

WHEN WE FIGHT, WE WIN: EVICTION DEFENSE AS SUBVERSIVE LAWYERING

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INTRODUCTION

“When we fight,” shouts a tenant, “WE WIN!” responds the room filled with tenants, organizers, homeowners, neighbors, and lawyers. These words echo off the brick walls of a converted brewery in Jamaica Plain, Massachusetts, where the weekly City Life/Vida Urbana (“City Life” or CLVU) tenant association’s meeting occurs. The rallying call is uplifted in

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praise of a tenant who has just told her story of resisting her eviction. The incantation is a reminder to all those present in the struggle for their own home, and a message to the newcomers that the act of fighting for yourself and your neighbors is where victory lies.¹

To reinforce this solidarity, a meeting organizer asks each newcomer, “Are you willing to fight to stay in your home?” The organizer repeats the question three times until the affirmative response is loud and emphatic. Satisfied, the organizer continues, “and guess what?” On cue, the packed meeting erupts with, “And we’ll fight WITH YOU!!”

These City Life meetings are the heart of the “sword and shield” model described in this Essay. The weekly meetings are where lawyers and law students meet with people facing eviction, where organizers conduct political education, and where members share news of recent and upcoming actions and events. Most importantly, it is the time and place where people facing displacement are told to “leave their shame at the door.” A longtime lead organizer, Jim Brooks, would joke that people were “welcome to pick it up on their way out,” but shame had no place here.

I. GOALS FOR THE ESSAY

This Essay will examine the “sword and shield” model in action to explore the meaning of “subversive lawyering” in the housing context, particularly in eviction defense. In this model, we²—the lawyers and law students—provide the “shield” (i.e., legal defense), while the organizers and members of grassroots housing justice organizations³ provide the “sword” (i.e., public pressure and protest). The lawyers are shielding tenants and foreclosed homeowners in the courts, which allows these “defendants” to simultaneously work with organizers to take necessary extralegal actions to ensure they are protected from displacement.

What is subversive about this model? The methodology is similar to that of a “resistance lawyer,” as defined by Professor Daniel Farbman in his brilliant article about “a group of abolitionist lawyers” who fought to keep their clients free and frustrate the operation of the Fugitive Slave Act of 1850.⁴ Farbman describes a “resistance lawyer” as someone who “engages in a regular, direct service practice within a procedural and substantive legal

1. See GREG JOBIN-LEEDS & AGITARTE, *WHEN WE FIGHT WE WIN: TWENTY-FIRST CENTURY SOCIAL MOVEMENTS AND THE ACTIVISTS THAT ARE TRANSFORMING OUR WORLD* 115–17, 124–25 (2016).

2. By “we,” I am referring to my students, my colleagues, and myself at the Harvard Legal Aid Bureau (HLAB), as well as the student attorneys, clinical instructors at the Legal Services Center at Harvard Law School, and the attorneys at Greater Boston Legal Services. Where I do not cite to a particular source, my commentary is based on my own observations and experiences drawn from practicing and teaching in this method over the last decade.

3. Our primary “sword” partner, and one of the creators of the sword and shield method, is City Life/Vida Urbana, located in Boston. We also work with other grassroots organizations such as Lynn United for Change (LUC) and Springfield No One Leaves. See *infra* notes 114–16 and accompanying text.

4. Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1877 (2019); Ch. 60, 9 Stat. 462 (repealed 1864).

regime that she considers unjust and illegitimate. Through that practice, she seeks both to mitigate the worst injustices of that system and to resist, obstruct, and dismantle the system itself.”⁵

Not content with mitigating and resisting the unjust system, a “subversive lawyer” seeks to subvert the corrosive effects of such a system on poor people and people of color. Such a lawyer works directly with organizers to take a moment imbued with vulnerability, isolation, and feelings of powerlessness—when a person is facing an eviction—and transform it into one of strength, solidarity, and empowerment. In the words of one tenant, reflecting on his and his fellow tenants’ successful fight to remain in their building, “[W]e realized we are a lion.”⁶

Finally, this Essay is my attempt to answer my clinical students who frequently ask questions expressing doubt and skepticism about their chosen profession after a disheartening appearance in court or an upsetting encounter with an opposing counsel. These questions are of this nature: “How can I even participate in such an unjust legal system? Aren’t I actually helping to preserve the status quo as an ‘officer of the legal system’⁷ with my participation? Isn’t this preservation or perpetuation made worse when I am not explicitly challenging the laws, the judges, or the courts, but instead simply trying to prevent my client from being evicted?” My hope is that this Essay demonstrates how a lawyer can work “within” a system, *and* “resist, obstruct and dismantle the system itself.”⁸

This discussion proceeds as follows: Part II will explore how our model of eviction defense and movement building (i.e., the “sword and shield” model) shares many of the attributes of the abolitionists’ “resistance lawyering,” as defined by Farbman in his article of the same name, with an added subversive element. Part III will include two case studies, based on my own cases, demonstrating how our “sword and shield” model has worked in response to different displacement forces, namely foreclosure and gentrification, and why the model is “subversive.”

II. THE “SWORD AND SHIELD” MODEL EXAMINED IN THE CONTEXT OF ABOLITIONISTS’ “RESISTANCE LAWYERING”

The “sword and shield” model of eviction defense and movement building bears many striking similarities to the “resistance lawyering” of the abolitionist lawyers.⁹ Two aspects of “resistance lawyering” are directly relevant to the “sword and shield” model. First, the abolitionist lawyers worked “*within* [a] system with the goal of resisting it. . . . [They] did not

5. Farbman, *supra* note 4, at 1880.

6. Katie Trojano, *Jury Says That Tenants in Uphams Corner Case Can Stay in Their Homes*, DORCHESTER REP., Nov. 14, 2019, at 1, 15.

7. See MASS. RULES OF PRO. CONDUCT pmb1. (1997). A lawyer is “an officer of the legal system” and “lawyers play a vital role in the preservation of society.” *Id.*

8. Farbman, *supra* note 4, at 1880.

9. With some trepidation of creating a false equivalency between slavery and eviction, I follow Farbman’s call to heed “[t]his history” in the hopes that it “serve[s] as a provocation for contemporary resistance lawyering.” Farbman, *supra* note 4, at 1877.

abandon the field to levy high-level attacks on slavery, but rather engaged in a detailed, strategic practice of direct representation.”¹⁰ Second, the abolitionist lawyers “were not deluded into thinking that their practice alone would make the change that they sought.”¹¹ They understood that their daily practice was “situated within [a] broader context” and that “every courtroom battle helped to build political power.”¹²

Another remarkable parallel is that we are both operating in a “summary process” regime where the laws explicitly prioritize property rights over human rights. The very premise of “summary process” actions is that they favor the right of the “owner” to retrieve property “without fuss, delay, or political uproar.”¹³ In formal law, Massachusetts’s summary process¹⁴ has been tempered over the last fifty years by the recognition of “the unique and fundamental need of tenants for dwellings that are habitable and secure.”¹⁵ As a result, “extensive changes [have occurred] through case law in the legal relationship between tenants and landlords and a host of legislative enactments providing tenants with new rights and remedies.”¹⁶ In practice, these additional rights and remedies are only meaningful if tenants know they exist and understand how to enforce them. These conditions rarely exist without legal representation,¹⁷ and only a tiny fraction of tenants are represented by counsel.¹⁸ Given this deep power imbalance,¹⁹ summary

10. *Id.* at 1932.

11. *Id.*

12. *Id.*

13. *Id.* at 1894; *see also infra* notes 44–46 and accompanying text. The modern summary process rules explicitly state that they shall be interpreted in a manner that ensures “the just, speedy, and inexpensive determination” of every eviction case. MASS. UNIF. SUMMARY PROCESS R. 1.

14. *See generally* MASS. GEN. LAWS ch. 239 (2022).

15. MASS. UNIF. SUMMARY PROCESS R. 1 cmt.

16. *Id.*

17. *See* *Adjartey v. Cent. Div. of the Hous. Ct. Dep’t*, 120 N.E.3d 297, 302 (Mass. 2019) (“[W]e [the Supreme Judicial Court] recognize that the complexity and speed of summary process cases can present formidable challenges to individuals facing eviction, particularly where those individuals are not represented by an attorney.”); *see also* Andrew Scherer, *Gideon’s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 562 (1988) (making the case that the constitutional right to procedural due process should encompass the right to counsel “when faced with the loss of something as crucial as one’s home”).

18. According to the Massachusetts Housing Court Department Fiscal Year 2019 Statistics, almost 90 percent of all tenants facing eviction were unrepresented by counsel. MASS. HOUS. CT. DEP’T, ADDITIONAL DEPARTMENTAL STATISTICS (2019), <https://www.mass.gov/doc/2019-housing-court-self-represented-represented-litigants-by-court-location/download> [<https://perma.cc/6G5W-D4AR>]. A 2014 study of Boston Housing Court (now Eastern Housing Court) revealed that, of those represented, only 7 percent received full representation, 2 percent had limited assistance representation, and 1 percent had assistance filling out a pro se answer form. *See* PROJECT HOPE, HOMESTART & DUDLEY ST. NEIGHBORHOOD INITIATIVE, BOSTON HOUSING COURT DATA REPORT 12 (2016). The rate of execution (the presumed rate of actual evictions) was almost one third of all cases brought against unrepresented tenants, but only 17.5 percent for tenants who received full representation. *See id.* at 12 tbl.3, 23 tbl.13.

