

Public Housing and Public Health: The Separate and Unequal Protection of Private and Public Housing Tenants' Health in New York City

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News outlets were full of reports of New York City Housing Authority's (NYCHA) systemic failures at the end of 2017. When questioned whether people who live in public housing deserve the same standard of living as people in private housing, Mayor Bill de Blasio explained "[p]eople in public housing deserve the very best living standard we can give them with the money we have."¹ This statement both manages to acknowledge the dignity of the tenants and yet still excuses the city's failure to provide healthy housing.

Dr. Ben Carson, who as Secretary of the U.S. Department of Housing and Urban Development (HUD) oversees public housing across the nation, has made public comments that fail to even recognize the dignity of public housing tenants. Dr. Carson states poverty is a "state of mind,"² where his interest is to make sure tenants are not provided "a comfortable setting that would make somebody want to stay,"³ instead of instituting ambitious goals such as reducing child lead poisoning.⁴

Across the political spectrum our leaders and our funding demonstrate that the physical health of public housing tenants is not a priority. Every new initiative is a reaction to the latest crisis. NYCHA tenants are expected to be thankful and accept that the cost of lower rent is lower expectations for their safety. NYCHA's lack of accountability is in stark contrast to the standard to which NYCHA residents are held. They "face life

1. William Neuman, *4 in 5 Public Housing Tenants Have Lost Heat Since Autumn*, N.Y. TIMES, Feb. 6, 2018, at A22.

2. Yamiche Alcindor, *Comments on Poverty Start Uproar*, N.Y. TIMES, May 25, 2017, at A15

3. Yamiche Alcindor, *Housing Secretary, on a Tour, Says Compassion Is Not About Comfort*, N.Y. TIMES, May 4, 2017, at A15.

4. Alec MacGillis, *Is Anybody Home at HUD?*, N.Y. MAG., Aug. 21, 2017.

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changing consequences for *de minimis* defaults⁵ in following the agency's regulations, but are forced to wait months or even years for basic repairs of questionable quality.⁶

This essay will briefly examine the history of housing as instrumental to public health in New York City. Part II will describe the different regulatory arrangements that partition the rights and remedies of private and public housing tenants regarding the health and safety conditions of their housing. The separate and unequal protection of NYCHA tenants will be demonstrated in Part III, using lead, lack of heat and hot water, and mold as recent examples of regulatory failure. From these failures Part IV will articulate general principles of what has worked for private housing tenants and apply those lessons to improving the conditions of public housing.

I. Brief History of Health and Housing in New York City

Poor housing has long been understood to be a public health problem. Many of New York's earliest and most important housing laws and judicial doctrines were publicly connected to promoting public health. These include constructive evictions,⁷ Tenement House Laws,⁸ criminal prosecution as an enforcement tool for repairs,⁹ the first zoning law in the

5. Justin R. La Mort, *The Rich Get Richer and the Public Gets Punished: How Unenforced Regulations Perpetuate Inequality*, 3 J. REG. COMPLIANCE (Forthcoming 2018). See generally Jaime Alison Lee, *Poverty, Dignity, and Public Housing*, 47 COLUM. HUM. RTS. L. REV. 97 (2015).

6. MARJORIE LANDA, NEW YORK CITY OFFICE OF THE COMPTROLLER, AUDIT REPORT ON THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT'S HANDLING OF HOUSING MAINTENANCE COMPLAINTS 9 (June 30, 2015).

7. *Dyett v. Pendleton*, 8 Cow. 727 (N.Y. 1826). See generally Max P. Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 DEPAUL L. REV. 69 (1951). "[C]onstructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises." *Barash v. Pennsylvania Terminal Real Estate Corp.*, 256 N.E.2d 707 (N.Y. 1970). This includes conditions that affect the health and safety of the tenant.

8. 1867 N.Y. Law 908. The first Tenement House Law was passed in response to a report by physicians who after examining the city's tenements found that, "New York, by permitting such evils to continue, not only puts in jeopardy the prosperity of trade and the welfare of citizens, but also becomes guilty of a high crime against society at large." CITIZENS' ASSOCIATION OF NEW YORK, REPORT OF THE COUNCIL OF HYGIENE AND PUBLIC HEALTH OF THE CITIZENS' ASS'N OF NEW YORK UPON THE SANITARY CONDITION OF THE CITY lxi (1865). It was later updated to better achieve its goals. See 1879 N.Y. Law 504 and 1901 N.Y. Law 334.

9. 1915 N.Y. Law 531 ¶ 43(g). This permitted the state to seek criminal sanctions for owners who put tenants at risk.

