

# The Warranty of Habitability and the New York City Housing Authority

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## INTRODUCTION

As an intern with the New York Legal Aid Society's housing unit last summer, I helped a woman file an affirmative, pro se action against the New York City Housing Authority (NYCHA) to compel it to fix the conditions in her apartment. Her descriptions and the pictures she showed me of her apartment were heart-breaking. There was peeling paint on the walls, the water coming out of her pipes was brown, and she did not have adequate heat. All her belongings were bagged and raised off the ground because frequent flooding made that the most reasonable means of storing them. These conditions were not new, and neither was her experience filing cases in housing court. She had filed—and won—cases just like the one we were filing annually for over a decade. And yet the conditions persisted.

Her case was not unique. During a summer internship at the Queens Housing Court, I represented countless low-income renters who lived in broken apartments, both private and public, with little hope for repairs. One tenant had no lock on her door and a broken refrigerator. Another had no mailbox and a leak in the ceiling. A colleague and I visited a NYCHA resident who had been complaining for months about a severe leak in the ceiling right above a light fixture, which was a fire hazard. If a tenant was lucky, her landlord would make the repairs agreed to in the case's settlement agreement, but NYCHA tenants were almost never lucky.

NYCHA is the largest landlord in New York City, housing more than 381,000 people—approximately one in twenty-two New York City dwellers.<sup>1</sup> That is almost as large as the entire population of Minneapolis, whose public housing authority the new chair and CEO of NYCHA most recently led.<sup>2</sup> Breaches of the warranty of habitability in New York City public housing are pervasive, the

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\* J.D., Georgetown University Law Center (expected May 2021); B.A., Northwestern University (2013). © 2020, Rachel Schwartz.

1. *NYCHA 2019 Fact Sheet*, N.Y.C. HOUS. AUTH. 1, 3 (Mar. 2019); see *Quick Facts, New York City, N.Y.*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/newyorkcitynewyork> [<https://perma.cc/CSA9-APV8>] (last visited Dec. 19, 2019).

2. See *Gregory Russ*, N.Y.C. HOUS. AUTH., <https://www1.nyc.gov/site/nycha/about/board-members/chair-greg-russ.page> [<https://perma.cc/SJM8-SXY4>] (last visited Dec. 19, 2019); *Quick Facts, Minneapolis City, Minn.*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/minneapoliscityminnesota> [<https://perma.cc/W5XQ-G2YR>] (last visited Dec. 19, 2019).

remedy is evasive, and the battle is being fought on all fronts. There are many reasons for this mammoth problem, and many ways to chip away at it, including increased funding, changes in management, and more. However, this Note is written for the direct legal services lawyer whose primary tools are those of the courtroom. The warranty of habitability is ubiquitous in housing court cases, and constantly top of mind for housing attorneys. However, it is also a tool that direct legal services lawyers can use strategically, with an eye toward long term rehabilitation and preservation of NYCHA units.

This Note will explore some of the effects of litigating warranty of habitability claims on public housing entities through an examination of claims against NYCHA.<sup>3</sup> This Note argues that strategic deployment of the warranty is one way direct legal services lawyers can chip away at the problem of NYCHA's crumbling housing stock, and it examines the ethical implications of these strategies.

In Part I, this Note explores the history of the warranty of habitability, the intricacies of how it operates in New York City, and how there is still a need for more quality and affordable units in the private market. Part II presents information that strongly suggests that the warranty of habitability is having the same effect on NYCHA as it is having on private housing because (a) NYCHA is losing units and (b) the general condition of NYCHA housing is abysmal. This Part goes on to argue how these findings might influence the way direct service lawyers allocate resources and litigate cases. Finally, Part III describes the ethical dilemma a direct legal services lawyer has in both serving her clients and serving the long-term interests of local low-income tenants generally. Ultimately, she should consider the future interests of potential clients alongside the interests of current clients in deciding which clients to take and what claims to assert.

## I. THE WARRANTY OF HABITABILITY

In the 1960s, the inequality of bargaining power between landlord and tenant across the country became apparent due, in part, to a housing shortage giving landlords the upper hand in the rental market.<sup>4</sup> Around this time, courts began implying terms into residential leases that bound landlords to ensure that the homes they provided were fit for human habitation.<sup>5</sup> "The warranty of habitability . . . established that a tenant's obligation to pay rent is contingent upon the landlord's obligation to maintain the premises in good repair."<sup>6</sup> Tenants could then

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3. This Note builds on all that has been written about the effects of litigating warranty of habitability claims on affordable housing owned by *private* landlords. *E.g.*, Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145 (2020); David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389 (2011).

4. *See, e.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970).

5. *See* Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, 9 (1979); Jean C. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 91-92 (1975).

6. Summers, *supra* note 3, at 147.

withhold rent or receive rent abatements as a remedy for landlords not maintaining habitable conditions in their homes, rather than being forced to wait for the state to enforce the housing code.<sup>7</sup> This national shift toward treating leases like contracts rather than property conveyances gave tenants more power.<sup>8</sup> There were many reasons for this shift, but a chief goal was simply to increase the supply of quality, affordable housing by giving tenants a means of compelling their landlords to fix poor housing conditions.<sup>9</sup>

New York codified the warranty of habitability in 1975.<sup>10</sup> Thus, landlords are required to ensure that leased premises “are fit for human habitation and for the uses reasonably intended by the parties,” and to ensure occupants are not “subjected to conditions which would be dangerous, hazardous or detrimental to their life, health or safety.”<sup>11</sup> Conditions that have been ruled breaches of this law include lack of heat,<sup>12</sup> broken elevators,<sup>13</sup> lead paint,<sup>14</sup> and mold,<sup>15</sup> among other elements of the New York Housing Code.<sup>16</sup> New York’s statutory warranty of habitability has been applied to private housing as well as public housing units.<sup>17</sup>

In response to a breach of the warranty of habitability, a tenant can repair the conditions and deduct the cost of doing so from their next rent payment,<sup>18</sup> make a claim in court affirmatively, or assert the breach as a defense or counterclaim to an eviction.<sup>19</sup> Most of the 200,000 annual eviction cases based on nonpayment of rent end in repayment agreements.<sup>20</sup> Asserting the warranty of habitability in these settlement agreements may reduce the amount owed proportional to the

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7. See *id.*; Love, *supra* note 5, at 94.

8. See Super, *supra* note 3, at 394.

9. See Summers, *supra* note 3, at 159; *id.* at 402.

10. N.Y. Real Prop. Law § 235-b (McKinney 1997).

11. *Id.*; see Barbara Jo Smith, *Tenants in Search of Parity with Consumers: Creating A Reasonable Expectations Warranty*, 72 WASH. U.L.Q. 475, 492 (1994).

12. See, e.g., 111 East 88th Partners v. Simon, 434 N.Y.S.2d 886, 888 (N.Y. Civ. Ct. 1980); Parker 72nd Assocs. v. Isaacs, 436 N.Y.S.2d 542, 544 (N.Y. Civ. Ct. 1980); see also Andrew Scherer & Fern Fisher, RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK § 12:105 (Thomas Reuters, 2019) (“Lack of heat and hot water is probably the archetypical violation of the warranty of habitability, and can, if properly proven, result in abatements of 50% of the rent or more for periods that they are not provided.”).

13. See, e.g., Solow v. Wellner, 569 N.Y.S.2d 882, 887–88 (N.Y. Civ. Ct. 1991); 111 East 88th Partners, 434 N.Y.S.2d at 888.

14. See, e.g., Morris v. Flaig, 511 F. Supp. 2d 282, 291 (E.D.N.Y. 2007); German v. Fed. Home Loan Mortg. Corp., 885 F. Supp. 537, 567–69 (S.D.N.Y. 1995).

15. See, e.g., Ketchakeu v. Secka, 108 N.Y.S.3d 323, 329–30 (N.Y. Civ. Ct. 2019); *In re Kirkview Assocs. LP v. Amrock*, 75 N.Y.S.3d 288, 291 (N.Y. App. Div. 2018); see also Scherer & Fisher, *supra* note 12, at § 12:107 (describing rent abatements due to mold ranging from thirty five percent to one hundred percent depending on severity and effects of mold).

16. See Park West Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1294 (N.Y. 1979); Scherer & Fisher, *supra* note 12, at § 12:74.

17. See, e.g., Ketchakeu, 108 N.Y.S.3d at 329–30 (applying warranty of habitability to private housing); Law v. Franco, 690 N.Y.S.2d 893, 895–96 (N.Y. Sup. Ct. 1999) (applying warranty of habitability to public housing).