19. The deep power imbalances in Eastern Housing Court that I observe routinely between the largely white, male, able-bodied landlords and their attorneys and the “unrepresented

process works as originally intended in the vast majority of cases, and places profit over people.²⁰ Thus, the “shield” lawyers, like the abolitionist lawyers, work within the system to represent individual “defendants,” and with the “sword” activists and community members to expose the inequities in the eviction system itself and the role that the eviction system plays in perpetuating societal inequality and injustice.

A. “*The Shield*” as “*Contemporary Resistance Lawyering*”

In his article *Resistance Lawyering*, Farbman reveals and reframes the history of abolitionist lawyers who defended people against being returned to slavery—and in the process sought to undermine the Fugitive Slave Act of 1850 itself.²¹ Farbman explains that “[r]esistance lawyering is rooted in direct service within the hostile system rather than collateral attack against it through other systems.”²² He posits that the most effective attacks on the Fugitive Slave Act were “within its own procedural framework.”²³ Specifically, these attacks or tactics took the form of “delay” through continuances or “clogging up the process” with custody disputes between the federal and state authorities.²⁴ Both of these tactics, along with substantive legal victories, allowed for political organizing.²⁵ The political organizing was critical to increasing the chances of “freedom of the alleged fugitive” and to transforming “summary rendition into a community referendum on slavery.”²⁶

tenants [who] typically are poor, female, and people of color” has persisted for decades. See Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 2059 & n.316 (1999); see also Jenifer McKim & Alejandro Serrano, *As Rents Soar in Boston, Low-Income Tenants Try to Stave Off Eviction*, *BOS. GLOBE MAG.* (Feb. 19, 2019, 11:46 AM), <https://www.bostonglobe.com/magazine/2019/02/19/rents-soar-boston-low-income-tenants-try-stave-off-eviction/QddCq1bLrV3JQhaFTzYnGP/story.html> [https://perma.cc/HZ2H-SCQ5] (describing Eastern Housing Court a year before the pandemic).

20. Even those summary process actions that do not immediately result in actual eviction may result in what Nicole Summers refers to as “civil probation agreements.” See Nicole Summers, *Civil Probation*, 75 *STAN. L. REV.* (forthcoming 2023) (manuscript at 22–24), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3897493 [https://perma.cc/3XAU-NZKQ]; see also *id.* at 4 (noting that 37 percent of all summary process filings in Boston Housing Court over a five-year period resulted in “civil probation agreements”). These agreements provide stays of the “actual eviction” unless and until certain conditions are met. If these conditions are violated, a simple motion for execution (“actual eviction”) is filed by the landlord to which the tenant has extremely limited procedural protections remaining. *Id.* at 4–5.

21. Farbman’s novel research reveals that out of 210 cases in which some type of process was invoked, eighty-one “of the fugitives ended their cases as free people.” Farbman, *supra* note 4, at 1896–97. He uses this data to demonstrate that lawyers and activists were more effective in preventing people from being sent back into slavery than historians previously understood. See *id.* at 1882.

22. *Id.* at 1880.

23. *Id.*

24. *Id.* at 1898.

25. See *id.*

26. *Id.*

One of the stories Farbman tells is the case of Shadrach Minkins, a former slave in Boston, who was subject to the Fugitive Slave Act. When Minkins was captured by a slave catcher and brought to court, a network of abolitionist activists and lawyers quickly assembled to prevent Minkins from having “a swift and quiet hearing.”²⁷ Although the lawyer for the purported “slave owner” argued that because the proceedings were “summary,” they should proceed at once, Minkins’s lawyers requested a continuance for three days, arguing that they had just met their client and needed time to prepare.²⁸ While the hearing was proceeding, a group of abolitionist activists gathered quickly outside the courthouse. When the continuance was granted and Minkins was to be held in the courtroom, the crowd broke into the courtroom and ushered Minkins “into the street and eventual freedom.”²⁹

As I illustrate in the case studies in this Essay,³⁰ “shield” lawyers similarly use the eviction process’s own procedural framework to fight “the hostile system.”³¹ By “hostile system,” I mean an “eviction system” that grossly favors landlords, results in the displacement of thousands of people annually, and robs the dignity of many subjected to it. While the core of our work is direct service, we also are “happy to use the strategies of impact litigation and collateral attack when they [are] useful.”³² Similarly, we will use other systems, such as the legislative process, public protest, and political pressure, to attack the hostile system. To that end, we are both engaging in “resistance lawyering,” as defined by Farbman, and seeking to subvert the current paradigm where thousands of people are displaced from their homes every year.³³ Furthermore, we are a counterpoint to the view that “triage and direct service is generally not seen as the most direct way to achieve broad systemic reforms.”³⁴

An opposing view of direct service has existed in many social reform efforts for decades. Professor Gary Bellow, who founded the Legal Services

27. *Id.* at 1907.

28. *Id.*

29. *Id.* at 1908.

30. *See infra* Part III.

31. Farbman defines the word “system” as a “discrete legal system like the Fugitive Slave Law, capital punishment, bankruptcy, etc.”; it “does not mean ‘the law’ broadly.” *Id.* at 1880 n.4.

32. *Id.* at 1880.

33. *See* CITY OF BOS. EVICTION PREVENTION TASK FORCE, AN ACTION PLAN TO REDUCE EVICTIONS IN BOSTON 6 (2019), https://www.boston.gov/sites/default/files/file/2020/01/An_Action_Plan_to_Reduce_Evictions_in_Boston_%28report%29%20200109_1.pdf [<https://perma.cc/272H-HUS7>] (noting that in the City of Boston alone, “[t]he total number of eviction cases filed in Eastern Housing Court . . . were . . . approximately 5,000 for each of the three years examined: 2015, 2016 and 2017”). According to the Massachusetts trial court’s statistics for the 2019 fiscal year (the last full year before the pandemic), 30,614 summary process cases were filed. *See* MASS. HOUS. CT. DEP’T, DEPARTMENTAL TOTAL NUMBER OF FILINGS AND DISPOSITIONS (2019), <https://www.mass.gov/doc/filings-and-dispositions-by-court-location-3/download> [<https://perma.cc/X8PR-BB5Y>].

34. Farbman, *supra* note 4, at 1881. Farbman uses the term “triage [to] . . . refer[] to the direct service lawyer’s position in relation to her clients. . . . [T]he purpose of direct representation is to address the symptoms that walk in the door rather than the diseases that may be causing them within the political culture.” *Id.* at 1881 n.6.

Center in Boston, describes how he and his staff in the early 1980s used a “focused-case” strategy in Social Security cases as a way “to produce changes in local practice and perspective that had proven very hard to alter in more judicially and legislatively focused challenges to the same problems.”³⁵ Bellow further explains that “[f]rom 1984 to 1989, the same staff undertook a variation of this ‘focused-case’ strategy in an effort to stop evictions and slow down speculation in a rapidly gentrifying area of Boston.”³⁶ As described below, Bellow’s method was one of the precursors for the current “sword and shield” model that we use thirty years later.

When discussing the abolitionist lawyers, Farbman makes a critical point, however, that this direct service cannot be understood without acknowledging “that lawyers [were] acting in concert with grassroots opposition to slavery” and that they had a “clear political analysis” of how their efforts fit into the broader movement to end slavery.³⁷ Farbman eloquently summarizes:

The story of the antislavery lawyers shows the power of direct representation as a proxy battle in a broader political movement. It shows how a clear political analysis and a deep connection with movement activists can transform a triage legal practice into a tool in a broader project of social change.³⁸

Similarly, Bellow notes that “the legal work was done in service to both individuals and larger, more collectively oriented goals. . . . Moreover, the visions we embraced, particularly those that sought radical extensions of democracy, equality, and racial justice, were focused on deep-seated, structural, and cultural change.”³⁹ In short, Bellow also thought it essential that direct service work be connected to an articulated political analysis.⁴⁰

A further parallel can be drawn between abolitionist lawyers’ efforts to attack the hostile system from within and our own efforts today. Neither I nor my colleagues believe that we will achieve our broader goals of “housing justice” in the courtroom alone. Likewise, abolitionist lawyers knew that

35. Gary Bellow, *Steady Work: A Practitioner’s Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 299 (1996).

36. *Id.*

37. Farbman, *supra* note 4, at 1903, 1953.

38. *Id.* at 1953.

39. Bellow, *supra* note 35, at 300.

40. *Id.*; see also Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 119 (1977) (“It’s my own experience that these views—of the limited change potential in aggressively representing individual clients, and of the degree of professional circumspection, detachment and apoliticality necessary in legal aid work—are simply wrong. Both personal involvement and a political orientation in legal aid work seem to me essential to avoiding its further bureaucratization. Indeed, the conception of the legal problems of clients as capable of division between large (and political) ‘test case’ claims, and routine (apolitical) grievances not only depreciates the importance of day-to-day legal aid work but actually fosters the very limiting perceptions of what can and could be done in those cases to which it purports to respond.”); Betty Hung, *Essay—Law and Organizing from the Perspective of Organizers: Finding a Shared Theory of Social Change*, 1 L.A. PUB. INT. L.J. 4, 7 (2009) (“[L]awyers and organizers [should] find common ground with a shared theory of social change that honors the primacy of affected community members.”).

