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High-Volume Accuracy: An Empirical Look at an Inquisitorial Experiment

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Introduction

This Article reports on the results of a study that examines whether inquisitorial procedure has the potential to produce accurate outcomes in a high-volume court where most litigants are unrepresented. In particular, the Article evaluates the use of inquisitorial procedure as a mechanism for attacking the social problem of substandard housing in low-income neighborhoods. Relying on in-court observations of nearly 300 hearings, and a longitudinal review of nearly 75 cases in an experimental housing court, this Article concludes that judicially controlled investigations and procedures may be effective in motivating landlords to repair substantiated housing code violations.

Low quality housing stock has plagued poor urban communities for decades. Particularly in large metropolitan areas, it is not uncommon for residents paying market rate rents to live in units with multiple habitability problems, including rodent infestations, bedbugs, mold, broken locks and windows, inadequate cooking facilities, ineffective waste disposal, faulty electrical wiring, unsafe egress, and cracked doors and walls. In recent years, much attention has been paid to housing quality as a social determinant of health. Studies have connected substandard housing to a wide range of health problems, including chronic illnesses such as asthma and headaches, increased risk of injuries such as burns and falls, malnutrition in children, transmission of infectious disease, anxiety and depression. In addition, substandard housing has been linked to

1 Associate Professor of Clinical Law, George Washington University Law School
3 See Emily Alpert Reyes & Tim Logan, Shortage Of Low-Income Housing Pushes Tenants Into Dangerous Situations, L.A. Times (Apr. 6, 2014) (detailing substandard housing conditions in Los Angeles); Greg B. Smith, City's 'Worst Landlord' Lives In $1.2M Mansion While Tenants Deal With Rats, Mold, Lead Paint Among Thousands Of Violations, N.Y. Times (Oct. 11, 2014) (describing a “worst landlords” list in New York City that includes a database of thousands of buildings the city deems hazardous); Lauren Ober, In Fast-Changing Columbia Heights, Tenants Fight Large Rent Hike, WAMU.ORG (Sept. 14, 2014) (depicting the uninhabitable conditions faced by low-income tenants paying up to $900 per month for a one bedroom unit).
reduced employment rates and a loss of dignity.\(^5\) When housing quality is poor across a whole neighborhood these effects are exacerbated.\(^6\)

A landlord’s failure to maintain rental property in decent, safe, and sanitary condition is a violation of the housing code and the implied warranty of habitability.\(^7\) Yet it has been difficult for tenants to enforce their rights to adequate housing in court.\(^8\) Tenants typically have two options for remediating substandard conditions through the courts, both of which present challenges.\(^9\) The first option is to withhold rent, provoke the landlord to initiate an eviction suit, and then raise breach of the implied warranty of habitability as an affirmative defense. The second option is to sue the landlord for violation of the housing code through an affirmative civil action.\(^10\) If successful through one of these processes, the substantive law provides substantial relief: tenants may be awarded damages, sanctions, or rent abatements that accrue until the landlord repairs the unsafe conditions.\(^11\) However, the civil courts employ procedures that render the available remedies very difficult to obtain; thus, tenants often find that repairs and compensation for legitimate claims are out of their reach.\(^12\)

In habitability cases—as in all civil matters—courts adhere to a traditional adversarial process. Parties are charged with investigating and presenting their cases and judges remain largely passive with respect to factual development of the claims. While, in theory, this paradigm may be effective at producing fair outcomes, the reality is that low-income litigants are typically unrepresented and shunted onto overcrowded dockets, making it difficult to attain substantive justice within an adversarial framework.

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\(^7\) The implied warranty of habitability was first established by the D.C. Circuit in 1970. See Javins v. First Nat. Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970). Now, most states have adopted an explicit housing code requiring the landlord to maintain rental dwellings in safe and habitable condition. See, e.g. VA. CODE ANN. § 55-248.13 (West 2014); NEV. REV. STAT. ANN. § 118A.290 (West 2014); FLA. STAT. ANN. § 83.51 (West 2014).