18. Scherer & Fisher, *supra* note 12, at § 12:118.

19. See Park West Mgmt., 391 N.E.2d at 1295.

20. Summers, *supra* note 3, at 178.

percentage the apartment's value was reduced during the time of the inadequate conditions and provide some accountability for a landlord to make repairs.<sup>21</sup> A tenant is also entitled to a rent abatement and injunctive relief in affirmative cases as well.<sup>22</sup> Finally, a tenant may collect punitive damages if a landlord's breach of the warranty of habitability was at a "level of high moral culpability or indifference to civil obligations."<sup>23</sup>

## II. THE WARRANTY OF HABITABILITY IN THE PRIVATE HOUSING MARKET

Despite its noble goals, the national availability of quality, affordable housing has not increased since the advent of the warranty of habitability.<sup>24</sup> Between the 1980s and the 2010s, there was a massive reduction in the availability of unsubsidized, low-rent housing.<sup>25</sup> Between 1978–1997 and between 2005–2015, the number of households with "worst case needs"<sup>26</sup> increased.<sup>27</sup> In 2015, a high rent-burden is what pushed most "worst case needs" households into that category; however, over 360,000 "worst case" renters had severely inadequate housing.<sup>28</sup> Additionally, the percent of very low income renters with severely inadequate homes was more than double that of renters with higher incomes, and the shortage of affordable units for those with very low incomes worsened.<sup>29</sup>

On a more micro level, the vast majority of tenants with meritorious warranty of habitability claims have not received any material benefit from asserting it.<sup>30</sup> For example, in 2016, only 1.75 percent of all tenants in nonpayment of rent eviction cases received rent abatements even though at least thirty-six percent of them likely had meritorious habitability claims.<sup>31</sup> In such cases where there was also an official, publicly recorded violation of the housing code, only nine percent of claimants received a rent abatement, even though all of them had meritorious habitability claims.<sup>32</sup> Where nonpayment of rent eviction cases yielded a second settlement after the terms of the first one expired, the second settlement included the same repair obligations as the first settlement seventy-two percent of the time,

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21. *Id.* at 179 n.165; *Park West Mgmt.*, 391 N.E.2d at 1295.

22. *Bartley v. Walentas*, 434 N.Y.S.2d 379, 383 (N.Y. App. Div. 1980).

23. 2301 7th Ave. *HDFC v. Hudgen-Grace*, 918 N.Y.S.2d 400, 400 (N.Y. App. Term 2010).

24. *See Super*, *supra* note 3, at 397.

25. *Id.* at 455.

26. "Worst case needs" is defined "as unassisted renters with very low incomes (below 50 percent of area median income) who pay more than half of their income for housing or live in severely substandard housing." Office of Policy Development & Research, U.S. Department of Housing & Urban Development, *Trends in Worst Case Needs for Housing, 1978-1999 ix* (2003) [hereinafter HUD Trends 2003].

27. *Id.*; Office of Policy Development & Research, U.S. Department of Housing & Urban Development, *Worst Case Housing Needs 2017 Report to Congress ix* (2017) [hereinafter HUD Trends 2017].

28. HUD Trends 2017, *supra* note 27, at 2–3.

29. *Id.* at 1–3.

30. *Summers*, *supra* note 3, at 193, 202–03.

31. *See id.* at 190.

32. *Id.*

indicating that the repair had yet to be done.<sup>33</sup> Where such cases included a housing code violation, the second settlement included repeat repair obligations eighty percent of the time.<sup>34</sup>

The warranty of habitability has likely had such a meager effect because it does not provide a sufficient incentive for landlords to maintain units that are both habitable and affordable.<sup>35</sup> Landlords have no incentive to repair units unless the cost of doing so is less than the cost of failing to do so. This cost depends on the probability that a tenant will successfully assert (or reassert) their rights and hold the landlord liable for repair, offset by the building's increased value after any repairs.<sup>36</sup> Often, low income renters do not know about their rights under the warranty of habitability, have a hard time raising it, or choose not to raise it because the benefits of raising it would not outweigh the costs of litigation or just moving.<sup>37</sup> In cities with a tight housing market, like New York City, the poorest tenants will likely be extremely reticent to either move or affirmatively and repeatedly assert their rights for fear that they may end up somewhere worse.<sup>38</sup>

A landlord at risk of tenant enforcement of the warranty of habitability who wants to comply with it has two options: she may pass the cost of repairing the apartment to the tenants in the form of raised rents, or she may cover the costs herself.<sup>39</sup> In a housing market with a substantial vacancy rate, a landlord may undertake the second option because she would rather retain her tenants even at a low price than price them out and receive no rent revenue for the unit at all.<sup>40</sup> However, in a market with high demand, like in New York City, she may make repairs and charge more for the unit, either pushing her tenants out with even a slight rent increase, or making enough repairs to charge substantially more, thus removing the unit from the affordable market completely.<sup>41</sup> Of course, a landlord may also choose to abandon the units rather than repair them, allowing them to completely fall into disrepair, thus removing them from the rental market entirely.<sup>42</sup>

### III. THE WARRANTY OF HABITABILITY IN PUBLIC HOUSING

Because only in some zipcodes are NYCHA residents in evictions proceedings guaranteed a lawyer (who would likely know how to raise warranty of

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33. *See id.* at 202.

34. *Id.* at 203.

35. *See Super, supra* note 3, at 405.

36. *Id.*

37. *Id.* at 406.

38. *Id.* at 409.

39. *Id.* at 422.

40. *Id.* at 421.

41. *Id.* at 422.

42. *Id.*

habitability claims),<sup>43</sup> many NYCHA residents, like low income renters in the private market, do not have the ability to raise these claims or would rather just tough it out than spend the time and effort litigating demands, risking retaliation, and needing to move.<sup>44</sup> If NYCHA residents did win on a habitability claim, NYCHA would not be able to raise rent to cover the costs of repairs, unlike private landlords would.<sup>45</sup> Thus, as in the private affordable housing market, one would expect NYCHA housing to be either in severe disrepair, shrinking, or both. And indeed, it is.<sup>46</sup> The warranty of habitability does not seem to be fully achieving its goals in public housing, just as in private housing.

#### A. NYCHA IS LOSING UNITS

While there are limits on public housing associations' ability to remove units from their stock, there is no flat ban.<sup>47</sup> NYCHA's massive capital needs<sup>48</sup> and inability to raise rents to cover the cost of repairs<sup>49</sup> has motivated it to find a way. Data from NYCHA's annual reports from 2004 to 2019 show that NYCHA's public housing population shrank by over eleven percent, the number of NYCHA apartment units declined by about three percent, the number of NYCHA residential buildings shrank by almost twelve percent, and the number of NYCHA public housing developments shrank by almost six percent in the past fifteen years (see [Figures 1 to 4](#) below).<sup>50</sup>

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43. See *Universal Access to Legal Services*, N.Y.C. HUM. RES. ADMIN., <https://www1.nyc.gov/site/hra/help/legal-services-for-tenants.page> [<https://perma.cc/MH3V-AAXC>] (last visited Dec. 19, 2019) [hereinafter *Universal Access*].

44. 43. See *supra* Section II.

45. See *Public Housing Rent Calculation Frequently Asked Questions*, N.Y.C. HOUS. AUTH., <https://www1.nyc.gov/assets/nycha/downloads/pdf/Rent-Calculation-FAQ.pdf> [<https://perma.cc/LC4U-PNEC>] (last visited Feb. 23, 2020) [hereinafter *NYCHA Rent Calculation*] (showing that monthly rents are set once annually based on income, implying they cannot be raised when the need to make repairs puts financial strain on NYCHA).

46. See discussion *infra* Sections III.A, III.B.

47. *E.g.*, 42 U.S.C. § 1437p (2018) (placing limits on when a public housing association may demolish or sell units, its responsibility to the tenants who live in those units, its responsibility to replace lost units, etc.); 42 U.S.C. § 1437t (2018) (outlining conditions in which a public housing association may convert public housing to vouchers).

48. N.Y.C. HOUS. AUTH., ADOPTED BUDGET FOR FISCAL YEAR 2019 AND THE FOUR-YEAR FINANCIAL PLAN FY 2020-2023 2 (2019) ("The Authority's nearly 2,500 buildings have \$31.8 billion in identified capital needs.").

