

# Paying for Pushout: Regulating Landlord Buyout Offers in New York City's Rent-Stabilized Apartments

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## TABLE OF CONTENTS

INTRODUCTION .....	491
I. BUYOUTS AND AGGRESSIVE TENANT DISPLACEMENT IN NEW YORK CITY'S GENTRIFYING NEIGHBORHOODS .....	494
II. POTENTIAL LITIGATION-BASED RESPONSES TO ABUSIVE BUYOUT TACTICS .....	499
A. <i>The Tenant Protection Act of 2008</i> .....	500
B. <i>New York State Consumer Protection Law: Section 349             of the General Business Law</i> .....	502
III. THE ARGUMENT FOR REGULATING THE BUYOUT PRACTICE AND SUGGESTED REGULATORY STRUCTURE .....	506
A. <i>Ban the Buyout?</i> .....	507
B. <i>A Better Bargain</i> .....	508
C. <i>In Defense of Regulating Buyout Offers Through             Compulsory Terms</i> .....	510
1. <i>Freedom of Contract</i> .....	510
2. <i>Critique from Antipaternalism</i> .....	512
3. <i>Distributive Critique</i> .....	515
CONCLUSION .....	517

## INTRODUCTION

Since the 1970s, researchers have investigated the phenomenon of gentrification across American cities, examining both the causes<sup>1</sup> and effects<sup>2</sup> of

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<sup>1</sup> See, e.g., Chris Hamnett, *The Blind Men and the Elephant: The Explanation of Gentrification*, 16 TRANSACTIONS INST. BRIT. GEOGRAPHERS 173, 176–80 (1991) (reviewing and evaluating explanations based on consumer preferences and supply-side economics); Neil Smith, *Toward a Theory of Gentrification: A Back to the City Movement by Capital, not People*, 45 J. AM. PLAN. ASS'N 538, 538–39 (1979). In an attempt to identify the causes of gentrification,

upper- and middle-class migration to lower-income urban neighborhoods. Scholarly interest in the topic has persisted, and even experienced a “resurgence” since 2000;<sup>3</sup> more recent scholarship on gentrification has been marked by a debate between critics, who focus on “rent increases, landlord harassment and working-class displacement,”<sup>4</sup> and gentrification’s apologists, who argue that gentrification mitigates concentrated poverty by “the tax base, rub-off work ethic, and political effectiveness of a middle-class, and in the process improves the quality of life for all a community’s residents.”<sup>5</sup> Today, from San Francisco to New York, this scholarly dispute is frequently complemented by a parallel commentary in popular publications, with some claiming that gentrification revitalizes neighborhoods and others decrying harms to longtime (and often low-income and minority) residents.<sup>6</sup>

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Neil Smith draws attention to cultural and economic factors. Smith explains the “[i]nner-city resurgence” of gentrification as a manifestation of a cultural shift among young, middle-class professionals driven by an emphasis on consumption. See Smith, *supra* at 538–39. Smith also stresses the importance of economic factors in driving gentrification, especially the rising cost of newly constructed housing coupled with its increasing distance from urban centers. See *id.* David Ley provides an overview of the scholarship explaining the causes of gentrification, noting four broad explanatory factors: his discussion adds demographic change and housing market dynamics to the cultural and economic shifts outlined by Smith. See David Ley, *Alternative Explanations for Inner-City Gentrification: A Canadian Assessment*, 76 ANNALS ASS’N AM. GEO. 521, 522–25 (1986) (focusing on Canadian gentrification, but basing initial discussion of causes on scholarship from the United States). John Logan and Harvey Molotch argue that gentrification is the intentional result of specific policy choices by elites, such as politicians, developers, university officials, and newspaper editors, aimed at ensuring urban growth. See John R. Logan & Harvey Molotch, *The City as a Growth Machine*, in THE GENTRIFICATION DEBATES: A READER 87, 87 (Japonica Brown-Saracino ed., 2013). Hamnett argues for a theory of gentrification that integrates theories that focus on demand and consumption with theories that focus on supply and production. See Hamnett, *supra*, at 187–88.

<sup>2</sup> See, e.g., Rowland Atkinson, *The Evidence on The Impact of Gentrification: New Lessons for The Urban Renaissance*, 4 EUR. J. HOUSING POL’Y 107, 107 (analyzing scholarship of gentrification in the English-speaking world and concluding the effects have been “largely harmful, predominantly through household displacement and community conflict”); Lance Freeman & Frank Braconi, *Gentrification and Displacement in New York City in the 1990s*, 70 J. AM. PLAN. ASS’N 39, 39, 51 (2007) (noting potential costs and benefits of gentrification and concluding that gentrification does not necessarily make displacement of low-income residents more rapid or more probable); Jonathan Jackson, *The Consequences of Gentrification for Racial Change in Washington, DC*, HOUSING POL’Y DEBATE 2 (2014), available at <http://www.tandfonline.com/doi/abs/10.1080/10511482.2014.921221#.VQwxRLPF9ew>, archived at <http://perma.cc/3ZKM-8B4G> (hypothesizing gentrifying neighborhoods will experience greater displacement of black populations and higher influxes of racial diversity than non-gentrifying neighborhoods).

<sup>3</sup> Tom Slater, *The Eviction of Critical Perspectives from Gentrification Research*, 30 INT’L J. URB. & REGIONAL RES. 737, 737 (2006).

<sup>4</sup> *Id.* at 738.

<sup>5</sup> *Id.* at 741 (quoting Andres Duany, *Three Cheers for Gentrification*, AM. ENTERPRISE MAG. 36, 36 (April/May 2001)).

<sup>6</sup> Compare, e.g., Laura Sullivan, *Gentrification May Actually Be a Boon to Longtime Residents*, NPR (Jan. 22, 2014, 3:44 AM), <http://www.npr.org/2014/01/22/264528139/long-a-dirty-word-gentrification-may-be-losing-its-stigma>, archived at <http://perma.cc/4ZWZ-P7AW>, and Justin Davidson, *Is Gentrification All Bad?*, N.Y. MAGAZINE (Feb. 2, 2014), <http://nymag.com/news/features/gentrification-2014-2>, archived at <http://perma.cc/33KV-68FA>, with Rick Hampson, *Studies: Gentrification a Boost for Everyone*, USA TODAY (Apr. 19, 2005), <http://>

The displacement of longtime residents is foregrounded in both the popular and scholarly debates on gentrification. The work of Lance Freeman and Frank Braconi, which concluded that gentrification actually slowed displacement of “disadvantaged” residents,<sup>7</sup> has led some commentators to declare that gentrification is in fact a “boost for everyone.”<sup>8</sup> Other scholars, however, have challenged these conclusions, providing an alternative explanation for Freeman and Braconi’s findings: perhaps disadvantaged residents are avoiding displacement not because they are helped by gentrification, but instead are unable to move because “so much of the city has gentrified that people are trapped.”<sup>9</sup> Qualitative analyses of gentrification supplement this alternative narrative of displacement, describing how low-income residents feel pressure to leave gentrifying neighborhoods and are often frustrated by the fact that as the community improves, they find it “increasingly difficult to remain.”<sup>10</sup> This Note builds upon such qualitative analyses in an effort to answer the call to “do[ ] something” about the dearth of “qualitative accounts of displacements” in the otherwise expansive gentrification literature.<sup>11</sup>

The feelings of frustration and marginalization amongst longtime residents who are displaced by gentrification are magnified as landlords often turn to aggressive and abusive tactics to compel longtime residents to leave.<sup>12</sup> This Note will focus on New York City, where the problem of abusive tenant displacement is particularly acute. Under New York’s rent-regulation regime, landlords in gentrifying neighborhoods often stand to profit tremendously if they successfully force tenants out of rent-stabilized apartments. This Note will specifically describe how landlords attempt to induce tenants to abandon their rent-stabilized units by proffering “buyout” deals: tenants are offered a lump sum to vacate their apartments, and these offers are often undergirded by abusive tactics, including threats of eviction proceedings and discontinued maintenance.<sup>13</sup> Part I will provide a detailed qualitative account of buyout practices in low-income, rapidly gentrifying neighborhoods in New York City, infused with interviews with residents, community organizers, and legal aid attorneys. Part II of this Note evaluates

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usatoday30.usatoday.com/news/nation/2005-04-19-gentrification\_x.htm, archived at <http://perma.cc/62QE-7P2K>, and Gina Bellafante, *Gentrifying into the Shelters*, N.Y. TIMES (July 6, 2013), <http://www.nytimes.com/2013/07/07/nyregion/gentrifying-into-the-shelters.html>, archived at <http://perma.cc/5XU5-5ZYG>.

<sup>7</sup> Freeman & Braconi, *supra* note 2, at 51.

<sup>8</sup> Hampson, *supra* note 6.

<sup>9</sup> Slater, *supra* note 3, at 749.

<sup>10</sup> Kathe Newman & Elvin K. Wyly, *The Right to Stay Put, Revisited: Gentrification and Resistance to Displacement in New York City*, 43 URB. STUD. 23, 45 (2006).

<sup>11</sup> Slater, *supra* note 3, at 749; see also Newman & Wyly, *supra* note 10, at 26 (noting the nuanced, ground-up view of gentrification and displacement offered by qualitative analysis).

<sup>12</sup> See, e.g., Interview with Latoshia Wheeler, *infra* note 44 (describing “disruption of sense of community”).

<sup>13</sup> See, e.g., Mireya Navarro, *As New York Landlords Push Buyouts, Renters Resist*, N.Y. TIMES (July 9, 2014), <http://www.nytimes.com/2014/07/10/nyregion/as-new-york-landlords-push-for-buyouts-tenants-stand-their-ground.html>, archived at <http://perma.cc/28SG-GV25>.

the legality of this process under current New York City and State consumer and tenant-protection laws. Although city laws like the Tenant Protection Act of 2008<sup>14</sup> provide some relief from the most abusive landlord practices, such laws fail to address coercive buyout tactics. While state consumer protection law might be construed to cover abusive buyout tactics, the Note concludes that consumer protection law, like the Tenant Protection Act, does not provide sufficient protections for individual tenants subjected to aggressive buyout tactics or for the rent stabilization system writ large. Consequently, Part III proffers proposals for regulating the buyout practice through legal rule changes, positioning the discussion within the broader national political discourse around consumer protection regulations. Anticipated criticisms of the proposals are addressed, and the Note argues that regulation of the buyout practice through a “compulsory term” is necessary and desirable to ensure fairness in landlord-tenant bargaining in the gentrification context and to prevent buyouts from undermining the purpose of New York’s rent-regulation system.