\(^8\) It should also be noted that there are inherent trade-offs to combating substandard housing, as some low-income renters may prefer to have access to cheaper low quality housing stock as opposed to better, but considerably more expensive, rental housing. See David Super, *supra*, note 5.

\(^9\) This Article focuses on court-based solutions for remedying housing code violations. Tenants may also address housing code violations outside of court through other means, including seeking the imposition of fines through a locality’s building department.

\(^10\) Micki Bloom, *Assessing the District’s “Fix-It Court,”* Bread for the City blog (July 15, 2011), http://www.breadforthecity.org/2011/07/fixitcourt (discussing the two options available to tenants for bringing habitability claims to the attention of the court)

\(^11\) For examples of typical relief awarded to a prevailing tenant, see e.g. TEX. PROP. CODE ANN. § 92.0563 (West 2013); CAL. CIV. CODE § 1942.4 (West 2014).

\(^12\) Low-income tenants typically do not have significant protection under the law. In most places, they can be evicted for any reason or no reason, they are vulnerable to losing their homes when a landlord sells property or is unable to make a mortgage payment, and their ejection from the premises can occur swiftly and with collateral damage, including a negative credit rating, loss of a school district for young children, and even homelessness. Habitability is among the few areas in which powerful substantive laws exist to protect tenants, and yet court procedures often hinder the granting of relief.
eviction court, where habitability may be raised as a defense, upwards of ninety-eight percent of tenants are unrepresented and there are not enough city building inspectors available to investigate thousands of reports of housing code violations.\textsuperscript{13} Tenants must generate their own evidence and often do so unsuccessfully. For example, a tenant who takes a picture of mildew might learn in court that the judge cannot confirm the blurry black smudge in the photograph as any substance in particular. If unable to prove the substandard conditions, the tenant will be evicted and the sheriff may arrive within five days to physically remove her belongings from the unit.\textsuperscript{14}

Moreover, most tenants facing eviction do not even have the opportunity to appear in front of a judge to make their best case. Upwards of one hundred landlord-tenant matters may be scheduled in housing court on a daily basis. As a result, judges rely heavily on “hallway negotiations” to remove contested matters from the docket.\textsuperscript{15} Many cases are settled between an unrepresented tenant and a landlord’s attorney just outside the courthouse doors without any judicial intervention or oversight. While obtaining repairs or damages through an unbalanced negotiation is certainly possible, the prospect of a poor outcome is considerable.\textsuperscript{16} In fact, most tenants in eviction court end up evicted—even though many have valid habitability claims.\textsuperscript{17}

The tenant who pursues a habitability matter through an affirmative civil action fares no better. This process is less risky, as no damaging court judgment will result if the tenant loses; however it is problematic for other reasons. No attorney’s fees are awarded in habitability cases, and therefore a lawyer is unlikely to offer representation unless the expected damages are both certain and substantial—which is rare. Apart from rent abatements, the major damages in habitability cases are tied to financial loss, not the severity of the conditions; therefore, even where a family has experienced significant

\textsuperscript{13} Jessica K. Steinberg, Demand Side Reform in the Poor People’s Court, 47 Conn. L. Rev. 741, 748-751; Assemblymember Scott Stringer, Total Collapse: How NYC Department of Buildings’ Failed Policies Contributed to Crumbling Buildings (2002) (documenting a mere 196 building inspectors for 900,000 units).


\textsuperscript{15} Russell Engler, Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed, 37 FORDHAM URB. L.J. 37, 47 (2010)

\textsuperscript{16} New Settlement Apartments’ Community Action for Safe Apartments (CASA) et. al, Tipping the Scales: A Report of Tenant Experiences in Bronx Housing Court, 1 (Mar. 2013) (indicating that unrepresented and “overwhelmed” tenants who participate in unmonitored hallway settlements often agree to the terms offered by the landlord without even attempting to negotiate).