“slavery was a problem too large to be attacked directly by lawyering.”⁴¹ However, our direct representation and the attendant challenge to the eviction system is a “proxy battle” for the larger goals of the housing justice movement. These goals are exemplified by the intention of Right to the City Alliance, a leading grassroots housing justice organization, to fight for “[t]he right to land and housing that is free from market speculation and that serves the interests of community building, sustainable economies, and cultural and political space.”⁴² And the housing justice movement is part of an even larger reimagining. In the words of Professors David Madden and Peter Marcuse, “The built form of housing has always been seen as a tangible, visual reflection of the organization of society. It reveals the existing class structure and power relationships. But it has also been a vehicle for imagining alternative social orders.”⁴³

B. Summary Process Under Fugitive Slave Act Versus Under Eviction Statutes

The Fugitive Slave Act and eviction law both employ what is called “summary process.”⁴⁴ Summary process means that the time for the lawsuit is considerably shorter and that procedural protections are fewer than in a traditional civil case.⁴⁵ According to Farbman, the Fugitive Slave Act “was intended to create a summary process where owners could reclaim their ‘property’ with federal assistance, requiring only minimal proof.”⁴⁶

41. Farbman, *supra* note 4, at 1952.

42. *Mission, History, & Platform*, RIGHT TO THE CITY, <https://righttothecity.org/about/mission-history/> [<https://perma.cc/XS3E-VUMH>] (last visited Mar. 4, 2022).

43. DAVID MADDEN & PETER MARCUSE, IN DEFENSE OF HOUSING 12 (2016).

44. See Farbman, *supra* note 4, at 1898 (describing the summary process of the Fugitive Slave Act). In 1972, the U.S. Supreme Court upheld the use of summary process for evictions against a constitutional challenge. See *Lindsey v. Normet*, 405 U.S. 56, 64–69 (1972) (holding that Oregon’s use of summary process in eviction cases was not a violation of the federal Due Process Clause even where the statute allowed the trial to be held six days after service of the complaint).

45. Farbman, *supra* note 4, at 1894. Farbman’s description of summary process as prescribed in the Fugitive Slave Act is far more restrictive than summary process for the possession of land in Massachusetts; for example, alleged fugitives were not allowed to testify on their own behalf, and were not entitled to jury trials. See *id.* But similarities do exist; there is no guarantee of counsel in either procedure, and minimal proof is required for the landlord’s prima facie case. While jury trials are allowed in eviction cases, they are the exception, and they are frequently waived (often unintentionally by pro se litigants) or stripped for minor infractions. See MASS. GEN. LAWS ch. 185C, § 21 (2022) (“All cases in the housing court department . . . shall be heard and determined by a justice of a division of the housing court department sitting without jury, except . . . in all cases where a jury trial is required by the constitution of the commonwealth or of the United States and the defendant has not waived his rights to a trial by jury . . .”); see also *CMJ Mgmt. Co. v. Wilkerson*, 75 N.E.3d 605, 613 (Mass. App. Ct. 2017) (overturning the trial court’s decision to strip a pro se tenant of her jury trial because she failed to file a pretrial memorandum in accordance with housing court’s instructions).

46. Farbman, *supra* note 4, at 1907.

Massachusetts law has long allowed for summary process to recover possession of real property.⁴⁷ The Uniform Summary Process Rules, promulgated pursuant to the Summary Process for Possession of Land statute,⁴⁸ are explicit that the rules “shall be construed and applied to secure the just, speedy, and inexpensive determination of every summary process action.”⁴⁹ The official commentary explains that the reason underlying this directive is that “time is of the essence in eviction cases. This is based on the notion that real estate constitutes unique property and that because it generates income, time lost in regaining it from a party in illegal possession can represent an irreplaceable loss to the owner.”⁵⁰ In other words, the state will provide minimal due process protections to a tenant because the loss of time means the landlord will lose money that cannot be replaced.

The official commentary notes that this “principle”—that housing is a unique commodity intended for the benefit of the owner—is in competition with

the unique and fundamental need of tenants for dwellings that are habitable and secure. Recognition of this need has resulted in extensive changes through case law in the legal relationship between tenants and landlords and a host of legislative enactments providing tenants with new rights and remedies.⁵¹ These changes have made the legality of possession an often difficult and complex judicial question.⁵²

Exploiting this tension is often central to our work. The court, the landlords, and their attorneys focus almost exclusively on the legislature’s goal of providing “just, speedy and inexpensive”⁵³ process. We, as eviction defense attorneys, leverage all the procedure and protections provided by the summary process rules, especially those requiring strict compliance.⁵⁴ We also employ additional protections provided by the applicable rules of civil procedure, as well as other statutory “enactments providing tenants with new

47. *Bank of N.Y. v. Bailey*, 951 N.E.2d 331, 336 (Mass. 2011) (“The current summary process statute, [MASS. GEN. LAWS ch. 239, § 1 (2022)], derives from the ‘summary remedy’ statute that has its roots in the beginning of the Eighteenth Century in the Province Laws 1700–1701.”); *see also* *Hastings v. Pratt*, 62 Mass. (8 Cush.) 121, 123 (1851) (describing summary process as a “cheap, prompt and summary remedy, for the restoration of possession wrongfully withheld” as early as 1851).

48. MASS. GEN. LAWS ch. 239 (2022).

49. MASS. UNIF. SUMMARY PROCESS R. 1.

50. *Id.* cmt.

51. MASS. UNIF. SUMMARY PROCESS R. 1. (“Procedures in such actions that are not prescribed by these rules shall be governed by the Massachusetts Rules of Civil Procedure insofar as the latter are not inconsistent with these rules, [or] with applicable statutory law . . .”).

52. *Id.* cmt.

53. *Adjartey v. Cent. Div. of Hous. Ct. Dep’t*, 120 N.E.3d 297, 306 (Mass. 2019) (quoting *Bank of N.Y. v. Bailey*, 951 N.E.2d 331, 336 (Mass. 2011)).

54. For a discussion of the importance of strict compliance with the summary process rules, see *Dayton v. Brannelly*, 152 N.E. 65, 66 (Mass. 1926) (“The process pursued is purely statutory; and it does not lie in favor of any one not strictly within its terms.”).

rights and remedies”⁵⁵ and long-existing constitutional rights, such as the right to a jury trial.⁵⁶

Farbman posits that the reason for summary process in the Fugitive Slave Act was “to avoid the political complications of public attention and resistance.”⁵⁷ Arguably, the same could be said for allowing summary process in eviction of people from their homes. He also points out that “[t]here was no prohibition against alleged fugitives being represented by lawyers, but it was fairly clear the Law did not anticipate a robust legal process.”⁵⁸ Similarly, the current eviction system depends on scarce legal representation and minimal legal process in the large majority of cases. As a result, when we meet someone on the day of their trial in housing court, we will use “every scrap of procedure that [we can] grasp to slow down and frustrate the process.”⁵⁹ We will also use our activist colleagues in big and small ways to resist this speedy process by relying on their presence in the hallways of the courthouse to identify unrepresented tenants, and on the courthouse steps to protest unjust evictions. One could easily apply Farbman’s description to our work when he says, “It was this collaboration between activists and lawyers and their work resisting the Law and its operation that accounted for most of the successes achieved by opponents of the Law.”⁶⁰

C. Differences Between Fighting a Facially Unjust Law and an As-Applied Unjust Law

A key difference between the Fugitive Slave Act, which Farbman describes as the “archetypal unjust American law,”⁶¹ and the totality of the laws that govern evictions in Massachusetts is that the latter does not appear on its face to substantially favor one party over the other. This appearance of fairness is due to the case law and statutory enactments over the last half century that have provided many tenants rights and remedies that did not exist in the traditional summary process scheme.⁶² In fact, one scholar has characterized Massachusetts as one of only thirteen states with “protectionist” or pro-tenant laws.⁶³ Instead, one could argue that it is the

55. MASS. UNIF. SUMMARY PROCESS R. 1. cmt.

56. *See, e.g.*, *New Bedford Hous. Auth. v. Olan*, 758 N.E.2d 1039, 1045 (Mass. 2001) (“Article 15 has been construed as preserving the right to trial by jury in actions for which a right to trial by jury was recognized at the time the Constitution of the Commonwealth was adopted in 1780. At that time, the common law afforded a tenant the right to trial by jury on a landlord’s writ of entry, the procedure to evict a tenant after the expiration or termination of a tenancy. Thus, the right to trial by jury in eviction cases has been preserved under art. 15.” (internal citations omitted)).

57. Farbman, *supra* note 4, at 1907.

58. *Id.* at 1908.

59. *Id.* at 1903.

60. *Id.* at 1904.

61. *Id.* at 1885.

62. *See supra* note 52 and accompanying text.

