



National Lawyers Guild *Review*



NATIONAL LAWYERS GUILD REVIEW

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EDITOR'S PREFACE

By: Dalia Fuleihan

As the New Year approaches, we may feel called to reflect on the past year. 2022 has been a turbulent year with many dramatic events with far reaching implications—war in Ukraine, setbacks in abortion rights, continued violence against marginalized communities, the midterm elections, and a controversial World Cup hosted in Qatar, to name just a few. The end of a year is as good a time as any to reflect upon the state of our society and our goals for progressive change.

With this in mind, the editorial board is excited to bring you this issue of the *NLGR*. The articles in this issue cover a wide array of subjects, including racial segregation and public housing, the need for greater protection for unionizing workers, and a couple forays into NLG's past. We hope that the following articles encourage you to reflect on our role as movement lawyers, the challenges we face in the future, and the mechanisms we use to advocate for change.

We begin this issue with “A Carefully Selected Tenancy: Public Housing and Racial Segregation in New York City” by David Leeds. Leeds examines the New York City Housing Authority's (NYCHA) role in perpetuating racial and economic segregation across the five boroughs of New York City. Leeds details the history of the NYCHA and its role in perpetuating racial segregation today. Leeds then offers various proposals for reforming the NYCHA and encouraging desegregation.

In this issue's second article, former editor in chief of the *NLG Review*, David Gesspass, reviews *No Equal Justice: The Legacy of Civil Rights Icon George W. Crockett*, by Edward J. Littlejohn and Peter J. Hammer. *No Equal Justice* is a much-anticipated biography of NLG legend George Crockett. Crockett was one of the founders of the NLG, and was committed to advocating for racial justice, and was instrumental in shifting the NLG's focus from union advocacy to racial justice during the Civil Rights Movement. Gesspass's review expertly assesses the importance of Crockett's biography and highlights how much we have to learn from the lives and careers of those who came before.

In his article, “Promoting Justice During Union Organizing: The Persuader Rule,” Jeffrey P. Nieznanski discusses the necessity of reinstating the persuader rule in order to promote fairness during union organizing. Nieznanski describes the fraught history of the persuader rule, which promotes transparency during union organizing efforts. Nieznanski's article explains the importance of the persuader rule, as well as the organized opposition efforts which resulted in its repeal in 2018. In the wake of the Biden

administration's union busting resolution forcing railroad workers to accept management's demands, "Promoting Justice During Union Organizing" is a much-needed reminder of some of the changes urgently needed in American labor law.

We close this issue with a review of Luca Faciola's new book *Up Against the Law: Radical Lawyers and Social Movements, 1960s-1970s*, a history of radical lawyers' involvement through the dynamic social movements of the 1960s and 1970s. Faciola chronicles the involvement of radical lawyers (most especially NLG-affiliated lawyers) with the Civil Rights Movement, Free Speech Movement, Black power militants, and the anti-war movement among others. He documents the development of new legal strategies such as militant litigation and the creation of lawyers' new identity—comrades in the movement rather than impartial representatives. Faciola's book provides a fresh perspective on a dynamic era and is an excellent case study for those of us who continue to use our role as legal workers in support of movements for social change.

At the close of this year, these articles offer us both a glimpse into our past and possibility for the future. As we move into the New Year let us take time to reflect on our current position and follow the guidance of these authors as we continue to strive for justice and equality in all its forms.

A CAREFULLY SELECTED TENANCY: PUBLIC HOUSING AND RACIAL SEGREGATION IN NEW YORK CITY

By: David Leeds¹

Introduction

Housing projects are a great metaphor for the government's relationship to poor folks: these huge islands built mostly in the middle of nowhere, designed to warehouse lives. People are still people, though, so we turned the projects into real communities, poor or not... But even when we could shake off the full weight of those imposing buildings and try to just live, the truth of our lives and struggle was still invisible to the larger country. The rest of the country was freed of any obligation to claim us. Which was fine, because we weren't really claiming them, either.

—Jay-Z²

In September 2022, New York City's public housing agency informed the more than 26,000 residents of the Jacob Riis Houses complex that their tap water contained arsenic and was unsafe to drink.³ A week later, local officials reversed course and told Riis residents that the lab results from the earlier water quality test had been wrong and there had never been any arsenic in the drinking water, even though a resident had recently tested positive for low levels of arsenic poisoning.⁴ Riis residents, many of whom

1. David Leeds graduated *cum laude* from Georgetown University Law Center with exceptional pro bono pledge recognition in 2022 and is currently the Region II Legal Honors fellow at the U.S. Department of Housing and Urban Development.

Acknowledgements: I would like to thank Professor Sheryll D. Cashin, Diane Lee, and the rest of my peers in Segregation Seminar: History and Future for Education, Housing and Opportunity for their guidance, feedback, and encouragement during the development of this Article. I would also like to thank Brigid DeTreux for her ongoing support throughout my legal career and beyond.

2. Jay-Z, Decoded 155 (2010).

3. Greg B. Smith, *NYCHA Found Arsenic in the Water Two Weeks Ago — Tenants Only Found Out Friday Night*, CITY (Sept. 2, 2022), <https://www.thecity.nyc/2022/9/2/23335265/nycha-found-arsenic-in-jacob-riis-projects-water-two-weeks-ago-tenants-only-found-out-friday-night>.

4. Greg B. Smith, *Tenants and Critics Demand Answers as City Hall Says Test Showing Arsenic in the Water at the Jacob Riis Houses Was a 'False Reading,'* CITY (Sept. 9, 2022), <https://www.thecity.nyc/2022/9/9/23345526/arsenic-water-nycha-jacob-riis-houses-false-reading-says-adams-administration-but-questions-remain>; Henry Rosoff, *NYCHA Resident*

soon joined a lawsuit against the city, were outraged at the local government and the New York City Housing Authority (“NYCHA”) for subjecting them to fear, confusion, potential health risks, and the economic burden of having to purchase bottled water, prepared meals, and emergency medical tests.⁵ For many residents, the arsenic scare was the latest episode in a long history of mismanagement and deception; the city’s Chief Housing Officer acknowledged before a packed auditorium that “over the years NYCHA has lost your trust.”⁶ However, when asked whether any of her neighbors were considering leaving Riis, one resident reported, “No. No one could afford to move out. It is affordable housing.”⁷

The Riis Houses arsenic scare illustrates one of the core dilemmas that NYCHA creates for fair housing advocates: preserving housing affordability while severely limiting residents’ mobility and subjecting them to uniquely poor living conditions.⁸ At a city level, NYCHA’s public housing stock helps to maintain racial and economic diversity by providing permanent, affordable housing to thousands of low-income families of color who might otherwise not be able to afford to rent housing in New York City’s five boroughs.⁹ NYCHA serves a population of approximately 600,000 New Yorkers, all of whom are low-income and more than 88% Black and Hispanic.¹⁰ The median rent for NYCHA residents is about \$500 per month, compared to \$1,790 for market-rate rental housing.¹¹ NYCHA residents also enjoy long-term stability in their housing arrangements as a result of being

Says He Has Suspected Arsenic Poisoning, PIX 11 NEWS (Sept. 6, 2022), <https://pix11.com/news/local-news/manhattan/nycha-resident-says-he-has-suspected-arsenic-poisoning/>.

5. David Brand, *NYCHA Pledges \$200 to Riis Households in Wake of Botched Arsenic Alert*, CITY LIMITS (Sept. 26, 2022), <https://citylimits.org/2022/09/26/nycha-pledges-200-to-riis-households-in-wake-of-botched-arsenic-alert/>.

6. Smith, *supra* note 4.

7. Lisa Rozner, *NYCHA’s Jacob Riis Houses Tenants Say During City Council Hearing They Don’t Trust Water After Arsenic Scare*, CBS NEWS (Sept. 23, 2022), <https://www.cbsnews.com/newyork/news/city-council-hearing-today-on-arsenic-scare-in-drinking-water-at-nychas-jacob-riis-houses/>. Some sources report that the typical Riis household has lived in the complex for 29 years. Howard Husock, *How New York Can End the Public Housing Trap*, CITY JOURNAL (2021), <https://www.city-journal.org/new-york-public-housing-trap>.

8. Compare Kyle Giller, *The Fight for NYCHA: RAD and the Erosion of Public Housing in New York*, 23 CUNY L. REV. 283, 284-87 (2020) (arguing forcefully in favor of NYCHA’s role in keeping low-income New Yorkers of color housed in “the last large-scale bastion of deeply affordable housing throughout the five boroughs”), with Douglas S. Massey & Shawn M. Kanaiaupuni, *Public Housing and the Concentration of Poverty*, 74(1) SOCIAL SCIENCE QUARTERLY 109, 120 (1993) (criticizing public housing as a “federally funded, physically permanent institution for the isolation of black families by race and class”).

9. See Giller, *supra* note 2, at 284-87.

10. Bart M. Schwartz, *Monitor’s First Quarterly Report for the New York City Housing Authority* 24 (Jun. 2019).

11. N.Y.C. Department of Housing Preservation and Development, *Where We Live NYC: Fair Housing Together* 173-74 (2020) [hereinafter *Where We Live NYC*].

able to avoid the periodic rent increases and vulnerability to eviction that characterize market-rate rental housing.¹² Against the backdrop of a private housing market defined by rising costs, gentrification, and displacement, public housing creates a safety net that ensures that significant numbers of working-class families of color remain housed in New York.¹³

Despite preserving racial and economic diversity at the citywide level, NYCHA is a key contributor to New York's high levels of neighborhood-level residential segregation.¹⁴ Functioning as highly concentrated and tightly contained pockets of Black and Hispanic poverty, NYCHA's public housing developments reproduce and magnify the effects of segregation on its residents.¹⁵ The compounding effects of decades of federal divestment and Authority mismanagement force NYCHA residents to face unsafe living conditions, isolation, social stigma, over-policing, and bureaucratic obstacles not experienced by other New Yorkers.¹⁶ As a direct result of inhabiting government-operated housing, NYCHA residents not only lack access to crucial resources and opportunities, but they also face conditions that negatively affect their quality of life and their likelihood of intergenerational upward mobility.¹⁷

12. *Id.* at 176.

13. See Mihir Zaveri, Rents Are Roaring Back in New York City, N.Y. TIMES (Mar. 7, 2022) <https://www.nytimes.com/2022/03/07/nyregion/nyc-rent-surge.html> ("Rents in New York rose 33 percent between January 2021 and January 2022, according to the online listing site Apartment List, almost double the national rate and the highest increase among the 100 largest American cities tracked by the group"); see also Urban Displacement Project, *Mapping Displacement and Gentrification in the New York Metropolitan Area* (2019), <https://www.urbandisplacement.org/maps/new-york-gentrification-and-displacement/> (finding that over twelve percent of neighborhoods in the New York area are "gentrifying or in an advanced state of gentrification" and that almost nine percent of neighborhoods are experiencing "displacement without gentrification").

14. Where We Live NYC, *supra* note 5, at 89 ("While the racial composition of many neighborhoods has changed dramatically since 1990, the city's high degree of segregation has not changed meaningfully by most measures").

15. Massey & Kanaiaupuni, *supra* note 2, at 120.

16. NICHOLAS D. BLOOM & MATTHEW G. LASNER, AFFORDABLE HOUSING IN NEW YORK: THE PEOPLE, PLACES, AND POLICIES THAT TRANSFORMED A CITY 293-96 (2016).

17. A growing body of research confirms that the defining characteristics of geographic areas—ranging from investment to crime to educational access—play a major role in determining the "conditions for intergenerational upward mobility." See John A. Powell & Stephen Menendian, *Opportunity Communities: Overcoming the Debate over Mobility Versus Place-based Strategies* in THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT 207, 207-27 (Greg Squires ed., 2018).

This Article argues that the segregation experienced by NYCHA residents is unique, both in degree and in kind.¹⁸

To remedy the injustices caused by NYCHA's contributions to racial segregation, this Article argues that federal and local policymakers need to undertake creative place-based strategies aimed at integrating public housing residents into the broader local community. Part I analyzes the historical forces that laid the foundation for NYCHA's current status as a network of insular communities isolating Black and Hispanic New Yorkers by race and class. Part II examines the relationship between racial segregation and NYCHA public housing in the current day. Furthermore, this Article proposes a conception of public housing segregation as a unique force in New York City. Part III offers normative and legal justifications for reform and discusses various proposals for desegregating NYCHA without abandoning the goals and principles underlying public housing.

PART I. HISTORICAL BACKGROUND

Established in 1934, NYCHA was the first public housing authority of its kind in the United States.¹⁹ Inspired by the successes of some European cities' efforts to establish low-cost public housing programs, NYCHA's earliest champions envisioned the Authority as a radical departure from Progressive Era housing programs like settlement houses and privately run shelters.²⁰ NYCHA would be a government-funded and operated agency aimed at constructing large, high-quality developments with a wide range of community facilities to serve as permanent housing for middle-income families, rather than as transient housing for the poorest residents.²¹

Over the course of the ensuing ninety years, NYCHA would veer away from this vision, eventually taking its current form as a collection of deeply segregated residential communities housing almost exclusively low-income Black and Hispanic residents.²² Two Authority policies in particular laid the foundations for NYCHA's transformation: those guiding tenant admissions and site selections. NYCHA's tenant admission procedures changed significantly over the Authority's first several decades of existence, while the Authority's approach to site selection remained relatively consistent throughout the period where it constructed the bulk of its housing stock.²³ Because of a long-running Authority mandate to populate public housing developments with tenancies that demographically reflected the surrounding neighborhoods, tenant admission and site selection policies have historically been closely linked.²⁴

18. "Segregation" for the purposes of this Article means the isolation of racial and ethnic minorities in areas of concentrated poverty, a dynamic that "systematically undermines the social and economic well-being" of people of color in the United States. *See* Douglas

Because of a long-running Authority mandate to populate public housing developments with tenancies that demographically reflected the surrounding neighborhoods, tenant admission and site selection policies have historically been closely linked.²⁴

A. TENANT ADMISSIONS

1. 1939-1958: Sorting Tenants by Race

The evolutionary history of NYCHA's policies for admitting and sorting residents set the stage for its modern-day status as the source of a unique form of segregation inside New York City. For its first few years of operation in the 1930s, NYCHA deliberately segregated its residents by race.²⁵ Harlem River Houses, the Authority's second-ever development, opened exclusively for Black families in 1937.²⁶ A year later, NYCHA opened the doors of its third development, Williamsburg Houses, exclusively to white families.²⁷

For its first three decades NYCHA did not house the very poor. The Authority's early leaders did not envision public housing as a system for providing shelter to the New Yorkers most in need of assistance, but rather as a network of desirable permanent homes for morally upstanding members of the working poor and middle classes.²⁸ Accordingly, early administrators of the Authority screened applicants for a variety of factors, including income, family status, employment, previous housing accommodations, rent habits, social background, and perceived need for new housing.²⁹ Years before it became home to a population of almost exclusively low-income

S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 2 (1988).

19. *See* Bloom & Lasner, *supra* note 10, at 75-80. *See generally* RICHARD PLUNZ, *A HISTORY OF HOUSING IN NEW YORK CITY* (2016).

20. *Id.*

21. *Id.*

22. New York City Housing Authority, NYCHA Resident Data Book Summary 3 (2021) [hereinafter *Resident Book 2021*] (finding the official NYCHA population to be 45.20% Hispanic, 43.14% Black, 5.92% Asian and Pacific Islander, and 4.73% white).

23. Bloom & Lasner, *supra* note 10, at 82, 116.

24. *Id.* at 87.

25. *Id.* at 82.

26. *Id.*

27. *Id.*

28. *Id.* at 86.