United State,¹⁰ the Multiple Dwelling Law,¹¹ and the creation of Housing Court.¹²

An often ignored but critical question to ask when considering the evolution of housing law and public health is not merely whether low-income communities benefited from these regulations, but whether concern for their welfare was what actually led to their creation. Professor Peter Marcuse argues these changes “were not the beginnings of a benevolent concern for the housing of the poor; they were a continuation of the use of state power to prevent any disturbance—physical, social, or political—of the private conduct of economic affairs.”¹³ It is hard to ignore that many important moments in the development of tenants’ rights were connected to social movements causing unrest or dangers that reached beyond the borders of so-called slums.

Professor Marcuse’s explanation is especially relevant in considering the history of public housing. During the Great Depression, substantial attention was paid to the old tenements that were considered the source of all social ills. One *New York Times* article expressed it well: “[i]t is to the slum that the criminologist traces the bulk of crime. To the slum the social worker looks for delinquency; health agencies for much rickets, cardiac trouble, pernicious anemia; and to the schools in the slums for great mental deficiency.”¹⁴ Consistent with this line of argument, then Mayor-Elect LaGuardia advocated that public housing was “in competition not with real estate, but with disease and poverty.”¹⁵

NYCHA was founded in 1934 with the goal of creating jobs and providing a safe alternative to the slums.¹⁶ NYCHA’s purpose is to provide “decent, affordable housing for low- and moderate-income New Yorkers.”¹⁷ This matches the federal purpose of remedying “the unsafe hous-

10. 1916 N.Y. Law 497 (The purpose as defined by ¶ 18 was “for the promotion of the public health, safety, comfort, convenience and general welfare.”).

11. 1929 N.Y. Law 713. It was meant as a replacement and expansion of the Tenement House Act of 1901 and expanded to buildings beyond tenements. See Lawson Purdy, *New York Multiple Dwelling Law*, 18 NAT’L MUN. REV. 305, 305 (1929).

12. “[T]he court may recommend or employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest . . .” Civil Court Act § 110(c).

13. PETER MARCUSE, *HOUSING POLICY AND THE MYTH OF THE BENEVOLENT STATE* in *THE AFFORDABLE HOUSING READER* 38 (J. Rosie Tighe & Elizabeth J. Mueller eds. 2013).

14. Frances D. McMullen, *Bad Slums That Remain a Reproach to New York*, N.Y. TIMES, May 4, 1930, at E10.

15. *LaGuardia to Seek Slum Clearance*, N.Y. TIMES, Nov. 26, 1933, at 6.

16. NICHOLAS DAGEN BLOOM, *PUBLIC HOUSING THAT WORKED: NEW YORK IN THE TWENTIETH CENTURY* 13–34 (2008).

17. NYCHA 2017 FACT SHEET 1 (Apr. 13, 2017), <https://www1.nyc.gov/assets/nycha/downloads/pdf/factsheet.pdf>.

ing conditions and the acute shortage of decent and safe dwellings for low-income families."¹⁸ When one tenement owner challenged the eminent domain that condemned and would soon clear his buildings for future public housing, the New York Court of Appeals supported the public use by finding the evils of slums are "unquestioned and unquestionable" and that slums were "the breeding places of disease which take toll not only from denizens, but, by spread, from the inhabitants of the entire city and state."¹⁹ From the start public health and public housing have been intertwined.

NYCHA at its inception was not "low-quality housing for lower-class people, but middle-class housing for working people."²⁰ It was from this era that NYCHA became considered "one of the finest housing authorities in the nation."²¹ The population shifted over time from the submerged middle-class who was unemployed during the Depression to tenants entrenched in poverty.²² This change was spurred by "three decades of federally financed 'white flight' to the suburbs, steady disinvestment in public housing infrastructure, and segregationist housing practices such as redlining" wherein public housing became home to primarily low-income minorities.²³ Exacerbating the transition was that private housing in New York City became drastically unaffordable,²⁴ with the result that for many tenants NYCHA is housing of last resort.²⁵

II. Separate and Unequal Protection of Tenant's Health

Currently, public housing in New York City is a city within a city. NYCHA is by far the largest landlord in the city, officially housing over 400,000 people or a population roughly the size of Miami, Florida.²⁶ As

18. United States Housing Act of 1937, ch. 896 (codified as amended at 42 U.S.C. § 1437(a)(1)(A) (2018)).

19. N.Y.C. Housing Auth. v. Muller, 270 N.Y. 333, 339 (N.Y. 1936).

20. Peter Marcuse, *The Beginnings of Public Housing in New York*, 12 J. URB. HIST. 353, 354 (1986).

21. PHILLIP THOMPSON, PUBLIC HOUSING IN NEW YORK CITY in HOUSING AND COMMUNITY DEVELOPMENT IN NEW YORK CITY 139 (Michael H. Schill ed., 1999).

22. See generally Lawrence M. Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF. L. REV. 642 (1966).

23. Leah Goodridge & Helen Strom, *Innocent Until Proven Guilty: Examining the Constitutionality of Public Housing Evictions Based on Criminal Activity*, 8 DUKE FORUM FOR L. & SOC. CHANGE 1, 7 (2016).