63. *See* Megan E. Hatch, *Statutory Protections for Renters: Classification of State Landlord-Tenant Policy Approaches*, 27 HOUS. POL’Y DEBATE 98, 110 (2017).

application of the eviction laws by the landlords, the landlords' attorneys, and the judges that makes the "eviction system" deeply unjust. In support of such an argument, legal scholar Nicole Summers's novel research has shown how most cases in Eastern Housing Court—the busiest housing court in Massachusetts—are resolved through civil probation, which creates a "shadow legal system"⁶⁴ that undermines the rights and procedures established by the legislature.⁶⁵ These are the same rights and procedures that are intended to regulate the power imbalances that exist between the parties in the eviction system.⁶⁶

If we accept this view, it would be logical to assume that if we could get summary process to function as it is intended, then we would achieve a just result. This conclusion is supported by the example of New York City, where the "Right to Counsel" law⁶⁷ has been enacted; there, the overall number of evictions has dropped considerably.⁶⁸ Arguably, the enforcement of the procedural mechanisms by a more adversarial system has driven up the cost of eviction and changed the calculus for landlords.⁶⁹ Disrupting and shrinking the eviction machine would lessen the racial inequities caused by

64. See Summers, *supra* note 20, at 39–51.

65. See generally *id.* (presenting novel empirical research on the number of cases that result in "civil probation agreements" as a result of the vast numbers of unrepresented clients, as well as other factors).

66. See *id.* at 40–45.

67. N.Y.C., N.Y., ADMIN. CODE §§ 26-1301 to 26-1306.

68. See OFF. OF CIV. JUST., UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR TWO OF IMPLEMENTATION IN NEW YORK CITY 4 (2019), https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_UA_Annual_Report_2019.pdf [<https://perma.cc/6M4M-LEP5>] ("In the last quarter of FY2019, over 32% of tenants appearing in Housing Court for eviction cases were represented by attorneys, reflecting . . . an exponential increase from the representation rate for tenants of only 1% in 2013 . . ."); Yoav Gonen, *Eviction Drop Fuels Push to Expand Free Housing Help for Low-Income NYC Tenants*, CITY (Feb. 24, 2020, 4:00 AM), <https://www.thecity.nyc/housing/2020/2/24/21210511/eviction-drop-fuels-push-to-expand-free-housing-help-for-low-income-nyc-tenants> [<https://perma.cc/HF37-8DZB>] ("Over the first two years of the program, evictions in the covered neighborhoods fell by a combined 29%—from 4,355 to 3,105, according to the analysis by the nonprofit Community Service Society. Evictions decreased citywide by roughly 18% over the same time period—to about 16,200, according to the analysis. That's down from a recent peak of nearly 29,000 evictions conducted by city marshalls [sic] in 2013 . . .").

69. In support of this supposition, the number of *filings* of eviction cases in 2019, the second full year of implementation of "Right to Counsel," fell by over 20 percent. See N.Y.C. OFF. OF CIV. JUST., ANNUAL REPORT 2019, at 8 (2019), https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2019.pdf [<https://perma.cc/HS2C-KZD9>].

the current system.⁷⁰ Fewer evictions also means a positive impact on society in general.⁷¹

Even if we achieved this critical goal of lessening the number of evictions by increasing the number of lawyers, and thereby ensuring a more robust legal process, it would not address the more fundamental problem of commodification of a basic human necessity.⁷² And “the problem with

70. Recent studies have shown that the trauma and harm of evictions in Boston is disproportionately felt by communities of color. A report found that evictions filed during the pandemic were more than twice as likely to have been filed in neighborhoods where a majority of renters are people of color than in neighborhoods where most renters are white. See DAVID ROBINSON & JUSTIN STEIL, CITY LIFE/VIDA URBANA, EVICTIONS IN BOSTON: THE DISPROPORTIONATE EFFECTS OF FORCED MOVES ON COMMUNITIES OF COLOR 8 fig.3 (2020) [hereinafter ROBINSON & STEIL, CITY LIFE/VIDA URBANA STUDY]. Additionally, although only 52 percent of the city’s rental housing is in neighborhoods where a majority of renters are people of color, 70 percent of eviction filings take place in these neighborhoods. See *id.* Conversely, neighborhoods where a majority of renters are white contain 46 percent of Boston’s rental housing and make up only 30 percent of the city’s eviction filings. *Id.* Although communities of color are disproportionately bearing the brunt of the COVID-19 eviction crisis, this trend predates the pandemic. In an examination of Boston Housing Court eviction records in Boston from 2014 to 2016, Massachusetts Institute of Technology (MIT) researchers found that the vast majority of eviction filings were concentrated in the Roxbury, Dorchester, Mattapan, and Hyde Park neighborhoods—all communities of color. See David Robinson & Justin Steil, *Eviction Dynamics in Market-Rate Multifamily Rental Housing*, 31 HOUS. POL’Y DEBATE 647, 657 (2021). In fact, this research revealed that “market-rate eviction filings are more likely in census tracts with a higher share of black renters, above and beyond other indicators of poverty and disadvantage.” See ROBINSON & STEIL, CITY LIFE/VIDA URBANA STUDY, *supra*, at 40.

71. Matthew Desmond has explained that eviction “is a cause, not just a condition, of poverty,” and research is rife with data supporting his fundamental reshaping of our collective understanding of eviction as a social problem. See MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 298 (2016). Evictions can also lead to homelessness because families are often unable to find subsequent stable housing. See Robert Collinson & Davin Reed, *The Effects of Evictions on Low-Income Households* (Feb. 2019) (unpublished manuscript), https://robcollinson.github.io/RobWebsite/jmp_rcollinson.pdf [<https://perma.cc/3ZG4-ZWNH>]. Formal evictions can disqualify families from most affordable housing programs, leaving them with no choice but to move into lower quality housing and more isolated neighborhoods. See Stephanie DeLuca et al., *Why Poor Families Move (and Where They Go): Reactive Mobility and Residential Decisions*, 18 CITY & CMTY. 556, 557 (2019) (“[W]hen families are forced to move, they land in poorer and less safe neighborhoods—and this is especially true for black renters.”). The effects of evictions extend beyond just housing. See MARK MELNIK & ABBY RAISZ, BOS. FOUND., RACIAL EQUITY IN HOUSING IN THE COVID-19 ERA 3 (2020), <https://www.ywboston.org/wp-content/uploads/2020/08/THEBOS2.pdf> [<https://perma.cc/6PZV-LKAD>] (finding that evictions affect families’ access to opportunity and social mobility); Binyamin Appelbaum, *Opinion, The Coming Eviction Crisis: “It’s Hard to Pay the Bills on Nothing,”* N.Y. TIMES (Aug. 9, 2020), <https://www.nytimes.com/2020/08/09/opinion/evictions-foreclosures-covid-economy.html> [<https://perma.cc/MYE7-4J97>] (noting that evictions displace families from communities, forcing children into lower quality schools and increasing the likelihood of divorce); Matthew Desmond & Rachel Tolbert Kimbro, *Eviction’s Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 310–13 (2015) (finding that evicted tenants are more likely to be laid off, have lower incomes and material hardship, and have poorer physical and mental health).

72. *But see* John Whitlow, *Gentrification and Countermovement: The Right to Counsel and New York City’s Affordable Housing Crisis*, 46 FORDHAM URB. L.J. 1081, 1131–32 (2019) (placing the right to counsel (RTC) within the context of other legal limits placed on property owners’ absolute right to control their property, and explaining the RTC Coalition’s

making housing a commodity,” as Madden and Marcuse have explained, is that “living space [is] distributed based on the ability to pay and provided to the extent that it produces a profit. But ability to pay is unequal while the need for a place to live is universal.”⁷³ To create a society where we provide safe and decent housing for all, regardless of ability to pay (or identity or characteristic of the dweller), we must fundamentally change the politics around the provision of this basic necessity. To shift the politics, a movement led by the people most affected is essential. And to build a movement, the lawyers who provide eviction defense must not simply “solve cases,” but must use an eviction as a moment to connect individuals to others who are exposed to the same forces of displacement and who will fight with them.⁷⁴ In short, the lawyers must practice “subversive lawyering.”

III. CASE STUDIES OF THE SWORD AND SHIELD MODEL AS SUBVERSIVE LAWYERING

To understand how practitioners engaged in the “sword and shield” model are “subversive lawyers,” I will describe two cases of mine that involved fighting different forces of displacement. The first case took place in the context of the foreclosure crisis, where I was representing homeowners and tenants in Lynn, Massachusetts and working closely with Lynn United for Change (LUC), a grassroots housing organization and close ally of City Life/Vida Urbana. The second case is an example of a fight against the forces of gentrification and speculation that are fueling rapid displacement of low-income people of color from the traditional heart of the Black community in Boston. Before describing these cases in detail, however, it is important that I explain the history and philosophy of the “sword and shield” model.

A. History of the “Sword and Shield” Model

The origins of the “sword and shield” model trace back to two distinct efforts in the Jamaica Plain neighborhood of Boston. The first was the grassroots tenant organizing of the 1970s, and the second was the innovative legal work of Gary Bellow and his colleagues at the Legal Services Center (LSC) in the 1980s. The grassroots tenant organizing started in 1973, when tenants living in the Jamaica Plain and Roxbury neighborhoods came together to fight displacement by forming the Jamaica Plain Tenants Action Group (JP TAG).⁷⁵ This group engaged radical tactics exemplified by the

construction of RTC as a method “to build the organizing capacity of tenants, with the ultimate aim of reconstituting housing as a social good”).

