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If You Prompt Them, They Will Rule: The Warranty of Habitability Meets New Court Information Systems

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IF YOU PROMPT THEM, THEY WILL RULE: THE WARRANTY OF HABITABILITY MEETS NEW COURT INFORMATION SYSTEMS

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INTRODUCTION

A recent conference on housing rights[1] invited participants to think about the impacts, actual and potential, of the judge-made doctrine of the implied warranty of habitability in residential tenancies. This essay focuses on the warranty, and suggests establishing technology systems for judges to help them give new life to the doctrine and thereby to accelerate actual repair of rental housing through court mandates.

The conference attendees seemed to agree that when trial judges are presented with claimed breaches of the warranty of habitability, they have not, on the whole, used the doctrine to order that repairs actually be effectuated. They do not rule on habitability requirements. They should.

My suggestion for cultivating stronger judicial responses to breaches of the warranty of habitability is two fold: a reinvigoration of the remedy of specific performance and a court technology system with a series of computer screens structured to prompt judges through repair-related information gathering, retrieval, and adjudication steps, leading efficiently to outcomes that link the application of the warranty of habitability doctrine to real world improvements in rental premises.

The proposed technology system will assist judges in a systematic progression, gathering and ruling upon information about repairs whenever the facts require it. Further, if they decline to issue orders for repair or to follow up with enforcement steps, a screen will prompt them to state the basis for this exercise of discretion. Both the repair-related information and the explanation of judicial decision making will be part of the

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1. The John Marshall Law School's Conference: "What King Wrought" — The Impact of the Summer of 1966 on Housing Rights: A Forty-Year Retrospective and Prospective (Sept. 8-9, 2006).

cumulative information gathered for each particular case. It will be readily available to judges within the court when they are called upon to adjudicate cases involving the same building or apartment, creating a powerful institutional memory.

I. CONTOURS AND ORIGIN OF THE WARRANTY OF HABITABILITY DOCTRINE

The implied warranty of habitability in residential premises is a dramatic, 20th century judge-made transformation of ancient common law doctrine. In 1970 judges, not legislatures, began to overthrow the weight of the past by holding that a tenant's covenant to pay rent and a landlord's implied covenant to maintain residential dwellings in habitable condition would henceforth be mutually dependent obligations. This reversed the long-standing common-law doctrine that tenants, unless ousted, must pay full rent, no matter how dilapidated the residential space.

The 1970 landmark opinion in *Javins v. First National Realty Corp.* by Judge Skelly Wright of the D.C. Circuit announced the doctrine:

> [A] warranty of habitability, measured by the standards set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases of urban dwelling units covered by those Regulations and that breach of this warranty gives rise to the usual remedies for breach of contract.[2]

In 1971, the first warranty of habitability case in New York state, *Amanuensis v. Brown*,[3] likewise reversed centuries of common-law doctrine and replaced it with the modern concept that linked an obligation to keep residential premises in decent repair with the duty to pay rent.

The State of New York codified this breakthrough in 1975, with a statutory version of the warranty, *Real Property Law* § 235-b. By its terms, section 235-b makes any purported waiver of the warranty void as against public policy.[4] The statute provides, in part:

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2. Javins v. First National Realty Corp., 428 F.2d 1071, 1072-73 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

3. 318 N.Y.S.2d 11 (N.Y. Civ. Ct. 1971). In *Javins*, an appellate bench reversed the trial court's refusal to apply the warranty of habitability. 428 F.2d 1071. *Amanuensis* appears to be the first time a trial court took the bold step of declaring the new doctrine, in the non-payment residential eviction context, facing down some difficult appellate authority to do so. The case, however, was not binding precedent for any other court and it was never appealed, remaining a mere trial court decision.

4. N.Y. REAL PROP. LAW § 235-b(2) (McKinney 2006). "Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy." *Id.*

> In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.[5]

In Illinois, the turning point came in 1972, with *Jack Spring, Inc. v. Little*.[6] The Illinois Supreme Court not only applied the warranty doctrine, but also quoted language from Justice Benjamin Cardozo, in his role as theorist, rather than jurist, explaining the right of a common law court to forge new law:

> A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the Mores of the day, may be abrogated by courts when the Mores have so changed that perpetuation of the rule would do violence to the social conscience . . . . This is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past.[7]

II. RENT ABATEMENTS, THE USUAL RELIEF FOR BREACHES OF THE WARRANTY, DO NOT ACTUALLY SECURE REPAIRS

The warranty of habitability is hailed as having brought tenancies out of the dark and musty realm of real property law, and, to some extent, into the sensible domain of contract law.[8] The application of contract doctrine means that a tenant cannot be forced to pay the full lease rental if serious conditions diminish the value of the premises. Although this is a significant advance doctrinally, this financial relief has not usually been joined with a court order that secures actual repairs.

A reduction in rent in proportion to the diminution in value of the unrepaired premises[9] may help a tenant make ends meet,

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5. N.Y. REAL PROP. LAW § 235-b(1) (McKinney 2006).

6. Jack Spring, Inc. v. Little, 280 N.E.2d 208 (Ill. 1972).

7. *Id.* at 367 (quoting BENJAMIN CARDOZO, THE GROWTH OF THE LAW 136 (1924)).

8. For further discussion of one underused contract remedy — *specific performance* — linked with enforcement of the warranty, see *infra* Part III.

9. *See, e.g.*, Parker 72nd Assocs. v. Isaacs, 436 N.Y.S.2d 542 (N.Y. Civ. Ct. 1980). In *Parker* the trial court found a fifty percent abatement because during a three-month period of winter there were seventeen "instances" of no heat and thirteen of no hot water, the reduction was twenty percent for lack of hot water and thirty percent for lack of heat. *Id.* at 544. This was what a rent

and yet be a very weak incentive for the landlord to make repairs. A litigious tenant may get a rent reduction covering a certain period of time, but the landlord will likely, in a situation of high demand, simply increase the rent when the lease ends and make up the loss from the same tenant or from a new lessee. This leaves the warranty of habitability, at best, as a complicated, litigation-based procedure to secure temporary rent reductions, not a tool for actually making premises habitable.

In many cases, the warranty of habitability itself may not be acknowledged and applied in busy trial courts. For example, in testimony given on December 14, 2006, Michael Hanley, Esq., an expert on housing issues in New York State, aptly described how the very concept of the warranty of habitability seems still to be unrecognized in many of the small town and rural courts in New York State. He made the point that tenants may be brought to court, complain about lack of repairs, and then be evicted from the dilapidated premises for non-payment of the full rent and without any glimmer rent being reduced or of repairs being ordered by the court.[10]

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regulating agency would have done, the court found, so the court based its percentages on that known "standard." *Id.*

Under the percentage method, a low income tenant in a $500 a month rental, for example, might get a fifty percent abatement for lack of heat and hot water. The court would order a reduction of $250 per month from the rent for the applicable period of time. A more affluent tenant, paying $2,000 a month, would deduct $1,000 per month for the same breach. When both are paying full rent, the low rent tenant pays $1,500 less per month than the wealthier one pays. With the no-heat no-hot water abatement, the low rent tenant is paying only $750 less per month than the wealthier one. It seems that the poor are short-changed by the way this remedy is calculated.

10. The testimony was in support of a proposal to amend N.Y. REAL PROP. ACTS. LAW § 711(2) (commonly known as the RPAPL) so that landlords would be required to plead information about code compliance. Michael L. Hanley, Esp., Testimony at the Assembly Standing Committees on Judiciary and Codes (Dec. 14, 2006), *available at* http://www.empirejustice.org/content.asp?ContentID=1998 (last visited Apr. 16, 2007). Mr. Hanley noted:

> In town and village justice courts, there is little doubt that the "summary eviction" proceeding under Article 7 of the RPAPL will indeed be "summary" and the outcome will be an "eviction." Over and over again I have heard from local counsel that lay justices typically approach the eviction proceeding not from the question of *whether* the landlord is entitled to an order evicting the tenant, but simply *when* the tenant will be out. And that is true, notwithstanding the applicability of legitimate defenses related to the conditions of the housing. "If you don't like it, why don't you move?" is the seat-of-the pants ruling of many town and village justices. . . . Although virtually every state in the nation has now, either by statute or by case law, adopted the concept of the implied warranty of habitability, in justice courts in New York state tenants are over and over again advised by the local magistrate (sometimes a neighbor of the landlord) that they must simply "pay or get out" — and sometimes both. . . . *As a result, one tenant is evicted,*

III. SPECIFIC PERFORMANCE OF THE WARRANTY IS AN APPROPRIATE REMEDY

I believe it is time for a new court-led transformation of the law for residential tenants, one that focuses on actual repairs. In my view this requires two shifts: one of doctrinal focus and the other of information management.

First, the doctrine. One contract remedy, court-ordered *specific performance* of an obligation, seems ready-made for warranty of habitability cases. Actual repairs can be ordered if the court finds proper facts, possesses injunctive and enforcement powers, and has the zeal to make and enforce mandatory injunctions. Specific performance is a remedial power that should be in the arsenal of any trial court with basic jurisdiction for injunctive relief.