24. Justin R. La Mort, *The Theft of Affordable Housing: How Rent-Stabilized Apartments are Disappearing from Fraudulent Individual Apartments and What Can Be Done to Save Them*, 40 N.Y.U. REV. L. & SOC. CHANGE 351, 362-64 (2016).

25. *Holiday v. Franco*, 709 N.Y.S.2d 523, 526 (N.Y. App. Div. 2000).

26. NYCHA 2017 FACT SHEET 1, *supra* note 17. Research by the N.Y.C. Department of Sanitation estimates the actual population is over a half million people. Joe Anuta, *How Many People Live in the City's Public Housing? The Answer is in the Trash*, CRAIN'S N.Y. BUS., Oct. 29, 2015, <http://www.craainsnewyork.com/article/>

this section will detail, public housing tenants are segregated into a different regulatory system than their neighbors in private housing.

A private housing tenant can call 311 and request an independent government inspector to investigate the conditions and issue fines to the property owner.²⁷ If corrections are not made by certain deadlines, more fines will be incurred.²⁸ The complaints and violations are public records so anyone can find them online.²⁹ The violations are also used by government officials to shame the worst landlords³⁰ or to allow the New York City Department of Housing Preservation and Development (HPD) to repair the conditions at the owner's expense.³¹

In contrast, NYCHA tenants call the internal NYCHA Customer Contact Center to make a complaint and receive a work ticket number.³² The inspectors who investigate are NYCHA employees and provide no penalty to those responsible for failing to repair.³³ The records of complaints and violations are not publicly available.³⁴ This means tenants and their advocates "are in the dark about its code violations."³⁵ There is very little incentive for NYCHA to act because there is generally no external pressure, such as an active regulator, or financial consequences, such as cumulative fines.³⁶ If NYCHA were subject to the same penalties as private landlords, it would be at risk of substantial fines.³⁷

20151029/REAL_ESTATE/151029852/how-many-people-live-in-the-citys-public-housing-the-answer-is-in-the-trash.

27. Complaints and Inspections, New York City Department of Housing and Community Development, <http://www1.nyc.gov/site/hpd/renters/complaints-and-inspections.page> (last visited May 26, 2018).

28. N.Y.C., N.Y. ADMIN. CODE § 27-2115.

29. HPDONLINE Building Data, New York City Department of Housing and Community Development, <https://www1.nyc.gov/site/hpd/about/hpdonline.page> (last visited May 26, 2018).

30. Press Release, Public Advocate for the City of New York, PA James Releases Annual Worst Landlords Watchlist (Nov. 14, 2017), <https://pubadvocate.nyc.gov/news/articles/pa-james-releases-annual-worst-landlords-watchlist>.

31. N.Y.C., N.Y., ADMIN. CODE § 27-2153.

32. Customer Contact Center, New York City Housing Authority, <http://www1.nyc.gov/site/nycha/residents/customer-contact-center.page> (last visited May 26, 2018).

33. Abigail Savitch-Lew, *Should NYCHA Be Treated Like a Private Landlord?*, CITY LIMITS, Jan. 12, 2018, <https://citylimits.org/2018/01/12/should-nycha-be-treated-like-a-private-landlord/>.

34. *Id.*

35. David R. Jones, *Forcing NYCHA Out of the Dark*, CMTY. SERV. SOC'Y, Dec. 14, 2017, <http://www.cssny.org/news/entry/forcing-nycha-out-of-the-dark>.

36. This is beginning to change. The greater publicity has led new actors outside of the city's control to intervene as discussed in Part III.

37. BILL DE BLASIO, PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, THE TROUBLING STATE OF PUBLIC HOUSING REPAIRS 2 (2013).

The separate and unequal treatment stems from not only the procedures but also the laws. NYCHA is exempted from regulations such as lead poisoning and prevention regulations,³⁸ boiler inspections,³⁹ and certification for mold removal.⁴⁰ It is no accident that the failures NYCHA is experiencing with lead, loss of heat and hot water, and mold (as discussed in Part III) are often the same issues NYCHA is shielded from by city and state legislatures.

This practice of exemption also nearly applied to legal representation for tenants. The funding legal services providers receive to represent public housing tenants has been traditionally limited compared to protecting private housing tenants.⁴¹ New York City was the first jurisdiction in the United States to guarantee legal representation for low-income tenants.⁴² The purpose of this access to counsel (also called right to counsel though no right was created) was to reduce the justice gap where property owners almost always had an attorney and tenants mostly did not, putting tenants at a disadvantage in court.⁴³ After the landmark passage of access to counsel, it took months of advocacy from elected officials and tenant advocates to overcome the concerns of the Mayor's office to ensure that NYCHA tenants also receive an attorney at administrative hearings.⁴⁴ Access to counsel at the administrative hearing stage allows attorneys to use their legal knowledge to articulate NYCHA tenant's arguments and build better records for appeals of adverse decisions.