73. MADDEN & MARCUSE, *supra* note 43, at 51.

74. See SARENA NEYMAN, CITY LIFE/VIDA URBANA, BANK TENANT ASSOCIATION ORGANIZING MANUAL: BUILDING SOLIDARITY TO PUT PEOPLE BEFORE PROFIT 30 (2012), http://www.campusactivism.org/server-new/uploads/city_life_bank_tenant_association_manual.pdf [<https://perma.cc/R5CW-LGBK>] (describing CLVU’s “radical organizing” model: “It is not about providing services or advocacy. No radical challenge can emerge from fostering reliance on professional advocates or service providers.”).

75. See *Our History*, CITY LIFE/VIDA URBANA, <https://www.clvu.org/history> [<https://perma.cc/Z4QR-Q5YC>] (last visited Mar. 4, 2022).

story of 68-year-old Mrs. Dona Julia Diaz and her two grandchildren, who were evicted from their Roxbury apartment.⁷⁶ Mrs. Diaz had refused to pay rent because of the lack of heat and hot water and the presence of rats and roaches.⁷⁷ The housing court had taken the word of the inspector who had not visited the property and ordered her out.⁷⁸ “When the marshals arrived to evict her, forty friends and neighbors stood in the way. Five days later, however, with the police there in force, the eviction took place.”⁷⁹ These friends were JP TAG, who moved Mrs. Diaz back in a few days after the eviction—“still cold, still without hot water, still living with roaches, but there, undaunted, and determined to change things.”⁸⁰

JP TAG changed its name to City Life/Vida Urbana in the late 1970s.⁸¹ It has remained “committed to fighting for racial, social and economic justice and gender equality by building working class power” for almost fifty years.⁸² Members of CLVU also “promote individual empowerment, develop community leaders and build collective power to effect systemic change and transform society,” all while maintaining its core focus on housing justice as a central building block in the transformation of society.⁸³

In 1979, in the same section of Boston, Gary Bellow, Jeanne Charn, and other “political lawyers” and innovators in legal education created a neighborhood legal clinic called the Legal Services Institute.⁸⁴ Bellow, in his well-known article on “political lawyering,” explained that, from 1984 to 1989, LSC had a focused case strategy where

[w]e designated an ‘eviction-free zone,’ took as many eviction cases from that area as possible, and pressed the cases in ways that not only sought to preserve tenants’ possession of the property, but communicated directly to landlords the risk of increased cost and exposure that would accompany efforts to empty substandard residential property for redevelopment. These efforts were accompanied by attempts—still ongoing—to affect the

76. Howard Zinn, Opinion, *Some Day, a Winter Without an Eviction*, BOS. GLOBE, Oct. 31, 1975, at 21.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* Professor Zinn described this event in an op-ed in *The Boston Globe* and provided commentary that CLVU would still wholeheartedly approve of: “It is a harsh commentary on our economic-constitutional system that, after 200 years of national history, the law still fails to recognize what should be an elementary principle of any decent society: that no family should be deprived of a home, no one shall be chucked out on the sidewalk, because they cannot pay the price set by some real estate profiteer, or because they insist that their living space be fit for human habitation.” *Id.*

81. See *Our History*, *supra* note 75.

82. *Mission & Vision*, CITY LIFE/VIDA URBANA, https://www.clvu.org/mission_vision [<https://perma.cc/YXB8-3FFQ>] (last visited Mar. 4, 2022).

83. *Id.* For further history of CLVU and eviction blockades, see *Our History*, *supra* note 75.

84. See *History*, WILMERHALE LEGAL SERVS. CTR. OF HARV. L. SCH., <https://www.legalservicescenter.org/about-the-legal-services-center/history/> [<https://perma.cc/D97A-XSSW>] (last visited Mar. 4, 2022). The Legal Services Institute has changed its name a number of times throughout its history, but for the purposes of this Essay, I will refer to it as the Legal Services Center or “LSC.”

attitudes and behavior of court and other personnel toward both our clients and the much larger number of tenants who appear without representation.⁸⁵

In the late 1990s and early 2000s, a protégé of Gary Bellow, David Grossman,⁸⁶ continued the “focused-case strategy” and joined forces with CLVU lead organizer Steve Meacham.⁸⁷ Meacham, who had been an organizer in Cambridge in the fight to defend rent control, was now organizing tenant unions in buildings located in Jamaica Plain and Roxbury.⁸⁸ Grossman and his students began representing individual tenants in their eviction cases, and they also represented the tenant unions organized by CLVU in collective bargaining negotiations with the landlords.⁸⁹ In particular, they would use the poor conditions in the properties as leverage against the landlords⁹⁰ because, in Massachusetts, poor conditions can mean both money damages for a tenant and defense to eviction.⁹¹ Similar to Bellow’s approach in the 1980s, this method “communicated directly to landlords the risk of increased cost and exposure that would accompany efforts to empty substandard residential property for redevelopment.”⁹² Grossman and Meacham employed this combination of legal and political strategies, including the consistent use of “eviction free zones,” to force landlords into collective bargaining agreements where the tenants would forgo their claims in exchange for long-term leases with affordable rents and commitments to conduct repairs.⁹³

The partnership of Grossman and Meacham was significant not only because of their complementary tactics but also, in the words of Betty Hung, because they had “a shared theory of social change.”⁹⁴ Hung believes that “[f]or those dedicated to the law and organizing model, it seems imperative that there be commitment to a theory of social change based on the primacy and leadership of affected community members and, thus in practice, a prioritization of community organizing *complemented* by legal and other social change strategies.”⁹⁵

85. Bellow, *supra* note 35, at 299.

86. Grossman returned to the Legal Services Center in the late 1990s and carried on Bellow’s work even after his premature death in 2000. Upon Bellow’s passing, Grossman wrote: “[Gary] became my mentor and, in a sense, my hero—someone whom I sought to model my life after.” *In Memoriam: David Grossman ’88, Clinical Professor and Lawyer for the Poor*, HARV. L. TODAY (July 14, 2015), <https://today.law.harvard.edu/in-memoriam-david-grossman-88-clinical-professor-and-lawyer-for-the-poor/> [<https://perma.cc/RMT8-SAWQ>].

87. Interview with Steve Meacham, CLVU Lead Organizer, CLVU in Jamaica Plain (Sept. 14, 2021) (interview notes on file with author).

88. *Id.*

89. *Id.*

90. *Id.*

91. See MASS. GEN. LAWS ch. 239, § 8A (2022).

92. Interview with Steve Meacham, *supra* note 87.

93. *Id.*

94. Hung, *supra* note 40, at 21–23.

95. *Id.* at 21.

Grossman and Meacham had a deep commitment to the idea that those most affected must lead. This principle meant, in practice, that it was necessary for the low-income, working class people of color who were being displaced or losing their homes to discuss tactics, decide strategy, and be the public voice and face of the movement. Grossman and Meacham also shared the view that legal strategies should complement organizing and movement building; they are not ends unto themselves.

B. Case Study: Foreclosure Resistance

In 2006 and 2007, a new pernicious force of displacement was growing: foreclosure and the evictions that ensued. In Massachusetts, a foreclosing entity⁹⁶ may conduct a “nonjudicial” foreclosure (i.e., without judicial imprimatur) to attain full title to a property, but the bank cannot attain possession of the property without using the judicial system if a resident chooses not to leave their home.⁹⁷ As a result, Grossman, his students, and other legal aid lawyers who worked regularly in Boston Housing Court began to notice many filings in which banks were the named plaintiffs.⁹⁸

The Harvard Legal Aid Bureau (HLAB) jumped in to start representing these tenants and homeowners. The size and the scale of the problem, however, demanded that HLAB move away from its traditional full representation model.⁹⁹ Former HLAB student Nick Hartigan explained that “we knew that litigating cases only for the few tenants who actively sought legal services assistance would not be sufficient to achieve this broad effect. Rather, tenants would need to file responsive pleadings, request jury trials, and fight every step of the way en masse.”¹⁰⁰ As a result, HLAB and colleagues at LSC reemployed the “focused case representation” model, but rather than focusing on a geographic area or any one landlord, they focused on any tenant or former homeowner who was being evicted by a bank.¹⁰¹

In practice, this focused case representation meant that HLAB and LSC would contact all potential defendants before their court dates, and host weekly clinics to ensure that every tenant who appeared in court to fight post-foreclosure eviction would have representation or attorney advice to support their pro se efforts at fighting foreclosure.¹⁰² Even with the combined resources of the Harvard Law School clinics, the volume was too great even to perform Limited Assistance Representation¹⁰³ and provide brief

96. I will refer to the “foreclosing entity” as the “bank,” but in reality, it was often a loan servicing company that was acting on behalf of the entity that owned the loan.

97. See *Bank of N.Y. v. Bailey*, 951 N.E.2d 331, 335 (Mass. 2011).

98. See Nicholas Hartigan, *No One Leaves: Community Mobilization as a Response to the Foreclosure Crisis in Massachusetts*, 45 HARV. C.R.-C.L. L. REV. 181, 188 (2010).

99. See *id.* at 189.

100. *Id.* at 189–90.

101. *Id.* at 183–84, 190.

