

RIGHTING THE SCALES OF JUSTICE: THE CRITICAL NEED FOR CONTEMPT PROCEEDINGS AGAINST LAWLESS LANDLORDS

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ABSTRACT

In his Pulitzer Prize-winning book *Evicted*, Matthew Desmond demonstrates that lack of safe and stable housing, a fundamental human right, “is among the most urgent and pressing issues facing America today.” Yet, although more than one in three Americans (over one hundred million individuals) live in rental housing, landlord/tenant law is largely neglected in the scholarly literature. This Article is the first to address the use of contempt to enforce court orders to repair hazardous conditions. Hazardous living conditions affect millions of renters nationwide, and disproportionately affect communities of color and low-income individuals. This Article reviews the profound imbalance in power in the housing courts of New York, America’s largest city, and reveals that what was conceived as a forum to ensure safe and habitable housing has become a collection and eviction service for landlords. It is a system that, between 2011 and 2016, yielded 117,952 evictions, yet fewer than fifty contempt rulings for failure to obey court orders to repair hazardous conditions; this, despite landlords’ chronic and widespread flouting of such orders. The Article contends that rather than merely returning to court over and over for the reissuance of orders to repair, courts and practitioners must initiate contempt proceedings. The Article demonstrates, finally, how such proceedings can remedy this injustice, including (1) establishing deadlines for the completion of ordered repairs, with either imprisonment or fines for each day that the landlord continues to flout the court’s authority; (2)

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awarding damages to the aggrieved tenant, including damages for emotional distress and diminished habitability; and (3) awarding attorneys' fees and costs to tenants' counsel.

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INTRODUCTION

“The threat of contempt proceedings inspires respect for the rule of law by serving as a strong incentive to interpret the mandate of the court in the best of faiths and to therefore treat the judiciary with the reverence that is its main source of strength.”

– *Musselman v. Blue Cross & Blue Shield of Ala.*¹

“In the overwhelming majority of cases in which repairs were ordered in settlement agreements, it appears that landlords did not in fact follow through on their obligations . . . [T]he fact that between 72 and 80 percent of repairs appeared to have not been performed on the scheduled access dates strongly suggests that landlord’s repair obligations are not being effectively enforced in the course of nonpayment of rent eviction cases. The findings also indicate that judges rarely utilized the tools available to them to hold landlords accountable for needed repairs.”

– Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes.*²

The late actor and comedian Robin Williams liked to joke that the police in England, lacking weapons, meekly shout, “[s]top, or I’ll say stop again.”³ It is a concept all too familiar to attorneys representing tenants in New York City (“New York”)’s housing courts, where landlords flout court orders to make repairs, only for the courts to meekly reissue the same order.⁴ Unlike the English “bobbies,” however, housing court judges possess the full power to enforce compliance with their orders, and to punish contempt, both civil and criminal.⁵ New York’s housing courts were in fact established to ensure the health and safety of New York’s tenants: “Housing Court’s original purpose was to adjudicate code violations in order to

1. *Musselman v. Blue Cross & Blue Shield of Ala.*, 684 Fed. App’x 824, 831 (11th Cir. 2017) (citations omitted).

2. Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 204 (2020).

3. Susan King, *Robin Williams, Memorable Lines from a Stand-Up Comedian*, L.A. TIMES (Aug. 12, 2014), <https://www.latimes.com/entertainment/movies/moviesnow/la-et-mn-robin-williams-standup-memorable-lines-20140811-story.html> (on file with the *Columbia Human Rights Law Review*).

4. *See infra* Section II.

5. *See infra* Section III.

maintain the health of New York City's housing stock and its tenants, in the interest of the public at large."⁶

Quite simply, what was originally conceived as a forum to ensure safe and habitable housing has become a collection and eviction service for landlords. The evidence is overwhelming. Every day, New York's housing courts enforce orders to pay rental arrears, wielding "one of the harshest decrees known to the law,"⁷ namely, the decree of eviction. According to the New York City Council, in 2018 alone, "tenants in over 19,000 apartments experienced an eviction from their homes."⁸ In stark contrast, New York's housing courts rarely hold landlords in civil—much less criminal—contempt for failure to comply with court orders to repair, even in the face of flagrant and repeated violations.⁹ "Between 2011 and 2016," for example, "landlords or their lawyers were sanctioned or cited for contempt in housing court fewer than 50 times."¹⁰ During that same period, there were 117,952 evictions in New York.¹¹ It is difficult to

6. Cynthia Cheng-Wun Weaver & Donna Chiu, *Public Interest Practitioner Section: 43 Essex Street: A Case Study in Shutting Down Tenant Harassment and Displacement with Community Organizing and Lawyering*, 21 CUNY L. REV. 326, 336 (2018); accord Leonard N. Cohen, *The New York City Housing Court—An Evaluation*, 17 URB. L. ANN. 27, 27 (1979) ("The statutory findings and policy statement clearly express that the Act is to provide 'effective enforcement of state and local laws for the establishment and maintenance of proper housing standards . . . , essential to the health, safety, welfare and reasonable comfort of the citizens of the state.'" (citation omitted)); Kim Barker et al., *The Eviction Machine Churning Through New York City*, N.Y. TIMES (May 20, 2018), <https://www.nytimes.com/interactive/2018/05/20/nyregion/nyc-affordable-housing.html> (on file with the *Columbia Human Rights Law Review*) ("Housing court was not supposed to be used this way, as a cudgel against tenants in decrepit housing. The system was created in 1973 with a very different mission: to foster the repair and preservation of New York's aging housing stock.").

7. *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 215 (1989).

8. *Evictions*, N.Y.C. COUNCIL, <https://council.nyc.gov/data/evictions/> [<https://perma.cc/4K2Y-Q25W>] ("NYC residents are affected by evictions every day.").

9. See *infra* Part II; see also Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187, 268 (2009) ("Ironically, when the New York City housing part system was created in the early 1970s, the main purpose of these courts was to create a forum for tenants to commence actions against their landlords for repairs. Now, affirmative cases brought on behalf of tenants for repairs make up approximately three percent of the housing cases filed in these courts across the five boroughs.").

10. Barker et al., *supra* note 6.

11. See NYU FURMAN CTR., TRENDS IN NEW YORK CITY HOUSING COURT EVICTION FILINGS 10 (2019), available at https://furmancenter.org/files/publications/NYUFurmanCenter_TrendsInHousingCourtFilings.pdf

overstate the injustice of a system that yields 117,952 evictions of men, women, and children for violation of the legal duty to pay, yet fewer than fifty contempt rulings in the same period for failure to repair often hazardous conditions. Given the chronic and widespread flouting of court orders to repair, examined in Part II, this imbalance is downright flabbergasting.

Meanwhile, the need for proper maintenance and repair of New York's rental apartments could hardly be greater: New York has been rated the very worst city in the country for substandard housing conditions.¹² "From water leaks, to mice scurrying around, to a really, really cold apartment, New Yorkers deal with more inadequate housing than any other city in the country."¹³ As studies have shown, moreover, communities of color and low-income individuals suffer disproportionately. For example, in New York, "37.1% of those making less than \$30,000 a year reported having had a problem with vermin, compared to 17.5% of those making more than \$150,000," while "[B]lacks (38.9%), Hispanics (32.8%), and Asians (30.3%) were more likely to have had problems with vermin than whites (25.9%)."¹⁴ Problems with heat and hot water "varied by race and ethnicity as well: Hispanics (21.8%) and [B]lacks (19.9%) were more likely to report having had a problem than whites (13.5%) and Asians (10.6%)."¹⁵

[<https://perma.cc/44KN-GLKU>]. This figure includes evictions for the years 2011 through 2016. Excluding 2016, the figure is 100,994. *See id.*

12. *Housing Inequalities: Examining Housing Qualities Across American Demographics*, PORCH, <https://porch.com/resource/housing-inequalities> [<https://perma.cc/4UZA-R4BY>].

13. Anna Quinn, *NYC Is City with Most Inadequate Housing in the Country: Study*, PATCH (Mar. 15, 2019), <https://patch.com/new-york/new-york-city/nyc-city-most-inadequate-housing-country-study> [<https://perma.cc/BU57-YCBY>].

14. *Housing in New York City*, EQUAL INDICATORS (2020), <https://equalityindicators.org/themes/housing/> [<https://perma.cc/HMU6-NUC6>].

15. *Id.*; accord CITY OF NEW YORK, WHERE WE LIVE NOW: DRAFT PLAN 165 (2020), available at <https://wherewelive.cityofnewyork.us/wp-content/uploads/2020/02/Where-We-Live-NYC-Draft-Plan.pdf> [<https://perma.cc/3L3A-B37Z>] ("Black (20%) and Hispanic (20%) New Yorkers are each far more likely to report the presence of maintenance deficiencies in their homes than White New Yorkers (6%)."); see Aly J. Yale, *Mold, Rodents And Roaches, Oh My: NYC's Hot Spots For Asthma*, FORBES (Feb. 7, 2019), <https://www.forbes.com/sites/alyyale/2019/07/mold-rodents-roaches-oh-my-nycs-hot-spots-for-asthma/> [<https://perma.cc/7UFG-K5FU>] ("The violations are worse in lower-income areas. Traditionally high-income neighborhoods, like Manhattan's Tribeca and Brooklyn's Dumbo have significantly fewer incidences of pests, mold and asthma overall."); Emily A. Benfer & Allyson E. Gold, *There's No Place Like Home: Reshaping Community*

Given that the conditions in question often threaten the very health, safety, and lives of tenants,¹⁶ it is critical that New York's housing court judges reform their jurisprudence and demand compliance with their orders through the power of contempt. The power to evict must, in fairness, be balanced with the power to hold landlords responsible for flouting court orders to repair. Concomitantly, tenant attorneys must abandon their typical practice of repeatedly restoring matters to the calendar to secure new dates for repair, and instead move for contempt. Under the current scheme, this is simply not possible. Tenants' attorneys, particularly those representing indigent and low-income tenants, do not have the luxury

Interventions and Policies to Eliminate Environmental Hazards and Improve Population Health for Low-Income and Minority Communities, 11 HARV. L. & POL'Y REV. 1, 28 (2017) (“[S]ubstandard housing conditions disproportionately affect low-income tenants as well as minority tenants. Tenants living in such conditions are nearly all low-income.”); David E. Jacobs, *Environmental Health Disparities in Housing*, 101 AM. J. PUB. HEALTH (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3222490/> [<https://perma.cc/Z8CN-X4AF>] (“In a large cohort of more than 12,000 households in New York City, asthma was most prevalent in Puerto Rican households, followed by other Hispanic and Black households, with exposure to deteriorated housing conditions and low social cohesion in the neighborhood significantly elevating the odds of asthma. Indicators of housing deterioration in that study included maintenance problems such as toilet breakdowns; heating breakdowns; need for additional heat; the presence of rats or mice; leaks, cracks, or holes in floors, walls, or ceilings; and broken plaster.”); Samiya A. Bashir, *Home Is Where the Harm Is: Inadequate Housing as a Public Health Crisis*, 92 AM. J. PUB. HEALTH 733, 734 (2002) (“Asthma triggers like mold, cockroaches and cockroach dust, mice and rats and their droppings, dust mites, carbon monoxide, and environmental tobacco smoke are all more prevalent in low-income and inner-city homes. Once again, the most vulnerable find themselves at greatest risk of harm.”).

16. See, e.g., Frank Griffin, M.D., J.D., *Administering Housing Law as Health Care: Attorneys As Healthcare Providers*, 71 S.C. L. REV. 349, 370 (2019) (“Substandard housing has been shown to contribute to asthma, developmental and behavioral pathology, elevated lead levels, injury, transmission of infectious disease, and exacerbation of new or pre-existing symptoms.” (citation and internal quotations omitted)); Dayna Bowen Matthew, *Confronting Persistent Poverty: Lessons from The Other America’ Turning a Public Health Lens on Fighting Racism and Poverty*, 49 U. MEM. L. REV. 229, 245 (2018) (“Substandard conditions such as pest infestation, lead contamination, faulty plumbing, and overcrowding lead to health problems including asthma, lead poisoning, heart disease, and neurological disorders.”); Bashir, *supra* note 15, at 733 (“Significant research demonstrates the harmful association of asthma, neurological damage, malnutrition, stunted growth, accidents, and injury with household triggers like poor insulation, combustion appliances, cockroach and rodent infestation, dust mites, hyper- and hypothermia, unaffordable rent, and dangerous levels of lead in soil and household paint.”).

of bringing contempt motions, save in rare cases. Legal services organizations must triage their cases and their efforts,¹⁷ with overworked and underfunded staff focusing on emergencies such as eviction prevention, rather than seeking enforcement of orders to repair.¹⁸ As one commentator observed, “while tenants in substandard housing generally cannot purchase representation to enforce the laws that prohibit it, individuals who could afford to hire lawyers typically avoid such conditions. As a result, the pay-to-play structure [of our judicial system] systematically neglects the enforcement of housing safety laws.”¹⁹

In addition to the power to compel compliance and award damages, however, New York State’s contempt statute provides for fee-shifting.²⁰ Prevailing parties are entitled to attorneys’ fees, and tenants’ attorneys can recover full and substantial compensation for their work in filing and prosecuting contempt motions.²¹ There is thus an economic incentive to file for contempt—and a disincentive to flout court orders to repair—if only the courts would adhere to the law. It is a chicken-and-egg problem: practitioners will only bring contempt

17. See, e.g., Jack Newton et al., *Civil Gideon and NYC’s Universal Access: Why Comprehensive Public Benefits Advocacy Is Essential to Preventing Evictions and Creating Stability*, 23 CUNY L. REV. 200, 201 (2020) (“Advocates who work in direct civil legal services agencies, like Legal Services NYC, understand that we work in the law firm equivalent of an emergency room.”); James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 292 (2012) (“It is a truism that courts, legal aid, and those in the bar serving low- and middle-income clients are overwhelmed with unmet legal need. It is also sadly true that these organizations lack sufficient funding to provide adequate services using the current delivery methods.”); Paul R. Tremblay, *Acting “A Very Moral Type of God”: Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2482 (1999) (“Whether they want to or not, legal services providers will engage in significant triage.”).

18. See, e.g., John Whitlow, *Community Law Clinics in the Neoliberal City: Assessing CUNY’s Tenant Law and Organizing Project*, 20 CUNY L. REV. 351, 352 (2017) (“The dominant legal services paradigm with regard to tenant advocacy is highly individuated, prioritizing eviction prevention”); Tamar Ezer, *Delivery of Legal Services to Children in the Boston Area*, 8 U.C. DAVIS J. JUV. L. & POL’Y 95, 141 n.265 (2004) (“[O]ther legal service organizations focus mostly on evictions and do not work on housing conditions.”); Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529, 1545–46 (1995) (noting that the “near-universal Legal Services priorities are eviction defense and benefits eligibility,” rather than “improvement of substandard housing” (internal quotations omitted)).

19. Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants’ Rights*, 27 GEO. J. POVERTY L. & POL’Y 97, 120 (2019).

20. See *infra* Section III.C.2.iii.

21. See *infra* Section III.C.2.iii.

proceedings if they see that the courts are willing to enforce their orders, and to award both damages and attorneys' fees, as the law expressly permits, and as justice poignantly demands. This Article aims to rectify this state of affairs, and to provide guidance on filing for contempt, a practice with which most tenant attorneys—and particularly legal services attorneys—are wholly unfamiliar, as the dearth of contempt cases attests.²²

This Article combines two areas that are far too often neglected in the scholarly literature: landlord-tenant law (a glaring oversight, considering that more than one in three Americans live in rental housing, and even higher percentages of African Americans and Latinx Americans²³) and contempt. It is the first to address the use of contempt to enforce orders to repair in particular. Part I of this Article briefly highlights the imbalance of power in housing court, exemplified by the unrivalled power to evict. Part II provides an overview of the problem addressed here: the recurrent flouting of court orders to repair. Finally, Part III examines the law of contempt and sets forth the legal basis for securing contempt orders against contumacious landlords. As that examination reveals, the criteria for contempt—particularly civil contempt—are amply satisfied in the lion's share of cases involving the failure to complete court-ordered repairs.

I. HOUSING COURT: A "GROTESQUE" IMBALANCE OF POWER

There is a profound imbalance of power in the landlord-tenant relationship.²⁴ "Indeed, the imbalance of power between residential

22. See *infra* Part I; *infra* note 63 and accompanying text; see also Raymond H. Brescia et al., *Who's in Charge, Anyway? A Proposal for Community-Based Legal Services*, 25 FORDHAM URB. L.J. 831, 844 (1998) ("Many legal services' attorneys have developed a specialized knowledge of the substance and procedure of eviction defense and provide exceptional representation in such cases. At the same time, their knowledge in other areas is limited."); Feldman, *supra* note 18, at 1546 ("Legal Services lawyers do not undertake the required follow-up or subsequent action to enforce the judgment of the original forum.").

23. Census Bureau housing data reveals that "more U.S. households are headed by renters than at any point since at least 1965," and the percentage of households renting their home "rose from 31.2% of households in 2006 to 36.6% in 2016." Anthony Cilluffo et al., *More U.S. Households Are Renting Than at Any Point in 50 Years*, PEW RSCH. CTR. (July 19, 2017), <https://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/> [<https://perma.cc/6378-5CAD>].