49. See *NYCHA Rent Calculation*, *supra* note 45.

50. See N.Y.C. HOUS. AUTH., PERFORMANCE TRACKING AND ANALYTICS DEPARTMENT, DEVELOPMENT DATA BOOK 2019 96 (2019); N.Y.C. HOUS. AUTH., PERFORMANCE TRACKING AND ANALYTICS DEPARTMENT, DEVELOPMENT DATA BOOK 2018 99 (2018); N.Y.C. HOUS. AUTH., PERFORMANCE TRACKING AND ANALYTICS DEPARTMENT, DEVELOPMENT DATA BOOK 2017 99 (2017); N.Y.C. HOUS. AUTH., PERFORMANCE TRACKING AND ANALYTICS DEPARTMENT, DEVELOPMENT DATA BOOK 2016 81 (2016); N.Y.C. HOUS. AUTH., RESEARCH AND MANAGEMENT ANALYSIS DEPARTMENT, DEVELOPMENT DATA BOOK 2015 63 (2015); N.Y.C. HOUS. AUTH., RESEARCH AND MANAGEMENT ANALYSIS DEPARTMENT, DEVELOPMENT DATA BOOK 2014 65 (2014); JOHN B. RHEA ET AL., N.Y.C. HOUS. AUTH., DEVELOPMENT DATA BOOK 2013 65 (2013); JOHN B. RHEA ET AL.,

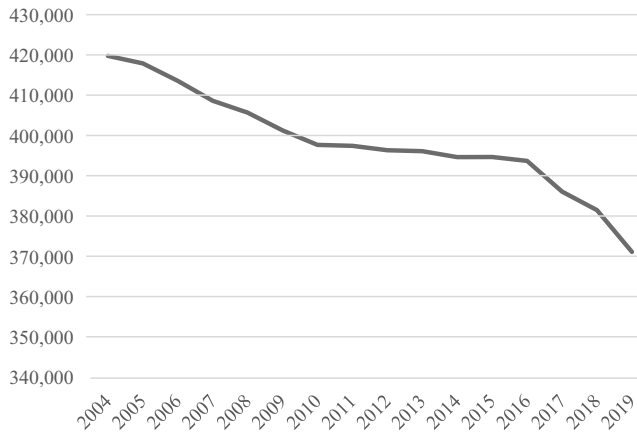


FIGURE 1: NYCHA Population

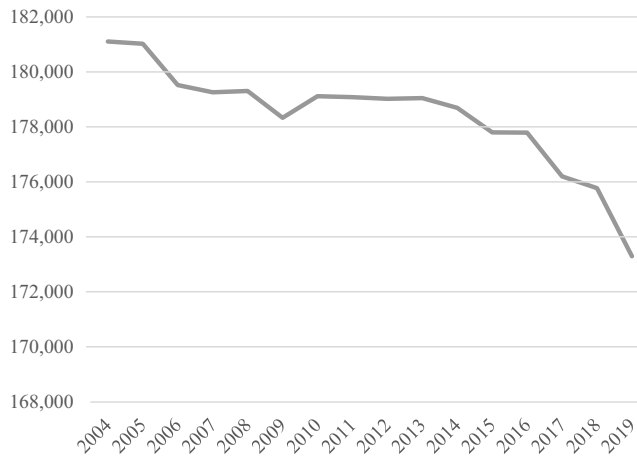


FIGURE 2: NUMBER OF NYCHA UNITS

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N.Y.C. Hous. Auth., Development Data Book 2012 63 (2012); JOHN B. RHEA ET AL., N.Y.C. HOUS. AUTH., DEVELOPMENT DATA BOOK 2011 63 (2011); JOHN B. RHEA ET AL., N.Y.C. HOUS. AUTH., DEVELOPMENT DATA BOOK 2010 63 (2010); RICARDO ELIAS MORALES ET AL., N.Y.C. HOUS. AUTH., DEVELOPMENT DATA BOOK 2009 65 (2009); TINO HERNANDEZ ET AL., N.Y.C. HOUS. AUTH., DEVELOPMENT DATA BOOK 2008 65 (2008); TINO HERNANDEZ ET AL., N.Y.C. HOUS. AUTH., DEVELOPMENT DATA BOOK 2007 66 (2007); TINO HERNANDEZ ET AL., N.Y.C. HOUS. AUTH., DEVELOPMENT DATA BOOK 2006 65 (2006); TINO HERNANDEZ ET AL., N.Y.C. HOUS. AUTH., DEVELOPMENT DATA BOOK 2005 60 (2005); TINO HERNANDEZ ET AL., N.Y.C. HOUS. AUTH., DEVELOPMENT DATA BOOK 2004 59 (2004).

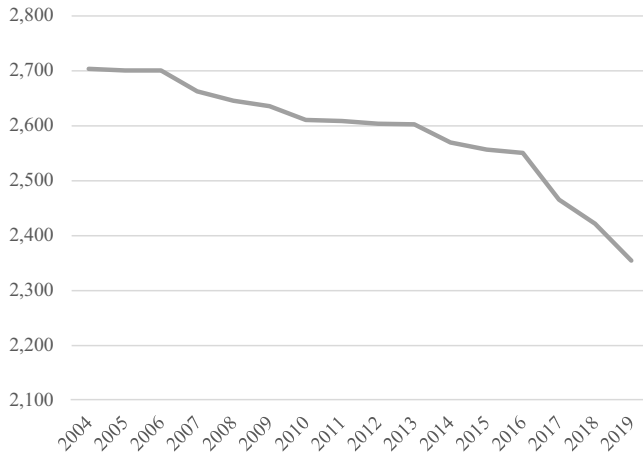


FIGURE 3: NUMBER OF NYCHA BUILDINGS

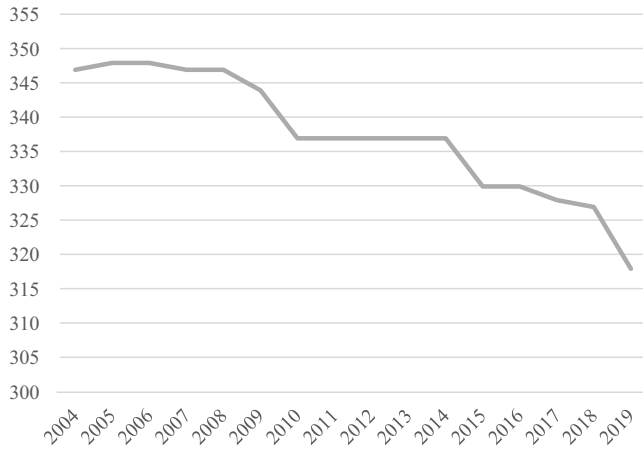


FIGURE 4: NUMBER OF NYCHA DEVELOPMENTS

These declines are not due to a similar reduction in demand for public housing units. The average wait-time to receive a public housing unit has grown dramatically. Between 2009 to 2018, the average number of months on the waitlist increased from less than one to forty (see [Figure 5](#) below).<sup>51</sup>

Between 2004 and 2019, the number of people on the waitlist for a NYCHA unit fluctuated greatly. While the number of people in September 2004 was similar to the number in September 2019, from 2009 to 2014 it increased by over one

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51. See Appendix, *infra*, for full citation including instructions on how to access each data point through the website query fields. The author created this graph by pulling each data point individually from a HUD website portal and consolidating them in the graph above.



hundred and fourteen percent before beginning to decrease again. While this spike and drop-off may have been due to the recession, the size of the NYCHA waitlist seems to bear very little relationship to the size of the NYCHA housing stock since then, suggesting that the decrease in NYCHA's size is not a response to decreased demand for NYCHA housing (see Figure 6 below).<sup>52</sup>

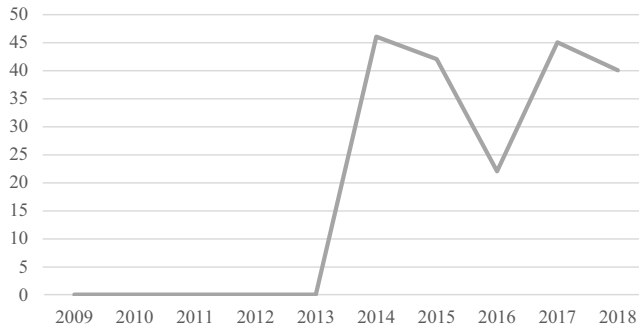


FIGURE 5: AVERAGE NUMBER OF MONTHS ON WAITLIST BEFORE RECEIVING NYCHA HOUSING UNIT

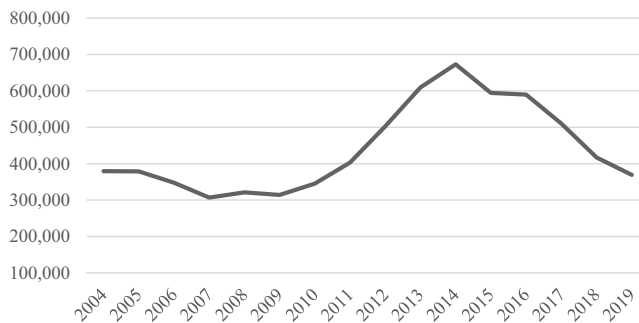


FIGURE 6: ANNUAL NYCHA WAITLIST SIZE IN SEPTEMBER

Some former NYCHA properties are no longer affordable housing.<sup>53</sup> However, much of NYCHA's shrinkage is due to privatization.<sup>54</sup> One method of privatization

52. E-mail from NYCHA FOIL Unit, to author (Dec. 10, 2019, 03:59 PM EST) (containing PDF Attachment "Count of Persons on Wait List - Total tally by year\_2004 - 2019") (on file with author).

