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REGULATING ROOMMATE RELATIONS: PROTECTION OR ATTACK AGAINST NEW YORK CITY'S TENANTS?

*Laurel R. Dick**

INTRODUCTION

On December 20, 2000, the New York State Division of Housing and Community Renewal (“DHCR”) promulgated an amendment to the Rent Stabilization Code (“the code”) that governs all rent stabilized housing in New York City.¹ This amendment, section 2525.7 of the code, took on a task that was novel to rent regulation in New York, the regulation of roommate relations.² It prohibits tenants from charging their roommates more than a “proportionate” share of the rent under any circumstance.³ An analysis of the statutory history demonstrates that this provision’s novelty is not creative innovation, but rather an unauthorized interference with the protected tenant-roommate

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¹ N.Y. COMP. CODES R. & REGS. tit. 9, § 2525.7 (2001) (recording effective date as Dec. 20, 2000 in “Historical Note”). *See also* Hutchins v. Conciliation and Appeals Bd., 480 N.Y.S.2d 684 (Sup. Ct. 1984) (finding that Rent Stabilization Law and Code are binding authority in regards to New York City rent stabilized units).

² § 2525.7.

³ *Id.*

relationship.⁴

While an examination of the current state of the rental market shows that protection of roommates is warranted, interference is not necessarily protection. Interference with the tenant-roommate relationship can only be justified if the regulation puts the remedy in the hands of the proper party—the roommate—and limits its effects to real, unjustified profiteering by tenants at the expense of their roommates.⁵ Section 2525.7 (“the proportionality provision”) has done neither of these things, but has instead created the potential for large-scale eviction of tenants and the simultaneous eviction of their roommates.⁶

Part I of this note describes the regulatory context in which the proportionality provision was promulgated including relevant New York statutes, codes and caselaw. Part II explains the two main flaws in the design of the provision as a roommate protection. Finally, Part III demonstrates that protection of roommates against gross overcharge is justified only if it is done in a way that actually protects the roommate and does not infringe unnecessarily on the rights of the primary tenants. Part III also includes proposals for designing a roommate protection provision that is successful to those ends—a difficult but workable task.

I. BACKGROUND

In 1983, DHCR was given authority by the New York State Legislature to administer the Rent Stabilization Law in New York City through the code.⁷ In promulgating the proportionality provision, DHCR made a significant departure from the usual approach to the tenant-roommate relationship taken by the state legislature through the Rent Stabilization Law, and by the courts

⁴ See N.Y. REAL PROP. LAW § 235-f (McKinney 2001). See *infra* note 24 (explaining how DHCR’s promulgation lacked authority).

⁵ See *infra* Part II.A-B.

⁶ See *infra* Part II.A-B.

⁷ Omnibus Housing Act, 1983 N.Y. Laws 403, § 3.

REGULATING ROOMMATE RELATIONS

541

in their decisions.⁸ Section 2525.7 of the Rent Stabilization Code states:

The rental amount that a tenant may charge a person in occupancy pursuant to section 235-f of the Real Property Law shall not exceed such occupant's proportionate share of the legal regulated rent charged to and paid by the tenant for the subject housing accommodation. For the purposes of this subdivision, an occupant's share shall be determined by dividing the legal regulated rent by the total number of tenants named on the lease and the total number of occupants residing in the subject housing accommodation. However, the total number of tenants named on the lease shall not include a tenant's spouse, and the total number of occupants shall not include a tenant's family member or an occupant's dependent child. Regardless of the number of occupants, tenants named on the lease shall remain responsible for payment to the owner of the entire legal regulated rent. The charging of a rental amount to an occupant that exceeds that occupant's proportionate share shall be deemed to constitute a violation of this Code.⁹

The New York State Legislature last expressed its stance on the tenant-roommate relationship in 1983 with the enactment of the Omnibus Housing Act, which amended several statutes governing rental housing.¹⁰ In its legislative findings it stated that in order to protect those households in which unrelated roommates live together "for reasons of economy, safety and companionship," it had become necessary to declare a tenant's right to have a roommate.¹¹ Based on this finding of necessity,

⁸ See *infra* Part I (detailing the history of New York City's treatment of the tenant-roommate relationship).

⁹ N.Y. COMP. CODES R. & REGS. tit. 9, § 2525.7(b) (2001). Section (a) reads, "Housing accommodations subject to the RSL and this Code may be occupied in accordance with the provisions and subject to the limitations of section 235-f of the Real Property Law." *Id.* § 2525.7(a).

¹⁰ Omnibus Housing Act, 1983 N.Y. Laws 403.

¹¹ *Id.* § 1 (stating "that unless corrective action is taken by the legislature, thousands of households throughout this state composed of unrelated persons

the legislature enacted section 235-f of the Real Property Law which states in part:

2. It shall be unlawful for a landlord to restrict occupancy of residential premises, by express lease terms or otherwise, to a tenant or tenants or to such tenants and immediate family. Any such restriction in a lease or rental agreement entered into or renewed before or after the effective date of this section shall be unenforceable as against public policy.

3. Any lease or rental agreement for residential premises entered into by one tenant shall be construed to permit occupancy by the tenant, immediate family of the tenant, one additional occupant, and dependent children of the occupant provided that the tenant or the tenant's spouse occupies the premises as his primary residence.¹²

This provision was intended to overrule a court of appeals decision in which the court found that a lease restricting occupancy to the tenant and her immediate family did not violate the State Human Rights Law or New York City Human Rights Law, which prohibit discrimination on the basis of marital status.¹³

who live together for reasons of economy, safety and companionship may be placed in jeopardy”).

¹² N.Y. REAL PROP. LAW § 235-f (McKinney 2001).

¹³ *Hudson View Prop. v. Weiss*, 450 N.E.2d 234, 235 (N.Y. 1983) (reasoning that the landlord had “not discriminated against the tenant in violation of [s]tate or city Human Rights Law” because the eviction was triggered “not because the tenant is unmarried, but because the lease restricts occupancy of her apartment, as are all apartments in the building, to the tenant and the tenant’s immediate family”).

See Omnibus Housing Act (Memorandum of Senator John B. Daly), 1983 N.Y. Laws 403. *See also id.* § 1 (declaring “that recent judicial decisions refusing to extend the protection of the human rights laws to unrelated persons sharing a dwelling place will exacerbate this serious problem”). These memoranda refer to *Hudson View Properties*, 450 N.E.2d 234, which cited both the New York State Human Rights Law, N.Y. EXEC. LAW § 296-5(a) (McKinney 2001), *cited in Hudson View Prop.*, 450 N.E.2d at 235, and the New York City Human Rights Law, Administrative Code of City of New York § B1-7.0-5(a), *cited in Hudson View Prop.*, 450 N.E.2d at 235.

REGULATING ROOMMATE RELATIONS

543

At the same time, the legislature enacted separate findings and prohibitions with regard to a tenant subletting to another person during her absence from the premises.¹⁴ Finding that “speculative and profiteering practices on the part of certain holders of apartment leases [were] leaving many subtenants without protection and removing many housing accommodations from the normal open market,”¹⁵ the legislature included in the Omnibus Housing Act an amendment to the Rent Stabilization Law regulating subletting.¹⁶ This amendment limited the amount of time a tenant could sublet a regulated apartment in New York City to a period of two years and the rent at which a tenant could sublet to the amount charged by the landlord plus 10% for furnishings.¹⁷ Examining these two provisions clearly shows that the legislature treated the acts of taking in roommates and subletting differently.

Since the changes were enacted, the courts have reinforced the distinctions laid out in the law between subletting and taking in roommates. In *520 East 81st St. Associates v. Roughton-Hester*, the appellate division held that, in contrast to overcharging a sublettor, overcharging a roommate was not a proper cause for eviction and dismissed a petition for eviction on those grounds.¹⁸ The court pointed to the legislature’s clear intent

¹⁴ Omnibus Housing Act, 1983 N.Y. Laws 403.

¹⁵ *Id.* § 1.

¹⁶ N.Y. UNCONSOL. LAW § 26-511(c)(12) (McKinney 2001).

¹⁷ *Id.* The amendment states that the regulation:

[P]ermits subletting of units subject to this law pursuant to section two hundred twenty-six-b of the real property law provided that (a) the rental charged to the subtenant does not exceed the stabilized rent plus a ten percent surcharge payable to the tenant if the unit sublet was furnished with the tenant’s furniture; (b) the tenant can establish that at all times he or she has maintained the unit as his or her primary residence and intends to occupy it as such at the expiration of the sublease . . . (f) the tenant may not sublet the unit for more than a total of two years, including the term of the proposed sublease, out of the four-year period preceding the termination date of the proposed sublease.

Id.

¹⁸ *520 East 81st St. Assocs. v. Roughton-Hester*, 555 N.Y.S.2d 70, 73

to differentiate a sublease from a tenant-roommate arrangement when regulating tenants' actions.¹⁹ It also reasoned that, "many 'roommates' are not strangers but individuals who choose to live together, apportioning costs according to their respective financial abilities, and other considerations."²⁰ The court in *Roughton-Hester* also based its decision on the fact that there was no law explicitly governing the rent a tenant charges her roommate.²¹

The reasoning behind *Roughton-Hester* holds strong today. While DHCR has promulgated the proportionality provision since *Roughton-Hester* was decided in 1990, it is only a regulatory provision.²² In fact, there is still no legislatively enacted law governing rent between tenants and roommates in New York City.²³ As a result, tenants and tenant organizations have argued convincingly that DHCR had no legislative grounding when it passed the proportionality provision and that it overstepped its authority.²⁴

(App. Div. 1st Dep't 1990) (holding that "neither the lease nor any law governing rent stabilized apartments permit a landlord to evict a tenant for earning a profit from the rent charged a roommate"); *see also* *Handwerker v. Ensley*, 690 N.Y.S.2d 54 (App. Div. 1st Dep't 1999) (denying injunction against a nonpayment proceeding when the roommate had requested the injunction on the theory that he was being overcharged).

¹⁹ *Roughton-Hester*, 555 N.Y.S.2d at 72 (stating that "[t]he Legislature enacted separate provisions pertaining to subtenants and roommates and specifically indicated its intention to eliminate profiteering in subleases while remaining silent as to such practices committed by a tenant vis-a-vis a roommate").

²⁰ *Id.* at 73.

²¹ *Id.* at 72.

²² *RAM 1 LLC v. Mazzola*, N.Y.L.J., June 8, 2001, at 21:1 (Civ. Ct.), *aff'd & remanded*, No. 01-294, 2001 WL 1682829 (Sup. App. Term. 1st Dep't Dec. 28, 2001). The court in *RAM 1 LLC v. Mazzola* cites the existence of a new proportionality provision as its reason for distinguishing *Roughton-Hester*. *Id.*

²³ *See supra* notes 10-17 and accompanying text (recounting the history of lawmaking around roommates and subletters).

²⁴ *See, e.g.*, Petitioners-Plaintiffs' Memorandum of Law in Support of Petition at 19-21, *Brooklyn Hous. & Family Serv. v. N.Y. State Div. of Hous. and Cmty. Renewal*, No. 14191/01 (N.Y. Sup. Ct. Kings County

REGULATING ROOMMATE RELATIONS

545

The “Findings and Declaration of Emergency” introducing New York City’s Rent Stabilization Law states that one of this law’s purposes is “to forestall profiteering, speculation, and other disruptive practices tending to produce threats to the public health.”²⁵ When enacting the limitations on subletting covered under the Omnibus Housing Act of 1983, the legislature reaffirmed its goal of protecting all tenants against profiteering by expressing this intent in its legislative findings,²⁶ and by providing subtenants with the remedy of treble damages against an overcharging tenant.²⁷ Moreover, when a tenant overcharges her subtenants and the landlord has constructive knowledge that the tenant holds only an “illusory tenancy”²⁸ because she has

2001). One consortium of tenants and tenant advocates challenging this and other provisions promulgated by DHCR argue that DHCR was given a limited grant of authority by the legislature, citing Rent Stabilization Law section 26-511(c) as stating, “A code shall not be adopted hereunder unless it appears to the division of housing and community renewal that such code (1) provides safeguards against unreasonably high rent increases and, in general, protects tenants and the public interest.” N.Y. UNCONSOL. LAW § 26-511(c) (McKinney 2001). Citing such cases as *Matter of Jones v. Berman*, 332 N.E.2d 303 (N.Y. 1976), and *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 443 N.E.2d 940 (N.Y. 1982), they assert that the New York Court of Appeals holds that promulgations beyond the authority of an agency are invalid. Petitioners-Plaintiffs’ Memorandum of Law in Support of Petition at 19-21. *See also* Appellant’s Opening Brief at 9-11, *RAM 1 LLC v. Mazzola*, No. 01-294, 2001 WL 1682829 (Sup. App. Term. 1st Dep’t Dec. 28, 2001) (No. 72479/01). These arguments are supported by the well-established *ultra vires* doctrine, summarized as follows:

[T]he basic doctrine of administrative law . . . is the doctrine of *ultra vires*. The jurisdictional principle is the root principle of administrative power. The statute is the source of agency authority as well as of its limits. If an agency act is within the statutory limits (or *vires*), its action is valid; if it is outside them (or *ultra vires*), it is invalid. No statute is needed to establish this; it is inherent in the constitutional positions of agencies and courts.

BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 171 (3d ed. 1991).

²⁵ N.Y. UNCONSOL. LAW § 26-501 (McKinney 2001).

²⁶ *See supra* text accompanying note 15 (quoting the legislative findings).

²⁷ § 26-511(c)(12).

²⁸ *Primrose v. Donahoe*, 676 N.Y.S.2d 585, 587 (App. Div. 1st Dep’t

been absent from the premises for more than two years, the courts have crafted their decisions to protect the subtenant.²⁹ They have found that the subtenant has the right to the tenancy.³⁰ The proportionality provision, on the other hand, contains no such remedy that evinces the purpose of protecting roommates against profiteering.³¹ The language of the provision is entirely silent as to the remedy for a roommate overcharge.³²

Even without looking at the underlying Rent Stabilization Law, the code itself does not allow for eviction under its new proportionality provision. The code states that, “[a]s long as the tenant continues to pay the rent to which the owner is entitled, no tenant shall be denied a renewal lease or removed from any housing accommodation . . . except on one or more grounds specified in this Code.”³³ Unless prior approval of DHCR has been obtained, an action to recover possession of a rent-stabilized unit based on wrongful acts of the tenant may only be commenced based on one of the grounds listed in section 2524.3 of the code.³⁴ Roommate overcharge is not listed as one of the

1998) (defining an “illusory tenancy” as one where “the rent laws have been violated in a way that has permitted the prime tenant to ‘rent . . . [the apartment] for the purpose of subleasing for profit or otherwise depriving the subtenant of rights under the Rent Stabilization Law’” (quoting *Avon Furniture Leasing v. Popolizio*, 500 N.Y.S.2d 1019, 1022 (App. Div. 1st Dep’t 1986))).

²⁹ *Id.* (defeating a holdover proceeding against the sublettors and re-assigning the tenancy to them after the primary illusory tenants had moved out).

³⁰ *Id.* See also *Skeeter v. Clark*, N.Y.L.J., Mar. 23, 2001, at 20:3 (Civ. Ct.) (defeating a holdover proceeding against the sublettor and re-assigning the tenancy to her despite lacking the landlord’s permission to succeed to the tenancy).

³¹ See *supra* note 9 and accompanying text (quoting the language of the proportionality provision).

³² See *supra* note 9 and accompanying text (quoting the language of the proportionality provision).

³³ N.Y. COMP. CODES R. & REGS. tit. 9, § 2524.1(a) (2001), cited in Memorandum in Support of Motion for Summary Judgment at 1-2, *Kips Bay LLC v. Feinberg*, No. 96915/01 (Civ. Ct. N.Y. County 2001).

³⁴ N.Y. COMP. CODES R. & REGS. tit. 9, § 2524.3 (2001). These grounds include failure to cure a substantial violation of the lease, creation of a

REGULATING ROOMMATE RELATIONS

547

grounds for eviction.³⁵ In fact, DHCR's own general counsel stated that the provision was never meant to provide a new cause for eviction.³⁶ Thus, the code mandates that the proportionality provision cannot serve as grounds for eviction.

Nevertheless, the fact that the language of the provision does not specify a remedy has led to confusion. The first and only case decided under this new provision, *RAM I LLC v. Mazzola*, read the remedy of eviction of the entire household into the proportionality provision.³⁷ This case concerned an eviction action brought by a landlord against a tenant who charged her roommate almost \$300 per month above the rent for the entire apartment for the rental of one bedroom.³⁸ In this decision, Judge Schachner denied a motion to dismiss for failure to state a cause of action reasoning that the proportionality provision provides a cause for eviction when a tenant charges her roommate more than her proportionate share of the rent.³⁹ The court distinguished

nuisance in the building, substantial damage to the building, harassment of the landlord or other tenants, use of the unit for illegal activities, refusal to allow the landlord necessary access, refusal to renew an expired lease, and violation of the limits on subletting. *Id.*

³⁵ *Id.* It should be noted that a tenant earning money from her apartment is not in substantial breach of her lease. In order for business use to be a substantial breach of a residential lease, and therefore grounds for eviction under § 2524.3, the use "must materially affect the character of the building, materially damage or burden the property or materially disturb the other tenants." *Haberman v. Gotbaum*, 698 N.Y.S.2d 406, 410 (Civ. Ct. 1999). Activities that have been allowed under this standard include a private art studio, *Haberman*, 698 N.Y.S.2d 406, a private office, *Nissen v. Wang*, 431 N.Y.S.2d 984 (Civ. Ct. 1980), and a family childcare facility, *Sorkin v. Cross*, N.Y.L.J., Apr. 24, 1996, at 27:3 (Civ. Ct.).

³⁶ *Live at Five* (WNBC-TV broadcast June 5, 2001). *See also* Affidavit of Marcia Hirsch, DHCR General Counsel, In Support of Response at ¶ 282, *Brooklyn Hous. & Family Services v. N.Y. State Div. of Hous. and Cmty. Renewal*, No. 14191/01 (N.Y. Sup. Ct. Kings County 2001) (stating that "DHCR's interpretation of § 2525.7 is that it vests roommates with the right to file a complaint against the tenant rather than create a new cause of action for eviction") [hereinafter Hirsch Affidavit].

³⁷ *Mazzola*, No. 01-294, 2001 WL 1682829, at *1.

³⁸ *Id.*

³⁹ *Mazzola*, N.Y.L.J., June 8, 2001, at 21:1, *aff'd & remanded*, No. 01-

Roughton-Hester on the grounds that the proportionality provision was not in existence at the time of that decision.⁴⁰ The petition upheld by the court read, in part, that “[t]he serious nature of this violation, charging a roommate a monthly sum in excess of the entire monthly rent for the whole apartment, constitutes illegal profiteering and as such, does not lend itself to, nor is it susceptible of cure.”⁴¹ While the succinctness of the housing court’s decision obscures its reasoning to some extent, the court appears to have accepted this landlord’s characterization of Ms. Mazzola’s actions as “profiteering” to not only find a cause for eviction that is not explicitly provided in the provision, but also to find that cause for eviction incurable.⁴²

II. THE PROPORTIONALITY PROVISION’S FAILURES

The main flaws in the proportionality provision as it now stands, and as it has been applied, are twofold. First, it places the remedy in the wrong hands.⁴³ Rather than giving the roommate a

294, 2001 WL 1682829 (holding that “[g]iven the language of Section 2525.7(b) of the Rent Stabilization Code, . . . respondent’s motion to dismiss the petition is denied”).

⁴⁰ *Id.* (stating erroneously, “Roughton-Hester even mentions that at the time there was no law governing rent stabilized tenants which dealt with the issue of a tenant who earns a profit from a roommate. With the recent amendment this is no longer true”).

⁴¹ Appellant’s Opening Brief at 8, *RAM 1 LLC v. Mazzola*, No. 01-294, 2001 WL 1682829 (Sup. App. Term. 1st Dep’t Dec. 28, 2001) (No. 72479/01) (quoting Petitioner’s opening brief).

⁴² *Mazzola*, N.Y.L.J., June 8, 2001, at 21:1, *aff’d & remanded*, No. 01-294, 2001 WL 1682829, at *1. See also Jay Romano, *Your Home: Roommate Overcharges Risk Lease*, N.Y. TIMES, Jan. 27, 2002, § 11, at 5.

DHCR has responded to this decision by taking a step back, see quotation by Marcia Hirsch, *supra* note 36, but qualified its denunciation of the decision so that its stance is somewhat unclear: “[h]owever, it should be noted that *Ram I LLC* presents the kind of egregious situation where the roommate paid not only more than her proportionate share but more than the tenant was paying.” Hirsch Affidavit, *supra* note 36, at ¶ 282.

⁴³ See, e.g., N.Y. COMP. CODES R. & REGS. tit. 9, §§ 2522.1, 2526.1 (2001) (giving overcharged tenants a right to reimbursement with interest from their landlords); N.Y. UNCONSOL. LAW § 26-511(c)(12) (McKinney 2001)

REGULATING ROOMMATE RELATIONS

549

claim for reimbursement against the primary tenant, it gives the landlord a cause for eviction of the entire unit, including the roommate.⁴⁴ Second, it provides no exemptions for justified disproportionalities.⁴⁵ Given the current housing market, low-income tenants are justified in charging their roommates greater than proportionate rents when needed in order to sustain their tenancies.⁴⁶ An examination of four major schools of thought on the justifications behind rent regulation enlightens this analysis: the redistribution of wealth, the preservation of stable communities, the protection of the “personhood” interest that a tenant holds in her home, and the maintenance of a fair market free from speculation and profiteering.⁴⁷ An application of these theories to the problem of roommate relations reaffirms the ways in which the proportionality provision is flawed in its design and recent interpretation.

A. The Remedy Must Not Lie with the Landlord

By construing the proportionality provision as providing a just cause for eviction, the *Mazzola* court gave the remedy for an overcharge to the wrong party.⁴⁸ Under *Mazzola*, landlords stand to profit from the discovery of a roommate overcharge, while

(giving overcharged subtenants a right to treble damages from their primary tenants).

⁴⁴ *Mazzola*, No. 01-294, 2001 WL 1682829. *But see supra* note 36 (quoting DHCR as denying intent to be used as a cause for eviction).

⁴⁵ *See infra* Part II.B.

⁴⁶ *See infra* Part II.B.1 (describing the current economic straits of New York City tenants in relation to rent levels).

⁴⁷ *See* Margaret Jane Radin, *Residential Rent Control*, in PERSPECTIVES ON PROPERTY LAW 410 (Robert C. Ellison et al. eds., 2d ed. 1995) (summarizing and comparing the first three justifications); Timothy L. Collins, “Fair Rents” or “Forced Subsidies” Under Rent Regulation: Finding a Regulatory Taking Where Legal Fictions Collide, 59 ALB. L. REV. 1293 (1996) (summarizing the fair market objective). *See infra* Part II.A (discussing the relevance of the redistribution of wealth and community preservation theories to the proportionality provision); Part II.B (discussing the relevance of the fair market objective and personhood interest theories).

⁴⁸ *Mazzola*, No. 01-294, 2001 WL 1682829.

roommates are given no remedy and ultimately face eviction themselves upon the discovery of their “disproportionate” rent burden.⁴⁹ Because this provision only benefits landlords at the expense of tenants and their roommates, the proportionality provision cannot find its justification in statutory enactments intended to protect tenants from profiteering.⁵⁰

The sentiment voiced by the court in *Mazzola*, that a tenant who overcharges a roommate wrongly profiteers off of her landlord’s assets, is one that is echoed by the media.⁵¹ The *Mazzola* court’s recognition of a cause for eviction in roommate overcharging received significant media attention—presented to the public both as the justifiable curtailment of a tenant’s “profit center”⁵² and, in contrast, as the opportunism of a landlord at the expense of a disabled old lady.⁵³ One article reported that the tenant, Ms. Mazzola, owned a second house in Westport Connecticut worth \$490,000 to \$640,000 that was yielding \$33,000 per year in rental income.⁵⁴ At the same time, the article stated, the landlord was deprived of the \$10,000 monthly market

⁴⁹ *Id.* The bias in this placement of the remedy is particularly transparent given that the penalty that a landlord faces for overcharging a tenant is mere reimbursement of the tenant with interest. N.Y. COMP. CODES R. & REGS. tit. 9, § 2526.1 (2001).

⁵⁰ *See supra* note 25 and accompanying text (quoting the purposes of the Rent Stabilization Law). Clearly, § 235-f of the Real Property Law also fails to provide the justification needed by DHCR to restrict a tenant’s right to take in roommates upon penalty of immediate eviction. The court of appeals has emphatically affirmed that “it is undeniable that this section was passed to protect tenants and occupants, not landlords.” *Capital Holding Co. v. Stravrolakes*, 662 N.Y.S.2d 14, 15-16 (App. Div. 1st Dep’t 1997), *aff’d*, 707 N.E.2d 432 (N.Y. 1998) (holding that § 235-f does not create a cause for eviction in the taking in of more than one unrelated roommate), *cited in* Petitioners-Plaintiffs’ Memorandum of Law, *supra* note 24, at 56.

⁵¹ *See, e.g.*, John Tierney, *A Room and a View (Libertarian)*, N.Y. TIMES, June 12, 2001, at B1 (asking, “Does Joan E. Mazzola deserve to join the list of New York’s 10 Worst Tenants?”).

⁵² *Id.*

⁵³ Bruce Lambert, *Rule Limits Overcharging of Roommates*, N.Y. TIMES, June 5, 2001, at B1.

⁵⁴ Tierney, *supra* note 51, at B1.