24. See, e.g., Stephanie Gorin, *Collective Bargaining in Rent Stabilized Buildings: How New York City's Rent Regulated Market Can Benefit from the*

landlords and tenants is so severe that it has been described as ‘grotesque.’²⁵ New York’s Right to Counsel initiative, which seeks to ensure legal representation for all indigent tenants in eviction proceedings,²⁶ is insufficient to correct this imbalance. Even where tenants are able to secure legal representation, the inherent difference in power between the parties persists, particularly with respect to the remedies available to the aggrieved party:

To influence tenants, landlords can threaten to evict or refuse to make necessary repairs to the dwelling. A landlord’s threat of eviction can be devastating to a tenant who has meager alternative housing options. A landlord’s failure to make repairs can be equally damaging when the housing does not meet basic standards of health and safety. Tenants, in contrast,

Fundamentals of Labor Law, 17 CARDOZO J. CONFLICT RESOL. 1045, 1046 (2016) (“There is an evident imbalance of power between the two parties, which is often exasperated by the costs, timing and intimidation of Housing Court.”); Melissa T. Lonegrass, *A Second Chance for Innovation—Foreign Inspiration for the Revised Uniform Residential Landlord and Tenant Act*, 35 U. ARK. LITTLE ROCK L. REV. 905, 960 (2013) (“Perhaps the most significant source of unfairness faced by residential tenants in the United States is their lack of bargaining power relative to landlords.”); Lauren A. Lindsey, *Protecting the Good-Faith Tenant: Enforcing Retaliatory Eviction Laws by Broadening the Residential Tenant’s Options in Summary Eviction Courts*, 63 OKLA. L. REV. 101, 116 (2010) (“[S]tudies show that the balance of power between landlords and tenants within the summary eviction courts is skewed in favor of landlords.”); see also *Whitby Operating Corp. v. Schleissner*, 117 Misc. 2d 794, 799 (N.Y. Sup. Ct. 1982) (“[O]ur Legislature has specifically recognized the right of tenants to join together in order to redress the imbalance of power in the individual landlord/tenant relationship, as well as to enforce those laws and regulations by which the State and city seek to compel minimum standards of health, safety and habitability in multiple dwellings.”); see also Dr. Dana Raigrodski, *Property, Privacy and Power: Rethinking the Fourth Amendment in the Wake of U.S. v. Jones*, 22 B.U. PUB. INT. L.J. 67, 116 (2013) (“The power matrix between a landlord and tenant is not limited to gender. A landlord’s power also derives from economic dominance or from other factors, such as race or class.”).

25. Lonegrass, *supra* note 24, at 960 n.381 (citation omitted).

26. In 2017, New York became the first city in the United States to ensure the provision of legal counsel for all tenants facing eviction. See N.Y.C., N.Y. Admin. Code § 26-1302. “Local Law 136, passed in August 2017, ensures that low-income tenants are represented in eviction cases by attorneys when they defend their rights and their homes. The law is currently in effect in 20 zip codes in NYC but will be in full effect by 2022 so that ‘all income eligible tenants in NYC will have the right to an attorney when facing an eviction in Housing Court.’” UNIS Hum. Rts. Project 2019, *Segregated by Design* (Jan. 9, 2020), <https://storymaps.arcgis.com/stories/024a559c38a647eab362843f14380e12> [<https://perma.cc/J5HG-7HJK>].

have fewer and less powerful options when dissatisfied with a landlord's behavior.²⁷

Even where a tenant secures representation, the power to evict starkly distinguishes the parties. As one commentator noted, “[t]he ultimate power of the landlord over the tenant is the mechanism of eviction, which carries with it not only the immediate consequence of forced relocation or homelessness, but also the long-term damage to that tenant’s rental history[,] which may disable her from qualifying for replacement housing.”²⁸ The harm occasioned by eviction is “grave and irreparable”²⁹ and constitutes “one of the harshest decrees known to the law.”³⁰ Indeed:

Both the eviction process and homelessness have devastating impacts on individuals and the communities in which they reside. Eviction is a

27. Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who is the Reasonable Person?*, 38 B.C. L. REV. 861, 882 (1997); Elinor Chisholm et al., *Tenants' Responses to Substandard Housing: Hidden and Invisible Power and the Failure of Rental Housing Regulation*, HOUS. THEORY & SOC'Y 4 (2018) (“The landlord, by carrying out an eviction or refusing to maintain the property, has a greater ability to affect the tenant’s life than the other way around.” (citations and internal quotations omitted)).

28. Nicole A. Forkenbrock Lindemyer, *Sexual Harassment on the Second Shift: The Misfit Application of Title VII Employment Standards to Title VIII Housing Cases*, 18 LAW & INEQ. 351, 375–76 (2000); see also Barker et al., *supra* note 6 (“Even if a case is shown to be baseless, just being sued can hurt a tenant’s ability to rent a new apartment. Screening companies tell landlords whether a prospective tenant has been sued for eviction, without necessarily saying how the case was resolved. Attempts to abolish this ‘tenant blacklist’ have so far failed.”). In 2019, New York passed a law outlawing the rejection of applicants based upon involvement in prior landlord-tenant proceedings; the maximum fine is \$1,000, and the New York Attorney General must bring the action. See N.Y. REAL PROP. LAW § 227-f. There is some question, however, whether the law will be at all effective. See, e.g., Emily Myers, *New Law Says NY Landlords Cannot Reject You for Being on the ‘Tenant Blacklist’—But They Might Try Anyway*, BRICK UNDERGROUND (July 17, 2019), <https://www.brickunderground.com/rent/tenant-black-list-rent-reforms-imperfect-changes> [<https://perma.cc/KFV3-MGQY>] (“But whether that fine is a big enough deterrent for leasing agents who want to weed out tenants this way remains to be seen. Landlords say the penalty is unenforceable and that they will get the information through other means.”).

29. *Paulino v. Wright*, 162 Misc. 2d 274, 279–80 (N.Y. Sup. Ct. 1994) (“The grave and irreparable injury that results when someone is evicted is undeniable.”), *rev'd on other grounds.*, 210 A.D.2d 171 (N.Y. App. Div. 1994); *Ortiz v. Five Seven Naught Assoc.*, No. 402804/05, 2006 N.Y. Misc. LEXIS 9308, at *9 (Sup. Ct. Apr. 26, 2006) (“Eviction constitutes irreparable damage. It is the loss of one’s home.”).

30. *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 215 (1989).

forcible, violent experience in which property is lost and damaged and lives are disrupted. Because the housing market is so tight, low-income people who are evicted are likely to become homeless, which severely compounds the trauma of eviction and displacement In addition to the emotional toll of eviction and the disruption it causes, homelessness also has devastating consequences on an individual's health.³¹

Tenants thus face the most terrifying of consequences for failure to comply with court orders: the specter of ejection from their

31. Megan Stuart, *Housing Is Harm Reduction: The Case for the Creation of Harm Reduction Based Termination of Tenancy Procedures for the New York City Housing Authority*, 13 N.Y.C. L. REV. 73, 82 (2009) (citation and internal quotations omitted); accord Harry DiPrinzio, *Hundreds of NYCHA Evictions Raise Questions About Process*, CITY LIMITS (Aug. 14, 2019), <https://citylimits.org/2019/08/14/nycha-evictions-rad-oceanbay/> [<https://perma.cc/S6A8-LGSA>] (“Evictions create crises for families. They fuel homelessness, strain fragile family dynamics, hamper school performance and can lead to job loss.”); Paula A. Franzese, *A Place to Call Home: Tenant Blacklisting and the Denial of Opportunity*, 45 FORDHAM URB. L.J. 661, 663 (2018) (“There are catastrophic personal and societal consequences of housing displacement and homelessness. To add offense to the injury of eviction, tenants named in an eviction proceeding, no matter the outcome or the context, find themselves placed on damning registries collected and maintained by ‘tenant reporting services.’ Tenants whose names appear on these so-called ‘blacklists’ are often denied future renting opportunities, stigmatized, and excluded from the promise of fair housing.”); Terry Gross, *First-Ever Evictions Database Shows: “We’re In the Middle of a Housing Crisis,”* NPR (Apr. 12, 2018), <https://www.npr.org/2018/04/12/601783346/first-ever-evictions-database-shows-were-in-the-middle-of-a-housing-crisis> [<https://perma.cc/9HDW-3VRP>] (“We have studies that show that eviction is linked to job loss It’s such a consuming, stressful event, it causes you to make mistakes at work, lose your footing there, and then there’s just the trauma of it — the effect that eviction has on your dignity and your mental health and your physical health. We have a study for example that shows that moms who get evicted experience high rates of depression two years later.”); Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 91 (2012) (“[E]viction often increases material hardship, decreases residential security, and brings about prolonged periods of homelessness; it can result in job loss, split up families, and drive people to depression and, in extreme cases, even to suicide; and it decreases one’s chances of securing decent and affordable housing, of escaping dis-advantaged neighborhoods, and of benefiting from affordable housing programs.” (citations omitted)); Brescia, *supra* note 9, at 236 (“The hardship of eviction brings with it many consequences that can be devastating even for those who have alternative housing to occupy; disruption at school and work, unsettling of social networks, and the costs associated with securing and moving property.”).

home—with all of its accompanying harms, from “blacklisting,”³² to social displacement, to loss of possessions and employment,³³ to emotional trauma—and quite possibly homelessness. Tenants, by contrast, have no such Sword of Damocles and must rely upon the courts to secure repairs. As the following discussion demonstrates, however, New York’s housing courts practically never utilize their powers of enforcement through contempt proceedings. As a result, tenant attorneys are compelled to return to court over and over to seek the landlords’ compliance not with private agreements, but with actual orders that the courts have proven unwilling to enforce. It is an enormous waste of judicial resources and a massive burden for typically overburdened tenants’ counsel—particularly those representing the indigent. It is, moreover, an affront to our judicial system, and an injustice that demands immediate correction.

II. REPAIR, OR I WILL TELL YOU TO REPAIR AGAIN

The case of *Smith v. 2676 G C LLC*³⁴ is illustrative of the problem. Mr. Smith was a fifty-six-year-old New Yorker living with symptomatic HIV illness (AIDS), as well as carcinoma, at the time of filing.³⁵ In November 2014, Mr. Smith commenced an “HP” action³⁶ to force his landlord to repair several conditions in his apartment, including leaks, mold, water bug and insect infestation, rodents, defective wall sockets, defective light switches, and faulty water pressure.³⁷ An inspection conducted by the New York City Housing

32. See *supra* notes 28, 31 and accompanying text.

33. See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 298 (2016) (noting that eviction means “[l]osing your home and possessions and often your job”).

34. Index No. HP 64361/2014 (N.Y. Civ. Ct. filed Nov. 3, 2014). The author has changed the petitioner’s name for the purpose of confidentiality.

35. Affirmation of Mark Hess, Esq. in Support of Motion for Attorneys’ Fees, *Smith v. 2676 GC LLC*, Index No. HP 64361/2014 (N.Y. Civ. Ct. Mar. 31, 2016), ¶ 4 (on file with the *Columbia Human Rights Law Review*) [hereinafter Hess Aff.].

36. See Weaver & Chiu, *supra* note 6, at 336–37 (“In a ‘Housing Part’ or ‘HP’ action, an individual tenant or a group of tenants petition the court to compel a landlord to make repairs. A HP action is also considered a special proceeding subject to the provisions of Article 4 of the New York State Civil Practice Law and Rules.”).

37. Hess Aff., *supra* note 35, ¶ 5.

and Preservation Department (“HPD”) confirmed Mr. Smith’s allegations and cited numerous violations.³⁸

In late November 2014, the court so-ordered a stipulation to repair these violations, which the landlord simply ignored.³⁹ Neither the court nor counsel for Mr. Smith initiated contempt proceedings. Instead, the parties returned to court, and on February 2, 2015, the court so-ordered another stipulation mandating that the landlord repair numerous conditions, including exterminating for mice and remediating mold in the bathroom.⁴⁰ Once again, the landlord failed to comply with the court order, and in February and March 2015, the court ordered re-inspections of the subject premises and issued a *third* order to effectuate repairs.⁴¹ In early April 2015, the landlord performed some work, but again failed to complete many of the mandated repairs.⁴²

On April 22, 2015, the court issued a fourth order requiring the landlord to inspect and repair. The landlord failed entirely to appear at the subject premises in blatant violation of the court order, and as of the end of May 2015, there were still numerous “open” violations in Mr. Smith’s apartment.⁴³ By this time, the landlord had flouted *four* court orders to complete repairs. With no other recourse, Mr. Smith moved for contempt, asking the court to find the landlord in civil contempt, to order repairs of hazardous conditions in the subject premises, and to award reasonable attorneys’ fees and costs. On the return date for the motion, the court ordered yet another inspection, adjourning the proceedings to July 2015. The landlord strenuously objected to the inspection, stating that all violations were cured.⁴⁴ On June 18, 2015, HPD cited four violations for the subject premises, confirming that the landlord still had not cured the violations.⁴⁵

Although the landlord had disobeyed four court orders; although the HPD inspections confirmed the landlord’s contempt; and although Mr. Smith had already moved for contempt, the court failed to schedule contempt proceedings or to punish the landlord’s blatant

38. *Id.* For a description of HPD’s role and responsibilities, see *infra* note 77.

39. Hess Aff., *supra* note 35, ¶ 6.

40. *Id.* ¶ 7.

41. *Id.* ¶¶ 8–10.

42. *Id.* ¶ 10.

43. *Id.* ¶ 11.

44. *Id.* ¶ 12.

45. *Id.*

disregard of the court's authority. Instead, the court issued yet another order directing the landlord to make all repairs between July 13–15, 2015.⁴⁶ On July 13 and 14, 2015, the landlord *again* failed to appear at the subject premises. On July 15, 2015, the landlord merely re-glazed Mr. Smith's bathtub, but failed to address the outstanding violations. Mr. Smith scheduled two additional access dates with the landlord for repairs. Once again, the landlord failed to appear.⁴⁷ The landlord had now violated *five* court orders, and still the court failed to commence contempt proceedings.

Instead, in August 2015, the court issued yet another order for repairs and scheduled another HPD inspection. The landlord *again* failed to appear at the subject premises.⁴⁸ By this point, the proceedings had dragged on for nearly a year, and the landlord had now flouted no fewer than *six* consecutive court orders to repair Mr. Smith's apartment. Finally, in late 2015, the court held hearings on Mr. Smith's contempt motion. On January 5, 2016, the court held the landlord in civil contempt of court and imposed a fine of \$250 (the "Decision").⁴⁹ The Decision did not impose a deadline to complete the long-overdue repairs or establish any penalties for the prospective failure to comply.⁵⁰ The Decision also failed to grant leave to file a motion for attorneys' fees. Mr. Smith was thus compelled to return to court once again to seek enforcement of the court's orders and to secure leave to file an attorneys' fees motion.⁵¹ In January 2016, the landlord finally completed extermination in the subject premises, over thirteen months after Mr. Smith commenced the proceedings.⁵² In March 2016, Mr. Smith's counsel filed an attorneys' fees motion as entitled under the Judiciary Law,⁵³ asking for \$9,850 in fees incurred in attempting to secure compliance with the court's orders to repair.⁵⁴ The court noted that it had not initially granted leave to file for fees, and ultimately made no award of fees.⁵⁵

46. *Id.* ¶ 13.

47. *Id.*

48. *Id.* ¶ 14.

49. *Id.* ¶ 16.

50. A court can order daily fines until the work is finally completed, a typical remedy employed to secure compliance and to protect the power and dignity of the court. *See infra* Section III.C.2.i.

51. Hess Aff., *supra* note 35, ¶¶ 16–17.

52. *Id.* ¶ 18.

53. *Id.* ¶ 11.

54. *Id.* ¶ 26.

55. Telephone Interview with Mark Hess, Esq., Counsel for Mr. Smith (May 12, 2020) [hereinafter Hess Interview].

Mr. Smith's counsel was forced to expend extraordinary resources to secure repairs and to hold the landlord responsible for flouting six court orders. Among other things, the landlord's contumacious behavior meant that Mr. Smith, whose immune system was severely compromised by symptomatic HIV illness or AIDS, was forced to wait over a year for the landlord to exterminate for rodents, which posed a very real threat to his health and life.⁵⁶ And on each of the numerous court-ordered access dates, Mr. Smith was compelled to wait all day in his apartment lest the landlord complain of his failure to provide access.⁵⁷ For all of that, the only penalty that the court imposed upon the landlord was a statutory fine of \$250.

Not surprisingly, another commentator recently related a strikingly similar tale, involving no fewer than eight orders to repair, all of which the landlord disregarded:

The two sides came into [New York] Housing Court in July 2016, and the judge ordered the landlord to correct the defective conditions. The order required the landlord to make the repairs on two specific dates in August. Yet Ms. J waited at home all day both days, and no one ever showed. The parties went back into court in early September, and the court again ordered the landlord to make the repairs—this time, a few weeks later. The landlord again did not comply. This series of events repeated itself six more times

56. Rodents pose a threat to even the fully healthy. "The accumulation of feces from mice and rats can spread bacteria, contaminate food sources and trigger allergic reactions in humans. Once the fecal matter becomes dry, it can be hazardous to those who breathe it in. Moreover, rodent droppings can spread diseases and viruses . . ." *An Overview of the Real Health Risks Posed by Mice and Rat Infestations*, PESTWORLD (Jan. 28, 2013), <https://www.pestworld.org/news-hub/pest-health-hub/overview-of-the-real-health-risks-posed-by-mice-and-rat-infestations/> [<https://perma.cc/XSM7-LUWM>]; *accord Rodents*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://cdc.gov/rodents/index.html> [<https://perma.cc/QUS9-XGUZ>] ("[R]ats and mice spread over 35 diseases. These diseases can be spread to humans directly, through handling of rodents, through contact with rodent feces, urine, or saliva, or through rodent bites . . . [and] indirectly, through ticks, mites or fleas that have fed on an infected rodent."). Obviously, the threat is far greater for the immuno-compromised. *See, e.g.,* *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 185 (E.D.N.Y. 2000), *aff'd*, 331 F.3d 261 (2d Cir. 2003), *cert. denied*, 541 U.S. 936 (2004) ("People living with HIV and AIDS develop numerous illnesses and physical conditions not found in the general population, and experience manifestations of common illnesses that are much more aggressive, recurrent, and difficult to treat. . . . Illnesses that are not lethal to the general population can kill an HIV-infected person.").