53. E.g., N.Y.C. HOUS. AUTH., PERFORMANCE TRACKING AND ANALYTICS DEPARTMENT, DEVELOPMENT DATA BOOK 2017 216 (2017) [hereinafter 2017 NYCHA DATA BOOK] ("[T]he New York City Housing Authority completed the transfer of Franklin MHOP from public housing to Private Co-op. Franklin Avenue I, II and III MHOP is now called Franklin Kite and is no longer part of NYCHA's public housing stock.").

54. See Luis Ferré-Sadurní & Frank G. Runyeon, *Nycha Has a New Plan to Clean Up Rats, Mold and Lead Paint: Bring in Private Landlords*, N.Y. TIMES (Nov. 15, 2018), <https://www.nytimes.com/2018/11/15/nyregion/nycha-private-landlords-repair.html> [<https://perma.cc/AJ6P-S22W>].

currently being used is the Rental Assistance Demonstration program (RAD), through which developers buy NYCHA properties, and tenants pay rent through Section 8 vouchers.<sup>55</sup> There was no comprehensive plan of privatization aimed at raising funds to repair violations of the warranty of habitability until the first RAD conversion of Ocean Bay (Bayside) apartments in 2016.<sup>56</sup>

Congress initiated the RAD program in 2012, and it has been steadily expanding since.<sup>57</sup> The program authorizes public housing authorities to sell public housing complexes to private real estate developers while retaining a portion of the ownership.<sup>58</sup> Private developers are then able to leverage the properties to raise private capital for repairs, and once repairs are done they can rent out the complex as a mixed income community.<sup>59</sup> The contract of sale through which private developers acquire these properties requires them to keep units affordable, and this provision mandatorily renews for a certain period of time after the acquisition.<sup>60</sup>

The RAD program, and privatization in general, has both positive and negative aspects. On the one hand, such public-private partnerships allow for flexible financing that may facilitate rehabilitating NYCHA properties with less need for public funds.<sup>61</sup> Without additional funding sources, some NYCHA buildings would continue to deteriorate and may eventually be torn down, so securing additional funding for their repair may save them.<sup>62</sup> Additionally, landlords, developers, investors, and banks have profited from RAD conversions, and the property rehabilitation processes that have ensued have stimulated the local economy through hiring and purchasing supplies.<sup>63</sup> There are also protections built into RAD guarding against developers converting all their newly acquired RAD units immediately into market rate units.<sup>64</sup>

On the other hand, RAD developments are subject to less oversight from the Department of Housing and Urban Development (HUD) which may result in RAD developers mistreating tenants.<sup>65</sup> Additionally, there is some concern over the long-term preservation of RAD units' affordability.<sup>66</sup> The concerns include that HUD has not completed a plan for retention of affordable units in the event

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55. *Id.*

56. See 2017 NYCHA DATA BOOK, *supra* note 53, at 3; ALICIA GLEN, N.Y.C. HOUS. AUTH., NEXTGENERATION NYCHA 87–88, 108 (2015).

57. Erica Mahoney, *Mitigating the Legal Risks for Landlords Under the Rental Assistance Demonstration Program*, 5 TEX. A&M J. PROP. L. 701, 705–06 (2019).

58. *Id.* at 707.

59. *Id.*

60. See *id.* at 711–12.

61. Andrea J. Boyack, *Responsible Devolution of Affordable Housing*, 46 FORDHAM URB. L.J. 1183, 1225 (2019).

62. See Ferré-Sadurní & Runyeon, *supra* note 54.

63. Mahoney, *supra* note 57, at 711.

64. See 2017 NYCHA DATA BOOK, *supra* note 53, at 222.

65. Boyack, *supra* note 61, at 1225–26.

66. Mahoney, *supra* note 57, at 712.

of a developer's foreclosure,<sup>67</sup> and that once the restrictions on developers to maintain housing affordability expire, they can raise rents to market rate.<sup>68</sup> This might yield a "massive windfall" for developers, and a massive loss to low income New Yorkers.<sup>69</sup>

Coming to a conclusion on the topic of public-private partnerships in affordable housing would be a paper of its own; however, based on the brief preceding discussion, in the long run RAD conversions, and privatization in general, may continue to diminish the number of affordable apartments available to NYCHA qualifying tenants. Insofar as NYCHA selling its units to private developers through RAD may yield a net decrease of public housing units, the warranty of habitability seems to have failed. Indeed, NYCHA has cited increasing pressure to repair the condition of its housing stock as the reason for selling its properties in the hopes that it will finance their repair.<sup>70</sup>

### B. NYCHA IS IN DISREPAIR

Many NYCHA apartments are simply uninhabitable. Over half of NYCHA developments contain lead paint, NYCHA failed to conduct lead paint inspections for years, NYCHA artificially deflated the number of reported cases of elevated lead levels in residents' blood, and NYCHA management was aware of these practices.<sup>71</sup> There were over three quarters of a million heating complaints between 2011–2016, and eighty percent of NYCHA residents lost heat at some point during the winter of 2017–2018.<sup>72</sup> In one tenant's NYCHA apartment, the temperature lingered below 50 degrees for weeks, sometimes falling below freezing, aggravating her asthma and leg injuries.<sup>73</sup> On average, there were ninety-four outages per elevator from 2011–2016, an average of almost nineteen outages per year per elevator.<sup>74</sup> Severe and recurring mold in NYCHA apartments routinely exacerbates residents' asthma.<sup>75</sup>

Tenants have recently brought constitutional claims around NYCHA's failure to remedy persistently abysmal housing conditions in federal court.<sup>76</sup> However, NYCHA has not complied with federal court orders. A 2014 consent decree

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67. U.S. GOV'T ACCOUNTABILITY OFF., RENTAL ASSISTANCE DEMONSTRATION: HUD NEEDS TO TAKE ACTION TO IMPROVE METRICS AND ONGOING OVERSIGHT 1 (GAO Highlights 2018).

68. Mahoney, *supra* note 57, at 712.

69. *Id.*

70. 2017 NYCHA DATA BOOK, *supra* note 53, at 3.

71. *United States v. N.Y.C. Hous. Auth.*, 347 F. Supp. 3d 182, 189–91 (S.D.N.Y. 2018) ("Even where NYCHA found a child with elevated blood lead levels who lived in a development previously determined to be lead free, it still—in defiance of all common sense—did not conduct risk assessments of that development.").

72. *Id.* at 194.

73. *Davis v. N.Y.C. Hous. Auth.*, 379 F. Supp. 3d 237, 243, 255 (S.D.N.Y. 2019).

74. *United States v. N.Y.C. Hous. Auth.*, 347 F. Supp. 3d at 191, 194 ("[T]he majority of NYCHA elevator buildings experienc[ed] at least one period with no functioning elevators in 2016.").

75. *Baez v. N.Y.C. Hous. Auth.*, No. 13CV8916, 2015 WL 9809872, at \*1, \*3 (S.D.N.Y. Dec. 15, 2015).