REGULATING ROOMMATE RELATIONS 551

rent potential of this Park Avenue apartment because Ms. Mazzola was paying the stabilized rent of \$1,847.77 per month.⁵⁵ This argument, that tenants who are not properly using their tenancies wrongly deprive landlords of the market rent for those years of tenancy, can be seen in other contexts as well.⁵⁶ In *Mazzola*, this sentiment motivated the form that the remedy took—eviction.⁵⁷ However, placing the remedy for roommate overcharge in the hands of the landlord is neither justified, because it is the roommate whom the provision seeks to protect, nor wise, given the repercussions.⁵⁸

⁵⁵ *Id.* But see *infra* notes 90-92 and accompanying text (presenting mitigating facts and conflicting stories as to Ms. Mazzola's resources and roommate arrangement).

⁵⁶ See, e.g., John Chipman, *Bogus NYC Tenant Sued for \$5M: Lived 30 Years in Flat Leased to Friend at Bargain Rate*, NAT'L POST, Aug. 24, 2001, at A11. The story tells of a landlord who recently sued a tenant who had been living under the leaseholder's name for more than thirty-five years. His claim for \$5 million, the difference between the tenant's rent and lucrative market rents in the neighborhood, has not yet been decided. *Id.* Despite the fact that the occupant had not been trying to hide his identity, paying rent directly to the landlord, the judge saw the tenant as exploitive: "[he] has received a largesse for an extremely long time by paying an artificially low rent in a highly desirable neighborhood." *Id.*

⁵⁷ *Mazzola*, No. 01-294, 2001 WL 1682829, at *1.

⁵⁸ A quick analysis of the government takings doctrine demonstrates that the placement of the remedy in the hands of the roommate rather than the landlord constitutes neither a physical taking nor a regulatory taking in the context of the New York City housing market. U.S. CONST. amend. V, amend. XIV.

In *Yee v. City of Escondido*, the Supreme Court found that a per se physical taking was not made when city regulations over mobile home parks placed limits on rents, required good cause for eviction, and allowed renters of mobile home sites (or "pods") to sell their homes and transfer their tenancies to another person. *Yee v. City of Escondido*, 503 U.S. 519, 524-25 (1992). The Court found that the determining fact was that the mobile home park owners had "voluntarily rented their land to mobile home owners." *Id.* at 527. Likewise, New York City rent stabilized landlords enter the business voluntarily and, like in *Yee*, have a regulatory means of leaving the business. *Id.* at 527-28; N.Y. COMP. CODES R. & REGS. tit. 9, § 2524.5(a)(1) (2001). The fact that the ordinance in *Yee* allowed a transfer of wealth from park owners to their mobile home tenants, through the sales premium which mobile

home owners stood to receive by selling their right to a regulated tenancy, did not make for a physical taking. *Yee*, 503 U.S. at 529-30. This is suggestive of the argument that to allow tenants to overcharge their roommates constitutes a per se taking by transferring profits. That argument is clearly defeated by *Yee*. The *Yee* Court, however, did not decide whether such regulation constituted a regulatory taking. *Id.* at 538.

Regulation of private property constitutes a violation of the Fifth Amendment takings clause through the Fourteenth Amendment as a regulatory taking "if it denies an owner economically viable use of the property (a per se regulatory taking), or if it does not substantially advance legitimate State interests." *Rent Stabilization Assoc. of New York City v. Higgins*, 630 N.E.2d 626, 83 N.Y.2d 156, 173 (1993). Landlords' profits are in no way extinguished by rent stabilization in New York City. According to a Rent Guidelines Board report, the New York City agency that annually sets maximum stabilized rent increases, the average rent-stabilized landlord made a net income (excluding income tax and debt service) of \$177,000 per building in 1999. RENT GUIDELINES BOARD, 2001 INCOME AND EXPENSE STUDY 8, available at <http://www.housingnyc.com> (Apr. 10, 2001).

The courts have found that a regulation advances a legitimate state interest, except in situations where they cannot find a close causal nexus between the property being regulated and the stated purposes of the regulation. *See, e.g., Seawall Assocs. v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989) (finding that a city ordinance requiring residential hotel owners to renovate and rent out their units at regulated rates rather than to demolish or convert them was not closely related to the purpose of alleviating homelessness, because the rooms would not be limited to formerly homeless or potentially homeless individuals), *cited in Collins, supra* note 47, at 1297. As explained below, one of the principal purposes of the New York City rent regulation system is to protect tenants against an unfair housing market of scarcity and unnaturally high rents. As Justice Antonin Scalia pointed out in *Pennell v. City of San Jose*, "When commodities have been priced at a level that produces exorbitant returns, the owners of those commodities can be viewed as responsible for the economic hardship that occurs." *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (concurring in part, dissenting in part) (arguing, however, that the rent ordinance clause at issue was an unconstitutional taking because any exorbitant returns would be curtailed by other parts of the ordinance), *cited in Collins, supra* note 47, at 1304. Thus, the fair market objective constitutes the necessary causal nexus between the protection of tenants and the regulation of landlords. *Id.*, *cited in Collins, supra* note 47, at 1304. This same reasoning supports giving the remedy for a roommate overcharge to the roommate rather than the landlord. As argued in greater detail below, because current rent levels are governed more by scarcity and market forces than by regulation, allowing tenants to charge their

REGULATING ROOMMATE RELATIONS

553

Because of the multitude of shared living situations among rent stabilized tenants, landlords may have great latitude in choosing who to evict under the proportionality provision, and can do so based on what they stand to gain from the eviction.⁵⁹ In fact, landlords stand to gain a considerable sum due to the recently enacted vacancy allowance of 20%.⁶⁰ They can bring an eviction under the proportionality provision even when a roommate is satisfied with her rental arrangement.⁶¹

Many disproportionate roommate arrangements are voluntary and negotiated in the context of a personal relationship.⁶² For this reason, unmarried couples, particularly gay and lesbian couples, will be disparately impacted by the proportionality provision.⁶³ Like married couples, many unmarried couples divide rent and

roommates “disproportionate” rents in some circumstances must be allowed in order to protect tenants from those market forces. *See infra* Part II.B.1.

⁵⁹ *See* Lambert, *supra* note 53, at B1. As many as 15.8% of rent stabilized tenants have roommates. One source cites 8.3% of rent stabilized tenants according to the 2000 Census, equaling approximately 83,000. Affidavit of John Seley in Support of Petition, Brooklyn Hous. & Family Services v. N.Y. State Div. of Hous. and Cmty. Renewal, No. 14191/01 (N.Y. Sup. Ct. Kings County 2001). Another source cites 158,238 rent-stabilized tenants in 1999, Lambert, *supra* note 53, at B1, which would seem to equal approximately 15.8% of the group.

⁶⁰ N.Y. UNCONSOL. LAW § 26-511(c)(5-a) (McKinney 2001). For two-year leases after a vacancy, a landlord can increase the monthly rent by 20%. The formula is a little more complicated for one-year leases that follow a vacancy. *Id.* The fact that a 20% increase above a low-rent unit may not be considerable is made up for by two additional allowances. First, a landlord who had a long-term tenant and was unable to collect a vacancy allowance within the last eight years is allowed upon termination of that tenancy to collect a 0.6% increase for each year since the last vacancy allowance. *Id.* Second, upon the vacancy of a unit that was renting for \$300 to \$500 per month, the landlord can increase the rent by \$100. *Id.*

⁶¹ *See supra* note 9 and accompanying text (quoting statutory language).

⁶² *See supra* note 20 and accompanying text (quoting the *Roughton-Hester* court’s finding on the personal nature of roommate arrangements).

⁶³ *See* Memorandum of Law of Amicus Curiae LAMBDA Legal Defense and Education Fund, Inc. in Support of Petitioners-Plaintiffs, Brooklyn Hous. & Family Services v. N.Y. State Div. of Hous. and Cmty. Renewal, No. 14191/01 (N.Y. Sup. Ct. Kings County 2001) [hereinafter LAMBDA Memo].

other living expenses according to who is best able to pay them, or for other personal reasons.⁶⁴ Unlike married couples, however, unmarried couples who live in apartments where only one partner's name is on the lease, and where the unnamed partner pays the greater portion of the rent, will have the burden of proving that they are family if they are to defend against an eviction action alleging a violation of the proportionality provision.⁶⁵ That burden is likely to be a significant one, requiring the help of a lawyer and disclosure of intimate details of the couple's relationship.⁶⁶

Giving landlords the benefit of a roommate overcharge action

⁶⁴ *Id.* at 5-6.

⁶⁵ See N.Y. REAL PROP. LAW § 235-f(1)(b) (McKinney 2001) (defining an "occupant," as referred to in the proportionality provision, as "a person, other than a tenant or a member of a tenant's immediate family, occupying a premises with the consent of the tenant or tenants"), cited in LAMBDA Memo, *supra* note 63, at 5.

⁶⁶ LAMBDA Memo, *supra* note 63, at 6-11. The legislature has constructed a definition of family in relation to succession rights that was meant to incorporate same-sex couples. Rent Regulation Reform Act, 1997 N.Y. Laws 116, § 21; N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.6(o)(2) (2001). The new definition of family calls for an examination of "emotional and financial commitment" evidenced by such factors as longevity of the relationship, sharing of expenses, intermingling of finances, jointly attending family functions and celebrations, formalizing legal obligations, holding themselves out to the public as family members, regularly performing family functions, and other evidence evincing "the intention of creating a long-term, emotionally-committed relationship." *Id.* That definition has also been found to apply to other contexts. LAMBDA Memo, *supra* note 63, at 6. However, the burden of demonstrating that a relationship qualifies under this definition can be overwhelming and intrusive. See, e.g., *Classic Properties, L.P. v. Martinez*, 646 N.Y.S.2d 755, 755-56 (App. Term 1st Dep't 1996), cited in LAMBDA Memo, *supra* note 63, at 11 (offering photographs, intimate correspondence, and affidavits as proof of a twenty-four year relationship); *Strassman v. Estate of Eggena*, 582 N.Y.S.2d 899 (App. Term 1st Dep't 1992), cited in LAMBDA Memo, *supra* note 63, at 11 (involving two-and-a-half years of litigation). Statutory family status may be even harder to prove in the context of the proportionality provision than in the context of succession rights, because those couples defending against this sort of eviction are less likely to be long-term couples with intermingling finances. LAMBDA Memo, *supra* note 63, at 13.

REGULATING ROOMMATE RELATIONS

555

also gives them reason to harass their tenants and a tool by which to do so.⁶⁷ This harassment may cause a tenant tremendous stress, and may cause her to move even without the process of an eviction proceeding.⁶⁸ Disproportionate rents are not always easy to prove without the cooperation of the roommate.⁶⁹ Because tenants can conceal rent-sharing arrangements by paying with one check, a landlord may have to use creative means of finding out a roommate's rent when attempting an eviction.⁷⁰ Many of these means may border on harassment. The *New York Apartment Law Insider*, for example, advises landlords to hire a private investigator and to collude with the roommate.⁷¹ One landlord attempted to investigate by sending a letter that failed to allege any evidence of disproportionate rent charges, but still demanded that the tenant "account to this office for any and all sums collected by you from roommates."⁷² It is unclear whether the *Mazzola* court's interpretation of the proportionality provision gives landlords the right to demand information on roommate arrangements.⁷³

Even without these practical infirmities, the theoretical approaches to rent regulation would reject the placement of the remedy in the hands of landlords. Proponents of the

⁶⁷ See G. Samuel Zucker, Note, *Insurance for Eviction Without Cause: A Middle Path for Tenant Tenure Rights and a New Remedy*, 28 URB. LAW. 113, 129 (1996).

⁶⁸ *Id.*

⁶⁹ See *Court OKs Eviction of Tenant Who Overcharges Roommate*, N.Y. APARTMENT L. INSIDER, Aug. 2001, at 11 [hereinafter *Court OKs Eviction*] (stating that "[i]t's not always easy to find out whether a tenant is overcharging a roommate").

⁷⁰ N.Y. COMP. CODES R. & REGS. tit. 9, § 2525.7(b) (2001) (stating that "[r]egardless of the number of occupants, tenants named on the lease shall remain responsible for payment to the owner of the entire legal regulated rent").

⁷¹ *Court OKs Eviction*, *supra* note 69, at 11.

⁷² Exhibit A, Affidavit of Sara Jane Swanson in Support of Petition, *Brooklyn Hous. & Family Services v. N.Y. State Div. of Hous. and Cmty. Renewal*, No. 14191/01 (N.Y. Sup. Ct. Kings County 2001).

⁷³ See *infra* note 171 (discussing the repercussions of such an interpretation).

redistribution of wealth theory defend a tenant's use of a landlord's assets to her own gain.⁷⁴ If a housing market is subject to high demand and low supply, landlords will make high economic rents (rents above a rate of return that is considered reasonable on an average investment).⁷⁵ Under such circumstances, rent control and stabilization will cause a transfer of wealth from the landlord to the tenants without an accompanying decrease in supply that comes from lowering rents to below a reasonable rate of return.⁷⁶ The current New York City housing market provides high economic rents and, even under rent stabilization, provides substantial profits.⁷⁷ According to this approach, because wealth should be more equally apportioned and because most tenants are poorer than their landlords, rent regulation is a justified means to that end.⁷⁸

⁷⁴ Radin, *supra* note 47, at 412 (attributing this standpoint to “‘pure’ welfare economists”).