#### I. BUYOUTS AND AGGRESSIVE TENANT DISPLACEMENT IN NEW YORK CITY’S GENTRIFYING NEIGHBORHOODS

In rapidly gentrifying neighborhoods,<sup>15</sup> the structure of New York City’s rent stabilization provisions provides the profit motive for aggressive, and sometimes abusive, attempts by landlords to create vacancies by pushing out disadvantaged tenants.<sup>16</sup> At the outset, it is important to note that New York’s rent regulation system encompasses both “rent control,” which applies to a particular tenant’s or her successors’ rent in a particular unit, and “rent stabilization,” a more modern and flexible alternative, which applies only to a particular apartment unit.<sup>17</sup> Under New York’s rent stabilization regime, a nine-member Rent Guidelines Board (“RGB”) authorizes a percentage-based yearly rent increase for one- and two-year leases.<sup>18</sup> Generally, the increase is intended to account for inflation in landlord operating costs.<sup>19</sup>

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<sup>14</sup> NEW YORK, N.Y., LOCAL LAW NO. 7 (2008).

<sup>15</sup> This is not to suggest that the practice of offering buyouts to tenants in rent-stabilized apartments is exclusively a byproduct of gentrification. For example, one holdout in the building that is now 15 Central Park West infamously negotiated a buyout deal for \$17 million. See Joseph Del Signore, *How to Turn Your Rent-Stabilized Apartment into \$17 Million*, THE GOTHAMIST (Mar. 2, 2014, 1:45 PM), [http://gothamist.com/2014/03/02/rent-stabilized\\_buyout\\_record.php](http://gothamist.com/2014/03/02/rent-stabilized_buyout_record.php), archived at <http://perma.cc/P8FM-62BF>. Moreover, as discussed *infra* note 23, even in neighborhoods untouched by gentrification, landlords attempting to convert their buildings into privately run homeless shelters push tenants out using similar tactics.

<sup>16</sup> See, e.g., Interview with Sebastian Riccardi, *infra* note 39 (discussing landlords’ incentives under rent stabilization laws).

<sup>17</sup> For a basic comparison of rent control and rent stabilization in New York City, see *Rent Stabilization FAQ*, N.Y.C. RENT GUIDELINES BD., <http://www.nycrgb.org/html/resources/faq/rentstab.html> (last visited Oct. 31, 2014), archived at <http://perma.cc/698F-BD9F>.

<sup>18</sup> N.Y. UNCONSOL. LAW § 8624a (McKinney 2014); see also Freeman & Braconi, *supra* note 2, at 42.

<sup>19</sup> Freeman & Braconi, *supra* note 2, at 42.

Given the relative rarity of rent control (38,000 units compared to 1 million rent-stabilized units in 2011<sup>20</sup>), this Note will focus exclusively on the relationship between rent stabilization and landlord buyout practices.

As a neighborhood gentrifies (and by definition, market rents rise<sup>21</sup>) landlords face an increasing incentive to deregulate their rent-stabilized apartments. This profit motive is particularly acute in the current context, as the RGB last year allowed the smallest rent increase in its forty-five-year history, with rents rising only 1% on one-year leases and 2.75% on two-year leases.<sup>22</sup> This economic incentive is the motivating force behind abusive pushout tactics, including buyout offers, in gentrifying neighborhoods; in the words of Councilwoman Helen Rosenthal, landlords can “can make a killing in the market” if they succeed in deregulating their rent-stabilized units.<sup>23</sup>

There are two ways that landlords can achieve the goal of deregulation under the Rent Act of 2011,<sup>24</sup> the most recent statewide rent stabilization legislation. The first method applies only to apartments *occupied* by high-income tenants,<sup>25</sup> and is thus inapposite to a discussion of pushout tactics. The second method incentivizes aggressive pushout tactics because it applies to *vacant*, rent-stabilized units. If a unit is vacant and it can be legally rented

<sup>20</sup> Navarro, *supra* note 13; Freeman & Braconi, *supra* note 2, at 42; *Rent Stabilization FAQ*, N.Y.C. RENT GUIDELINES BD., <http://www.nycrgb.org/html/resources/faq/rentstab.html> (last visited Oct. 31, 2014), *archived at* <http://perma.cc/698F-BD9F>.

<sup>21</sup> See Benjamin Grant, *What is Gentrification?*, PBS (June 17, 2003), [http://www.pbs.org/pov/flagwars/special\\_gentrification.php](http://www.pbs.org/pov/flagwars/special_gentrification.php), *archived at* <http://perma.cc/A59G-2YFU>, (“Gentrification is a general term for the arrival of wealthier people in an existing urban district, a related increase in rents and property values, and changes in the district’s character and culture.”); Shireen Deobhakt, ANALYSIS OF SOCIAL COSTS OF GENTRIFICATION IN OVER-THE-RHINE: A QUALITATIVE APPROACH 1 (2014), *available at* <http://digital.library.louisville.edu/utls/getfile/collection/etd/id/2985/filename/5782.pdf>, *archived at* <http://perma.cc/KNU8-8YGF> (“Gentrification is a form of socio-spatial urban development wherein working class or lower-income residential neighborhoods are transformed into middle-class residential or commercial neighborhoods, resulting in the displacement and geographical reshuffling of existing residents.”).

<sup>22</sup> See Navarro, *supra* note 13.

<sup>23</sup> *Id.* Even in neighborhoods that remain untouched by gentrification, such as the South Bronx, a similar dynamic drives abusive pushout tactics and buyout offers: many landlords try to move tenants out so they can convert rent-stabilized units into privately run homeless shelters. Telephone Interview with Edmund Witter, Staff Attorney, Legal Aid Society Housing Help Program (July 16, 2014) [hereinafter Interview with Edmund Witter]. Because the New York City Department of Homeless Services will pay “over \$3,000 a month for [a] threadbare room,” landlords in neighborhoods like the South Bronx stand to profit just as much as those in gentrifying neighborhoods by deregulating rent-stabilized units. Joseph Berger, *For Some Landlords, Real Money in the Homeless*, N.Y. TIMES (Feb. 8, 2013), <http://www.nytimes.com/2013/02/09/nyregion/for-some-landlords-real-money-in-the-homeless.html>, *archived at* <http://perma.cc/LS5J-Q6BV>; Interview with Edmund Witter, *supra*.

<sup>24</sup> 2011 N.Y. Laws 774–76.

<sup>25</sup> N.Y. UNCONSOL. LAW § 8625-a (McKinney 2014). Under state law, a landlord can deregulate a rent-stabilized apartment if tenants in a rent-stabilized apartment meet a “deregulation income threshold,” defined as a “total annual income” equal to \$200,000 “in each of the two preceding calendar years.” *When Can an Apartment Be Deregulated*, N.Y.C. RENT GUIDELINES BD., <http://www.nycrgb.org/html/guidelines/decontrol.html#vacancy> (last visited Apr. 20, 2015), *archived at* <http://perma.cc/T39N-DFVQ>.

at or above the “deregulation rent threshold,”<sup>26</sup> then it can be deregulated completely.<sup>27</sup>

The landlord has tremendous profit incentives to push out tenants and create vacancies, even if the unit cannot be deregulated completely. Under the rent stabilization laws, when a tenant signs a lease for a vacant, rent-stabilized apartment for the first time (called a “vacancy lease”<sup>28</sup>), the landlord is entitled to a substantial rent increase under the state rent stabilization law. For a two-year lease, the landlord may increase the rent by 20%.<sup>29</sup> For a one-year lease, the landlord can raise the rent by 20%, minus the difference between the permissible rates of increase for two- and one-year renewal leases.<sup>30</sup>

As landlords attempt to induce tenants to leave their rent-stabilized apartments with buyouts, the line between “persisten[ce]” and “abus[e]” is often blurred.<sup>31</sup> Although New York City’s 2008 Tenant Protection Act<sup>32</sup> (“TPA”) prohibits egregious landlord conduct, such as “interrupting essential services, initiating baseless eviction proceedings or locking out a tenant,”<sup>33</sup> abusive tactics persist<sup>34</sup>: according to Richard R. White of New York State’s Tenant Protection Unit, landlords ignore the duty to make repairs, illegally threaten to evict tenants, and refuse to cash rent checks to pressure tenants into abandoning their rent-regulated units.<sup>35</sup> Consequently, landlords’ buyout offers, which are often coupled with other means of “intimidat[ing] or pressur[ing]”<sup>36</sup> longtime residents to leave, epitomize the “injustice of community upheaval and working-class displacement [and] also . . . the erosion of affordable housing”<sup>37</sup> in rapidly gentrifying communities.

In the rare situations where a tenant truly desires to move to a new neighborhood and is fortunate enough to have access to legal representation

<sup>26</sup> *Id.* The deregulation rent threshold is \$2,000 for proceedings commenced before July 1, 2011. For proceedings commenced on or after July 1, 2011, the deregulation rent threshold is \$2,500. *Id.* at § 8625-a(13).

<sup>27</sup> *Id.*; *When Can an Apartment Be Deregulated*, N.Y.C. RENT GUIDELINES BD., <http://www.nycrgb.org/html/guidelines/decontrol.html#vacancy> (last visited Apr. 20, 2015), archived at <http://perma.cc/T39N-DFVQ>.

<sup>28</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.8 (2000); see also *Vacancy Leases*, N.Y.C. RENT GUIDELINES BD., <http://www.nycrgb.org/html/guidelines/vacancy.html> (last visited Apr. 20, 2015), archived at <http://perma.cc/Q86F-E34R> (providing a detailed discussion of vacancy leases).

<sup>29</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.8(a)(1) (2000); see also *Vacancy Leases*, *supra* note 28.

<sup>30</sup> See *Vacancy Leases*, *supra* note 28.

<sup>31</sup> Navarro, *supra* note 13 (quoting Mitchell Posilkin, General Counsel for the Rent Stabilization Association).

<sup>32</sup> NEW YORK, N.Y., LOCAL LAW NO. 7 (2008).

<sup>33</sup> Navarro, *supra* note 13; see also NEW YORK, N.Y., LOCAL LAW NO. 7 § 1 (2008).

<sup>34</sup> Part II, *infra*, discusses the effectiveness of the TPA in addressing the problems presented by coercive buyouts.

<sup>35</sup> Navarro, *supra* note 13.

<sup>36</sup> *Id.*

<sup>37</sup> Slater, *supra* note 3, at 739.