76. *E.g., Davis*, 379 F. Supp. 3d at 243–44.

required—among other stipulations—that NYCHA complete simple repairs of mold growths within seven days and complex repairs within fifteen days.<sup>77</sup> By 2015 it had become clear that NYCHA did not comply with this consent decree.<sup>78</sup> Instead, when NYCHA opened a work order for mold abatement, rather than simply completing it within seven or fifteen days, as required in the consent decree, they created a system of sub-work orders and completed those within the requisite amount of time to make it look like they addressed mold problems on schedule.<sup>79</sup> Mold would then recur between twenty-two and forty-one percent of the time.<sup>80</sup>

NYCHA also falsely certified its compliance with HUD's lead paint requirements and the general requirement to provide safe housing.<sup>81</sup> While lead paint inspections are required annually for buildings built before 1960, between 2013–2016 NYCHA conducted no inspections at all, and when they resumed inspections in 2016, some of the inspectors were unqualified for the job.<sup>82</sup> To address a backlog of work orders to fix tenant complaints, NYCHA suspended regular building inspections (which allowed conditions to worsen and led to fewer new work orders), and it instituted a policy that allowed workers to close work orders if a tenant was not home when workers arrived.<sup>83</sup> NYCHA circumvented HUD's inspection system by fixing only the things inspectors were known to care about, racing ahead of inspectors to patch unforeseen issues, and employing strategies to cover up violations like “(1) temporarily shutting off a building's water supply to hide water leaks; (2) plugging holes in walls and ceilings with newspaper and cork before painting over the hole; (3) building fake walls to conceal broken doors and dilapidated rooms.”<sup>84</sup>

While NYCHA has an estimated \$31.8 billion in capital needs (an average of over \$180,000 per apartment) and an annual budget of only approximately three billion dollars,<sup>85</sup> concealing the extent of the problems was not the only choice they could have made.<sup>86</sup> They could have instead allowed ticket requests for repairs to build up while doing their best to complete as many of them as possible, thus alerting city officials to the extent of the mounting crisis.<sup>87</sup> Given the lack of funding available to properly repair all that is needed, NYCHA's management and local elected officials were motivated to preserve their reputations, and thus

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77. *Baez*, 2015 WL 9809872, at \*1.

78. *Id.* at \*2.

79. *Id.*

80. *Id.* at \*3.

81. *United States v. N.Y.C. Hous. Auth.*, 347 F. Supp. 3d 182, 192, 194 (S.D.N.Y. 2018).

82. *Paige v. N.Y.C. Hous. Auth.*, No. 17CV7481, 2018 WL 1226024, at \*1–2 (S.D.N.Y. Mar. 9, 2018).

83. *United States v. N.Y.C. Hous. Auth.*, 347 F. Supp. 3d at 192–93.

84. *Id.* at 193.

85. *Id.* at 196 n.10; GLEN, *supra* note 56, at 32; *see also* Benjamin Weiser, Luis Ferré-Sadurní, Glenn Thrush & J. David Goodman, *De Blasio Cedes Further Control of Nycha but Avoids Federal Takeover*, N.Y. TIMES (Jan. 31, 2019) <https://www.nytimes.com/2019/01/31/nyregion/hud-nycha-deal.html> [<https://perma.cc/HZ7Q-N6EP>] (reporting NYCHA's funding has been cut by \$2.7 billion since 2001).

86. *Davis v. New York City Hous. Auth.*, 379 F. Supp. 3d 237, 256–57 (S.D.N.Y. 2019).

87. *Id.* at 257.

their jobs, by this concealment.<sup>88</sup> As a result of all this noncompliance, while warranty of habitability litigation continues to pervade housing court cases, NYCHA is now bound by a monitor agreement with HUD.<sup>89</sup>

The monitor agreement includes the appointment of a monitor over NYCHA who will have full access to NYCHA's data and facilities, and the authority to direct NYCHA to sign construction contracts.<sup>90</sup> The monitor's role will be to ensure that NYCHA complies with lead paint laws; provides decent, safe, sanitary housing in good repair; does not lie to the United States; and implements the terms of the consent decree by developing benchmarks for measuring compliance.<sup>91</sup> The agreement outlines timing requirements around reducing lead paint, heating outages, mold, elevator outages, and pests,<sup>92</sup> with some deadlines as far out as 2026.<sup>93</sup> Finally, the agreement also includes some additional funding from the city.<sup>94</sup>

### C. A WAY FORWARD

As the previous two Sections establish, NYCHA is shrinking, and the state of its housing stock is bleak. While this Note does not evaluate all the possible factors that may be contributing to these issues, all of this occurred despite wide use of the warranty of habitability, with its noble goals of expanding affordable, quality housing.

Short of pivoting away from direct legal services to lobbying for an increase in funding or a change of management, what is a direct service attorney to do? One option is to refrain from asserting the warranty of habitability until NYCHA receives more funding, and until the fear that frequently asserting the warranty would run NYCHA into the ground dissipates. Until systemic issues with NYCHA are adequately addressed, perhaps warranty of habitability judgments against NYCHA would do more harm than good. At least one judge seems to agree. One of the reasons the New York Supreme Court in New York County granted NYCHA's motion to dismiss a 2019 class action under the warranty of habitability for severe heating outages during the winter of 2017–2018 was that NYCHA's monitor agreement with HUD covered some of the same issues.<sup>95</sup> Since “HUD and the monitor are simply better equipped to address and remediate the dire, systemic problems raised by this action,”<sup>96</sup> Judge Edmead thought that

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88. *Cf. id.*

89. HOUSING AND URBAN DEVELOPMENT AND NEW YORK CITY HOUSING AUTHORITY, AGREEMENT 1, 2, 5 (2019).

90. *See id.* at 6, 8–9.

91. *Id.* at 7, 13–14.

92. *Id.* ex. A–B.

93. *Id.* ex. B at 4 (“NYCHA will replace or address approximately 500 boilers by 2026”).

94. *Id.* at 16.

95. *Diamond v. N.Y.C. Hous. Auth.*, No. 153312/18, 2019 N.Y. Misc. LEXIS 483, at \*12 (N.Y. Sup. Ct. Feb. 7, 2019).

96. *Id.*

granting the relief sought by tenants here might frustrate this purpose.<sup>97</sup>

Another judge, though, implicitly endorsed the philosophy that mounting habitability judgments may be productive, even if NYCHA does not immediately comply.<sup>98</sup> It was in the context of NYCHA concealing the extent of the dire conditions in its housing that Judge Oetken of the Southern District of New York said that “allowing ticket requests for repairs to amount . . . would alert city officials to the extent of the . . . crisis.”<sup>99</sup> Continuing to make and win habitability claims that NYCHA cannot keep up with may be one of the many tools legal services lawyers have to put pressure on federal, state, and city officials to increase funding to NYCHA. Otherwise, the extent of the problem may remain hidden.

There are two more reasons it may make sense for lawyers to continue raising the warranty of habitability against NYCHA. First, not asserting the warranty of habitability, thereby concealing the extent of the problem and not giving NYCHA the opportunity to make repairs, may lead to NYCHA housing falling further into disrepair, yielding the same feared result—fewer livable public housing units. Second, while NYCHA rarely makes repairs in compliance with habitability judgments against it, without judgments against it, it is even less likely to make repairs. Forgoing the warranty of habitability altogether would forgo the possibility of securing better housing for a client.

Thus, while remaining part of a litigator’s toolkit, an attorney can deploy the warranty of habitability strategically, with an eye toward preserving NYCHA’s units. Since there are serious small- and large-scale benefits to both refraining from asserting the warranty of habitability and continuing to assert it, it seems like one element of a strategic warranty deployment plan would include reducing, but not eliminating its use. The next Part develops this plan and explains how to ethically justify it.

#### IV. ETHICAL IMPLICATIONS: ADVOCATING FOR BOTH CURRENT AND FUTURE CLIENTS

The discussion above suggests that the warranty of habitability against NYCHA has not had all the positive effects on quality, affordable housing it set out to achieve, and may even have had some negative effects. Therefore, a legal services attorney whose job responsibilities primarily center around litigation may want to devise a strategy for deployment of the warranty that aims at the long term goals the warranty was created to achieve.

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97. *Id.* at \*10.

98. *Cf.* Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817, 821 (2013) (exploring ways that losing in court can be beneficial).

99. *Davis v. N.Y.C. Hous. Auth.*, 379 F. Supp. 3d 237, 256–57 (S.D.N.Y. 2019).

Under the current scheme of legal ethics, a lawyer has a duty to her client first, with only limited responsibilities to the court and other parties.<sup>100</sup> However, legal services lawyers do have some responsibility to the broader community, and must contend with the competing responsibilities of representing their current clients while caring for the needs of potential future clients.<sup>101</sup> These attorneys usually have a mandate to provide services to a specific community of low-income folks.<sup>102</sup> If this duty carries any weight, it must compel a legal services lawyer to consider the legal needs of the non-clients in her community.<sup>103</sup> The ABA has recognized this duty in adopting a set of rules for the provision of civil legal aid, including that legal services organizations should have a strategy for how to best meet the needs of their low income population.<sup>104</sup> This obligation creates a professional duty for legal services organizations to care for the needs of their low-income population in addition to just retained clients.<sup>105</sup>

While the ABA rules for the provision of civil legal aid are one source of a legal services organization's responsibility to non-clients, the movement lawyering context also presents a possible approach to navigating the tension between interests in considering what cases to take and whether to assert warranty of habitability claims. Movement lawyering can be defined as "the use of integrated advocacy strategies, inside and outside of formal lawmaking spaces, by lawyers who are accountable to mobilized social movement groups to build the power of those groups to produce or oppose social change goals that they define."<sup>106</sup> While legal services lawyers' goals are not about systematic, societal change, like movement lawyers they similarly navigate tensions and tradeoffs between immediate client interests and long term organizational goals.<sup>107</sup>

Section A, *infra*, describes the contours of a legal services lawyer's professional mandate to provide for both clients and non-client community members. Section B discusses how a legal services lawyer ought to choose among clients who have warranty of habitability claims. Finally, Section C discusses how a legal services lawyer ought to defend clients who have warranty of habitability claims she cannot turn away.

