

REPARATIONS FOR GENTRIFICATION?: A RESPONSE TO
PROFESSOR INFRANCA’S ‘DIFFERENTIATING
EXCLUSIONARY TENDENCIES’

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Professor John Infranca’s important article, *Differentiating Exclusionary Tendencies*,¹ takes on one of the most difficult questions in local politics today. The status quo in every area entrusted to local governments—housing, transportation, schools, policing—practically by definition has disproportionately negative impacts on the most disadvantaged and marginalized members of our society. But efforts to reform the status quo can have unintended consequences that, again almost by definition, will have disproportionately negative impacts on those same people. It is often said that, for this reason, any change to the status quo should “center” around the perspectives of marginalized people, but the very fact of being marginalized makes this extremely difficult. Even the most earnest efforts to involve marginalized communities in public participation processes ends up favoring the most privileged.² Making matters worse, those with a vested interest in maintaining the status quo may strategically deploy fake concerns about marginalized people to launder their own self-interested opposition to change. In practice, this often means that nothing is done to address the major problems we confront because of concerns, real or manufactured, about making the worst off even worse off.

The focus of Professor Infranca’s paper is the effort underway in many high-opportunity regions to reform local land use regulations. It is widely acknowledged that regulations restricting the use, density, bulk, height and design of new housing has helped create a crisis of supply and affordability, contributing to increased home costs, sprawl, racial segregation, homelessness, and many other societal ills.³ Several states have now taken steps to curtail or preempt local land use regulations as they relate to housing.⁴ But many erstwhile housing advocates actually oppose these efforts because they say that loosening land use regulations will trigger or accelerate “gentrification,” a nebulous term generally referring to the phenomenon whereby places that have been traditionally

1. John Infranca, *Differentiating Exclusionary Tendencies*, 72 FLA. L. REV. 1271 (2020).

2. See Jerusalem Demsas, *Not Everyone Should Have a Say*, THE ATLANTIC (Oct. 19, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/environmentalists-nimby-permitting-reform-nepa/671775/> [<https://perma.cc/GE4W-H37H>] (explaining that community participation processes are “undemocratic by nature” and tend to reflect the views of people with time and money, even where efforts are made to reduce barriers to participation for marginalized communities).

3. See Infranca, *supra* note 1, at 1273–74;

4. See Kenneth A. Stahl, *Home Rule and State Preemption of Local Land Use Control*, 50 THE URB. LAW. 179, 181 (2021).

occupied by disadvantaged communities, usually communities of color, are repurposed for white middle-class consumption.⁵ The argument is that loosening land use regulations will make these communities more desirable for white middle-class investors and hasten the gentrification process. Those who take this view often argue that more robust processes of public participation in land use decision-making are required in order to ensure that the perspectives of communities at risk of gentrification are adequately considered.⁶ In practice, however, those who tend to participate in land use decisions are older, whiter, more affluent homeowners who deploy public participation to keep poor people out of their suburban enclaves, reinforcing existing patterns of segregation to the detriment of already disadvantaged groups.⁷

Professor Infranca exhaustively demonstrates the widespread benefits of zoning reform and convincingly argues that loosening land use regulations is unlikely to harm communities at risk of gentrification; in fact, it is more likely to benefit them.⁸ Studies consistently show that development of market-rate housing in lower-income communities of color reduces housing costs and does not contribute to displacement.⁹ Nevertheless, Professor Infranca acknowledges that these communities are justified in being mistrustful of zoning reform, given the many harms that previous policy “reforms” such as urban renewal, redlining, discriminatory highway building, and exclusionary zoning have done to those communities.¹⁰

Professor Infranca then takes on the real conundrum in addressing the housing crisis: how do we empower the marginalized to have a real, effective voice in land use decision-making processes that affect them without actually empowering the most privileged members of our society to further their own interests at the expense of the marginalized?