(or savvy enough to negotiate an adequate deal),<sup>38</sup> buyout negotiations can prove to be a “mutually beneficial transaction.”<sup>39</sup> For example, Sebastian Riccardi, a housing attorney with the Legal Aid Society in Brooklyn, recounts the story of one client who negotiated a \$40,000 buyout, with the hope of using it for a down payment in New Jersey.<sup>40</sup> More commonly, however, landlords will try to “lowball” tenants, especially when they are not represented by an attorney in negotiations.<sup>41</sup> In fact, according to Legal Aid attorneys and housing advocates, some tenants complain that buyout offers amount to a mere “pittance,”<sup>42</sup> ranging from as low as \$2,000 to \$10,000;<sup>43</sup> one former resident of Brooklyn reported that most of her neighbors were taking only \$5,000 to leave.<sup>44</sup> The experience of Raquel Cruz, a fifty-one year Brooklyn resident of Puerto Rican descent, is paradigmatic:

Cruz says she was offered \$10,000 and three months paid rent at a two-bedroom apartment “with a little skinny kitchen” on Quincy Street in Bedford-Stuyvesant, with a rent of \$1,300 a month, \$400 more than she was paying on Franklin Avenue. MySpace [a Brooklyn-based real-estate agency] also offered to pay for her moving costs and provide her with a permanent cleaning job. . . . She knew that she would struggle to afford the \$1,300 a month rent, but she says she felt compelled to sign, pressured by the money and the fact that her neighbors were vacating.<sup>45</sup>

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<sup>38</sup> The Shalom Tenants’ Alliance created a “buyout calculator,” which helps tenants figure out how much money they are actually making from a buyout deal, once the costs of moving and higher rent are considered. See Ronda Kaysen, *Should I Swap My Rent-Stabilized Apartment*, N.Y. TIMES (Apr. 4, 2014), <http://www.nytimes.com/2014/04/06/realestate/should-i-swap-my-rent-stabilized-apartment.html>, archived at <http://perma.cc/5V24-2QN9>. For tenants in low-income neighborhoods, this calculator can illuminate the bleak reality of a seemingly enticing offer. One writer on the topic offers this hypothetical demonstration: “For example, let’s say you make \$30,000 a year after taxes, your landlord has offered you \$10,000 to vacate, and you plan to pay \$800 more every month in rent. Turns out your ‘windfall’ would actually only cover you for three months by the time you pay the costs and taxes associated with moving, plus the higher rent. You’d also lose all the protections of rent stabilization.” Leigh Kamping-Carder, *What’s a Buyout Really Worth? Use this Calculator to Figure it Out*, BRICK UNDERGROUND (Apr. 7, 2014, 11:59 AM), [http://www.brickunderground.com/blog/2014/04/whats\\_a\\_buyout\\_really\\_worth\\_use\\_this\\_calculator\\_to\\_figure\\_it\\_out](http://www.brickunderground.com/blog/2014/04/whats_a_buyout_really_worth_use_this_calculator_to_figure_it_out), archived at <http://perma.cc/BXL5-WEJB>.

<sup>39</sup> Telephone Interview with Sebastian Riccardi, Staff Attorney, Legal Aid Society (July 11, 2014) [hereinafter Interview with Sebastian Riccardi].

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; see also Telephone Interview with Marcela Mitaynes, Tenant Counselor, Neighbors Helping Neighbors (July 30, 2014) [hereinafter Interview with Marcela Mitaynes] (citing buyout offers often as low as \$5,000 to \$10,000, which tenants still accept).

<sup>44</sup> Telephone Interview with Latoshia Wheeler, former Brooklyn tenant who accepted a buyout offer (Aug. 12, 2014) [hereinafter Interview with Latoshia Wheeler].

<sup>45</sup> Vinnie Rotondaro & Maura Ewing, *The Ins and the Outs*, NARRATIVELY (Jan. 15, 2013), <http://narrative.ly/stories/the-ins-and-the-outs>, archived at <http://perma.cc/T72A-5PNZ>.

Many low-income tenants probably share Ms. Cruz's compulsion to take what seems to be a large sum of money, but when a longtime resident of a rent-stabilized apartment accepts such a buyout deal, it will often threaten her ability to afford rent in the long run.<sup>46</sup>

In addition to the coercion experienced by tenants like Ms. Cruz, which inheres in the nature of a monetary bargain against the backdrop of "dire economic necessity,"<sup>47</sup> landlords often supplement the force of their offer with abusive tactics. Neglecting their properties and failing to make repairs is one of the primary methods landlords employ to make their meager buyout offers more tempting to tenants.<sup>48</sup> One former resident of Brooklyn, who recently accepted a buyout and left New York, explained frustration as the landlord stopped making repairs while simultaneously offering her a "bogus" buyout offer.<sup>49</sup> Unresolved problems with her apartment included a leak from rain in the bedroom and mold throughout the whole bathroom.<sup>50</sup> Similarly, a Brooklyn-based community organizer explained how property management companies will buy properties in rapidly gentrifying neighborhoods, such as Brooklyn's Crown Heights, and then will fail to conduct maintenance and make repairs.<sup>51</sup> As part of a strategy aimed at encouraging tenants to accept buyouts, one Crown Heights property management company would begin to make some repairs as they offered an "escalating" amount of money to rent-stabilized tenants.<sup>52</sup> In at least one case in Crown Heights, the management company would promise to make repairs, but instead of showing up with workmen, would show up as late as 9:00 PM with a lawyer and a buyout contract.<sup>53</sup>

Furthermore, in neighborhoods like Brooklyn's Sunset Park, where there is a large population of undocumented immigrants, landlords may leverage a tenant's immigration status to increase the pressure to accept a buyout.<sup>54</sup> A community organizer recounts how one landlord bought proper-

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<sup>46</sup> Telephone Interview with Celia Weaver, Assistant Director of Policy and Organizing, Urban Homesteading Assistance Board (July 30, 2014) [hereinafter Interview with Celia Weaver]; see also Interview with Sebastian Riccardi, *supra* note 39.

<sup>47</sup> MICHAEL SANDEL, WHAT MONEY CAN'T BUY 111 (2012) (discussing economic coercion in bargaining). Extreme economic necessity structures the background of many buyout negotiations. Raquel Cruz, for example, "works as a maid and also does odd jobs — cleaning, shoveling, painting, can collecting — anything to get by." Rotondaro & Ewing, *supra* note 45.

<sup>48</sup> Interview with Edmund Witter, *supra* note 23; see also Interview with Marcela Mitaynes, *supra* note 43. This conduct may or may not violate the TPA, depending on the severity of the landlord's failure to make repairs. Under the TPA, a finding of harassment related to physical conditions of the apartment unit "must be based at least in part on one or more violations of record issued by [a city] department or any other agency." NEW YORK, N.Y., LOCAL LAW NO. 7 § 3(2)(i) (2008).

<sup>49</sup> Interview with Latoshia Wheeler, *supra* note 44.

<sup>50</sup> *Id.*

<sup>51</sup> Interview with Celia Weaver, *supra* note 46.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Interview with Marcela Mitaynes, *supra* note 43.



ties in Sunset Park and then circulated an ominous letter, instructing tenants to give immigration authorities any information about which they inquire, should authorities show up at the building.<sup>55</sup> Similarly, in more widely publicized incidents, the state Tenant Protection Unit<sup>56</sup> (“TPU”) “accused Castellán NYC Partners and Liberty Place Property Management of offering sums as low as \$2,000 to get mostly Spanish-speaking immigrants to waive their tenancy rights in buildings in Brooklyn, the South Bronx and Harlem and Washington Heights.”<sup>57</sup> In April 2014, Legal Services NYC filed a civil rights lawsuit against Homewood Estates Gardens in Prospect-Lefferts Gardens, Brooklyn, alleging intentionally discriminatory eviction actions against black tenants.<sup>58</sup> Such tactics create a coercive and “antagon[istic]” situation in which tenants “no longer feel at home” in their apartments, but instead “feel scared, like they have no other choice” but to accept a buyout.<sup>59</sup>

## II. POTENTIAL LITIGATION-BASED RESPONSES TO ABUSIVE BUYOUT TACTICS

Recently, as coercive buyout practices have become more common, both tenants and the State have attempted to combat the practice through litigation. For example, in December, the New York State Tenant Protection Unit settled a case against Castellán Real Estate Partners.<sup>60</sup> The State ac-

<sup>55</sup> *Id.*

<sup>56</sup> See *infra* section II.A (describing TPU in greater detail).

<sup>57</sup> Navarro, *supra* note 13.

<sup>58</sup> Janet Babin, *Suit Alleges Landlord Targets Blacks*, WNYC News (Apr. 15, 2014), <http://www.wnyc.org/story/suit-alleges-landlords-target-blacks>, archived at <http://perma.cc/M828-DZEQ>; see also Navarro, *supra* note 13.

<sup>59</sup> Interview with Marcela Mitaynes, *supra* note 43.

<sup>60</sup> Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Subpoena Served on Landlord to Investigate Allegations of Harassment and Intimidation of Tenants in Northern Manhattan and the Bronx (June 25, 2013), available at <https://www.governor.ny.gov/press/06252013-governor-announces-subpoena-to-investigate-tenant-harassment-in-northern-manhattan>, archived at <https://perma.cc/624B-QENL>; Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Settlement with Brooklyn Landlord to End Harassment of Rent-Regulated Tenants (Oct. 8, 2014), available at <https://www.governor.ny.gov/news/governor-cuomo-announces-settlement-brooklyn-landlord-end-harassment-rent-regulated-tenants>, archived at <https://perma.cc/E55W-9XAT>; see also Navarro, *supra* note 13 (noting that Castellán NYC Partners and Liberty Place Property Management were accused of “offering sums as low as \$2,000 to get mostly Spanish-speaking immigrants to waive their tenancy rights in buildings in Brooklyn, the South Bronx and the Harlem and Washington Heights sections of Manhattan”). The Tenant Protection Unit is a unit within the Homes and Community Renewal (“HCR”), a New York State agency that encompasses all of the state’s major housing and community renewal initiatives. See *Agency Description, HOMES AND COMMUNITY RENEWAL* (Jan. 2, 2015), <http://www.nyschr.org/AboutUs/AgencyDescription.htm>, archived at <http://perma.cc/9Z5T-RN53>. When New York expanded rent regulation laws in 2011, it created the Tenant Protection Unit to act as a “proactive law enforcement office” within HCR, aiming “to increase compliance with these laws and further protect rent-regulated tenants.” *Tenant Protection Unit, HOMES AND COMMUNITY RENEWAL* (Feb. 20, 2015), <http://www.nyschr.org/Rent/TenantProtectionUnit>, archived at <http://perma.cc/C45G-C9XJ>. The TPU is composed of four units: Audit/Investigatory, Legal, Forensic Analysis, and Intergovernmental Affairs. See *id.* These four units work in concert to “detect[ ] and curtail[ ] pat-

cused the company of harassing the predominantly Hispanic immigrant population in its 1,700 apartments in northern Manhattan; the allegations included specifically “failure to provide renewal leases; false fees on individuals’ rent statements when tenants have payment receipts; and sending tenants information sheets asking them to provide documents proving income, as well as citizenship status, all of which are illegal to do to existing leaseholders.”<sup>61</sup> In addition, the company attempted to induce tenants to vacate their apartments by offering buyout deals for “as low as \$2,000.”<sup>62</sup> In January 2014, Castellan and TPU executed a settlement agreement, which provides for the “monitoring of the landlord’s practices for up to three years, the establishment of a fund to compensate mistreated tenants, the return of tenants that had been wrongfully removed from their homes and requirement that all future communication between landlord and tenants be conducted in both English and Spanish.”<sup>63</sup>

The following section discusses alternative legal theories which provide tenants and advocates a private right of action against abusive buyout tactics and which at least some legal services organizations in New York are already utilizing.<sup>64</sup> These litigation-based responses can provide immediate relief to tenants facing harassment and aggressive pushout tactics, but a broader regulatory solution is necessary in order to address underenforcement, provide systemic protection from abusive pushout tactics, and protect the integrity of New York’s rent stabilization regime.