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100. Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447, 465 (2018).

101. Paul R. Tremblay, *Toward A Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1117 (1990) [hereinafter Tremblay, *Community Based Ethic*].

102. Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2510 (1999) [hereinafter Tremblay, *Very Moral God*].

103. *Id.*

104. AM. BAR ASS'N, ABA STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID §§ 1.1-3, 2.1 (2006) (Section 2.1 reads, "It should also support development and deployment of resources in the system to assure the availability of a full range of services, responsive to the most pressing needs of low income persons in its service area.").

105. *Id.*; Tremblay, *Community Based Ethic*, *supra* note 101, at 1112, 1124.

106. Carle & Cummings, *supra* note 100, at 452.

107. *See id.* at 459.

## A. LAWYERS' ROLES

As described in the introduction to this Section, legal services lawyers steward a responsibility to a community of clients and potential clients in a way private lawyers do not. While the responsibility a legal services lawyer has for her community is not governed by the ethics rules that come with a formal lawyer-client relationship, Paul Tremblay proposes that a legal services lawyer's duties to her community ought to be conceived as those of a trustee.<sup>108</sup> Like a trustee has a duty to future beneficiaries, including those with whom she does not have a direct contract, legal services lawyers owe a duty to a larger constituency than merely those with whom they already have a formalized lawyer-client relationship.<sup>109</sup> A trustee may owe a fiduciary duty to multiple principals who do not have aligned interests.<sup>110</sup> For example, a trustee must consider future beneficiaries' interests when investing for current beneficiaries.<sup>111</sup> Improperly favoring one over the other, while broadly defined, is a violation of the trustee's fiduciary duty.<sup>112</sup>

While a legal services lawyer is bound by professional ethics rules to pursue her clients' interests, as a trustee for a low-income community that includes both clients and non-clients, she cannot actively pursue matters that will harm the broader community.<sup>113</sup> Difficult cases arise when resolving one client's case may require a lawyer to make legal arguments which would undermine the interests of other clients or non-clients if they become precedent.<sup>114</sup> Tremblay describes a hypothetical scenario to illustrate this tension where a legal services lawyer represents a poor, elderly homeowner who has rented out a room in his house to someone who turns out to be a difficult tenant.<sup>115</sup> To make the scenario more realistic, one can imagine this homeowner as someone who fell prey to the mortgage crisis in 2008. As a zealous advocate for her client, it may behoove a lawyer in this situation to argue for a narrow reading of tenants' rights to protect her client's interests in his unique circumstance.<sup>116</sup> However, there are surely tenants who would qualify for her legal services whose interests would be undermined by such a narrowing of their rights.<sup>117</sup>

Asserting the warranty of habitability for public housing tenants is a similar case to the one just described. Though a lawyer is only required to zealously advocate for the client's interests and is not required "to press for every advantage

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108. Tremblay, *Very Moral God*, *supra* note 102, at 2509.

109. *Id.* at 2509–10.

110. *Id.* at 2515.

111. *Id.*

112. *Id.*

113. *Id.* at 2510.

114. Tremblay, *Community Based Ethic*, *supra* note 101, at 1125.

115. *Id.*

116. *Id.*

117. *Id.*



that might be realized for a client,”<sup>118</sup> if the primary interests of a client who lives in public housing is to not be evicted or to have his apartment repaired, zealous advocacy may require asserting the warranty. However, as described earlier, NYCHA does not have the funds to comply with all of the habitability judgments against it and these mounting financial needs are causing it to sell its properties to private developers, reducing the number of public housing units available.<sup>119</sup> Zealously representing clients whose homes are in disrepair seems to jeopardize public housing for future tenants. This presents a conflict between the professional duty to zealously represent clients and the fiduciary duty neither to favor the interest of current beneficiaries or those of future ones.

As discussed above,<sup>120</sup> a way to do this is to cut back on using the warranty of habitability, but not to eliminate it. One method of doing this is for lawyers to assert it when necessary for clients they cannot turn down, but not to take on clients whose cases would require asserting it. Section B will discuss the ethical grounding for not asserting the warranty in discretionary cases, and Section C will discuss ethical grounding of asserting it in cases a legal services organization must take.

## B. WHEN LAWYERS CAN CHOOSE THEIR CLIENTS

Barring some other law,<sup>121</sup> a lawyer may either accept or reject any client for any reason other than discrimination,<sup>122</sup> so deciding not to accept clients whose cases would demand asserting the warranty of habitability does not, on its face, violate professional ethics rules. In fact, a legal services lawyer cannot possibly accept all potential clients, and she has an imperative to reject clients who would pose a conflict of interest.<sup>123</sup> In the medical field, this kind of decision making is called “triage,” or “screening of [clients] to determine their priority for treatment [i.e., representation].”<sup>124</sup> There are various approaches to triaging clients when accepting everyone is not an option, all of which are morally charged; for example, “random selection, amount of legal need, degree of legal need, degree of poverty, and likelihood of success.”<sup>125</sup> Given the fiduciary duty a legal services organization has to a community stemming from its professional obligation to

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118. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2018) [hereinafter MODEL RULES]; *see also* N.Y. RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (N.Y. BAR ASS'N 2018).

119. *See* discussion *supra* Section III.A.

120. *See* discussion *supra* Section III.C.

121. *See Universal Access*, *supra* note 43 (describing the Universal Access to Legal Services law that guarantees low-income tenants facing eviction legal representation even if they cannot pay for a lawyer).

122. *See* MODEL RULES R. 8.4; NEW YORK RULES OF PROF'L CONDUCT R. 8.4 (N.Y. BAR ASS'N 2018).

123. MODEL RULES R. 1.16 cmt. 1; NEW YORK RULES OF PROF'L CONDUCT R. 1.16 cmt. (N.Y. BAR ASS'N 2018).

124. Tremblay, *Community Based Ethic*, *supra* note 101, at 1111 (brackets in original) (quoting STEDMAN'S MEDICAL DICTIONARY 1322 (22d ed. 1972)).

125. *Id.*

maximize its resources,<sup>126</sup> provision of legal services must be guided by triage criteria informed by the values, interests, and needs of a legal services lawyer's low-income clientele.<sup>127</sup> For example, Paul Tremblay outlines a set of principles a lawyer may consider in making triage decisions.<sup>128</sup> They include favoring:

1. Clients for whom legal representation will likely make a difference and achieve some success for that client;
2. Cases that would require less organizational resources to achieve success;
3. Cases that will benefit larger groups of people over those that benefit only the client (and disfavoring cases that will undercut community interests);
4. The most serious matters, defined as those associated with a high level of harm if left unresolved; and
5. Long-term, over short-term benefit.<sup>129</sup>

A legal services organization has scarce resources and cannot possibly meet all the legal needs of everyone in its community; it must, therefore, engage in some sort of rationing.<sup>130</sup> It may even be unable to represent everyone under threat of eviction. This approach would allow lawyers to focus their limited resources on areas that have fewer collateral, detrimental effects as asserting the warranty of habitability.

However, simply rejecting clients who may have warranty of habitability claims as a strategy to avoid asserting the warranty more than necessary is an ineffective strategy to balance current client needs with the needs of the community for three reasons. First, even clients who make it past an initial screening meant to weed out cases with habitability claims may still have habitability claims. Unanticipated claims may arise, and a lawyer would be faced with the more difficult choice of whether to assert the warranty of habitability when the claimant is already a client—the choice she was trying to avoid by her triage criteria.

Second, it would involve abandoning some members of the community who truly need legal representation. Tenants who live in broken-down apartments could benefit greatly from legal representation for other reasons. If lawyers all reject these tenants outright because one straightforward claim to make on the tenants' behalf is a warranty of habitability claim, then these tenants will be poorly served by parties who have a duty to serve them. In rejecting clients with potential warranty of habitability claims for the sake of the future interests of the community, legal services organizations forgo community members' more

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126. See AM. BAR ASS'N, ABA STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID §§ 1.1-3, 2.1 (2006).