29. After using a variety of factors to screen tenant-applicants for the early years of operation, NYCHA refined its tenant selection process in 1953 to test applicants for twenty-one moral factors including things like single motherhood and irregular work history. *See* Bloom & Lasner, *supra* note 10, at 86, 123; NICHOLAS D. BLOOM, *PUBLIC HOUSING THAT WORKED: NEW YORK IN THE TWENTIETH CENTURY* 8 (2009) [hereinafter *Bloom 2009*].

families of color, NYCHA initially provided housing only to a carefully selected tenancy of “deserving” families of relative means, whom the Authority strictly separated by race.³⁰

In 1939, the state legislature enacted an anti-discrimination law requiring NYCHA to adopt a new policy guaranteeing racial integration in public housing.³¹ Despite the legislative mandate, NYCHA did very little to increase the levels of racial integration in its public housing projects over the next two decades.³² Upon adopting the new, ostensibly integrationist policy, the Authority included the caveat that it would continue to regulate the racial composition of individual housing developments to remain sensitive to “existing community patterns.”³³ During this period, however, New York’s neighborhoods were highly segregated according to race.³⁴ As a result, the commitment to “existing community patterns” equated to little more than a pledge to keep public housing developments segregated in a manner reflective of neighborhood-level segregation.³⁵

During the early years of NYCHA, government policy and private behavior worked together to preserve residential segregation in New York City, which continued to provide a basis for admitting and sorting public housing tenants based on race.³⁶

30. NYCHA’s first developments were far from alone among the federally financed housing projects that kept their tenants segregated by race during the prewar period. Among the public housing developments built with federal dollars before World War II, 236 of the 261 projects subsidized by the U.S. Housing Authority and 43 of the 46 projects built through the Public Works Administration were completely segregated by race. New York was also already home to several privately developed but federally financed housing developments that excluded non-white residents. In the early 1930s, for example, the Metropolitan Life Company constructed two giant whites-only housing complexes—Parkchester in the borough of the Bronx and Stuyvesant Town in Manhattan—with federal subsidies. *See* Plunz, *supra* note 13, at 254-56; Raphael W. Bostic & Arthur Acolin, *Affirmatively Furthering Fair Housing: The Mandate to End Segregation*, in *THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT* 189, 189-206 (Greg Squires ed., 2018).

31. The state enacted the legislation in response to a lawsuit from the National Association for the Advancement of Colored People. NYCHA opened its first racially integrated housing project, South Jamaica Houses in Queens, in 1940. *See* Bloom & Lasner, *supra* note 10, at 87.

32. Bloom 2009, *supra* note 23, at 169-71.

33. Bloom & Lasner, *supra* note 10, at 87.

34. MARTHA BIONDI, *TO STAND AND TO FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POST-WAR NEW YORK* 116 (2003); CRAIG WILDER, *A COVENANT WITH COLOR: RACE AND SOCIAL POWER IN BROOKLYN* 202-04 (2001).

35. Bloom & Lasner, *supra* note 10, at 87.

36. *Id.*

In addition to funding the construction of racially exclusionary housing developments, the federal government helped to maintain New York's residential segregation in the 1930s by "redlining" maps of the city to preserve the color line.³⁷ Simultaneously, the Mortgage Conference of Greater New York, a consortium of almost forty bank and trust companies, commissioned a block-by-block survey of the city to determine where "Negroes and Spanish-speaking persons resided."³⁸ Relying on this study, the Conference directed its member organizations not to issue mortgages to any properties on these blocks.³⁹

Segregated residential patterns in New York sharpened in the 1930s as a result of the Great Migration of African Americans from the rural South to the urban North.⁴⁰ With the influx of new arrivals from the South, the city's Black population more than tripled from 152,467 in 1920 to over 458,000 in 1940.⁴¹ The various governmental and private policies underlying residential segregation funneled Black migrants into small neighborhoods with high levels of racial isolation and stark poverty.⁴²

From the 1940s through the late 1950s, NYCHA's policy of filling new developments with tenants who reflected "existing community patterns" led to a rise in the non-white share of the public housing tenant population as the Authority increasingly built new projects in Black and Hispanic

37. This practice, carried out by the federally-run Home Owners' Loan Corporation, assigned grades to different residential areas to ensure that loans underwritten by the Federal Housing Authority only went to prospective home-buyers in white neighborhoods. *See* RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 64-66 (2017); Massey & Denton, *supra* note 12, at 52-53.

38. Biondi, *supra* note 28, at 116; Wilder, *supra* note 28, at 202-04.

39. *Id.*

40. *See generally* ERIN R. BATTAT, *AIN'T GOT NO HOME: AMERICA'S GREAT MIGRATIONS AND THE MAKING OF AN INTERRACIAL LEFT* (2014); FARAH GRIFFIN, "WHO SET YOU FLOWIN'?: THE AFRICAN-AMERICAN GREAT MIGRATION NARRATIVE" (1995).

41. U.S. Census Bureau, *New York - Race and Hispanic Origin for Selected Large Cities and Other Places: Earliest Census to 1990* (2005).

42. *See* PATRICK SHARKEY, *UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE* 15 (2018) ("The combined influence of redlining, segregated housing developments, and rampant discrimination in the employment and education fields concentrated low-income people of color in small geographic areas and created a 'new form of urban poverty.'"). Newly arrived Black migrants were generally not eligible for NYCHA housing as a result of the income- and moral character-based tenant admission criteria—an additional constraint on Black New Yorkers' ability to live in areas outside their designated ghettos. *See* Bloom & Lasner, *supra* note 10, at 87.

neighborhoods.⁴³ As discussed below, New York City Construction Coordinator Robert Moses took charge of capital projects at NYCHA in 1946 and quickly set about building new developments in predominantly Black and Puerto Rican neighborhoods.⁴⁴ In accordance with the mandate to preserve segregated residential patterns across the city, NYCHA continued to fill these new developments with racially homogeneous tenant communities.⁴⁵

Some new developments were moderately diverse; for instance, the Authority designated a few city-funded projects for majority-white tenants but admitted enough Black families to constitute between 12.2 and 24.2 percent of the resident population.⁴⁶ However, these developments represented an exception to the general rule of keeping NYCHA housing racially homogeneous to reflect the city's segregated living patterns. New projects in Black neighborhoods were frequently ninety-nine percent Black, while new ones in white neighborhoods were consistently majority-white.⁴⁷ For example, when NYCHA constructed Marlboro Houses in the mostly white neighborhood of Coney Island, the Authority admitted a 93.3 percent white tenant population.⁴⁸ In 1958, the New York Committee of Racial Equality spoke out against NYCHA's role in preserving segregated residential patterns across the city, claiming: "Since New York City housing is predominantly segregated, merely placing people in projects in the neighborhoods in which they have been living perpetuates and seals segregation in official mortar and brick."⁴⁹

In conjunction with NYCHA's aggressive expansion, demographic shifts in the city at large caused significant changes in the racial composition of New York's public housing population. Between 1940 and 1950, the city's Black population grew by 63% and the Puerto Rican population by 200%.⁵⁰ Meanwhile, white New Yorkers began to flee the city for racially exclusive suburbs in the surrounding metropolitan area, causing the city's first ever population decline in the 1950s.⁵¹ Changes in NYCHA's tenant population mirrored these dynamics. As the Authority built more developments in the city's expanding majority-minority neighborhoods, the number of new Black and Hispanic tenants admitted into public housing began to

43. See Bloom 2009, *supra* note 23, at 170-71.

44. See *id.* See generally ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* (1974).

45. See Bloom 2009, *supra* note 23, at 171.

46. See *id.* at 169.

47. See *id.* at 171.

48. *Id.*

49. Willis F. Jones, *Housing Site Criticized*, N.Y. TIMES, Apr. 18, 1958, at 22.

50. Bloom 2009, *supra* note 23, at 169.

51. Plunz, *supra* note 13, at 282, 274; Biondi, *supra* note 28, at 226; Wilder, *supra* note 28, at 85; Caro, *supra* note 38, at 20.

outpace white tenants.⁵² Meanwhile, growing numbers of white NYCHA residents responded to the city's increasing diversity by abandoning public housing in favor of the affordable housing available exclusively to them in nearby suburbs, which caused the number of white departures from NYCHA to significantly outnumber Black and Hispanic departures.⁵³ By the late 1950s, non-white NYCHA residents outnumbered white residents for the first time, with Black and Puerto Rican tenants making up 57% of the public housing population in 1959.⁵⁴

2. 1958-1968: Unsuccessful Efforts at Integration

In 1958, Mayor Robert F. Wagner Jr. cleaved control of NYCHA away from Robert Moses and revised the Authority's tenant admissions policy with the goal of furthering racial integration—a goal that the Authority ultimately failed to accomplish.⁵⁵ Pledging to reverse public housing's "growing racial concentration," Wagner had NYCHA create an Intergroup Relations division to encourage integration in public housing.⁵⁶ Over the next several years, the Authority followed a plan drafted by Intergroup Relations in 1960 to bring more white tenants into predominantly Black and Hispanic developments and vice versa.⁵⁷ However, not only did white tenants continue to abandon public housing faster than they could be replaced, but white flight from the city continued at such a high rate that NYCHA lacked enough white tenant applicants to integrate its majority-minority developments.⁵⁸ In the South Bronx, for example, NYCHA succeeded in meaningfully integrating its housing stock, but the gains were short-lived.⁵⁹ In accordance with the Intergroup Relations plan, NYCHA began admitting substantial numbers of Black and Hispanic tenants into its existing majority-white developments and filling its new developments, including St. Mary's Park Houses, with diverse tenant populations.⁶⁰ Within a few years, however, white residents had almost totally abandoned both the developments and the surrounding neighborhoods. By the mid-1970s, every

52. Bloom 2009, *supra* note 23, at 170.

53. *Id.*

54. Bloom 2009, *supra* note 23, at 171.

55. *Id.* at 174 ("whites were leaving in far larger numbers from all the different phases than could be expected").

56. *Id.* at 171.

57. *Id.* at 171-72.

58. *Id.* at 174.

59. *Id.*

60. *Id.*

NYCHA development in the area – including St. Mary’s Park Houses – was inhabited almost exclusively by Black and Hispanic tenants.⁶¹

NYCHA was able to make certain majority-minority developments less racially homogeneous, but only temporarily as white flight continued to outpace white entry into public housing.⁶² Apartments reserved for white residents in an effort to integrate NYCHA buildings sat vacant for months while Black and Puerto Rican applicants waited to receive housing.⁶³ Civil rights advocates, including the State Commission for Human Rights, accused NYCHA of discriminating against applicants of color by refusing to house them in vacant units.⁶⁴ Bowing to pressure, NYCHA quietly abandoned its policy of guaranteeing racial integration in public housing in 1964, although the Authority continued to make modest efforts at preserving racial diversity in new developments and in the few housing complexes where integration efforts had succeeded.⁶⁵

3. 1968-today: Social Safety Net as Segregation

White flight out of public housing accelerated to a fever pitch after NYCHA loosened its tenant screening process in 1968.⁶⁶ Until that point, NYCHA had continued using income-based standards and “moral factors” to screen tenants for things like single motherhood and irregular work history.⁶⁷ As a result, NYCHA continued to keep welfare-receiving and low-income families in relatively low numbers in public housing, even though the number of middle-income Black and Hispanic families grew exponentially in the 1950s and early 1960s.⁶⁸ In 1968, however, NYCHA Chair Albert Walsh acquiesced to growing political pressure and revised the Authority’s standards for admission, abolishing the most morally tinged criteria in favor of a screening process that gave staff members more latitude to admit applicants.⁶⁹ At the same time, new regulations severely cut back on the Authority’s ability to evict tenants for behavior-related reasons.⁷⁰

61. *Id.*

62. *Id.*

63. *Id.* at 172.

64. Peter Kihss, *Housing Policy of City Changed*, N.Y. TIMES, Jan. 27, 1964 at 16.

65. *See id.*

66. *See* Bloom 2009, *supra* note 23, at 8.

67. Bloom & Lasner, *supra* note 10, at 123.

68. *See id.*

69. Bloom 2009, *supra* note 23, at 209-10.

70. *See id.* at 210.

The public housing population began to transform immediately. NYCHA quickly went from serving as a permanent housing resource for a mixed-income population primarily composed of working families, to serving as a housing resource for those in deep poverty.⁷¹ Higher-income residents, especially white ones, responded to the growing number of poor and welfare-receiving residents by abandoning public housing, even the developments located in majority-white neighborhoods, *en masse*.⁷²

The 1970s saw the transformation of NYCHA public housing into its current status as a network of pockets of concentrated non-white poverty. At the beginning of the decade, NYCHA was effectively administering two parallel public housing systems: one system for higher-income white residents in the outer boroughs and one system for poor Black and Puerto Rican residents in the urban core.⁷³ White flight continued to speed up, and NYCHA's white population dropped from 29.1% in 1971 to 14.1% in 1974.⁷⁴ The white exodus from NYCHA mirrored ongoing white flight from the larger city; in the 1970s approximately 1.4 million white New Yorkers fled and mainly relocated in the surrounding suburbs.⁷⁵ During this era, NYCHA was continuing to set aside units for white residents in developments—mostly located in white neighborhoods like Manhattan's Upper West Side and Lower East Side—where the tenant populations were changing from majority-white to majority-minority.⁷⁶ However, the Authority ended this program in the mid-1970s because not enough white applicants were seeking admission to public housing, prompting Black and Hispanic community groups to protest the Authority's habit of keeping white-designated apartments vacant for months while non-white families waited to receive housing.⁷⁷

White flight out of public housing continued unabated for the next two decades and has shaped NYCHA's tenant population through today. By 1995, white residents made up just eight percent of NYCHA's public hous-

71. *See id.* at 175, 207-08.

72. *See id.* at 169, 211.

73. NYCHA developments in the northeast Bronx, the Brooklyn neighborhoods of Coney Island and Williamsburg, and Staten Island housed predominantly white tenant populations. Meanwhile, developments in South Brooklyn, Williamsburg, and Harlem housed mostly Black and Puerto Rican tenant populations. *See* Bloom 2009, *supra* note 23, at 174.

74. *See* Bloom 2009, *supra* note 23, at 175.

75. *See* Wilder, *supra* note 28, at 85.

76. *See, e.g., Otero v. N.Y.C. Hous. Authority*, 484 F.2d 1122, 1128 (2nd Cir. 1973); Nancy E. LeBlanc, *Race, Housing, and the Government*, 26 VANDERBILT L. REV. 495 (1973).

77. *See Otero*, 484 F.2d at 1124.

ing population.⁷⁸ Today, white residents account for less than five percent of NYCHA inhabitants.⁷⁹ Based on this history, NYCHA historian Nicholas Dagen Bloom argues that public housing at this scale can only remain racially diverse if the housing authority commits to preserving a mixed-income population.⁸⁰ Endorsing a believe espoused by New York housing administrators in the 1970s and 1980s, Bloom concludes that white residents tend to abandon housing networks once the low-income, non-white population passes a certain “tipping point.”⁸¹

B. SITE SELECTION

1. 1937-1966: The “Second Ghetto” Model

If NYCHA’s evolution into a driver and magnifier of segregation derives largely from the history of its policies for selecting tenants, the same holds true for its policies for selecting development sites. From the 1930s through the late 1950s, largely due to the stiff political opposition from the residents of wealthy white neighborhoods, NYCHA primarily selected construction sites that lined up with old tenements designated for slum clearance.⁸² During the prewar period, many of the sites selected for NYCHA developments were located in white ethnic neighborhoods.⁸³ Over the course of the 1940s, and especially after Robert Moses seized control of the Authority, NYCHA increasingly targeted tenements primarily inhabited by Black and Puerto Rican New Yorkers.⁸⁴

The “second ghetto” approach to site selection resulted in the dense concentration of NYCHA developments within just seven areas of the city: the Lower East Side, the Upper West Side, East and Central Harlem, Bedford Stuyvesant, Brownsville, Coney Island, and the South Bronx.⁸⁵ Under Robert Moses’ direction, the Authority continued to focus new construction in these areas even as it embarked on unprecedented growth during the immediate postwar period.⁸⁶

78. Bloom 2009, *supra* note 23, at 175.

79. Resident Book 2021, *supra* note 16, at 2.

80. Bloom 2009, *supra* note 23, at 175.

81. *Id.*; see also Otero, 484 F.2d at 1140; Peter Hellman, *A Dilemma Grows in Brooklyn*, NEW YORK MAGAZINE (Oct. 17, 1988) 55.

