise in efforts in which legal tactics are used by attorneys and legal advocates where organizing groups and their legal supporters may have diverging goals or wish to use different tactics to achieve those goals. Had the *Roberts* litigation failed, it is quite possible that the potential underlying tensions between regulated and unregulated tenants might have arisen. Low-income tenants who were not at risk of having their tenancy challenged (because they did not have property elsewhere) would have questioned the use of legal resources to defend tenants who did. Some tenants might have sought to cut deals with the landlords to surrender their apartments on favorable terms, rather than try to remain in their homes and stay active in the tenant association.

But the very fact that the strategy was clearly defined and the tactics used to achieve it were carried out by attorneys who understood their respective roles, and were comfortable and skilled in executing them, might have been central to the ability of the campaign to achieve its overall success, at least to the present. In this way, it would appear that this campaign offers lessons for future campaigns that wish aggressively to support progressive goals; strategy, roles and expertise must all be aligned in order to improve the chances of success and avoid some of the potential pitfalls, of progressive lawyering.

With respect to those tactics, although the tenant association and elected official leadership seemed unified on the overall strategy,

¹⁵⁸ Interview with Daniel Garodnick, *supra* note 62, at 9.

the tactics employed to achieve that strategy were obviously critical to the overall success of the campaign to date. The following section addresses the key features of those tactics and some of the questions raised by their use.

B. The Tactical Features of the Campaign and Some of the Questions They Raise

1. A Multi-Pronged Approach

The legal campaign to preserve affordable rents for apartments in Peter Cooper Village and Stuyvesant Town was employed a range of tactics. These included individual client direct services through eviction prevention; coordinated community organizing; affirmative impact litigation through the *Roberts* class action; and community education through the walk-in legal clinics, warm line, electronic and print media, and presentations given at tenant association meetings.

Each of these different tactics served a critical role. The community education served to inform tenants of their rights, make them aware of steps in the affirmative litigation, and alert them to the availability of legal services in the event a tenant faced eviction. Tenants who might face a primary residency challenge were informed about the evidence they would need to gather to prove the manner in which they used their apartment within the complex, and learned to document their comings-and-goings, to begin to establish a factual defense to any challenge they might face. Tenants who were (or could become) members of the *Roberts* class were given regular updates on the litigation. Those in need of legal services were informed of how they could obtain representation, either from the legal services attorneys or from the private counsel available to take on individual eviction cases, if they did not qualify for such services. In these ways, the community education served to empower tenants, by making them aware of their rights, informing them as to what affirmative steps were underway on their behalf if they were members of the putative class in *Roberts*, and ensuring them that they would have some form of representation should they face eviction. It also served as a triage mechanism: whether it was steering tenants towards attorneys based on their income and other qualifications, or assisting tenants in learning of the merits of their case and whether they had a basis for opposing the landlords' efforts to evict them.

These community education efforts were made possible by the

organizing efforts of the tenant association and council member Garodnick's office. If not for those efforts, any attempt to engage in community education would have been time-consuming and ineffective. Because the community organizing was geared towards community education, it was able effectively and efficiently to serve the important goals of that community education: keeping tenants informed of developments on all fronts and ensuring tenants who needed access to representation had it. Through use of electronic media like Web sites and e-mail, and through traditional print forms of communications, like printed newsletters, the tenant association and council member's office were able to coordinate their communications through the tenant association's network of contacts within the various buildings.¹⁵⁹ This network of communication ensured that the information needed by the tenants was disseminated in a meaningful and efficient manner. Thus, without the organization itself, combined with the leadership of the association and the Council Member, it is unlikely that the community education would have been effective or worthwhile.

If we are to ask which tactic was the most effective in defeating the landlords' efforts to destroy the affordability of the complexes, it is likely that the affirmative litigation would stand out. As a result of that litigation, literally thousands of tenants are protected from decontrol in the complexes. And many previously decontrolled units are now subject to rent regulations. Given the timing of the landlords' decision to default on their own payment obligations—just a few months after the *Roberts* decision was issued—it is relatively easy to point to the outcome of the affirmative litigation as having taken a baseball bat to the landlords' business model. Unable to decontrol units due to luxury or high rent/high income decontrol—which was the basis for overheated income projections—and forced to *re-regulate* previously deregulated units, landlords' debt service, which was based on those income projections, was unsustainable. And it was the *Roberts* decision that ultimately put an end to the landlords' efforts to use deregulation as a tool to boost the rent rolls in the complexes.