127. Tremblay, *Community Based Ethic*, *supra* note 101, at 1139.

128. Tremblay, *Very Moral God*, *supra* note 102, at 2489–90.

129. *Id.* at 2491–93.

130. See *id.* at 2484.

immediate interests. Forgoing one interest completely in favor of another is a breach of the legal services organization's fiduciary duty to its community.

Third, clients with habitability claims may have other claims that, if asserted, would benefit future clients. For example, a lawyer may have the option to take on a NYCHA tenant as a client who did not receive proper notice of her eviction. Taking her case may allow the lawyer to establish precedent that would hold NYCHA to more stringent notice requirements in the future. As a potentially low cost, high reward policy change, this would benefit tenants. Rejecting that tenant as a client because she may also have a habitability claim would mean turning down the opportunity to set helpful precedent because of a desire to avoid setting an unhelpful one. In fact, the widespread disrepair in NYCHA<sup>131</sup> might make it difficult, if not impossible, to find tenants who do not have warranty of habitability claims. While allowing lawyers to avoid the negative effects of the warranty of habitability, it would make it extremely hard to bring cases that would be good for the community at large as well.

A better route than simply rejecting all NYCHA clients whose apartments are in disrepair would be to accept clients based on some criteria that include providing representation to those who need it while still trying to limit or eliminating the use of the warranty of habitability. This may mean rejecting clients whose primary goal is to assert the warranty of habitability, while accepting clients whose primary goals are otherwise, but refraining from asserting warranty of habitability claims that come up. Unlike the decision to reject a tenant as a client completely, this presents at least three potential ethical problems.

First, the most effective way to advocate for NYCHA tenants one has taken on as clients for reasons other than their warranty of habitability claims may still be to assert the warranty. In refusing to assert it, lawyers may be renegeing on their duty to zealously advocate for the client.<sup>132</sup> Second, lawyers must adopt clients' objectives, and it is not lawyers' job to dictate to clients that the objective of their case is aimed toward long term communal benefit in addition to immediate relief.<sup>133</sup> It also means that if, once a tenant becomes a client, she decides that she wants to assert the warranty of habitability, her lawyer ought to abide by her decision.<sup>134</sup> Third, the *Model Rules* and New York's Rules of Professional Conduct prohibit lawyers from representing clients when the representation would be limited by a conflict of interest between the current case and either another person or a personal interest.<sup>135</sup> If a lawyer is committed to reducing or eliminating her use

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131. See discussion *supra* Section III.B.

132. See MODEL RULES pmb1.; cf. N.Y. RULES OF PROF'L CONDUCT pmb1. (N.Y. BAR ASS'N 2018).

133. MODEL RULES R. 1.2 (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation.”); N.Y. RULES OF PROF'L CONDUCT R. 1.2 (N.Y. BAR ASS'N 2018).

134. See MODEL RULES R. 1.2; N.Y. RULES OF PROF'L CONDUCT R. 1.2 (N.Y. BAR ASS'N 2018); see also Carle & Cummings, *supra* note 100, at 450.

135. See MODEL RULES R. 1.7; N.Y. RULES OF PROF'L CONDUCT R. 1.7 (N.Y. BAR ASS'N 2018); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 125 cmt. c (2000) (“A conflict under this Section

of the warranty of habitability, it can be useful to think of cases where the warranty arises as presenting a potential conflict.<sup>136</sup>

One way to resolve these conflicts is through client consent.<sup>137</sup> It is common for lawyers to address conflicts of interest between clients in initial retainer agreements where a “secondary client” informedly consents to an agreement where its lawyer commits to withdraw from representing it when faced with an unresolvable conflict with a primary client.<sup>138</sup> This argument stems from the movement lawyering context, where lawyers must routinely balance client goals and long term movement interests.<sup>139</sup> Movement lawyers effectively have two sets of clients—individuals and a movement.<sup>140</sup> Just as private lawyers are entitled to explain to their clients that representing multiple clients carries a risk that the clients’ interests may eventually conflict with each other even when they seem to align at the start of a lawyer-client relationship, movement lawyers may be as well.<sup>141</sup> Just as private lawyers may have to withdraw from a case when a conflict arises, movement lawyers may as well.<sup>142</sup>

While legal services lawyers are not movement lawyers in the traditional sense, they too have conflicting responsibilities to both retained clients and the future interests of a low-income community. Under the client consent model, in taking on a NYCHA tenant as a client, a legal services lawyer should explain the following in her client retainer agreement: her competing commitments between representing the client and not asserting the warranty of habitability, the procedures she will use if a conflict arises, and the possibility that she will withdraw from the representation if the conflict cannot be resolved.<sup>143</sup> Withdrawing from the representation would ensure that the lawyer can continue to dispatch her ethical duty for zealous advocacy.<sup>144</sup> Additionally, in withdrawing from a case where there is conflict rather than steering the representation toward movement goals when the client objects, the lawyer does not violate her duty to abide by her client’s decisions.<sup>145</sup>

need not be created by a financial interest. . . . Such a conflict may also result from a lawyer’s deeply held religious, philosophical, political, or public-policy beliefs.”); Carle & Cummings, *supra* note 100, at 450.

136. *Cf.* Carle & Cummings, *supra* note 100, at 466 (“[W]e suggest that long-term movement goals be treated akin to a consentable client conflict.”).

137. *Id.* But see Lawrence J. Fox, *All’s O.K. Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics*, 29 HOFSTRA L. REV. 701, 715–16 (2001) (questioning the fairness of having clients sign prospective waivers as a way to deal with conflicts of interest).

138. Carle & Cummings, *supra* note 100, at 466; see also MODEL RULES R. 1.16 (“[A] lawyer may withdraw from representing a client if . . . the client insists upon taking action . . . with which the lawyer has a fundamental disagreement.”).

139. See Carle & Cummings, *supra* note 100, at 466, 474.

140. *Id.* at 467–68.

141. *Id.*

142. See *id.*

143. See *id.*

144. See MODEL RULES pmbI.; N.Y. RULES OF PROF’L CONDUCT pmbI. (N.Y. BAR ASS’N 2018).

145. See MODEL RULES R. 1.2; N.Y. RULES OF PROF’L CONDUCT R. 1.2 (N.Y. BAR ASS’N 2018).

### C. WHEN LAWYERS CANNOT CHOOSE THEIR CLIENTS

In New York City, there are situations where a legal services organization is unable to turn down a client. The Universal Access to Legal Services law ensures that anyone in New York City facing eviction in housing court has a right to a lawyer.<sup>146</sup> While the program is not yet operable in all ZIP codes, tenants facing eviction who meet the income criteria in applicable ZIP codes cannot be denied counsel, and counsel cannot refuse to represent them.<sup>147</sup>

The previous Section depends on a legal services organization's ability to make triage decisions and turn some clients down. However, in the context of Universal Access, these organizations do not have a choice about whether or not to represent clients, and clients do not have the freedom to find another lawyer.<sup>148</sup> Because withdrawing from representing a Universal Access client would jeopardize a legal service organization's public funding and would have "material adverse effect on the client's interests,"<sup>149</sup> legal services organizations should represent them, and assert all the claims they can, including the warranty of habitability, for three reasons.<sup>150</sup>

First, as a trustee for its community's rights and legal needs, a legal services organization is bound not to prioritize the needs of current clients over the community's future needs, and vice versa. However, not asserting the warranty of habitability for clients who cannot choose a different lawyer for help avoiding eviction would be forgoing current client interests for the sake of future ones. This is to be distinguished from when lawyers choose their clients with long term communal goals in mind. Triage is not prioritizing future interests over current ones; it is maximizing the good an organization can do. Additionally, there is still some ambiguity as to the community's future needs. For example, mounting habitability claims may, indeed, spur policymakers to action and NYCHA may receive more funding. Prioritizing hypothetical (though very likely) future needs of the community over the imminent needs of clients an organization cannot turn down would be a breach of a legal services organization's fiduciary duty. Thus, as part of a comprehensive legal strategy, a legal services lawyer should assert the warranty of habitability in defending clients it cannot turn away.

Second, the warranty of habitability claims might win, and NYCHA may make repairs. Asserting the warranty of habitability does not usually result in repairs, but not asserting it definitely will not. Mounting habitability judgments against NYCHA are bad because the larger NYCHA's responsibility to repair grows, the less likely it is to make repairs, and the more likely it is to sell units. However,

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146. *Universal Access*, *supra* note 43.