57. Hess Interview, *supra* note 55.

throughout the fall and winter of 2016, and even into the spring and summer of 2017. Each time, the court ordered the landlord to make the exact same repairs, and each time, the landlord ignored the order. Eventually, the case settled. The landlord still had not made any of the repairs, but Ms. J agreed to repay the full amount of the back rent. The letter of the law had proven meaningless.⁵⁸

Experienced housing court practitioners confirm that the repeated flouting of court orders to repair is so commonplace as to be the norm, and enforcement through contempt the very rare exception. Robert F. Bacigalupi, former President of LeGal, the LGBT Bar Association & Foundation of Greater New York, explained, “In fourteen years of virtually weekly practice in New York’s housing courts, I never once was aware that any housing court judge had imposed a fine on a delinquent landlord.”⁵⁹ “I have practiced in all of New York’s courts,” Bacigalupi added, “and in no other court is the flagrant disobedience with court orders so readily countenanced—or in fact countenanced at all. In housing court, noncompliance without consequence is viewed as normal, and is generally expected.”⁶⁰

58. Summers, *supra* note 2, at 148. Even when courts do find landlords in contempt, it is typically only after they have flouted repeated court orders to repair, forcing tenants to endure hazardous or substandard conditions for extended periods of time. See, e.g., Nazeer v. N.Y.C. Hous. Auth., 2700/2018, 2019 NYLJ LEXIS 4515, at *41-42 (N.Y. Civ. Ct. Jan. 6, 2020) (“The court file contains numerous two attorney stipulations and court orders in this case concerning mold in the petitioner’s apartment, and so ordered access dates.”); Amsterdam I LLC v. Santos, 67418/18, 2019 NYLJ LEXIS 4669, at *13-14 (N.Y. Civ. Ct. Feb. 14, 2020) (“The court finds petitioner not only in contempt of its order, dated May 2, 2019, but also orders of July 30, 2019, September 11, 2019, and September 20, 2019, which directed correction of the same conditions[;] two of these conditions are categorized by the City of New York as ‘immediately hazardous’”); Edwards v. N.Y.C. Hous. Auth., 2628/2015, 2018 NYLJ LEXIS 2687, at *2 (N.Y. Civ. Ct. Aug. 8, 2018) (contempt found only “[a]fter multiple stipulations, inspections and Orders”); Randolph v. N.Y.C. Hous. Auth. E. River Houses, 44 Misc. 3d 1207(A), 2014 N.Y. Misc. LEXIS 2987, at *8 (N.Y. Civ. Ct. 2014) (at the time of contempt proceedings, “NYCHA breached four so-ordered stipulations, and one court order by failing to restore hot water, paint and plaster . . . and abate the mold”); see also Odimgbe v. Dockery, 153 Misc. 2d 584, 592 (N.Y. Civ. Ct. 1992) (“Here, the evidence established that the Respondent failed to comply with the Court’s Order for at least half a year.”).

59. Telephone Interview with Robert F. Bacigalupi, Esq., former President, LeGal (Apr. 27, 2020).

60. *Id.*

Edward Campanelli, Associate Director of Tenants' Rights Unit at the New York Legal Assistance Group, observed that in the majority of cases, orders to repair are flouted. "It takes at least two or three bites of the apple to get the job done," he explained.⁶¹ "It's a dance, rocking back and forth, that you're used to. It's understood as part of the process in housing court."⁶² Campanelli reported that despite hundreds of cases of landlord noncompliance in matters that he has handled, he has never once filed a contempt motion. "It's a lot of work for little or no payoff," he explained, because "housing court judges are loath to issue contempt orders or award fees."⁶³

Finally, Donna Chiu, Housing Supervising Attorney at Mobilization for Justice, estimated that in "at least 90% of the cases," landlords disobey court orders to repair.⁶⁴ Ms. Chiu has never seen a judge issue a contempt order *sua sponte*, and has only filed about four contempt motions in her fifteen years of housing court practice: only in emergency circumstances, such as a lack of heat, and only when the problem was building-wide.⁶⁵ "I already know what the judge is going to say," she explained.⁶⁶ "We're jaded, because judges don't enforce their orders. Instead, they ask if we have talked it out with opposing counsel and tried again to secure the repairs."⁶⁷ As a *New York Times* exposé concluded, in New York's housing courts, "[p]unishable [landlord] conduct is rarely punished."⁶⁸

The evidence is not only anecdotal. As noted, between 2011 and 2016, New York housing court judges held landlords in contempt fewer than fifty times.⁶⁹ A recently published study of all nonpayment of rent cases in New York in 2016, in which the subject premises had

61. Telephone Interview with Edward Campanelli, Esq., Associate Director of Tenants' Rights Unit, New York Legal Assistance Group (Apr. 29, 2020).

62. *Id.*

63. *Id.*

64. Telephone Interview with Donna Chiu, Esq., Housing Supervising Attorney, Mobilization for Justice (Apr. 29, 2020).

65. *Id.*

66. *Id.*

67. *Id.*

68. Barker et al., *supra* note 6; *see also* DiPrinzio, *supra* note 31 (Attempts by tenants to force landlords to make repairs "[fall] on deaf ears," according to housing attorney Lucy Newman. "The resident could keep filing a motion to say that NYCHA is in contempt of their agreement to make these repairs but most often, residents have many more important things to do in their lives than keep going back to housing court and try to get an order that they're likely not going to get anyway.")

69. *See supra* note 10 and accompanying text.

“hazardous” or “immediately hazardous” conditions, confirmed the widespread lack of enforcement of court orders to repair.⁷⁰ In nearly three-quarters of all cases for which data was available, landlords failed to comply with orders to repair.⁷¹ “In nonpayment of rent cases in which substantial repair orders were included in the original settlement agreement and the parties entered into a subsequent settlement agreement after the access dates in the original settlement agreement had passed, the subsequent agreement included the same repair obligations 72% of the time.”⁷² In HP actions, or what the article refers to as “violation cases,” this figure was 80%.⁷³

Equally troubling, the study found that housing court judges are failing miserably to enforce their orders to repair: “The findings also indicate that judges rarely utilized the tools available to them to hold landlords accountable for needed repairs. Judges invoked their authority to order Housing Code inspections in only a tiny share of cases, despite tenants’ frequent reporting of serious conditions of disrepair.”⁷⁴ According to the tenants surveyed, “their efforts [to secure repairs] failed not because their claims were invalid or because they were unfamiliar with the proper legal procedures, but because judges did not want to entertain them.”⁷⁵ As the author concludes, “the fact that between 72 and 80 percent of repairs appeared to have not been performed on the scheduled access dates strongly suggests that landlord’s repair obligations are not being effectively enforced in the course of nonpayment of rent eviction cases.”⁷⁶

The lack of judicial enforcement is compounded, finally, by the failure of HPD to fully penalize offending landlords to ensure the remediation of hazardous conditions and deter future violations.⁷⁷

70. See Summers, *supra* note 2, at 181–83. The study examined “all nonpayment of rent eviction cases filed in 2016 in which the tenant appeared *and* in which one or more ‘hazardous’ or ‘immediately hazardous’ Housing Code violations were open at the unit at the time the case was filed.” *Id.* at 183.

71. *Id.* at 201.

72. *Id.* at 202.

73. *Id.* at 203.

74. *Id.* at 204.

75. *Id.* at 217. Indeed, even those with legal representation largely failed to secure compliance: “The study showed that among tenants with meritorious claims who had legal representation, 75 percent did not benefit from the claim. Thus, while universal access to counsel is likely to improve the effectiveness of the warranty, it is unlikely to serve as a cure-all.” *Id.* at 212–13.

76. *Id.* at 204.

77. As the New York City Comptroller explains, HPD:

“[HPD] is supposed to ensure that the city’s 2.2 million rental apartments are habitable. But the agency takes a gentle hand with landlords who deprive tenants of basic services, declining to enforce the maximum penalties for even the worst offenders,” a *New York Times* review of city records revealed.⁷⁸ Indeed, HPD settled for less than 15% of available penalties in more than two-thirds of cases, and in most, closer to 10%.⁷⁹ Even when the city took landlords to court for multiple violations—the more egregious cases—the landlords escaped lightly:

Most were settled for relatively little. In one, the city accepted \$1,500 for \$28,800 worth of fines. In another, the city accepted \$4,000 out of a possible \$100,000. In all, the city left \$4.7 million in civil penalties on the table in those cases—nearly five times the amount it actually levied. Landlords who lie about making repairs also face minimal repercussions. One landlord who filed 40 certifications with the city over two years that falsely claimed violations had been fixed paid less than \$3,000 in fines⁸⁰

inspects dwellings in response to complaints and issues Notices of Violation (NOVs) to building owners in response to observed violations. When issued an NOV, a building owner must correct the cited conditions within a specified amount of time and certify to HPD—either by mail or online—that the violations have been corrected. If a building owner fails to correct a violation or notify HPD of the correction, or if repeated violations are found, HPD may take a number of actions to enforce compliance, including seeking to have civil penalties imposed against the building owner. Penalties can range up to \$1,000 per offense or \$1,000 per day until the violation is corrected. As part of its enforcement efforts, HPD’s Housing Litigation Division (Housing Litigation) is authorized to initiate cases in Housing Court to compel building owners to correct violations and/or to enforce civil penalties.

CITY OF NEW YORK OFF. OF THE COMPTROLLER MGMT. AUDIT, AUDIT REPORT ON THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT’S EFFORTS TO COLLECT OUTSTANDING MONEY JUDGMENTS 1 (Nov. 17, 2016), <https://comptroller.nyc.gov/wp-content/uploads/documents/MJ16-063A.pdf> [<https://perma.cc/US3B-G2UL>] [hereinafter COMPTROLLER REPORT].

78. Grace Ashford, *Leaks, Mold and Rats: Why New York City Goes Easy on Its Worst Landlords*, N.Y. TIMES (Dec. 26, 2018), <https://www.nytimes.com/2018/12/26/nyregion/nyc-housing-violations-landlords-tenants.html> (on file with the *Columbia Human Rights Law Review*).

79. *Id.*

80. *Id.*

An earlier audit and report by the Comptroller of the City of New York similarly concluded that HPD's "collection efforts, while undertaken in accordance with the [law], did not result in the collection of the vast majority of the money judgments referred to JEU [the Judgement Enforcement Unit] for collection."⁸¹ The Comptroller found that the JEU was hamstrung by a shortage of legal staff, "and its caseload was significantly backlogged[,] with nearly half its total caseload remaining unassigned for an average of two years. Consequently, cases are not acted upon in a timely manner[,] which limits HPD's efforts to collect outstanding money judgments."⁸² Given that a large portion of these cases involve the failure to provide heat and/or hot water,⁸³ this is an alarming state of affairs. As the Comptroller concluded, "HPD might actually be creating the unintended impression that building owners face little immediate risk of penalty for such violations."⁸⁴ This is, of course, equally applicable to the courts' failure to enforce orders to repair. It is a crisis in desperate need of remedying. Thankfully, as the following discussion makes clear, tools of enforcement are already at the courts' disposal.

III. CONTEMPT OF COURT: A CRITICAL TOOL OF ENFORCEMENT

New York's housing courts were established with broad remedial powers to ensure the maintenance and repair of New York's housing stock.⁸⁵ Indeed, "[r]egardless of the relief originally sought by

81. COMPTROLLER REPORT, *supra* note 77, at 2.

82. *Id.* at 5. The Comptroller noted that JEU attorneys handle "approximately 250 cases or more at any given time," which "necessarily limits the actions that an attorney can take on each case" and acts as "a disincentive for the Unit to take actions that might require increased time and effort." *Id.* at 13.

83. *Id.* at 3.

84. *Id.* at 13.

85. See *Carter v. Andriani*, 84 A.D.2d 513, 514 (N.Y. App. Div. 1981) ("The sweeping grant of remedial powers coupled with the liberal joinder provisions, is designed to give the Housing Court the flexibility it needs to be effective."); *Osman v. Kirschenbaum*, 24 Misc. 3d 143(A), 2009 N.Y. Misc. LEXIS 2126, at *1 (App. Term 2009) (citing housing courts' "expansive jurisdiction over proceedings to enforce proper housing standards"); Mary Marsh Zulack, *The Housing Court Act (1972) and Computer Technology (2005): How the Ambitious Mission of the Housing Court to Protect the Housing Stock of New York City May Finally Be Achieved*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 773, 776 (2006) ("The court's role in the protection of the housing stock was considered so crucial that it was given broad injunctive powers, which its parent court, the New York City Civil Court, had not previously enjoyed.").

a party,” a housing court “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”⁸⁶ Among these powers, Section 110(e) of the New York City Civil Court Act expressly provides that “housing judges shall have the power of judges of the court to punish for contempts.”⁸⁷ Accordingly, under the New York Judiciary Law, housing court judges may hold landlords in both civil and criminal contempt for failing to make repairs.⁸⁸

The following provides a brief review of both criminal and civil contempt as applied to court orders, followed by a discussion of the use of contempt specifically for failure to comply with orders to repair.⁸⁹ As the discussion reveals, contempt proceedings, and particularly civil contempt proceedings, provide a useful and necessary tool for securing compliance from contumacious landlords, damages for aggrieved tenants, and attorneys’ fees for tenants’ counsel.

A. Criminal Contempt

Section 750 of the New York Judiciary Law empowers courts to “punish for a criminal contempt” any “[w]ilful disobedience to its lawful mandate” and any “[r]esistance wilfully offered to its lawful mandate.”⁹⁰ Criminal contempt seeks to vindicate an offense against judicial authority, “and is utilized to protect the dignity of the judicial system and to compel respect for its mandates.”⁹¹ The objective of

86. N.Y.C. CIV. CT. ACT § 110(c) (2021).

87. N.Y.C. CIV. CT. ACT § 110(e) (2021); *see, e.g.*, *Dep’t of Hous. Pres. & Dev. v. 24 W. 132 Equities, Inc.*, 137 Misc. 2d 459, 462 (N.Y. Sup. Ct. 1987) (“The designated Housing Judges who preside in the Housing Part of Civil Court are officers of that court and are expressly authorized by statute to punish for contempts in the same manner as Civil Court Judges.” (citations omitted)), *aff’d*, 150 A.D.2d 181 (N.Y. App. Div. 1989).

88. *Weaver & Chiu*, *supra* note 6, at 338 (“A landlord’s failure to make repairs by a certain date may be met with a motion for civil or criminal contempt filed by a tenant. A Housing Court Judge has the power to issue a criminal summons against a landlord and place him or her in jail.”).

89. For a full discussion of both criminal and civil contempt, see Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 ST. JOHN’S L. REV. 337, 373 (1998).

90. N.Y. JUD. LAW §§ 750(3), (4) (2012).

91. *McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983) (citation omitted); *accord Dep’t of Env’t. Prot. v. Dep’t of Env’t. Conserv.*, 70 N.Y.2d 233, 239 (1987)

criminal contempt is deterrence, and the penalty imposed is “punitive in nature.”⁹²

To sustain a finding of criminal contempt for violation of a court order, one must establish that (1) a lawful order of the court, setting forth an unequivocal mandate, was in effect; (2) the order was disobeyed; (3) the party charged with contempt had knowledge of the order; and (4) the disobedience was wilful.⁹³ The fourth requirement has caused significant confusion because the Court of Appeals has opined that “[t]o be found guilty of criminal contempt, the contemnor usually must be shown to have violated the order with a higher degree of willfulness than is required in a civil contempt proceeding.”⁹⁴ This is misleading for two reasons. First, determining degrees of wilfulness is logically absurd, akin to determining the degree to which an individual is pregnant. As one commentator has observed, “[t]his is conceptual nonsense worthy of a philosophy class dropout. How can one be more or less wilful than willful?”⁹⁵ Thankfully, in *El-Dehdan v. El-Dehdan*,⁹⁶ the Court of Appeals clarified the wilfulness requirement: “The meaning to be attached to the Court’s ‘level of wilfulness’ language is that the contemnor’s action must connote an intentionality not otherwise indicative of wrongfulness. In other words, the contemnor must have a consciousness that reflects an awareness of the act that is other than

“A criminal contempt . . . involves an offense against judicial authority and is utilized to protect the integrity of the judicial process and to compel respect for its mandates.” (citation omitted).

92. *McCormick*, 59 N.Y. 2d at 583 (citation omitted); accord *Dep’t of Env’t. Prot.*, 70 N.Y.2d at 239 (noting that criminal contempt serves the distinct purpose of punishing the contemnor).

93. *Dep’t of Env’t. Prot.*, 70 N.Y.2d at 240; *Town Bd. of Southampton v. R.K.B. Realty, LLC*, 91 A.D.3d 628, 629 (N.Y. App. Div. 2012) (reiterating the four-part framework for criminal contempt established in *Dep’t of Env’t. Prot.*).