⁷⁵ *Id.*

⁷⁶ *Id.* (positing that there is no “allocative inefficiency” when “landlords have high economic rents, so that rent control causes a ‘mere’ wealth transfer from landlords to tenants”).

⁷⁷ INCOME AND EXPENSE STUDY, *supra* note 58, at 8. According to a report by the Rent Guidelines Board, the New York City agency that annually sets maximum stabilized rent increases, the average rent stabilized landlord made a net income (excluding income tax and debt service) of \$177,000 per building in 1999. *Id.* “As operating costs have consumed less revenue in recent years, inflation-adjusted [net operating income] in 1999 was nearly 18% more than the average found in 1989.” *Id.* See also OFFICE OF THE PUBLIC ADVOCATE, RENT DESTABILIZATION STUDY II: AN ANALYSIS OF THE FAIRNESS TO LANDLORDS OF RENT INCREASES GRANTED BY THE RENT GUIDELINES BOARD FOR STABILIZED APARTMENTS 4, available at <http://www.housingnyc.com> (May 18, 1997) [hereinafter RENT DESTABILIZATION STUDY].

⁷⁸ For those people who do not believe that the landlord's “search for profits is no different from that of other providers of goods and services,” as Irving Welferd believes, redistribution of wealth through the housing market seems particularly appropriate. See Irving Welferd, *Poor Tenants, Poor Landlords, Poor Policy*, in PERSPECTIVES ON PROPERTY LAW 374, 374 (Robert C. Ellison et al. eds., 2d ed. 1995). Disbelief in such a sentiment may be fueled, for example, by the recognition that rents are mostly returns on an investment rather than earnings from work. See ROBERT L. HEILBRONER, THE WORLDLY PHILOSOPHERS 96, 188 (6th ed. 1992) (attributing this critique to

REGULATING ROOMMATE RELATIONS

557

Likewise, because the tenant is often the party in need of greater wealth, the rent regulation scheme cannot justly be used to prevent a tenant from “profiteering” off of the landlord’s assets by renting out part of her apartment at a profit.⁷⁹ Thus, regulation of the tenant-roommate relationship must not focus on the landlord’s welfare.

There are flaws with the wealth redistribution justification.⁸⁰ Because New York City’s rent stabilization is available to all but the wealthiest tenants, this redistribution is not directed at those who need it most.⁸¹ Redistribution of wealth has not been the primary impetus behind New York City’s rent regulation scheme.⁸² A more sensible scheme, under this reasoning, would give the lowest-income tenants the greatest benefits.⁸³ Moreover, arguably not all landlords are wealthy. Some struggle to get by and are nevertheless subject to the same rent regulation scheme as those landlords who are making significant profits.⁸⁴

the economic philosophers David Ricardo and Henry George); INCOME AND EXPENSE STUDY, *supra* note 58, at 2, 6 (reporting that out of the average unit rent of \$706, arguably only \$220 goes to some sort of landlord “work”—i.e., labor, maintenance, and administration costs combined). It may also reflect a sense of injustice that tenants feel when paying rents that, because of tax favoritism for homeowners, are close to what those tenants would be paying in mortgage payments were they able to place a down payment on a house. Zucker, *supra* note 67, at 133.

⁷⁹ See Radin, *supra* note 47, at 412 (explaining that proponents of wealth redistribution are strictly concerned with the wealth transfer from landlords to tenants).

⁸⁰ See generally Collins, *supra* note 47 (arguing that viewing rent regulation as a subsidy could make it vulnerable to challenge under the takings doctrine).

⁸¹ Zucker, *supra* note 67, at 124.

⁸² See *infra* notes 119-26 and accompanying text (documenting evidence of the fair rent objective throughout New York City’s rent regulation history).

⁸³ See Zucker, *supra* note 67, at 124.

⁸⁴ See, e.g., Welferd, *supra* note 78 (arguing that most landlords are small-scale operators earning small incomes off of low-income tenants). The New York City Rent Stabilization Code, however, allows for rent increases by reason of a landlord’s economic hardship in certain circumstances, such as when the landlord’s annual gross rents do not exceed her annual operating costs by at least 5%. N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.4(c)

However, another approach, the community preservation theory, also confirms the error made by the *Mazzola* court in assigning the remedy to the landlord.⁸⁵ The community preservation theory is based on the understanding that communities have value beyond the mere conveniences that they provide; communities play a strong part in shaping the identities of their members.⁸⁶ Thus, communities are valuable to society and should be preserved.⁸⁷ Using the community preservation theory to inform a solution to roommate overcharge supports the protection of both tenants and roommates. For example, a large group of those tenants who charge their roommates more than a “proportionate” share of the rent are likely to be senior citizens who have often lived in their units and in their communities for many years.⁸⁸ On the other hand, roommates may also be long-term residents; even new roommates may more likely be community members than new tenants because shared housing opportunities are generally advertised locally and informally, if at all.⁸⁹ Thus, both parties need protection if the community is to be

(2001). *See also* N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.4(b)(1) (2001).

⁸⁵ Radin, *supra* note 47, at 417-18.

⁸⁶ *Id.*

⁸⁷ *Id.* at 418 (stating that “[w]e suppose from our knowledge of life in this society that the personal utility attributable to living in an established close-knit community is very high . . . [and] that personhood is fostered by living within an established community of other persons”).

⁸⁸ UNDER ONE ROOF: ISSUES AND INNOVATIONS IN SHARED HOUSING 11 (George C. Hemmens et al. eds., SUNY Series in Urban Public Policy 1996) [hereinafter UNDER ONE ROOF].

⁸⁹ *See* ZANY’S NEW YORK CITY APARTMENT SALES AND RENTAL GUIDE 314-15 (Courtney Andrialis and Janet Beard eds., 2001 ed.) [hereinafter ZANY’S] (recommending word-of-mouth as the most effective means of finding a compatible roommate). Moreover, a 1999 study in New York City found that 42% of renters moving into low-rent apartments (renting for under \$600 per month) learned of the apartment by word-of-mouth. RENT GUIDELINES BOARD, INCOME AND AFFORDABILITY BRIEF: HOW RECENT MOVERS FIND APARTMENTS IN NEW YORK CITY 2, available at <http://www.housingnyc.com> (Jan. 1999). While that study excluded roommate situations, this economical method of advertising arguably would be used just as frequently by tenants as by low-revenue landlords. *Id.*

REGULATING ROOMMATE RELATIONS

559

preserved. While it is not clear which party the community preservation theory favors in the tenant-roommate relationship, it is clear from this approach that eviction of the entire household cannot be the proper remedy for a roommate overcharge.

B. Exemptions Must Be Made Where Justified

At the same time that one *New York Times* journalist portrayed Ms. Mazzola and her fellow tenants as profiteers, another reported conflicting facts and also brought to light the mitigating circumstances behind her actions.⁹⁰ The article reported that Ms. Mazzola subsisted on only \$12,000 per year and suffered from emphysema and heart ailments.⁹¹ Moreover, Ms. Mazzola provided her roommate with food, use of the common rooms, and daily maid service.⁹²

These contrasting media representations raise the question as to whether those tenants charging disproportionate rents should be differentiated based on their reasons for doing so—based on whether they are capitalists or little old ladies struggling to get by. Low-income tenants are more likely to be justified in charging their roommates disproportionate rents for several reasons. First, in today's housing market low-income tenants need to take in roommates in order to subsist.⁹³ Second, low-

⁹⁰ See, e.g., Lambert, *supra* note 53, at B1.

⁹¹ *Id.*

⁹² *Live at Five* (WNBC-TV broadcast June 5, 2001).

⁹³ See Affidavit of Jacqueline Burger in Support of Petition, Brooklyn Hous. & Family Services v. N.Y. State Div. of Hous. and Cmty. Renewal, No. 14191/01 (N.Y. Sup. Ct. Kings County 2001) [hereinafter Burger Affidavit]. Burger states the following:

A number of my clients can only afford to remain in their apartments by obtaining roommate [sic]. Among those clients is an elderly Holocaust survivor whose only source of income is less than \$800.00 per month from Social Security Retirement. Her rent is higher than her income. The only way she has been able to remain in an apartment she has occupied for over 30 years is by having a roommate who pays more than 50 percent of the rent.

Id. at ¶ 7. See also Lambert, *supra* note 53, at B1.

income tenants face greater repercussions as a result of eviction.⁹⁴ Third, low-income tenants may be more likely to engage in informal exchanges that equalize a roommate arrangement but are not exempted by DHCR in its definition of “disproportionate” rents.⁹⁵ And, finally, low-income tenants have less access to legal information and representation, and so are less capable of avoiding a disproportionate arrangement and of defending against an eviction on that basis.⁹⁶ Therefore, a roommate overcharge provision that fails to recognize justifications for overcharging is unfair to those rent stabilized tenants who are the poorest.⁹⁷

1. Economic Need

Because they cannot afford to pay even half of their monthly rent, many low-income rent stabilized tenants must take in a roommate at a disproportionate rent.⁹⁸ Recent annual rent-increase allowances for rent stabilized apartments have outpaced tenant household income increases.⁹⁹ The New York City Rent Guidelines Board reports, “When looking at both rent costs and income, statistics indicate that it is increasingly difficult for those

⁹⁴ See Ken Karas, Note, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J.L. & SOC. PROBS. 527, 531 (1991) (stating that “[m]any tenants who are threatened with eviction risk not only losing their current homes, but also dislocation from their communities to the streets and shelters”).

⁹⁵ See UNDER ONE ROOF, *supra* note 88, at 10-11.

⁹⁶ See 144 Woodruff Corp. v. Lacrete, 585 N.Y.S.2d 956, 958 (Civ. Ct. 1992).

⁹⁷ See generally Karas, *supra* note 94, at 527-32.

⁹⁸ See Burger Affidavit, *supra* note 93; Lambert, *supra* note 53. See also RENT GUIDELINES BOARD, 2001 INCOME AND AFFORDABILITY STUDY 4, 6, available at <http://www.housingnyc.com> (Apr. 24, 2001) (reporting that higher rates of overcrowding in rent stabilized units demonstrate that economic need has forced rent stabilized tenants to take in roommates).

⁹⁹ Zucker, *supra* note 67, at 154 n.31. In the 1990s, New York City rents in general increased by 10.8% while tenants’ incomes rose by only 2.8%. In the late 1990s, the real median household income for rent stabilized tenants decreased 0.5%. J.A. Lobbia, *The 8.7 Percent Solution*, VILLAGE VOICE, May 22, 2001, at 26.

REGULATING ROOMMATE RELATIONS

561

households with lower incomes to afford housing without some government assistance.”¹⁰⁰ In 1997, the New York Supreme Court in *Jiggetts v. Dowling* found that the shelter allowance paid to recipients under the Aid to Families with Dependent Children (“AFDC”) program in New York City “[did] not bear a reasonable relationship to the cost of housing in New York City,” and ordered that it be increased.¹⁰¹ The court based this finding on evidence of the scarcity of units renting within the shelter allowance and the prevalence of AFDC recipients renting at a level above their shelter allowance.¹⁰² Even though it has been two years since the court’s order to issue new subsidies was affirmed by the appellate division,¹⁰³ the State Commissioner of Social Services has yet to do so.¹⁰⁴ Thus, while the shelter allowance was unreasonable in 1987, when the *Jiggetts* suit was initiated, it is even more unreasonable today at the same level of \$312 per month for a family of four.¹⁰⁵

Despite little to no increase in real income for tenants over the last decade, the Rent Guidelines Board has increased rents

¹⁰⁰ INCOME AND AFFORDABILITY STUDY, *supra* note 98, at 4.

¹⁰¹ *Jiggetts v. Dowling*, N.Y.L.J., Apr. 22, 1997, at 26:2 (Sup. Ct.), *aff’d*, 689 N.Y.S.2d 482 (App. Div. 1st Dep’t 1999). In response to a motion to dismiss, this same court had found that New York State Social Services Law § 350(1)(a) imposes a mandatory duty on the State Commissioner to set adequate shelter allowances. *Jiggetts v. Grinker*, 528 N.Y.S.2d 462, 468 (Sup. Ct. 1988), *rev’d*, 543 N.Y.S.2d 414 (App. Div. 1st Dep’t 1989), *rev’d*, 553 N.E.2d 570 (N.Y. 1990), *remanded to Jiggetts v. Dowling*, N.Y.L.J., Apr. 22, 1997, at 26:2 (Sup. Ct.), *aff’d*, 689 N.Y.S.2d 482. The court also granted a preliminary injunction, which is still in effect today, ordering that AFDC recipients be paid rent arrears and future reasonable rents upon any eviction action for non-payment caused by the inadequate shelter allowance in order to prevent eviction. *Id.*

¹⁰² *Jiggetts v. Dowling*, N.Y.L.J., Apr. 22, 1997, at 26:2.