The *Restatement (Second) of Contracts*, explains the basic concept of specific performance in the comment on this topic, Section 357a, "Availability Of Specific Performance and Injunction":[11]

> An order of specific performance is intended to produce as nearly as is practicable the same effect that the performance due under a contract would have produced. It usually, therefore, orders a party to render the performance that he promised. Such relief is seldom granted unless there has been a breach of contract, either by non-performance or by repudiation. In unusual circumstances, however, it may be granted where there is merely a threatened breach.[12]

In a case based on non-payment, a tenant's defense to the landlord's claim, alleging breach of the warranty, provides an opportunity (if the facts support it) for the court to require specific performance of the landlord's implied warranty that the premises will be kept in habitable condition.

Judicial initiative is important, especially where the party damaged by the breach (the tenant) is often appearing pro se, without an attorney, and is unlikely to call for the specific performance remedy by its technical name. My proposed computer assisted system will help judges measure up to the task even when the parties are not expert attorneys.

The availability of reliable, relevant information for judges to act upon is indispensable. However, the trial courts handling housing cases now reportedly wrap things up in less than five minutes per case. In such an environment, proper information

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another moves in, the conditions of the house or apartment are not repaired, and the community suffers while landlords and tenants play a game of musical chairs with substandard housing.

Id. at 6-8 (emphasis added).

11. Restatement (Second) of Contracts § 357 cmt. a (2006).

12. *Id.*

gathering and carefully crafted orders for specific performance are highly unlikely, as matters stand today. It is my hope that a well-designed computer system based on "screens" and "prompts", sketched out and pictured in Part V-B, will make it possible for courts to gather and to retrieve the repair-related information they need in a speedy and easily useable fashion, so that appropriate orders will be issued and enforced. The use of such a system will, I trust, generate enthusiasm within the court system for achieving results "on the ground."

A fair number of judges now on the bench are surely not at home in the world of digital technology, but when they are provided with excellent equipment, training and support, they will soon reap the satisfaction that comes from mastering tools that allow them to do a better job.

On the other hand, the lack of such technology seems to rule out the possibility of court-enforced orders for specific performance of repairs. I will show, in the next sections, through an example, how unlikely it is that an order for specific performance will be issued with any alacrity in a court that does not provide a basic computer-assisted information system for its judges.

IV. HOW A CASE THAT CRIES OUT FOR AN ORDER OF SPECIFIC PERFORMANCE IS HANDLED IN THE ABSENCE OF A COMPREHENSIVE SYSTEM OF COMPUTER PROMPTS

In this section, we will examine a typical case. It is a real case, chosen to illustrate that the lack of a digital information system within a court leads to blindness and delay. The case took place in the New York City Housing Court, a court specifically designed to attend to repair issues. In other jurisdictions there might have been a summary dismissal of any claims by the tenant, without even a nod towards the implied warranty of habitability. Thus, readers familiar with courts that do not even pretend to be accountable for enforcing the warranty of habitability may be impressed, rather than appalled, by the history of this case.[13] But

13. A remarkable study, NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT, DECEMBER 2003, prepared for the Lawyers' Committee for Better Housing by the Chicago-Kent-College of Law Class of 2004 Honors Scholars, draws on observations of 736 cases in the fall of 2002. "The average period of time spent per case was 1 minute and 44 seconds, a marked decrease from an average of less than three minutes reported in the 1996 study." NO TIME FOR JUSTICE, *supra*, at 11. "Minor prompting from a judge makes a dramatic difference in tenants' abilities to participate in the judicial process: when a judge asks for a defense, the tenant presents a defense about 55% of the time. However, if the judge does not ask for a defense, the tenant presents a defense only 9% of the time. *Id.* at 16. However "[I]n all cases, the defense raised made no difference to the outcome: the tenant always lost." *Id.* at 16

the record of actions taken by even this specialty housing court, compared to the true situation — as shown by the photographs in Figure 6 below — is lamentable. The judges' efforts do not create a particularly impressive record, but without better tools — the tools proposed in Section V-B — not much more could be expected.

The case is a basic non-payment summary eviction proceeding, in which a landlord sued to recover unpaid rent and to recover possession of the apartment. About 300,000 such cases are filed in the New York City Housing Court each year, and more than 260,000 are disposed of in a typical year, with the others being carried over.[14]

Although this case may have received not much more than five minutes of judicial attention on any single occasion, it appeared on the court's calendar eleven times in just the first six months, presumably for brief conferences or dispositions. It remained on the docket for a total of more than thirty-four months. No effective repair order was issued by the court in that span of time. The length of time the case remained active is unusual, but the lack of enforcement and failure to achieve needed repairs is not.

During the first six months of the case, the tenant appeared without an attorney, as almost all tenants do in New York City and elsewhere.[15] And during that time, the court, lacking recourse to any database for managing the information, handled the case without a systematic method for taking in and acting upon information about repairs.

For purposes of confidentiality, the address of the premises is redacted, the names of judges are changed to A, B, and C, and the names of the parties, and landlord's counsel, have been

14. The index to the annual reports for all the courts in New York is at, New York State Unified Court System, Annual Reports, http://www.nycourts.gov/reports/annual/index.shtml. (last visited Apr. 16, 2007). The three most recent reports are located at: http://www.nycourts.gov/ reports/annual/pdfs/2005annualreport.pdf; http://www.nycourts.gov/reports/annual/pdfs/2004annualreport.pdf; and http://www.nycourts.gov/reports/annual/pdfs/2003annualreport.pdf.

15 The percentage of unrepresented tenants is thought to be close to ninety-percent of all tenants appearing in the Housing Court. This was the finding in a study prepare thirteen years ago. *See* HOUSING COURT, EVICTIONS AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL, COMMUNITY TRAINING AND RESOURCE CENTER AND CITY-WIDE TASK FORCE ON HOUSING COURT, INC. 21 (1993) (finding that 11.9% of tenants in New York City Housing Court were represented by an attorney and 97.6% of landlords were represented by an attorney). This included tenants of all income levels. Five Minute Justice — A Summary of The City-Wide Task Force on Housing Court, http://www.interactivist.net/housing/justice.html (Last visited Dec. 20, 2006).

eliminated. The chronology uses a "year plus or minus" numbering system.[16]

Let us now plunge in and see what happened. The calendar information, Figure 1, shows the first six months of activity, with three separate judges handling the case during this period. The chart is copied from the court's publicly available website.[17] This case tracking information is accurate, timely, and important.

At the start of the case, the tenant must have responded to the landlord's papers by answering, so that the case was placed on the court calendar.[18] The first calendar date was July 28 of "year zero," as indicated in the first line of Figure 1.

Figure 1

Housing Court Information System

Appearance Information County: Case: X vs. Y

Appearance Date/Time	Calendar Category	Judge Part	Calendar Marking
Jul 28, year zero 9:30 a.m.	Housing New Non-Payment	Judge A	Judgment(No Appearance Resp)
Aug 8, year zero 9:30 a.m.	New Order to Show Cause	Judge B	Adjourned
Sep 1, year zero 9:30 a.m.	Adjourned Order to Show Cause	Judge B	Judgment(No Appearance Resp)
Sep 19, year zero 9:30 a.m.	New Order to Show Cause	Judge B	Granted To Extent
Oct 17, year zero 9:30 a.m.	New Order to Show Cause	Judge C	Granted To Extent
Nov 3, year zero 9:30 a.m.	Motion	Judge C	Adjourned
Nov 3, year zero 2:00 p.m.	General Hearing	Judge C	Adjourned
Nov 17, year zero 9:30 a.m.	Adjourned Motion	Judge C	Adjourned
Nov 17, year zero 9:30 a.m.	General Hearing	Judge C	Adjourned
Dec 8, year zero 2:00 p.m.	Adjourned Motion	Judge C	Adjourned
Dec 8, year zero 2:00 p.m.	General Hearing	Judge C	Adjourned

According to the calendar chart, the respondent-tenant did not appear on the initial date, July 28, and Judge A awarded the landlord a judgment on default: "Judgment (No Appearance

16. This year-numbering system is adopted to help block efforts to uncover the actual case. The unredacted copies of the papers referred to in this case are on file with the author. Permissions from the tenant and from the current counsel for the tenant to use the material in the form it appears in this essay are on file with the author.