### A. *The Tenant Protection Act of 2008*

The New York City Tenant Protection Act of 2008<sup>65</sup> “provide[s] legal remedies for tenants experiencing harassment by landlords attempting to force them out.”<sup>66</sup> The Act amended the New York City Housing Mainte-

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terms and practices of landlord fraud and harassment through audits, investigations, and impactful legal actions.” *Id.* The TPU legal unit responsibilities include “analyz[ing] investigations for fraud and other illegality, enforc[ing] rent regulation laws, commenc[ing] litigation for injunctive relief, and negotiat[ing] settlement agreements.” *Tenant Protection Units and Initiatives*, HOMES AND COMMUNITY RENEWAL (Oct. 17, 2013), <http://www.nyschr.org/Rent/TenantProtectionUnit/tpu-units-and-initiatives.htm#legal>, archived at <http://perma.cc/9HDL-84BC>.

<sup>61</sup> Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Subpoena Served on Landlord to Investigate Allegations of Harassment and Intimidation of Tenants in Northern Manhattan and the Bronx (June 25, 2013), available at <https://www.governor.ny.gov/press/06252013-governor-announces-subpoena-to-investigate-tenant-harassment-in-northern-manhattan>, archived at <https://perma.cc/624B-QENL>.

<sup>62</sup> Navarro, *supra* note 13.

<sup>63</sup> Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Settlement Curtailing Immigrant Tenant Harassment to Ensure Fair and Safe Communities for New York City Renters (Jan. 15, 2014), available at <https://www.governor.ny.gov/news/governor-cuomo-announces-settlement-curtailling-immigrant-tenant-harassment-ensure-fair-and-safe>, archived at <https://perma.cc/BM7C-5ZD2>.

<sup>64</sup> See, e.g., *Aguaiza v. Vantage Properties, LLC*, 893 N.Y.S.2d 19, 20 (2010).

<sup>65</sup> NEW YORK, N.Y., LOCAL LAW NO. 7 (2008).

<sup>66</sup> *Prometheus Realty Corp. v. City of New York*, 911 N.Y.S.2d 299, 300 (2010).

nance Code to provide that “[t]he owner of a dwelling shall not harass any tenants or persons lawfully entitled to occupancy of such dwelling.”<sup>67</sup> The Act defines harassment as “any act or omission by or on behalf of an owner that . . . causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy.”<sup>68</sup> Some of the tactics labeled harassment under the TPA include “the use of force, interruptions of essential services, baseless court proceedings, removing the door or the tenant’s possessions”<sup>69</sup> or any other tactic that “substantially interfere[s] with or disturb[s] the comfort, repose, peace or quiet” of the tenant.<sup>70</sup>

The TPA provides tenants with a private right of action against their landlords. The tenants may sue for injunctive relief against future acts of harassment.<sup>71</sup> If a court finds that a landlord’s conduct violated the TPA’s ban on harassment, the court shall impose a penalty at least “one thousand dollars and not more than five thousand dollars for each dwelling unit . . . [where tenants were] subject of such violation, and such other relief as the court deems appropriate.”<sup>72</sup> According to the New York City Department of Housing Preservation and Development, the number of complaints under the TPA has risen from 541 in 2012 to 748 in 2013.<sup>73</sup> In total, more than 3,200 TPA cases have been filed since 2008, with 600 concluding in settlements and forty-four resulting in a judicial finding of harassment.<sup>74</sup>

Litigation under the TPA presents one potential response to protecting tenants from coercive buyouts. The TPA alone, however, provides insufficient protection for at least three reasons. First, the language of the TPA is too narrow to protect against all unfair buyout offers, even with the catchall provision protecting against any tactic that “substantially interfere[s] with or disturb[s] the [tenant’s] comfort, repose, peace or quiet.”<sup>75</sup> Even if landlord tactics do not rise to the level of “harassment” under the TPA, in the context of buyouts, tenants often feel tremendous pressure and self-describe

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<sup>67</sup> *Id.*

<sup>68</sup> NEW YORK, N.Y., LOCAL LAW NO. 7 § 1 (2008).

<sup>69</sup> *Id.* It is worth noting that the seventh “act or omission” that constitutes harassment under the Act is a catchall, which would ostensibly cover much conduct by landlords, potentially including overly aggressive pursuit of a buyout deal: “other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of such dwelling unit and that cause or are intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy.” *Id.*

<sup>70</sup> NEW YORK, N.Y., LOCAL LAW NO. 7 § 1 (2008); *see also* Manny Fernandez, *Court Upholds the City’s Tenant Protection Act*, N.Y. TIMES CITY ROOM (Aug. 5, 2009, 5:06 PM), <http://cityroom.blogs.nytimes.com/2009/08/05/court-upholds-citys-tenant-protection-act>, archived at <http://perma.cc/92NY-CKWE>.

<sup>71</sup> NEW YORK, N.Y., LOCAL LAW NO. 7 § 5 (2008).

<sup>72</sup> *Id.* § 4.

<sup>73</sup> Navarro, *supra* note 13.

<sup>74</sup> *Id.*

<sup>75</sup> NEW YORK, N.Y., LOCAL LAW NO. 7 § 1 (2008).

their experiences with landlords' tactics as "harassment."<sup>76</sup> Secondly, as noted previously, abusive pushout tactics such as failing to make repairs and frivolous eviction proceedings have persisted since 2008, according to the New York City Tenant Protection Unit.<sup>77</sup> This underenforcement problem is likely a reflection of broader problems with access to civil legal aid services, a problem that is beyond the scope of this Note.<sup>78</sup> Finally, while the TPA protects against overt aggression in buyout offers, the determination under the catchall provision is indeterminate and discretionary. Buyout offers can do damage to individual tenants' well-being, as well as systemic damage, by undermining the rent stabilization system more generally through deregulation. Consequently, a broader regulatory solution is needed to protect tenants at both the individual and systemic levels.

*B. New York State Consumer Protection Law: Section 349 of the General Business Law*

Tenants who have been subjected to abusive and aggressive buyout tactics may have a claim under New York State's consumer protection law, which declares unlawful any "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service."<sup>79</sup> The law empowers the Attorney General to bring an action to "enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly";<sup>80</sup> the law also provides for a private right of action for "any person who has been injured by reason of any violation of this section . . . to enjoin such unlawful act or practice, an action to recover his actual damages . . . , or both such actions."<sup>81</sup>

Section 349's proscription on deceptive practices generally applies to residential landlord-tenant relationships.<sup>82</sup> However, tenants' actions under § 349 may face a significant hurdle at the threshold: in order to state a claim under § 349, the plaintiff must establish that the allegedly deceptive practice is "consumer-oriented."<sup>83</sup> To satisfy this threshold requirement, the plaintiff

<sup>76</sup> Interview with Sebastian Riccardi, *supra* note 39.

<sup>77</sup> Navarro, *supra* note 13.

<sup>78</sup> See generally Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 67 (2007) (describing the "Civil Gideon" movement).

<sup>79</sup> N.Y. GEN. BUS. LAW § 349(a) (McKinney 2014).

<sup>80</sup> *Id.* § 349(b).

<sup>81</sup> *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 344 F.3d 211, 218 (2d Cir. 2003) (alteration in original) (quoting N.Y. GEN. BUS. LAW §349(h)) (internal quotation marks omitted), *certified question accepted*, 801 N.E.2d 417 (N.Y. 2003), *certified question answered*, 818 N.E.2d 1140 (N.Y. 2004).

<sup>82</sup> *Purmil Co. v. Chuk Dey India Too, Inc.*, 20 Misc.3d 1136(A), 2008 N.Y. Slip Op. 51766(U), \*7 (Nassau Dist. Ct. 2008); see also *Meyerson v. Prime Realty Servs.*, 796 N.Y.S.2d 848, 854 (N.Y. Sup. Ct. 2005) (holding § 349 applied to landlord's representation that tenant was required by law to provide social security number to secure renewal lease and avoid eviction).

<sup>83</sup> *E.g.*, *Citipostal, Inc. v. Unistar Leasing*, 724 N.Y.S.2d 555, 558 (2001).

must show that the defendants' "acts or practices have a broad[ ] impact on consumers at large."<sup>84</sup> This does not mean that the defendant's conduct needs to be recurring, but a dispute that is "unique to the parties" is not covered by § 349.<sup>85</sup> Consequently, a "single shot transaction," such as a contract negotiated for the rental of Shea Stadium, is not covered by § 349 because it is "not a typical consumer transaction."<sup>86</sup> As long as the tenant can show that a landlord's conduct is a typical consumer transaction, and thus not "unique to the parties," the landlord's conduct will satisfy the "consumer-oriented" requirement under § 349.

The conduct of landlords who are aggressively pursuing buyouts of multiple tenants in rent-stabilized units across entire buildings (or even across multiple properties)<sup>87</sup> is therefore very likely to satisfy this threshold requirement of consumer-oriented behavior. For example, in *Meyerson v. Prime Realty Services, LLC*,<sup>88</sup> the court asserted that where the defendant landlords "own[ed] and manage[d] a substantial number of rent-regulated apartments" and used a particular challenged lease form for all lease renewals, the defendants' practice was consumer-oriented; thus the claim could not be dismissed as "simply a private contract dispute."<sup>89</sup> Similarly, many of the landlords and management companies employ aggressive pushout tactics, including coercive buyout offers, across a substantial number of rent-regulated apartments. For example, according to one Brooklyn-based tenant advocate, BCB Property Management has purchased at least fifteen buildings, at least ten of which are rent-regulated, and is actively pursuing an aggressive eviction campaign against longtime residents.<sup>90</sup> Such a campaign across multiple units, and even multiple buildings, would likely satisfy § 349's requirement of a "consumer oriented practice."