At the same time that the affirmative litigation served to defend units throughout the complexes, eviction prevention also played a critical role in ensuring that as many tenants as possible who were eligible to stay in their homes under rent regulations could do so. Through a comprehensive community education campaign,

¹⁵⁹ Interview with Alvin Doyle, *supra* note 68, at 5–6.

including the walk-in clinics, warm line, and referral network, tenants had access to lawyers. For those who qualified for free legal assistance, they received it from the UJC. Those who did not qualify because of that agency's income restrictions on its funding were referred to private counsel. Harvey Epstein described the value of the comprehensive, public campaign as follows, criticizing what he calls "lawyer[ing] in a vacuum":

You take on a case and help a person; you know there's going to be millions of people out there who still need help. But if you do it in a way that's comprehensive, you can look for systemic solutions that help everyone. And that's what this kind of work does. It raises the bar on the work you could do. It makes it a more public thing. And then it really allows people to be helped comprehensively. You put your resources in a strategic way you can actually do good things.¹⁶⁰

At the same time, while thousands of tenants received assistance in this way, some tenants slipped through the cracks between the income restrictions of the UJC and the fee demands of private counsel. These eviction prevention services—from brief advice to full bore representation—nevertheless helped to preserve the tenancies of hundreds, if not thousands, of regulated tenants, which served as a complement to the affirmative efforts of the class action counsel in the *Roberts* litigation to assist tenants in unregulated units.

2. A Loose Network of Legal Providers

The legal campaign featured different sectors of the bar: private, plaintiff-side class action counsel; legal services attorneys; and private, tenant-side landlord-tenant attorneys. Each sector seemed to have a role to play. In the words of Harvey Epstein, the campaign was successful by "the private bar focusing on what they do and the legal services office focusing on what they do."¹⁶¹ Class action counsel handled the *Roberts* litigation. Private attorneys handled eviction cases for tenants who were beyond the income eligibility requirements of the UJC and other members of the Legal Services for the Working Poor coalition. The legal services providers supplied tenants who called into the warm line or

¹⁶⁰ Telephone Interview with Harvey Epstein, *supra* note 61, at 22.

¹⁶¹ *Id.* at 18.

attended the walk-in legal clinics with a list of private attorneys who handled eviction defense cases. According to James Fishman, there was some coordination among the private and legal services attorneys handling the eviction cases through the sharing of briefs, motions, and communications over a legal advocacy e-mail list serve.¹⁶² Apart from this coordination—referring higher income tenants to the private eviction-defense attorneys and some pooling of information—there was little coordination among the eviction defense counsel and the class action counsel.

Regardless of the lack of formal coordination between the attorneys handling the defensive and affirmative cases coming out of the Peter Cooper/Stuyvesant Town campaign, a range of attorneys were able to meet the broad legal needs of the tenants, and a range of funding mechanisms made this possible. First, class action counsel, although it was not revealed how their pay was going to be structured,¹⁶³ presumably took the case on some contingency basis. Should their class receive certification, it would entitle them to reasonable attorneys' fees for their victory.¹⁶⁴ It is also possible that a settlement could be reached in which the landlords agree to pay class action counsel's fees.¹⁶⁵ The legal services attorneys received funding from the City Council to counsel the "working poor," and such funding helped provide for the community education and representation offered by those organizations to individuals eligible for their services.¹⁶⁶ The individuals who were precluded from free representation based on income were referred to private counsel, who picked up those cases where a tenants' income exceeded the income limits of the legal services attorneys and the tenant could afford the attorney's fee.

Might better communication have improved the ability of the attorneys from these different sectors to ensure that all tenants who needed services received them? Perhaps in other settings, as where several affirmative lawsuits are pending with different counsel are handling those cases, more communication would have been necessary. This was not the case in the Peter Cooper/Stuyvesant Town campaign, however. Rather, each attorney group seemed to have its role, and there did not appear to be much of a need for

¹⁶² Telephone Interview with James B. Fishman, *supra* note 85, at 7–8.

¹⁶³ Interview with Alexander Schmidt, Partner, Wolf, Haldenstein, Adler, Freeman & Herz, LLP, in N.Y.C., N.Y., at 3–4 (Dec. 15, 2009).

¹⁶⁴ See N.Y. C.P.L.R. 909 (McKinney 2010).

¹⁶⁵ See Interview with Alexander Schmidt, *supra* note 163, at 4.

¹⁶⁶ Telephone Interview with Harvey Epstein, *supra* note 61, at 11–12.

coordination.