147. *See id.*

148. *See id.* (describing the law through which low-income tenants are provided legal representation. Such tenants do not have the financial wherewithal to secure a different lawyer than the one provided).

149. MODEL RULES R. 1.16 cmt. 7; N.Y. RULES OF PROF'L CONDUCT R. 1.16 cmt. (N.Y. BAR ASS'N 2018).

150. *See supra* Section III.C for a preliminary discussion of these three reasons.

repairs it makes do not factor into its capital needs. Even if NYCHA does not make repairs, winning a warranty of habitability claim may be beneficial in reducing the amount of money a tenant who has fallen behind on rent owes. It would be a disservice to clients on the verge of eviction to forgo a defense that may, in fact, be one of only a few things that works. However, because usually winning on the warranty of habitability does not yield repairs, it should be deployed only when necessary for clients who cannot be turned away.

Finally, not asserting the warranty of habitability at all might have the same result as asserting it too much: NYCHA's widespread disrepair and decline. Habitability claims against NYCHA give NYCHA notice that their units are falling apart, and at least the opportunity to prevent them from falling further into ruin. Even if NYCHA does not make repairs, mounting habitability judgments against it serve as an alarm bell to policymakers and elected officials that NYCHA has a problem that needs fixing. Without such notice, units almost definitely will not be repaired, and policymakers would not feel urgency to come up with a solution. With no repairs and no officials working to support NYCHA long term, NYCHA may fall into even greater disrepair such that when NYCHA's problems are eventually discovered, it would be too far gone to save. One way to strike the balance between not asserting the warranty at all versus too much is to adhere to this Section's limiting principle—only asserting it for clients who cannot be turned away.

### CONCLUSION

In public housing, much like in private housing, the warranty of habitability does not seem to have fully achieved what it set out to do. While this Note does not prove that mounting habitability judgments against NYCHA are to blame for its shrinkage and disrepair, the warranty of habitability has seemingly failed to counteract the forces pushing NYCHA in that direction. NYCHA has explicitly pointed to its increasing need to comply with habitability judgments in explaining its continuous loss of units both to public-private partnerships pledging to maintain units as affordable for a limited time, and to market rate landlords. Meanwhile, the buildings it retains are ridden with lead paint, ineffective heaters, unreliable elevators, persistent mold, pervasive pests, and many more uninhabitable conditions.

Given these facts, the warranty of habitability ought to be deployed more strategically. A legal services organization not only has a professional duty to its retained clients, but also a fiduciary duty to the low-income community it serves, which includes non-clients. As such, it ought not prioritize its current clients' needs over its future clients, or vice versa. While over-assertion of the warranty of habitability may be damaging to NYCHA and its future residents by causing NYCHA's decline, refraining from asserting it could be damaging to future residents by concealing the extent of NYCHA's disrepair, not to mention current

clients who lose the opportunity for home repairs. One way to limit assertion of the warranty of habitability to the most strategic cases is to assert it for clients who legal services organizations must take, but not to assert it for clients who they do not have to take.

While this approach can be a powerful use of a legal services lawyer's toolkit, it is an incomplete solution. NYCHA units may continue to crumble until NYCHA receives an increase in funding and a sustainable shift in management that would facilitate efficiently repairing its housing stock. In deploying the warranty of habitability strategically, perhaps legal services attorneys can be part of a movement for achieving these changes.

## APPENDIX

Below are citations for each data point in Figure 5. Each data point was accessed separately by filling out the query fields on the landing page at <https://www.huduser.gov/portal/datasets/assthsg.html#2009-2018> [<https://perma.cc/79MY-QZ55>] according to the instructions below.

2018 HUD Data on Assisted Housing for New York City Public Housing, HUD USER OFF. OF POL'Y DEV. & RES., <https://www.huduser.gov/portal/datasets/assthsg.html#2009-2018> (under "2009-2018," "Query Tool," search Select a Year field for "2018 based on 2010 Census," Select a Summary Level field for "City," Select a State field for "NY New York," Select a City field for "3651000 NEW YORK CITY (PART)," Select a Program field for "Public Housing," Select a Variable field for "Average Months on Waiting List");

2017 HUD Data on Assisted Housing for New York City Public Housing, HUD USER OFF. OF POL'Y DEV. & RES., <https://www.huduser.gov/portal/datasets/assthsg.html#2009-2018> (under "2009-2018," "Query Tool," search Select a Year field for "2017 based on 2010 Census," Select a Summary Level field for "City," Select a State field for "NY New York," Select a City field for "3651000 NEW YORK CITY (PART)," Select a Program field for "Public Housing," Select a Variable field for "Average Months on Waiting List");

2016 HUD Data on Assisted Housing for New York City Public Housing, HUD USER OFF. OF POL'Y DEV. & RES., <https://www.huduser.gov/portal/datasets/assthsg.html#2009-2018> (under "2009-2018," "Query Tool," search Select a Year field for "2016 based on 2010 Census," Select a Summary Level field for "City," Select a State field for "NY New York," Select a City field for "3651000 NEW YORK CITY (PART)," Select a Program field for "Public Housing," Select a Variable field for "Average Months on Waiting List");

2015 HUD Data on Assisted Housing for New York City Public Housing, HUD USER OFF. OF POL'Y DEV. & RES., <https://www.huduser.gov/portal/datasets/assthsg.html#2009-2018> (under "2009-2018," "Query Tool," search Select a Year field for "2015 based on 2010 Census," Select a Summary Level field for "City," Select a State field for "NY New York," Select a City field for "3651000 NEW YORK CITY (PART)," Select a Program field for "Public Housing," Select a Variable field for "Average Months on Waiting List");

2014 HUD Data on Assisted Housing for New York City Public Housing, HUD USER OFF. OF POL'Y DEV. & RES., <https://www.huduser.gov/portal/datasets/assthsg.html#2009-2018> (under "2009-2018," "Query Tool," search Select a Year field for "2014 based on 2010 Census," Select a Summary Level field for "City," Select a State field for "NY New York," Select a City field for "3651000 NEW YORK CITY (PART)," Select a Program field for "Public Housing," Select a Variable field for "Average Months on Waiting List");



2013 HUD Data on Assisted Housing for New York City Public Housing, HUD USER OFF. OF POL'Y DEV. & RES., <https://www.huduser.gov/portal/datasets/assthsg.html#2009-2018> (under "2009-2018," "Query Tool," search Select a Year field for "2013 based on 2010 Census," Select a Summary Level field for "City," Select a State field for "NY New York," Select a City field for "3651000 NEW YORK CITY (PART)," Select a Program field for "Public Housing," Select a Variable field for "Average Months on Waiting List");

2012 HUD Data on Assisted Housing for New York City Public Housing, HUD USER OFF. OF POL'Y DEV. & RES., <https://www.huduser.gov/portal/datasets/assthsg.html#2009-2018> (under "2009-2018," "Query Tool," search Select a Year field for "2012 based on 2010 Census," Select a Summary Level field for "City," Select a State field for "NY New York," Select a City field for "3651000 NEW YORK CITY (PART)," Select a Program field for "Public Housing," Select a Variable field for "Average Months on Waiting List");

2011 HUD Data on Assisted Housing for New York City Public Housing, HUD USER OFF. OF POL'Y DEV. & RES., <https://www.huduser.gov/portal/datasets/assthsg.html#2009-2018> (under "2009-2018," "Query Tool," search Select a Year field for "2011," Select a Summary Level field for "City," Select a State field for "NY New York," Select a City field for "3651000 NEW YORK CITY," Select a Program field for "Public Housing," Select a Variable field for "Average Months on Waiting List");

2010 HUD Data on Assisted Housing for New York City Public Housing, HUD USER OFF. OF POL'Y DEV. & RES., <https://www.huduser.gov/portal/datasets/assthsg.html#2009-2018> (under "2009-2018," "Query Tool," search Select a Year field for "2010," Select a Summary Level field for "City," Select a State field for "NY New York," Select a City field for "3651000 NEW YORK CITY," Select a Program field for "Public Housing," Select a Variable field for "Average Months on Waiting List");

2009 HUD Data on Assisted Housing for New York City Public Housing, HUD USER OFF. OF POL'Y DEV. & RES., <https://www.huduser.gov/portal/datasets/assthsg.html#2009-2018> (under "2009-2018," "Query Tool," search Select a Year field for "2009," Select a Summary Level field for "City," Select a State field for "NY New York," Select a City field for "3651000 NEW YORK CITY," Select a Program field for "Public Housing," Select a Variable field for "Average Months on Waiting List").