¹⁰³ *Jiggetts v. Dowling*, 689 N.Y.S.2d 482.

¹⁰⁴ Cerisse Anderson, *Four Years After ‘Jiggetts,’ State Has Yet to Raise Rent Allowance*, N.Y.L.J., June 18, 2001, at 1:2.

¹⁰⁵ *Id.* (noting also that 25,000 families are receiving court-ordered enhanced interim shelter allowances in metropolitan New York in order to avoid eviction, which demonstrates that the shelter allowance level is not adequate).

steadily each year.¹⁰⁶ The board's annual decision is based principally on the price of goods and services that landlords purchase, often exaggerated by temporary spikes in fuel prices, inaccurate quotes by vendors, and embellished figures reported by the landlords themselves.¹⁰⁷ In recent years, the Rent Guidelines Board has routinely granted landlords rent increases higher than the cost of operating indicated by the Commensurate Rent Increase formula.¹⁰⁸ Legal methods of raising rents beyond those levels set by the Rent Guidelines Board include a 20% vacancy allowance,¹⁰⁹ a vacant apartment renovation pass-through,¹¹⁰ and a pass-through for building-wide major capital improvements ("MCIs").¹¹¹ Tenants have a remedy to rent overcharges, both in the form of illegal rent increases and illegal

¹⁰⁶ Lobbia, *supra* note 99, at 26.

¹⁰⁷ *Id.* (reporting that "landlords' actual costs are often less than the prices vendors quote to RGB researchers" as well as on the effects of temporary fuel spikes); INCOME AND EXPENSE STUDY, *supra* note 58, at 5 (stating that, according to audit results, reports by landlords are generally exaggerated by 8%).

¹⁰⁸ According to a 1997 report, the Rent Guidelines Board had done this for eighteen of the preceding twenty-two years. RENT DESTABILIZATION STUDY, *supra* note 77, at 4-5.

¹⁰⁹ N.Y. UNCONSOL. LAW § 26-511(c)(5-a) (McKinney 2001). The fact that rent collections reported by rent stabilized landlords have increased by figures greater than that allowed by Rent Guidelines Board allowances demonstrates that landlords are taking advantage of these additional means of raising rents. INCOME AND EXPENSE STUDY, *supra* note 58, at 4.

¹¹⁰ N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.4(a)(1) (2001). When a unit is vacant, a landlord does not need any approval to make improvements to such things as kitchen and bathroom fixtures, doors, and windows and to increase the base monthly rent for that unit by one-fortieth of the cost of those improvements. *Id.*

¹¹¹ N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.4(a)(2)(i) (2001). Entire apartment complexes can be affected by MCIs. For example, the owner of Peter Cooper Village on Manhattan's East Side recently applied for a \$44 rent increase for each room of the 2,480 units to pay for rewiring all of the buildings. Many of the complex's tenants are long-term elderly residents living on fixed incomes, for whom a \$132 monthly increase (for a one-bedroom apartment) is a large burden. David Kirby, *Tempers Flare over a Rent Rise at Peter Cooper Village*, N.Y. TIMES, July 30, 2000, § 14, at 8.

REGULATING ROOMMATE RELATIONS

563

initial rents, through a claim filed with DHCR.¹¹² If an overcharge is found by DHCR in a hearing on the claim, DHCR will order the landlord to reimburse the tenant for the overcharged amount plus interest.¹¹³ Because of a backlog of claims at DHCR, however, rent overcharge claims are rarely addressed before a complaining tenant moves out of the apartment.¹¹⁴ This results in very few illegal rents being curbed and contributes to the phenomenon of rising rents in New York City.¹¹⁵ As a result, almost 48% of New York City tenants spend more than one-third of their income on rent, and 18% spend more than half of their income on rent.¹¹⁶ These current realities are the result of New York City's narrow conception of rent regulation. Particularly of late, New York City's rent regulation

¹¹² N.Y. COMP. CODES R. & REGS. tit. 9, §§ 2522.1, 2526.1 (2001). Section 2526.1 states the following:

Any owner who is found by the DHCR, after a reasonable opportunity to be heard, to have collected any rent or other consideration in excess of the legal regulated rent shall be ordered to pay to the tenant a penalty equal to three times the amount of such excess, except as provided under subdivision (f) of this section

If the owner establishes by a preponderance of the evidence that the overcharge was not willful, the DHCR shall establish the penalty as the amount of the overcharge plus interest.

§ 2526.1(a)(1).

¹¹³ *Id.*

¹¹⁴ Zucker, *supra* note 67, at 121 n.28.

¹¹⁵ *Id.*

¹¹⁶ Lobbia, *supra* note 99, at 26. *See also* INCOME AND AFFORDABILITY STUDY, *supra* note 98, at 5. These numbers are likely to be exacerbated by the World Trade Center disaster, which has had strong unemployment effects on low-wage workers. A report by the Fiscal Policy Institute states that an estimated 60% of the 79,700 workers who were laid off as a result of the disaster had an average hourly wage of only \$11.00 (\$22,880 annual income). The five occupations most impacted by layoffs were waiters/waitresses, janitors/cleaners, retail workers, food preparation workers, and cashiers. FISCAL POLICY INSTITUTE, WORLD TRADE CENTER JOB IMPACTS TAKE A HEAVY TOLL ON LOW-WAGE WORKERS: OCCUPATIONAL AND WAGE IMPLICATIONS OF JOB LOSSES RELATED TO THE SEPTEMBER 11 WORLD TRADE CENTER ATTACK 2, tbl.3, *available at* <http://www.fiscalpolicy.org/Nov5WTCreport.PDF> (Nov. 5, 2001).

scheme has been pared down to the bare minimum required by the two theories that have been most strongly advanced throughout the city's history with rent regulation—the fair market objective¹¹⁷ and the preservation of a tenant's personhood interest.¹¹⁸

New York's history with rent control and rent stabilization demonstrates that the legislature's objective, arguably, has always been to prevent unfair profiteering by owners at times when the market makes that profiteering possible.¹¹⁹ The rent control program began during the housing shortage of the World War II era, caused by a shift in production away from housing and toward materials needed for the war.¹²⁰ When rent stabilization was introduced in the 1960s, it protected some of the best and newest of New York's housing rather than limiting itself to low-income housing, the supply of which had already been increased by the construction of public housing.¹²¹

Both rent control and rent stabilization are still subject to discontinuance today in the event that the citywide vacancy rate exceeds 5%.¹²² And the current Rent Stabilization Law still claims prevention of profiteering as one of its primary purposes:

The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York . . . ; that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist *an acute shortage of dwellings* which creates a special hardship to persons and families occupying rental housing; . . . that such action is

¹¹⁷ See *infra* notes 119-26 and accompanying text (defining the fair market objective).

¹¹⁸ See *infra* notes 127-41 and accompanying text (defining the personhood interest).

¹¹⁹ See Collins, *supra* note 47.

¹²⁰ *Id.* at 1312.

¹²¹ *Id.* at 1313.

¹²² N.Y. UNCONSOL. LAW §§ 26-414, 8623(b) (McKinney 2001), *cited in* Collins, *supra* note 47, at 1314.

REGULATING ROOMMATE RELATIONS

565

necessary to prevent the exactions of unjust, unreasonable and oppressive rents and rental agreements and to *forestall profiteering, speculation and other disruptive practices* tending to produce threats to the public health, safety and general welfare.¹²³

One commentator calls this the “fair rent objective” and finds that it also explains recent amendments to the Rent Stabilization Law.¹²⁴ Today in New York City, rents are high and the vacancy rate is low, making those apartments that are affordable to low-income tenants even more scarce than the vacancy rate of 3.19% suggests.¹²⁵ Thus, in order to protect low-income tenants against exorbitant rents, those tenants should be allowed to take in roommates as they need them.¹²⁶

A second justification for rent regulation that is relevant in the context of New York’s regulatory history is the “personhood” interest that a tenant holds in her home.¹²⁷

¹²³ N.Y. UNCONSOL. LAW § 26-501 (McKinney 2001) (emphasis added).

¹²⁴ Collins, *supra* note 47, at 1300. This explains why in 1993 a luxury decontrol amendment was designed to take out of regulation those tenants earning greater than \$250,000 annual income while at the same time paying greater than \$2000 in monthly rent. There is a scarcity of low-rent apartments available for less than \$2000 per month, and for this reason, Collins explains, the legislature did not decontrol them even when occupied by rich tenants earning greater than \$250,000 annually. *Id.* at 1317-19. However, this example demonstrates that a fair rent objective alone cannot explain the amendment because its effects were purposely limited to high-income tenants. Moderate-income tenants paying greater than \$2000 per month did not have their units deregulated. A separate justification must have played a role is this limitation—either redistribution of wealth or the recognition that affordable rents are needed to preserve the tenure rights of low-income tenants but not high-income tenants. *See Zucker, supra* note 67, at 135-37 (noting the relationship between rent levels and tenure).

¹²⁵ *See infra* note 147 (citing the vacancy rates for lower-rent apartments).

¹²⁶ The Rent Guidelines Board explained the 5.5% increase in average building rent collections for rent stabilized buildings in 1999 as “most likely propelled by fewer vacancies and strong rent collections as demand for rental housing continued to outstrip supply.” INCOME AND EXPENSE STUDY, *supra* note 58, at 9.

¹²⁷ Radin, *supra* note 47, at 414. The findings behind the Emergency Price Control Act of 1942 expressed the purpose of preventing the “uprooting

Proponents of this view argue that a person's interest in her home "is morally entitled to more weight than purely commercial landlording" because a person's "individuality and selfhood become intertwined" with her home.¹²⁸ Control over resources in the external environment, such as an apartment or house, gives a person an important sense of achievement and well-being.¹²⁹ The U.S. Constitution affirms the special importance of the home by making it the locus of the right to privacy.¹³⁰ Under this reasoning, taking in a roommate differs drastically from subletting because the tenant not only has a personal relationship with her roommate, as noted by the appellate division in *Roughton-Hester*, but maintains a personal relationship to her home.¹³¹ A subletting tenant's personhood interest in her home fades as she takes a new home for up to two years and her apartment approaches "fungible property," defined as property "held merely instrumentally or for investment and exchange."¹³²

The aspect of the New York rent regulation system that most directly reflects an interest in the personhood justification is the tenant's tenure rights.¹³³ Tenure rights, in relation to housing, derive from the recognition that as tenants become long-term occupants of their homes, they develop "a right not to be

[of] long-time city residents from their communities." Emergency Price Control Act, 1942 N.Y. Laws 460, § 1, *cited in* Collins, *supra* note 47, at 1314.

¹²⁸ Radin, *supra* note 47, at 414-15.

¹²⁹ Margaret Jane Radin, *Property and Personhood*, in PERSPECTIVES ON PROPERTY LAW 8, 8 (Robert C. Ellison et al. eds., 2d ed. 1995).

¹³⁰ *Id.* at 17.

¹³¹ 520 East 81st St. Assocs. v. Roughton-Hester, 555 N.Y.S.2d 70, 73 (App. Div. 1st Dep't 1990) (reasoning that "[m]any roommates are not strangers, but individuals who choose to live together, apportioning the costs according to their respective financial abilities, and other considerations").

¹³² Radin, *supra* note 47, at 415.

¹³³ "Tenure" is defined as "[a] right, term or mode of holding lands or tenements in subordination to a superior." BLACK'S LAW DICTIONARY 1481 (Bryan Garner ed., 7th ed. 1999). A residential tenant's right to tenure is the "tenant's presumptive right to continue in possession" of her home. Paul Sullivan, *Security of Tenure for the Residential Tenant: An Analysis and Recommendations*, 21 VT. L. REV. 1015, 1015 (1997).

REGULATING ROOMMATE RELATIONS

567

uprooted, a right to call their place of residence a home with some of the same sense of permanence with which a homeowner uses the term.”¹³⁴ The most important tenure right is the requirement that a landlord have a just cause for eviction.¹³⁵ Eviction control, however, is not the only regulation necessary to ensure tenure rights because there is always a level at which a tenant’s rising rent will force her to move.¹³⁶

The New York State Assembly seems to have focused on the personhood interest as its principal justification for regulating landlord-tenant relations in its recent enactments, but has done so in a way that neglects the effects of rent levels on tenure.¹³⁷ For example, the Rent Regulation Reform Act of 1997, the most recent set of amendments to the Rent Stabilization Law, codified the more liberal definition of family eligible for succession rights that was part of the Rent Stabilization Code.¹³⁸ Under this act, a tenant’s ability to pass on her home to her family is fortified. At the same time, however, the act limits a succeeding tenant’s right to the regulated rent level to only the first succeeding family member.¹³⁹ Any subsequent succeeding family members can be charged the vacancy bonus.¹⁴⁰ Thus, the legislature has focused on longevity over affordability. In this same act, the only other provision that could be characterized as pro-tenant is a new protection for tenants against certain types of landlord harassment intended to cause a tenant to vacate her apartment illegally.¹⁴¹

¹³⁴ Zucker, *supra* note 67, at 127-28 (arguing for a system in which landlords would have to pay their tenants “insurance” for the loss of their tenure rights if they were to evict their tenants without cause).