Professor Infranca wisely eschews more participation as a remedy, observing correctly that efforts to make participation more responsive to the concerns of disadvantaged communities almost always work to entrench the interests of the most powerful.¹¹ Instead, he proposes to give individuals affected by neighborhood change in historically disadvantaged communities a direct role in shaping neighborhood change and financial compensation if they agree to participate in it. Specifically,

5. See Infranca, *supra* note 1, at 1282–85; see SHARON ZUKIN, *NAKED CITY: THE DEATH AND LIFE OF AUTHENTIC URBAN PLACES* 9 (2010); see JAPONICA BROWN-SARACINO, *A NEIGHBORHOOD THAT NEVER CHANGES: GENTRIFICATION, SOCIAL PRESERVATION, AND THE SEARCH FOR AUTHENTICITY* 51–56 (2009).

6. See Infranca, *supra* note 1, at 1313.

7. See *id.* at 1314–17.

8. See *id.* at 1288–94.

9. See *id.*

10. See *id.* at 1297–1301.

11. See *id.* at 1314–17.

he proposes a financial device modeled on the popular “transferable development rights” (TDR) scheme practiced by many municipalities. In one iteration, called the I-TDR, investors desiring to develop in gentrifying neighborhoods would have to purchase development rights from existing residents.¹² This mechanism allows those who are truly affected by neighborhood change to express their preferences through the marketplace, giving them real power over whether and how their neighborhood changes and the ability to benefit financially from it. Professor Infranca sees this mechanism as a form of reparations for the systemic racism that has segregated our metropolitan regions and established the preconditions for gentrification.¹³

Reparations in the form of individual property rights solves one of the key problems Professor Infranca identifies. Because the I-TDRs are narrowly targeted at individual existing residents of gentrifying communities, there is no risk that they will be appropriated for the benefit of affluent communities in the way that existing processes of public participation so often are. Professor Infranca’s idea also solves a related problem: we often do not know who really speaks for marginalized communities, and the advocacy groups that claim to speak on their behalf usually have their own motivations that may be at odds with the actual interests of marginalized communities. Consider this example: one of the most influential housing advocacy groups in California, Western Center for Law and Poverty, claims to speak on behalf of low-income residents of the state and in that capacity virtually always opposes any kind of statewide land use reform, citing concerns about gentrification and displacement.¹⁴ But one of Western Center’s long-time staff attorneys is also the mayor of Santa Monica, an affluent city in Los Angeles County with a long history of restrictive zoning practices that also, coincidentally, typically opposes statewide land use reform because it would mean that Santa Monica would have to finally make provisions for many new units of affordable housing.¹⁵ Professor Infranca’s approach would take power

12. *See id.* at 1322–25.

13. *See id.* at 1324 n.261.

14. Recently, for example, California passed a landmark bill reducing mandatory parking minimums, which often function to raise the cost of housing. *See* A.B. 2097, 2021–22 Leg., Reg. Sess. (Cal. 2022). Western Center opposed the bill on the grounds that cities need parking requirements as leverage to negotiate more affordable housing from developers, citing no empirical evidence that any city has ever actually done this. *See* Letter from Brian Augusta, CRLA Foundation, Anya Lawler, Public Interest Law Project, and Cynthia Castillo, Western Center on Law & Poverty, to Governor Gavin Newsom (Sept. 26, 2022), <https://www.dropbox.com/s/fesuu51bpumg9qf/AB%202097%20Request%20for%20Vet%20o%209.6.22.pdf?dl=0> [<https://perma.cc/584S-8BNM>].

15. *See Mayor Sue Himmelrich Biography, Santa Monica City Council*, CITY OF SANTA MONICA, <https://www.smgov.net/departments/council/content.aspx?id=50555> [<https://perma.cc/JZF2-PNB3>].

out of the hands of groups like Western Center and place it directly in the hands of the people most directly affected by historical and systemic racism.