Housing Court is a court of limited jurisdiction. It has authority to hear NYCHA tenant cases on the merits when tenants sue for repairs or when NYCHA seeks to evict tenants for the nonpayment of rent. All other types of termination cases are decided on the merits in an administrative hearing in which a NYCHA-employed attorney prosecutes the case in front of a NYCHA-employed hearing officer.⁴⁵ If a tenant loses at the administrative hearing the case is then brought to Housing Court so NYCHA can obtain the warrant of eviction to dispossess the tenant. Housing Court lacks the authority to review the decision of the administrative hearing. Tenants who want to appeal the merits of an adverse administrative decision are

38. N.Y.C., N.Y., ADMIN. CODE § 27-2056.

39. N.Y.C., N.Y., ADMIN. CODE § 27-2033(b).

40. N.Y. LABOR LAW § 933(4) (McKinney 2018).

41. This statement is based upon the author's personal experience and observations.

42. N.Y.C., N.Y., ADMIN. CODE § 26-1301 et seq.

43. La Mort, *supra* note 24, at 371.

44. Erin Durkin, *Tenants Facing Eviction Will Get Lawyers Paid For By the City*, N.Y. DAILY NEWS, July 20, 2017; Steve Wishnia, *Tenants Are Finally Getting the Right to an Attorney in Housing Court*, VILLAGE VOICE, July 21, 2017.

45. New York City Tribunals, <http://www1.nyc.gov/site/ajc/tribunals/tribunals.page#nycha> ("Hearing officers assigned to the Office of Impartial Hearings are full-time NYCHA employees.") (last visited May 26, 2018).

required to file an Article 78 action (where there is no right to counsel) within four months of the final determination to either a New York State Supreme or an Appellate Division Court.⁴⁶ These courts give great deference to NYCHA decisions; as a government agency, it only has to show "a rational basis for the action in question" and that the decision was not arbitrary and capricious to defeat most challenges.⁴⁷

These differences in laws and protections put public housing tenants at a disadvantage. These distinctions create an underclass of tenants who are primarily low-income people of color. These unjust distinctions between public and private tenants do nothing to protect the tenants, but only ease the administrative burdens of NYCHA. The length of time it took to ensure public housing tenants would not continue to suffer from the justice gap exemplifies how hard it is to maintain equality.

III. Public Health Crisis for NYCHA Tenants

The fact public housing has become so dilapidated compared to private housing "is ironic considering the original mission of the New York City Housing Authority."⁴⁸ There has been no shortage of recent dangerous conditions in NYCHA developments, such as playground equipment,⁴⁹ broken lights,⁵⁰ elevators,⁵¹ and smoke alarms.⁵² It has reached such critical levels that Governor Andrew Cuomo believes he can intervene because "the conditions of habitability at NYCHA-managed residential properties constitute a public nuisance affecting the security of life and health in the City of New York . . ."⁵³ While Cuomo's actions may be seen as a way to score political points against Mayor de Blasio,⁵⁴ he

46. N.Y. C.P.L.R. § 7801 et seq.

47. *Gilman v. New York State Div. of Housing & Cmty. Renewal*, 753 N.Y.S.2d 1, 3 (N.Y. 2002).

48. SCOTT M. STRINGER, OFFICE OF NEW YORK CITY COMPTROLLER, *HOW NEW YORK CITY LIVES: AN ANALYSIS OF THE CITY'S HOUSING MAINTENANCE CONDITIONS* 15 (Sept. 2014).

49. Sharon Otterman, *Perils on Housing Authority Playgrounds Went Unreported, an Audit Finds*, N.Y. TIMES, Apr. 5, 2018, at A22.

50. Benjamin Mueller, *At Council Meeting, Concerns About Housing Authority Practices and Safety*, N.Y. TIMES, Dec. 17, 2014, at A28.

51. Mireya Navarro, *City's Housing Agency Faulted for 'Significant Flaws' in Elevator Safety*, N.Y. TIMES, Mar. 30, 2016, at A17.

52. Erin Durkin, *City Department of Investigation Head Slams NYCHA for 'Systemic Mismanagement' that Put Tenants in Danger*, N.Y. DAILY NEWS, Nov. 19, 2017, <http://www.nydailynews.com/new-york/city-doi-head-slams-nycha-systemic-mismanagement-article-1.3643959>.

53. Luis Ferré-Sadurní & J. David Goodman, *Cuomo Orders Public Housing Oversight*, N.Y. TIMES, Apr. 3, 2018, at A19.

54. See e.g., Jeffery C. Mays, *The Latest Mayor-Governor Spat Is Over Fixing Public Housing Boilers*, N.Y. TIMES, Feb. 17, 2018, at A21; Amir Khafagy, *Cuomo, Now an Advocate for Saving NYCHA, Oversaw Public-Housing Demolition as HUD Chief*, CITY LIM-

would not have the political leverage to justify such drastic action on a city agency if the conditions were not so dire.