¹³⁵ *Id.* at 128.

¹³⁶ *See id.* at 137. Limits on rent increases also reflect the goal of protecting personhood interests by allowing tenants to plan for predictable rent increases so that they are not forced out by them. *Id.* at 128.

¹³⁷ *See infra* notes 138-45 and accompanying text.

¹³⁸ *See supra* note 66 (outlining the statutory definition).

¹³⁹ Rent Regulation Reform Act, 1997 N.Y. Laws 116, § 22.

¹⁴⁰ *Id.*; *see also supra* note 60 (describing the 20% vacancy allowance).

¹⁴¹ Rent Regulation Reform Act, 1997 N.Y. Laws 116, § 28.

An owner is guilty of harassment of a rent regulated tenant when with intent to cause a rent regulated tenant to vacate a housing

Thus, the legislature again has demonstrated its concern for insuring the personhood interests of existing tenants.

In his memorandum in support of the Rent Regulation Reform Act of 1997, Governor George Pataki voiced the prediction that “3 of every 4 apartments are expected to reach market levels as a result of the far-reaching reforms included in the bill,” including the vacancy bonus of 20%, supplemental vacancy bonuses, and luxury decontrol.¹⁴² To anyone cognizant of the effects of rent levels on a tenant’s ability to find adequate housing and of a tenant’s periodic need to move,¹⁴³ it is surprising to read the governor’s repeated assertions in the same memorandum that “the bill continues to protect more than 99 percent of all currently regulated tenants and their families.”¹⁴⁴ The governor’s concern is evidently focused upon a tenant’s interest in her established home, not upon the existence of adequate choices for a tenant in her housing search.¹⁴⁵ This narrow focus has clearly contributed to the lack of affordable units in New York City.

accommodation, such owner: 1. With intent to cause physical injury to such tenant, causes such injury to such tenant or to a third person; or 2. Recklessly causes physical injury to such tenant or to a third person.

Id.

¹⁴² GOVERNOR’S PROGRAM BILL MEMORANDUM #72, A.8346, Ch. 116 (New York State Legislative Annual 1997), at 74.

¹⁴³ Kim Phillips-Fein, *Housing: The Hidden Issue*, AM. PROSPECT, Dec. 4, 2000, at 26. Between 1993 and 1996, 35% of New York City’s rent regulated apartments turned over at least once. *Id.* See also Sullivan, *supra* note 133, at 1070.

¹⁴⁴ GOVERNOR’S PROGRAM BILL MEMORANDUM #72, *supra* note 142, at 77.

¹⁴⁵ See Shaila K. Dewan, *Deregulation by Landlords Is Increasing*, *Study Says*, N.Y. TIMES, Feb. 17, 2002, § 1, at 37 (quoting one of the study’s authors as saying that “[t]he ability of anyone moving within the city or to the city to find a rent-regulated apartment is gone”). See also Zucker, *supra* note 67, at 130 (“[H]ome is a place to establish identity. Identity requires change as much as continuity The goal should be to nurture identity by enlarging tenant choice.”).

REGULATING ROOMMATE RELATIONS

569

2. *Disparate Impact of Eviction*

A low-income tenant who is evicted from her apartment loses more than a middle- or upper-income tenant who is evicted.¹⁴⁶ That tenant's search for a new apartment will be much more difficult because of a greater scarcity of apartments that low-income tenants can afford.¹⁴⁷ In fact, homelessness is a dangerous repercussion of evicting low-income tenants.¹⁴⁸ Studies show that 27.5% to 60% of homeless families became homeless as a result of eviction.¹⁴⁹ From another viewpoint, among those tenants supported by public assistance who are evicted from their apartments, an estimated one-quarter will become homeless.¹⁵⁰

Commentators on rent regulation argue that a low-income tenant loses more when she is evicted, even when that eviction does not lead to homelessness, because low-income tenants invest more "psychic equity" into their apartments.¹⁵¹ "Psychic equity" has been defined as something that is derived "from the effort, attachment, and commitment required to turn one's house or

¹⁴⁶ See Karas, *supra* note 94, at 527.

¹⁴⁷ In 1999, the vacancy rate for apartments renting under \$400 per month was 1.26%, rising slightly to 2.53% for apartments renting at \$400-\$499, and to 2.86% for apartments renting at \$500-\$599 per month. INCOME AND AFFORDABILITY STUDY, *supra* note 98, at 4.

¹⁴⁸ Karas, *supra* note 94, at 532.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* The repercussions of homelessness are harsh. For example, those who are homeless are more susceptible to illness (including such chronic diseases as hypertension, diabetes, traumatic disorders, and respiratory ailments). *Id.* at 532-34. A person is more likely to suffer from mental disorders as a result of homelessness (including dementia, severe depression, and substance addiction). *Id.* at 532-33. Homelessness takes its toll on a person's ability to find a job, raise her family, build friendships, and participate in elections. *Id.* at 545-46. It increases a person's likelihood of family separation, institutionalization, and imprisonment. *Id.* (arguing that indigent tenants have a right to counsel in New York eviction cases in part because of the harsh results of eviction for so many tenants).

¹⁵¹ Zucker, *supra* note 67, at 134; see also EDGAR O. OLSEN, THE IMPACT OF VACANCY DECONTROL IN NEW YORK CITY: THE FIRST ESTIMATES FROM THE 1996 HOUSING AND VACANCY SURVEY 19, available at http://www.housingnyc.com/research/html_reports/olsen.html (Nov. 1997).

apartment into a home.”¹⁵² Because their choices are limited, low-income tenants invest more psychic equity into making an apartment a home.¹⁵³ This argument holds true for tangible investments as well. Rent stabilized tenants generally spend more time and money on both acquiring their apartments and on maintaining their apartments, since rent stabilized landlords are less likely to provide needed repairs.¹⁵⁴ These arguments elucidate the concept of the “personhood” interest discussed above.¹⁵⁵

The fact that a tenant has taken in a roommate does not devalue those arguments. A tenant who takes in a roommate does not lose her personhood interest in the apartment even by charging her roommate a rent greater than the entire rent. A tenant’s personhood interest derives from the importance of her home to her sense of self.¹⁵⁶ While the investment value of her apartment increases, its personal value does not consequentially decrease.¹⁵⁷ Psychic equity may in fact be increased by the taking in of a roommate in that the process of finding an acceptable roommate to help pay the rent is a considerable investment.¹⁵⁸

3. *Informal Exchange*

Tenants who take in roommates frequently offer something in exchange for a higher portion of the rent such as furnishings, utilities, food, chores, childcare, freedom from paying a security

¹⁵² Zucker, *supra* note 67, at 134.

¹⁵³ *Id.* at 135-36.

¹⁵⁴ Olsen, *supra* note 151, at 19. *See also* 1999 HOUSING AND VACANCY SURVEY, TABLE: NUMBER OF 1999 MAINTENANCE DEFICIENCIES, RENT-OCCUPIED HOUSING UNITS, *available at* <http://www.housingnyc.com> (last visited Mar. 23, 2002) (reporting U.S. Census research that 56.5% of unregulated units were free from deficiencies, while only 40% of stabilized units were).

¹⁵⁵ *See* Radin, *supra* note 47, at 414-15. *See supra* notes 127-32 and accompanying text (defining the personhood interest).

¹⁵⁶ Radin, *supra* note 47, at 414-15.

¹⁵⁷ *See generally id.*

¹⁵⁸ Zucker, *supra* note 67, at 134.

REGULATING ROOMMATE RELATIONS 571

deposit, and freedom from committing to a long-term lease.¹⁵⁹ When the rent paid by a tenant is not actually disproportionate, there is obviously no wrong warranting interference. A study conducted in three low-income neighborhoods in Chicago in the 1980s suggests that this sort of in-kind exchange is more common among low-income tenants.¹⁶⁰ It may also be more common between those who have social or familial ties, and in situations where the primary tenant is a senior citizen.¹⁶¹ Despite the fact that an in-kind exchange can make a roommate arrangement that is actually proportionate appear disproportionate, the strict language of the proportionality provision does not exempt these roommate arrangements from its restriction.¹⁶² In fact, the proportionality provision does not even allow for a greater share of the rent to be paid by a roommate who occupies a greater number of the rooms.¹⁶³

4. Lack of Representation

While landlords are represented by counsel in approximately 80% to 90% of summary eviction proceedings, tenants are represented in only 10% to 15% of such proceedings.¹⁶⁴ The

¹⁵⁹ See UNDER ONE ROOF, *supra* note 88, at 10; Burger Affidavit, *supra* note 93.

¹⁶⁰ UNDER ONE ROOF, *supra* note 88, at 17.

¹⁶¹ *Id.* at 10; George C. Hemmens & Charles J. Hoch, *Shared Housing in Low Income Households*, in UNDER ONE ROOF, *supra* note 88, at 17; Jay Romano, *Rent Rules: Codification or Stretch?*, N.Y. TIMES, Feb. 24, 2002, § 11, at 5 [hereinafter *Rent Rules*].

¹⁶² N.Y. COMP. CODES R. & REGS. tit. 9, § 2525.7 (2001) (“For the purposes of this subdivision, an occupant’s proportionate share shall be determined by dividing the legal regulated rent by the total number of tenants named on the lease and the total number of occupants residing in the subject housing accommodation.”).

¹⁶³ *Id.* § 2525.7. See also Romano, *supra* note 42, § 11, at 5.

¹⁶⁴ 144 Woodruff Corp. v. Lacrete, 585 N.Y.S.2d 956, 958 (Civ. Ct. 1992). See also Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79 (1997) (describing the repercussions of that imbalance for legal negotiations and calling for the more ethical treatment of unrepresented

overwhelming majority of unrepresented tenants are poor, and many are people of color.¹⁶⁵ Moreover, the presence or absence of representation profoundly affects the outcome of legal proceedings.¹⁶⁶ Lack of representation is likely to have a particularly strong effect in cases concerning the proportionality provision because the interpretation of this provision is still open for argument.¹⁶⁷ For example, the housing court in *Mazzola* interpreted the provision in relation to the concept of profiteering, holding that a tenant is subject to eviction without the opportunity to cure when that tenant charges her roommate a rent greater than the entire unit rent.¹⁶⁸ The decision, however, does not stipulate the results for tenants who charge their roommates greater than a “proportionate” amount but less than the entire rent.¹⁶⁹ Moreover, DHCR’s own general counsel disagrees with the court’s interpretation of the remedies provided by the provision, calling reliance on the *Mazzola* court’s decision

tenants in housing court where pressured negotiations between landlords’ lawyers and tenants are the norm).

¹⁶⁵ *Lacrete*, 585 N.Y.S.2d at 958. One study found that only 17.3% of black tenants and 18.6% of Hispanic tenants were represented by lawyers whereas 32.7% of white tenants were. Female tenants were represented slightly less often than male tenants. Engler, *supra* note 164, at 108 n.130.

¹⁶⁶ Carol Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 L. & SOC’Y REV. 419 (2001). This recent study, comparing a treatment group to a control group, found drastic differences even though only 56% of the treatment group was given legal representation (compared to 4% of the control group). Of the treatment group, 32% had judgments entered against them, compared to 52% of the control group; 24% had warrants of eviction entered against them, compared to 44% of the control group; and 19% were able to stipulate for a rent abatement due to repair problems, compared to 3% of the control group. *Id.* at 427.

¹⁶⁷ See Karas, *supra* note 94, at 549-50 (“Without mastering the relevant statutory provisions or case law, no tenant can conceivably hope to raise an effective defense against eviction.”).

¹⁶⁸ *RAM I LLC v. Mazzola*, N.Y.L.J., June 8, 2001, at 21:1 (Civ. Ct.), *aff’d & remanded*, No. 01-294, 2001 WL 1682829 (Sup. App. Term. 1st Dep’t Dec. 28, 2001).

¹⁶⁹ *Id.*

REGULATING ROOMMATE RELATIONS

573

to create a cause for eviction “misplaced.”¹⁷⁰ Thus, there is room for argument, but these arguments will only be successfully made by tenants who are represented by counsel.¹⁷¹

¹⁷⁰ Hirsch Affidavit, *supra* note 36, at ¶ 282. *See also supra* note 36 (quoting DHCR’s interpretation of the provision as providing a claim to the overcharged roommate).

¹⁷¹ *See infra* notes 177-81 and accompanying text (detailing Baltimore housing court study). Another legal issue that has yet to be resolved in the court’s treatment of the provision as grounds for eviction is the tenant’s accountability to the landlord for her actions. One landlord’s attorney wrote the following to his client’s tenant:

[You] are herewith demanded to . . . forthwith account to this office for any and all sums collected by you from your roommates or other persons who have occupied the apartment in the last two years. Unless I receive this information by close of business on February 6, 2001, Landlord will move to terminate your tenancy based on wrongful conduct and seek your eviction from the Subject Premises.