Once the plaintiff has established at the threshold that the defendant's conduct is "consumer oriented," she must next prove a prima facie case by showing (1) that the defendant is "engaging in an act or practice that is deceptive or misleading in a material way"; and (2) that the plaintiff has been injured by the defendant's act or practice.<sup>91</sup> Courts have adopted an "objective definition" for the first element of the prima facie case: a defendant's conduct is "deceptive or misleading in a material way" if it is "likely

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<sup>84</sup> *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 744 (N.Y. 1995).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (quoting *Genesco Entm't v. Koch*, 593 F. Supp. 743, 752 (S.D.N.Y. 1984)) (internal quotation marks omitted).

<sup>87</sup> See, e.g., Interview with Latoshia Wheeler, *supra* note 44; Interview with Marcela Mitaynes, *supra* note 43; Interview with Celia Weaver, *supra* note 46.

<sup>88</sup> 796 N.Y.S.2d 848 (N.Y. Sup. Ct. 2005).

<sup>89</sup> *Id.* at 856.

<sup>90</sup> Interview with Celia Weaver, *supra* note 46; see also Interview with Latoshia Wheeler, *supra* note 44 (describing single landlord's attempt to buyout numerous rent-regulated tenants in one building).

<sup>91</sup> *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 744 (N.Y. 1995).

to mislead a reasonable consumer acting reasonably under the circumstances.”<sup>92</sup> This determination can be made as a matter of law.<sup>93</sup>

In *Gaidon v. Guardian Life Insurance Co. of America*,<sup>94</sup> for instance, the plaintiffs alleged that the defendant insurance company “lured them into purchasing policies by using illustrations that created unrealistic expectations” that their insurance premiums would eventually “vanish[ ]” over time.<sup>95</sup> The disappearance of premium payments, however, could only occur if interest rates were to “continue at a high, unprecedented rate” for twenty years or more — a scenario allegedly known to be highly unlikely by defendants.<sup>96</sup> The Court of Appeals of New York held that the plaintiffs adequately alleged a violation of § 349’s prohibition of “deceptive or misleading” acts.<sup>97</sup> Therefore, it is possible that a landlord who aggressively pushes buyout deals on rent-regulated tenants has also engaged in “deceptive or misleading” conduct, although the analysis is by its nature fact-dependent.<sup>98</sup> For example, hypothetically, a landlord may violate § 349 by representing a \$10,000 (or even a \$60,000<sup>99</sup>) buyout offer as adequate to support a tenant in transitioning from a rent-regulated unit to a new market rate apartment; any landlord or property manager familiar with the New York City rental market would be aware of the inaccuracy of such a representation,<sup>100</sup> just as the insurance company in *Gaidon* was aware that interest rates would not remain high enough to eliminate premium payments on the plaintiffs’ policies. In the words of one Brooklynite who resisted BCB’s

<sup>92</sup> *Id.* at 745.

<sup>93</sup> *Id.*

<sup>94</sup> 725 N.E.2d 598 (N.Y. 1999).

<sup>95</sup> *Id.* at 604.

<sup>96</sup> *Id.*

<sup>97</sup> The case combines separate but similar complaints against Guardian Insurance Company (Guardian) and Mutual Life Insurance Company of New York and MONY Life Insurance Company of America (collectively MONY). The trial court granted Guardian’s motion to dismiss and held that the plaintiff’s § 349 claim against Guardian failed as a matter of law. The trial court also granted MONY’s motion for summary judgment on plaintiff’s § 349 claim. The Appellate Division affirmed in both cases. The Supreme Court granted summary judgment to the defendant insurance companies and the Court of Appeals affirmed.

<sup>98</sup> It is also important to note that § 349 “surely does not require businesses to ascertain consumers’ individual needs and guarantee that each consumer has all relevant information specific to its situation.” *Oswego Laborers’ Local*, 647 N.E.2d at 745. The Court of Appeals emphasized that the statute covers situations “where the business alone possesses material information that is relevant to the consumer and fails to provide this information.” *Id.* It is unclear how the court would view a situation where the buyout offer seemed objectively inadequate and this information was readily available to the tenant, yet the buyout offer was still accepted.

<sup>99</sup> See Elaisha Stokes, *The New Kings of Crown Heights*, AL JAZEERA AMERICA (July 9, 2014, 5:00 A.M.), <http://america.aljazeera.com/articles/2014/7/9/the-new-kings-ofcrown-heights.html>, archived at <http://perma.cc/3LRC-6PU6>; see also Interview with Marcela Mitaynes, *supra* note 43 (expressing the view that tenants should not accept less than \$100,000).

<sup>100</sup> Notably, § 349 does not require proof that the defendant intended to mislead, but proof of such intent allows the court to award treble damages up to \$1,000. N.Y. GEN. BUS. LAW § 349 (McKinney 2014).

buyout offers, “That’s a lot of money. . . . But let’s be real. In the New York City market, that money will slip right through your fingers.”<sup>101</sup>

Landlords who aggressively push buyout offers may violate § 349’s ban against deceptive or misleading acts if they insinuate that they will not allow the tenant to renew her lease when it expires, so she should just move out early and take the buyout offer. In other words, landlords may deceive tenants by convincing rent-stabilized tenants that they have no right to stay in the apartment when the lease expires. Unlike market-rate tenants, rent-stabilized tenants cannot be evicted or denied a renewal lease as long as the tenants continue to pay rent.<sup>102</sup> Rent-stabilized tenants can only be evicted on fault-based grounds; otherwise, they have a right to stay in the apartment. If in the context of aggressive buyout negotiations a landlord made any representations to the contrary, the landlord’s conduct would violate § 349’s prohibition on deceptive or misleading acts.

Once the plaintiff establishes that the defendant’s actions were “deceptive or misleading,” she must also demonstrate that she was injured by these actions.<sup>103</sup> Section 349 does not require proof of “justifiable reliance,” but the plaintiff seeking compensatory damages under the statute must prove actual (although not necessarily “pecuniary”) harm.<sup>104</sup> For tenants who are coerced into accepting inadequate buyouts, it should not be difficult to prove actual harm. Many tenants who accept such deals “discover[ ] that finding a new apartment nearby [is] almost impossible.”<sup>105</sup> Furthermore, many are forced to “move to outlying neighborhoods, [where they] pay[ ] four times as much rent without the protection of rent stabilization.”<sup>106</sup> Therefore, although a plaintiff-tenant would not be required to prove “pecuniary harm,”<sup>107</sup> she very well may be able to prove economic harms occurred. If the court finds a § 349 violation was knowing and willful, it may increase the damages to “an amount not to exceed three times the actual damages up to one thousand dollars.”<sup>108</sup>

While litigation under New York consumer protection law represents a potential source of relief for tenants, there are two shortcomings to this approach. First, the only relief available under the statute is compensatory damages. Tenants who prevail on these claims can perhaps recover a sum sufficient to sustain them in a new housing search, but the threat of such litigation is unlikely to provide a systemic solution to the problem by sufficiently discouraging landlord buyouts. The second, related problem is that

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<sup>101</sup> Stokes, *supra* note 99.

<sup>102</sup> See N.Y. COMP. CODES R. & REGS. tit. 9, § 2524.1 (1985).

<sup>103</sup> *Oswego Laborers’ Local*, 647 N.E.2d at 745.

<sup>104</sup> *Id.*

<sup>105</sup> Stokes, *supra* note 99.

<sup>106</sup> *Id.*

<sup>107</sup> *Oswego Laborers’ Local*, 647 N.E.2d at 745 (holding that plaintiff “must show that the defendant engaged in a material deceptive act or practice that caused actual, although not necessarily pecuniary, harm”).

<sup>108</sup> N.Y. GEN. BUS. LAW § 349 (McKinney 2014).

the “unfair and deceptive” standard is by its nature fact-dependent and subject to interpretive discretion. It will fail to capture conduct at the margins<sup>109</sup> where landlords capitalize on information asymmetries and tenants’ cognitive biases and plaintiffs lack proof of overt misrepresentation or deception.<sup>110</sup> A broader regulatory solution is needed to promote fairness in bargaining and to prevent the subtle undermining of rent stabilization legislation.

### III. THE ARGUMENT FOR REGULATING THE BUYOUT PRACTICE AND SUGGESTED REGULATORY STRUCTURE

In the context of New York City’s well-documented<sup>111</sup> and ever-worsening dearth of affordable housing, capped by Mayor Bill de Blasio’s recent (unsuccessful) call for a “rent freeze,”<sup>112</sup> the practice of buyout offers in low-income neighborhoods has drawn attention from the media and city legislators.<sup>113</sup> For example, Councilwoman Helen Rosenthal has recently proposed a law that would empower tenants to fight harassment by permitting them to collect compensatory and punitive damages and attorney’s fees in landlord harassment suits.<sup>114</sup> Meanwhile, experts are predicting the demise of rent regulation in Manhattan within “five to ten years,”<sup>115</sup> as apartments are often deregulated through vacancy (and often with the help of buyouts).<sup>116</sup> Preventing the disappearance of rent regulation would require revision of the state rent stabilization laws, a topic beyond the scope of this Note. The following section instead discusses two possible regulatory mechanisms for curbing abusive landlord buyout tactics in pursuit of deregulation and higher rental profits. Following this discussion, anticipated counterarguments against these regulatory mechanisms are engaged against the backdrop of the broader theoretical debate about regulation through compulsory contractual terms.

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<sup>109</sup> See *Oswego Laborers’ Local*, 647 N.E.2d at 745 (outlining “objective definition of deceptive acts or practices,” limited only to acts or omissions likely to deceive a reasonable consumer).

<sup>110</sup> See *infra* section III.A (discussing information asymmetries and cognitive biases).

<sup>111</sup> See, e.g., Editorial Board, Editorial, *New York’s Affordable Housing Shortage*, N.Y. TIMES (Feb. 7, 2014), <http://www.nytimes.com/2014/02/08/opinion/new-yorks-affordable-housing-shortage.html>, archived at <http://perma.cc/F63N-VJV6>.

<sup>112</sup> Navarro, *supra* note 13.

<sup>113</sup> See, e.g., *id.*

<sup>114</sup> *Remedies for the breach of the duty of an owner to refrain from harassment of tenants*, Int. 0347-2014, 2014 N.Y. City Council, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1797008&GUID=4C7A1A7E-18AA-4545-8848-FA8DA1A46BE0&Options=Advanced&Search=>, archived at <http://perma.cc/7RAP-PDHG>.