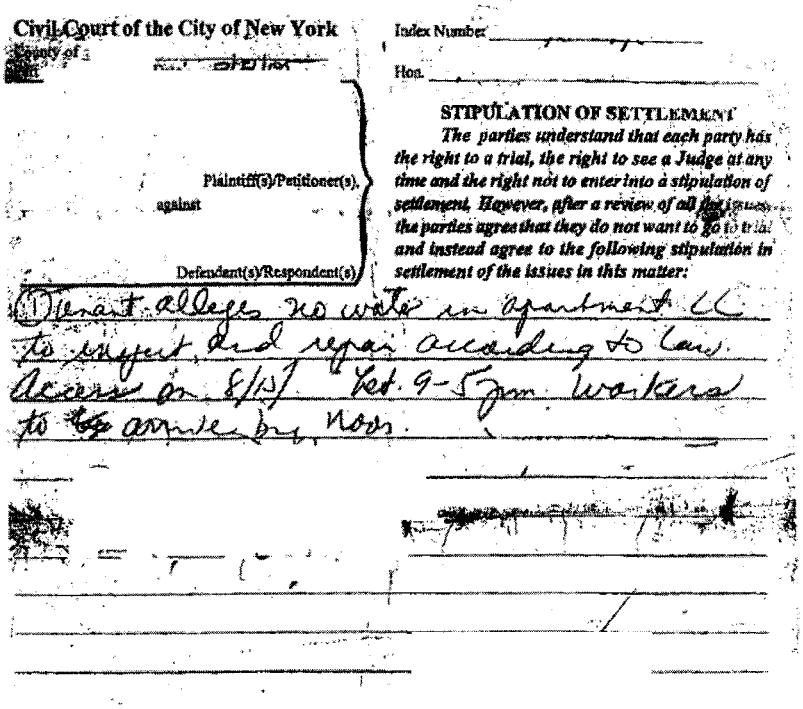
17. New York State Unified Court System, http://iapps.courts.state.ny.us/housing/ (last visited Dec. 20, 2006). One can search cases by date, party name, or index number. After choosing which category to search, the user must designate the relevant borough and supply other specific information.

18. N.Y. REAL PROP. ACTS. LAW § 732 (2006). Section 732(1) states that the petition "shall be made returnable within five days after its service." Section 732(2) provides that "[i]f the respondent answers, the clerk shall fix a date for trial or hearing not less than three nor more than eight days." *Id.* § 732(2).

Resp)." The next calendar date, August 8, shows a "New Order to Show Cause", which was adjourned to September 1, by Judge B. An Order to show cause is the method for bringing an expedited motion, typically with a temporary *ex parte* stay of eviction.[19] It is often used by tenants to present an excusable default and meritorious defense sufficient to persuade a judge to vacate a default and return the case to the calendar, using forms supplied by the court clerks.[20]

The fact that the case was adjourned on August 8 indicates that both sides were present. Indeed, we have a copy of a stipulation that the parties both signed on that date. Judge B also signed this paper, with the "So Ordered" statement included, making the document an official order of the court. Figure 2-a is the redacted original (written on a form supplied by the landlord's attorney), and Figure 2-b is a typed copy to make the information easier to read.

Figure 2-a



Civil Court of the City of New York

Index Number

Hon.

STIPULATION OF SETTLEMENT

The parties understand that each party has the right to a trial, the right to see a Judge at any time and the right not to enter into a stipulation of settlement. However, after a review of all the issues, the parties agree that they do not want to go to trial and instead agree to the following stipulation in settlement of the issues in this matter:

Plaintiff(s)/Petitioner(s)

against

Defendant(s)/Respondent(s)

19. *See* N.Y. C.P.L.R. 2214(d) (McKinney 2006) (Order to Show Cause); N.Y. C.P.L.R. 2201 (McKinney 2006) (Stay).

20. *See* New York State Unified Court System, Housing Court Forms, http://www.courts.state.ny.us/courts/nyc/housing/forms.shtml (providing various examples). A sample affidavit form to vacate a default is at http://www.courts.state.ny.us/courts/nyc/housing/forms/CIV-LT-10.pdf (last visited Apr. 16, 2007). There are no samples for the Order to Show Cause itself.

Figure 2-b

Civil Court of the City of New York
County of **Index Number**_____
Part _____ **Date**_____ **Hon.**_____

STIPULATION OF SETTLEMENT

Plaintiff(s)/Petitioner(s)

The parties understand that each party has the right to a trial, the right to see a Judge at any time and the right not to enter into a stipulation of Settlement, However, after a review of all the issues the parties agree that they do not want to go to trial and instead agree to the following stipulation in settlement of the issues in this matter:

against

Defendant(s)/Respondent(s)

1. Tenant alleges no water in apartment. Landlord to inspect and repair according to law. Access on 8/15/___ between 9-5 p.m. Workers to arrive by noon.

_____ _____
Petitioner Respondent

SO ORDERED:

_____

A. First Stipulation: What the Court Learned

The August 8 stipulation is handwritten. It states that the tenant, "alleges no water in the apartment," and the landlord agrees to "inspect and repair according to law." It also provides a specific date, August 15, for access. There is no disposition of the case, and, oddly, no date for the parties to come back before the court in the future, to report on compliance with the agreement.

It seems, from later information in the case, that the judge probably did not ask the tenant whether other repairs were needed. Although there is an Administrative Directive reminding judges to be sure that unrepresented tenants know what they are agreeing to, the Directive is silent on the topic of asking about repair conditions.[21] So Judge B learned only that the tenant

21. *See* Fern A. Fisher, Civil Court of the City of New York, Advisory Notice: Allocutions of Stipulations in Landlord and Tenant Cases, http://www.courts.state.ny.us/courts/nyc/housing/directives/AN/allocutions.pdf (last visited Apr. 26, 2007). Judge Fisher advises:

> Since appellate courts have upheld vacating stipulations when *pro se* litigants failed to understand the consequences of stipulations or when stipulations were overreaching (citations omitted), and since in some instances parties have not been seen by the judge and only by the court attorney, the following is strongly advised:
>
> No stipulation in which any party is *pro se* should be approved by the Court unless the Judge is convinced that a *pro se* litigant understands the terms of the stipulation and an allocution is conducted on the record. While no specific format for allocution is mandated, the minimum that should be ascertained by the judge is the following . . . .

Id. Strikingly, in a court with broad powers to preserve the housing stock, the

complained that there was no water and that the landlord would look into this and correct it "according to law."

B. First Stipulation: What the Court Should Have Learned

Let us step back a moment and see if more information was available to the court on August 8. There are two potentially important database sources that the court could have used, but did not, and a number of other sources that were not consulted. The first database is a case tracking system within the court; the second is the database of the municipal agency charged with inspecting and reporting violations of the city's housing maintenance code. There is also oral and written information the parties could have provided, but apparently did not.

The New York City Housing Court's present case tracking system, has little value. If the case-tracking system develops into an integrated system containing the information developed by the trial judges within the entire Housing Court system, including information on repairs needed, ordered, and accomplished it will be extremely valuable. Currently, it contains minimal and only marginally reliable repair information. Each pro se tenant has an opportunity (often after standing in a long line for a long time) to state to the court clerk in his or her own words any defense to the landlord's petition for non-payment of rent.[22] The clerk can then

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list does not include any direct reference to consideration of repairs. *Id.*

22. Pursuant to N.Y. REAL PROP. ACTS. LAW § 743 (McKinney 2006) a person "may answer, orally or in writing." If oral, "the substance thereof shall be recorded by the clerk." *Id.* The court has a useful form for tenants answering without counsel to use to prepare for their conversation with the clerks. *See* New York State Unified Court System, NYC Housing Court Forms, http://www.courts.state.ny.us/courts/nyc/housing/forms.shtml (last visited Apr. 16, 2006) (select Answer in Person-Nonpayment, CIV-LT-91). A tenant may check box ten that states "[t]here are conditions in the apartment which need to be repaired and/or services which the Petitioner has not provided." This is a simple, plain language way to claim a breach of the warranty of habitability. It is a check list for the oral answer, not a written answer, however, and it does not have a place to list the actual conditions or services that need attention.

In the Spring of 2007, the New York City Housing Court, through the extraordinary skill and determination of the Administrative Judge, the Hon. Fern A. Fisher, and her staff, a new on-line program to help tenant answer non-payment petitions has been unveiled. *See* New York City Civil Court Housing Part, Interactive Programs to Prepare Court Forms, http://nycourts.gov/courts/nyc/housing/interactive.shtml (Last visited June 1, 2007). There is also a complete Spanish language version. *See* Tribunal Civil de la Ciudad de Nueva York División de la Vivienda, Programa Interactivo de Ayuda Para Rellenar los Formularios del Tribunal, http://nycourts.gov/courts/nyc/housing/housing_spanish/interactive.shtml (Last visited, June 1, 2007). This is a huge step forward in the use of technology in the court system. The Lawyering in the Digital Age Clinic of Columbia Law School had the honor of playing a role in this development and is acknowledged on the first screen.

enter into the case-tracking database one or more defenses. Two of the pre-designated categories might reflect a need for repairs: "warr't/habit'lty", standing for warranty of habitability, and "viols", standing for violations of the code that governs housing maintenance.[23]

However, even if the clerk scrupulously records such categories, there are no fields in the court's case-tracking database for listing particular violations or repairs claimed to be needed. And, in fact, judges neither see nor use these categories when they are contemplating the possible defenses a respondent-tenant may be asserting. The categories are captured only for statistical purposes and reflect the unreviewed judgments of clerks on the proper category to be recorded. This could be changed rather easily, so that answering tenants could fill out a check list of needed repairs, and even submit digital photographs, at the clerk's window. Then the database would indeed have valuable information for the judge to check at the outset of a case.

The second readily available database contains the New York City Housing Maintenance Code violations, maintained by the Housing Preservation and Development Administration ("HPD"). It is now a web-based, publicly available database of all violations of the Housing Maintenance Code. It reflects information gathered by HPD inspectors, and specifies the dates when official notices of violation were sent to the landlord and when the violations must be corrected.[24] The information is listed by

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23. This information is maintained by the court for internal tracking purposes only. The screen was demonstrated by the clerks during an authorized tour for students in 2006.