94. *Dep’t of Env’t. Prot.*, 70 N.Y.2d at 240; see also *McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994) (“[T]he element which escalates a contempt to criminal status is the level of willfulness associated with the conduct.” (citation omitted)).

95. Gray, *supra* note 89, at 373; see also Lawrence N. Gray, *Judiciary and Penal Law Contempt in New York: A Critical Analysis*, 3 J.L. & POL’Y 81, 127–28 (1994) (“By qualitatively confounding criminal contempt’s mens rea of willfulness, New York’s courts have introduced confusion into the law and encouraged the arbitrary imposition or withholding of contempt sanctions.”).

96. 26 N.Y.3d 19 (2015).

‘unwitting conduct.’⁹⁷ In plain terms, the disobedience must be intentional, rather than unwitting.⁹⁸

Second, announcing that criminal contempt required “a higher degree of willfulness than is required in a civil contempt proceeding” was mystifying, since civil contempt requires no showing of wilfulness whatsoever.⁹⁹ Thankfully, again in *El-Dehdan*, the Court of Appeals corrected this error: “nowhere in Judiciary Law § 753(A)(3) is wilfulness explicitly set forth as an element of civil contempt.”¹⁰⁰ Hence, “wilfulness is not an element of civil contempt.”¹⁰¹

Unlike civil contempt, for criminal contempt, there is no requirement to demonstrate harm to a party to the litigation.¹⁰² Criminal contempt must, however, be proven beyond a reasonable doubt.¹⁰³ Upon a finding of criminal contempt, finally, courts may impose significant penalties. These include imprisonment not to

97. *Id.* at 35 (citations omitted).

98. This is precisely what the same commentator called for seventeen years earlier: “The words ‘willful’ and ‘willfully,’ wherever they appear in any criminal contempt statute or opinion, should be changed to ‘intentional’ or ‘intentionally.’ Criminal contempt is premised on intentional disobedience, not disobedience with an attitude.” Gray, *supra* note 89, at 372.

99. See *infra* notes 101–02 and accompanying text; *In re Bonnie H.*, 145 A.D.2d 830, 832 (N.Y. App. Div. 1988) (“It is not necessary that the disobedience be deliberate; the mere act of disobedience, regardless of motive, is sufficient to sustain a finding of civil contempt if such disobedience defeats, impairs, impedes or prejudices the rights of a party.” (citation omitted)); *Poughkeepsie v. Hetey*, 121 A.D.2d 496, 497 (N.Y. App. Div. 1986) (“a showing of willfulness is not necessary in a proceeding to punish for civil contempt” (citation omitted)).

100. *El-Dehdan*, 26 N.Y.2d at 34 (citation omitted).

101. *Id.* at 35; accord *McComb, Adm’r v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) (“absence of willfulness does not relieve from civil contempt”).

102. See, e.g., *Dep’t of Env’t. Prot. v. Dep’t of Env’t. Conserv.*, 70 N.Y.2d 233, 239–40 (1987) (“In a criminal contempt proceeding, no such showing is needed since the right of the private parties to the litigation is not the controlling factor.”); *Gomes v. Gomes*, 106 A.D.3d 868, 869 (N.Y. App. Div. 2013) (“No showing of prejudice to the rights of a party to the litigation is needed since the right of the private parties to the litigation is not the controlling factor.”).

103. See, e.g., *Cnty. of Rockland v. Civ. Serv. Emp. Ass’n*, 62 N.Y.2d 11, 14 (1984) (“The applicable standard of proof to establish criminal contempt is proof beyond a reasonable doubt.”); *Gomes*, 106 A.D.3d at 869 (“[U]nlike a civil contempt proceeding, [in a criminal contempt proceeding,] proof of guilt must be established beyond a reasonable doubt.” (citation and internal quotations omitted)).

exceed thirty days, or fines, or both.¹⁰⁴ Such fines are punitive in nature and are payable to the public treasury.¹⁰⁵

B. Civil Contempt

Section 753 of the New York Judiciary Law empowers courts “to punish, by fine and imprisonment, or either,” any “disobedience to a lawful mandate of the court, or of a judge thereof.”¹⁰⁶ Civil contempt arises “where the rights of an individual have been harmed by the contemnor’s failure to obey a court order.”¹⁰⁷ Unlike criminal contempt, civil contempt penalties are “designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court’s mandate or both.”¹⁰⁸ Fines for civil contempt “must be remedial in nature and effect.”¹⁰⁹ They must be “formulated . . . solely to compensate or indemnify private complainants”¹¹⁰ or to compel compliance.¹¹¹

To sustain a finding of civil contempt for violation of a court order, it must be shown that (1) a lawful order of the court, setting forth an unequivocal mandate, was in effect; (2) the order was

104. See N.Y. JUD. LAW § 750(1); *N.A. Dev. Co. v. Jones*, 114 Misc. 2d 896, 897 (N.Y. Civ. Ct. 1982).

105. See, e.g., *E. Concrete Steel Co. v. Bricklayers’ & Mason Plasterers’ Int’l Union, Local No. 45, of Buffalo*, 200 A.D. 714, 716 (N.Y. App. Div. 1922) (“The fine imposed and collected for a criminal contempt in a civil action goes into the public treasury, and is imposed to punish the person guilty of the contempt and not to indemnify the moving party.”); *Randolph v. N.Y.C. Hous. Auth. E. River Houses*, 44 Misc. 3d 1207(A), 2014 N.Y. Misc. LEXIS 2987, at *19 (Civ. Ct. 2014) (“[F]ines payable for criminal contempt are not payable to Tenant, but rather are payable to NYC Commissioner of Finance.”).

106. N.Y. JUD. LAW § 753.

107. *Dep’t of Env’t. Prot.*, 70 N.Y. 2d at 239 (citation omitted); see also N.Y. JUD. LAW § 753(A) (requiring a showing that a party’s rights were “defeated, impaired, impeded, or prejudiced”).

108. *Dep’t of Env’t. Prot.*, 70 N.Y. 2d at 239 (citation omitted); accord *State v. Unique Ideas, Inc.*, 44 N.Y.2d 345, 349 (1978) (affirming that civil awards should be “formulated not to punish an offender, but solely to compensate or indemnify private complainants.”).

109. *Unique Ideas*, 44 N.Y.2d at 349.

110. *Id.*

111. *Dep’t of Env’t Prot.*, 70 N.Y. 2d at 239 (citation omitted); accord *Unique Ideas*, 44 N.Y.2d at 349; *Dep’t of Hous. Preserv. & Dev. v. Deka Realty Corp.*, 208 A.D.2d 37, 47–48 (N.Y. App. Div. 1995) (“A contempt fine is considered civil and remedial if it either ‘coerce[s] the defendant into compliance with the court’s order, [or] compensate[s] the complainant for losses sustained.’” (quoting *United States v. Mine Workers*, 330 U.S. 258, 303–304 (1947))).

disobeyed; (3) the party charged with contempt had knowledge of the order; and (4) as a result, the rights of a party to the litigation were prejudiced.¹¹² Notably, “it is not necessary that the order actually have been served upon the party,”¹¹³ but only that the contemnor “had knowledge of the court’s order.”¹¹⁴ As noted, moreover, “wilfulness is not an element of civil contempt.”¹¹⁵

Unlike criminal contempt, civil contempt must be established by clear and convincing evidence, rather than beyond a reasonable doubt.¹¹⁶ This standard is met by satisfying the trier of fact “that the evidence makes it highly probable that what [he or she] claims is what actually happened.”¹¹⁷ In earlier formulations of the standard, most notably in *McCormick v. Axelrod*,¹¹⁸ the New York Court of Appeals held that the civil contempt must be proved “with reasonable certainty.”¹¹⁹ As the Second Department has explained, this is essentially the same as the clear and convincing standard.¹²⁰

The penalties for civil contempt include imprisonment or fines to secure prospective compliance, actual damages payable to the aggrieved party, and attorneys’ fees and costs.¹²¹

112. *McCain v. Dinkins*, 84 N.Y.2d 216, 226 (N.Y. 1994); *accord McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983) (restating the four-part rule for civil contempt); N.Y. JUD. LAW § 753.

113. *McCormick*, 59 N.Y.2d at 583; *accord McCain*, 84 N.Y.2d at 226 (“it is not necessary that the order actually have been served upon the party”).

114. *McCormick*, 59 N.Y.2d at 583.

115. *El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 35 (2015).

116. *Town Bd. of Southampton v. R.K.B. Realty, LLC*, 91 A.D.3d 628, 629 (N.Y. App. Div. 2012); *accord El-Dehdan*, 26 N.Y.3d at 29.

117. *Matter of Stavisky v. Koo*, 54 A.D.3d 432, 433–34 (N.Y. App. Div. 2008) (citations and internal quotations omitted); *accord Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

118. 59 N.Y.2d 574 (N.Y. 1983).

119. *Id.* at 583.

120. *See El-Dehdan*, 114 A.D.3d at 10 (“The reasonable certainty standard requires a quantum of proof . . . greater than a preponderance of evidence but less than proof beyond a reasonable doubt . . . akin to the clear and convincing evidence standard.” (citation and internal quotations omitted)); *see also Blyer v. Domsey Trading Co.*, No. 91 CV 1304, 1992 U.S. Dist. LEXIS 10780, at *9 (E.D.N.Y. 1992) (“This standard requires more than the preponderance of the evidence standard applicable to most civil cases, but less than proof beyond a reasonable doubt, as in criminal cases.”).

121. *See* N.Y. JUD. LAW §§ 753, 773. For further discussion, see *infra* Section III.C.2.

C. Contempt for Failure to Comply with Orders to Repair

As the discussion in Section II, *supra*, suggests, the flouting of court orders to repair is typically blatant and chronic, easily satisfying the elements of both civil and criminal contempt,¹²² although a finding of both forms of contempt is rare.¹²³ There are, however, several advantages to moving for civil contempt in the event of noncompliance, including the lower burden of proof, the irrelevance of wilfulness or good faith, the simplicity of a bench rather than a jury trial,¹²⁴ and the availability of remedies and penalties that directly benefit the tenant and the tenant's counsel.¹²⁵ The latter includes penalties to enforce timely compliance, damages payable to the tenant, rather than to the court, and attorneys' fees and costs.¹²⁶

122. See *supra* Section II; see also Sabbeth, *supra* note 19, at 127 (“With the assistance of counsel, establishing substandard conditions and notice to the landlord should be relatively easy. . . . [T]he likelihood of ‘prevailing’ on liability should be extremely high, and recovery of fees should therefore be virtually certain.”).

123. See Warren A. Estis & Michael E. Feinstein, *Landlord’s Noncompliance Leads to Contempt Charge(s)*, N.Y. L.J. (Aug. 2, 2016), <https://www.law.com/newyorklawjournal/almID/1202764178758/Landlords-Noncompliance-Leads-to-Contempt-Charges/> [<https://perma.cc/X7AP-HP95>] (“[I]t is far from common to see a decision from the New York City Civil Court involving a landlord being held in both civil and criminal contempt . . .”).

124. There is no right to a jury trial in civil contempt, simplifying proceedings. *Shillitani v. United States*, 384 U.S. 364, 365 (1966); *Dep’t of Hous. Pres. & Dev. of New York v. Deka Realty Corp.*, 208 A.D.2d 37, 47 (N.Y. App. Div. 1995) (“Civil contempts engender no right to a jury trial.”); Jennifer Fleischer, *In Defense of Civil Contempt Sanctions*, 36 COLUM. J.L. & SOC. PROBS. 35, 41 (2002) (“[T]he right to a trial by jury is accorded only in criminal contempt proceedings; no such right is available for a civil contempt defendant.”). In fact, where there are no disputed facts, contempt can be adjudicated without a hearing. See, e.g., *Garbitelli v. Broyles*, 257 A.D.2d 621, 622 (N.Y. App. Div. 1999) (“The appellants failed to submit any affidavits based on personal knowledge, and consequently failed to contradict the petitioner’s allegations. They were thus properly adjudicated to be in contempt without a hearing.” (citations omitted)); *Cashman v. Rosenthal*, 261 A.D.2d 287, 287 (N.Y. App. Div. 1999) (holding that the finding of contempt without a hearing was proper because there was no issue of fact to be resolved “and, in any event, defendant never requested a hearing in opposing the contempt application”); *Dep’t of Hous. Pres. & Dev. of N.Y. v. Gottlieb*, 136 Misc. 2d 370, 373 (N.Y. Civ. Ct. 1987) (“The summary disposition of a civil contempt proceeding where there are no disputed facts has long been permitted.”).

125. See *infra* Sections III.C.1–2.

126. See *infra* Section III.C.2.

In addition, criminal contempt, which generally cannot be purged,¹²⁷ has been labelled “harsh”¹²⁸ and “severe,”¹²⁹ rendering courts more reluctant to impose this “extraordinary sanction.”¹³⁰ With civil contempt, by contrast, even where courts order imprisonment or impose fines to compel compliance, contemnors control their own fate. As the Supreme Court has explained, “[w]here the court exercises such coercive power . . . for the purpose of compelling future obedience, those imprisoned carry the keys of their prison in their own pockets; by obedience to the court’s valid order, they can end their confinement; and the court’s coercive power in such a civil contempt proceeding ends when its order has been obeyed.”¹³¹

Compared with the eviction decrees that housing courts hand out each day, then, civil contempt orders are relatively mild and entirely purgeable. As one commentator has observed:

Although one may be inclined to feel sympathetic toward particular civil contempt defendants, one must remember that such defendants are not at the mercy of the court, but of themselves. It is always within their power to end their sanctions In order to maintain judicial effectiveness, we must demand respect for the court and its authority. . . . Such

127. See, e.g., *Spindelfabrik Suessen-Schurr v. Schubert*, 903 F.2d 1568, 1579 (Fed. Cir. 1990) (“On the other hand, because criminal contempt is intended to vindicate the authority of the court, it cannot be purged by any act of the contemnor.”); *Rubackin v. Rubackin*, 62 A.D.3d 11, 17 (N.Y. App. Div. 2009) (“When the period of commitment is imposed for a definite term, to protect the integrity of the judicial process, without the possibility of shortening that term by purging the contempt, the contempt is criminal.”). *But see* *People v. Leone*, 44 N.Y.2d 315, 318 (1978) (suggesting that it may be possible “to purge some criminal contempts as distinguished from crimes of contempt,” but “that issue need not be reached”).

128. *Bloom v. Illinois*, 391 U.S. 194, 206 (1968).

129. See, e.g., *In re Diane D.*, 161 Misc. 2d 861, 863 (N.Y. Sup. Ct. 1994) (describing contempt as a more severe penalty for jurors who disobey court orders than other penalties within the court’s inherent authority).

130. *Dep’t of Env’tl. Prot. of N.Y.C. v. N.Y. Dep’t of Env’tl. Conserv.*, 70 N.Y.2d 233, 241 (1987).

131. *United States v. United Mine Workers of Am.*, 330 U.S. 258, 331–32 (1947) (Black, J., concurring in part and dissenting in part) (citation and internal quotations omitted); accord Jacob R. Fiddelman, *Protecting the Liberty of Indigent Civil Contemnors in the Absence of a Right to Appointed Counsel*, 46 COLUM. J.L. & SOC. PROBS. 431, 438–39 (2013) (“The defining feature of civil contempt is the contemnor’s ability to purge the contempt at any time by complying with the court order (hence the now oft-quoted adage that civil contemnors ‘carry the keys of their prison in their own pockets’).”).

sanctions are the court's sole means of coercing compliance and ensuring a just result.¹³²

Housing Court is, at present, a single-edged sword wielded against tenants. There is no principled reason why courts fail to wield the second, duller edge of the sword, the power of contempt for flouting orders to repair, especially given the court's original purpose and the comparatively lighter sanction that civil contempt in particular imposes.

The following discussion focuses on this very sanction, given its many advantages and common applicability.

1. Establishing the Elements of Civil Contempt for Failure to Repair

A finding of civil contempt requires four elements,¹³³ each of which is easily satisfied where a landlord has flouted an order to repair:

i. A Lawful Order of the Court with an Unequivocal Mandate

For civil contempt, "a lawful judicial order expressing an unequivocal mandate must have been in effect."¹³⁴ In housing court, a large number of repair orders arise from the resolution of nonpayment proceedings, in which obligations to pay rent are combined with agreements to repair outstanding violations in the form of so-ordered stipulations.¹³⁵ HP actions, too, are often resolved through court-ordered stipulations or consent orders.¹³⁶ These so-ordered stipulations are the same as any other court orders for the

132. Fleischer, *supra* note 124, at 63.

133. See *supra* note 112 and accompanying text.

134. McCain v. Dinkins, 84 N.Y.2d 216, 226 (1994).

135. See Summers, *supra* note 2, at 178, 199 ("In recent years, approximately 200,000 nonpayment of rent eviction cases have been filed annually in New York City Housing Court. Consistent with the eviction case resolution processes nationwide, the overwhelming majority of such cases are resolved through settlement agreements The settlement agreements in slightly over half of all nonpayment of rent cases included an order obligating the landlord to make substantial repairs").