NYCHA has made some progress in recent years but the failures have been too large and the proposed solutions too small.⁵⁵ The problems NYCHA faces are decades in the making—neglect by federal authorities,⁵⁶ past mismanagement,⁵⁷ and buildings that are only getting older as more maintenance and modernization is deferred. The following case studies highlight the structural deficiencies in NYCHA's buildings and bureaucracy.

A. Lead

Lead is particularly dangerous to children because it has been documented to cause adverse cognitive, cardiovascular, immunological, and endocrine effects.⁵⁸ NYCHA is required by federal law⁵⁹ to perform visual assessments of approximately 55,000 apartments a year where lead-based paint is possible.⁶⁰ However, starting in August 2012 through 2016, NYCHA ceased performing these inspections, despite certifying it did so to HUD in 2013–16.⁶¹

The Citywide Council of Presidents, a group of tenant leaders chosen by residents, brought a lawsuit against NYCHA claiming “a pattern and practice of failing to protect” tenants.⁶² The tenants are empowered to go to the court because NYCHA failed to perform a clear legal duty.⁶³ In this case, the judge found “[i]n a startling display of sophistry, NYCHA posits it can be trusted to expeditiously complete the requisite inspections and remediations. This rings hollow in light of NYCHA's record of making false statements about its compliance with its lead paint inspection requirements.”⁶⁴ The judge ordered NYCHA to identify and inspect thousands of

its, Apr. 20, 2018, <https://citylimits.org/2018/04/20/cuomo-now-an-advocate-for-saving-nycha-oversaw-public-housing-demolition-as-hud-chief/>.

55. Jarrett Murphy, *How Bill de Blasio Bought NYCHA*, CITY LIMITS, Apr. 30, 2018, <https://citylimits.org/2018/04/30/how-bill-de-blasio-bought-nycha/>.

56. NEW YORK CITY HOUSING AUTHORITY, CAPITAL PLAN CALENDAR YEARS 2016–2020 5 (Dec. 23, 2015).

57. STRINGER, *supra* note 48, at 7–10.

58. ADVISORY COMMITTEE ON CHILDHOOD LEAD POISONING PREVENTION, CENTERS FOR DISEASE CONTROL AND PREVENTION, LOW LEVEL LEAD EXPOSURE HARMS CHILDREN: A RE-NEWED CALL FOR PRIMARY PREVENTION ix (Jan. 4, 2012).

59. 24 C.F.R. § 35.1115.

60. MARK G. PETERS, NEW YORK CITY DEPARTMENT OF INVESTIGATIONS, INVESTIGATION INTO FALSE CERTIFICATIONS OF NYCHA LEAD PAINT INSPECTIONS 2 (Nov. 2017).

61. *Id.* at 3–6.

62. City-Wide Council of Presidents v. NYCHA, 100283/18 Sup. Ct. N.Y. Cty., Verified Article 78 Petition 1 (Feb. 26, 2018).

63. N.Y. C.P.L.R. § 7803(1).

64. City-Wide Council of Presidents v. NYCHA, 100283/18 Sup. Ct. N.Y. Cty., Decision and Order 14 (Apr. 23, 2018).

apartments.⁶⁵ While this is occurring, federal prosecutors are investigating the false certifications to HUD with the outcome of their investigation remaining uncertain.⁶⁶

B. No Heat and Hot Water

New York City has strict rules on heat: from October 1–May 31, landlords must provide enough heat to maintain 68 degrees Fahrenheit during the day and 55 degrees Fahrenheit at night.⁶⁷ Exposure to cold indoor temperatures is more than unpleasant. Lack of heat can have serious consequences, such as an increased risk of cardiovascular disease for seniors,⁶⁸ hypothermia, and weakened immunity to respiratory illness.⁶⁹

More than 80 percent of NYCHA residents lost their heat and hot water during the winter of 2017–18.⁷⁰ This failure was partly due to colder than average weather, but it was also directly the result of an agency ill-equipped for winter. NYCHA still keeps its boiler records as handwritten documents, making analysis of the heating systems difficult. NYCHA has suffered a 36 percent reduction in the number of boiler maintenance workers over the last five years.⁷¹ This loss of workforce is especially challenging since 39.5 percent of their inspections of NYCHA housing boilers found defects, compared to 7.9 percent in buildings citywide.⁷² This result is not surprising because of the combination of a recordkeeping system preventing a meaningful review of the overall status of the heating system, fewer employees to inspect and repair the heating system, and the fact that the records that do exist demonstrate a high rate of defective equipment. The city's response is a proposal to spend \$82 million to install replacement boilers for 104 buildings over the next four years.⁷³ While a positive step, NYCHA has previously stated the cost to replace the most

65. Luis Ferré-Sadurní, *Public Housing Must Be Tested For Lead Paint*, *Judge Orders*, N.Y. TIMES, Apr. 18, 2018, at A17.