24. *See* The City of New York, Department of Housing Preservation & Development, http://www.nyc.gov/html/hpd/html/pr/violation.shtml (last visited Apr. 16, 2007). There is a tab on the right side of the screen for "housing violation look up" — after designating the borough, house number and street name the user enters the violation database for the selected building. *Id.*

In 1973, when the New York City Housing Court started, there was no web communication to speak of, but each Housing judge had a personal computer at the bench linked directly to this powerful database. Further, by statute, what the judge saw on the computer screen was not only admissible, but actually prima facie evidence. *See* N.Y. MULT. DWELL. LAW § 328(3) (McKinney 2006).

> In any action or proceeding before the Housing Part of the New York city civil court either (a) the visually displayed or (b) the printed computerized violation files of the department responsible for maintaining such files and all other computerized data as shall be relevant to the enforcement of state and local laws for the establishment and maintenance of housing standards . . . shall be prima facie evidence of any matter stated therein and the courts shall take judicial notice thereof as if same were certified as true under the seal and signature of the commissioner of that department.

Id.

building address, and the violations within the building may then be sorted by apartment, by date of inspection or by date correction is due, and by category of violation.

Figure 3 shows the violations for the apartment in question in chronological order.[25] There are other violations that pertain to the entire building, and thus to each unit, but for simplicity, Figure 3 shows only the violations for the apartment. This information is in a format that can easily be copied into a new document, so the Housing Court judge could in principle place the information from Figure 3, by a simple cut and paste, into the court's own database — if only it had such a database configured to receive the information.

Figure 3

Open Violations.

Reported Date, NOV ISSUED Date	Viol Class	Order no. Item no	Violation Description
year-13 /12/27 year-12 /01/14	B	508 175	§ 27-2005 adm code repair the broken or defective plastered surfaces and paint in a uniform color ceilings & walls X sty west apt X all rooms.
year-13 /12/27 year-12 /01/14	B	505 176	§ 27-2005 adm code replace with new the broken or defective window glass bottom sash kitchen & 3 room from south X sty west apt X.
year-13 /12/27 year-12 /01/14	A	529 177	§ 27-2005 adm code refit window sashes X sty west apt X all rooms.
year-13 /12/27 year-12 /01/14	A	556 178	§ 27-2013 adm code paint with light colored paint to the satisfaction of this department ceilings & walls X sty west apt X all rooms.
year-4 /02/15 year-4 /02/22	B	508 -	§ 27-2005 adm code repair the broken or defective plastered surfaces and paint in a uniform color ceiling and walls in the kitchen located at apt X, X story, apartment at west
year-4 /02/15 year-4 /02/22	B	508 -	§ 27-2005 adm code repair the broken or defective plastered surfaces and paint in a uniform color ceiling and walls in the bathroom located at apt X, X story, apartment at west
year-4 /02/15 year-4 /02/22	B	508 -	§ 27-2005 adm code repair the broken or defective plastered surfaces and paint in a uniform color ceiling and walls in the 1st room from north located at apt X, X story, apartment at west
year-4 /02/15 year-4 /02/22	B	501 -	§ 27-2005 adm code properly repair the broken or defective inoperative light fixture ceiling in the bathroom located at apt X, X story, apartment at west
year+2 /02/23 year+2 /02/28	A	508 -	§ 27-2005 adm code repair the broken or defective plastered surfaces and paint in a uniform color walls and ceiling in the entire apartment located at apt X, X story, 1st apartment from south at west
year+2 /02/23 year+2 /02/28	B	505 -	§ 27-2005 adm code replace with new the broken or defective glass of top window sash at east in the 6th room from north located at apt X, X story, 1st apartment from south at west
year+2 /02/23 year+2 /02/28	C	508 -	§ 27-2005 adm code repair the broken or defective plastered surfaces and paint in a uniform color ceiling in the 6th room from north located at apt X, X story, 1st apartment from south at west
year+2 /02/23 year+2 /02/28	C	508 -	§ 27-2005 adm code repair the broken or defective plastered surfaces and paint in a uniform color ceiling in the 3rd room from north located at apt X, X story, 1st apartment from south at west
year+2 /02/23 year+2 /02/28	C	508 -	§ 27-2005 adm code repair the broken or defective plastered surfaces and paint in a uniform color ceiling in the bathroom located at apt X, X story, 1st apartment from south at west

25. Several columns have been eliminated, both to save space and to forego extraneous information like dates of notices, the violation number, due date for repair. The portal to the database is available at http://www.nyc.gov/html/hpd/html/pr/violation.shtml (last visited Apr. 16, 2007).

year+2 /02/23 year+2 /02/28	C	508 -	§ 27-2005 adm code repair the broken or defective plastered surfaces and paint in a uniform color ceiling in the kitchen located at apt X, X story, 1st apartment from south at west	
year+2 /02/23 year+2 /02/28	B	702 -	§ 27-2045 adm code repair or replace the smoke detector missing in the entire apartment located at apt X, X story, 1st apartment from south at west	
year+2 /02/23 year+2 /02/28	B	1502 -	§ 27-2046.1, 2046.2 hmc: provide an approved and operational carbon monoxide detecting device, installed in accordance with applicable law and rules. in the entire apartment located at apt X, X story, 1st apartment from south at west	
year+2 /02/23 year+2 /02/28	B	593 * -	§ 27-2026 adm code repair the flushing apparatus and maintain same so as to flush effectively the water closet .. in the bathroom located at apt X, X story, 1st apartment from south at west	
year+2 /02/23 year+2 /02/28	A	596 * -	§ 27-2026 adm code replace the broken or defective wash basin in the bathroom located at apt X, X story, 1st apartment from south at west	

The violation chart shows some violations from long ago, thirteen years before the case started, written as "year-13". Other violations are from "year-4". The final set of violations is from "year+1"and have been shaded in grey since they were not in the record on August 8, the stipulation date in year 0.

If Judge B had looked at this (only the eight violations that were of record in year 0), different repair requirements surely would have been proposed. There are window problems, a light fixture in the bathroom that does not work, and painting and plastering problems that are considered "hazardous" — class B violations. The violations go back 13 years, or 4 years. There is more here than a problem with the water being turned on: there are long-standing hazardous violations.

A word about how to read the violations. The letters A, B, or C, indicate the seriousness of the violation. An "A" violation is non-hazardous, a "B" violation is hazardous, and a "C" violation is immediately hazardous. The inspector has some discretion in determining the seriousness of a violation. Each category has a different time period within which an owner, after receiving notice, is required to complete the repair.[26] The time to repair is

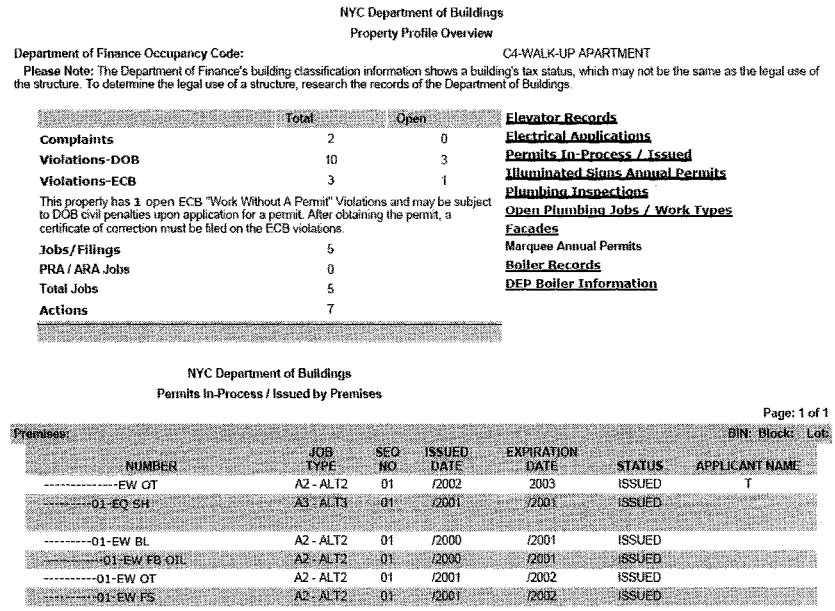
26. *See* N.Y. HOUS. MAINT. CODE § 27-2115 (McKinney 2006) (imposition of civil penalty). The Housing Maintenance Code provides:

> (b) The department shall serve a notice of violation upon the owner, his or her agent or other person responsible for its correction. The notice shall identify the condition constituting the violation, the provision of law applicable thereto, the department's order number, the classification of the violation according to its degree of hazard, the time for certifying the correction of such violation, and the amount of the possible penalty. . . .
>
> (c) The said notice of violation shall also specify the date by which each violation shall be corrected. Such date shall be:
>
> (1) ninety days from the date of mailing of the notice in the case of non-hazardous violations;
>
> (2) thirty days from the date of mailing of the notice in the case of hazardous violations; and

measured in days, however, not years. The language describing each condition does not convey what is actually wrong with the apartment, since violations are phrased only in terms of the corrective steps that should be taken.