102. See *id.* at 190–91.

103. Limited Assistance Representation is an effort to “unbundle” legal services and fill the gap for low-income people who are unable to secure an attorney. See MASS. TRIAL CT. R. XVI.

service and advice without partnering with Greater Boston Legal Services (GBLS) and CLVU. This eventual partnership was called the “Foreclosure Taskforce,” and it is in that space where CLVU first “preached victory through the combination of the legal shield from the Foreclosure Taskforce attorneys and the sword of public action.”¹⁰⁴

The model itself was quickly known as the “sword and shield” model and was incredibly successful in protecting tenants and homeowners facing eviction in Boston Housing Court.¹⁰⁵ This success inspired the Foreclosure Taskforce to try to replicate the model in other communities hit hard by the foreclosure crisis. The model was adapted to community needs and the organizers’ specific styles and approaches, but overall most of the tactics—both legal and extralegal—were largely the same. Each week we¹⁰⁶ would get the list of new cases from the court, and in any case with a bank or servicing company as the plaintiff, the organizers would send letters and knock on doors to make contact and encourage the named defendants to come to a meeting to fill out pro se answers and discovery forms.

Our method was to represent every single tenant or former homeowner who was facing an eviction by a bank post-foreclosure. In that way, we employed the “triage” method, as the word is used by Farbman, wherein the direct service lawyer who “takes in those with the symptoms created by the broader political and social problems as an emergency room takes in all comers.”¹⁰⁷ We would do enough to buy some time and give them the opportunity to join with organizers and other members in the fight. We did not evaluate the merits of their claims or decide who was worthy of our limited resources.

If we met them the day of trial, we would enter a limited assistance appearance in the summary process action. In that appearance, we would argue a motion to file a late answer and request discovery, assuming that the unrepresented foreclosed homeowner had not submitted anything prior to the trial date. The answer would not only assert potential defenses and counterclaims but also request a jury trial. Given the volume of cases, the request for discovery alone could provide weeks, if not months, for the homeowner to connect with the movement and fight to undo the foreclosure,

104. Hartigan, *supra* note 98, at 196.

105. The model was featured on the PBS television program *Bill Moyers Journal*. See Steve Meacham: *Fighting Foreclosure*, PBS (May 1, 2009), <https://www.pbs.org/moyers/journal/05012009/profile2.html> [<https://perma.cc/E3Y2-S5FN>].

106. I use the term “we” because I was hired by HLAB in 2011 to expand the sword and shield model outside of Boston. I had previously worked at GBLS in the Consumer Rights Unit providing full representation to homeowners fighting foreclosures and learned firsthand how few people I could serve using this traditional legal services approach. I worked in a number of communities (e.g., Brockton, Randolph, Stoughton, and Worcester), but spent the majority of the next four years in Lynn, Massachusetts, working daily with members and organizers of LUC. In particular, I worked with the extraordinary LUC lead organizer Isaac Simon Hodes, who created a version of the sword and shield model uniquely suited to his community.

107. Farbman, *supra* note 4, at 1881 n.6; see also *supra* note 34 and accompanying text.

negotiate for a modified loan, or complete a “buyback” via a nonprofit.¹⁰⁸ In short, we “used delay, procedural entanglement, and building public attention as strategies in nearly every case.”¹⁰⁹

Our representation of the tenants and homeowners across the board forced the banks’ attorneys and the court to change their behavior. They knew that, in every case, we were going to ask for discovery, demand a jury trial, and most likely file dispositive motions based on the discovery received. Initially, many Housing Court judges were extremely hostile to the efforts of legal aid lawyers pushing for any protections for homeowners,¹¹⁰ and routinely ruled that the Housing Court did not have jurisdiction to hear any challenge to the foreclosure itself.¹¹¹ Furthermore, many Housing Court judges adopted the view of the banks that argued that because the former homeowners had never been tenants, they were not entitled to raise any substantive defenses or counterclaims.¹¹² Due to the combined efforts of HLAB, GBLS, and LSC, the Massachusetts Supreme Judicial Court repeatedly overruled the Housing Court’s narrow interpretation of its jurisdiction or the rights of former homeowners.¹¹³

108. Nathalie Martin & Max Weinstein, *Addressing the Foreclosure Crisis Through Law School Clinics*, 20 GEO. J. ON POVERTY L. & POL’Y 531, 537–38 (2013).

109. Farbman, *supra* note 4, at 1905.

110. In addition to the traditional protections for all tenants in Massachusetts, tenants in post-foreclosure properties received greater protections as a result of the passage of Tenant Protections in Foreclosed Properties. MASS. GEN. LAWS ch. 186A (2022). This bill was written by Grossman and his students at HLAB, and at the time it was passed, it was one of the strongest in the nation. Essentially, the law required a landlord to have “just cause” to evict a tenant; as defined by the statute, just causes for eviction included a tenant’s refusal to pay rent or violation of a material term of their lease. *See* MASS. GEN. LAWS ch. 186A, §§ 1–2 (2022). Because the banks had no interest in becoming landlords, they almost never asked for rent or accepted it, and thus the law was incredibly effective at protecting tenants from eviction.

111. *See, e.g.*, *Bank of N.Y. v. Bailey*, 951 N.E.2d 331, 332 (Mass. 2011) (“BNY argued that the housing court lacked jurisdiction to address the claim raised by Bailey’s defense, and that it had made out a prima facie claim for superior possession by virtue of the deed, a copy of which was attached to the complaint. The motion judge agreed; she allowed BNY’s motion, and entered summary judgment in favor of BNY.”).

112. *But see* *Bank of Am. v. Rosa*, 999 N.E.2d 1080, 1085 (Mass. 2013) (consolidated appeals) (affirming the decision of a rare Housing Court judge who did find that Housing Court had jurisdiction to hear defenses and counterclaims that challenge title in postforeclosure cases).

113. In *Bailey*, argued by an HLAB student under the supervision of her clinical instructor Esme Caramello, the Supreme Judicial Court found that the Housing Court had “jurisdiction to consider the validity of the plaintiff’s title as a defense to a summary process action after a foreclosure sale pursuant to [MASS. GEN. LAWS ch. 239, § 1 (2022)].” 951 N.E.2d at 332. Essentially, this case allowed us to argue that improper foreclosures invalidated the bank’s title and were fatal to their summary process case. What was considered an improper or “void” foreclosure was vigorously contested by legal aid lawyers as well. *See generally* *Fed. Nat’l Mortg. Ass’n v. Marroquin*, 74 N.E.3d 592 (Mass. 2017); *Pinti v. Emigrant Mortg. Co.*, 33 N.E.3d 1213 (Mass. 2015); *Eaton v. Fed. Nat’l Mortg. Ass’n*, 969 N.E.2d 1118 (Mass. 2012); *U.S. Bank Nat’l Ass’n v. Ibanez*, 941 N.E.2d 40 (Mass. 2011); *Bevilacqua v. Rodriguez*, 955 N.E.2d 884 (Mass. 2011). All of these cases were litigated by one of the three shield partners: HLAB, LSC, or GBLS. *See* Martin & Weinstein, *supra* note 108, at 531 (describing some of the GBLS, LSC, and HLAB cases); *see also* Larisa G. Bowman et al., *Remembering Chief Justice Gants as a Champion for Housing Justice*, 62 B.C. L. REV. 2840,

The cases that went up to the Massachusetts Supreme Judicial Court were almost always cases where we had initially encountered the person in the course of our triage method. We did not search for law reform cases. Instead, they bubbled up through the sheer volume of cases, and the repetitiveness of the errors that the national banks and servicers made. As an example, a pivotal case that allowed former homeowners to bring substantive defenses and counterclaims—including discrimination and unfair and deceptive acts and practices claims—in summary process originated from some of the families we met in Northeast Housing Court in Lynn.¹¹⁴ These families became active members and leaders of LUC.

One of the most protracted fights to restore a family's home started with an encounter in the hallway of the Northeast Housing Court. The Northeast Housing Court was located in a modest, single-story office building with a narrow hallway leading to small, crammed courtrooms. On Tuesdays, when the Housing Court heard summary process cases, the hallway was always jammed with people. It was the summer of 2011, and the lead organizer of LUC ran into a man, Mr. H, whom he knew from playing soccer in Lynn. The organizer would attend court every Tuesday looking for people who, like this gentleman, were facing eviction after foreclosures on their homes. The organizer quickly advised Mr. H. not to agree to move out of his home, and instead to assert his right to a jury trial and seek discovery. He then advised Mr. H to come to an LUC weekly meeting to figure out how to fight for his home.

Mr. H and his wife were foreclosed on early in 2011. Their mortgage loan was insured by the U.S. Department of Housing and Urban Development's (HUD) Federal Housing Administration (FHA) and as a result had additional protections for homeowners in default. These protections required a bank or its servicer to have a face-to-face meeting with the homeowner to address the default and avoid a foreclosure.¹¹⁵ Banks routinely ignored this requirement and rushed to foreclose to collect on the insurance provided by the government. We argued that the foreclosing entity must comply with this face-to-face meeting requirement in order to strictly comply with the terms of the mortgage. Because they had never had such a meeting with the mortgagors, the foreclosing entity had failed to strictly comply with the terms of the mortgage, rendering the foreclosure void.¹¹⁶

After we employed the limited procedural protections of summary process and of the nonjudicial foreclosure statute beyond the bank's expectation, the

2844–48 (2021) (describing Chief Justice of the Supreme Judicial Court Ralph D. Gants's role in the development of the Supreme Judicial Court's jurisprudence in this area of law).