66. Mireya Navarro & William K. Rashbaum, *Prosecutors Disclose Sweeping Inquiry of Hazards in City's Housing Projects*, N.Y. TIMES, Mar. 17, 2016, at A21.

67. N.Y. Multiple Dwelling Law § 79.

68. K.J. Collins, *Low Indoor Temperatures and Morbidity in the Elderly*, 15 AGE & AGEING 212 (1986).

69. Julie Evans et al., *An Epidemiological Study of the Relative Importance of Damp Housing in Relation to Adult Health*, 54 J. EPIDEMIOLOGY & COMMUNITY HEALTH 677, 684 (2000).

70. Neuman, *supra* note 1.

71. *Id.*

72. Press Release, Scott M. Stringer, N.Y.C. Comptroller, As New Yorkers Face Sub-Zero Conditions, Comptroller Stringer Announces New Audit of NYCHA Heating Systems (Jan. 6, 2018), <https://comptroller.nyc.gov/newsroom/press-releases/as-new-yorkers-face-sub-zero-conditions-comptroller-stringer-announces-new-audit-of-nycha-heating-systems/>.

73. William Neuman, *As Heating Complaints Pile Up, Mayor Announces Plan for 39 New Boilers*, N.Y. TIMES, Feb. 1, 2018, at A19.

critical boilers would cost \$2 billion.⁷⁴ There is a disconnect between the scope of the problem and the size of the cure.

Legal Aid has brought a lawsuit requesting a rent abatement on behalf of the 323,098 tenants who lost heat or hot water.⁷⁵ NYCHA argues that “[e]very dollar spent on a rent abatement would be one less dollar for staff and repairs. . . .”⁷⁶ NYCHA is absolutely right that lost funding hurts its organization, but it is misguided if it thinks the harm inflicted on tenants by its failures is of no consequence. The litigation continues, and there is no public interim plan in place that will protect tenants in the forthcoming winters while the four-year plan is implemented.

C. Mold

In 2006, the State of New York assembled a task force to evaluate the risk of mold to the health and safety of people in indoor environments. The task force found the “strongest evidence exists for associations between indoor mold exposures and upper and lower respiratory health effects such as nasal symptoms and asthma exacerbations.”⁷⁷ This is especially important in public housing as researchers have found that children residing in NYCHA buildings have asthma at prevalence rates that are double that of their classmates who live in private housing.⁷⁸

In 2013, the National Resources Defense Council and the National Center for Law and Economic Justice brought a suit against the city for its failure to remedy mold in public housing apartments. The suit was quickly settled.⁷⁹ Under the settlement, NYCHA agreed to repair simple mold cases within seven days and complex cases within 15 days with the goal of 95 percent of work orders meeting this timeline.⁸⁰

After this consent agreement, legal advocates had tenants claiming mold would persist for years and that repairs would consist of superficial treatment. The reported data validates the anecdotal reports given to legal advocates. NYCHA never came close to 95 percent of repairs within the given deadlines, and 34 percent of the mold recurred, indicating that

74. James Barron, *For Many Public Housing Residents, It's Cold Inside, Too*, N.Y. TIMES, Jan. 6, 2018, at A15.

75. Jeffery C. Mays, *Legal Aid Sues Housing Authority After a Freezing Winter*, N.Y. TIMES, Apr. 13, 2018, at A21.

76. *Id.*

77. NEW YORK STATE TOXIC MOLD TASK FORCE, FINAL REPORT TO THE GOVERNOR AND LEGISLATURE 38 (Dec. 2010).

78. Jennifer Northridge et al., *The Role of Housing Type and Housing Quality in Urban Children with Asthma*, 87 J. URB. HEALTH 211, 218 (2010).

79. Mireya Navarro, *Facing Suit, City Agrees to Remove Mold in Public Housing More Quickly*, N.Y. TIMES, Dec. 17, 2013, at A27.

80. *Baez v. N.Y.C. Housing Auth.*, 13-cv-8916, Stipulation and Order of Settlement 3–4 (Dec. 16, 2013).

the work being done was cosmetic instead of comprehensive.⁸¹ A special master was appointed by a federal judge after finding “Nycha’s justifications for its failure to comply are inadequate, and the attitude of Nycha officials appears to be one of indifference.” The judge concluded that this inaction “jeopardizes the health and public welfare of hundreds of thousands of New Yorkers.”⁸²

The special master met with NYCHA for two years, which is now rolling out the “Mold Busters” program in an effort to comply with the 2013 agreement.⁸³ In March 2018, the New York Senate Independent Democratic Conference released a report based on a survey of NYCHA tenants. While not necessarily methodologically sound, it echoed previous reports that the majority of tenants with mold believe NYCHA “did nothing” to correct the problem.⁸⁴ It remains to be seen whether the Mold Buster program will be effective, but the special master is in place to hold the agency accountable if its efforts are inadequate.