Other agencies beside HPD also place useful, building-specific information on the web. Figure 4 shows part of the information available from the Department of Buildings for this apartment. The Department of Buildings, among other actions, grants certificates permitting construction work and issues violations that are generally focused on structural, rather than maintenance, problems.[27]

Figure 4



NYC Department of Buildings

Property Profile Overview

Department of Finance Occupancy Code: C4-WALK-UP APARTMENT

Please Note: The Department of Finance's building classification information shows a building's tax status, which may not be the same as the legal use of the structure. To determine the legal use of a structure, research the records of the Department of Buildings.

	Total	Open
Complaints	2	0
Violations-DOB	10	3
Violations-ECB	3	1

This property has **1** open ECB "Work Without A Permit" Violations and may be subject to DOB civil penalties upon application for a permit. After obtaining the permit, a certificate of correction must be filed on the ECB violations.

Jobs/Filings	5
PRA / ARA Jobs	0
Total Jobs	5
Actions	7

Elevator Records
Electrical Applications
Permits In-Process / Issued
Illuminated Signs Annual Permits
Plumbing Inspections
Open Plumbing Jobs / Work Types
Facades
Marquee Annual Permits
Boiler Records
DEP Boiler Information

NYC Department of Buildings

Permits In-Process / Issued by Premises

Page: 1 of 1

Premises: BIN: Block: Lot:

NUMBER	JOB TYPE	SEQ NO	ISSUED DATE	EXPIRATION DATE	STATUS	APPLICANT NAME
----------EW OT	A2 - ALT2	01	/2002	2003	ISSUED	T
----------01-EQ SH	A3 - ALT3	01	/2001	/2001	ISSUED	
---------01-EW BL	A2 - ALT2	01	/2000	/2001	ISSUED	
----------01-EW FB OIL	A2 - ALT2	01	/2000	/2001	ISSUED	
---------01-EW OT	A2 - ALT2	01	/2001	/2002	ISSUED	
---------01-EW PS	A2 - ALT2	01	/2001	/2002	ISSUED	

(3) twenty-four hours in the case of immediately hazardous violations.

. . .

(g) When there are a number of separate instances of a single condition which violates any housing standard established by law, such separate instances shall be treated collectively as a single violation with respect to any one dwelling unit, or with respect to the public area of a building, but nothing contained in this subdivision shall limit the number of violations for which a penalty under this section may be collected with respect to each dwelling unit or the public area of a building.

Id. § 27-2115(b)-(c), (g).

27. *See* New York City Department of Buildings, http://www.nyc.gov/html/dob/html/bis/bis.shtml (last visited Apr. 16, 2007).

Figure 4 highlights the web-based availability of other information — about violations and permit for work — that might be relevant to the case, if the judge pursued it.

It appears that Judge B did not feel impelled to check the violations database, nor to develop repair-related facts that the parties had not mentioned in their stipulation. Why is this so? Possibly judges do not realize that they could reap substantial benefits by being pro-active, by going after the information, since they have never experienced life on the bench with a powerful and well-designed database at their service.

C. Second Stipulation: What the Court Learned

The next date for the case, in spite of the fact that the stipulation, Figure 2, has no adjourned date, was apparently September 1, as shown in Figure 1. Judge B entered a landlord's judgment on that date for non-appearance by the respondent-tenant. Judge B could have looked into the paper file and come face-to-face with his or her "So Ordered" stipulation stating that the tenant contends there is no water in the apartment and stating that the landlord has agreed to do something about it. Apparently though, to Judge B, the order's validity evaporated, because the tenant did not appear to defend the non-payment proceeding.

Judges of the New York City Housing Court, actually have the explicit power to do more than award a default judgment to the landlord. Pursuant to *New York Civil Court Act* § 110(c), the court:

> Regardless of the relief originally sought by a party . . . may recommend or employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest.[28]

Even a court without this broad power, however, could certainly enforce an order requiring that water be restored if it felt confident in the facts, and accountable for seeing that orders for specific performance of repairs are enforced to effectuate the warranty of habitability. Because the actual facts were *not developed by the court, it is no surprise that the judge did not enforce the order.*

The September 1 default, before Judge B, is followed by a new Order to Show Cause, placed on the calendar for September 19. On that date the motion is "Granted to Extent", by Judge B, as indicated in Figure 1.[29]

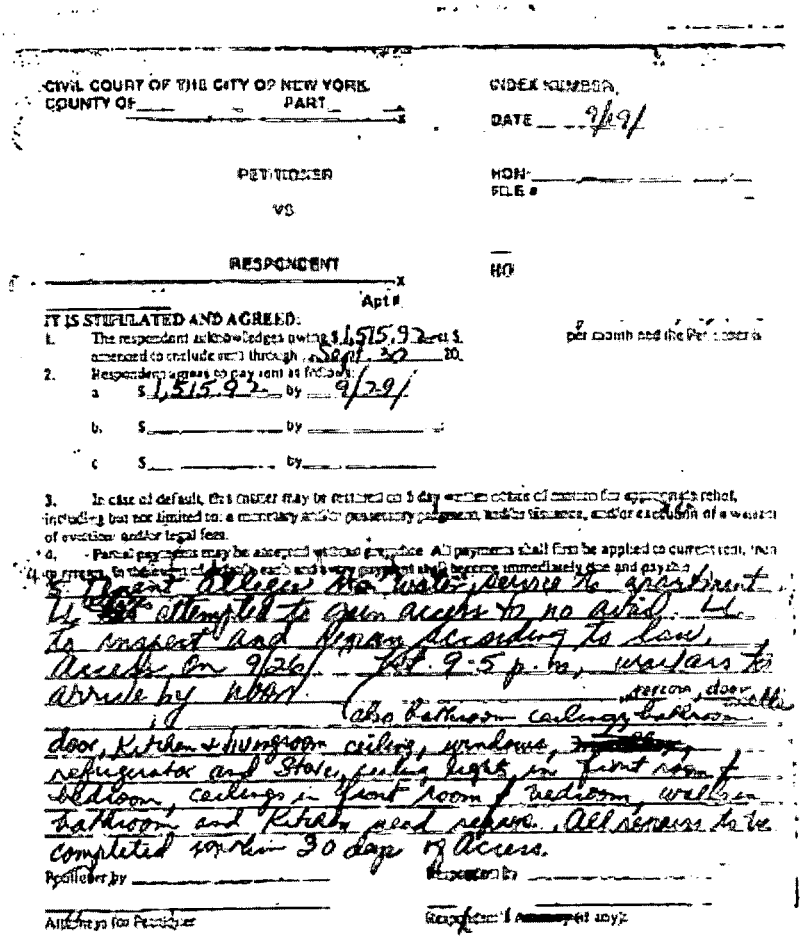
---

28. N.Y. CITY CIV. CT. ACT § 110(c) (McKinney 2006).

29. The affidavit by the tenant in support of the Order to Show Cause

The case is back, and another stipulation is signed, again by Judge B, as an Order of the court, as shown in Figures 5-a and 5-b. This stipulation, redacted to show only payment and repair issues, is the last court activity we will follow in this particular case, a case which, slightly more than a month after this stipulation, appeared again, on the calendar before Judge C.

Figure 5-a



CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF ____ PART ____

INDEX NUMBER

DATE 9/29/

PETITIONER

HON. ____

FILE #

VS

RESPONDENT

HO

Apt #

IT IS STIPULATED AND AGREED:

1. The respondent acknowledges owing $1,515.92 as and $ ____ per month and the Petitioner is amended to include rent through Sept. 30 20__.
2. Respondent agrees to pay rent as follows:
   a. $1,515.92 by 9/29/
   b. $____ by ____
   c. $____ by ____
3. In case of default, this matter may be restored on 5 day written notice of motion for appropriate relief, including but not limited to: a money and/or possessory judgment, warrant issuance, and/or execution of a warrant of eviction and/or legal fees.
4. Partial payments may be accepted without prejudice. All payments shall first be applied to current rent, then to the oldest rent arrears, each and every payment and breach immediately due and payable.

Dept alleges no water, service to apartment
H attempted to gain access to no avail. L
to inspect and upon proceeding to Law,
Access on 9/26/ Ret. 9:5 p.m., warrant to
abate by HPD (also bathroom ceiling, bathroom intercom, door saddle
door, kitchen + livingroom ceiling, windows, [redacted]
refrigerator and stove, parking light in front room of
bedroom ceilings - front room & bedroom, walls in
bathroom and kitchen need repair. All repairs to be
completed within 30 days of Access.

Petitioner by ____ Respondent by ____

Attorney for Petitioner Respondent [illegible] any)

The list of repairs this time is more extensive, and one access day is provided. The new items added to the list of problems were: bathroom ceiling, intercom, door saddle, bathroom door, kitchen

rightfully points out that the stipulation contained no date to return to court (affidavit on file with author).

and living room ceiling, windows, refrigerator, stove and ceiling lights in front room, bathroom, and kitchen. The landlord, in addition to undertaking to "repair according to law," (whatever that means) now promises "[a]ll repairs to be completed within 30 days." The landlord also asserted that access was not provided on the earlier date, and the tenant reasserted the lack of water.