136. See, e.g., Dole v. 106-108 W. 87th St. Owners Inc., 831 N.Y.S.2d 352, *7 (Civ. Ct. 2006). ("In the typical consent order in a tenant-initiated HP proceeding, an owner agrees to correct a violation(s) issued by [HPD].").

purposes of contempt: “A so-ordered stipulation constitutes a lawful court order and violation of same is punishable by civil contempt.”¹³⁷

As for the “unequivocal mandate” prong, the order must expressly list the specific conditions or violations to be repaired. Note that at least one court has drawn a distinction between “conditions” and “violations.” “Violations,” the court noted, are states of disrepair “which statutes and regulations require landlords to repair,” whereas “conditions” are states of disrepair “which statutes and regulations do not require landlords to repair.”¹³⁸ Hence, an order to repair all “violations” does not necessarily cover all of the conditions that a tenant might wish to have repaired. Litigants who wish to secure the repair of conditions that do not rise to the level of “violations” must carefully note this distinction and expressly enumerate the conditions to be repaired, rather than refer merely to “violations.” Similarly, where the stipulation mandates that the landlord undertake repairs “as required by law,” the landlord “must fix only violations.”¹³⁹ If there is a dispute, the court will “determine retroactively whether the condition was a violation. If the court determines that unrepaired violations existed, the landlord may be held in contempt.”¹⁴⁰

ii. The Landlord Disobeyed the Order

The question whether landlords have violated court orders to repair is straightforward: “If [the landlords] did not make all the repairs the stipulation [or order] required, then they violated the stipulation.”¹⁴¹ A tenant’s testimony alone may be sufficient to prove a violation.¹⁴² Inspection and violation reports, however, are a powerful

137. Dep’t of Hous. Pres. & Dev. of N.Y. v. Living Waters Realty, Inc., 14 Misc. 3d 484, 486 (N.Y. Civ. Ct. 2006) (citations omitted); *accord Dole*, 831 N.Y.S.2d at *6.

138. *Schlueter v. East 45th Dev. LLC*, 9 Misc. 3d 1105[A], at *13 (N.Y. Civ. Ct. 2005).

139. *Id.* at *17; *see also id.* at *15 (“The phrase ‘as required by law’ in a Housing Part stipulation or order concerning repairs refers to conditions constituting HMC and like-code violations.”). Note that “a landlord that consents to an inspect-and-repair-as-required-by-law stipulation waives all statutory or common-law defenses against a motion for an order to correct and must fix the violation as a matter of law.” *Id.* at *16.

140. *Id.* at *16.

141. *Id.* at *21.

142. *See, e.g.*, Dep’t of Hous. Pres. & Dev. of N.Y. v. 1505 Townsent Ave. Realty, Inc., 1993 N.Y. Misc. LEXIS 656, at *1 (App. Term 1993) (“[T]he testimony of various tenants as to sporadic heat and hot water at the premises was sufficient to support the civil contempt conviction.” (citation omitted)); *Lu v. Betancourt*, 116

tool in contempt proceedings. Under the New York Multiple Dwelling Law, “computer-printed HPD violations and all other computerized data relevant to the enforcement of state and local housing standards are prima facie evidence of any matter stated therein, and the court must take judicial notice thereof as if same were certified as true.”¹⁴³ In addition, where the landlord has failed to certify that the violations in question have been corrected, there is a presumption that the violations have not been corrected.¹⁴⁴ As one court observed, “[t]he enactment of the presumption of a continuing violation protects the tenants’ rights by removing the onerous burden of proof that the violation existed on every date in question.”¹⁴⁵

Landlords cannot overcome this presumption through their testimony alone. “Required to rebut the presumption of a continuing violation is proof beyond respondents’ mere testimony that they removed the violations and accordingly complied with the order to

A.D.2d 492, 494 (N.Y. App. Div. 1986) (“Petitioner’s tenants testified that the radiators were cold. The trier of fact was free to credit their testimony and could on this basis find with reasonable certainty that petitioner was guilty of civil contempt.”).

143. Dep’t of Hous. Pres. & Dev. of N.Y. v. Living Waters Realty, Inc., 14 Misc. 3d 484, 486–87 (N.Y. Civ. Ct. 2006); accord *Kraebel v. Michetti*, No. 93 Civ. 4596 U.S. Dist. LEXIS 11796, at *23 (S.D.N.Y. Aug. 22, 1994), *aff’d*, 57 F.3d 1063 (2d Cir. 1995); Dep’t of Hous. Pres. & Dev. v. Knoll, 120 Misc. 2d 813, 814 (N.Y. App. Term 1983); see also N.Y. MULT. DWELL. LAW § 328(3) (noting that in a housing court action, “violation files . . . 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”).

144. See, e.g., *Living Waters Realty*, 14 Misc. 3d at 487 (“[T]here is also a presumption that the violations continue to exist” (citation omitted)); *Allen v. Rosenblatt*, 5 Misc. 3d 1032(A), at *13 (N.Y. Civ. Ct. 2004) (“Respondents have not filed a certification of compliance showing that they corrected the violations . . . The court finds in this case that their failure to file establishes a prima facie case that they did not correct the violations timely.” (citations omitted)); *Toribio v. Whiz Realty Corp.*, 131 Misc. 2d 227, 232 (N.Y. Civ. Ct. 1986) (“The screen listed various, serious Building Code violations dating back to 1971 and which had not been certified as having been corrected, for a presumption that an uncertified violation has not been corrected.”); *Knoll*, 120 Misc. 2d at 814 (“The failure of an owner to file a certification of compliance shall establish a prima facie case that such violation has not been corrected.” (citation and internal quotations omitted)); see also N.Y.C. ADMIN. CODE §§ 27-2115(k)(1)(i) (“There shall be a presumption that the condition constituting a violation continues after the affixing of the notice [of violation].”).

145. Dep’t of Hous. Pres. & Dev. v. De Bona, 101 A.D.2d 875, 876 (N.Y. App. Div. 1984).

correct.”¹⁴⁶ Indeed, “[t]o permit a property owner to come into court and merely testify that the violations were removed, without any supporting evidence, would vitiate the impact of the Housing Code of this city and render it meaningless.”¹⁴⁷

A landlord cannot, however, be held in contempt for failure to obey an order with which it is impossible to comply.¹⁴⁸ The landlord bears the burden of proving impossibility.¹⁴⁹ “This is a heavy burden and will not be satisfied by showing that the respondents were attempting to comply or acting in good faith.”¹⁵⁰ This defense is, moreover, unavailing in almost all cases involving so-ordered stipulations to repair. Such stipulations are the product of negotiation and agreement between the parties.¹⁵¹ If the landlord has agreed to the terms, presumably the landlord was capable of undertaking the repairs to which he or she assented. Indeed, agreeing to terms with which the landlord is incapable of complying is itself a ground for

146. *Allen*, 5 Misc. 3d 1032(A) at *13–14.

147. *Knoll*, 120 Misc. 2d at 814 (citation omitted).

148. *See, e.g.*, *United States v. Rylander*, 460 U.S. 752, 757 (1983) (“Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action.”); *Wheeler v. Wheeler*, 252 A.D. 673, 674 (N.Y. App. Div. 1937); *Hasson v. S.B.J. Assoc., LLC*, No. 021860/2009, 2017 LEXIS 1074, at *8 (N.Y. Sup. Ct. Apr. 3, 2017) (“In answering a motion for contempt, the party alleged to have disobeyed the Court’s Order may assert factual impossibility as a defense.” (citation omitted)). Where the landlords have, by their own acts, made compliance impossible, however, this defense is unavailable. *See, e.g.*, *City of New York v. Quadrozzi*, 171 A.D.3d 1009, 1010 (N.Y. App. Div. 2019) (upholding contempt where defendant argued it was impossible to make repairs without necessary permits, but “defendant failed to apply for a building permit even after the Supreme Court granted him three extensions”); *Roach v. Mabry*, No. 116193/06, 2011 LEXIS 7271, at *4 (N.Y. Sup. Ct. Sept. 29, 2011) (“A court cannot [find contempt] for not doing that which is impossible, or for not doing what is not in his power to do, unless he has voluntarily disabled himself to do the act in such a manner that the creation of the disability is in itself a contempt.” (citation omitted)).

149. *See, e.g.*, *Rylander*, 460 U.S. at 757 (“It is settled, however, that in raising this defense, the defendant has a burden of production.” (citations omitted)); *Roach*, No. 116193/06 LEXIS 7271, at *4; *Matter of Cardino*, No. 37021/2007, 2017 LEXIS 2984, at *7 (N.Y. Sup. Ct. July 28, 2017).

150. *Cardino*, No. 37021/2007, 2017 LEXIS 2984, at *7; *accord Roach*, No. 116193/06 LEXIS 7271, at *5 (citation and internal quotations omitted); *Hassan*, No. 021860/2009 LEXIS 1074, at *7; *Badgley v. Santacroce*, 800 F.2d 33, 36 (2d Cir. 1986) (“In raising this defense, the defendant has a burden of production that may be difficult to meet” (citations omitted)), *cert. denied*, 479 U.S. 1067 (1987); *see also infra* note 161 and accompanying text.

151. *See Summers, supra* note 2, at 178–79.

contempt.¹⁵² This ability, moreover, clearly separates the parties. As Attorney Campanelli observed, “in all my years of practice, I have never had a landlord state that he was unable to effectuate the repairs set forth in the stipulation, and I have never had a client state that he was able, without considerable effort, to pay the stipulated amount.”¹⁵³ Tenants must scramble to raise the funds, e.g. from governmental agencies, through “One Shot Deals,”¹⁵⁴ and from charitable organizations, family, or friends. Every day, tenants are evicted for failure to do what has proven impossible: paying rent and arrears.¹⁵⁵ Landlords, by contrast, typically escape even the mildest—and purgeable—remedy of civil contempt for their failure to do the entirely possible.

152. *Randolph v. N.Y.C. Hous. Auth. E. River Houses*, Nos. L & T 15490/2010, HP 862/2012, 2014 N.Y. Misc. LEXIS 2987, at *18 (Civ. Ct. July 8, 2014) (“Criminal contempt is appropriately found here because NYCHA’s execution of stipulations which it knew it could not comply with is an offense against judicial authority.”).

153. Campanelli Interview, *supra* note 61.

154. See DiPrinzio, *supra* note 31, ¶ 50 (“A program helps all qualifying tenants facing eviction pay back rent. The ‘One Shot Deal’ is a grant intended to help tenants in dire circumstances avoid eviction and shelters. It also covers moving expenses or other emergency costs. The city . . . gave 62,000 households grants to pay back rent in 2018.”).

155. It is only getting harder:

[B]etween 2000 and 2012, NYC median rents rose by 75%, well ahead of the national median rent increase of 44%. This period included a loss of 400,000 affordable housing units that rented for less than \$1,000 monthly. While rents continued to rise at approximately 3.9% annually, wages increased only 1.8% per annum between 2010 and 2017.

Newton et al., *supra* note 17, at 208. Nationwide, in 2017, approximately one in six renters earning below \$30,000 a year reported that they were either unable to pay all or part of their rent (9%) or that it was at least somewhat likely that they would be forced to leave their homes through eviction within two months (8%). *Am. Housing Survey 2017 National-Delinquent Payments and Notices – All Occupied Units, Tenure Filter: Renter, Variable 1: Household Income*, U.S. CENSUS BUREAU (2017), https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?s_areas=00000&s_year=2017&s_tablename=TABLES08&s_bygroup1=7&s_bygroup2=1&s_filtergroup1=3&s_filtergroup2=1 [https://perma.cc/7WV4-5M3K]. For African American renters earning below \$30,000 annually, this ratio was one in five (11% and 9%, respectively). *2017 National – Delinquent Payments and Notices Summary Tables, Am. Housing Surv. Table Creator*, U.S. CENSUS BUREAU (2017), https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?s_areas=00000&s_year=2017&s_tablename=TABLES08&s_bygroup1=7&s_bygroup2=1&s_filtergroup1=3&s_filtergroup2=1 [https://perma.cc/N89V-8H54].

Finally, contemnors typically raise two defenses in civil contempt proceedings that the courts have conclusively ruled unavailing: the defenses of good faith and substantial compliance. As we have seen, the Court of Appeals has established that “wilfulness is not an element of civil contempt.”¹⁵⁶ Consonant with this principle, the Court of Appeals has also established that “it is no defense that the . . . defendants were attempting to comply or acting in good faith.”¹⁵⁷

Contemnors, including landlords, similarly argue that they have substantially complied with the order in question sufficiently to avoid contempt.¹⁵⁸ The Court of Appeals has expressly rejected this defense as well. In *McCain v. Dinkins*,¹⁵⁹ defendants asserted that substantial compliance with the court’s order to house homeless individuals should suffice, since they “acted in good faith and to the best of a municipal ability to fulfill the court orders,”¹⁶⁰ they “did all they humanly or officially could do”¹⁶¹ and “total compliance in every instance was impossible.”¹⁶² Rejecting this argument, the Court of Appeals ruled that “[t]he notion of substantial compliance [has been] rejected as it is no defense that the municipal defendants were attempting to comply or acting in good faith.”¹⁶³ As one court has

156. *El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 35 (2015); *see also supra* notes 100–01 and accompanying text.

157. *McCain v. Dinkins*, 84 N.Y.2d 216, 225 (1994) (citations and internal quotations omitted); *accord* *In re Bonnie H.*, 145 A.D.2d 830, 832 (N.Y. App. Div. 1988) (“It is not necessary that the disobedience be deliberate; the mere act of disobedience, regardless of motive, is sufficient to sustain a finding of civil contempt if such disobedience defeats, impairs, impedes or prejudices the rights of a party.” (citation omitted)); *Yalkowsky v. Yalkowsky*, 93 A.D.2d 834, 835 (N.Y. App. Div. 1983); *In re Derrick*, No. 111105/98, 2001 N.Y. Misc. LEXIS 842, at *14 (Sup. Ct. June 19, 2001) (“the violation need not be willful, nor must there be a finding of bad faith” (citation omitted)), *aff’d*, 289 A.D.2d 182 (N.Y. App. Div. 2001).

158. *See, e.g., Schleuter*, 2005 N.Y. Misc. LEXIS 1897, at *24 (“Respondents claim they substantially complied with the stipulation,” and “they corrected more than half the violations on the repair list.”).

159. *McCain*, 84 N.Y.2d at 216.

160. *Id.* at 223.

161. *Id.*

162. *Id.* at 225.

163. *Id.* (citations and internal quotations omitted); *accord* *Hanna v. Turner*, 289 A.D.2d 182, 183 (N.Y. App. Div. 2001) (“Contrary to respondents’ arguments, there was no requirement that the finding of contempt be supported by a finding that, not only had the judgment been violated in specific instances, but that there had been no substantial compliance therewith.” (citations omitted)); *Spinnenweber v. N.Y. Dep’t of Env’t Conserv.*, 160 A.D.2d 1138, 1140

observed, “McCain clearly rejected the ‘best efforts’ defense, and held that substantial compliance is not enough.”¹⁶⁴ Hence, a landlord who fails timely to complete *all* ordered repairs is in contempt, and the fact that some—or even many—of the repairs have been completed is legally irrelevant and insufficient to defeat a finding of civil contempt.

iii. The Landlord Had Knowledge of the Order

To be found in contempt, a party must have had knowledge of the order in question, although it is not necessary that the order was served upon the party.¹⁶⁵ The question arises, then, whether a landlord can be held in contempt based upon a so-ordered stipulation to repair, signed by the landlord’s attorney but not by the landlord (and possibly concluded in the absence of the landlord). The answer is yes, for in such instances, knowledge of the landlord’s attorney is imputed to the landlord:

Notice to the attorney is notice to his client, at least, where the attorney receives such notice in the course of the transaction in which he is acting for his client. In such case it is the duty of an attorney at law to communicate to his client whatever information he acquires in relation to the subject-matter involved in the transaction; and he will be conclusively presumed to have performed this duty, and notice to him is, therefore, conclusive notice to his client or principal. It is the general rule that notice to an attorney is notice to the client employing him, and that knowledge of an attorney is knowledge of his client.¹⁶⁶

(N.Y. App. Div. 1990) (“[The] Supreme Court’s order . . . is clear and unequivocal . . . ; there is no intimation that ‘substantial performance’ will suffice Petitioner’s disobedience of the court’s lawful mandate defeated, impaired, impeded, or prejudiced respondent’s right . . . hence, civil contempt was established and punishment is appropriate.” (citations omitted)); *In re Derrick*, No. 111105/98, 2001 N.Y. Misc. LEXIS 842, at *14 (Sup. Ct. June 19, 2001) (rejecting substantial compliance argument and observing: “This contempt proceeding is not about what the City has done, but rather about what the City has not done.”), *aff’d*, *Hanna*, 289 A.D.2d at 182; *Schlueter*, 2005 N.Y. Misc. LEXIS 1897, at *24 (“[N]either substantial compliance nor a good-faith effort at compliance is a defense to civil contempt.” (citations omitted)); Gray, *supra* note 89, at 367 (“Substantial or diligent effort is not enough, even if performed in good faith.”).

164. *In re Derrick*, 2001 N.Y. Misc. LEXIS 5842, at *15 (citation omitted).