IV. Proposals for Protecting Public Housing Tenants' Health

The challenges facing NYCHA go beyond the current administration.⁸⁵ There will be those who will call for neoliberal solutions claiming only market forces can solve public housing’s problems.⁸⁶ I disagree. NYCHA is a public good, not a commodity. Neoliberalism has led to the slow strangulation through defunding that has put public housing in danger. Despite some recent improvements, the management of NYCHA has done a disservice to its tenants and the status quo is simply not acceptable. When people are put in danger, they need more than apologies. The following proposals articulate guiding principles that have worked for private housing and could address the weaknesses of the current practices in public housing.

81. *Baez v. N.Y.C. Housing Auth.*, 13-cv-8916, Plaintiff Memorandum in Support 26-27 (Apr. 22, 2015).

82. *Baez v. N.Y.C. Housing Auth.*, 13-cv-8916, Memorandum and Order 3, 6 (Dec. 15, 2015).

83. *Baez v. N.Y.C. Housing Auth.*, 13-cv-8916, Amended Stipulation and Order of Settlement (Apr. 6, 2018).

84. INDEPENDENT DEMOCRATIC CONFERENCE, *BREAK THE MOLD: CLEANING UP NYCHA’S MESS 1* (Mar. 2018).

85. STRINGER, *supra* note 48, at 7–10.

86. Mara Gay & Laura Kusisto, *Largest Public-Housing System in the U.S. Is Crumbling*, WALL ST. J., Mar. 18, 2018. See generally Jaime Alison Lee, *Rights at Risk in Privatized Public Housing*, 50 TUL. L. REV. 759 (2015); Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878 (1990).

A. Funding

NYCHA's average unit is 58 years old and 84 percent of its housing was built before 1970.⁸⁷ Every five years, HUD requires public housing authorities to assess their capital assets. NYCHA's last assessment was made in 2015 when it estimated it needed \$16.5 billion over five years to bring up its properties to a state of good repair.⁸⁸ As the buildings grow older, the amount of federal assistance has declined. From 2001 to 2015, the federal capital grants have declined by 27 percent.⁸⁹ During their administrations, former Mayor Michael Bloomberg and former New York Governor George Pataki also terminated funding for NYCHA that was never fully restored.⁹⁰ The challenges facing NYCHA are immense. Any solution to undo the damage wrought from decades of disinvestment is going to be costly. Federal, state, and city financing must be made available in a way that does not cause displacement or permanently foreclose opportunities for future affordable housing. Better management can lead to greater savings but only a large infusion of funds now and stable financing in the future will resolve the public health crisis.

B. Transparency

Tenants should not be left in the dark about code violations. Complaints and violations should be publicly available. With greater transparency NYCHA would be able to improve itself by using the information to evaluate its performance. Greater exposure of violations would also create accountability because problems would be visible for the public to see and respond to. Tenant leaders would be able to recognize patterns and attorneys under access to counsel could substantiate anecdotal evidence to enforce tenants' rights.

Under the existing HPD model, tenants in private housing can call 311 to report problems in their units. There is no reason why 311 cannot absorb the calls from NYCHA tenants and make the appropriate referrals. Mayor de Blasio even identified NYCHA's Customer Call Center as a redundant service in NYCHA's ten-year plan.⁹¹ This is not to say that the HPD model is perfect,⁹² but it is a much more transparent system. If NYCHA is convinced that its decentralized model will be more efficient, it should still use 311 as the gateway and publicize the results in exactly

87. Sean Campion, *NYCHA Capital: What You Need to Know*, CITIZEN'S BUDGET COMM'N 2 (Dec. 2017).

88. CAPITAL PLAN CALENDAR, *supra* note 56, at 5.

89. *Id.*

90. Luis Ferré-Sadurní & Jeffery C. Mays, *Cuomo's Emergency Order on Public Housing May Carry Big Costs for City*, N.Y. TIMES, Apr. 24, 2018, at A18.

91. NEW YORK CITY HOUSING AUTHORITY, NEXTGENERATION NYCHA 59 (May 2015).

92. *See generally* MARJORIE LANDA, NEW YORK CITY OFFICE OF THE COMPTROLLER, AUDIT REPORT ON THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT'S HANDLING OF HOUSING MAINTENANCE COMPLAINTS (June 30, 2015).

the same manner as HPD. If poor conditions continue to linger, then HPD should intervene with a commensurate funding increase. Advocates and tenants should not have to depend on litigation and City Council intervention to access such basic information.