<sup>115</sup> Robert Kolker, *The High Cost of Leaving*, N.Y. MAGAZINE (Oct. 20, 2013), <http://nymag.com/nymetro/realstate/features/755>, archived at <http://perma.cc/P5AQ-3PGV>. See also Navarro, *supra* note 13.

<sup>116</sup> See Part I, *supra*.



A. *Ban the Buyout?*

The first and perhaps most obvious solution would be simply to prohibit landlords from offering buyout deals to tenants in rent-stabilized units.<sup>117</sup> While this is an admittedly blunt solution,<sup>118</sup> it does have some redeeming qualities. First, this clear-cut rule is easily administrable: the buyout is simply no longer a tool within the landlord's arsenal in pursuit of deregulating rents within an apartment building. This rule would likely increase tenants' sense of security within their homes and reduce the degree to which they feel harassed by incessant buyout offers. Most importantly, this rule protects vulnerable low-income tenants from accepting unfavorable buyout offers, which causes them to lose the tremendous economic benefit of rent stabilization without sufficient monetary compensation. Because such tenants often suffer from asymmetric access to information during negotiations, they are often unaware of the true market value of the apartment and therefore do not realize that they could hold out for more money, which results in a windfall to the landlord. Moreover, behavioral economic research has revealed that human decisionmaking is subject to a "present bias,"<sup>119</sup> which causes tenants to irrationally overvalue receiving a smaller sum (e.g., \$5,000) immediately in a buyout deal. In reality, such meager buyouts will not suffice to support low-income tenants in a new tenancy at market rent. Therefore, legislation eliminating the tactic of buyouts from rent-stabilized apartments would intervene to help protect tenants from cognitively biased decisionmaking.

Although the clarity and administrability of this first proposed rule make it appealing, it ultimately is not the best solution to the problem. A categorical ban on buyouts would exacerbate inefficiency in the rental market by preventing mutually beneficial transactions and thus could actually harm the interests of certain tenants. From the tenant's perspective, her rent-stabilized lease is a valuable asset that she may want to sell in the market.<sup>120</sup> Assuming that the tenant has adequate information and the landlord sees

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<sup>117</sup> In other words, this solution would make the rent stabilization entitlement "inalienable." See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111–15 (1972).

<sup>118</sup> Inalienability of entitlements involves a "great[ ] degree of societal intervention." *Id.* at 1111.

<sup>119</sup> See, e.g., Jess Benhabib, Alberto Bisin & Andrew Schotter, *Present-bias, quasi-hyperbolic discounting, and fixed costs*, 69 GAMES AND ECON. BEHAVIOR 205, 206 (2010).

<sup>120</sup> Notably, in March of 2014 the U.S. Court of Appeals for the Second Circuit was faced with the issue of "whether the value inherent in a New York City tenant's rent-stabilized lease . . . make[s] the lease, or some portion of its value, exempt from the tenant's bankruptcy estate as a 'local public assistance benefit.'" *In re Santiago-Monteverde*, 747 F.3d 153, 155 (2d Cir. 2014), *certified question accepted*, 23 N.Y.3d 958 (2014). Although the Second Circuit declined to decide the question, instead certifying it to the New York Court of Appeals, the tenant's argument that rent stabilization creates value inherent in the lease, which amounts to a public benefit, supports the argument for allowing tenants to "sell" their leases to landlords on an open market.

sufficiently high value in a vacant apartment, the two parties will be able to negotiate an efficient buyout exchange that leaves both parties better off. This class of tenants, which benefits from realizing the value of its rent-stabilized units on the open market, will clearly be harmed by a ban on buyouts. Moreover, a prohibition on buyouts is in essence a mandatory lease term, the cost of which will be passed by landlords on to their consumers, the tenants, in the rental market. The prohibition will reduce the landlords' profits because they are no longer able to increase rents by creating a vacancy and signing a vacancy lease. In addition, because of rent-stabilization, which prevents rent increases on certain units, the burden of this added cost will be concentrated on the nonstabilized portion of the market, further driving up rents and limiting the affordability of housing for New York City's middle class. Despite the drawbacks of a ban on buyouts, it is still worth noting that this rule would curb the gradual undermining of New York's rent-stabilization regime through deregulation.<sup>121</sup>

### B. A Better Bargain

An alternative and preferable solution would be to anchor the buyout price to the unit's fair market rent, thereby allowing buyouts to take place where it is truly in both parties' interest. This can be accomplished by legislation that sets a fair price for buyouts, according to the following formula:

$$\text{Present Discounted Value of } ((\text{Average Market Rent} \times M \text{ months}) - (\text{Stabilized Rent} \times M \text{ months})^{122}) = \text{Buyout Price}$$

This solution sets the price at the difference between the stabilized rent and the average market rent, allowing the landlord to realize a fair profit at market value rather than capitalizing on rent-deregulation to realize a tremendous windfall at the tenants' expense. The landlord pays the difference between the stabilized value and the market rent for  $M$  months, essentially compensating the tenant with the cash value of her stabilized lease.<sup>123</sup> In other words, the value in this approach is that it treats the tenants' rent-

<sup>121</sup> See *supra* section I.A.

<sup>122</sup> The value  $M$ , representing the number of months, could be increased if policymakers wanted to provide greater assurances that tenants emerge from the bargain with sufficient funds to relocate to a sustainable tenancy. Ultimately, the number of months is a political question that the legislature must settle. In resolving this question, however, it is important to keep in mind that tenants in rent-stabilized units have a statutory right to stay in their apartments as long as they pay rent and do not engage in certain proscribed conduct. See section II.B, *supra*. Consequently, landlords should be willing to accept a  $M$ -value of at least several years, if not more.

<sup>123</sup> This rule chooses to protect the value of the tenant's entitlement to rent stabilization through a "property rule." See Calabresi & Melamed, *supra* note 117, at 1105. An entitlement is protected by a "property rule" when it cannot be taken away from the holder unless the holder sells it willingly and at the price at which he subjectively values the property." *Id.* In this case, however, the proposed formula sets a "floor" on the tenant's subjective valuation to correct for information asymmetry, economic coercion, and cognitive bias.

stabilized lease as a valuable asset that can then be exchanged on the rental market. This minimum standard is necessary because reliance on bargaining between landlord and tenant will not produce an efficient result. High transaction costs present a barrier to efficient bargaining because the landlord-tenant bargain is a bilateral monopoly: the landlord is the only one who can offer the buyout and the tenant has the sole control over the supply of “goods” (i.e., the single, rent-regulated unit). Therefore, regulation of the bargain is necessary to promote efficiency.

From the tenants’ perspective, regulation in this form would preserve their freedom to move without sacrificing the value of their rent-stabilization. Moreover, because the tenant receives the cash value of her rent-stabilized lease over  $M$  months, she will likely receive sufficient funds to endure a search for a new sustainable tenancy. In fairness to the landlord, the amount the tenant receives must be discounted to account for the interest rate because the tenant is receiving the money up front in a lump sum. Under this scheme, the landlord also benefits by obtaining vacancy of the desired apartment at a fair price, allowing the landlord to invest in renovations and re-rent the apartment at a higher value. In this way, the landlord’s ultimate goal is also achieved: landlords are able to realize a greater investment return over the long run.

The most significant downside of this proposed solution is its implications for the entire rent-regulation regime, rather than for individual tenant-landlord bargaining situations. The landlord’s profit motive for the buyout practice stems from a loophole in the rent-regulation laws: the landlords are able to raise rents on regulated units whenever they enter into “vacancy leases.”<sup>124</sup> Therefore, buyouts allow landlords to “deregulate” apartments. Regardless of one’s position on the wisdom of New York’s rent regulation regime,<sup>125</sup> it is obvious that as rent regulation disappears (even gradually, through the buyout practice), landlords stand to realize a windfall profit.<sup>126</sup> As long as the buyout practice persists and landlords continue to exploit this aspect of the law to achieve gradual deregulation, “[r]ent regulation is very likely to go away, eventually, even without any explicit effort to kill it.”<sup>127</sup> Some housing experts have suggested a “grand bargain,” under which some of the profits realized through deregulation would be reinvested, through higher property taxes, in securing affordable housing for low-income tenants

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<sup>124</sup> See section I.A, *supra*.

<sup>125</sup> See generally Jeffrey James Minton, *Rent Control: Can and Should It Be Used to Combat Gentrification?*, 23 OHIO N.U. L. REV. 823 (1997) (describing two sides of the rent control debate amongst economists).

<sup>126</sup> Adam Davidson, *The Perverse Effects of Rent Regulation*, N.Y. TIMES MAG. (July 23, 2013), <http://www.nytimes.com/2013/07/28/magazine/the-perverse-effects-of-rent-regulation.html>, archived at <http://perma.cc/5M5C-X9HS> (quoting Christopher Mayer, a housing economist at Columbia Business School, as saying “Eliminating rent regulation would be such a huge windfall for landlords . . .”).

<sup>127</sup> *Id.*

in New York.<sup>128</sup> This solution is impossible, however, if deregulation through buyouts continues unchecked. If rent regulation disappears over time without a plan in place to address the crisis in access to affordable housing, “Manhattan [and possibly Brooklyn and Queens] will have fewer and fewer poor people each year and almost none whatsoever in a few decades.”<sup>129</sup>

### C. *In Defense of Regulating Buyout Offers Through Compulsory Terms*

A “compulsory term” is a duty “that come[s] into existence for a legal actor as a consequence of entering some kind of relationship with another legal actor.”<sup>130</sup> The party benefiting from such duties cannot waive them.<sup>131</sup> A few examples of compulsory terms include: implied warranties of habitability in residential leaseholds, minimum-wage laws, and bans on child labor.<sup>132</sup> Both of the solutions proposed above, either banning buyouts or determining a minimum fair buyout price,<sup>133</sup> are examples of compulsory terms regulating potential contractual relationships between landlord and tenant. Consequently, these proposed solutions implicate the vigorous contemporary political debate about the normative value of government-imposed compulsory terms as a means of consumer protection.<sup>134</sup> This section addresses the anticipated counterarguments as they relate to the solutions to the buyout problem suggested above.

#### 1. *Freedom of Contract.*

The first predictable criticism of the compulsory terms proposed in this Note is that freedom of contract is unjustifiably restricted by either setting a minimum price for buyouts or by banning the practice of buyouts entirely. Conservatives consistently object to compulsory terms as a form of consumer protection on the ground that they “diminish[ ] freedom of contract . . . an essential element in a market economy.”<sup>135</sup> Theorists of this view argue that freedom of contract is the basic premise governing political mo-

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 590–91 (1982) [hereinafter Kennedy, *Distributive and Paternalist Motives*].