82. Bloom & Lasner, *supra* note 10, at 85, 120.

83. *See id.* at 120.

84. Bloom 2009, *supra* note 23, at 170 (“To informed outsiders it appeared that NYCHA was building a second ghetto that would replicate the social problems of the first”).

85. Bloom & Lasner, *supra* note 10, at 121.

86. *Id.* at 116.

By 1959, the Authority had either completed or was in construction on 148,583 apartments housing a population greater than that of St. Paul, Minnesota.⁸⁷ As discussed above, NYCHA paired its geographically targeted development strategy with a commitment to replicating “existing community patterns,” which effectively reinforced, “in official mortar and brick,” segregation patterns that already existed in the city.⁸⁸ For example, NYCHA deliberately filled its developments in Harlem with almost exclusively Black tenants, while in the predominantly white neighborhood of Coney Island the Authority was filling new developments with white tenants.⁸⁹

2. 1966-1972: The “Scatter-Site” Experiment

In the mid-1960s, under the leadership of Mayor John V. Lindsay, NYCHA attempted to break its reform its site selection practices and spread the city’s public housing stock more evenly across the five boroughs.⁹⁰ Lindsay had been elected as a fierce liberal vowing to use the powers of local government for social justice, and he publicly characterized his desire to racially integrate the city’s housing as a “moral imperative.”⁹¹ In 1966, as white residents of the South Bronx were responding to the arrival of Black and Puerto Rican public housing residents by fleeing the city in droves, Lindsay introduced the “scatter-site” program – which would construct new NYCHA developments for mostly Black and Puerto Rican residents in middle-class white neighborhoods.⁹² The political pushback from white New Yorkers was swift and intense, especially after NYCHA tried to bring the program to the neighborhood of Forest Hills, Queens.⁹³ After years of protracted political warfare, NYCHA “bowed to white community resistance” and abandoned most of its planned scatter-site program develop-

87. *Id.*

88. In 1957, NYCHA Chair William Reid explained “We don’t try to create too sharp or too sudden a difference between our projects and the neighborhoods around them. It is our aim to stimulate integration, not to force it.” Bloom 2009, *supra* note 23, at 171.

89. See Bloom 2009, *supra* note 23, at 171.

90. See generally Vincent J. Cannato, *The Ungovernable City: John Lindsay and His Struggle to Save New York* 505 (2001); Andrea M. K. Gill, “We Will Not Be Forced Out Again”: The Scatter Site Housing Controversy in Forest Hills, Queens and the Reshaping of Public Policy 31-32 (Apr. 2004) (unpublished M.A. thesis, Simon Fraser University), https://primo-pmtca01.hosted.exlibrisgroup.com/permalink/f/1ecgsju/01SFUL_ALMA21163793250003611.

91. *Id.*

92. *Id.*; Bloom 2009, *supra* note 23, at 204.

93. *Id.*

ments, including Forest Hills.⁹⁴ Despite City Hall's best efforts during the Lindsay era, NYCHA never constructed significant amounts of public housing beyond the neighborhoods targeted during the Authority's boom years.⁹⁵

3. 1972-today: The End of New Public Housing Construction

The failure of the "scatter-site" program ultimately signified the end to any hopes that NYCHA would construct new developments in middle-class neighborhoods. In the early 1970s, President Richard Nixon issued a federal moratorium on new expenditures on public housing, which began a decades-long, unbroken trend of federal divestment from public housing.⁹⁶ Prior to this point, NYCHA had relied on federal aid to finance new construction, as well as maintenance and attendant costs; the end of federal support meant the end of NYCHA's ability to pursue new development at the same levels it had during the immediate postwar period.⁹⁷ With the local government's finances in catastrophic state, City Hall was not a viable resource for new construction funds.⁹⁸ Between 1974 and 1998, NYCHA's rate of new construction fell far below its postwar-era levels, with the Authority only opening a handful of modestly sized developments.⁹⁹ Congress then enacted the Faircloth Amendment¹⁰⁰ to prohibit public housing authorities from using any federal funds to increase the number of units in their total supply.¹⁰¹ Consequently, NYCHA's total supply of public housing has remained constant since 1998.¹⁰²

Mayor Lindsay's vision of NYCHA developments as instrumentalities for creating neighborhood-level racial diversity—if not development-level integration—came to pass eventually, but not through deliberate attempts like the scatter-site program. Instead, the process took place as the inadvertent result of white flight and gentrification. After the Authority

94. Bloom 2009, *supra* note 23, at 204 (quoting the N.Y. Times).

95. Bloom & Lasner, *supra* note 10, at 121.

96. *Id.* at 197.

97. *Id.*

98. *Id.* at 248.

99. N.Y.C. Housing Authority, NYCHA Development Data Book 2021 (2021).

100. 42 U.S.C.A. § 1437g(g)(3)(A) (2022)

101. U.S. Department of Housing and Urban Development, Office of Capital Improvements (updated May 10, 2022), https://www.hud.gov/program_offices/public_indian_housing/programs/ph/capfund; Ross Barkan, *Alexandria Ocasio-Cortez Knows How to Fix Housing*, N.Y. TIMES (Jan. 4, 2021), <https://www.nytimes.com/2021/01/04/opinion/public-housing-faircloth-amendment-repeal.html> ("the Faircloth Amendment... prohibits any net increase in public-housing units").

102. N.Y.C. Housing Authority, *supra* note 93.

loosened its tenant admission criteria in the late 1960s, NYCHA's white population decreased at an exponential rate, dropping from 29.1% in 1971 to 14.1% in 1974.¹⁰³ This trend even held true for public housing developments in majority-white neighborhoods in the outer boroughs.¹⁰⁴ For example, Marlboro Houses in Coney Island went from 93.3% white in 1958 to 70.3% white by 1972 and eventually majority-Black by the 1980s.¹⁰⁵ As a result, many public housing developments eventually came to function as discrete communities of Black and Hispanic residents nestled within predominantly white areas of the city.¹⁰⁶

The gentrification of several neighborhoods with high densities of public housing since the early 1990s has exacerbated this trend, causing the neighborhoods surrounding NYCHA buildings to grow whiter and wealthier as the public housing population has remained mostly non-white and low-income.¹⁰⁷ In particular, Williamsburg, Central Harlem, the Lower East Side, East Harlem, the Upper West Side, and Astoria have gentrified at higher rates than the citywide average since 1990.¹⁰⁸ In these areas, the high numbers of public housing towers function as cordoned-off pockets of Black and Latino poverty surrounded by mostly white and upper-middle class residences.¹⁰⁹

103. See Bloom 2009, *supra* note 23, at 175 ("The white exodus proceeded at a blistering pace" in the early 1970s).

104. See, e.g., *Hart v. Cmty. Sch. Bd. of Brooklyn*, N.Y. Sch. Dist. No. 21, 383 F.Supp. 699, 722 (E.D. N.Y. 1974) (concluding from the history of demographic change at NYCHA developments in Coney Island between the late 1950s and the mid-1970s that "It is readily apparent that there had been a loss of white population from these early Authority projects from initial occupancy to the present").

105. See Roger Lowenstein, *Turf Defenders: The Mood Gets Nasty in City Neighborhood as Racial Tension Rises*, WALL STREET JOURNAL, Jul. 25, 1988 at 1 (calling Marlboro Houses a "predominantly black enclave" in the neighborhood); Emil Parker, *If You're Thinking of Living in Gravesend*, N.Y. TIMES, Aug. 10, 1986 at R9 (alluding to a history of racial tension between Marlboro Houses' mostly Black residents and the surrounding neighborhood's mostly white residents).

106. See Bloom 2009, *supra* note 23, at 175.

107. See Maxwell Austensen et al., *State of New York City's Housing and Neighborhoods in 2015* 6 (2015), available at https://furmancenter.org/files/sotc/NYUFurmanCenter_SOCin2015_9JUNE2016.pdf.

108. See *id.* (measuring gentrification as percent change in average rent between 1990 and 2014).

109. See Abigail Savitch-Lew, *Van Bramer Says He'll Listen to Public Housing Residents on Rezoning*, City Limits (Oct. 17, 2017), <https://citylimits.org/2017/10/17/van-bramer-says-hell-listen-to-public-housing-residents-on-rezonings/> (Long Island City "ranked first among neighborhoods in the country with the most new apartments since 2010, according to a study by RentCafé. Since 2000, the neighborhood has become more White, less Black, and incomes in the area south of Queensbridge Houses have skyrocketed, according to a presentation by Paula Crespo from the Pratt Center for Community Development.").

York City has a complex economic geography – while broad patterns of income distribution can be observed among the boroughs, it is also not uncommon to find economic contrasts in close proximity, such as million-dollar condominiums located across the street from a public housing development.”¹¹⁰

As the result of Authority decision-making over the decades regarding both tenant admission and site selection, NYCHA developments now represent spatially confined pockets of concentrated Black and Hispanic. Even though only a handful of areas contain a high concentration of public housing developments, this dynamic applies in every neighborhood with a NYCHA community. The result invariably harms public housing residents. For NYCHA developments situated in high-poverty areas, the tenants are effectively sealed into under-resourced communities as a result of state action.¹¹¹ For developments in low-poverty areas, tenants are effectively cordoned off from their surrounding communities and forced to inhabit anomalously poor-quality dwellings in neighborhoods with high costs of living.¹¹²

PART II. NYCHA’S ONGOING ROLE IN REPRODUCING AND MAGNIFYING SEGREGATION IN NEW YORK

Today, NYCHA continues to serve the laudable goal of keeping hundreds of thousands of New Yorkers in stable, affordable housing, but it does so at the expense of exacerbating and intensifying the realities of residential segregation in the city. NYCHA developments concentrate Black and Hispanic poverty in spatially confined and knowingly under-maintained areas, subjecting their residents to hardships and disenfranchisement that are different in both kind and degree from those faced by the residents of nearby (and in some cases immediately adjacent) residents inhabited by white New Yorkers. In a landmark 1993 study of the effects of public housing on residential segregation in Chicago, scholars Douglas Massey and Shawn Kanaiaupuni concluded,

110. New York City Bar, *The Future of Affordable Housing in New York City 2016 Update* 55 (2016).

111. See Matthew Shin, *The Race to Get In, and the Struggle to Get Out: The Problem of Inter-Generational Poverty in Federal Housing Programs*, 40 WASH. U. J. L. & POL’Y 337, 341 (2012).

112. See Corey Kilgannon, *Amazon’s New Neighbor: The Nation’s Largest Housing Project*, N.Y. TIMES (Nov. 12, 2018), <https://www.nytimes.com/2018/11/12/nyregion/amazon-queens-queensbridge-houses.html> (noting that gentrification in Astoria has not benefited the residents of nearby Queensbridge houses in part because it is “making the neighborhood less affordable for people of limited means”).

Public housing concentrates poverty because federal guidelines explicitly require public housing applicants to be poor and because projects apparently generate class-selective migration into neighborhoods that contain them. Public housing thus represents a key institutional mechanism for concentrating large numbers of poor people within a small geographic space, often within dense, high-rise buildings. Because low-income projects were systemically targeted to black neighborhoods in a discriminatory fashion, this institutional mechanism greatly exacerbated the degree of poverty concentration for one group in particular—blacks... Public housing thus represents a federally funded, physically permanent institution for the isolation of black families by race and class, and must be considered an important structural cause of concentrated poverty in U.S. cities.¹¹³

Massey and Kanaiaupuni's Chicago case study is instructive for assessing the role of NYCHA in New York's human geography, but it does not go far enough. First, while NYCHA has indeed exacerbated the degree of poverty concentration for New York's non-white population, that dynamic has targeted Puerto Ricans and other Hispanics—today the largest ethnic group in the public housing system—in equal if not greater measure as Black New Yorkers. Moreover, Massey and Kanaiaupuni fail to account for the ways in which NYCHA public housing residents face a more extreme and insidious form of segregation than other New Yorkers of color.

A. NYCHA CONTRIBUTES TO SEGREGATION IN NEW YORK CITY

At the citywide level, New York is increasingly diverse but sharply segregated by race and class.¹¹⁴ In 2020, the city government published a thoroughly researched report that analyzed New York's residential patterns and offered a six-part plan for affirmatively furthering fair housing.¹¹⁵ Titled *Where We Live NYC*, the report found high levels of racial segregation and concluded that “[w]hile the racial composition of many neighborhoods has changed dramatically since 1990, the city’s high degree of segregation has not changed meaningfully by most measures.”¹¹⁶

113. Massey & Kanaiaupuni, *supra* note 2, at 120.

114. See *Where We Live NYC*, *supra* note 5, at 55.

115. *Id.* at 187.

116. *Id.* at 89.

The spatial dimension of New York City's racial segregation is stark, especially for Black and Hispanic residents. Researchers used neighborhood-level data to find the dissimilarity index, which measures the evenness of distribution across a geographic area, for each of the city's main racial groups.¹¹⁷ The data showed high levels of Black-white and Hispanic-white segregation, with dissimilarity indexes of 75 and 57, respectively, out of a possible 100.¹¹⁸ By contrast, the dissimilarity index of Asian and Pacific Islander (API) New Yorkers to white ones is moderate, at 54 out of 100.¹¹⁹

Researchers also analyzed the city's racial segregation using the isolation index, which measures the level of probability that members of a racial group will interact with members of other groups.¹²⁰ White New Yorkers experience the highest rate of racial isolation at 0.54, with Black residents close behind at 0.51.¹²¹ Hispanic isolation in the city is moderately high at 0.45. API New Yorkers are the least isolated racial group, with an isolation index of 0.30. The report's authors also concluded that, since 1990, "no neighborhood in New York City has had all four racial and ethnic groups represented proportionally." 0.45.¹²² API New Yorkers are the least isolated racial group, with an isolation index of 0.30.¹²³ The report's authors also concluded that, since 1990, "no neighborhood in New York City has had all four racial and ethnic groups represented proportionally."¹²⁴

New York is also defined by high levels of racial inequality, and geography plays a fundamental role in structuring and maintaining that inequality.¹²⁵ According to *Where We Live NYC*, non-white New Yorkers are disadvantaged in terms of infant mortality, childhood housing instability, academic achievement, high school graduation rates, median income from employment, wealth, homeownership rates, quality of housing, housing over-crowdedness, exposure to violent crime, and likelihood of death caused by COVID-19.¹²⁶ Segregation facilitates this inequality by acting as the direct and proximate cause of unequal access to economic opportunity, safe and healthy neighborhoods, quality schools, reliable transportation, and

117. *Id.* at 81.

118. *Id.*

119. *Id.*

120. *Id.* at 82.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 84.

125. See generally SHERYLL CASHIN, *WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY* (2021); Massey & Denton, *supra* note 12, at 7-10.

126. *Where We Live NYC*, *supra* note 5, at 57-64.

other public services.¹²⁷ White New Yorkers are the only racial group over-represented in areas of the city with low levels of poverty, while Black and Hispanic New Yorkers are significantly over-represented in areas with high levels of poverty.¹²⁸ As the report's authors explain, "access to these resources is not shared equally, and disparities in access are often clustered by neighborhood," which leads to "stark disparities in life outcomes by race."¹²⁹

NYCHA public housing helps to maintain this spatially-structured racial inequality by concentrating hundreds of thousands of Black and Hispanic families in high-poverty communities.¹³⁰ According to Authority data, NYCHA's public housing population in 2021 was 88.34% Black or Hispanic but only 4.73% white.¹³¹ The average public housing family's annual income is \$24,454, which would put them in the "extremely low income" band for New York City.¹³² *Where We Live NYC* also produced data indicating a significant correlation between neighborhoods with a high density of public housing units and those with low scores on the Labor Market Engagement Index, which measures an area's levels of employment, labor force participation, and educational attainment.¹³³ In essence, NYCHA is one of the principal forces isolating Black and Hispanic New Yorkers in areas where the effects of concentrated poverty negatively affect their life outcomes.