Having praised Professor Infranca's approach, I must also point out some of its flaws. First, the idea of an individual property right is somewhat at odds with Professor Infranca's celebration of the idea of "solidarity."¹⁶ The I-TDR is an unlikely tool for achieving a sense of solidarity among community residents. Assuming, as Professor Infranca does, a robust market for selling I-TDRs, developers will easily be able to pit neighbor against neighbor in pursuit of the cheapest development rights.¹⁷ Where the developer has lots of potential sellers from whom to purchase development rights and residents presumably only have a handful of developers to whom they can sell (parcels of land to develop being finite), the developer holds a significant bargaining advantage. Making matters worse is the fact that community residents are often poor and may be far less knowledgeable about the intricacies of real estate markets than developers are, increasing the likelihood that they will sell their development rights too cheaply.¹⁸

The idea that marginalized people are likely to sell their rights too cheaply in a market system—the same market system that has exploited them for years—may explain why so many of the housing advocacy groups who oppose land use reform see their role as fighting capitalism and market solutions to the housing crisis. For these groups, leverage against developers to extract as much of the value of development as possible for the community can only be achieved through collective action, which is typically the threat of litigation or the use of political participation processes to generate delays.¹⁹

16. See Infranca, *supra* note 1, at 1313 (observing that "principles of solidarity and the common good" provide "a limit on tendencies towards privatization and exclusion").

17. See *id.* at 1324 (proposing "thick market" for I-TDRs in order to "make it easier [for developers] to obtain and use I-TDRs for new development"). Presumably, the reason Professor Infranca assumes a robust market is because otherwise development in gentrifying neighborhoods would be made too expensive, and communities would lose the benefits of development.

18. Professor Infranca's scheme has some echoes of the notorious "block-busting" schemes popular in the mid-twentieth century. Realtors would scare white families into listing their homes for sale with false rumors that neighbors down the street were planning to sell their homes to black people. In this case, developers could presumably pressure residents to sell their development rights by puffing about how they have been talking to other neighbors and are close to a deal to buy the development rights. What characterizes both cases is an inability to engage in collective action because of individual rather than collective property rights. On the collective action problem that enabled blockbusting, see RICHARD R. W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW & SOCIAL NORMS* (2013).

19. See Daniela A. Tagtachian, Natalie N. Barefoot & Adrienne L. Harreveld, *Building by Right: Social Equity Implications of Transitioning to Form-Based Code*, 28 J. AFFORDABLE HOUS. & CMTY. DEV. L. 71, 100, 109 (2019) (arguing that removing public participation processes deprives community of leverage to demand improvements); see also Kenneth A. Stahl,

Granted, as I said before, it is questionable whether many of these “housing advocates” actually speak for the communities they claim to represent. And the anti-capitalist rhetoric tends to be a bit hollow since, at the end of the day, these housing advocates are ultimately propping up the capitalist status quo in which a small cadre of homeowners keeps the rest of society in rent-peonage. Nevertheless, it seems these groups have a point that community solidarity is difficult to achieve under the sort of individualistic, “neoliberal” economic solution that Professor Infranca proposes.

Professor Infranca has a difficult task here: he wants to make development in gentrifying neighborhoods cheap enough that development will not be deterred, so communities will have the benefits that come from development. But he also wants to give existing residents of those communities meaningful compensation for the costs of neighborhood change. It is not clear to me that both of these objectives can be achieved, or even if they should—if residents are better off, on balance, with new development than without it, then why compensate them at all?