Exhibit A, Affidavit of Sara Jane Swanson in Support of Petition, Brooklyn Hous. & Family Services v. N.Y. State Div. of Hous. and Cmty. Renewal, No. 14191/01 (N.Y. Sup. Ct. Kings County 2001). *See also Rent Rules, supra* note 161, § 11, at 5 (quoting one tenant activist as fearing that the provision “allows the landlord to pry into [tenants’] personal finances” even before bringing an eviction action). The decision in *Mazzola* left open the question of whether landlords have the right to order their tenants to report their roommate arrangements upon demand or face eviction. It also left open the question of whether this reporting requirement can be written into a lease and whether such reports could be treated as admissions if they were to reveal disproportionalities of rents.

Such an interpretation would remove a large burden from the landlord in proving that a tenant is subject to eviction under the proportionality provision because a landlord would find it easy to gather the facts needed to commence an eviction. *See* N.Y. REAL PROP. ACTS. § 741[4] (McKinney 2001) (requiring that every petition to recover real property “[s]tate the facts upon which the special proceeding is based”); *Gianni v. Stuart*, 178 N.Y.S.2d 709, 711 (App. Div. 1st Dep’t 1958) (“A tenant is entitled to a concise statement of the ultimate facts upon which the proceeding is predicated so that the issues, if any there be, are properly raised and can be met.”); *City of New York v. Torres*, 631 N.Y.S.2d 208, 209 (App. Term 1st Dep’t 1995) (finding that facts were insufficient for an eviction action where landlord stated only that the building was “in a condition which endangers the life, health or safety of the occupants,” rather than alleging specific dangerous conditions). An interpretation of the provision as allowing landlords to demand information on

Access to pre-litigation information is equally disparate. Fifty percent of rent stabilized tenants do not even know that their units are regulated, information that is necessary to even begin understanding the applicable laws.¹⁷² DHCR has made no effort to inform tenants and tenant advocates of the implications of the proportionality provision; it has not published any operational bulletin or other written explanation to inform the public of the proportionality provision's relevance and application.¹⁷³ Because tenants can conceal rent-sharing arrangements by paying with one check, this disparity of access to information becomes especially important.¹⁷⁴ Informed tenants will know not to pay with two checks that disclose the amount of rent paid by each party. Furthermore, compliance also requires a certain level of education and proficiency in the English language.¹⁷⁵ Proper calculation of the proportionality formula requires a close reading of the statutory language and some mathematical ability.¹⁷⁶

A study of the Baltimore housing court found that the failure of tenants to successfully defend their cases was due in large part

their tenants' roommate arrangements would also create disparate treatment between those tenants who know of the proportionality provision and have made the decision to lie to their landlords about their roommate arrangements, and those who do not. *See generally Rent Rules*, *supra* note 161.

¹⁷² Olsen, *supra* note 151, at 18-19 (attributing this ignorance, in part, to the misperception that high regulated rents engender).

¹⁷³ Telephone Interview with Helpline Personnel, DHCR Rent Helpline (on Oct. 18, 2001). The staff at the Rent Helpline informed the author that the only written explanation of the roommate proportionality provision was the code itself. *Id.*

¹⁷⁴ *See supra* note 70 (citing the statutory basis for paying with one check).

¹⁷⁵ *See Zucker*, *supra* note 67, at 144 ("Given that illiteracy among the poor runs around three times higher than the level for the general population, understanding the fine-print legalese of the existing lease may not be possible for many."); Karas, *supra* note 94, at 534-35.

¹⁷⁶ *See supra* note 9 and accompanying text (citing the statutory language of the proportionality provision). *See also* Karas, *supra* note 94, at 548-50; Seron, *supra* note 166, at 431 (surmising that the calculation of rent owed is one of the important functions that a tenant's lawyer plays in their representation).

REGULATING ROOMMATE RELATIONS

575

to their inability to be accommodated by the culture of the court.¹⁷⁷ Poor tenants are more likely to understand the world in a relational way, taking into account the entire history of relations between people, which contrasts with a rule-oriented perspective applied by the courts.¹⁷⁸ To these tenants, “rules are a series of ‘they say,’ the power of which is felt in the paucity of relief to be had from the law’s abstractions and categories, made by people authorized to say what the law is.”¹⁷⁹ Thus, tenants have difficulty translating rules and laws into their rights.¹⁸⁰ Even when informed of their rights, unrepresented tenants in this study remained silent about their rights when standing before a judge.¹⁸¹

Despite the familiar adage that ignorance of the law is no excuse, the courts have traditionally been sympathetic to ignorant and unrepresented parties when disparate representation has led to disparate results.¹⁸² For example, a tenant’s ignorance of the law can constitute good cause for vacating a stipulation when a tenant has unknowingly waived valid defenses to an eviction proceeding.¹⁸³ The New York housing courts routinely set aside stipulations for this reason.¹⁸⁴ One court stated, “Although stipulations are highly regarded by the courts and not lightly cast

¹⁷⁷ Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992).

¹⁷⁸ *Id.* at 586-87.

¹⁷⁹ *Id.* at 591.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 561, 591.

¹⁸² Zucker, *supra* note 67, at 145 n.85 (“[O]ne of the fundamental justifications for government intervention is to reduce the costs and extent of asymmetric information.”).

¹⁸³ *In re Estate of Frutiger*, 272 N.E.2d 543 (N.Y. 1971) (setting forth a “good cause” standard).

¹⁸⁴ *See, e.g.,* Dearie v. Hunter, 676 N.Y.S.2d 896 (Civ. Ct. 1998) (where *pro se* tenant had waived defenses under the Spiegel Act and the Fair Rent Collection Practices Act); 144 Woodruff Corp. v. Lacrete, 585 N.Y.S.2d 956 (Civ. Ct. 1992) (where *pro se* tenant had agreed to pay rent in excess of the legal regulated amount); Sicherman/Pomp v. Jenkins, 567 N.Y.S.2d 566 (Civ. Ct. 1989) (where *pro se* tenant had waived the defense of warranty of habitability and improper rent amount).

aside, the court may do so in appropriate cases upon a showing of good cause. This is especially true where, as here, there is an unsophisticated tenant not represented by counsel and completely unaware of defenses available to them [sic].”¹⁸⁵

Additionally, ethical rules prevent parties from taking advantage of unrepresented persons by limiting communications between an attorney and an unrepresented person whose interests are contrary to the interests of the attorney’s client.¹⁸⁶ Advice-giving, for example, is prohibited.¹⁸⁷ If an unrepresented party perceives a statement made by the other party’s lawyer to be advice, that statement is unethical regardless of whether it was intended as advice.¹⁸⁸ Thus, the rules of ethics recognize the potential for misunderstandings by unrepresented parties and defer to their interpretation of the lawyer’s statements in order to best protect them.

Based on this argument, a tenant should not necessarily be excused from complying with regulations simply because she is ignorant of them, but where possible, regulations should seek to avoid disparate impacts on those who are unrepresented. For example, in constructing a roommate protection, it may not be enough to provide tenants with an affirmative defense when their overcharge is justified.¹⁸⁹ Tenants might not benefit from, for

¹⁸⁵ *Dearie*, 676 N.Y.S.2d at 897 (citation omitted).

¹⁸⁶ New York Code of Professional Responsibility DR 7-104(A)(2), *cited in Engler*, *supra* note 164, at 85, 101. Disciplinary bodies in New York have the authority to impose sanctions including reprimand, referral to the court with a recommendation for censure, suspension, or disbarment. N.Y. COMP. CODES R. & REGS. tit. 22, § 605.14(a)(4) (1990), *cited in Engler*, *supra* note 164, at 133 n.254. Unfortunately, Engler argues, the existing rules are frequently violated in part because the reporting responsibility does not lie with an independent body, but with clients and colleagues who have no incentive to file complaints against lawyers who mistreat unrepresented tenants. Engler, *supra* note 164, at 133-34.

¹⁸⁷ New York Code of Professional Responsibility DR 7-104(A)(2), *cited in Engler*, *supra* note 164, at 85.

¹⁸⁸ Engler, *supra* note 164, at 99.

¹⁸⁹ See Bezdek, *supra* note 177, at 561 (observing that whether a tenant held a legal defense and was cognizant of it was not the determining factor in her success in housing court).

REGULATING ROOMMATE RELATIONS

577

example, an allowance for sharing the rent burden among family members, or an exemption in the case of economic hardship, because the majority of tenants will not be successful in arguing such defenses in court.¹⁹⁰ Likewise, tenants should be given the opportunity to cure their errors without the grave repercussion of losing their homes. The proportionality provision, in contrast, has been read to provide an incurable basis for eviction, giving an unrepresented tenant no chance to pay back an overcharge before she is evicted.¹⁹¹

III. A PROPER SOLUTION

Both DHCR and the *Mazzola* court have erred in their design of a roommate overcharge provision, but the question remains whether one should exist at all. As set forth in *Roughton-Hester*, the tenant-roommate relationship is often a personal one and, arguably, should not be regulated.¹⁹² However, examining the tenant-roommate relationship from the perspective of several rent regulation theories demonstrates that some protection of roommates from overcharge is warranted.¹⁹³ In some respects, the primary tenant's access to the coveted commodity of housing in a tight housing market warrants treatment somewhat similar to the treatment given landlords. Under the reasoning of the fair market objective, it is clear that a tenant who takes advantage of the housing shortage to charge a roommate exorbitant rents can be prevented from doing so under the same justification that prevents a landlord from doing so.¹⁹⁴ Indeed, this reasoning was

¹⁹⁰ See generally Bezdek, *supra* note 177; Seron, *supra* note 166.

¹⁹¹ RAM I LLC v. Mazzola, N.Y.L.J., June 8, 2001, at 21:1 (Civ. Ct.), *aff'd & remanded*, No. 01-294, 2001 WL 1682829 (Sup. App. Term. 1st Dep't Dec. 28, 2001), at *1. See *supra* notes 37-42 and accompanying text (discussing the decision in *Mazzola*).

¹⁹² See *supra* notes 18-21 and accompanying text.

¹⁹³ See generally Collins, *supra* note 47, at 1300; Radin, *supra* note 47.

¹⁹⁴ See Collins, *supra* note 47, at 1300. However, a counter-argument under this reasoning might be that shared housing arrangements decrease the shortage of housing in a way that is relatively inexpensive. UNDER ONE ROOF, *supra* note 88, at 11.

used to justify limits on a tenant's right to overcharge a sublettor.¹⁹⁵ By promulgating a properly designed roommate overcharge provision, DHCR would therefore act within the Rent Stabilization Law's stated purpose "to forestall profiteering, speculation, and other disruptive practices tending to produce threats to the public health,"¹⁹⁶ and would thus avoid overstepping its authority.¹⁹⁷ As laid out above, however, that provision needs to take into account the tenant's economic needs.¹⁹⁸ Moreover, under both the community preservation and redistribution of wealth theories, it is not clear that a roommate is less deserving of protection than a primary tenant.¹⁹⁹ The justifications that provide support for a tenant's overcharging her roommate, therefore, should have limits.

A. The Exemptions Must Be Limited

A careful analysis of the justifications for rent overcharge can delineate the limits of those justifications. For example, while a tenant's economic need may justify her taking in a roommate at a disproportionate rent, the purpose of constructing such an exemption is to allow tenants to afford their escalating rents.²⁰⁰ That justification, therefore, does not apply when a tenant's rent from her roommate goes to pay expenses other than rent.²⁰¹ Rent from a roommate beyond the level needed to pay the tenant's rent

¹⁹⁵ See *supra* notes 14-17 and accompanying text (analyzing the purposes behind statutory limitations on subletting).

¹⁹⁶ N.Y. UNCONSOL. LAW § 26-501 (McKinney 2001).

¹⁹⁷ See *supra* note 24 and accompanying text (applying the *ultra vires* doctrine to the promulgation of the proportionality provision).

¹⁹⁸ See *supra* Part II.B.1.

¹⁹⁹ See *infra* Part III.A.

²⁰⁰ See *supra* Part II.B.1.

²⁰¹ See *supra* note 58 (discussing the governmental takings doctrine). It may be argued that those expenses should be subsidized as well, many of them being just as essential to living as housing. That subsidy, however, should not come from other renters in need of housing or by means of the protection of rent regulation. See *supra* note 196 and accompanying text (quoting the Rent Stabilization Law's stated purpose).