B. NYCHA CREATES A UNIQUE FORM OF SEGREGATION FOR PUBLIC HOUSING RESIDENTS

The relationship between NYCHA and segregation goes well beyond public housing's tendency to drive up the city's scores on the dissimilarity and isolation indexes. Rather, public housing owned by NYCHA creates a distinctive form of segregation that is unique in degree if not also

127. *Id.* at 67.

128. *Id.* at 91.

129. *Id.* at 116; 55.

130. *See* Shin, *supra* note 105, at 341.

131. Resident Book 2021, *supra* note 16, at 3.

132. New York City Housing Authority, NYCHA 2022 Fact Sheet 2 (2022); N.Y.C. Department of Housing Preservation & Development, Area Median Income, <https://www1.nyc.gov/site/hpd/services-and-information/area-median-income.page> (last visited May 14, 2022).

133. *Where We Live NYC*, *supra* note 5, at 118, 162; Carole Chartouni, Robert Holzmänn & Gustavo N. Paez, *Not Everyone is Engaged: An Innovative Approach to Measure Engagement Levels on the Labor Market*, Institute of Labor Economics, Dec. 25, 2018 at 2, https://conference.iza.org/conference_files/worldbank_2019/paez_g28014.pdf.

kind.¹³⁴ The almost exclusively Black and Hispanic families inhabiting NYCHA's public housing supply face challenges not shared by other New Yorkers.

1. Spatial and Social Isolation by Race and Class

At the outset, NYCHA's current model for providing public housing is inherently a form of segregation, systematically containing families of color inside tightly defined areas marked by concentrated poverty.¹³⁵ NYCHA's public housing population is 45.20% Hispanic, 43.14% Black, and uniformly low-income as a result of the Authority's use of income caps in determining eligibility for housing.¹³⁶ For example, a family of two only qualifies for NYCHA housing if its annual income is under \$85,450, less than eighty percent of the city's area median income.¹³⁷ As a result, NYCHA developments make up some of the highest concentrations of poverty in New York.¹³⁸

Public housing communities are spatially and socially isolated from the rest of the city. As public housing networks across the United States have fallen into disrepair as the result of decades of targeted neglect, stigmas have developed around the very concept of public housing and linked public housing residents to drugs, crime, and various racialized social ills.¹³⁹ As discussed below, targeted federal divestment caused many public housing authorities like NYCHA to begin deteriorating at the same time that they were serving increasingly poor and non-white tenant populations.¹⁴⁰

134. Massey & Denton, *supra* note 12, at 2.

135. *See id.*

136. Resident Book 2021, *supra* note 16, at 3; N.Y.C. Housing Authority, Eligibility, <https://www1.nyc.gov/site/nycha/eligibility/eligibility.page> (last visited May 14, 2022).

137. *Id.*; N.Y.C. Department of Housing Preservation & Development, Area Median Income, <https://www1.nyc.gov/site/hpd/services-and-information/area-median-income.page> (last visited May 14, 2022).

138. New York City Bar, *supra* note 104, at 61.

139. *See* Fritz Umbach & Alexander Gerould, *Myth #3: Public Housing Breeds Crime* in PUBLIC HOUSING MYTHS: PERCEPTION, REALITY, AND SOCIAL POLICY 64, 64-90 (Nicholas D. Bloom, Fritz Umbach & Lawrence J. Vale eds., 2015); Naomi J. McCormick, Mark L. Joseph & Robert J. Chaskin, *The New Stigma of Relocated Public Housing Residents: Challenges to Social Identity in Mixed-Income Developments*, 11(3) CITY & COMMUNITY 285, 285 (2012) ("Residents of public housing have long been stigmatized for their reliance on government subsidies, perceived self-destructive and nonmainstream behavior, and the crime and gang culture entrenched in and around public housing developments").

140. Bloom & Lasner, *supra* note 10, at 197; Bloom 2009, *supra* note 23, at 9.

Even though the decline in material conditions at public housing facilities was rooted in policymakers' refusal to fund them according to their needs, mainstream and academic discourse readily latched onto the false explanation that the cultural characteristics of poor non-white communities actually accounted for the trend.¹⁴¹

This stigma on public housing residency places significant strain on public housing residents' ability to enjoy the equal rights of citizenship.¹⁴² NYCHA tenants report that negative stereotypes adversely affect their ability to obtain new housing, develop social ties to their surrounding communities, and secure employment.¹⁴³ During conversations with government researchers, a sample of NYCHA tenants "described feeling treated with suspicion or disdain by landlords, brokers, neighbors, and even staff and providers working for the City."¹⁴⁴

Over-policing exacerbates the effects of social alienation on NYCHA communities. NYCHA properties are kept under tight surveillance by Authority staff and by the New York Police Department.¹⁴⁵ The constant surveillance, as well as the tensions between residents and police, create negative psychological effects on public housing residents while contributing further to the general criminalization of Black spaces and mass incarceration.¹⁴⁶

The physical design of most NYCHA structures gives public housing residents' isolation a brick-and-mortar component as well. Since the Authority's earliest years, NYCHA has built its developments in conformity with the notorious red brick tower-in-the-park design.¹⁴⁷ During the 1930s and 1940s, this design choice made sense for the Authority's construction needs; not only were these towers consistent with the modernist aesthetic that defined much new construction across the city, but they were also "efficient, cost-effective, and practical."¹⁴⁸ Inspired by the courtyard apartments

141. See Lisa Levenstein, *Myth #11: Tenants Did Not Invest in Public Housing* in PUBLIC HOUSING MYTHS: PERCEPTION, REALITY, AND SOCIAL POLICY 223, 229 (Nicholas D. Bloom, Fritz Umbach & Lawrence J. Vale eds., 2015).

142. See *Where We Live NYC*, *supra* note 5, at 46.

143. *Id.*

144. *Id.*

145. See FRITZ UMBACH, THE LAST NEIGHBORHOOD COPS: THE RISE AND FALL OF COMMUNITY POLICING IN NEW YORK PUBLIC HOUSING 173-78 (2011).

146. See Monica C. Bell, *Anti-Segregation Policing*, 96 N.Y.U. L. REV. 650 (2020); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016).

147. Bloom & Lasner, *supra* note 10, at 91-94.

148. *Id.* at 118.

popular in the 1920s, this model offered residents fresh air, sunlight, and open space safe from vehicular traffic.¹⁴⁹

As tastes have changed, NYCHA's boxy red towers have come to stand out visually in the middle of Manhattan's cluttered, gray skyline.¹⁵⁰ Consequently, NYCHA's instantly recognizable buildings have become instantly visible markers of the stigma on public housing.¹⁵¹ Additionally, the inclusion of courtyards surrounded by towers in many NYCHA developments has made it so that the interiors of those communities remain physically separated and hidden from outside view.¹⁵²



*Holmes Towers, Manhattan*¹⁵³

149. *Id.*

150. See Nicholas D. Bloom & Matthias Altwicker, Looks Matter, Especially in Public Housing, *GOHAM GAZETTE* (Feb. 19, 2016), <https://www.gothamgazette.com/authors/130-opinion/6176-looks-matter-especially-in-public-housing>.

151. *See id.*

152. *See id.*; Bloom & Lasner, *supra* note 10, at 118.

153. Alchetron, Holmes Towers, <https://alchetron.com/Holmes-Towers#holmes-towers-69b38370-8c18-41fb-92bf-e84fe0e1402-resize-750.jpg> (last visited May 14, 2022).



Map of Harlem River Houses, Manhattan¹⁵⁴

2. Restraints on Mobility

In addition to the confining and isolating public housing residents inside communities of concentrated poverty, NYCHA reproduces yet another element of residential segregation on public housing residents: restraints on their housing mobility.¹⁵⁵ NYCHA's public housing developments are clustered in a handful of neighborhoods, and they cumulatively create the effect of confining the public housing population to a small slice of the city.¹⁵⁶ Between the prohibitive cost of private rental housing and the relative stability offered by NYCHA dwellings, public housing residents are incentivized to remain in place permanently.¹⁵⁷

154. Sebastian Morris, *LPC Approves \$130M Renovation of the Historic Harlem River Houses in Manhattan*, NEW YORK YIMBY (Oct. 23, 2021), <https://newyorkyimby.com/2021/10/lpc-approves-130m-renovation-of-the-historic-harlem-river-houses-in-manhattan.html>.

155. See Sharkey, *supra* note 36, at 1-7; SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 58-60 (2004); Alexander Polikoff, *Reflections on Gautreaux at Fifty*, BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST 3-6 (2016).

156. Where We Live NYC, *supra* note 5, at 154.

157. *Id.* at 176; Thomas J. Waters, *Rental Housing Affordability in Urban New York: A Statewide Crisis*, COMMUNITY SERVICE SOCIETY 4 (May 2019).

The inescapability of NYCHA housing is a product of the program's initial design. When NYCHA was founded, its leaders envisioned the Authority as a permanent housing resource for middle-income families—a departure from earlier Progressive Era programs that provided temporary shelter to those in deep poverty.¹⁵⁸ Consistent with that vision, policymakers did not devise any mechanisms to support public housing residents who wished to move out.¹⁵⁹ Over the following decades, the quality of NYCHA housing seriously declined and the resident community became uniformly low-income.¹⁶⁰ Nonetheless, neither the Authority nor any other government actors has created a program offering public housing inhabitants a pathway to escaping the conditions of concentrated poverty.¹⁶¹ As the *Where We Live NYC* report describes, many NYCHA residents today feel “stuck with no pathway for leaving.”¹⁶² NYCHA housing not only facilitates the concentration of Black and Hispanic poverty to a small number of neighborhoods, but also cements it there permanently.

In addition to the dearth of opportunities for departure, public housing residents face constraints on their housing choice within the system. Residents newly accepted into public housing rarely get a choice in their assignment of housing.¹⁶³ One anonymous public housing resident told researchers in 2018 that they had initially asked NYCHA for placement in Queens, Manhattan, or Brooklyn so they could be close to their daughters and grandchildren, who lived in Queens.¹⁶⁴ However, NYCHA only offered the resident a unit in Staten Island, which requires a two-hour commute by bus or ferry to get to Queens. This lack of housing choice can create significant issues for public housing residents in accessing vital services and community hubs—especially for the over forty percent of NYCHA households headed by New Yorkers over the age of 62.¹⁶⁵

158. Bloom & Lasner, *supra* note 10, at 75-80.

159. *Id.*

160. Bloom 2009, *supra* note 23, at 9.

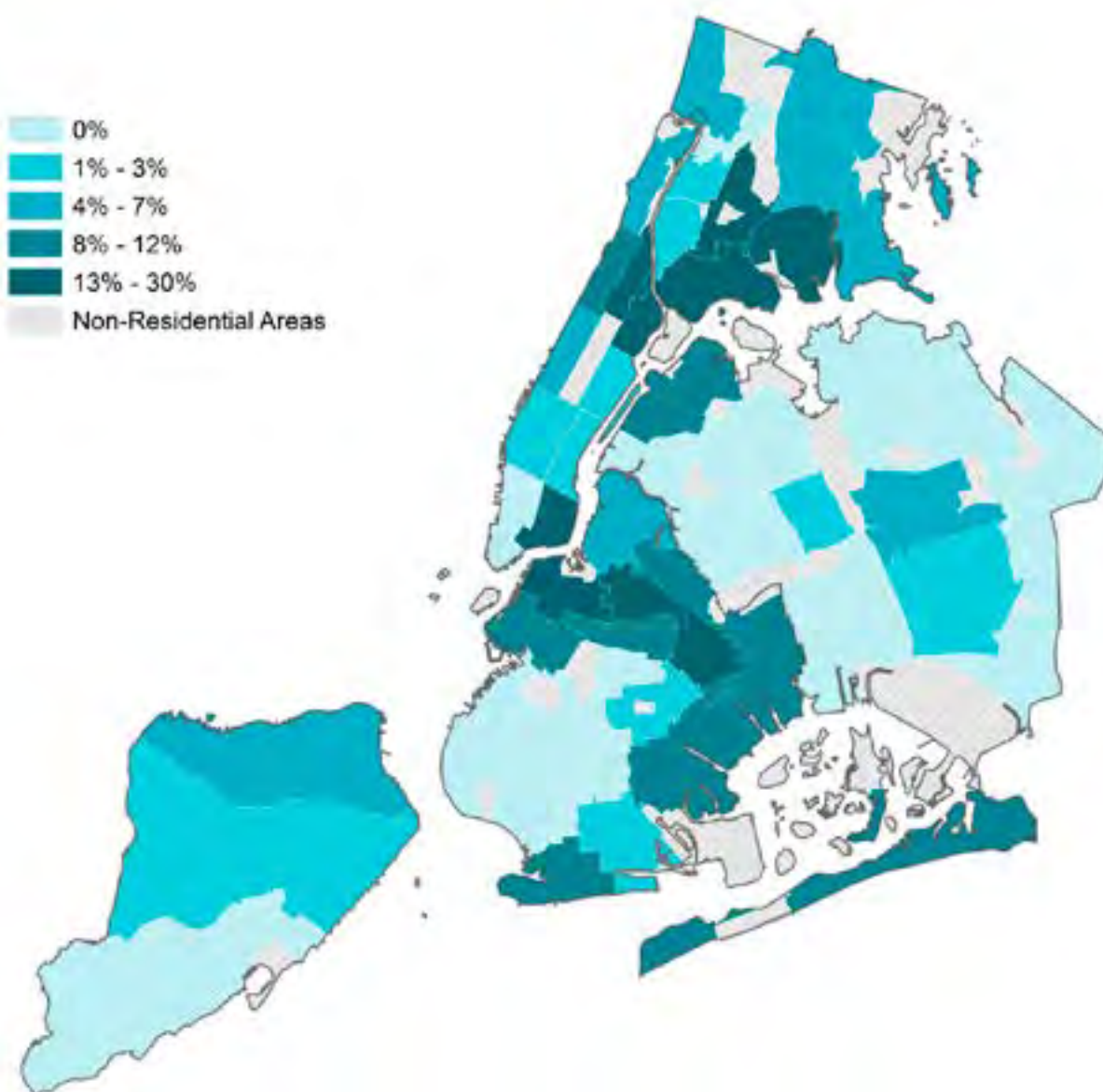
161. *Where We Live NYC*, *supra* note 5, at 176.

162. *Id.* at 154.

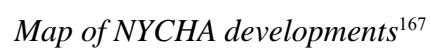
163. *Id.*

164. *Id.* at 55.

165. Resident Book 2021, *supra* note 16, at 3.



166. Where We Live NYC, *supra* note 11, at 162 citing NYC Housing and Vacancy Survey, 2017. US CENSUS BUREAU/NYC HPD.



167. N.Y.C. Housing Authority, Official Map 2022 (Mar. 2022), <https://www1.nyc.gov/assets/nycha/downloads/pdf/nychamap.pdf>.