<sup>131</sup> *See id.*

<sup>132</sup> *See* William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1242 (1998).

<sup>133</sup> *See supra* sections III.A & III.B.

<sup>134</sup> *See* Joseph William Singer, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSON OF THE SUBPRIME CRISIS (forthcoming 2015) (manuscript at 5–6, 53) (on file with author); Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 15 (2004) (describing a “classical revival” in American law, which challenges progressive developments in contract law in the 1960s and 1970s, and especially the development of unconscionability doctrine).

<sup>135</sup> *E.g.*, Feinman, *supra* note 134, at 15.

rality, which inexorably “generates the structure” of contract law as a unified body of doctrine.<sup>136</sup> From this perspective, any compulsory terms are unjustified distortions of this basic organizing principle of contract doctrine, rooted in liberal political morality.

This critique of the Note’s proffered solutions fails on multiple accounts. As in other contexts,<sup>137</sup> the “first step” in addressing this argument is to disprove the notion of contractual freedom as the unifying foundational principle of American society: in reality, compulsory terms, from “implied warranties of habitability in residential leaseholds” to “maximum-hours legislation,” are “ubiquitous in American law.”<sup>138</sup> In light of the libertarian argument that any such limitation on contractual freedom interferes with the liberty of both parties to “choose the terms of [their] contracts” through bargaining,<sup>139</sup> the ubiquity of compulsory terms in American law raises an obvious question: Why is the restriction of freedom of contract so prevalent if it is so damaging?

Professor Joseph Singer answers that such compulsory terms actually “promote[ ],” rather than restrict, “freedom.”<sup>140</sup> Such laws are necessary in order to enable markets to function properly. Therefore, compulsory terms cannot be understood as “intrusions on private liberties.”<sup>141</sup> Such interventions are actually necessary to “define market structures and property rights” in a way that allows the exercise of individual liberty to coexist with the “rights and liberties of others.”<sup>142</sup> With this insight in mind, the contemporary American political landscape, which understands a libertarian view on markets and contractual freedom as diametrically inconsistent with regulatory laws and mandatory terms, fails to account for how regulatory laws simultaneously “protect[ ] property rights and market freedoms while promoting liberty.”<sup>143</sup> Singer thus suggests a reframing of the relationship between contractual freedom and regulation, anchored in the concept of “*democratic liberty*”: social and economic relations must adhere to a set of democratically determined minimum standards to ensure that individual freedoms are exercised without impinging on the freedom of other social actors.<sup>144</sup> Under Singer’s paradigm, a concept of liberty as “the absence of

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<sup>136</sup> Charles Fried, *CONTRACT AS PROMISE* 6 (1981). Cf. Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 270 (1989) (positing “consent” rather than the “will” or “promise” as the unifying premise of contract doctrine).

<sup>137</sup> See, e.g., Fisher, *supra* note 132, at 1242 (making a similar argument for compulsory terms in regulating interaction between suppliers and consumers of internet material).

<sup>138</sup> *Id.* Some of the many other examples include “implied warranties of merchantability; . . . rent control; minimum-wage laws; bans on child labor; compulsory terms in insurance policies; manufacturers’ strict liability for injuries caused by their products; and protections for mortgagors and the occupants of migrant labor camps.” *Id.*

<sup>139</sup> Singer, *supra* note 134, at 53.

<sup>140</sup> *Id.* at 10.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 10–11.

<sup>143</sup> *Id.* at 18.

<sup>144</sup> *Id.* at 18–19.

regulation” is counterproductive and incomplete; *democratic liberty* “is the freedom to live with others under rules we have adopted together and which set the minimum standards that enable . . . each of us . . . to pursue happiness.”<sup>145</sup>

A mandatory, nonwaivable contract term, such as either of this Note’s proposals for regulating landlord buyouts, undoubtedly constrains contractual freedom. Yet compulsory terms, in the form of consumer protection law, have been democratically successful, even in “the most libertarian of states,” because people recognize that such laws “help us get what we want” in the market.<sup>146</sup> Such laws free bargaining parties from the threat that “every potential contracting party [is] an enemy”; compulsory terms regulating buyout offers are no different.<sup>147</sup> It is true any compulsory term restricts one party’s — here, the landlord’s — “freedom to enter an arrangement that does not comply with minimum standards.”<sup>148</sup> In this case, the “minimum standard[ ]” is fair compensation for the value of the rent-stabilized lease.<sup>149</sup> This constraint on freedom of action is justified by the fact that a nonwaivable, compulsory term frees vulnerable tenants from the fear that their buyout contract will not conform to justified expectations of fair dealing. Preserving the status quo on buyout deals in the name of contractual freedom is analogous to advocating for the deregulation of housing codes: eliminating the regulation would not promote freedom, but rather “allow[ ] those who do not care about safe homes to impose their will on the rest of us.”<sup>150</sup> The proposed regulation of buyouts would free rent-stabilized tenants from the fear that they are risking a future of housing insecurity and homelessness when they accept a landlord’s buyout offer.

## 2. Critique from Antipaternalism.

A second anticipated critique from the contemporary libertarian perspective portrays the proposal to regulate buyouts through compulsory terms as unjustified and damaging paternalism because it interferes with the decisionmaking process of tenants to prevent decisions that otherwise “would be contrary to the [tenant’s] own welfare.”<sup>151</sup> The libertarian critique of such policies derives from John Stuart Mill’s harm principle, which holds “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. He

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 53.

<sup>147</sup> *Id.* at 54.

<sup>148</sup> *Id.* at 59.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 *YALE L.J.* 763, 763 (1983); see also Willem H. van Boom & Anthony Ogus, *Introducing, Defining, and Balancing ‘Autonomy v. Paternalism’*, 3 *ERASMUS L. REV.* 1, 1 (2010) (providing several definitions of “paternalism”).

cannot be rightfully compelled to do or forbear because it will be better for him to do so, because it will make him happier, [or] because . . . to do so would be wise.”<sup>152</sup> Devotees of the Nozickian “minimal state” similarly insist, “the minimal state ‘may not use its coercive apparatus for the purpose of getting some citizens to aid others, or in order to prohibit activities to people for their *own* good or protection.’”<sup>153</sup> In other words, both Mill and Nozick categorically reject legal paternalism because “paternalism violates an individual’s right to the liberty to determine the course of his or her own life.”<sup>154</sup> Unless a tenant was unduly coerced by “force, theft, [or] fraud”<sup>155</sup> into accepting a buyout offer, she must be allowed to voluntarily accept the offer. Any state interference in the bargaining process is a per se violation of her individual liberty. If a tenant voluntarily vacates a rent-stabilized unit for \$5,000, the state must respect her autonomous decision.

Categorical antipaternalism dominates classical liberal thought,<sup>156</sup> and a “widely shared hostility to paternalism” remains the “dominant strain” in contemporary legal thought.<sup>157</sup> This aversion to paternalism in legal discourse contrasts sharply with the reality of American legal rules. Just as limitations on contractual freedom are more the norm than the exception in American private law,<sup>158</sup> paternalistic motives proliferate in American adjudication and legislation. Examples of legal doctrines grounded in paternalist norms include: “the compelled use of various safety measures while driving[,] . . . compulsory elementary education[,] . . . and the limited enforceability of some contract terms, such as forfeiture clauses and liquidated damages.”<sup>159</sup>

Like these legal doctrines, the suggested regulation of buyouts derives in part from a paternalist motive. The first defense of the proposed buyout regulations against the libertarian’s criticism is thus to dispute the categorical illegitimacy of the paternalist motive. Categorical antipaternalism ignores the legitimacy of the other-regarding foundation of paternalist motives: “the

<sup>152</sup> Gerald Dworkin, *Paternalism*, 56 THE MONIST 64, 64 (1972) (quoting JOHN STUART MILL, UTILITARIANISM AND ON LIBERTY 135 (1962)) (internal quotation marks omitted).

<sup>153</sup> JONATHAN WOLFF, ROBERT NOZICK: PROPERTY, JUSTICE, AND THE MINIMAL STATE 11 (1991) (citing ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, at ix (1974)).

<sup>154</sup> *Id.*; see also Fried, *supra* note 136, at 105 n.\* (“Sometimes it is said that poor people do not understand contractual provisions or are unable to calculate risks rationally. Such arguments are often patronizing as well as paternalistic.”).

<sup>155</sup> NOZICK, *supra* note 153, at ix.

<sup>156</sup> See Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 231 (1998).

<sup>157</sup> David L. Shapiro, *Courts, Legislatures and Paternalism*, 74 VA. L. REV. 519, 519 (1988); see also Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 THE AM. ECON. REV. 175, 175 (2003) (describing how paternalism is treated like a “derogatory” term).

<sup>158</sup> See section III.C.1, *supra*.

<sup>159</sup> EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS, AND MORALITY 317 (2010); see generally Kennedy, *Distributive and Paternalist Motives*, *supra* note 130. Other examples include “exclusion of victim consent as a defense to certain criminal offenses; . . . compulsory social security and pension arrangements; compulsory elementary education; . . . cooling-off periods in door-to-door sales; [and] certain applications of the undue influence and unconscionability doctrines.” ZAMIR & MEDINA, *supra*, at 317.

basis of paternalism is empathy or love, and its legitimate operation cannot be constricted to situations in which its object lacks 'free will.'"<sup>160</sup>

Empathy motivates legal decisionmakers to act paternalistically in numerous legal scenarios. Consumer protection laws, such as either of the compulsory contract terms proposed for landlord buyouts, pervade the legal system because minimum market standards free consumers (or tenants) from fear of exploitation. As Professor Singer has argued in rejecting principled antipaternalism, "[c]onsumer protection laws do not paternalistically take away our freedom. They give us the benefit of things we want. It would violate our freedom to prevent us from choosing to enact laws that set minimum standards for market relationships. *We want those protective laws* and it would be paternalistic for scholars to argue that we should not have them."<sup>161</sup>

Once one accepts the inadequacy of the principled antipaternalist argument, elected legislators are freed to evaluate the policy rationales for adopting the proposed paternalist interventions. There are two affirmative justifications for adopting a paternalist intervention to protect tenants in landlord-tenant buyout bargaining. First, the regulation of the buyout bargain is necessary to counteract the externalities of the unregulated bargain.<sup>162</sup> Individual autonomy is sometimes "curtailed for the benefit of the greater good" when individual decisions have potential "spillover effects for the rest of society."<sup>163</sup> For example, mandatory seatbelt laws and antismoking laws are justified not only by individual safety concerns but also by reference to the social costs incurred by such dangerous practices.<sup>164</sup> Similarly, third-party tenants currently experience negative externalities from aggressive buyout deals in the form of "neighborhood composition effects."<sup>165</sup> As rent-stabilized tenants are pushed out and the forces of gentrification continue to work changes on the neighborhood, the pressure on individual tenants who desire to stay put becomes increasingly concentrated.<sup>166</sup> Market regulation is required to address the externality of the costs "perceived" by preexisting tenants as gentrifying tenants move into the neighborhood.<sup>167</sup>

A second affirmative justification of a mandatory term in buyout transactions is that it is "not paternalistic at all" but rather protects tenants from taking actions they would actually avoid with "perfect information."<sup>168</sup> A flood of recent academic literature has revealed numerous cognitive biases

<sup>160</sup> Kennedy, *Distributive and Paternalist Motives*, *supra* note 130, at 563.