165. See *supra* notes 113–14 and accompanying text.

166. *United States v. Sumner*, 127 Misc. 907, 908–09 (N.Y. Sup. Ct. 1926) (citations and internal quotations omitted); *accord* 1420 Concourse Corp. v. Cruz,

So-ordered stipulations to repair, even if negotiated and signed only by counsel, subject the landlord to contempt for failure to comply.

iv. The Rights of the Tenant Were Prejudiced

For civil contempt, New York's Judiciary Law requires a showing that a party's rights were "defeated, impaired, impeded, or prejudiced."¹⁶⁷ Failure to make repairs necessarily prejudices the rights of the tenant in question: "When a court requires a landlord to make repairs in a tenant's apartment and the landlord fails to do so, the landlord's failure to effect the repairs necessarily prejudices the tenant."¹⁶⁸ Even without this presumption, moreover, tenants can

175 A.D.2d 747, 749 (N.Y. App. Div. 1991) (holding that counsel was "certainly clothed with apparent authority and the appellant reasonably relied upon that appearance of authority" where, *inter alia*, counsel represented petitioner "throughout the proceedings" and entered into and negotiated stipulations "in open court" (citations omitted)); 346-52nd Realty, LLC v. La Estancia, Ltd., 7 Misc. 3d 134(A), 801 N.Y.S.2d 243 (App. Term 2005); *In re Savoy*, 232 N.Y.S.2d 396, 398 (Sup. Ct. 1962), *aff'd*, 22 A.D.2d 855 (N.Y. App. Div. 1964) ("[W]here a notice pertains to the transaction in which an attorney is acting for the client, the knowledge so obtained is imputed to the principal. . . . Notice of a fact to an attorney is consequently recognized as constituting constructive notice to the principal when it is connected with the subject matter." (citations omitted)); *Castillo v. Banner Group LLC*, 825/2019, 2019 N.Y. Misc. LEXIS 2913, at *4 (Civ. Ct. June 6, 2019) ("The order expressed an unequivocal mandate to correct the violations. Respondents do not dispute that they did not correct the violations by the date . . . in the order. Respondents' counsel was in Court when the Court rendered the order, conferring the requisite knowledge to incur contempt liability." (citation omitted)); *see also* *McCormick v. Axelrod*, 59 N.Y.2d 574, 585 (1983) ("We also conclude that all parties or their counsel, had sufficient knowledge, actual or imputed, of the terms of the stay, to render their conduct in disregard of the stay contumacious.").

167. N.Y. JUD. § 753(A) (1963).

168. *Schlueter*, 2005 N.Y. Misc. LEXIS 1897, at *26 (citation omitted); *accord* *Various Tenants of 446-448 W. 167th St. v. N.Y.C. Dep't of Hous. Pres. & Dev.*, 588 N.Y.S.2d 840, 841 (App. Term 1992) ("DHPD did not even commence, let alone substantially perform, the work required by the terms of the stipulation. In consequence, tenants' rights in the litigation were necessarily and significantly impaired." (citation omitted)), *aff'd*, 603 N.Y.S.2d 718 (App. Div. 1993); *Amsterdam I LLC v. Santos*, 67418/18, 2019 NYLJ LEXIS 4669, at *13 (Civ. Ct. Feb. 14, 2020) ("The existence of these violations, in and of themselves, evince prejudice to petitioner which supports a finding of contempt." (citation omitted)); *Earnest v. 1109-1113 Manhattan Ave Partners*, HP 2508/2009, 2013 NYLJ LEXIS 7384, at *7 (Civ. Ct. Sept. 20, 2013) ("[C]ontrary to respondents' allegations that petitioner's affidavit does not establish any threat to his life, health or safety the outstanding unrepaired violations speak for themselves."); *Brown v. 315 E. 69 St.*

easily satisfy this requirement by demonstrating the manner in which the unresolved conditions or violations prejudiced them, whether it be lack of heat, broken windows, lack of electricity, or rodents.¹⁶⁹

2. Securing Penalties, Damages, and Attorneys' Fees

Tenants, and their attorneys, will readily bring contempt motions if they see that the courts are willing to respect the law and enforce their orders to repair—as consistently as they do their orders to pay rent. This must include: penalties for the prospective failure timely to complete repairs, particularly for hazardous conditions; damages awards, with an understanding that the failure to repair subjects clients to emotional distress and that, even absent medical or psychological corroboration, such distress warrants appropriate compensation; and full attorneys' fees and costs.

i. Penalties and Fines to Coerce Compliance

The *Smith* case, examined *supra*,¹⁷⁰ highlights the critical need to include compliance penalties in contempt orders. By the time the court held contempt proceedings in *Smith*, the landlord had already flouted six orders to repair, among other things subjecting an

Owners Corp., 6424/2005, 2006 N.Y. Misc. LEXIS 562, at *5 (Civ. Ct. 2006) (“When a consent order requires a landlord to correct violations in a tenant's apartment, the landlord's failure to effect the repairs necessarily prejudices the tenant.” (citation omitted)); *Odingbe v. Dockery*, 582 N.Y.S.2d 909, 914 (Civ. Ct. 1992) (“[T]he court finds that the rights of petitioner were prejudiced by the disobedience by respondent of the court's order. It can hardly be disputed that the failure to timely cure hazardous violations works a substantial prejudice to the rights of the party entitled by law to habitable, nonhazardous, premises.”); see also *Randolph v. N.Y.C. Hous. Auth. E. River Houses*, HP 862/2012, 2014 N.Y. Misc. LEXIS 2987, at *10 (Civ. Ct. 2014) (“The undisputed failure by NYCHA to comply with four so-ordered stipulations and one court order by failing to provide an adequate supply of hot water, prejudices the Tenant's rights in the proceeding and is sufficient to hold NYCHA in Civil Contempt.” (citation omitted)).

169. At least one court has suggested that the very nature of a proceeding to enforce orders to repair “confirms the prejudice caused to the petitioner.” Dep't of Hous. Pres. & Dev. of N.Y.C. v. *Living Waters Realty, Inc.*, 827 N.Y.S.2d 627, 630 (Civ. Ct. 2006). The court in *Living Waters Realty* was referring to HPD, “whose primary responsibility is to enforce the Housing Maintenance Code,” but the same reasoning certainly applies to tenants who are forced to seek enforcement of court orders to repair substandard housing conditions. *Id.* at 631.

170. See *supra* notes 34–57 and accompanying text.

immuno-compromised tenant to rodents for over a year.¹⁷¹ Yet, despite holding the landlord in contempt, the court neglected to establish a deadline for repairs, much less to impose jail time or penalties in the event of continued noncompliance.¹⁷² Mr. Smith was therefore forced to endure hazardous conditions even longer while his attorney returned to court to request yet another order to complete the repairs.¹⁷³ This was a serious error, and an injustice for Mr. Smith.

It was also sadly typical. In *Dole v. 106-108 W. 87th St. Owners, Inc.*,¹⁷⁴ for example, respondents were ordered in January 2006 to remediate mold in the tenant's apartment,¹⁷⁵ a condition that the court deemed a Class "B" or hazardous violation.¹⁷⁶ Under New York State law, hazardous violations must be corrected within thirty days.¹⁷⁷ Respondents ignored the order, and over ten months later, the court found that the "respondents disobeyed the clear terms of a lawful court order warranting a finding of civil contempt."¹⁷⁸ Although the tenant had already been subjected to "hazardous" conditions for ten months, however, the court did not impose any fines to coerce future compliance. Instead, the court merely ordered the respondents once again "to correct this violation within 30 days," the same time frame under which the respondents had been ordered to remediate the mold ten months earlier.¹⁷⁹ Failure to comply would result not in daily fines, but either "civil penalties," for which the respondents were already liable under the Housing Maintenance Code ("HMC"),¹⁸⁰ "and/or contempt," i.e., yet another contempt proceeding—despite the court's having already found respondents in contempt.¹⁸¹

171. See *supra* notes 34–57 and accompanying text.

172. See *supra* note 50 and accompanying text.

173. See *supra* note 51 and accompanying text.

174. HP 6004/05, 2006 N.Y. Misc. LEXIS 3421 (Civ. Ct. 2006).

175. *Id.* at *1.

176. *Id.* at *25. For a brief explanation of the different classes of violations in New York, see *infra* notes 187–90 and accompanying text.

177. See *infra* note 189 and accompanying text.

178. *Dole*, 2006 N.Y. Misc. LEXIS 3421, at *24.

179. *Id.* at *25.

180. See *infra* note 193 and accompanying text.

181. *Dole*, 2006 N.Y. Misc. LEXIS 3421, at *25; see, e.g., *Edwards v. N.Y.C. Hous. Auth.*, 2628/2015, 2018 NYLJ LEXIS 2687, at *8–9 (Civ. Ct. Aug. 8, 2018) (holding respondent NYCHA guilty of contempt for flouting court orders to repair, including mold abatement, yet not imposing a deadline or ordering coercive penalties; instead merely observing, "NYCHA is still legally required to comply with the remediation of the moisture and mold as ordered by the court"); *Schlueter v. East 45th Dev. LLC*, HP 6463/03, 2005 N.Y. Misc. LEXIS 1897, at *43

This must change. Courts in New York have broad discretion in determining the nature of the penalty to be imposed, and in determining the specific conditions under which a contemnor may purge the contempt.¹⁸² New York's Judiciary Law expressly empowers courts to impose jail time or fines to secure compliance with court orders,¹⁸³ including orders to repair.¹⁸⁴ Indeed, along with

(Civ. Ct. 2005) (finding respondents in civil contempt for failing to correct dozens of violations, yet imposing no fines to enforce future compliance, and merely ruling that if respondents again flout the court order, "petitioners may restore this proceeding to the calendar . . . to seek civil and criminal contempt once again").

182. *In re Hildreth*, 28 A.D.2d 290, 293 (N.Y. App. Div. 1967) ("[A] contempt adjudication generally requires the exercise of the court's discretion in determining the nature and extent of the punishment to be imposed, in determining whether or not the respondent should have an opportunity to purge himself of the contempt and in fixing the conditions relative thereto."); *Midlarsky v. D'Urso*, 133 A.D.2d 616, 617 (N.Y. App. Div. 1987) ("The court is vested with broad discretion in determining appropriate conditions upon which a contemnor may purge the contempt." (citation omitted)); *Nestler v. Nestler*, 125 A.D.2d 836, 837 (N.Y. App. Div. 1986) ("The decision of whether to punish as contempt noncompliance with a court's decree and the fixing of conditions by which the contemnor may purge himself rest in the sound discretion of the court." (citations omitted)); *Busch v. Berg*, 52 A.D.2d 1082, 1082 (N.Y. App. Div. 1976) ("The decision whether to punish noncompliance with a court directive as a contempt generally rests in the sound discretion of the court, as does the fixing of conditions upon which the contemnor may purge himself.").

183. *See* N.Y. JUD. LAW §§ 753, 773; *see, e.g.*, *Kozel v Kozel*, 161 A.D.3d 699, 700 (N.Y. App. Div. 2018) ("[T]he court properly imposed a daily civil contempt fine of \$250 to compel Inga's compliance." (citation omitted)); *Ruesch v Ruesch*, 106 A.D.3d 976, 977 (N.Y. App. Div. 2013) (imposing fine of \$250 for each day defendant remained in continuing violation of the so-ordered stipulation, prospectively, and observing: "[A] fine is considered civil and remedial if it either coerces the recalcitrant party into compliance with a court order, or compensates the claimant for some loss . . . If a fine is not compensatory, it is civil only if the contemnor is given an opportunity to purge." (citation and internal quotations omitted)); *Edwards v. Edwards*, 122 A.D.2d 18, 19 (N.Y. App. Div. 1986) ("The power of the court to punish a civil contempt is limited by Judiciary Law § 774 (1) which states: 'Where the misconduct proved consists of an omission to perform an act or duty, which is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it.'" (citation omitted)); *Jones N. A. Dev. Co. v. Jones*, 99 A.D.2d 238, 240 (N.Y. App. Div. 1984) ("Where it is in the power of the offender to perform the act directed, it is immaterial that he may be imprisoned for a long time, for he has it in his power to perform the act ordered.").

184. *See, e.g.*, *Castillo v Banner Group LLC*, 825/2019, 2019 N.Y. Misc. LEXIS 2913, at *7 (Civ. Ct. June 6, 2019) (noting "large degree of discretion the Court retains to forge an appropriate punishment for civil contempt," including "order designed to coerce compliance with the Court's mandate," with "a prospective fine that is civil in nature so long as the contemnor is given an

compensating the aggrieved party, the very purpose of civil contempt is to coerce compliance with the court's orders.¹⁸⁵

If a landlord has been found in contempt, that means the landlord has *already* flouted a court order to repair (possibly multiple orders), and the tenant has been forced to endure often hazardous conditions while waiting at home on access dates, in vain, for the landlord to obey the law. Merely reissuing the order to repair is woefully inadequate and, as we have seen, often futile.¹⁸⁶ Accordingly, contempt orders must include coercive penalties, with clear deadlines for completing repairs.¹⁸⁷

New York State's Housing Maintenance Code establishes strict deadlines for completing repairs. Class "C" violations are the most serious and harmful, and are classified as "immediately hazardous."¹⁸⁸ A landlord is required to correct Class "C" violations within twenty-four hours of the time the notice of the violation is served.¹⁸⁹ Class "B" violations are classified as "hazardous" and must be corrected within thirty days of the mailing of the notice of violation.¹⁹⁰ Finally, Class "A" violations are classified as "not hazardous" and must be corrected within ninety days of the mailing of the notice of violation.¹⁹¹ These statutory time frames should inform the court of the appropriate coercive deadlines to impose, with

opportunity to purge"); *see also* 729 Prospect Realty Serv. Corp. v. Rodriguez, 55313/15, NYLJ 1202761611720, at *3 (Civ. Ct. July 6, 2016) ("The petitioner was also ordered to pay the respondent \$150 per day for each day that the petitioner failed to comply with the order [to restore the tenant to possession].").

185. *See supra* note 108 and accompanying text; *see, e.g.*, United States v. United Mine Workers, 330 U.S. 258, 303-04 (1947) ("Judicial sanctions . . . may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." (citations omitted)); *Badgley v. Santacrose*, 800 F.2d 33, 36 (2d Cir. 1986) ("The purpose of civil contempt, broadly stated, is to compel a reluctant party to do what a court requires of him.").

186. *See supra* Section II.

187. *See, e.g.*, *Odingbe v. Dockery*, 153 Misc. 2d 584, 592 (N.Y. Civ. Ct. 1992) ("As a general rule when the petitioner has established that violations remain uncorrected at the time the contempt proceeding has concluded this court's inclination is to commit the respondent to an indefinite jail term.").

188. N.Y. HOUS. MAINT. CODE § 27-2115(c)(3).

189. *See id.* There are some exceptions. *See, e.g.*, N.Y. HOUS. MAINT. CODE § 27-2017.3(c)(2) (requiring correction of mold 21 days after service of the notice of violation); *id.* § 27-2017.4(c) (requiring correction of "an immediately hazardous violation for cockroaches, mice, or rats" 21 days after service of the notice of violation).

190. N.Y. HOUS. MAINT. CODE § 27-2115(c)(2).

191. N.Y. HOUS. MAINT. CODE § 27-2115(c)(1).

one caveat: if a landlord is in contempt, the landlord has likely already missed some or all of these statutory deadlines. It is just and proper to subtract the number of days that a landlord has flouted the order to repair from the statutory time frames, provided the resultant time frame is feasible. For Class “C” violations, the contempt order should compel repairs within twenty-four hours (or twenty-one days for the Class “C” exceptions, minus the period of contumacy); this is no more than the HMC already imposes upon a landlord, even before a finding of contempt. For Class “B” violations, the time frame should be within thirty days, but appropriately shorter if the landlord has already flouted the law for some time. And for Class “C” violations, the time frame should be ninety days minus the period of contumacy.

Finally, the question whether to impose daily financial penalties or jail time for the prospective failure to comply should be tailored to the severity of the violation and the degree of contumacy (e.g., the number of orders flouted, the time period for which the court’s order has been flouted, the number of violations outstanding, etc.).¹⁹² As to the amount of the fines imposed, the HMC expressly provides for daily fines for violating “any law relating to housing standards,” including, e.g., a fine of \$125 a day “for each immediately hazardous violation, occurring in a multiple dwelling containing more than five dwelling units, from the date set for correction in the notice of the violation until the violation is corrected.”¹⁹³ Particularly given that the landlord has already been held in contempt for flouting a court order to repair, the MDL provides a reasonable guide to the sorts of daily fines, payable to the tenant, that a court might impose to secure future compliance.

ii. Damages

Section 773 of the Judiciary Law provides that if a party has suffered “an actual loss or injury” as a result of the contempt, that party is entitled to “recover damages for the loss or injury, [and] a fine, sufficient to indemnify the aggrieved party, must be imposed

192. It is impermissible in a civil contempt proceeding to impose penalties for *past* violations, since such penalties are punitive in nature and thus available only in criminal contempt proceedings. *See, e.g., Randolph v. New York City Hous. Auth. E. River Houses*, 44 Misc. 3d 1207(A), at *11 (N.Y. Civ. Ct. 2014) (“A flat per diem fine as a penalty is inappropriate for damages on civil contempt.” (citations omitted)).