C. Accountability

This is a strange time for NYCHA. Many of the problems it faces are in part due to the lack of accountability and foresight by its leadership. At the same time, it now has a pack of watchdogs: a special master for mold, the New York City Department of Investigations, state and federal judges, U.S. Attorney's Office of the Southern District of New York, HUD, Governor Cuomo, and potentially an independent federal monitor may all soon oversee NYCHA.⁹³ I think this is too many, but NYCHA has only itself to blame. In order for this congregation of regulators to work, there would need to be coordination, cooperation, and communication among the various parties. I do not believe such collaboration is possible with the full group above: it will more likely lead to inefficiency and become an arena of political infighting.⁹⁴

Accountability means that there needs to be communication and consequences for failures. While the Baez case concerning mold has been excruciatingly slow, it can serve as a model of respecting the breadth of the challenges facing NYCHA without absolving it of protecting tenants' health. An independent watchdog that could serve as a direct link between tenants and their advocates would be extremely useful for cases where NYCHA is not fulfilling its obligations. Either the judiciary or the executive branch could make such an appointment. To avoid regulatory capture, this monitor would need to be independent from those using public housing for political purposes and from NYCHA. Most importantly, the monitor must work with the tenants because no program will succeed without the cooperation and support of the tenant community.

The monitor must also be able to provide remedies and assess penalties in response to failures. Those harmed by the deteriorating conditions have the right to be heard and, where appropriate, compensated or provided voluntary alternative housing. These remedies should include both recognizing the right of tenants to safe housing and penalizing NYCHA when it puts people at risk.

The judiciary is already developing creative solutions to incentivize NYCHA to better protect its tenants. Recent cases provide a good example. Typically when the court orders HPD to inspect an apartment, any violation of the Housing Maintenance Code that results in a fine is payable to HPD. If this remedy were applied in the public housing context, it

93. Luis Ferré-Sadurní & J. David Goodman, *U.S. Expected To Get Oversight Of City Housing*, N.Y. TIMES, June 1, 2018, at A1.

94. Ferré-Sadurní & Mays, *supra* note 90.

would be ineffective because money would merely be transferred between city agencies. However, pursuant to Civil Court Act § 110(c), Housing Court can instead order the penalty be paid to the tenant in the form of a rent abatement⁹⁵ or provide a *de facto* abatement through contempt fines for NYCHA's failure to make court-ordered repairs.⁹⁶ NYCHA rightfully argues that every dollar paid as a penalty is a dollar the agency cannot spend on repairs but this truth should not undermine the tenant's right to be recognized and compensated for substandard housing. Penalties are necessary; otherwise the authority can continue ignoring health and safety without repercussions.

D. Equality

A tenant is a tenant regardless of whether she lives in public or private housing. There are too many legal exceptions for NYCHA that do not benefit the public housing residents. Elected officials should examine all exceptions and eliminate the ones that do not protect the tenants or for which NYCHA does not have a legitimate justification. The desire to avoid administrative burdens or have greater control should not be considered a sufficient reason. Litigation has been one of the few successful tools tenants have to protect themselves and their families from dangerous conditions. While litigation can be inefficient, we should ensure it remains an option for public housing tenants to protect themselves. Therefore, in addition to repealing unjustified exemptions, funding restrictions on legal services that prevent attorneys from representing NYCHA tenants or bring lawsuits against the city in an effort to enforce their rights should be removed.

Conclusion

It is no accident that separate and unequal treatment under the law has led to separate and unequal outcomes. Public housing is too important to let the buildings crumble to dust. Our neighbors in NYCHA deserve to be treated with the same dignity and provided the same protections as any other New Yorker. This disparate treatment puts people's lives in danger and has no justification beyond the acceptance that federal financial assistance for public housing will continue to be inadequate. We are legally and morally obligated to do better.

This essay's proposals recognize and build on what works without abandoning public housing to profiteering or obsolescence. The amount of media attention paid to this issue is a source of hope, but we need more than tragic stories and outrage. If Professor Marcuse is correct that

95. *Rivera v. N.Y.C. Housing Auth.*, NYLJ 1202799495590 (Civ. Ct. Bronx Cty. Decided Sept. 22, 2017); *Oteng v. N.Y.C. Housing Auth. St. Mary's Park Houses*, NYLJ 1202790627746 (Civ. Ct. Bronx Cty. Decided May 23, 2017).

96. *Brown v. N.Y.C. Housing Auth.*, NYLJ 1202715109979 (Civ. Ct. N.Y. Cty. Decided Jan. 7, 2015).

benevolence is not enough, then what more must fail before action is taken? We need systemic change so NYCHA tenants will be empowered to advocate for themselves before systems collapse. This will allow for proactive investment into the infrastructure and personnel of NYCHA, which will surely be cheaper than reacting to cascading crises and certainly better than waiting for unrest or permanent harm to force the issue. These suggestions will not be easy to implement, but increasing funding, transparency, accountability, and equality will make it possible for New York City to uphold its duty of providing safe housing to the hundreds of thousands of New Yorkers who call NYCHA home.