3. Hazardous Living Conditions

Beyond NYCHA's role in exacerbating the concentration of low-income Black and Hispanic New Yorkers in high-poverty communities, potentially the most immediate concern of public residents is their uniquely poor living conditions. After bucking national trends for decades and keeping its public housing facilities well-maintained and in good quality, NYCHA facilities have been steadily deteriorating since the 1970s.¹⁶⁸ Beginning with President Richard Nixon's 1973 federal moratorium on new expenditures on public housing, funding for public housing has consistently dwindled, forcing the Authority to stretch every dollar as far as possible in the maintenance and administration of NYCHA's massive infrastructure.¹⁶⁹ In the same era, Congress enacted legislation capping public housing rents at 25% of income, which made it even more difficult for NYCHA to cover costs without federal aid.¹⁷⁰ As the public housing stock has aged, costs have actually risen as government aid has dissipated.¹⁷¹ This dynamic has a compounding effect: unmet capital needs worsen over time and create additional structural deficiencies.¹⁷²

Today, NYCHA's physical infrastructure is in dire condition, and the Authority is in an unfathomably deep financial hole.¹⁷³ Current NYCHA Chair Gregory Russ told local lawmakers in March 2022 that the Authority has approximately \$40 billion in unmet maintenance needs as the result of the "compounding effects of four decades of federal divestment."¹⁷⁴ Included in this figure is more than \$3 billion in repairs needed to finish NYCHA's recovery from the effects of Hurricane Sandy, which damaged several complexes a decade ago in October 2012.¹⁷⁵ These capital needs are not invisible. NYCHA residents routinely invite reporters and politicians to tour the

168. Bloom & Lasner, *supra* note 10, at 8.

169. *Id.* at 197.

170. Bloom 2009, *supra* note 23, at 9.

171. See Nicholas D. Bloom, *Myth #4: High-Rise Public Housing Is Unmanageable* in PUBLIC HOUSING MYTHS: PERCEPTION, REALITY, AND SOCIAL POLICY 91, 107 (Nicholas D. Bloom, Fritz Umbach & Lawrence J. Vale eds., 2015) [hereinafter Bloom 2015].

172. See *id.*

173. See Giller, *supra* note 2, at 285 ("Budget shortfalls coupled with an aging housing stock have led to serious deficiencies in the infrastructure of the buildings, and some estimates to repair NYCHA properties total as much as \$32 billion").

174. Jeff Coltin, *Council member to colleagues: Don't bother giving NYCHA your money*, CITY & STATE NY (Mar. 9, 2022), <https://www.cityandstateny.com/politics/2022/03/council-member-colleagues-dont-bother-giving-nycha-your-money/362931/>.

175. *Id.*

facilities and take note of the deteriorating hallway walls, unclean stairways, broken elevators, and malfunctioning heating and cooling systems necessary to maintain basic levels of habitability.¹⁷⁶

The poor quality of NYCHA facilities extends to individual residents' units.¹⁷⁷ According to recent research, 37% of NYCHA units have three or more maintenance deficiencies including lack of heat, the need for additional heating sources, rodent infestation, toilet breakdowns, leaks, peeling paint or plaster, and or holes in the floor.¹⁷⁸ That figure is substantially higher than the percentage of deficient units among New York's Section 8 housing (20%), rent-stabilized housing (17%), and market-rate rental housing (7%).¹⁷⁹ Another study from 2020 found that 81% of NYCHA residents need immediate repairs to their apartments, with the majority of NYCHA residents needing bathroom repairs and 45% needing kitchen repairs.¹⁸⁰

Perhaps the most critical structural hazard that haunts nearly every NYCHA development is lead.¹⁸¹ After years of cover-ups, obfuscations, and attempts to minimize the extent of lead exposure in NYCHA public housing, Authority officials acknowledged in 2020 that approximately 134,000 units contain dangerous levels of lead paint.¹⁸² Contained within this figure

176. See, e.g., Luis Ferré-Sadurní, *The Rise and Fall of New York Public Housing: An Oral History*, N.Y. TIMES (Jul. 9, 2018), <https://www.nytimes.com/interactive/2018/06/25/nyregion/new-york-city-public-housing-history.html>.

177. One public housing resident told Where We Live NYC researchers, "The lack of repairs makes it hard to want to keep staying, but [NYCHA] is the only place nearby that many people can afford." Where We Live NYC, *supra* note 5, at 155.

178. Where We Live NYC, *supra* note 5, at 175.

179. *Id.* NYCHA's poor housing quality likely contributes to racial inequalities in New York's larger housing landscape. In the city as a whole, one in five Black and one in five Hispanic households report lower housing quality—i.e., three or more maintenance deficiencies—compared to 6% of white and 6% of AAPI households. *Id.* at 178.

180. See Regional Planning Association, *The Impacts of Living in NYCHA* (2020), <https://rpa.org/work/reports/nycha-resident-needs-assessment>.

181. See *id.* (surveying NYCHA residents and finding that 15% of respondents are aware of lead exposure in their apartments).

182. Greg B. Smith, *The Toll of NYCHA's Lead Lies: A Brooklyn Girl Poisoned as Officials Covered Up Danger*, THE CITY (Nov. 28, 2021), <https://www.thecity.nyc/2021/11/28/22806530/nycha-lead-paint-lies-brooklyn-girl-poisoned-public-housing>; Greg B. Smith, *Count of NYCHA Apartments With Lead Paint — and Kids — on Pace to Hit 20,000*, CITY (Oct. 28, 2020), <https://www.thecity.nyc/health/2020/10/25/21533629/count-of-nycha-apartments-with-lead-paint-and-kids-on-pace-to-hit-20k>; Greg B. Smith, *NYCHA'S Lead Paint Crisis Explodes as Known Number of Apartments Where Kids Risk Exposure Triples*, CITY (Oct. 22, 2020), <https://www.thecity.nyc/housing/2020/10/22/21528781/nycha-lead-paint-more-apartments-identified>; Tanzina Vega, *NYCHA Under Fire for Lead Poisoning*, TAKEAWAY (Aug. 1, 2018), <https://www.wnycstudios.org/podcasts/takeaway/segments/nycha-under-fire-lead-poisoning>.

are at least 20,000 units that potentially exposed children under the age of six to lead poisoning.¹⁸³ The full extent of actual lead poisoning is unclear, but some estimates place the number of affected children alone over 800.¹⁸⁴

Hazardous living conditions at NYCHA adversely affect the lives of public housing residents in profound ways. A recent health needs assessment survey conducted by the Regional Planning Association concluded that NYCHA's living conditions have severe negative impacts on the mental and physical health of residents.¹⁸⁵ Approximately one in three NYCHA residents told researchers that living conditions directly affect their mental health by creating additional stress, depression, and other related issues.¹⁸⁶ In this way, NYCHA's substandard physical conditions create a more extreme version of segregation for public housing residents, who are confined to permanent living arrangements that threaten their very well-being.

4. Poor Management

Exacerbating the deficient living conditions at NYCHA is an agency-wide crisis of management.¹⁸⁷ Even though NYCHA's leadership did not create the current crisis that results from decades of divestment and political hostility, the Authority has become increasingly unresponsive to tenant needs.¹⁸⁸ In 2018, the New York City Public Advocate named NYCHA the city's worst landlord, stating: "The conditions of NYCHA buildings are among the worst in the city and the response from management has been inadequate."¹⁸⁹ At that time, public housing residents were reporting that 174,488 units were waiting for the authority to attend to 240,120 open work orders.¹⁹⁰ Since 2019, NYCHA has been under the supervision of a federal monitor tasked with overhauling the Authority's "management, organizational, and workforce structure (including work rules), and overarching

183. *Id.*

184. *Id.*

185. Regional Planning Association, *supra* note 174.

186. *Id.*

187. See Office of the NYCHA Federal Monitor, MONITOR AGREEMENT 2-3 (2019), available at <https://nychamonitor.com/wp-content/uploads/2019/03/Final-Executed-NYCHA-Agreement.pdf> (explaining the mismanagement and misconduct by NYCHA officials that prompted the federal government to file a lawsuit and eventually execute a consent decree with the agency).

188. Bloom 2015, *supra* note 165, at 107.

189. Ameena Walker, *NYCHA Claims Top Spot on Annual List of NYC's Worst Landlords*, CURBED N.Y. (Dec. 19, 2018), <https://ny.curbed.com/2018/12/19/18148571/nyc-worst-landlords-list-nycha>.

190. *Id.*

policies.” tasked with overhauling the Authority’s “management, organizational, and workforce structure (including work rules), and overarching policies.”¹⁹¹

Even with the oversight of the federal monitor, public housing residents have seen little progress in the Authority’s ability to attend to their needs.¹⁹² By October 2021, the NYCHA maintenance backlog had ballooned to nearly 584,000 open work orders.¹⁹³

In March 2022, City Councilmember Raphael Salamanca Jr. of the South Bronx made headlines for proclaiming at a hearing, “I strongly advise my colleagues: if you want a project completed, do not give money to NYCHA from your capital dollars. Because you’re going to go through the frustration that I’ve been going through for years.”¹⁹⁴ Salamanca then revealed that the Authority had still not repaired the front doors at its Melrose Houses development, despite having received public money for such repairs in 2017.¹⁹⁵ Agency mismanagement has also hurt NYCHA’s ability to serve unhoused New Yorkers, who receive preference for placement into newly available public housing.¹⁹⁶ Since 2017, the wait time to be transferred from a shelter to stable public housing has exploded from 45 days to 114 days.¹⁹⁷

191. Caroline Spivack & Amy Plitt, NYCHA, *HUD reach tentative deal for more federal oversight*, CURBED N.Y. (Jan. 31, 2019), <https://ny.curbed.com/2019/1/31/18205314/nycha-hud-federal-oversight-ben-carson>; see also Bart M. Schwartz, Monitor Releases Tenth Quarterly Report Letter, Feb. 15, 2022, <https://nychamonitor.com/wp-content/uploads/2022/02/2.15.22-Tenth-Quarterly-Letter.pdf>

192. Sam Raskin, *NYCHA tops own naughty lessor list for the 4th year in a row*, N.Y. POST (Dec. 16, 2021), <https://nypost.com/2021/12/16/nycha-tops-own-worst-landlord-list-for-fourth-year-in-a-row/>.

193. *Despite everything, NYCHA remains a despicable landlord for public-housing tenants*, N.Y. POST (Nov. 29, 2021), <https://nypost.com/2021/11/29/despite-everything-nycha-remains-a-despicable-landlord-for-public-housing-tenants/>.

194. Coltin, *supra* note 168.

195. *Id.*

196. N.Y.C. Housing Authority, PRIORITY CODES FOR PUBLIC HOUSING 1 (2021), <https://www1.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Priority-Codes-Revised-04-01-2021.pdf>.

197. David Brand, *In NYC, the Long Road From Shelter to Public Housing Gets Longer*, CITY LIMITS (Mar. 28, 2022), <https://citylimits.org/2022/03/28/in-nyc-the-long-road-from-shelter-to-public-housing-gets-longer/>

5. Privatization under PACT-RAD

Faced with the daunting tasks of overhauling management practices and trying to meet \$40 billion's worth of needs with only \$2.9 billion in capital funds, NYCHA has recently been experimenting with various forms of privatization, most of which have actually exacerbated the difficulties faced by public housing residents. Most notably, local leaders have been pushing for the expansion of Permanent Affordability Commitment Together (PACT) and Rental Assistance Demonstration (RAD).¹⁹⁸ Under PACT-RAD, NYCHA has privatized the management of certain residential buildings and leased those buildings to private developers.¹⁹⁹

Since the beginning of PACT-RAD, affected public housing residents have voiced some significant concerns about their experiences with the program. NYCHA residents have complained, for example, that the decision-making regarding PACT-RAD conversion and related management reorganizations frequently takes place without the input of tenants.²⁰⁰

Residents of PACT-RAD developments have also claimed that private management firms have proved equally unresponsive to tenant needs compared to the management under NYCHA.²⁰¹ Afraid of displacement and housing stability, residents across the public housing system have repeatedly communicated their questions and concerns to NYCHA leadership, but the Authority has so far failed to provide responses that assuage resident fears.²⁰²

A yearlong study conducted by Human Rights Watch found that, in the developments converted to private management under PACT-RAD, privatization had actually harmed the standing of tenants.²⁰³ The study

198. Giller, *supra* note 2, at 302-07; Rachel Holliday Smith, *What Is RAD? A Look at NYCHA's Private Management Move*, CITY (Feb. 7, 2020), <https://www.thecity.nyc/housing/2020/2/7/21212243/what-is-rad-a-look-at-nycha-s-private-management-move>.

199. Giller, *supra* note 2, at 307-11.

200. Greg B. Smith, *NYCHA Housing Fix Clouded by Tenant Complaints About Private Managers*, CITY (Oct. 5, 2021), <https://www.thecity.nyc/2021/10/5/22711796/nycha-public-housing-to-private-managers-tenant-rad-complaints>.

201. *Id.*

202. Public housing residents' articulated concerns include whether conversions will make residents vulnerable to eviction, whether tenants will have the ability to return to their units after mandatory renovations, opportunities for tenant organizing and democratic decision-making, the types of vouchers that tenants will receive as part of the conversion process, continued affordability, and whether private management companies will replace outgoing tenants with higher-income people and facilitate gentrification. See Giller, *supra* note 2, at 311-16.

203. HUMAN RIGHTS WATCH, "THE TENANT NEVER WINS": PRIVATE TAKEOVER OF PUBLIC HOUSING PUTS RIGHTS AT RISK IN NEW YORK CITY 5 (2022), https://www.hrw.org/sites/default/files/media_2022/01/us_publichousing0122_web.pdf.

concluded: “The conversion of properties to PACT has been accompanied by insufficient oversight and has resulted in the loss of several specific protections that apply to NYCHA residents.”²⁰⁴ The loss of these protections makes residents more vulnerable to loss of housing and additional issues related to habitability.²⁰⁵ Human Rights Watch also found that NYCHA properties converted to private management under PACT-RAD were the sites of increased evictions, tenants “feeling pressured into signing leases without fully understanding them,” persistent deficiencies in housing conditions, potentially dangerous construction practices, lack of access to certain services, and difficulties for tenants seeking redress.²⁰⁶

On balance, NYCHA’s recent efforts at limited privatization have not only failed to effect positive change for public housing residents, but they have actually undermined the stability that many residents cite as the core benefit of public housing.²⁰⁷

This trend is likely to continue for the foreseeable future because, without a massive increase in public funding, NYCHA leadership sees privatization as the most viable option for covering the Authority’s considerable budget shortfalls.²⁰⁸ Additionally, both Mayor Eric Adams and NYCHA Chair Gregory Russ have publicly voiced their support for additional PACT-RAD conversions.²⁰⁹

PART III. NEW PATHS FOR PUBLIC HOUSING

Policymakers have a moral and legal obligation to de-segregate and improve New York’s system of public housing. As a unique form of segregation, the current institutional arrangement subjects NYCHA residents to unequal treatment, denies them equal access to the potential benefits of living in the five boroughs, and severely diminishes their capacity for upward mobility.²¹⁰ Furthermore, the City of New York has a legal obligation under the Fair Housing Act to affirmatively further fair housing, which includes a duty to use government housing programs as tools of racial integration.²¹¹

204. *Id.*

205. *Id.*

206. *Id.* at 2.

207. See Brand, *supra* note 191; Where We Live NYC, *supra* note 5, at 154.

208. See Smith, *supra* note 192.

209. See Coltin, *supra* note 168.

210. See Powell & Menendian, *supra* note 11, at 207-27.

211. See Leonard S. Rubinowitz & Elizabeth Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs*, 74 N.W.U. L. REV. 491, 532 (1979-1980).

Because NYCHA constitutes a significant share of the total housing stock in the city (7.7% of all rental apartments), allowing public housing to remain segregated also drives racial segregation in the city as a whole, a direct contradiction of the city's duties under the FHA.²¹²

A. THE CASE FOR PUBLIC HOUSING

Despite the plethora of ongoing issues in NYCHA, quality public housing remains a goal worth pursuing.²¹³ Public housing represents the best policy solution for providing New York's low-income families with safe, affordable, stable, livable, permanent homes free of the private housing market's threats of displacement and exploitation.²¹⁴ Public housing programs cannot reject or evict residents for criteria that would otherwise work to bar them from housing options, including low income or bad credit.²¹⁵ Whereas public housing residents pay no more than 30% of their monthly income in rent, 44% of all New York households are paying higher portions, and more than 368,000 low-income households are currently paying more than half of their income toward rent.²¹⁶

212. N.Y.C. Housing Authority, NYCHA FACT SHEET (2021), https://www1.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Fact-Sheet_2021.pdf ("NYCHA public housing represents 7.7 percent of the city's rental apartments... and houses 4.3 percent of the city's population").