193. N.Y. HOUS. MAINT. CODE § 27-2115(a). For the statutory fines for all classes of violations, see generally N.Y. HOUS. MAINT. CODE § 27-2115(a)..

upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court.”¹⁹⁴ The language is mandatory rather than precatory: where a complainant has suffered damages, “*a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender.*”¹⁹⁵ In addition to pecuniary damages—e.g., possessions ruined by water leaks or collapsing walls and ceilings, doctor’s bills for medical conditions linked to the apartment, hotel bills for displaced tenants (for example, where hazardous mold requires relocation), and food bills incurred as a result of broken refrigerators—the damages that flow from a failure to obey an order to repair typically also include both emotional distress and diminished habitability. Unfortunately, courts have thus far greatly underestimated or entirely ignored these damages.

a. Emotional Distress Damages

Nearly forty years ago, in *McCormick v. Axelrod*,¹⁹⁶ the Court of Appeals affirmed an award of damages for contempt “based upon such factors as the degree of emotional upset suffered by each of these elderly women, the period of time required for adjustment to their new surroundings, and the benefits to petitioners from their new placements.”¹⁹⁷ This only makes sense, since the statute expressly requires indemnification for any “loss or injury,” without any limitation merely to pecuniary loss or injury.¹⁹⁸ In the decades following *McCormick*, however, courts have ignored this holding, failing to explore the emotional distress damages that inevitably flow

194. N.Y. JUD. LAW § 773; *see, e.g.*, *Ortega v. City of New York*, 9 N.Y.3d 69, 80 (2007) (“Under our civil contempt statutory scheme, a party who suffers a loss or injury as a result of violation of a court order can seek full compensation from the contemnor.” (citations omitted)). Where a tenant does not demonstrate an actual loss or injury, a fine of \$250 payable to the tenant may be imposed, along with costs and fees. *See* N.Y. JUD. LAW § 773.

195. N.Y. JUD. LAW § 773 (emphasis added).

196. 59 N.Y.2d 574 (1983).

197. *Id.* at 587; *accord* *Randolph v. N.Y.C. Hous. Auth. E. River Houses*, HP 862/2012, 2014 N.Y. Misc. LEXIS 2987, at *6 (Civ. Ct. July 8, 2014) (“This holding suggests that [it] is appropriate for the court to consider a claim for non-pecuniary loss in determining actual damages on a finding for civil contempt.”).

198. *See* N.Y. JUD. LAW § 773; *see, e.g.*, *People v. Levy*, 15 N.Y.3d 510, 516 (2010) (“But if our Legislature had intended to impose such a limitation, it could have done so easily enough by enacting the relevant language New York’s legislators obviously did not make that choice, and we decline to make it for them.”).

from being forced to endure hazardous and substandard housing conditions even after a landlord has been ordered to correct them.

The case of *Nazeer v. New York City Housing Authority*¹⁹⁹ illustrates the injustice of this failure. In *Nazeer*, the tenant was forced to endure truly horrible conditions in her public housing apartment, including “mold on the apartment’s walls and ceiling, furniture, clothing, as well as on the inside and on the outside of the kitchen cabinets.”²⁰⁰ In her first bedroom, “there was black mold from the ceiling to the floor, and on the walls and radiators.”²⁰¹ The mold was so bad that the worker who came to address the problem refused to touch it, and “left the apartment without abating the mold.”²⁰² The condition only “got horrifyingly worse,” spreading to her second bedroom and onto her food, such that “even her cans of food were turning black.”²⁰³ To top it all off, “[f]our to five times each year raw sewage from the basement back[ed] up into her sinks and tub, and flood[ed] her entire apartment.”²⁰⁴

The tenant suffered immensely, experiencing nose bleeds, headaches, and hives, and being forced entirely out of her apartment for long periods of time.²⁰⁵ As a result of the unabated mold, she was “hardly able to breathe” and developed “a respiratory problem.”²⁰⁶ Her skin was “itchy, she ha[d] nose bleeds, an itchy nose, and her eyes burned.”²⁰⁷ “She experienced chest pains and labored breathing. She had to stop biking and became depressed.”²⁰⁸ On top of all of that, her social life was profoundly affected: “her children and eighteen grandchildren could not visit or sleep over,” and she “was not able to engage in activities.”²⁰⁹

The emotional toll on Ms. Nazeer was surely profound. Indeed, the conditions described are downright torturous, from the ubiquitous, spreading, and dangerous mold, to the raw sewage that repeatedly flooded her apartment, to her forced estrangement from

199. *Nazeer v. N.Y.C. Hous. Auth.*, 2700/2018, 2019 NYLJ LEXIS 4515 (Civ. Ct. Jan. 6, 2020).

200. *Id.* at *10.

201. *Id.* at *17.

202. *Id.*

203. *Id.* at *17–18.

204. *Id.* at *16.

205. *Id.* at *18.

206. *Id.* at *22.

207. *Id.*

208. *Id.*

209. *Id.* at *23.

her children and grandchildren. The court acknowledged all of this, including Ms. Nazeer's emotional distress, noting that she "became depressed."²¹⁰ Nonetheless, the court awarded Ms. Nazeer nothing for her palpable and avowed emotional distress. Instead, the court awarded Ms. Nazeer a rent abatement of 50% when she occupied the apartment, and 100% when she was constructively evicted.²¹¹ Ms. Nazeer was, however, already entitled to a rent abatement under New York State law even without a finding of contempt.²¹² The "loss or injury" occasioned by the contempt,²¹³ for which the court was legally required to compensate Ms. Nazeer, went far beyond a mere rent abatement.²¹⁴

A tenant who is forced from her dwelling by deplorable conditions is naturally relieved of the duty to pay rent. An abatement addresses the rent to which a landlord is legally entitled, and is always appropriate as a threshold matter, but it fails entirely to remunerate the tenant for the emotional distress she suffers.²¹⁵ As one commentator observes, "the prevailing methods for calculating damages incorporate biases of class, race, and gender, and they underestimate the value of poor tenants' cases."²¹⁶ Indeed, it is entirely possible that the average judge has never experienced raw sewage repeatedly backed up into her apartment,²¹⁷ experienced mice in her "beds and bed sheets," or awakened "to find a roach in her ear."²¹⁸ With luck, she has never been "forced to lock her bedroom

210. *Id.* at *22.

211. *Id.* at *45–46.

212. *See id.* at *35 ("An abatement based upon the implied warranty of habitability pursuant to Real Property Law section 235(b) protects against conditions that materially affect the health and safety of tenants or deficiencies that in the eyes of a reasonable person deprive the tenant of those essential functions which a residence is expected to provide." (citations omitted)); N.Y. REAL PROP. LAW § 235-b (providing for "damages sustained by a tenant as a result of a breach of the warranty [habitability]").

213. *See* N.Y. JUD. LAW § 773.

214. *Compare* *Simon v. Solomon*, 431 N.E.2d 556 (Mass. 1982) (upholding award of emotional distress damages of \$35,000 for landlord's failure to prevent repeated flooding of apartment with water and sewage).

215. *See, e.g., Myron Moskowitz, The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1472 (1974) ("Market value has no bearing on the actual physical discomfort and annoyance caused by the breach.").

216. *Sabbeth, supra* note 19, at 104.

217. *Nazeer*, 2019 NYLJ LEXIS 4515, at *16.

218. *Amsterdam I LLC v. Santos*, 67418/18, 2019 NYLJ LEXIS 4669, at *11 (Civ. Ct. Feb. 14, 2020) ("At times, [mice] were seen in the beds and bed

door at night as the rodents ran wild in the rest of her apartment,²¹⁹ to shiver for lack of heat and hot water,²²⁰ or to throw out food and eat out every night, at considerable cost, for lack of a functioning refrigerator.²²¹ These are just some of the conditions to which tenants in New York have been subjected as a result of their landlords' refusal to comply with orders to repair. Still, judges must ask themselves: if I or someone I loved were forced to endure these conditions, suffering serious emotional distress as a result, often for months or years at a time, would I be satisfied with an award that includes zero compensation for this suffering, despite an express, mandatory provision in the law providing for such damages? Put another way, does it suffice that a landlord who flouted a clear order to correct those horrendous conditions be charged nothing more than the legal reduction in rent already provided by law even before the contumacious conduct? Denying appropriate damages is not only an injustice to the tenant, but "merely serves to assure those owners who ignore conditions which violate the warranty of habitability that the worst consequence will be an abatement of rent which reduces the rent to be paid to a proper rental value."²²²

Because emotional distress damages are "not susceptible to mathematical formulation,"²²³ however, the question of precisely how to calculate them in these circumstances arises. The answer lies in analogous cases involving emotional distress damages, and particularly discrimination cases, where this very issue has been successfully resolved. In such cases, courts evaluate the reasonableness of emotional distress awards based upon a review of "awards in other cases involving similar injuries, bearing in mind that any given judgment depends on a unique set of facts and

sheets, events clearly disturbing to the witness. She also testified that she awoke to find a roach in her ear one morning.").

219. 79 Audubon Holdings Lp v. Rio, 098290/07, 2010 NYLJ LEXIS 7026, at *2 (Civ. Ct. Dec. 23, 2010).

220. Bironi v. Pellegrino, L&T 252296/2011, 2013 NYLJ LEXIS 7375, at *3 (Civ. Ct. Aug. 7, 2013) ("[D]ue to insufficient heat and hot water she had suffered many exceptionally cold days during the winter and early spring months." (internal quotations omitted)).

221. See Breland v. Abass, HP 000643/10, 2010 NYLJ LEXIS 7051, at *3 (Civ. Ct. April 25, 2010).

222. Century Apartments, Inc. v. Yalkowsky, 106 Misc. 2d 762, 766 (N.Y. Civ. Ct. 1980); accord Bironi, 2013 NYLJ LEXIS 7375, at *8.

223. Mathie v. Fries, 935 F. Supp. 1284, 1305 (E.D.N.Y. 1996), *aff'd*, 121 F.3d 808 (2d Cir. 1997).

circumstances.”²²⁴ Courts in the Second Circuit, for example, use three tiers or categories of emotional distress claims:

[G]arden-variety, significant and egregious. In “garden variety” emotional distress claims, the evidence of mental suffering is generally limited to the testimony of the plaintiff, who describes his or her injury in vague or conclusory terms, without relating either the severity or consequences of the injury. Such claims typically lack extraordinary circumstances and are not supported by any medical corroboration.

“Significant” emotional distress claims differ from the garden-variety claims in that they are based on more substantial harm or more offensive conduct, are sometimes supported by medical testimony and evidence, evidence of treatment by a healthcare professional and/or medication, and testimony from other, corroborating witnesses. Finally, “egregious” emotional distress claims generally involve either outrageous or shocking discriminatory conduct or a significant impact on the physical health of the plaintiff.²²⁵

The amount to be awarded, then, depends upon the severity (including duration) and consequences of the emotional distress suffered and the amount of evidence adduced, including whether the claim is corroborated by other witnesses and/or medical or psychological evidence.²²⁶ Comparing the specific facts and evidence proffered, courts (and advocates) can reason from analogous cases to arrive at just and appropriate awards. As the Court of Appeals has concluded: “That damages are not susceptible to precise determination does not insulate the landlord from liability.”²²⁷

224. *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 684 (2d Cir. 1993) (citation and internal quotations omitted); *see also* Armen H. Merjian, *Nothing Garden Variety About It: Manifest Error and Gross Devaluation in the Assessment of Emotional Distress Damages*, 70 SYR. L. REV. 689, 692 (2020) (examining the calculation of emotional distress damages in “garden variety” cases).

225. *Olsen v. City of Nassau*, 615 F. Supp. 2d 35, 46–47 (E.D.N.Y. 2009) (citations and internal quotations omitted); *accord* *Barham v. Wal-Mart Stores, Inc.*, 3:12-CV-01361, 2017 U.S. Dist. LEXIS 139565, at *6–7 (D. Conn. Aug. 30, 2017).

226. *See id.*

227. *Park West Mgmt. Corp. v. Mitchell*, 47 N.Y.2d 316, 329 (1979) (citations omitted); *accord* *Hilder v. St. Peter*, 144 Vt. 150, 162 (1984) (stating in

Because New York's housing courts have yet to establish any jurisprudence on the proper amount of emotional distress damages for a landlord's failure to comply with orders to repair, the courts must at least initially look to analogous discrimination cases in order to develop appropriate benchmarks. There are three things to note in this regard. First, the fact that discrimination cases represent distinct causes of action is of no moment.²²⁸ Emotional distress arising from discrimination, like that arising from exposure to hazardous living conditions, will vary from the mild to the extreme, and from the short-lived to the long-lasting. Both might include, for example, feelings of humiliation, depression, embarrassment, frustration, anger, lack of self-esteem, loss of confidence, and social isolation.²²⁹ And as the *Nazeer* case demonstrates, like discrimination, substandard housing can lead to physical suffering, which is both a cause²³⁰ and a symptom of emotional distress.²³¹ In either case, the analysis focuses on the *severity, consequences, and evidence of the*

case involving failure to repair: "Damages for discomfort and annoyance may be difficult to compute; however, the trier of fact is not to be deterred from this duty by the fact that the damages are not susceptible of reduction to an exact money standard." (citation and internal quotations omitted)); Moskowitz, *supra* note 215, at 1472 ("Placing a dollar value on the injury caused in a given case by a tenant's discomfort and annoyance is admittedly quite difficult. This difficulty is not, however, sufficient reason to disallow such damages. Fact-finders face a similar problem every day where damages for pain and suffering are claimed in personal injury trials.").

228. See Merjian, *supra* note 224, at 708 ("It is reasonable to distinguish Tier One emotional distress damages based upon the (universal) criteria utilized by the courts, such as the severity/duration and consequences of the injury . . . It is unprincipled, however, to do so based upon the technical statute or law upon which the claim is based.").

229. See *id.* at 692.

230. See Moskowitz, *supra* note 215, at 1471 (noting that tenant, *inter alia*, cannot bathe "if there is inadequate hot water" and "must worry about rodents harassing his children or spreading disease if the premises are infested"; "[t]hus discomfort and annoyance are the common injuries caused by each breach and hence the true nature of the general damages the tenant is claiming"); David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1234 (1995) ("Psychological pain related to a physical injury is caused directly by the emotional distress (suffering) that occurs as a result of the injury.").

231. See Merjian, *supra* note 224, at 692 ("Emotional distress can also give rise to physical manifestations, including sleeplessness, nightmares, loss of appetite and weight loss, headaches, forgetfulness, tearfulness, stomach and chest pains, hives and skin rashes, hair loss, and even suicidal ideation and hopelessness.").

emotional distress, and not on the cause of action. Comparing like for like will yield a useful benchmark and a fair result.²³²

Second, even Tier One cases,²³³ i.e., those in which the aggrieved party proffers no supporting witnesses or medical/psychological evidence, and testifies “in vague or conclusory terms, without relating either the severity or consequences of the injury,”²³⁴ can yield significant damage awards. As the Second Circuit noted sixteen years ago, courts have (now repeatedly) upheld “awards of more than \$100,000 without discussion of protracted suffering, truly egregious conduct, or medical treatment.”²³⁵ The current range for such awards in the Second Circuit is between \$39,000 and \$234,000.²³⁶ The jurisprudence on this issue has been freighted with errors, however, so practitioners and courts should take pains to cite the current and proper authorities, adjusting awards for inflation.²³⁷

Third, courts must be mindful of the difficulties that low-income tenants in particular face in proffering evidence of emotional distress. Such individuals are far less likely than wealthy and middle-class tenants to secure medical or psychological treatment for their distress.²³⁸ It is also difficult, and painful, to relate emotional

232. Courts have awarded tenants emotional distress damages for their landlords’ failure to correct substandard conditions based upon the tort of intentional infliction of emotional distress. *See, e.g.*, 49 Prospect St. Tenants Ass’n v. Sheva Gardens, Inc., 547 A.2d 1134, 1151 (N.J. Super. 1988); Simon v. Solomon, 431 N.E.2d 556, 571 (Mass. 1982); Stoiber v. Honeychuck, 101 Cal. App. 3d 903, 904 (Ct. App. 1980); *see also Hilder*, 144 Vt. at 161 (“We also find persuasive the reasoning of some commentators that damages should be allowed for a tenant’s discomfort and annoyance arising from the landlord’s breach of the implied warranty of habitability.” (citation omitted)). In turn, the Supreme Court has acknowledged that an action to redress discrimination “may also be likened to an action for defamation or intentional infliction of mental distress.” *Curtis v. Loether*, 415 U.S. 189, 195 n.10 (1974). Examining emotional distress awards in analogous cases, regardless of the cause of action, is thus entirely sensible.

233. The author uses this term over the demeaning and inaccurate “garden variety.” *See Merjian, supra* note 224, at 690.

234. *Olsen v. Cnty. of Nassau*, 615 F. Supp. 2d 35, 46 (E.D.N.Y. 2009) (citations and internal quotations omitted); *accord Barham v. Wal-Mart Stores, Inc.*, 3:12-CV-01361, 2017 U.S. Dist. LEXIS 139565, at *6–7 (D. Conn. Aug. 30, 2017).

235. *Meacham v. Knolls Atomic Power Lab’y*, 381 F.3d 56, 78 (2d Cir. 2004), *vacated and remanded for further consideration on other grounds sub nom.*, 544 U.S. 957 (2005) (citations omitted).

236. *See Merjian, supra* note 224, at 703.

237. *See id.* at 691.

238. *See, e.g., Sabbeth, supra* note 19, at 126 (“Medical records can show injuries, and treating practitioners can serve as witnesses to explain them, but if

suffering. “Presenting evidence of emotional distress entails reliving or even recreating a sense of powerlessness. Not only must the tenant describe her humiliation and despair, but the adequacy of her distress must be ruled upon by the judge or jury.”²³⁹ For this very reason, both the New York City Human Rights Commission and the courts have recognized that emotional distress can and should be inferred from the circumstances at issue.²⁴⁰

b. Diminished Habitability

In virtually every case in which a landlord has flouted a court order to repair substandard or hazardous conditions, the premises in question are of diminished value, and often substantially diminished value. As we have seen, in such instances, it is appropriate to award the tenant damages for the diminished value of the premises during the relevant period.²⁴¹ “The calculation of these type of damages is

a tenant is prohibited by cost from seeking treatment, no such evidence will exist.”).