Figure 5-b

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF _____ PART _____

INDEX NUMBER_____
DATE_____

PETITIONER

VS.

RESPONDENT

HON._____
FILE #

SO ORDERED:

signed

HON.
Motion Granted to the following extent

_____ Apt. #

IT IS STIPUALTED AND AGREED:

1. **The respondent acknowledges owing $1,515.92 at $194.68 per month and the Petition is amended to include rent through** Sept. 30, ___
2. **Respondent agrees to pay rent as follows:**
   a. $1,515.92 by 9/29/__
3. **In case of default, this matter may be restored on 5 day written notice of motion for appropriate relief, including but not limited to: a monetary and/or possessory judgment; and/or issuance, and/or execution of a warrant of eviction ; and/or legal fees.**
4. **Partial payments may be accepted without prejudice. All payments shall first be applied to current rent, then to arrears. In the event of a default, each and every payment shall become immediately due and payable.**
5. Tenant alleges no water service to apartment.* Landlord alleges attempted to gain access to no avail. Landlord to inspect and repair according to law. Access on 9/26/__ between 9-5 p.m., workers to arrive by noon.
   *also bathroom ceiling, intercom, door saddle, bathroom door, kitchen and living room ceiling, windows, refrigerator and stove, ceiling lights in front room and bathroom and kitchen need repair. All repairs to be completed within 30 days of access.

Petitioner by:_____ **Respondent by:_____**

Attorneys for Petitioner **Respondent's Attorney (if any)**

D. Second Stipulation: What Else the Court Could Have Learned

The second stipulation adds some repairs that correspond to violations later confirmed in a February 23, year+1, inspection, as

indicated in the grey shaded part of Figure 3. But there is not a perfect correspondence between any inspection by HPD and what the parties wrote in the stipulation. For example, the light fixture problems alleged for the front room and kitchen never appear in any violation report. Similarly, the assertions about the intercom, door saddle, refrigerator, and stove do not show up in the year+1 or any other inspection report. However, the window defects — existing and continuing violations from year-13 and found again in the year+1 inspection — are not mentioned by the parties in the stipulation.

Fragmented information is coming into the court system. In terms of database information from HPD, it seems that Judge B has still not looked into this resource. The court desperately needs a database system for repair information. None of the information presented by the parties to the judge, developed by the court, or by HPD is electronically recorded into a database. The two stipulations that are Orders of the court remain in the paper file, on paper, in handwritten form. They cannot be electronically retrieved — indeed they can barely be deciphered.

E. Second Stipulation: The Actual Situation — Not a Pretty Picture

We can take a closer look at the factual situation, a situation still completely unknown to the judge at the time of the second stipulation. If there is such a concept as habitable, then this apartment is the pinnacle of extreme uninhabitability.

The court file shows that neither party claimed any action was taken on repairs before the HPD inspection on February 23, year+1 made a report shown in the shaded area at the end of the violation list in Figure 3. Also, on that same day, February 23, year +1, two law students, undertaking a project for the Lawyering in the Digital Age Clinic at Columbia Law School, examined the apartment and recorded their observations using a digital camera.[30]

The students wrote very few words about the conditions in the apartment, because their digital photographs, shown in Figure 6, are more revealing than words. However, what they did write was crucial: it explained the causes and history of the repair

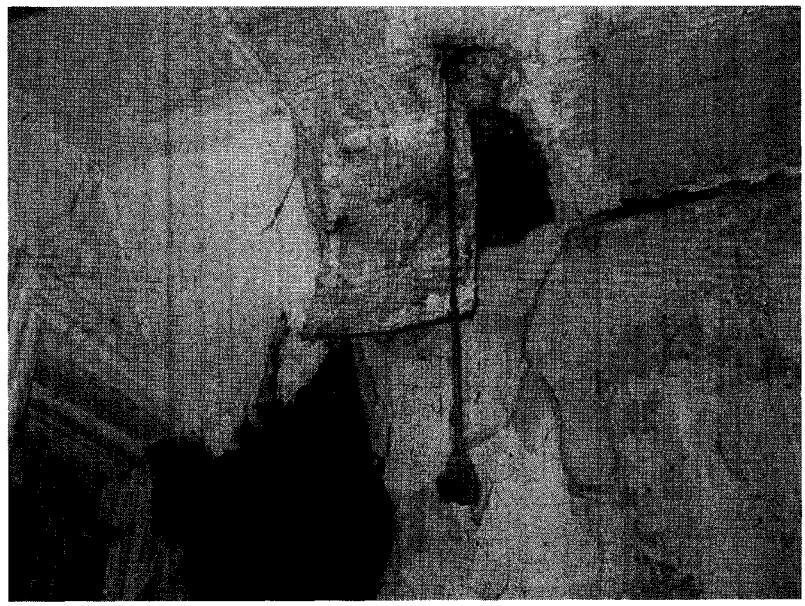
30. I wish to thank the anonymous tenant who has graciously allowed the use of these photos taken in the spring of year+1, and the remarkable law students at the Columbia University School of Law, Rachana Oza and Benjamin Crosson, member of the Lawyering in the Digital Age clinic. They took the photos and wrote an extensive report on the apartment in question. Extracts are shown in Figure 6 (permission to use photos and report on file with author).

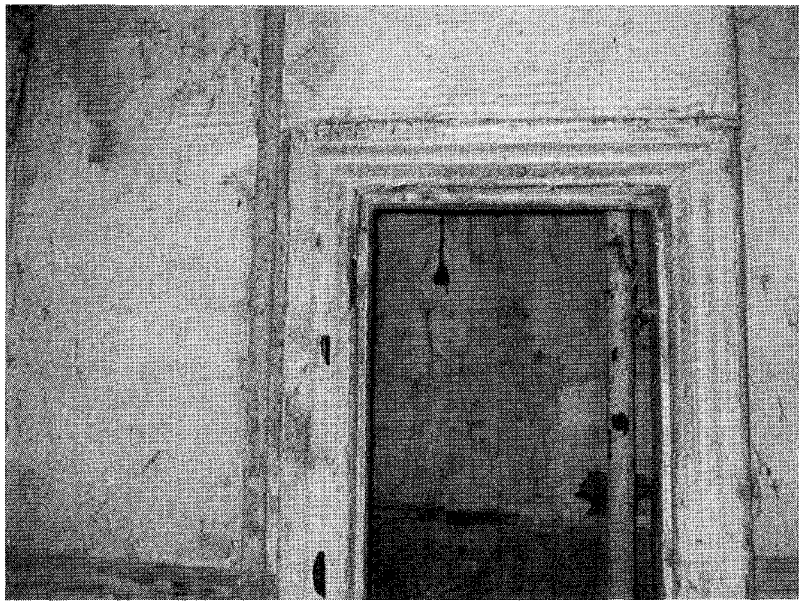
problems. Figure 6 shows only a few selected photographs and text about the bathroom and kitchen. Both rooms are in horrendous condition, as are all the rooms in the apartment.

Notice, in the photographs, the condition of the walls and ceilings. Recall that the tenant only mentioned lack of water in the first stipulation, and the kitchen and living room ceilings in the second, as defective. Although several HPD violations (shown in Figure 3) state that the owner must "repair the broken or defective plastered surfaces and paint in a uniform color ceilings and walls," that does not make the paint-and-plaster problem sound very serious.

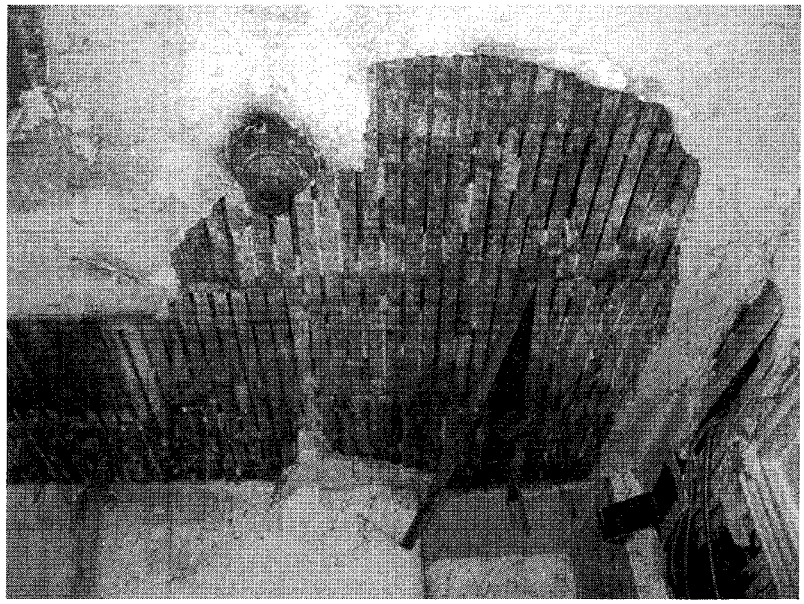
Figure 6

Bathroom — Before the water in the apartment was turned off, water leakage in the bathroom was a huge problem, causing a lot of damage. The ceiling and walls have disintegrated in places, so much so that the sink fell out of the wall.





Kitchen — The kitchen similarly had extensive water damage, as well as exposed wiring and broken window panes.