<sup>161</sup> Singer, *supra* note 134, at 84 (emphasis in original).

<sup>162</sup> See, e.g., *id.* at 82.

<sup>163</sup> Van Boom & Oigus, *supra* note 151, at 2-3.

<sup>164</sup> *Id.*

<sup>165</sup> See Stephen Malpezzi, *Housing Prices, Externalities, and Regulation in U.S. Metropolitan Areas*, 7 J. HOUSING RESEARCH 209, 211 (1996).

<sup>166</sup> See *supra* Part I.

<sup>167</sup> See Malpezzi, *supra* note 165, at 211.

<sup>168</sup> Singer, *supra* note 134, at 81.



that distort the rationality of everyday human decisionmaking.<sup>169</sup> Examples of cognitive biases include present bias (or a “particular desire for immediate consumption” or gratification)<sup>170</sup> and optimism bias (the tendency of a person’s expectations to be better than actual outcomes).<sup>171</sup> Such cognitive biases are often the source of the “false consciousness”<sup>172</sup> that motivates paternalist interventions. In light of research on cognitive biases, regulation is needed both paternalistically to protect consumers from bad decisions and to promote efficiency by correcting market failure.<sup>173</sup> Consequently, regulation of landlord buyouts through mandatory terms can also be justified by efficiency concerns arising from informational imperfections, rather than solely paternalist grounds.<sup>174</sup> First, tenants are disadvantaged by an information asymmetry regarding the true market value of their rent-stabilized lease. Experience has shown that many tenants accept deals that drastically undercompensate them while resulting in a tremendous windfall profit to the landlord.<sup>175</sup> Moreover, “present biased”<sup>176</sup> thinking causes tenants to irrationally overvalue receiving a smaller sum immediately.<sup>177</sup> Tenants thus accept buyout deals that are insufficient to sustain them in establishing a new tenancy and in exchange, they give up their access to affordable, rent-stabilized housing.

### 3. *Distributive Critique.*

Finally, either of the compulsory terms proposed in this Note will undoubtedly face criticism as an illegitimate form of redistribution. The proposed intervention is distributively motivated in that it “changes the groundrules so as to change the balance of power” between landlords and tenants.<sup>178</sup> From a classical liberal perspective, redistributive policies of this nature, aimed at altering the distributive power shares of landlords and tenants, are categorically illegitimate: landlords must not be made to bear the burden of redistribution in a “random, ad hoc way” just because they hap-

<sup>169</sup> See *id.* at 82–83; DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 109–84 (2013); Thaler & Sunstein, *supra* note 157, at 175 (noting “in some cases, individuals make inferior choices, choices that they would change if they had complete information, unlimited cognitive abilities, and no lack of willpower.”).

<sup>170</sup> See, e.g., Stephan Meier & Charles Sprenger, *Present-Biased Preferences and Credit Card Borrowing*, 2 *AM. J. APPLIED ECON.* 193, 193 (2010).

<sup>171</sup> See, e.g., Tali Sharot, *The Optimism Bias*, 21 *CURRENT BIOLOGY* 941, 941 (2011); see also Singer, *supra* note 134, at 82–83 (describing commonly observed cognitive biases).

<sup>172</sup> Kennedy, *Distributive and Paternalist Motives*, *supra* note 130, at 572.

<sup>173</sup> See, e.g., Zamir, *supra* note 156, at 279 (“[U]nregulated fulfillment of actual preferences may be inefficient due to either market failure, peoples’ bounded rationality, or both.”).

<sup>174</sup> See, e.g., Thaler & Sunstein, *supra* note 157, at 175.

<sup>175</sup> See *supra* Part I.

<sup>176</sup> See, e.g., Benhabib, Bisin & Schotter, *supra* note 119, at 206 (discussing empirical study of present bias in decisionmaking).

<sup>177</sup> See *supra* section III.A.

<sup>178</sup> Kennedy, *Distributive and Paternalist Motives*, *supra* note 130, at 571–72.

pen to do business “with persons poorer than themselves.”<sup>179</sup> From this perspective, liberal democracies “effect redistribution (to assure a social minimum) by welfare benefits on one hand and by general taxation based on an overall ability to pay on the other.”<sup>180</sup> In doing so, the government “remains neutral about the ways in which the better-off acquire their greater wealth, exacting (in principle, at least) the same contribution from everyone who enjoys the same level of wealth.”<sup>181</sup>

While it is true that the rule changes proposed by this Note effectively redistribute the windfall profits gained by landlords as a result of tenants’ asymmetric information access, the distributive motive in legal rulemaking is not categorically illegitimate. The classical liberal argument that the distributive motives are anathema to a liberal democracy obscures or ignores reality: all choices between alternative legal ground rules, which “structure bargains between competitive/cooperative groups” (for example, landlord/tenant) have a differential and asymmetric effect on the distribution of power between these groups.<sup>182</sup> Thus, even a decision to leave the status quo untouched when it comes to landlord-tenant buyout bargains would not be “apolitical,” as conventional liberal political theorists would like to assume.<sup>183</sup>

We can imagine enormous variation in the definition of the ground rules. In almost any type of situation, we can imagine modifying them so far in one direction or another that the outcome of struggles in that type of situation will also be dramatically modified. In this sense, law is at least partially responsible for the outcome of every distributive conflict between classes.<sup>184</sup>

Accepting the status quo also has “distributional consequences,” though these consequences are less visible than the proposed buyout regulations; permissions — to aggressively push buyout offers, for example — can have distributive effects equally as potent as those of legal prohibitions.<sup>185</sup> “Permissions to injure play an enormously important role in economic life, since all competition is legalized injury, as is the strike, the lockout, picketing, the

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<sup>179</sup> Cf. Fried, *supra* note 136, at 106 (ascribing to liberal political theory the premise that “[r]edistribution is not a burden to be borne in a random, ad hoc way by those who happen to cross paths with persons poorer than themselves”).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327, 327, 332–33 (1991).

<sup>183</sup> See *id.* at 331 (summarizing the “liberal model,” asserting that “[t]he distributive issue is present, but understood as a matter of legislative intervention (e.g., progressive taxation, labor legislation) to achieve distributive objectives by superimposition on an essentially apolitical private law background”).

<sup>184</sup> *Id.* at 333.

<sup>185</sup> Cf. *id.* (explaining that “distributional consequences” are invisible because unlike “ground rules of prohibition,” “ground rules of permission” are not considered ground rules at all).

consumer boycott, and the leveraged buyout.”<sup>186</sup> Therefore, the compulsory terms proposed in this Note simply ask society to make a political choice about the degree of power inequality we are willing to tolerate in the context of landlord-tenant bargaining.

#### CONCLUSION

Through an in-depth description of the landlord-tenant buyout offers, this Note provides an important qualitative supplement to our understanding of tenants’ experiences in some of New York City’s rapidly gentrifying neighborhoods. It explores how New York City’s current rent-stabilization regime incentivizes aggressive pushout tactics (including buyout offers) as rent regulation continues to gradually disappear. Without policy reform and legal intervention, tenants will continue to experience coercive pushout tactics as the stock of affordable housing in the city continues to dwindle. Litigation under New York State consumer protection law and legislative regulation of the buyout contract through mandatory terms provide two potential tools for combatting this problem, but intervention on a broader scale is needed in order to ensure that affordable housing remains available to New York City’s tenants.

Although New York City’s rent-regulation regime is idiosyncratic, the implications of this discussion extend beyond this local context. The processes of gentrification and displacement operate in urban areas across the country. In the aftermath of the foreclosure crisis, the landlord-tenant buyout dynamics of New York City are paralleled nationwide as banks offer “cash for keys” to tenants and former homeowners in foreclosed properties.<sup>187</sup> Banks offer buyouts to these residents because it is “cheaper and quicker than court-ordered eviction.”<sup>188</sup> In this way, the foreclosure crisis, like the processes of gentrification, has contributed to the involuntary displacement of low-income resident and is potentially intensifying inequality along class, race, and gender lines.<sup>189</sup> Again, any regulatory reforms aimed at addressing “cash for keys” scenarios in post-foreclosure tenancies will implicate the very same questions and counterarguments about contractual freedom, paternalism, and redistribution addressed in this Note. Without

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<sup>186</sup> *Id.*

<sup>187</sup> See, e.g., Tom Braithwaite, *U.S. Banks in ‘Cash for Keys’ Foreclosure Talks*, FINANCIAL TIMES (Mar. 25, 2011), <http://www.ft.com/cms/s/0/9dd9a394-5672-11e0-84e9-00144feab49a.html#axzz3RJOlaW1e>, archived at <https://perma.cc/VL6X-YK54?type=pdf>.

<sup>188</sup> *Id.*

<sup>189</sup> See Anne J. Martin, *After Foreclosure: The Displacement Crisis and the Social and Spatial Reproduction of Inequality* (U.C. Berkley Institute for the Study of Social Change Working Paper, 2010) 1, 29–30, available at <https://escholarship.org/uc/item/3551q7sd>, archived at <https://perma.cc/Z9K7-37DQ>.

legislative reform, access to housing continues to grow out of reach for low-income families in New York and across the country.<sup>190</sup>

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<sup>190</sup> ALTHEA ARNOLD ET AL., NAT'L LOW INCOME HOUS. COALITION, *OUT OF REACH 2014: TWENTY FIVE YEARS LATER, THE AFFORDABLE HOUSING CRISIS CONTINUES 3* (2014), available at <http://nlihc.org/sites/default/files/oor/2014OOR.pdf>, archived at <http://perma.cc/6CE3-QQDX> (overviewing the availability of low income housing in America and concluding that "each year the housing affordability problems of the lowest income people in America grow worse").