114. See *Rosa*, 999 N.E.2d at 1083. One of the pro se answers that formed the basis of this case had been filled out at Dunkin' Donuts shortly after meeting the former homeowners in court.

115. See 24 C.F.R. § 203.604(b) (2022).

116. See *Wells Fargo v. Cook*, 31 N.E.3d 1125, 1130–32 (Mass. App. Ct. 2015) (holding that the face-to-face requirement contained in the HUD mortgage was considered a “term of the mortgage” under Massachusetts Power of Sale, MASS. GEN. LAWS. ch. 183, § 21 (2022), and therefore strict compliance was required).

bank eventually dismissed the eviction case in exchange for negotiating an alternative solution called a “buy back.” Despite HUD’s written guidance that would have allowed a sale back to Mr. H, HUD’s practices “in the field” were preventing it.¹¹⁷ Upon realizing that HUD was the roadblock for this sale and many others, LUC organized to change these practices. This organizing included a public protest interrupting a speech of Julián Castro, then secretary of HUD, when he came to Boston to speak at the John F. Kennedy Presidential Library and Museum.¹¹⁸ While the protest produced many subsequent meetings with HUD both in Boston and Washington, D.C., HUD’s approach did not change.¹¹⁹

Mr. H., however, was equally resolute. And finally, the bank relented and decided to forgo the HUD insurance and sell back directly to the family. This resolution was not completed until 2019—eight years after the foreclosure and twelve years since the original default. This case was an outlier in the time it took to resolve and the resources it consumed, but we had many cases that lasted three, four, and five years after the successful defeat of the summary process case. In almost all of these cases, the individuals remained dedicated members of LUC and continued to grow the movement in Lynn. This committed group of homeowners and tenants who had suffered in the foreclosure crisis remains an essential component of the housing justice movement in Massachusetts and is a key reason that the Commonwealth passed the most aggressive eviction moratorium at the start of the pandemic in 2020.¹²⁰

Looking at our methods and results from the outside, a critic might argue, as Farbman suggests, that “in a robust adversarial system, *all* lawyering is resistance lawyering”¹²¹—and that what we were doing in the foreclosure crisis was no different than what any litigator would do to achieve the goals of a client “by making [the legal system] more complex, opaque, or nonfunctional.”¹²² But, like the resistance lawyers that Farbman describes, we were not merely “manipulating discovery rules to reach a better outcome.”¹²³ Instead, we “oppose[d] the procedural regime underlying the cause of action.”¹²⁴

117. See Rachel G. Bratt, *Post-Foreclosure Conveyance of Occupied Homes and Preferential Sales to Nonprofits: Rationales, Policies, and Underlying Conflicts*, 27 HOUS. POL’Y DEBATE 28, 44 (2017).

118. See Bill Forry, *HUD Chief Julián Castro Faces Critics at JFK Library Forum*, DORCHESTER REP. (Apr. 21, 2016), <https://www.dotnews.com/columns/2016/hud-chief-julian-castro-faces-critics-jfk-library-forum> [<https://perma.cc/AS6W-9R2Y>].

119. Bratt, *supra* note 117, at 31.

120. Miles Howard, *Massachusetts Showed State How to Create an Eviction Ban. Now It’s Backpedaling*, SHELTERFORCE (Nov. 5, 2020), <https://shelterforce.org/2020/11/05/massachusetts-showed-states-how-to-create-an-eviction-ban-now-its-backpedaling/> [<https://perma.cc/5M23-AJFQ>].

121. Farbman, *supra* note 4, at 1932.

122. *Id.*

123. *Id.* at 1933.

124. *Id.*

In the post-foreclosure cases, we were both fighting the “speedy” resolution of the summary process scheme and increasing the actual process due to homeowners and tenants under the law. These changes forced banks to reconsider their calculus when it came to foreclosing in Massachusetts. Instead of deciding it was financially preferable to foreclose and evict families, let the house sit empty to the detriment of the neighborhood, and/or resell at a substantial loss, we wanted them to modify the predatory or unaffordable loans before the foreclosure. Beyond the specific policies, we wanted to bring the moral lens to the actions of the banks and all those who were complicit in destroying the lives of so many people. Similar to the abolitionist lawyers who saw the courtroom contests as proxy battles, our goals were connected to the larger national struggle against a deeply oppressive structure of debt, greed, and wealth extraction largely from individuals and communities of color.¹²⁵

C. Case Study: Gentrification Resistance

On a Monday morning in the winter of 2018, HLAB received two phone calls. Each was from a tenant who had received a summons and complaint addressed to Jane and John Doe, which was highly unusual. An experienced third-year law student noted the oddity and looked up the cases on the online court docket system.¹²⁶ Her search revealed that six cases had been filed by the same landlord—all against Jane and John Doe. Suspecting that this was a “building clear-out,” she and the other students contacted CLVU to mobilize a response.

After voting to accept the initial cases on a limited assistance basis, the students asked the tenants to come to a weekly Tuesday night CLVU meeting the next evening¹²⁷ and to bring any neighbors they could. At that first Tuesday night meeting, only a few residents showed up, but Steve Meacham, lead organizer at CLVU, spoke to those present about forming a tenant association. The students also strongly encouraged the tenants to invite their neighbors in the building to attend HLAB’s regular Friday morning Answer and Discovery clinic in Cambridge. A number of tenants did attend the clinic, but some tenants still had not been reached. As a result, Project No One Leaves, one of Harvard’s Student Practice Organizations, was mobilized to canvass the building on their Saturday morning canvass.¹²⁸ The students

125. In 2015, the Federal Reserve Bank of Boston documented that only a third of Black residents in Boston owned a home, and those that did had much higher levels of mortgage debt than white families. See ANA PATRICIA MUÑOZ ET AL., FED. RSRV. BANK OF BOS., *THE COLOR OF WEALTH IN BOSTON* 20 (2015). The average net worth of a white family in Boston was \$247,500 as opposed to \$8 for a Black family. *Id.*

126. HLAB is a two-year commitment for Harvard Law School students. As a result, the student membership is approximately twenty-five 2Ls and twenty-five 3Ls.

127. Weekly meetings are a central aspect of CLVU’s model of organizing, which employs the “five masses”: Mass Outreach, Mass Meeting, Mass Casework, Mass Actions, and Mass Political Discussions. See NEYMAN, *supra* note 74, at 16–17. HLAB and other “shield” lawyers attend this meeting every week to provide brief services and advice.

128. See Hartigan, *supra* note 98, at 182.

brought the pro se forms to the building and filled them out on-site for all of the remaining tenants except one.¹²⁹ In five days, the students had learned of the existence of the building and the clear-out, and had filed and served responsive pleadings for all but one person in the building.

The tenants lived in a building located on a one-way street behind a new transit stop on the border of the Roxbury and Dorchester neighborhoods of Boston. This area of Boston is ground zero for gentrification due to the decades-long disinvestment and more recent reinvestment in response to advocacy by the local constituents of color.¹³⁰ The building itself was originally built to have six three-bedroom apartments. Over the years, the building had become dangerously run-down. The owner only kept it profitable by making minimal repairs and renting to individuals who were unable to acquire secure, sanitary, and affordable housing elsewhere.

In 2018, the owner decided to sell the building to a real estate “investor.” The owner had promised the building empty and had hired a lawyer inexperienced in eviction matters to clear the tenants out. At this time, each unit had three to four unrelated residents who had individual rooms—living rooms that had been turned into bedrooms—with locks on their bedroom doors and shared use of the kitchen and the bathroom. When the constable served the summonses and complaints, he dumped them all on the floor of the front hallway. None of the documents contained any actual names, instead they were addressed only “to Jane and John Doe.” As a result, we helped file motions to dismiss on behalf of each tenant not properly named.

On the day of the hearings for the motions, the students and I (as their supervisor) filed notices of limited appearance in order to argue before the Eastern Housing Court.¹³¹ The HLAB student argued that because summary process action is an “in personam” rather than “in rem” remedy, the failure to name an actual person, as opposed to Jane and John Doe, was fatal. It was not only a violation of summary process rules but also a violation of the Massachusetts Rules of Civil Procedure because it did not give the tenant-defendants actual notice of the lawsuit.¹³² The court ruled in the tenants’ favor and dismissed all five lawsuits.¹³³

CLVU had been quick to identify some leaders in the building, and a tenant association was formed and active almost immediately. In addition to the

129. HLAB students conducted a mini clinic where they worked with tenants to complete pro se answers and discovery forms, a transfer from the District Court (where the cases had originally been filed) to the Housing Court, and motions to intervene and dismiss because the tenants had not been properly named.

130. Chris Lovett, *At 6 Humphreys Place, a Quest for Affordable Housing Gains a Victory: City, Other Allies, Help Residents in Uphams Corner Gain Control*, DORCHESTER REP. (Dec. 30, 2021), <https://www.dotnews.com/2021/6-humphreys-place-quest-affordable-housing-gains-victory-city-other> [<https://perma.cc/5UV8-YFTL>].