239. Susan Etta Keller, *Does the Roof Have to Cave In?: The Landlord/Tenant Power Relationship and the Intentional Infliction of Emotional Distress*, 9 CARDOZO L. REV. 1663, 1678 (1988). As authors Katz and Haidar explain:

[C]lients with trauma experience can make terrible witnesses for a variety of reasons. First, . . . the client may be unable to present a linear narrative. Second, the client may not remember key elements of what occurred; while this may make a trier of fact question client’s credibility, it is a normal trauma reaction. Third, a client’s emotions or lack thereof may unnerve or misguide the trier of fact: the client may appear with a flat affect; or the client may want to tell the full story in a rush of hysterical emotion; or the client may appear angry (thus making her seem like the aggressor) or the client may simply disassociate and not be able to articulate what happened at all.

Sarah Katz & Deeya Haidar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 389–90 (2015).

240. See *Nieves v. Rojas*, OATH Index No. 2153/17, 12 (2019) (N.Y.C. Human Rights Comm’n) (“While Complainant’s testimony about his experiences of emotional distress is somewhat limited, the Commission is also informed by evidence of the objective circumstances of his experience.”); *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636 (7th Cir. 1974) (“[H]umiliation can be inferred from the circumstances as well as established by the testimony.”).

241. See, e.g., *Nazeer v. N.Y.C. Hous. Auth.*, 2700/2018, 2019 NYLJ LEXIS 4515, at*45 (Civ. Ct. 2020) (“Clearly one form of actual damages established by Tenant at the hearing pertains to the decreased value of the Subject Premises as plagued by the conditions for the relevant periods.” (citation and internal quotations omitted)); *Randolph v. N.Y.C. Hous. Auth. E. River Houses*, 44 Misc. 3d 1207(A), at *14–15 (N.Y. Civ. Ct. 2014) (same); *Bironi v. Pellegrino, L&T*

similar to the calculation for a rent abatement.”²⁴² As the Court of Appeals has instructed, the proper measure of damages in such instances “is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach.”²⁴³

iii. Attorneys’ Fees

As one commentator has observed, “fee-shifting is a particularly important tool for the enforcement of poor tenants’ rights.”²⁴⁴ The author rightfully laments the dearth of fee-shifting statutes for the enforcement of housing standards²⁴⁵ and notes that “the Supreme Court has undercut the fee-shifting device.”²⁴⁶ New York’s Judiciary Law, however, provides for fee-shifting in contempt proceedings, and the Supreme Court’s detrimental jurisprudence in this area, including its limitation on the definition of a “prevailing party,”²⁴⁷ does not apply to the New York State Law, which, in any event, contains no such language.²⁴⁸

Section 773 of the Judiciary Law provides for an award of damages, including the “costs and expenses” of bringing a motion for

252296/2011, 2013 NYLJ LEXIS 7375, at *9 (Civ. Ct. Aug. 7, 2013) (“The Respondent is awarded an indefinite continuation of the 80 percent rent abatement from the period May 2013 until the agreed-to repairs are completed.”); 79 Audubon Holdings Lp v. Rio, 098290/07, 2010 NYLJ LEXIS 7026, at *4 (Civ. Ct. Dec. 23, 2010) (“respondents are awarded damages in the form of a breach of the warranty of habitability”).

242. *Randolph*, 44 Misc. 3d 1207(A), at *15 (citation omitted).

243. *Park West Mgmt. Corp. v. Mitchell*, 47 N.Y.2d 316, 329 (1979).

244. *Sabbeth*, *supra* note 19, at 145.

245. *Id.* at 127.

246. *Id.* at 103.

247. As Professor Sabbeth points out, “the Supreme Court has applied a cramped interpretation of the definition of a ‘prevailing’ party,” a necessary element to securing attorneys’ fees under federal statutes. *Id.* at 128; *see also* *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health and Hum. Res.*, 532 U.S. 598, 603–10 (2001); *id.* at 644 (Ginsburg, J., dissenting) (“[T]he Court’s narrow construction of the words ‘prevailing party’ is unsupported by precedent and unaided by history or logic.”); Landyn Wm. Rookard, *Don’t Let the Facts Get in the Way of the Truth: Revisiting How Buckhannon and Ayeska Pipeline Messed Up the American Rule*, 92 IND. L.J. 1247, 1274 (2017) (“*Buckhannon* has chilled public interest litigation ‘across the political spectrum,’ and defendants have had success unilaterally mooting lawsuits to avoid paying fees . . .”).

248. *See* N.Y. JUD. LAW § 773.

civil contempt.²⁴⁹ It is well-established that this includes attorneys' fees and costs.²⁵⁰ Indeed, as one court has explained, "[l]ate in the 19th century, the Court of Appeals determined that attorney's fees are part of such costs and expenses."²⁵¹ To induce both public interest and private attorneys to seek contempt for failure to comply with orders to repair, the courts must award them the full fees and costs incurred in doing so, including fees at the appropriate hourly rate²⁵² and "fees on fees."²⁵³ An award of fees and costs is, moreover, essential to deter respondents from lightly flouting court orders in the future, particularly in the absence of actual damages, where the only consequence for flouting the court's order(s) is the imposition of a mere \$250 fine.²⁵⁴

a. Appropriate Hourly Rates

"Attorney's fees may be awarded even if the complainant received free legal representation."²⁵⁵ As the Supreme Court has

249. *Id.*

250. *See, e.g.*, *Matter of Ferrante v Stanford*, 172 A.D.3d 31, 39 (N.Y. App. Div. 2019) ("Here, where actual damages were not established, the petitioner may recover reasonable costs and expenses including attorney's fees" (citations and internal quotations omitted)); *Matter of Claydon*, 103 A.D.3d 1051, 1054 (N.Y. App. Div. 2013) ("Surrogate's Court properly required Ehring to pay the legal fees associated with the contempt motion." (citations and internal quotations omitted)); *Vider v Vider*, 85 A.D.3d 906, 908 (N.Y. App. Div. 2011) ("Judiciary Law § 773 permits recovery of attorney's fees from the offending party by a party aggrieved by the contemptuous conduct." (citations and internal quotations omitted)); *Jamie v. Jamie*, 19 A.D.3d 330, 331 (N.Y. App. Div. 2005) ("Plaintiffs shall be entitled to the attorney's fees, along with the costs and disbursements" (citations and internal quotations omitted)); *Ross v. Congregation B'Nai Abraham Mordechai*, 12 Misc. 3d 559, 573 (N.Y. Civ. Ct. 2006) (awarding Petitioner attorneys' fees *inter alia* for bringing civil contempt motion in HP proceeding); *Dole v. 106-108 W. 87th St. Owners, Inc.*, 13 Misc. 3d 1241(A), at *9 (N.Y. Civ. Ct. 2006) (permitting petitioner-tenant to seek attorneys' fees for contempt motion).

251. *In re Derrick*, Index No. 111105/98, 2001 N.Y. Misc. LEXIS 842, at *41–42 (Sup. Ct. June 19, 2001), *aff'd*, 289 A.D.2d 182 (N.Y. App. Div. 2001).

252. *See infra* Section III.C.2.iii.a.

253. *See infra* Section III.C.2.iii.b.

254. *See supra* note 194.

255. *In re Derrick*, 2001 N.Y. Misc. LEXIS 842, at *42; *accord* *Greenpoint Hospital Community Bd. v. New York City Health & Hospitals Corp.*, 495 N.Y.S.2d 467, 471 (App. Div. 1985) ("The Board was entitled to counsel fees for the contempt application. The fact that the Board was represented by a publicly funded legal services organization does not bar such an award." (citations omitted)); *Brown v. N.Y.C. Hous. Auth.*, HP 1885/10 & 116/12, 2015 NYLJ

explained in analogous circumstances, reasonable fees are to be calculated “according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel.”²⁵⁶ The requested rates must be “in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.”²⁵⁷ Finally, in determining the rate for nonprofit attorneys, “the rates charged in private representations may afford relevant comparisons.”²⁵⁸ Hence, legal services attorneys should be awarded the market rates that are appropriate for comparable attorneys in the real estate/housing court market.²⁵⁹ The billing rates of attorneys with similar skill, experience, and reputation in the civil rights/nonprofit sectors may also be useful by analogy.²⁶⁰

Finally, the notion that housing court cases are simple and uncomplicated, warranting a lower or capped hourly rate, has been soundly rejected. In *Ross v. Congregation of B’Nai Abraham Mordechai*,²⁶¹ the court observed:

1202715109979, at *5 (Civ. Ct. Jan. 7, 2015) (“[T]he fact that petitioner is represented by a free legal services provider does not bar her from an attorney’s fee award.”); *Alfonso v. Rosso*, 137 Misc. 2d 915, 916–17 (N.Y. Civ. Ct. 1987); see also *S.B.H. Realty v Santana*, 51678/2016, 2017 N.Y. Misc. LEXIS 3677, at *11 (Civ. Ct. Sept. 29, 2017) (“The fact that the attorneys who provided the legal services work for a non-profit organization which does not charge its clients for services does not impact its ability to recover reasonable attorneys’ fees under RPL § 234.” (citation omitted)).

256. *Blum v. Stenson*, 465 U.S. 886, 895 (1984).

257. *Id.* at 895 n.11.

258. *Id.*

259. See *In re Derrick*, 2001 N.Y. Misc. LEXIS at *42 (“Justice Brennan noted that legal services attorneys ‘should be paid as if they were in private practice, in order both to avoid windfalls to defendants and to free public resources for other types of law enforcement.’” (quoting *Hensley v Eckerhart*, 461 U.S. 424, 446, n.6 (Brennan, J., concurring in part and dissenting in part))); *Alfonso*, 137 Misc. 2d at 917 (“As Justice Brennan, concurring in *Hensley v Eckerhart* . . . noted: ‘such [legal services] attorneys should be paid as if they were in private practice, in order both to avoid windfalls to defendants and to free public resources for other types of law enforcement.’” (quoting same)).

260. See, e.g., *Heng Chan v. Sung Yue Tung Corp.*, No. 3 Civ. 6048, 2007 U.S. Dist. LEXIS 33883, at *4 (S.D.N.Y. May 7, 2007) (“[T]he relevant community to which the Court should look is that of Manhattan civil rights attorneys.” (citation omitted)); *Marisol A. v. Giuliani*, 111 F. Supp. 2d 381, 386 (S.D.N.Y. 2000) (determining hourly billing rates by looking at rates charge by civil rights attorneys of comparable skill, experience, and reputation).

261. 12 Misc. 3d 559 (N.Y. Civ. Ct. 2006).

Housing Part cases can be extraordinarily complicated. Housing Part judges regularly encounter high-stakes litigation—for money, for safe housing, for landlords the right to repossess what is lawfully their own, for tenants the very right to live in one’s home. Much Housing Part litigation can and does require representation by attorneys of great skill and vast experience who deservedly command and receive fees that well exceed a \$300-an-hour fee.²⁶²

The court proceeded to award a rate of \$445-an-hour for the tenant’s lead attorney, significantly exceeding the respondent’s proposed \$300-an-hour cap, nearly a decade and a half ago.²⁶³ More recently, in *Brown v. New York City Housing Authority*,²⁶⁴ the court awarded a Legal Aid attorney with twenty-three years of experience in landlord/tenant law attorney’s fees in a contempt proceeding at \$450-an-hour, for a total of \$20,025.²⁶⁵

b. Fees on Fees

The awarding of “fees on fees,” i.e., the fees incurred in preparing and defending a motion for attorneys’ fees, is also essential in these proceedings. As one court explained:

[T]he award of “fees on fees” is reasonable in light of the contempt statute’s purpose of making the injured party whole and not providing a “windfall” to the guilty party. Parties who seek to be compensated by those who have violated the court’s orders should not be required to litigate at their expense the amount that is required to make them whole. Any other result would encourage delay and obstructionist tactics on the part of contemnors in an effort to reduce the value of the award actually received and to encourage unfavorable settlements.²⁶⁶

Thankfully, the propriety of such awards is similarly well-established.²⁶⁷

262. *Id.* at 563.

263. *Id.* at 570.

264. HP 1885/10 & 116/12, NYLJ 1202715109979 (Civ. Ct. Jan. 7, 2015).

265. *See id.* at *2, *6.

266. *Alfonso v. Rosso*, 137 Misc. 2d 915, 920 (N.Y. Civ. Ct. 1987).

267. *See, e.g., Kumble v. Windsor Plaza Co.*, 161 A.D.2d 259, 260–61 (N.Y. App. Div. 1990); *Ross v. Congregation of B’Nai Abraham Mordechai*, 12 Misc. 3d 559, 573–74 (N.Y. Civ. Ct. 2006) (“A prevailing party may recover ‘fees on fees.’” (citation omitted)); *111 On 11 Realty Corp. v. Norton*, 191 Misc. 2d 483, 490 (N.Y.

CONCLUSION

There is something deeply amiss, even obscene, about a system that in one year subjects over 19,000 tenants, including the elderly,²⁶⁸ the disabled,²⁶⁹ and children,²⁷⁰ to the “forcible, violent experience” of eviction,²⁷¹ yet fails to impose even the purgeable remedy of civil contempt on more than ten landlords in the same period.²⁷² It is an abject betrayal of the spirit and purpose upon which the housing courts were founded, a torturous inequity.

If we are to right the scales of justice, this must change at once. Courts must no longer countenance the flouting of orders to

Civ. Ct. 2002) (“The court finds that there is no prohibition against awarding ‘fees on fees’ in New York law and there would be no logic to such a ruling.” (citation omitted)).

268. See, e.g., Roshan Abraham, *Many NYC Seniors Still Face the Threat of Evictions*, CITY LIMITS (Feb. 26, 2020), <https://citylimits.org/2020/02/26/many-nyc-seniors-sill-face-the-threat-of-evictions/> [<https://perma.cc/FC88-P8DG>] (“[T]he percentage of older adults in New York City’s shelter population is increasing. There is no way to determine how many elders become homeless each day through eviction . . . [but] the number of adults in city shelters who are age 65 and above increased 300 percent between 2004 and 2017 . . .”).

269. See, e.g., Kevin M. Cremin & Gerald Lebovits, *Accommodations and Modifications in the New York City Housing Court for Litigants with Disabilities*, 38-4 NYRPLJ 30, 30 (2010) (“Finding and keeping adequate housing is often a struggle for people with disabilities. . . . [I]t is unsurprising when a person with a disability ends up as a litigant in the Housing Part of the New York City Civil Court, commonly called the Housing Court.”); Newton et al., *supra* note 17, at 211 (“[E]asily over thirty-three percent of our eviction cases include households containing someone who is disabled or has a serious illness.”).

270. See, e.g., Ian Lundberg & Louis Donnelly, *A Research Note on the Prevalence of Housing Eviction Among Children Born in U.S. Cities*, 56 DEMOGRAPHY 391, 391 (2019) (“We estimate that one in seven children born in large American cities in 1998–2000 experienced at least one eviction for nonpayment of rent or mortgage between birth and age 15.”). The authors note that “[a]lthough eviction is widespread across demographic groups and cities, it is most prevalent among children who already face other disadvantages: black children and children raised in poverty.”). *Id.* at 402; see also SOPHIE COLLYER ET AL., *THE STATE OF POVERTY AND DISADVANTAGE IN NEW YORK CITY* 5 (2020), https://robinhoodorg-production.s3.amazonaws.com/uploads/2020/02/PT_2019_ANNUAL_2.21.pdf (“In 2018, 34 [percent] of households with children [in New York] experienced material hardships because they could not afford basic necessities like housing, heat, food, and medical care.”).

271. Stuart, *supra* note 31, at 82.

272. See *supra* note 10 and accompanying text (noting that between 2011 and 2016, New York’s housing courts sanctioned attorneys or cited landlords for contempt fewer than fifty times, an average of fewer than ten contempt citations a year, even counting the distinct attorney sanctions).

repair. They must cease the practice of impotently reissuing those same orders, over and over, and instead initiate, or invite, contempt proceedings. Upon a finding of contempt, they must (1) establish deadlines for the completion of ordered repairs, with either imprisonment or fines for each day that the landlord continues to flout the court's authority beyond the deadline; (2) award damages to the aggrieved tenant, including damages for emotional distress and diminished habitability; and (3) award attorneys' fees and costs to tenants' counsel.

This will help to ensure timely completion of repairs, a matter of great importance to tenants suffering unhealthful, stressful, and often hazardous conditions. It will compensate tenants for the emotional distress and lack of habitability that the violations impose upon them. It will incentivize tenants' counsel to begin seeking judicial enforcement of orders to repair, permitting indigent and low-income tenants to secure legal representation to enforce orders to repair where otherwise they would not.²⁷³ And it will act as a deterrent to landlords who, at present, flout the law with utter impunity and contempt.²⁷⁴

273. In the words of former New York Chief Judge Jonathan Lippman: "No issue is more fundamental to our constitutional mandate of providing equal justice under law than ensuring adequate legal representation." Jonathan Lippman, Chief Judge of the State of New York, Speech at the American Bar Association Law Day Ceremony on Law in the 21st Century: Enduring Traditions, Emerging Challenges 17 (May 3, 2010), <http://www.nycourts.gov/ctapps/LD10Transcript.pdf> [<https://perma.cc/3J74-W9R7>].

274. See, e.g., Fleischer, *supra* note 124, at 48 ("[I]t is logical to assume that [contemnors] will not be quick to comply in the future if the threat faced by noncompliance is minimal.").