213. See Samuel Stein, *Capital City: Gentrification and the Real Estate State* 191-93 (2019) (ebook) (arguing that, to combat the affordable housing crisis, "city, state and federal governments can get back in the business of funding, acquiring and building public housing"); Dan Darrah, *We Need Public Housing, Not Affordable Housing*, JACOBIN MAG. (Apr. 17, 2022), <https://jacobinmag.com/2022/04/us-canadian-social-housing-affordability-ownership-speculation>.

214. See Jesse A. Myerson, *How to Get Rid of Your Landlord and Socialize American Housing, in 3 Easy Steps*, NATION (Dec. 8, 2015) <https://www.thenation.com/article/archive/how-to-get-rid-of-your-landlord-and-socialize-american-housing-in-3-easy-steps/> (arguing that expanding public housing is a necessary component of any successful approach to fixing the affordable housing crisis).

215. *Where We Live NYC*, *supra* note 11, at 143.

216. N.Y.C. Housing Authority, *Public Housing Rent Calculation: Frequently Asked Questions* <https://www1.nyc.gov/assets/nycha/downloads/pdf/Rent-Calculation-FAQ.pdf> (last visited May 14, 2022); Tanay Warerkar, *Nearly Half of NYC Households are Rent Burdened*, CURBED N.Y. (Oct. 12, 2018), <https://ny.curbed.com/2018/10/12/17965416/nyc-rent-burden-households-affordable-housing>

Government-administered housing is also an invaluable tool for reducing homelessness. In 2014, Mayor Bill de Blasio instituted a program that reserved vacant NYCHA units and Section 8 vouchers for people experiencing homelessness.²¹⁷ In the first three years of this program, the city provided new housing to approximately 26,000 people.²¹⁸ In 2021 alone, the city moved 1,058 people from shelters into NYCHA housing.²¹⁹

Despite NYCHA's reputation as the city's "worst landlord," New Yorkers generally consider public housing units to be preferable to shelter housing for a variety of reasons, citing the benefits of living in stable housing, not having to abide by a curfew, the security of having one's own apartment, and not needing to spend extra money on storage and food needs that people could otherwise meet at home.²²⁰

Programs like NYCHA's public housing also advance the cause of fair housing by providing low-income families of color with stable, affordable housing that is otherwise scarce in cities like New York.²²¹ As long as private housing remains prohibitively scarce and expensive, public housing remains the best way to mitigate the displacement of poor people.²²² Remarking on the role of NYCHA in ensuring the survival of its residents, one public housing tenant stated in 2018, "I can't leave NYCHA. Right now, at end of pay week, I have \$200-300 after rent. And if I moved, I would only have \$5 left. I would go hungry in a nice apartment."²²³

B. ENVISIONING SOLUTIONS

Any political program aimed at improving NYCHA should include a strong emphasis on ending the segregation of public housing residents. To accomplish this goal, policymakers should consider both (1) place-based solutions and (2) mobility-based solutions.

217. Press Release, Office of the Mayor of New York, Mayor de Blasio Announces Over 50,000 Individuals Have Exited Shelter Since July 1, 2014 (Nov. 10, 2015), <https://www1.nyc.gov/office-of-the-mayor/news/811-15/mayor-de-blasio-over-50-000-individuals-have-exited-shelter-since-july-1-2014>.

218. Jarrett Murphy, *De Blasio is Pressed to Use More Federal Tools Against Homelessness*, CITY LIMITS (Oct. 25, 2017), <https://citylimits.org/2017/10/25/de-blasio-is-pressed-to-use-more-federal-tools-against-homelessness/>.

219. See Brand, *supra* note 191.

220. *Id.*

221. The *Where We Live NYC* authors assert that, as the city's largest source of permanently affordable housing, "NYCHA is critical to fair housing in New York City" because it is necessary for maintaining enough affordable housing to keep large numbers of low-income Black and Hispanic families in the five boroughs. N.Y.C. Department of Housing Preservation and Development, *Where We Live NYC: Executive Summary 12* (2020).

222. See Stein, *supra* note 207, at 191-93.

223. See *Where We Live NYC*, *supra* note 5, at 155

1. Place-Based Solutions

Place-based solutions would aim to preserve NYCHA's existing public housing stock while fostering racial integration in public housing.²²⁴ This approach would entail revitalizing the city's physical infrastructure, providing current public housing residents who wish to depart with the tools to do so, and admitting new tenants with an eye toward achieving racial balance.²²⁵ Policymakers would need to invest not only the \$40 billion necessary to repair NYCHA's facilities, but also the funds necessary to make government housing desirable for middle-class families.²²⁶ For example, "re-skinning" the exteriors of NYCHA buildings would make public housing towers more aesthetically appealing and less evocative of the Authority's historical decline.²²⁷ The government could easily enable current NYCHA residents to depart public housing by offering housing vouchers and designating sufficient resources toward enforcing the prohibition on source-of-income discrimination.²²⁸ Increasing the number of white and AAPI residents would likely require the use of racial quotas in new tenant admissions, as well as a full-throated campaign aimed at dispelling the stigma associated with inhabiting government-run housing.²²⁹

Besides the same political intransigence that has prevented lawmakers from securing adequate NYCHA funding for decades, the greatest obstacle to a place-based approach is the need for racial quotas. Based on existing case law, NYCHA might be able to populate brand-new developments with the aim of racial balancing, but it likely cannot use racial

224. According to Professors Michael Maly and Philip Nyden, neighborhoods need to possess certain characteristics to sustain racial diversity and integration over the long term: economic development, a full range of economically mixed housing, community safety, high-quality and integrated schools, and local social networks that promote diversity maintenance. Infusing NYCHA's public housing communities with all of these qualities will require a sustained, deliberate effort with support from every level of government. See Michael Maly & Philip Nyden, *Racial and ethnic diversity in US urban communities: challenging the perceived inevitability of segregation*, in *ETHNICITY AND HOUSING: ACCOMMODATING DIFFERENCES* 98-112 (Frederick W. Boal ed., 2000).

225. See Powell & Menendian, *supra* note 11, at 218-22.

226. See Coltin, *supra* note 168.

227. See Bloom & Altwicker, *supra* note 114.

228. See Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1230 (2011) (considering the need for both vouchers and effective protections against source-of-income discrimination in the context of proposals for desegregation).

229. See *Benign Steering and Benign Quotas: The Validity of Race-Conscious Government Policies to Promote Residential Integration*, 93 HARV. L. REV. 938 (1980) (arguing that anti-segregation policies need to be not only wealth-conscious but also race-conscious).

quotas to maintain specific levels of integration over time.²³⁰ Racial quotas are morally controversial because whenever housing providers in New York have historically used them, they succeeded at preserving integration but also created the effect of keeping a disproportionately high number of Black and Hispanic applicants on the waiting lists for long periods while white applicants could cut the line for new housing.²³¹ Accordingly, even though racial quotas work and may indeed be necessary for desegregating NYCHA, they may also have the unintended effect of harming low-income families of color.²³²

2. Mobility-Based Solutions

Mobility-based approaches to desegregating NYCHA would focus on moving residents out of public housing and dispersing them across the city evenly enough to break up the concentration of racialized poverty.²³³ The most effective way to accomplish this goal would be to provide low-income New Yorkers with vouchers or similar forms of financial assistance that would allow them to rent private housing anywhere in the city without paying more than 30% of their monthly income on rent.²³⁴ NYCHA could partially finance this initiative by capitalizing on the rising value of New York City real estate and selling its properties. According to one estimate, the Authority could earn \$300 million just by selling the Queensbridge Houses development at market rate.²³⁵

230. In the 1970s, NYCHA used racial quotas to avoid “tipping points” and prevent segregation, which federal courts endorsed as a valid effort to affirmatively further fair housing in *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1140 (2nd Cir. 1973). There, the 2nd Circuit held that NYCHA “may limit the number of apartments to be made available to persons of white or non-white races, including minority groups, where it can show that such action is essential to promote a racially balanced community and to avoid concentrated racial pockets that will result in a segregated community.” *Id.* Fifteen years later, the 2nd Circuit severely limited its prior ruling by holding that, even though NYCHA could validly populate a new development with the aim of racial balancing, “procedures for the long-term maintenance of specified levels of integration” like racial quotas are unlawful. *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1103 (2nd Cir. 1988).

231. See Hellman, *supra* note 75, at 55

232. *Benign Steering and Benign Quotas*, *supra* note 225.

233. Polikoff, *supra* note 149, at 3-6.

234. See Stefanie DeLuca & Peter Rosenblatt, *Walking Away from The Wire: Housing Mobility and Neighborhood Opportunity in Baltimore*, 20 HOUSING POL’Y DEBATE 519 (2017).

235. Mark Jacobson, *The Land That Time and Money Forgot*, N.Y. MAG. (Sept. 7, 2012), <https://nymag.com/news/features/housing-projects-2012-9/>.

The principal challenge in pursuing this strategy would be spreading public housing residents evenly across the five boroughs. New York's prohibition on source-of-income discrimination, enacted in 2008, theoretically enables housing voucher recipients to rent apartments anywhere in the city.²³⁶ In practice, however, a confluence of factors—including stigma, discrimination, voucher payment limits, and bureaucratic red tape—has effectively “quarantined” voucher recipients to a handful of high-poverty neighborhoods.²³⁷ For a mobility-based approach to NYCHA desegregation to succeed, government actors would need to commit additional resources to enforcing the ban on source-of-income discrimination, as well as to affirmatively assisting voucher recipients in accessing high-quality neighborhoods.²³⁸

Both of these approaches to desegregation carry benefits and drawbacks, but ultimately place-based solutions are more consistent with the goal of realizing public housing's fullest potential. Mobility-based solutions may promise a quick way to insert public housing residents into low-poverty, high-opportunity communities.²³⁹ However, they delegate the responsibility of housing low-income people to the market and, in doing so, line the pockets of private landlords while leaving tenants vulnerable.²⁴⁰

CONCLUSION

NYCHA provides stable, affordable housing to low-income families in a city where housing remains prohibitively expensive. The Authority accomplishes this task, however, at the cost of subjecting public housing residents to a unique form of racialized residential segregation. Reorienting NYCHA to fulfill its great potential while eradicating its worst elements will require creative thinking, substantial public investment, and the input of as many of the Authority's 600,000 public housing residents as possible.

236. N.Y.C., N.Y., Code § 8-101 (2022); Cindy Rodriguez, Banned A Decade Ago, Housing Discrimination Against Those With Section 8 Still Persists, *GOTHAMIST* (Dec. 16, 2019), <https://gothamist.com/news/banned-decade-ago-housing-discrimination-against-those-section-8-still-persists>.

237. N.Y.C. Department of Housing Preservation and Development, *supra* note 215, at 14; see also Bostin & Acolin, *supra* note 24, at 189-206 (affirming that voucher program apartments “still tend to be located in the neighborhoods that are less affluent than the average neighborhood in the region”).

238. See Johnson, *supra* note 222, at 1230.

239. See Bostin & Acolin, *supra* note 24, at 189-206 (“Compared with residents of public housing, voucher holders live in neighborhoods that feature lower poverty rates, higher median incomes, more amenities, and fewer disamenities such as crime”).

240. See Stein, *supra* note 207, at 192.

Book Review:

No Equal Justice: The Legacy of Civil Rights Icon George W. Crockett

by Edward J. Littlejohn and Peter J. Hammer

By David Gesspass¹

Lennox Hinds, whose vision has inspired and led the International Association of Democratic Lawyers and the National Conference of Black Lawyers for decades, received the 2022 Law for the People award from the Lawyers Guild. Lennox has had a storied career of his own. I mention him because, in his acceptance speech, he paid homage to George Crockett, who went from Detroit to New York to defend him against a bar complaint that threatened his license. His story shows how we all stand on the shoulders of those who have gone before. Lennox had said that a particular judge lacked the perspective and experience to be fair to a particular black litigant, a statement that aroused the ire of the New York State bar. Rather than simply going to the bar and apologizing, as many urged him to do, Lennox stood by his statement and Crockett, as was his wont, came to his defense.

George Crockett and Ernie Goodman formed the country's first integrated law firm. Both are legends and, each in their own way, models for what it means to be a radical lawyer, engaged in battle always on the enemy's turf. As a past Guild president, Paul Harris, said of the NLG, if we lose today, we'll be back tomorrow. If we win today, we'll be back tomorrow. George Crockett and Ernie Goodman exemplified that spirit and that commitment. A Goodman biography, *THE COLOR OF LAW: ERNIE GOODMAN AND THE STRUGGLE FOR LABOR AND CIVIL RIGHTS* was published in 2010 and reviewed in this journal in Vol. 68-1 by Arn Kawano. We now have, as it were, the bookend to that biography with one of Crockett, *NO EQUAL JUSTICE: THE LEGACY OF CIVIL RIGHTS ICON GEORGE W. CROCKETT, JR.* Edward J. Littlejohn and Peter J. Hammer.

Goodman rose to eminence primarily from the labor movement. He represented sit-down strikers at Ford in the 1930's. Until Walter Reuther became president of the United Auto Workers in 1946 and purged those he thought were too close to the Communist Party, he represented the UAW.

1. David Gesspass has been on the editorial board of the National Lawyers Guild Review for over twenty-years including several years as Editor in Chief. He is a past president of the National Lawyers Guild. David is doing his best to retire from the active practice of law with only moderate success.

Crockett's consciousness, on the other hand, was more that of a black man who grew up in the Jim Crow south and said, "Racism pervades every area and facet of American life. It is a characteristic of American life; and hence, it is a characteristic of American law."

But their two backgrounds melded. Crockett was the grandson of an enslaved African descendant but the son of a union father, a skilled carpenter and member of the Black Carpenters Union. His commitment to justice generally and particularly for workers, both black and white, animated him even as his principal focus was race. Goodman's vision recognized the significance of the Civil Rights Movement in the south and, under his leadership and not without opposition, the Guild's emphasis shifted from union side advocacy with the formation of the Committee to Assist Southern Lawyers and the opening of an office in Mississippi to further the work. In many ways, the law firm they opened together recognized that capitalism in the United States was based both on the exploitation of all workers and the particularly cruel and lasting effects of its development on enslaved Africans and their descendants. Parenthetically, neither book mentions how either Crockett or Goodman viewed the theft of native land, certainly another special aspect of US capitalism. While descendants of enslaved Africans were considered "Negro" if they had a single black grandparent – thus expanding the numbers to be subjected to super-exploitation as workers – indigenous people had to be nearly "full-blooded" because the fewer there were, the more land could be stolen.

But, this is supposed to be a review of the book about George Crockett. Why, you ask, all the prologue and why don't you get to it.

The closest the US has come to fascist rule was the McCarthy period. Communists, alleged Communists, Communist sympathizers and those who defended the right of Communists to espouse their ideas were shunned, persecuted, imprisoned and driven to suicide. The Lawyers Guild, virtually alone among legal organizations, refused to inquire as to the affiliations of its members and was willing to defend actual Communists, not just those they felt were wrongly accused of being Communists. We are today facing a similar crisis. In some ways, it may be even more dire. The Supreme Court with its reactionary majority is slashing rights won through decades, if not centuries, of struggle and sacrifice. What is hailed as "democracy" in this country is whittled down with every opinion in every term. The wealth that neoliberals claimed would "trickle down" with a growing economy in fact has siphoned up and political power and influence goes to the highest bidders. The question is whether to hunker down and accept this or to take up (at least figurative) arms against this sea of trouble and, by opposing, seek to end it. Crockett chose to do the latter. He did not win every battle. He

spent four months in jail for contempt of court for being a vigorous advocate for his clients in the wake of *United States v. Dennis*. His and his co-counsels' bar licenses were threatened for their alleged contempt. But, with these threats and attacks, his career did not collapse. On the contrary, he eventually was elected a judge and later a member of Congress. His career demonstrates that resistance is not always futile. An old friend of mine, David Rein, was a Guild lawyer in Washington, DC during the McCarthy era. Unlike many others, but much like Crockett, he did not shrink from facing the necessity of resistance, even with FBI agents outside his door every morning. When people told him, after the fact, what a hero he was, he scoffed. So far as he was concerned, he was only doing what was to be expected. His response to those who praised his heroism: "I'm not a hero, you're a stinker."