One sector that was noticeably absent from the representation of the tenants was pro bono counsel from large firms. There would have been greater coverage of all tenants who needed services if volunteer attorneys from private firms were available to offer services to those tenants who were over income but still could not afford to retain an attorney. The problem with leveraging the private, pro bono bar was the potential for a conflict of interest which precluded many firms from providing representation in cases involving the complexes.¹⁶⁷

Tishman-Speyer is one of the largest real estate developers in New York City. Few firms want to be precluded from handling matters on behalf of the group, or are already conflicted out of taking on a client in opposition to the group because the firm already provides services to it. As a result, finding private, pro bono counsel to assist in the defense of tenants was likely extremely difficult. Another potential barrier is the difficulty in training pro bono counsel to handle individual eviction cases. The law is arcane, and there are many nuances to the practice that must be imparted to volunteer attorneys. This may not justify the time it would take to train such attorneys to handle landlord-tenant matters, unless a trained volunteer attorney was willing to accept a volume of landlord-tenant cases, which few are willing to do.

One area that was not tapped for assistance for these clients was local law schools in New York City that might have been able to take on the cases that fell in that income window between eligibility for free legal services and ability to pay a private attorney. This could be a potential resource in future campaigns, assuming such clinical programs do not have similar income restrictions, imposed either by funding sources or internal, political, and/or pedagogical goals.

3. Questions of Staff Satisfaction

An additional question raised by the lack of coordination and communication between the attorneys providing direct services and those engaged in the class action litigation is the extent to which role division reinforces stereotypes about the lawyers playing each role. That is, the mundane, run-of-the-mill work, involving “low”

¹⁶⁷ E-mail from Harvey Epstein, Director, Urban Justice Center, to Raymond Brescia, Assistant Professor of Law, Albany Law School (January 21, 2010) (on file with author).

high stakes, was carried out by the legal services lawyers, while the cutting-edge, high stakes, glamorous class action work was reserved for the lawyers in the firms. Although private lawyers still handled individual eviction defense work, the more innovative and perhaps more professionally rewarding work was carried out by the plaintiff-side law firm.¹⁶⁸ At the same time, the eviction defense was mostly carried out by legal services lawyers and private attorneys, many of them former legal services lawyers.¹⁶⁹ In collaborative settings, where non-profit, public interest attorneys are paired with for-profit firms, whether they are civil rights attorneys or pro bono counsel from large firms, there is always the danger that the thankless, though necessary, work—like assisting clients to access social services—will be dumped on the non-profit lawyers, while the private firm lawyers will take on the more important tasks, like conducting depositions, drafting briefs and presenting oral arguments.

While in this setting, the legal services attorneys did not seem to bristle at performing the role of direct services provider, or engaging in extensive triage with individual clients,¹⁷⁰ it is only fair that attorneys from non-profits have the same opportunities to engage in the cutting edge and more challenging legal work that often arises in impact litigation. Future efforts that might wish to build on the successes of this campaign should look for opportunities for non-profit lawyers to engage in impact litigation, legislative work, and media campaigns, as well as the direct services work which is often where their greatest strengths lie.

4. The Value of Elected Official Buy-in and Support

One of the most important features of the larger campaign was the role played by Council Member Garodnick in helping to: (1) organize and galvanize opposition to the efforts to reduce the number of regulated apartments in the complexes; and (2) coordinate an effective legal campaign to support the grassroots

¹⁶⁸ For example, Alex Schmidt described the personal rewards he obtained from litigating the *Roberts* case as follows:

It just serves a historic important community and to achieve good things for people who are often ignored, not empowered under all our current social economic system. It's a good feeling. It's the most rewarding achievement in my career. To do this much good for this many people is truly a unique experience.

Interview with Alexander Schmidt, *supra* note 163, at 9.

¹⁶⁹ See Telephone Interview with Harvey Epstein, *supra* note 61, at 11; Telephone Interview with James B. Fishman, *supra* note 85, at 1.

¹⁷⁰ E-mail from Harvey Epstein, *supra* note 167.

efforts. The Council Member had a real stake in the community: not only does a large percentage of his constituents reside in the complexes, but he himself is a resident. Preserving the affordable nature of the complexes was an issue he embraced, and he employed the resources of his office in support of the campaign. While it is entirely possible that the efforts of class action counsel and the attorneys who handled the individual eviction cases might have been successful without the Council Member's coordinating efforts, it is hard to imagine that any of them would have been as effective. His office helped disseminate information within the community, organize community education events, coordinate the walk-in legal clinics, and secure funding for the telephone warm line operated by the UJC. Each of these facets of the campaign was central to its success, and the Council Member and his staff were critical in carrying out each element.¹⁷¹

Future campaigns would learn well from this example. Support from elected officials can help in bringing desperately needed resources and clout, tap information networks, and play a key organizing role in any campaign.