Although the HPD violation reports are extremely important — and no judge should fail to consult them and make them part of the record — they are by no means the whole story. They certainly do not scream out: "This is a terrible, totally uninhabitable apartment."[31]

The photographs, however, do scream out. They demonstrate that the reported paint-plaster violations, although worded with technical correctness, do not even hint at the horrible conditions. From the pictures, the apartment looks like a bombed-out wreck in a war zone, not a dwelling needing some touch-ups to the paint and plaster. The flushing apparatus repair violation, although technically accurate, misses the point by not mentioning that the water in the apartment is entirely shut-off.

Now that we can see, from the photographs and accompanying text, what the true situation was, one wonders why the tenant left out so much information when signing the stipulations in court. There are several plausible explanations, and they all point to the importance of the proposed database system.

31. Perhaps there should be an additional code system, similar to the one employed in many hospitals to help patients describe their level of pain, while looking at the stylized faces that go from a calm smile through several gradations of increasing unhappiness all the way to an excruciating, sobbing experience of pain. This apartment would get a "ten", on the uninhabitability scale, if the inspectors had such a scale.

First, the tenant may have made assumptions about what the court already knew. One assumption that proved false, was that the court had an institutional memory. There was a prior stipulation filed in this very court, between the tenant and a prior landlord many years before, and the tenant assumed that this document, part of the official court record from that case, would give the judge a detailed list of promised repairs. This indeed should have been the starting point for the court, and with a database system, it could have been.

Figure 7-a and 7-b show the repairs agreed to on February 6, year-minus-2, in a case started in year-minus-3. The stipulation, on February 6th, provided access in mid February, and completion 30 days later. Thus, by the end of March, year-minus-2, this tenant should have received basic repairs, as set forth in the part of the stipulation that deals with repairs. The later judges could not access this information.

Figure 7-a

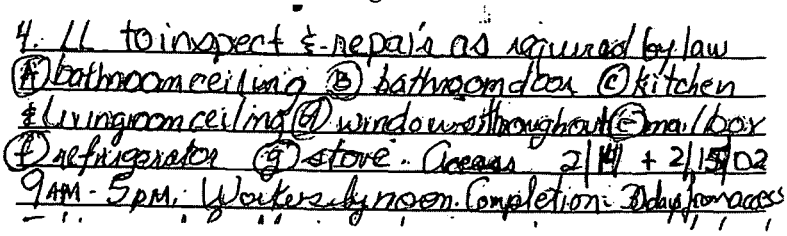


Figure 7-b

4. LL. To inspect & repair as required by law (A) bathroom ceiling (B) bathroom door (C) kitchen & livingroom ceiling (D) windows throughout (E) mailbox (F) refrigerator (G) stove. Access 2/14 + 2/15/02 9am-5pm. Workers by noon. Completion 30 days from access.

Second, a tenant without an attorney is not likely to command full attention. Even a novice attorney has difficulty making headway in such a busy trial court. A pro se tenant simply will not demand the right to make a full record of each and every item that should be repaired to bring the premises into compliance with the warranty of habitability. An unrepresented tenant lacks training, information, procedural sophistication, and clout. The tenant will have to persuade the landlord's attorney — not the strongest ally for a tenant — to write each item complained of, in long hand, on a paper form. There is no particular advantage, from the landlord attorney's perspective, in doing so with scrupulous care. Moreover, there is no requirement,

presently, for a judge to go step by step, in an interview with the parties, to determine the exact conditions of the apartment.

V. COURT SYSTEMS MUST SUPPLY THE TOOLS TO HELP JUDGES READILY ACQUIRE AND ACT UPON HABITABILITY INFORMATION

A. Busy Trial Courts Need Better Database Tools, if they are to Enforce the Warranty of Habitability.

Courts should strive to avoid allowing a case to stagnate unproductively for months or years. The doctrine of specific performance gives courts access to a powerful and effective remedy, and the court system must implement information management systems that will position their judges to pursue this role effectively. The essential starting point is an easily accessible, orderly, and comprehensive database of repair-related information. Judges need a record-keeping system so they can enter information, such as digital photographs, official violation reports, and the parties' explanations, and then search it, extract what they need, and use it. They will then be well positioned to issue, track, and enforce repair orders knowledgeably and efficiently.

Conventional paper systems no longer suffice. They cannot be the basis for cumulatively enlarging records, records that grow as information is acquired. Paper is not searchable in the way that electronic information is searchable. And hand-written material is so messy that few will even try to figure out what it says.

If judges are provided with the tools to acquire comprehensive information at the earliest possible moment in a case, valid enforceable orders to repair can replace the pattern we see in the sample case. The inconclusive meanderings of that case through the system must have been disheartening for all the judges involved — if they even recognized that it *was* a meander. Until judges see the photographs, and understand the history and extent of the disrepair, they cannot hope to apply the warranty of habitability.

The first judge here could have garnered full information on the very first court appearance by the tenant, if the tenant had known what to bring. The court needed the digital pictures of utter devastation, the stipulation of repairs in the court's own files, the tenant's statement that the collapse of walls and ceilings was caused almost fifteen years ago by water leaking from the apartment above, and the recorded violations placed by HPD. If a system had been in place that afforded the judge a series of computer screen prompts to start the process of examining old information, drawing out new information and information onf the status of old repairs, and recording it all in a database, an order for specific performance might readily have followed.

Any trial court with general jurisdiction, whether it is a specialized Housing Court or not, can grant the remedy of specific performance of the warranty of habitability in each case that calls for such a remedy. Judges of the New York City Housing Court are required, among other things, to retain jurisdiction over a building or an apartment until all repairs are complete, and to consolidate all proceedings from the same building, unless good cause is shown to keep them separate.[32]

However, no matter how specialized a court may be, if it does not systematically gather information about housing conditions and if it does not use all appropriate resources to make independent findings of fact, it simply cannot take meaningful steps toward ensuring actual repair.

In the example, the court did not make independent findings of fact about the repair situation. It appears that the court did not even capture or consult the HPD violations. It allowed the parties to define the repair problems as best they could, with the inevitable skewed result, owing to the all but institutionalized power imbalance between a pro se tenant contending against a professional lawyer who wields the pen in stipulation. The resulting court orders were incomplete and ineffective. The court took no steps to enforce even these limited stipulation-based orders.

B. The Database Can Serve to Level the Playing Field Between Parties While Also Giving Judges to Power to Ensure Specific Performance

My hope is that the specific performance remedy of the warranty of habitability will take hold as a mandatory remedy in trial courts with injunctive powers. If judges take an active role, following simple prompts from a computer screen, they will be more rigorous in collecting reliable information and more decisive in making and enforcing orders to repair. They will no longer fall back on a series of adjournments based on the hope that the parties will "work things out."

I will now sketch out how a judge might henceforth handle a typical non-payment case like the one presented, using prompts from the computer to take the necessary steps.

When a case first comes on the calendar the judge would log in and see something like the "screen shot" depicted in Figure 8. The docket database could pre-set the case specifics in a new record in the litigation database. The judge could then read off the court index numbers, all the other cases in the court, whether pending or closed, pertaining to the building. The judge could limit the view to just the index numbers involving this particular

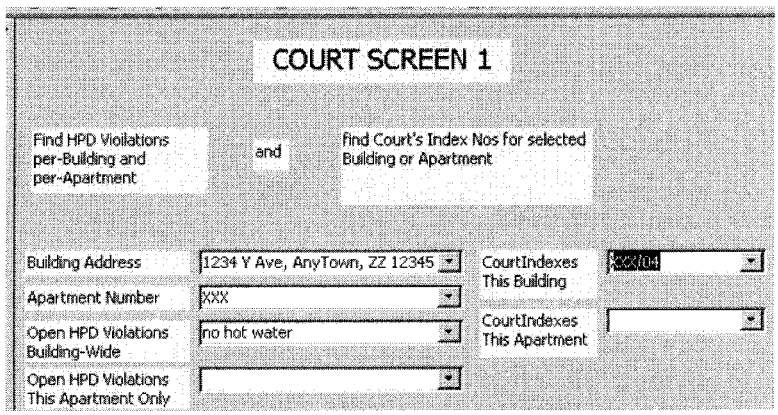
32. N.Y. CITY CIV. CT. ACT § 110(b) (McKinney 2006).

apartment. This step of surveying the other cases connects to the possibility that a judge of the New York City Housing Court might invoke *New York Civil Court Act* § 110(b), which instructs:

> On the application of any city department, any party, or on its own motion, the housing part of the civil court shall, unless good cause is shown to the contrary, consolidate all actions and proceedings pending in such part as to any building.[33]

In other courts, by surveying related cases, a judge could obtain valuable background information and history — the "lay of the land", including prior orders and factual material.