Crockett exemplified this attitude. One gets the feeling he did not concern himself with risks when he took on controversial cases. Rather, he did what he did out of principle and, therefore, could not do otherwise. He graduated from a top law school, the University of Michigan, but when he took the Florida bar exam in 1934, which was given in the Florida State Senate chamber, he was forced to sit in a chair outside the chamber because it was inconceivable to the examiners that he be allowed to sit in a senator's seat. His response to that indignity was not to worry about it, but not to forget it and to develop the skills to do something about it. His experiences led him to his principles, but such principles are not necessarily universal. Eugene Debs said, "When I rise, it will be with the ranks, not from them." While many aspire to rise from the ranks, Crockett remained true to the ranks of oppressed blacks and other targets of state repression and devoted his career to securing their rights.

The book itself chronicles critical events in Crockett's life chronologically, briefly covering his roots, his law school days and his work with the Department of Labor. But the vast bulk of his work was after he moved to Detroit to take a position with the United Auto Workers and, after he and Goodman lost their jobs there, opening their law firm, which handled one landmark case after another. The accounts of those cases are what makes the book compelling. Its heart is devoted to the *Dennis* case and its aftermath. In the midst of anti-Communist hysteria, *Dennis* and his ten co-defendants, all Communist Party leaders, were charged with plotting to overthrow the government of the United States only because of what they said and what their "philosophy" was. All were convicted and their convictions affirmed. It may not be a coincidence that the Supreme Court's decision in *Dennis* was

effectively overruled when a Klansman, Clarence Brandenburg, was charged with, and convicted of, advocating violence in violation of Ohio state law. The Supreme Court found that Brandenburg's speech, if inflammatory, was protected by the First Amendment, long after Dennis, his co-defendants served their sentences and their lawyers served theirs for contempt of court and then had to fight to keep their bar licenses.

The story of the Committee to Assist Southern Lawyers has many facets. *THE COLOR OF LAW* told it from Goodman's perspective. This book, telling it from Crockett's perspective, provides a more complete, and much needed, history of the NLG's pivot to the south and the Civil Rights Movement. It was that movement that began the resurgence of the Guild after its near disintegration in the face of McCarthyism. In no small measure, the Guild is what it is today and, indeed, may very well exist today, because of its support for that movement. The late John Lewis, in his memoir, *WALKING WITH THE WIND*, recalls that more traditional civil rights organizations warned SNCC not to associate with the Guild but that only the Guild responded to the call for assistance. He said the same to Michael Avery, who was then NLG president, when he was asked and agreed to deliver the keynote to the Birmingham convention.

Charles Hamilton Houston famously said a lawyer is either a social engineer or a parasite on society. Crockett was a very much a lawyer who had faith in the power of the law to engineer progressive social change. His career reflected the former of Houston's alternatives. Others may question this belief, but Crockett surely demonstrated that lawyers on the right side of history can make a difference. The authors, both academics, try to make Crockett's story accessible for any reader, not just for lawyers and intellectuals and it is because his life and career had such an impact on the social and political struggles of his times that it is an important story for us all and not just for lawyers.

The authors, both law professors do their best to avoid the argots of law and academia and are increasingly successful over the course of the book. The early chapters are slow to get through, but when the story gets to recounting Crockett's exploits, the importance of his life shines through. The choice to focus on just a few, Dennis and the Civil Rights Movement in the south and his handling of the New Bethel Baptist Church incident as a judge (if you want to know more about that, you will have to read the book), is more than enough to demonstrate his intellect, his steadfastness and just how consequential a fighter for justice he was.

The book concludes with a chapter on his being a member of Congress from a safe seat, which left him free to act on principle without regard to politics or trade-offs. It is no surprise then that one of his first acts as a member of Congress was to sue then-President Ronald Reagan for violating the War Powers Resolution by sending soldiers to act as “advisers” to the government of El Salvador (he was represented by the Center for Constitutional Rights). His time in Congress was more a fitting coda to a life of struggle than a new chapter or direction. He ran, evidently, because he had become bored with retirement and wanted something to do. Crockett was not one to rest on his laurels and enjoy his later years sleeping late and sipping daiquiris. He was, to the end, a fighter for justice. Thus, we end where we began. The biography of Ernie Goodman was a necessary and important account of an important life, but it was incomplete without a biography of George Crockett, his partner in the first integrated law firm this country had seen. One must say of the formation of the firm in 1946, it was about time. One can say the same thing about NO EQUAL JUSTICE.

Promoting Justice During Union Organizing: The Persuader Rule

By Jeffrey P. Nieznanski¹

“I think organized labor is a necessary part of democracy. Organized labor is the only way to have fair distribution of wealth.” - Dolores Huerta

Introduction

Increasing worker organizing and empowerment is critical to growing the middle class, building the economy and strengthening our democracy. Through its White House Task Force on Worker Organizing and Empowerment, the Biden administration proclaimed those views as it released 70 recommendations towards reaching those goals.² This article focuses on one of those recommendations, the “Persuader Rule,” that would give workers more power to confront anti-union campaigns when attempting to organize unions.

The Persuader Rule required disclosure of union avoidance agreements; reinstating it would help to pull back the curtain on the practices of union busters, union avoidance law firms and the monied interests intent on keeping workers from organizing. Presently, illegal tactics coupled with legal coercion result in union elections that make a mockery of the democratic process guaranteed by the National Labor Relations Act.

This article briefly reviews the way labor law is supposed to work, how it is (not) working, what the Persuader Rule does, and how the American Bar Association wrongly opposes it. As workers struggle to make ends meet, the legal profession has a moral obligation to support the legal rights of workers.

1. Jeffrey P. Nieznanski is a supervising attorney at Legal Assistance of Western New York, Inc. and co-chairs the Monroe County Bar Association Elder Law Committee. Prior to his legal career, he was a union representative in Washington, D.C. and Rochester, N.Y.

2. Kamala D. Harris, Martin J. Walsh, White House Task Force on Worker Organizing and Empowerment: Report to the President (2022), Exec. Order No. 14025, 86 Fed. Reg. 22,829 (Apr 26, 2021).

Laboratory Conditions

The National Labor Relations Board (Board) is charged with ensuring that union representation elections are free from misconduct, coercion or improper influence. To ensure that employees are able to exercise their rights, the Board has the power to see if union representation election proceedings are conducted in a manner designed to replicate “laboratory conditions,” free from coercion.³ Although this standard is not literally construed, the Board and the courts have drawn a firm line that an election cannot stand where the results do not reflect the employees’ free choice.⁴

Departure from National Policy

The right to self-organization has become increasingly illusory, as U.S. employers have been charged with violating federal law in 41.5% of all union election campaigns, according to a 2019 report by the Economic Policy Institute.⁵ This EPI report is based on analysis of 3,620 NLRB election filings and 49,396 Unfair Labor Practice charges filed against employers between fiscal years 2015 and 2018.⁶ It found that “one out of five union election campaigns involves a charge that a worker was illegally fired for union activity,” and that “employers are charged with making threats, engaging in surveillance activities, or harassing workers in nearly a third of all union election campaigns.”⁷

3. *SSC Mystic Operating Co., LLC v. N.L.R.B.*, 801 F.3d 302, 309 (D.C. Cir. 2015) (explaining that “[t]o ensure that employees are fully able to exercise their section 7 rights, the Board requires that elections take place under ‘laboratory conditions’ free from coercion by the union or the employer”).

4. *See N.L.R.B. v. City Wide Insulation of Madison, Inc.*, 370 F.3d 654, 658 (7th Cir. 2004) (stating, “the laboratory conditions doctrine is satisfied where the employees exercised a ‘free choice.’”); *Overnite Transp. Co. v. N.L.R.B.*, 104 F.3d 109 (7th Cir. 1997) (holding record did not show that union conduct

5. McNicholas, *supra* note 4.

6. *Id.*

7. *Id.*

The Persuader Rule

The “Persuader Rule” sought to enhance transparency during union representation elections. A U.S. Department of Labor summary of the Persuader Rule noted that “[t]his Rule does not prohibit employers from hiring consultants or constrain them in what information they can provide.”⁸ Had it not been rescinded in 2018, the rule would have required employers and their consultants to report when consultants directly communicate with workers or when consultants: 1) Plan, direct, or coordinate management efforts to persuade workers; 2) Provide persuader materials to employers to disseminate to workers; 3) Conduct union avoidance seminars; or 4) Develop or implement personnel policies or actions to persuade workers.⁹

Employees often hear from their employers in response to union organizing drives at their workplaces. In the absence of persuader reporting requirements, however, they often do not know the source of the message. By knowing that a third-party consultant hired by their employer is the source of the information, employees will be better able to assess the merits of the arguments directed at them and make a more informed choice about how to exercise their rights. This information would help employees understand the extent to which an employer’s message reflects the genuine view of their employer, or if it instead reflects strategy designed by the consultant to counter union representation.

Union avoidance law firms offer legal services, advice, consultation, training seminars, workshops and materials for management and supervisors, and targeted anti-union materials for distribution to employees, including videos, posters, leaflets, flyers and giveaways.¹⁰ These sophisticated tactics help anti-union employers create dissension and division among employees during an organizing campaign and spread misinformation about the union before workers vote in a union representation election.¹¹ Additionally, these consultants advise management on how to stall or prolong the bargaining process, almost indefinitely.¹²

8. U.S. Dep’t of Lab., Overview/Summary Persuader Agreements: Ensuring Transparency in Reporting For Employer and Labor Relations, <http://static.politico.com/24/b9/727920a748889063f7ce7213ab5d/persuader-rule-fact-sheet.pdf>.

9. *Id.*, see also 81 FR 15927

10. Erin Johansson, Unionbusters 101 (Jobs With Justice Education Fund, March 13, 2017 at 1), <https://www.jwj.org/wp-content/uploads/2014/03/unionbusters101.pdf>.

11. *Id.*

12. *Id.*

Union avoidance law firms offer legal services, advice, consultation, training seminars, workshops and materials for management and supervisors, and targeted anti-union materials for distribution to employees, including videos, posters, leaflets, flyers and giveaways.¹⁰ These sophisticated tactics help anti-union employers create dissension and division among employees during an organizing campaign and spread misinformation about the union before workers vote in a union representation election.¹¹ Additionally, these consultants advise management on how to stall or prolong the bargaining process, almost indefinitely.¹²

For example, Amazon's union avoidance efforts and who was coordinating them was invisible to the public and to employees voting in the April 2021 Bessemer, Alabama election, largely because the Trump administration scrapped a rule that would have required disclosure of certain union avoidance expenditures by corporations.¹³

The Persuader Rule enacted by the Obama administration took effect on April 25, 2016, amending the Labor-Management Reporting and Disclosure Act (LMRDA).¹⁴ As stated at the time in the Federal Register about how the reporting requirement was being interpreted prior to the Persuader Rule:

This [reporting requirement] left a broad category of persuader activities unreported, thereby denying employees important information that would enable them to consider the source of the information about union representation directed at them when assessing the merits of the arguments and deciding how to exercise their rights. The Department proposed to eliminate this reporting gap. The final rule adopts the proposed rule, with modifications, and provides increased transparency to workers without imposing any restraints on the content, timing, or method by which an employer chooses to make known to its employees its position on matters relating to union representation or collective bargaining. The final rule also maintains the LMRDA's section 203(c) advice exemption and the traditional privileges and disclosure requirements associated with the attorney-client relationship.¹⁵

10. Erin Johansson, *Unionbusters 101* (Jobs With Justice Education Fund, March 13, 2017 at 1), <https://www.jwj.org/wp-content/uploads/2014/03/unionbusters101.pdf>.

11. *Id.*

12. *Id.*

13. U.S. DEPARTMENT OF LABOR RESCINDS 2016 PERSUADER RULE, Office of Labor-Management Standards News Release Number 18-1198-NAT, July 17, 2018.

14. Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 81 FR 15923 (Mar. 24, 2016).

15. *Id.*

The Advice Exemption

The 2016 Persuader Rule would have modified the “advice exemption” loophole in federal disclosure regulations that exempt businesses from filing publicly accessible reports about their hiring of third-party labor relations advisers. “Companies now don’t need to disclose that information as long as the outside advisers don’t directly engage with workers—a broad exemption that shields a workforce’s awareness of avoidance messaging when it’s relayed to them solely by their bosses.”¹⁶

Legal Challenges

The Persuader Rule was challenged upon its enactment by business interests and management-side law firms in three different federal courts. Two federal courts declined to enjoin the rule from taking effect.¹⁷ However, a U.S. District Court Judge in Lubbock, Texas appointed by President Reagan halted implementation of the rule by ordering a nationwide preliminary injunction.¹⁸ The Trump Administration then rescinded the Persuader Rule before an appeal could be decided, saying that it “was incompatible with the law and client confidentiality.”¹⁹

In allowing the preliminary injunction, the Texas court adopted the American Bar Association’s claim that the Persuader Rule placed “unfair reporting burdens on both the lawyers and the employer clients they represent,” and that “the Proposed Rule could very well discourage many employers from seeking the expert legal representation that they need, thereby effectively denying them their fundamental right to counsel.”²⁰

16. Ben Penn, *Biden DOL Explores Redo of Obama Union-Avoidance Reporting Rule*, Bloomberg Law Daily Labor Report (Apr. 28, 2021), <https://news.bloomberglaw.com/daily-labor-report/biden-dol-explores-redo-of-obama-union-avoidance-reporting-rule-1>.

17. *Labnet Inc. v. United States Dep’t of Lab.*, 197 F. Supp. 3d 1159 (D. Minn. 2016); *Nat’l Ass’n of Mfrs. v. Perez*, No. 4:16CV00169-KGB (E.D. Ark. Mar. 30, 2016).

18. *Nat’l Fed’n of Indep. Bus. v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121, at *1-47 (N.D. Tex. June 27, 2016).

19. News Release, U.S. Dep’t of Lab. Rescinds Persuader Rule, Office of Labor-Management Standards Release Number 18-1198-NAT (July 17, 2018).

20. *Nat’l Fed’n of Indep. Bus.*, 2016 WL 3766121, at *9.

ABA Opposition Refuted

Giving its stated mission of “delivering justice as the national representative of the legal profession,”²¹ ABA opposition to the Persuader Rule is both troubling and a departure from its usual neutral posture on union-management disputes.²² The ABA’s arguments against the rule were effectively refuted by thirty-four law professors specializing in legal ethics and labor law, who sent a letter to lawmakers supporting the rule and addressing ethical concerns.²³ In their letter to lawmakers these professors pointed out that, “[t]he LMRDA’s reporting regime has always accommodated attorneys’ professional responsibility concerns when attorney-client communications were potentially subject to disclosure.”²⁴ Additionally, “several circuit courts of appeal have seen no conflict between LMRDA’s reporting requirements and the attorney-client privilege.”²⁵

Confidentiality and Attorney Client Privilege

Importantly, ABA Model Rule 1.6(b)(6) allows attorneys to disclose certain client information to comply “with other law or court order.”²⁶ Therefore, the Model Rule clearly contemplates the disclosure of client information to comply with a law such as the LMRDA.

21. The American Bar Assn., https://www.americanbar.org/about_the_aba/ (last visited Aug. 19, 2021).

22. Ben Penn, *Biden DOL Explores Redo of Obama Union-Avoidance Reporting Rule*, Bloomberg Law Daily Labor Report, (Apr. 28, 2021), <https://news.bloomberglaw.com/daily-labor-report/biden-dol-explores-redo-of-obama-union-avoidance-reporting-rule-1>.