A second concern has to do with Professor Infranca’s framing of the I-TDR as a form of reparations for systemic racism. The problem is that the I-TDR does not necessarily provide reparations to the right people. Given the degree of population turnover in gentrifying neighborhoods, it is uncertain how many residents of such neighborhoods are actual victims of systemic racism rather than, say, early-wave gentrifiers.²⁰ On the flipside, those who have suffered the most from systemic racism are probably not those living in gentrifying neighborhoods, but those living in neighborhoods with generations of concentrated poverty, where developers have no thought of investing capital. While gentrification gets all the media and policy attention, concentrated poverty is a much more common result of systemic racism in practice than gentrification is.²¹ Neighborhoods are often targeted for gentrification precisely because they are not as economically depressed as other minority neighborhoods. So it seems strange that residents of gentrifying neighborhoods would get all the benefits of new investment that Professor Infranca describes plus the added benefit of compensation for the costs of neighborhood change, while neighborhoods that have suffered under disinvestment and concentrated poverty for years get neither investment nor reparations.

Professor Infranca largely dismisses this concern as a problem of

Incorporating Transportation Topics into the Land Use Curriculum, 106 IOWA L. REV. 2451, 2489–91 (2021) (critiquing Tagtachian, *supra* note 19).

20. See JOHN JOE SCHLICHTMAN ET AL., GENTRIFIER 129–171 (2017) (describing different categories of gentrifiers and the ethical conundrums each one presents).

21. *Id.* at 118 (noting that “the only thing worse than investment is disinvestment” and that concentrated poverty is far more common than gentrification).

“under inclusiveness,”²² but I see it as indicative of a larger problem—gentrification takes up all the oxygen in the housing debate, leaving little room to discuss how to address systemic and concentrated poverty. Discussions surrounding gentrification often focus on how to keep people in their homes, but addressing concentrated poverty requires solutions that enable mobility out of distressed communities, or at the very least, some meaningful choice between staying and leaving. Widespread land use reform is, as Professor Infranca observes, likely to enable mobility without creating much risk of forcible displacement. And yet, gentrification continues to be the elephant in the room when it comes to achieving land use reform.

In my opinion, gentrification gets so much more attention in the media, in politics, and in academic literature than concentrated poverty because it plays into anxieties that white liberals have about our own complicity in systemic racism and, more broadly, our anxieties about unwanted change. “Gentrification” is often used today as a metaphor for anything we dislike about societal change,²³ from the “gentrification of the mind”²⁴ to the “gentrification of the heart.”²⁵ Even affluent communities like Beverly Hills openly complain that new housing development will “gentrify” them.²⁶ Gentrification speaks to white society in a way that concentrated poverty does not. Our lives are so far removed from the experience of concentrated poverty that we do not know what to say or do about it, but we all have something to say about seeing our neighborhoods change because it is something we have all experienced. At the end of the day, however, nostalgia is not a policy framework, and any scheme of reparations must address the scourge of concentrated poverty. Land use reform is the first step towards doing just that.

Nothing that I have said diminishes Professor Infranca’s significant achievement. It is a daunting task to thread the needle between the need for land use reform and legitimate concerns about how that reform may affect marginalized communities. Ultimately, a policy judgment must be made about whether the positives of sweeping land use reform outweigh the negatives such reform may visit on particular communities, and this judgment must be made, unfortunately, with limited empirical evidence as to what the outcomes will be and a limited ability, given the general status quo bias in our policymaking, to change course once we have

22. See Infranca, *supra* note 1, at 1301.

23. See Henry Grabar, *Gentrification Got Gentrified*, SLATE (May 3, 2019), <https://slate.com/business/2019/05/gentrification-definition-housing-policy-methodology-cities-suburbs.html>. [<https://perma.cc/PPE9-7E7X>].

24. See generally SARAH SCHULMAN, *THE GENTRIFICATION OF THE MIND* (2012).

25. See SCHLICHTMAN ET AL., *supra* note 20, at 22 (quoting Pope Francis).

26. See Grabar, *supra* note 23.

selected a path. The worst that can be said about Professor Infranca's scheme is that residents will sell their development rights too cheaply, but if that is the cost of achieving widespread land use reform that will bring a large host of potential benefits to both society at large as well as the most marginalized members of our society, then it will be worth it.