5. The Value of Impact Litigation

Another lesson that one could draw from the campaign is that affirmative litigation works. A forceful critique of public interest lawyering is that it often places too much faith in litigation, which can detract from critical organizing efforts and direct resources away from creating long-term solutions. It would be easy to say that the litigation in this instance "worked" and created rights. A deeper analysis, though, would acknowledge that in some ways this litigation was a far cry from the aggressive litigation that is the target of most critics of litigation-based, lawyer-dominated advocacy. In other words, this was not the type of litigation that is carried out in the federal courts, through which the recognition of a broad, sweeping right is sought: e.g., a right to affordable housing

¹⁷¹ Harvey Epstein described the critical role the Council Member's office played in the campaign in the following terms:

It's really coordinating the activities of the tenants to create a campaign or pattern moving forward. So they were the ones who had information going to and from the tenants in the building. They were the ones kind of mobilizing to come to events. They were the ones who did the targeted outreach. So they were really the ones facilitating the conversation so the lawyers and our office could just do the work.

Telephone Interview with Harvey Epstein, *supra* note 61, at 16.

under a federal or state constitution. Instead, this litigation was targeted and discrete, designed to preserve a narrow statutory protection that arguably was already on the books and did not need to be created by judicial fiat. In this way, this litigation is consistent with efforts by progressive lawyers who seek to preserve rights rather than establish them.¹⁷²

In some ways, as well, there was nothing to lose, other than the resources devoted to the litigation. There is obviously nothing lost by the tenants if the attorneys are willing to take on the case and receive payment only if they are victorious. As far as the legal claims, the agency responsible for administering the rent laws had already ruled against tenants on the issue at stake in the *Roberts* litigation. If that administrative rejection of tenants' rights in this setting was not challenged, then the status quo would have continued, and tenants in buildings receiving J-51 benefits routinely would have been denied the continued protections of rent regulations. The tenants obviously had nothing to lose by seeking to overturn the administrative interpretation of the relevant statute.

In this example, at least, a narrowly focused legal claim, though it has the potential for aiding hundreds of thousands of tenants over the coming years, was successfully prosecuted in the state courts. Bringing the litigation did not detract from the organizing efforts, and it ultimately brought about real relief for the plaintiffs involved in the action. It will also have broader ripple effects throughout the city. It is hard to declare it anything but a resounding success. Time will tell if there is any legislative backlash; elected officials may still step in to reverse *Roberts* and thereby bring rent laws into alignment with DHCR's original interpretation of the impact of J-51 benefits on buildings covered by the rent laws for reasons other than those benefits alone, or through a failure to renew the rent laws altogether.

VI. CONCLUSION

The campaign to keep Peter Cooper Village and Stuyvesant Town affordable, though far from over, has reached a critical milestone. The Court of Appeals' decision in *Roberts v. Tishman Speyer, L.P.* has dealt a fatal blow to the landlords' efforts to remove thousands

¹⁷² For a description of legal advocates concerned with preserving status quo protections rather than creating new rights, see Rhode, *Midlife*, *supra* note 52, at 2036–37.

of apartments from rent protections, and likely means thousands more must be returned to protection. From all traditional metrics, the litigation was a resounding victory. Analyzing the broader campaign through critiques of progressive lawyering yields similar positive marks.

Through a comprehensive effort, a range of services were provided to thousands of tenants: individual counseling, direct representation in individual eviction cases, community education, and class action representation. These services were coordinated by a local elected official tapping into an existing grassroots organizing network. The need for direct services was met by both legal services attorneys working free of charge and private attorneys working for fees. The need for class action litigation was met by private attorneys also working for a fee.

From all evidence, it appears that Tishman-Speyer is going to walk away from its investment, turn the buildings over to creditors, and abandon the plan to turn the properties into maximum revenue-generating, completely market-rate buildings. In addition, other landlords across the city must check their efforts to remove apartments from rent regulations if they receive J-51 tax benefits, and tens of thousands of units will be returned to the shelter of rent protections after *Roberts*. While it may not be the beginning of the end of landlords' efforts to roll back rent protections in New York City, the *Roberts* decision represents a major roadblock to those efforts. For progressive lawyers, the successful Peter Cooper/Stuyvesant Town campaign is an example of a comprehensive and flexible approach to legal advocacy that recognizes the need to defend a large number of clients and potential clients with limited resources, but with a range of allies beyond the non-profit legal sector. While such allies are typically sought from private firms seeking out pro bono opportunities, in this instance, for-profit firms working for fees were enlisted to help share the burden of the direct representation, as well as take on affirmative litigation with no guarantee of success (or remuneration). By making these allies, and allies of grassroots networks and a local elected official, progressive lawyers were able to improve the impact of their work to make it as effective, comprehensive, and efficient as possible.