23. Letter from Richard L. Abel, et. al., to Hon. John Kline, Chairman, Comm. on Educ. and the Workforce and Hon. Robert C. “Bobby” Scott Ranking Member, Comm. on Educ. and the Workforce (May 16, 2016).

24. *Id.*

25. *Id.*, see, e.g., *Humphreys et al v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. 1985) (upholding LMRDA’s reporting requirements for attorneys engaged in persuader activity and noting that, “[i]n general, the fact of legal consultation or employment, clients’ identities, attorneys’ fees, and the scope and nature of employment are not deemed privileged”); *Wirtz v. Fowler*, 372 F.2d 315, 332-33 (5th Cir. 1966), rev’d in part on other grounds, *Price v. Wirtz*, 412 F.2d 647 (1969); *Douglas v. Wirtz*, 353 F.2d 30, 33 (4th Cir. 1965).

26. N.Y. Rules of Prof’l Conduct r 1.6(b)(6) (2009).

The Persuader Rule does not violate attorney-client privilege, as it requires the disclosure of facts, not the advice given by the attorney. These facts include the identity of the client, the fee arrangement, and the scope and nature of the persuader agreement in cases where the consultant has agreed to provide services other than legal services with the intent to persuade employees regarding union representation or collective bargaining.²⁷ This basic information is not privileged. The attorney client privilege protects confidential communications between a lawyer and client relating to legal advice sought by the client.²⁸ To be subject to attorney-client privilege, communication must be primarily of legal, not factual, character.²⁹ Because the Persuader Rule only would require disclosure of factual information and not legal advice, the Persuader Rule does not violate attorney client privilege.

Significantly, there are other laws that require disclosures by attorneys when they engage in certain activities on behalf of a client, including the Lobbying Disclosure Act (LDA) of 1995.³⁰ Lobbying disclosure reports require much of the same information as on the forms that are at issue here, including the names of clients and payments.³¹ Both lawyers and non-lawyers alike are subject to the reporting requirements of the LDA,³² which has never been successfully challenged in over 25 years in effect.³³ Similar reporting requirements, such as in bankruptcy law, require attorney disclosures yet do not impede attorneys from fulfilling their duties to clients.³⁴

27. Interpretation of the “Advice” Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 81 FR 15923, 15943 (Mar. 24, 2016).

28. *In re Nassau Cty. Grand Jury Subpoena Duces Tecum Dated June 24, 2003*, 4 N.Y.3d 665, 830 N.E.2d 1118 (2005).

29. *Muriel Siebert & Co. v. Intuit Inc.*, 32 A.D.3d 284, 820 N.Y.S.2d 54 (2006), *aff’d*, 8 N.Y.3d 506, 868 N.E.2d 208 (2007)(citing *Spectrum Sys.*, 78 N.Y.2d at 379, 575 N.Y.S.2d 809, 581 N.E.2d 1055; *Eisic Trading Corp. v. Somerset Marine*, 212 A.D.2d 451, 622 N.Y.S.2d 728 [1995]).

30. 2 U.S.C.A. § 1601 *et. seq.* (West 2019).

31. 2 U.S.C.A § 1604 (West 2019).

32. 2 U.S.C.A § 1602(10) (West 2019).

33. See Lobbying Disclosure Act of 1995, Pub.L. 104-65, 109 Stat. 691 (1995) (codified as amended at 2 U.S.C.A. § 1601 *et. seq.* (West 2019)).

34. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010) (holding that a restriction on attorneys acting as debt relief agencies advising people to incur more debt in contemplation of filing for bankruptcy is a constitutionally permissible disclosure requirement because it is reasonably related to the government’s interest in preventing deception of consumers).

In regards to the LDA, the U.S. Court of Appeals for the District of Columbia found that the government had a compelling interest in increasing public awareness of efforts of paid lobbyists to influence public decision making.³⁵ Just as responsible representative government requires public awareness of the efforts of paid lobbyists to influence the public decision making process, so too do workers need to know who is trying to influence them when they vote in union elections.

Conclusion

The legal profession must not allow itself to be used to put the profits of corporate interests over the rights of workers. The time has come for lawyers, in the words of U.S. Supreme Court Justice William J. Brennan, to “bring real morality into the legal consciousness”³⁶ by supporting reenactment of the Persuader Rule.

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35. *National Ass’n of Mfrs. v. Taylor*, 582 F.3d 1, 13 (D.C. Cir. 2009).

36. Travis A. Knobbe, *Brennan v. Scalia, Justice or Jurisprudence? A Moderate Proposal*, 110 W. Va. L. Rev. 1265, 1271 (2008).

Book Review: Up Against the Law: Radical Lawyers and Social Movements, 1960s-1970s, by Luca Falciola

By Dalia Fuleihan¹

The 1960s and 1970s conjure up images of massive protest movements—sit-ins and “freedom rides” in the south, anti-war marches and young people burning draft cards, and the violent police repression of demonstrators all immediately come to mind. The stories of widespread social discontentment, civil disobedience, and unprecedented mass mobilization for progressive social change are well known in traditional discourse. Less known is the role of radical lawyers in this crucial moment in history.

In his new book *Up Against the Law: Radical Lawyers and Social Movements, 1960s-1970s*, Luca Falciola provides a fresh look the social movements of the 1960s and 1970s, but from the perspective of the radical lawyers who engaged with these movements—primarily those in the National Lawyers Guild (NLG).² Falciola traces NLG involvement in the various social movements of the time period and in doing so sheds light on the relationship between lawyers and social movements.

Traditional notions of lawyers in social movements conjure images of a removed legal advisor, or of a litigator bringing cases to defend individual rights. Radical lawyers in the 1960s and 1970s took on a drastically different role. As Falciola recounts, radical lawyers moved beyond a traditional legalist approach to representing activists in social movements. Radical lawyers sought to challenge and dismantle systems of power alongside their clients, using their legal education to keep their clients and comrades in social movements out of jail while also using the defense of their clients to challenge the systems of power that were actively trying to silence calls for change.

1. Dalia Fuleihan is Editor in Chief of the National Lawyers Guild Review and an immigration attorney with Scott D. Pollock & Associates, P.C., in Chicago, IL. She maintains a general immigration practice with emphasis on asylum, removal defense, and family-based immigration. She has been a member of NLG since 2015.

2. LUCA FALCIOLA, *UP AGAINST THE LAW: RADICAL LAWYERS AND SOCIAL MOVEMENTS, 1960S-1970S* (2022).

Falciola traces the development of these radical lawyering techniques across the 1960s and 1970s. Falciola uses an anecdotal style to track the progression of radical lawyers and their involvement in the social movements of the time period. It would be impossible to describe all the events and movements covered by Falciola's book in this review, however, he begins his account with the NLG's involvement in the southern civil rights movement.³ He creates a timeline for the re-energizing of the NLG through the mass defense of civil rights activists, highlighting this specific strategy during the Free Speech Movement.⁴

Falciola uses several high-profile trials to demonstrate the development of militant litigation as a strategy for defending activists with progressive social movements. He chronicles the defense movements for high profile cases such as the Huey Newton trial and the trial of the Chicago Eight. Through high profile defense—specifically of leaders of the Black Panther Party (“BPP”), Falciola shows how radical lawyers combined courtroom defense with publicity campaigns to create a very different dynamic in the courtroom. Instead of relying on established defense practices, radical lawyers used publicity campaigns to spread awareness of the goals of liberatory movements—like the BPP—and to educate the public about oppressive racial systems in the United States. This then culminated in using the trial to not simply defend BPP leaders under the restrictive measures provided for by law, but to put the entire system on trial. Radical lawyers used trials and political education tools to demonstrate that individuals had a right to revolution against oppressive power systems.⁵ Crucial to this form of litigation was jury selection—ensuring that BPP leaders were truly judged by their peers—and radical lawyers achieved great strides in challenging jury selection processes, resulting in diverse juries and ultimately more just decisions.⁶

Defense of members of the BPP formed a crucial element in this story of radical lawyers; it pushed radical lawyers to focus on prisoner defense. Many Black power militants were incarcerated for at least some time during the 1960s and 1970s. Radical lawyers rose to the challenge. Instead of focusing on prison conditions or simply trying to release individuals from penal institutions, these lawyers wanted to challenge the very existence

3. *Id.* at 10-36.

4. *Id.* at 37-62.

5. *Id.* at 89-117.

6. *Id.* at 104-107.

of penal institutions. Radical lawyers took the position that all prisoners were political prisoners and used their representation of incarcerated folks to challenge the legitimacy of the carceral system. Falciola recounts radical lawyers' involvement in challenging incarceration by focusing on a few high-profile cases including the Soledad brothers, the trial of Angela Davis, and NLG's work with prisoners during the Attica prison riot.⁷

No history of radical lawyering in the 1960s and 1970s would be complete without a history of the anti-war movement. The civil rights movement and the anti-war movement captured international attention during this period, and radical lawyers were right there with activists throughout. Falciola highlights one of the key distinctions between radical lawyers and progressive lawyers: the partisanship of radical lawyers. This is especially apparent in Falciola's analysis of how radical lawyers got involved defending anti-war activists.

Radical lawyers focused on defending draft resisters; interestingly, this work clashed with other progressive legal organizations such as the ACLU. The ACLU decided they would not defend draft resisters—even though the organization opposed the war, they felt that the draft was a legitimate law, and they did not want to expend resources defending resistance to a valid exercise of legal authority.⁸ Radical lawyers took a different view. Radical lawyers weren't interested in whether the draft was technically, legally valid. It was more important to challenge imperialist systems upholding the war machine for the immortal Vietnam war.⁹

Radical lawyers contributed to the anti-war movement by defending anti-war activists, regardless of the tactics they utilized to express their political dissent, including representing members of the Weather Underground. In addition to their work representing draft resisters, radical lawyers defended GIs who went AWOL, deserted, or engaged in political defense while on active duty.¹⁰

Falciola is exceptionally thorough, covering every aspect of radical lawyers' engagement with social movements during the period. This detailed account is impressive and admirable, yet certain movements and subject areas received more attention than others. The bulk of Falciola's book details radical lawyers' engagement with the civil rights movement,

7. *Id.* at 168-192.

8. *Id.* at 140.

9. *Id.* at 140.

10. *Id.* at 139-167.

anti-war movement, and Black power struggles (both outside and inside carceral institutions). Conversely, the indigenous liberation movement, gender equality movement, and labor rights movement shared one chapter.¹¹ Some of this imbalance is undoubtedly a function of where radical lawyers and the NLG especially were spending their time. Falciola acknowledges that there was internal criticism within the Guild over its focus on representing “male-dominated struggles” and “male political defendants.”¹² No doubt, the NLG was more heavily involved in civil rights, Black liberation, and anti-war struggles than they were with any other movement. This imbalance is reflected in Falciola’s novel.

As a historian, Falciola is cannot alter what the NLG and other radical lawyers chose to focus on, and so a representation of the imbalance in their involvement is expected. However, the lack of emphasis on the indigenous liberation movement in particular is somewhat concerning. Labor movements and the struggle for gender equality are by no means ignored in the wider literature and Falciola’s brief overview of radical lawyers’ involvement with them is more understandable and probably necessary when considering the breadth of subject matter included in his book. Indigenous liberation, however, is a topic often ignored.

I applaud Falciola for including an account of radical lawyers’ involvement with the indigenous liberation movement but am disappointed by his cursory treatment of the topic. Between radical lawyers’ involvement with American Indian Movement, the reclamation of Wounded Knee, intense FBI infiltration into the indigenous liberation movement, and radical lawyers’ representation of movement leaders at their trials, there is enough material to merit a chapter of Falciola’s book. Moreover, the indigenous liberation movement presented unique challenges such as cultural divides and the intersection of American law and tribal sovereignty, further meriting a chapter rather than a mention by Falciola.

Falciola’s book, in addition to providing a thorough and engaging history of radical lawyers in the 1960s and 1970s, discusses compelling case studies for two major philosophical conundrums that all progressive and radical lawyers must grapple with in their practice to this day. The first, is the type of attorney-client relationship a lawyer wishes to create. Falciola discusses that lawyers did not maintain the traditional attorney-client relationship. In the 1960s and 1970s, since radical lawyers were part of the

11. *Id.* at 218-247.

12. *Id.* at 240.

same social movements as their clients, Lawyers viewed the activists they represented as comrades rather than clients and saw themselves as part of the movements rather than outside observers. The goal was not to defend within the confines of existing legal structures. Radical lawyers aimed to further the political goals of their clients and use their trials and legal defense to advance the social movements of which they were a part.¹³ Throughout his book, Falciola uses the various events, trials, and movements to illustrate the way radical lawyers navigated this new approach to attorney-client relationships. Judges remarked on the familiarity of radical lawyers with their clients, and these attorneys fundamentally shifted the way lawyers could choose to approach the defense of their clients. Falciola honestly discusses both the positives and negatives — most notably the attack that paralyzed Fay Stender and her suicide in 1980¹⁴ — of this philosophical shift to the attorney-client relationship.

The choice between a traditional attorney client approach and the approach of radical lawyers remains a relevant question for lawyers today. I personally have struggled with these approaches in my own practice and have seen each play out in different scenarios. For example, my experience working with community organizations and social movements naturally leads me to prefer a movement lawyering approach. Those whose goal in entering the legal profession is to work with marginalized communities and fundamentally challenge oppressive legal systems tend to agree. At the same time, legal services organizations or small law firms (who tend to be our employers) often choose a client-centered approach. Falciola's book contains numerous examples of how lawyers have navigated, successfully or unsuccessfully, these very conflicts in the past, and is a useful source for us today as we are still faced with these.

The question on how to approach legal practice necessarily leads the second philosophical question presented by Falciola: "is it possible to practice law and use the legal system to defend activists and community organizers while simultaneously advocating for the dismantling of the very

13. *Id.* at 63-88.

14. Fay Stender was part of the legal defense team for Huey Newton and George Jackson. When she shifted the focus of her legal practice in the mid-1970s and moved away from representing inmates, this change was viewed as a betrayal of the incarcerated she used to represent. Fay Stender was shot in her home by a member of George Jackson's prison gang in 1979 and paralyzed below the waist. She ultimately committed suicide in 1980. *Id.* at 216.

system that lawyers uphold on a daily basis through the court system?” This is an inherent hypocrisy that we are confronted with daily. Falciola poses this question in his introduction¹⁵ and proceeds to provide detailed examples of how radical lawyers attempted to do just that throughout the 1960s and 1970s. Needless to say, the lawyers were not always successful. However, Falciola’s account provides examples of the many ways lawyers chose to navigate the precarious position of using courts and the legal system as a part of a larger movement to dismantle oppressive power structures and serves as a useful roadmap for those of us grappling with this question today.

Overall, *Up Against the Law* by Luca Falciola is a masterful account of radical lawyers’ involvement in the social movements of the 1960s and 1970s. Beyond merely chronicling their activities, Falciola uses specific case studies to explore the development of radical lawyering as a practice, highlighting both successes and failures of lawyers in the process. Importantly, Falciola does not view the era through rose-tinted glasses. While radical lawyers enjoyed numerous successes during that period, Falciola is clear that for strategies like militant litigation to work, a series of political and societal conditions need to be in place. In other words, radical lawyering works when the public has an appetite for social change.

Falciola’s work provides fuel for ongoing debates about the role of lawyers in social movements and the ability of lawyers to contribute to progressive social movements attempting to dismantle systems of power that created lawyers’ role in society in the first place. Many of the themes and debates described by Falciola in his book remain topical today and are much discussed among radical legal practitioners. Those of us engaged in radical legal practice have much to learn from both the successes and failures of our predecessors, and *Up Against the Law* provides an indispensable history of the beginnings of radical lawyering. Anyone interested in movement lawyering or radical social movements would do well to read *Up Against the Law* by Luca Falciola.

15. *Id.* at 6-7.

ABOUT THE REVIEW

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