REGULATING ROOMMATE RELATIONS

579

is true profiteering. It is difficult to determine that level for every individual, and such a determination would be prohibitively cumbersome in a court or administrative proceeding, requiring formulas akin to those used by welfare agencies and documentation of all income and any extraordinary expenses.²⁰² One approach would be to set that level at the unit's entire rent. The rent that a tenant earns from her roommate above the unit's rent, as a rule, does not go toward protecting her housing in an unfair housing market, and should not be protected by rent regulation.²⁰³

An alternative would be to set that level at the average welfare assistance payment for a household equal in size to the tenant's, on the assumption that the welfare shelter allowance is a good indicator of the minimum income that a household would be able to contribute toward rent.²⁰⁴ Thus, the roommate could bring an overcharge action if she were paying a rent greater than the entire unit rent minus the shelter allowance for which the tenant might be eligible.²⁰⁵ There are several problems, however, with this more conservative formula. First, it is not an accurate indication of minimum household income because not all tenants are eligible for welfare; therefore, some of the poorest tenants might be deprived of their tenancies despite a legitimate justification.²⁰⁶ Second, the complexity of the formula would

²⁰² See, e.g., BARRY STROM, PUBLIC BENEFITS IN NEW YORK § PA, at 123-206 (1998 ed.) (describing the process of calculating eligibility and benefits for the Family Assistance and Safety Net Assistance programs over the course of more than eighty pages).

²⁰³ See *supra* note 196 and accompanying text (quoting the Rent Stabilization Law's stated purpose).

²⁰⁴ See Anderson, *supra* note 104, at 1:2 (reporting the current monthly shelter allowance for a family of four in Manhattan as \$312).

²⁰⁵ See generally N.Y. COMP. CODES R. & REGS. tit. 9, §§ 2522.1, 2526.1 (2001) (prescribing the following overcharge action that a tenant may take against a landlord: "[a]ny owner who is found by DHCR . . . to have collected any rent or other consideration in excess of the legal regulated rent shall be ordered to pay the tenant a penalty equal to three times the amount of such excess").

²⁰⁶ See STROM, *supra* note 202, § PA, at 11, 61-106. The 1996 welfare reforms put into effect a sixty-month lifetime limit on receipt of Family

cause the same problems discussed above for tenants with less education and without legal representation.²⁰⁷

The similar statuses of tenants and their roommates also limit the justifications under which a tenant's interests should be protected at any cost. For example, the community preservation theory supports the protection of long-term tenants and recognizes their need to take in roommates at disproportionate rents over time as tenant incomes may decrease with retirement, and as rents increase.²⁰⁸ Nonetheless, this theory also supports the protection of roommates. As discussed above, roommates may be long-term members of the community even if they have not lived in their units for a long time because of the informal means by which tenants typically advertise for roommates.²⁰⁹ Likewise, the redistribution of wealth perspective does not clearly favor the tenant over her roommate so as to justify limitless overcharging.²¹⁰ While statistics on their relative wealth are not available, there is no reason to believe that people seeking rooms to rent are generally richer than those who already have stabilized apartments and are seeking roommates. Thus, a roommate overcharge protection is warranted to prevent unjustifiable redistribution of wealth from roommates to tenants.²¹¹

B. Provision Design

Economic need, informal exchange, and ignorance of the law should all be recognized as justifications for overcharging a roommate under any code that attempts to regulate roommate relations, both because these reasons excuse the tenant and because exemptions based on these reasons prevent disparate

Assistance, *id.* § PA, at 11, as well as an exclusion of benefits to some groups of non-citizens, *id.* § PA, at 61-106.

²⁰⁷ See *supra* note 176 and accompanying text.

²⁰⁸ Radin, *supra* note 47, at 417-18.

²⁰⁹ See ZANY'S, *supra* note 89, at 314-15.

²¹⁰ Radin, *supra* note 47, at 412.

²¹¹ See Collins, *supra* note 47, at 1305.

REGULATING ROOMMATE RELATIONS

581

effects on low-income tenants.²¹² Those exemptions, however, are limited by the extent to which the protection of roommates is also warranted. Thus, as the discussion above has already demonstrated, designing a roommate overcharge provision to encompass all of these goals is somewhat difficult.

An important consideration in the remedy must be the innocence of the roommate.²¹³ The case law around succession rights, for example, recognizes that “[i]mproprieties committed by the departed household member . . . cannot defeat the right of the remaining household member to succeed to the tenancy.”²¹⁴ Likewise, the roommate is an innocent party when the primary tenant charges her an excessive rent, and should be treated as such. Transfer of the tenancy to the roommate who has been overcharged is one potential remedy that recognizes the roommate’s innocence.²¹⁵ A problem with this remedy is that it, unfortunately, creates an incentive for collusion both at the expense of the primary tenant and at the expense of the landlord. The landlord may approach the roommate and encourage her to disclose the facts of her rental agreement in order to have the primary tenant evicted and to give the roommate the right to the tenancy.²¹⁶ This danger, however, can be mitigated by giving the tenant an opportunity to cure the overcharge by lowering the roommate’s rent to an amount equal to or below the entire unit rent within ten days of receiving notice from the landlord.²¹⁷ In

²¹² See *supra* Part II (explaining how such circumstances justify exemption).

²¹³ See *supra* notes 27-30 and accompanying text (contrasting the remedies given subletors when primary tenants are found to be profiteering at their expense).

²¹⁴ *I.N. Ovington Corp. v. Surdo*, N.Y.L.J., July 8, 1998, at 25:3 (Civ. Ct.) (assigning the tenancy to an innocent successor despite the primary tenant’s failure to report that person’s presence and income on her application for a Senior Citizens Rent Increase Exemption). See also *Levine v. Costanzo*, N.Y.L.J., Feb. 17, 1994, at 24:3 (App. Term 1st Dep’t).

²¹⁵ See *supra* notes 27-30 and accompanying text (citing the use of this remedy when a subletting tenant is found to have an “illusory tenancy”).

²¹⁶ See *Court OKs Eviction*, *supra* note 69, at 11 (“Once the roommate learns that the tenant is violating the law, try to get his cooperation.”).

²¹⁷ See, e.g., N.Y. COMP. CODES R. & REGS. tit. 9, § 2524.3(a) (2001)

addition, collusion might be discouraged by permitting no vacancy allowance to be added to the roommate's new base rent, thus removing the landlord's incentive to collude.²¹⁸

On the other hand, the vacancy allowance is needed to protect the landlord against collusion between the tenant and roommate. For example, a tenant who plans to move out of her unit permanently, but would like to give a friend the opportunity to have this rent-stabilized unit without competing with others, might spuriously overcharge that friend and cause her own eviction. This would provide a means of avoiding the requirements put in place for succession rights.²¹⁹ This danger could be mitigated by limiting the remedy of transferring the tenancy to the roommate to cases in which the roommate had lived in the unit for more than one or two years, creating a veritable succession right for the roommate. Giving the roommate a right to the tenancy, however, differs in an important respect from a succession right or the reassignment of the tenancy to a sublettor where an illusory tenancy is found. It evicts from her home a tenant who still lives in that home and has a personhood interest in it.²²⁰ For these reasons, the transfer of the tenancy to the roommate is not the best remedy for a roommate overcharge.

A roommate overcharge provision should instead provide roommates with a cause for reimbursement in cases where they are being charged a rent greater than the entire unit rent.²²¹ In this way, those tenants who cannot afford even half of their rent

(allowing eviction on the grounds of a violation of a substantial obligation of the lease only when the tenant has "failed to cure such violation after written notice of the owner that the violations cease within 10 days").

²¹⁸ See *supra* note 60 and accompanying text (outlining the statutory vacancy allowance).

²¹⁹ See *supra* notes 138-40 and accompanying text (discussing succession rights).

²²⁰ See *supra* notes 127-32 and accompanying text (defining the personhood interest).

²²¹ See, e.g., N.Y. COMP. CODES R. & REGS. tit. 9, §§ 2522.1, 2526.1 (2001) (providing tenants with a cause of action for reimbursement against landlords charging illegal initial rents and illegal rent increases).

REGULATING ROOMMATE RELATIONS

583

will not be penalized for taking in roommates out of economic need. This also avoids the inevitable disparate repercussions that an eviction action poses to poor tenants, who are less likely to be represented and more likely to become homeless upon losing their tenancy.²²² This solution allows tenants who are ignorant of the regulation at least some opportunity to correct their errors without losing their homes. Moreover, access to information and legal representation is likely to be more equal between a tenant and her roommate than between a landlord and tenant, making the tenant-roommate dispute more equitable than that between a landlord and tenant.²²³ Finally, the informal exchange of resources in the place of rent should be an affirmative defense to a roommate overcharge if greater or equal in value to the overcharge.²²⁴ It should be clearly written into the provision so that tenants and judges are aware of it.²²⁵

CONCLUSION

The roommate proportionality provision was enacted with two debilitating flaws.²²⁶ These errors show the true nature of the provision as a tool for weakening tenant rights in the guise of expanding protections to roommates.²²⁷ As applied by the courts

²²² See *supra* Parts II.B.2, 4.

²²³ See *supra* notes 164-66 and accompanying text (citing a great gap in representation between landlords and tenants).

²²⁴ See *supra* Part II.B.3.

²²⁵ But see *supra* notes 177-81 and accompanying text (citing Bezdek's assertion that tenants do not successfully argue affirmative defenses unless represented).

²²⁶ See *supra* Part II.A-B (explaining that the remedy must not lie with the landlord and that there must be exemptions for overcharging when the tenant is justified in doing so).

²²⁷ *Court OKs Eviction*, *supra* note 69, at 10. At least some landlords give no thought to the protection of roommates through the provision. One landlord newsletter informed its readers of the following options:

Most leases bar tenants from violating the law. So if a tenant overcharges a roommate in violation of the code, you can also seek the tenant's eviction based on breach of the lease. But there's a downside to this strategy . . . a court might give the tenant a chance

thus far, the provision places the remedy for an overcharge in the hands of the landlord rather than the roommate.²²⁸ It gives the landlord a means by which to evict entire units instead of giving roommates protection against overcharge akin to those that primary tenants hold.²²⁹ Moreover, the misapplication of this provision prevents roommates from choosing disproportionate rental arrangements even if more affordable to them, and prevents unmarried couples from sharing their rent as they see fit.²³⁰ Additionally, the provision sets forth a resolute prohibition against disproportionate rents that does not allow for needed exceptions.²³¹ If applied without an opportunity to cure, without consideration of the desperate economic straits of many New York City tenants, and without adjustments for informal exchanges, the provision will unjustly prevent many tenants from maintaining and affording their homes.²³² For these reasons, the provision cannot stand as written.

The purpose of the Rent Stabilization Law is “to prevent exactions of unjust, unreasonable, and oppressive rents and rental agreements and to forestall profiteering, speculation, and other disruptive practices tending to produce threats to the public health, safety, and general welfare.”²³³ While proponents of the proportionality provision jumped on the term “profiteering” in

to correct the lease violation by returning the overcharge amount and charging the roommate a lower rent in accordance with the code requirements. That’s why it’s better to sue to evict the tenant for violating the code.

Id.

²²⁸ RAM 1 LLC v. Mazzola, No. 01-294, 2001 WL 1682829 (Sup. App. Term. 1st Dep’t Dec. 28, 2001), at *1.

²²⁹ See *supra* note 205 (citing statutory basis for the tenant overcharge action).

²³⁰ See LAMBDA Memo, *supra* note 63.

²³¹ See *supra* note 9 and accompanying text (quoting language of proportionality provision); Part II.B (arguing that some sort of exemptions or accommodations are needed in cases of economic need, disparate impact, informal exchange, and lack of representation).

²³² See *supra* Part II.B.

²³³ N.Y. UNCONSOL. LAW § 26-501 (McKinney 2001).

REGULATING ROOMMATE RELATIONS

585

order to justify the eviction of a large number of tenants living with roommates, the scarcity of affordable units today requires that the statutory language be applied more carefully.²³⁴ Because so many tenants must take in roommates at disproportionate rents in order to afford their homes, and because the repercussions of eviction in this market are so harsh, eviction of those tenants is undoubtedly a “disruptive practice” that would produce a threat to the public welfare.²³⁵

Likewise, leaving roommates with no protection against those tenants who are truly profiteering by charging them greater than the unit rent would be inconsistent with the purposes of the Rent Stabilization Law. By adopting a limited and effective roommate protection, DHCR would avoid Governor Pataki’s shortsighted assumption that to protect current tenancies is to protect all tenants.²³⁶ Tenants navigating today’s housing market must frequently become roommates to existing tenants.²³⁷ The protection of roommates, therefore, insures that all tenants have adequate choices of affordable rooms and units.

For all of these reasons, the proportionality provision should be invalidated and roommates should be given the benefit of a cause of action in overcharge against their primary tenants when they are being charged rent greater than the entire unit rent and are not receiving in return additional services of equal or greater value to that overcharge.

²³⁴ See, e.g., *supra* note 41 and accompanying text (characterizing Ms. Mazzola’s actions as “profiteering”). See also *supra* note 147 (describing the scarcity of affordable units).

²³⁵ § 26-501.

²³⁶ See *supra* notes 142-45 and accompanying text (citing Governor Pataki’s optimistic assessment of the Rent Regulation Reform Act of 1997).

²³⁷ See *supra* note 59 (citing high rates of apartment sharing).