131. See *supra* note 104 and accompanying text (discussing limited assistance representation).

132. See MASS. R. CIV. P. 4(b).

133. The court also denied the landlord’s motion to amend due to futility. The notices to quit were similarly flawed, and if the tenancy was never properly terminated, the landlord could not make his prima facie case for possession.

legal defense, residents had signed a petition demanding that they be allowed to remain, pay affordable rent, and receive long-term leases to prevent future displacement. But shortly after the court's dismissal, the property was sold from the longtime owner to a real estate investor. The following month, the same attorney for the new owner tried again to evict the tenants. CLVU and the tenant association recognized that public pressure needed to be increased, and they held a vigil at the building to make similar demands of the new owner.

These new evictions were also fundamentally flawed because they were brought in the name of the investor himself, not the limited liability company that had legally purchased the building.¹³⁴ We filed motions to dismiss on behalf of the remaining tenants, and the court granted them. In December 2018, the limited liability company filed a third set of summary process cases. But again, they were not in strict compliance with the Uniform Summary Process Rules, and the court granted our motions to dismiss.¹³⁵ Instead of choosing to fix the problem, the landlord decided to file a motion to reconsider, which HLAB opposed—and won.¹³⁶

Similar to Farbman's description of the abolitionist lawyers' use of the Fugitive Slave Act, where the "law did not anticipate a robust legal process," we leveraged the technical process contained in the Summary Process Statute and rules to stave off evictions.¹³⁷ Farbman observed, "by claiming more process than was intended, the abolitionists were undermining the very purposes of the Law itself."¹³⁸ Likewise, we—the shield—were claiming more process than the summary process statute and rules intended, thereby thwarting their purpose to ensure "speedy[] and inexpensive determination" of eviction actions.¹³⁹

A full year had now passed since the new owner had purchased the building, and he had accomplished some of his intended displacement by attrition, but none by the court system. His attorney again filed a fourth round of summonses and complaints, but again they were not in compliance with the Uniform Summary Process Rules.¹⁴⁰ We filed yet another round of motions to dismiss.¹⁴¹ The court again allowed the motions.

134. See *Rental Prop. Mgmt. v. Hatcher*, 97 N.E.3d 323, 325 (Mass. 2018) (reaffirming that only the "owner or lessor" of a property is entitled to use summary process to recover possession of a residential property). The named plaintiff was not the lessor because no leases existed, nor was he the owner because the owner was the limited liability company. *Id.*

135. The landlord's attorney had failed to file the notices to quit with the summonses and complaints in violation of Massachusetts Uniform Summary Process Rule 2(d). See MASS. UNIF. SUMMARY PROCESS R. 2(d).

136. 57-59 Franklin 02145, LLC v. Bolding, 18H84SP005565 (Mass. E. Hous. Ct. 2019).

137. Farbman, *supra* note 4, at 1908.

138. *Id.*

139. See MASS. UNIF. SUMMARY PROCESS R. 1 cmt.

140. This time, the summons had been served on May 14, 2019—fewer than seven days before the entry date of May 20, 2019—in violation of Massachusetts Uniform Summary Process Rule 2(b), which requires at least seven days. MASS. UNIF. SUMMARY PROCESS R. 2(b).

141. See, e.g., 57-59 Franklin 02145, LLC v. Eric Boyd, 19H84SP2081 (Mass. E. Hous. Ct. 2019).

In July 2019, the landlord and his attorney filed the fifth set of summary process cases, and they were finally procedurally sufficient.¹⁴² Eventually, all the cases were scheduled for jury trials.¹⁴³ The first of the four cases went to jury trial in October 2019.¹⁴⁴ Throughout the trial, CLVU members and other members of the community were in the gallery to support the tenants—visible for the judge, the landlord, and the jury to see. Many times, members wore CLVU’s signature neon yellow t-shirts.¹⁴⁵ When we would have a break or were waiting for the jury verdict, the student attorneys and I would gather with the tenants, the organizers, and CLVU members to discuss the events of the trial. The presence of the community was essential to bolstering the spirits of the two tenants participating in the trial because it was emotionally and physically exhausting for them. We also chose to put as many of the other tenants on the stand as the judge would allow to testify not only to the conditions but also to the landlord’s discriminatory treatment of them—all persons of color.

In the end, the jury found for the tenants on their claims of retaliation for engaging in protected activity (participating in a tenant association), interference with quiet enjoyment, breach of the warranty of habitability, and violation of the Massachusetts Consumer Protection Act,¹⁴⁶ but did not find a violation of the state antidiscrimination law based on the tenants’ race or national origin. Both sides were now facing another three jury trials in seriatim. We began to engage in serious settlement discussions, but it took over four months to agree to final terms. In exchange for the dismissal of all the tenants’ claims, the landlord agreed to enter into five-year leases with affordable rents for all the tenants in the tenant associations; waive any claims for back rent (two years at that point); make enumerated repairs (the landlord planned a gut rehabilitation of each unit); waive any demand for rent until all repairs were complete; and pay a fraction of the attorney’s fees. We finalized the agreement and entered it with the court days before the pandemic began.

If we had finished the story of this “case” at the point where the lawyers usually exit the scene, we might have concluded with a quote from after the jury trial win. One of the tenant-defendants, Babatunde Kunnu, was interviewed after the trial and said: “We are powerful. We needed to know our rights, and we needed to exercise our rights. With support from City

142. 57-59 Franklin 02145, LLC v. Jones, 19H84SP002765 (Mass. E. Hous. Ct. 2019).

143. *Id.*

144. *Id.* What ensued was an eight-day trial with three HLAB students (one 3L and two 2Ls) representing the tenants throughout, from the voir dire, opening statements, and witness examinations to closing arguments.

145. Prior to the pandemic, CLVU members clad in their neon yellow t-shirts would attend Eastern Housing Court on the “trial day” for most summary process cases. The First Justice of the Eastern Housing Court, who was not presiding over this trial, was openly hostile to the t-shirts and would instruct the court officer to order CLVU members to take them off or turn them inside out when they were sitting in the gallery in support of a tenant facing eviction.

146. MASS. GEN. LAWS ch. 93A (2022).

Life/Vida Urbana and the amazing lawyers at Harvard Legal Aid Bureau, we realized we are a lion.”¹⁴⁷

But knowing and exercising one’s rights is rarely enough. It has been two years since that victory.¹⁴⁸ CLVU and the tenant association have had to use many of their “sword” tactics both before and after the trial; their work has included organizing public protests, vigils, testimony, and confrontation at public meetings, as well as generating media stories and letters to public officials.¹⁴⁹ As a result of these efforts and ongoing lawyering, the owner has finally sold the building to Boston Neighborhood Community Land Trust, making this building permanently affordable housing controlled by the community.¹⁵⁰

In sum, the use of the sword, shield, and offer approach shifted power from the developers to the community and to the residents in particular. The fight for this building has also been a rallying cry for an entire neighborhood undergoing similar displacement pressure, and it has awakened the city to the critical need to intervene and to preserve housing for the existing low-income residents.¹⁵¹

CONCLUSION

This Essay has described how housing lawyers providing eviction defense within the context of the “sword and shield” model are “subversive lawyers.” We share the methods of a “resistance lawyer” as defined by Professor Farbman, by engaging in the “regular, direct service practice” of eviction defense “within a procedural and substantive legal regime” that is often “unjust.”¹⁵² At the same time, we mitigate “the worst injustices” of the eviction system by working with organizers, activists, and community

147. Trojano, *supra* note 6, at 15.

148. Justice delayed is justice denied for some of our clients—one of whom passed away during this period, another who had a stroke and is now too disabled to live in the building, and a third who contracted COVID-19 and decided to leave permanently. Furthermore, we spent over a year trying to enforce the settlement agreement to repair the building, including twenty-five court appearances, before the building was sold to the Boston Neighborhood Community Land Trust.

149. Joe Tache, *Boston Residents Unite to Fight Landlord Greed*, LIBERATION (Nov. 4, 2018), <https://www.liberationnews.org/boston-residents-unite-to-fight-landlord-greed/> [<https://perma.cc/F663-JXQP>]; see also Chris Burrell, *Real Estate Boom Threatens Rooming Houses at the Bottom of the Housing Market*, GBH (July 1, 2019), <https://www.wgbh.org/news/local-news/2019/07/01/real-estate-boom-threatens-rooming-houses-at-the-bottom-of-the-housing-market> [<https://perma.cc/T3TX-D3QL>].

150. The Boston Neighborhood Community Land Trust was created during the foreclosure crisis and was formerly known as the Coalition for Occupied Housing in Foreclosure (COHIF). COHIF allowed homeowners and tenants to remain in foreclosed properties as renters in now permanently affordable housing. An entire essay could be written about the lessons learned from this experiment, but suffice to say, the entity is now a land trust and continues to serve as a critical piece of the “offer.”

151. Sheila Dillon, Boston’s chief of housing and director of the Department of Neighborhood Development, noted in an article about the acquisition of the building: “It’s very important that we supported the tenants . . . [while] creating more affordable housing in an area that’s becoming increasingly expensive.” Lovett, *supra* note 130.

152. Farbman, *supra* note 4, at 1880.

members “to resist, obstruct, and dismantle the system itself.”¹⁵³ We are also “subversive” due to our efforts to overturn the traditional oppressive effects of the eviction process on low-income people and people of color who are losing their homes. We strive to have clients cease being clients and instead become members of a movement who believe that “when they fight, they win!” This transformation grows the power of the housing justice movement to dismantle the present system and to build a more just and equitable future.

153. *Id.*