Figure 8



The screen, Figure 8, helps a judge locate repair-related information within the court system. If the judge clicks into the space for the index number, other cases will appear that involve, at the judge's choice, either the same building or just the same apartment. The information in those electronic case records would provide a starting point for what the judge is starting to build in the new case before the court. The records would start with the existing code violations, from the HPD database and other governmental sources, and would include detailed information from the parties — perhaps photographs and lists of conditions supplied by the tenant at the time of answering — and including whatever repair orders had previously been issued, with information on completion and follow up. Thus, hypothetically, a judge in our sample case might see that there is an active case in the court concerning the apartment located directly upstairs from this one, that repairs for that apartment are similar to those sought by the tenant in this case, and that they are due to be completed on a certain date. The screen for the active cases in the same building might also disclose a recent inspection that provides

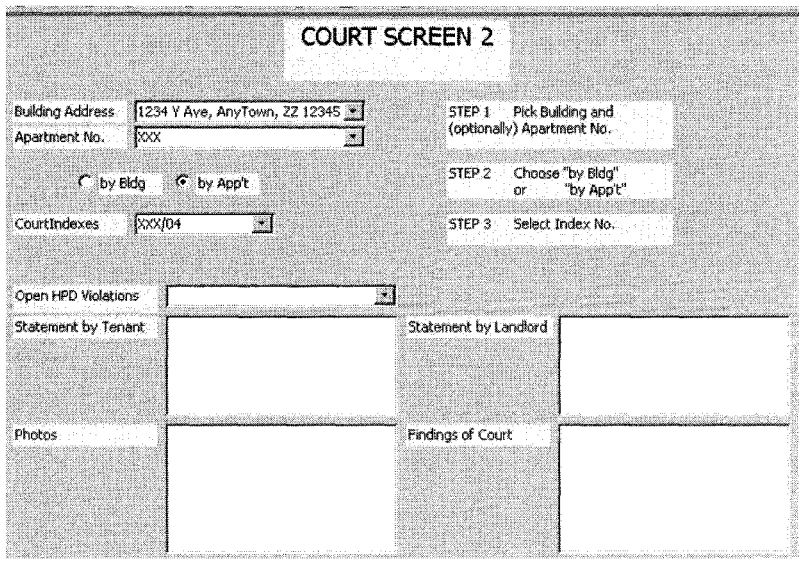
33. *Id.*

useful information about the state of the water and plumbing situation. Whether or not the two cases are then referred to a single judge, at least the respective judges would continue to be aware of the situation and would be accountable for moving things along in a coherent manner.

In the proposed system, information from the HPD web-based violation records would appear in the fields on the left of the screen shown in Figure 8. There is one location for apartment-specific violations, another for the building-wide violations. This creates a starting point, showing the status of violations when the case first came on the calendar.

A benefit of having this information visible is that the judge and the parties would have to confront whatever problems HPD has recorded. The information can be sorted in any manner the judge wishes: by date or by hazard code, for example. The judge can also call up the violations or orders from other agencies, such as the Department of Buildings.

Figure 9



The next screen, depicted in Figure 9, shows one possible format to allow judges to take in and record pertinent information from the parties. The HPD violations and other recorded violations would still be just a click away, but the court would now have boxes in which to record the contentions of the parties.[34]

34. The New York City Housing Court, from its inception, has used four-track tape recorders, instead of court stenographers. This means that, at present, a judge cannot call on the stenographer's notes to supply the necessary information. In courts with stenographers, the stenographer's

If the court took digital photos and conditions lists from the tenant at the time of answering, these would now appear in the fields for "Statement by Tenant" and "Photos," in Figure 9. Photographs will not capture the smell of mold, or the sound of rats fighting in the walls, but they are an excellent record for many types of conditions. The court would add to the information by close and full questioning of the parties.

The field on Figure 9 called "Findings of Court", prompts the court to make findings of fact on the repair claims. This is vital for the specific performance remedy.

If the example case is typical of present (non-computerized) practice, it seems likely that when judges let the parties work out and draft the terms of stipulations, the resulting Order may be treated by the judge like a provisional Order — subject to a new round of negotiations if things do not work out. Although this has some value, it can also delay the completion of repairs. If the judge used the screen in Figure 9 it would prompt him or her to make findings as soon as reliable information could be acquired.

After the judge makes the factual findings, with the care and wisdom required for such a task, the parties might still be permitted to work out many aspects of the time-table for repair. The resulting Order, drafted by the court itself, and entered into the court's database system would be an enforceable mandate for specific performance. Further, the information about the repairs required, or not required, would be open to all who have access to the court's information system, for further use in that case, or in related cases as they come on the docket.

I have not prepared a sample screen view for the next step the judge would take, but it would be a screen permitting the creation of the exact terms of the Order, helping the judge enter the dates and obligations in clear and enforceable language, and placing the order to repair in the court's electronic database. Prompts would ensure that all fields are filled appropriately.

The final sample screen, depicted in Figure 10, shows how the dates in the Order would be reflected. There might, for example, be separate dates for specific categories of repair. An important feature would be a streamlined way for the parties to notify the court that the terms of the order were (or were not) followed. The current practice is that either the court keeps the case on the calendar, adjourning from time to time, or the parties have to restore the case, through stipulation or motion. In the proposed

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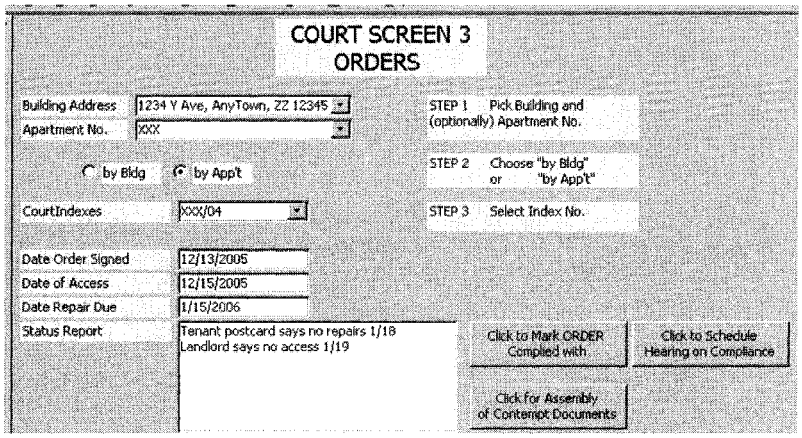
record could supply such information, under the direction of the judge. In New York, the judge would type the information, instead of hand writing it in the customary notebook at the bench. Perhaps voice-recognition software will soon become reliable enough so that parties can speak their descriptions, slowly and carefully, while the judge watches and makes necessary corrections on the screen.

system, each litigant would be given a few pre-printed postcards to use for notifying the court. Each postcard — marked with a bar code or similar recognition method — could be scanned by a clerk into the appropriate record, without imposing substantial data-entry chores. The cards might be multilingual, with icons or pictures, and would certainly use plain language (not HPD violation-speak) for the items of repair that must be reported.

Figure 10



Meanwhile, the due dates stated in the Order would automatically trigger a virtual re-calendaring of the case for the judge, so that on the target date the case file would appear. The first click of the judge would call up the screen with the terms of the repair order and the postcard-provided compliance reports. This screen would be similar to Figure 10. Using the information from the postcards, the judge would have a fairly clear picture of the next action to take.

As the sample screen shows, the court would have three likely options: (1) the court may find that the repairs are completed and the repair aspects of the case are indeed over, so the judge would click "Order Complied with"; (2) the court may find that there is controversy and it will notify the parties to return to court on a specific date and click "Schedule Hearing on Compliance"; or (3) the court may determine that it should employ the contempt power of the court to enforce specific performance and click "Assembly of Contempt Documents".[35] If the choice of the court were to pursue a hearing on contempt, it could use a document assembly tool to generate the appropriate papers.[36]

35. *See* N.Y. CITY CIV. CT. ACT § 110(e) (McKinney 2006) ("Such housing judges shall have the power of judges of the court to punish for contempt.").

36. N.Y. CITY CIV. CT. ACT § 110(c) (McKinney 2006); *see also* N.Y. C.P.L.R. § 5104 (McKinney 2006) (enforcement of judgment or order by contempt).

CONCLUSION

Although the New York City Housing Court is a court that can employ any program or remedy to secure repairs,[37] has full jurisdictional powers for injunctive relief,[38] and has the power to enforce orders of specific performance through punishment for contempt of court,[39] it is severely handicapped in enforcing the warranty of habitability through specific performance. This is because it lacks the tools and systems described above.

However, any court with full injunctive and contempt powers, using database technology, such as that sketched out in Part IV, can take the implementation of the warranty of habitability to its next level — actual repairs. My hope is that knowledgeable systems designers working with eager court administrators and judges can use these basic ideas and transform them into something that is attractive, simple, and satisfying to use — something that will help inspire judges to be as vigorous in applying the warranty of habitability to the issue of residential repairs as the creators of the doctrine must have hoped they would be.

> Any interlocutory or final judgment or order, or any part thereof, not enforceable under either article fifty-two or section 5102 may be enforced by serving a certified copy of the judgment or order upon the party or other person required thereby or by law to obey it and, if he refuses or willfully neglects to obey it, by punishing him for a contempt of the court.

Id.

37. N.Y. CITY CIV. CT. ACT § 110(c) (McKinney 2006).

38. N.Y. CITY CIV. CT. ACT § 110(a)(4) (McKinney 2006). "[T]he issuance of injunctions and restraining orders or other orders for the enforcement of housing standards under such laws." *Id.*

39. N.Y. CITY CIV. CT. ACT § 110(c) (McKinney 2006).