\textsuperscript{17} There are no clear data on case outcomes for eviction cases that raise the habitability defense exclusively, but the overall statistics for tenants in eviction cases—including those matters where habitability is raised—are quite sobering. Super, supra, note 5, at 437-438 (noting that successful assertion of the habitability defense is rare, and citing two cities, Cleveland and Detroit, where landlords won victories in upwards of 97% of nonpayment eviction cases at a time when substandard housing conditions were worsening); See also Barbara Bezdek, Silence in the Court: Participation, and Subordination of Poor Tenants’ Voices in Legal Process, 20 Hofstra L. Rev., 533, 535, 554 (noting that the great majority of housing in Baltimore is substandard and could give rise to a valid habitability defense, but that tenants won judgments in only 3.5% of cases.)
trauma from a condition such as a rodent infestation, it is difficult to recover damages unless work has been missed or doctor’s bills have been amassed.18

Compounding matters, affirmative litigation is laden with procedural barriers that make it difficult to proceed without an attorney. Discovery and pre-trial motions play a central role in habitability cases, making it unlikely that tenants can succeed without attorney representation. Finally, even in a case that resolves favorably for the tenant, the matter can take up to one or two years to litigate fully, which greatly diminishes the value of any relief obtained. Due to these factors, affirmative habitability cases are not often pursued, leaving many tenants without a meaningful remedy for documented housing code violations.19

The challenges faced by tenants in habitability cases are but one expression of a larger trend in which majority pro se courts are failing to offer access to substantive justice. The trend has been attributed, at least in part, to complex procedures that demand a degree of knowledge and skill that parties who are unrepresented and indigent are unlikely to possess.20

In an effort to address the fairness concerns that arise in habitability matters, and by extension, in other civil contexts involving low-income litigants, this Article offers data and analysis instrumental to evaluating the promise of an alternative procedural regime. The Article presents findings from a field study conducted over the course of a two-year period in an experimental Housing Conditions Court (HCC) in the District of Columbia. The HCC adjudicates cases in a manner that departs sharply from traditional, adversarial procedure. HCC judges actively examine parties and manage the litigation. Independent city-employed housing inspectors are charged with investigating tenant complaints. And the HCC holds episodic hearings, unspooling facts and issues over a period of time, rather than holding a single hearing to determine all issues in the case. The burden to present evidence and legal argument does not fall squarely on the parties in the HCC, but rather is a responsibility shared with the court. Further, the line that separates the adjudication and enforcement stages of the litigation is fuzzy, with the judge often monitoring the case until repairs are complete instead of closing the matter at the moment liability is established.

18 Even this explanation oversimplifies the difficulty of obtaining damages. Losses for personal injury— such as asthma arising out of a mold condition—are typically recoverable in tort, meaning that principles such as causation and contributory negligence apply. Although poor housing conditions are known to exacerbate many medical conditions, the tenant’s living habits and genetics may be deemed the principal causes of the health disturbance, potentially foreclosing recovery. Further, only a minority of jurisdictions permits the recovery of damages for emotional harm. Melissa T. Lonegrass, Convergence in Contort: Landlord Liability for Defective Premises in Comparative Perspective, 85 TUL. L. REV. 413, 414-417, 428-429, 431 (2010).
19 Zoe Tillman, Housing Conditions Calendar Creates a New Forum for Tenants, THE NATIONAL LAW JOURNAL (July 4, 2011) (reporting that, despite widespread housing code violations in the District of Columbia, filing an affirmative civil action “wasn’t an option for many local tenants, given the time and cost typically required”); Super, supra, note 5, at 405, 407.
20 Steinberg, supra, note 13, at 754-758.
Drawing on in-court observations of 327 hearings, and longitudinal case data from seventy-three matters, I offer preliminary evidence that inquisitorial procedure has the potential to produce accurate outcomes in a high-volume court. \(^{21}\) I define an “accurate” outcome as one in which a meritorious, or independently verified, claim was resolved favorably. \(^{22}\) I was able to determine which tenant claims had merit as an independent housing inspector visited the premises in each case and presented on her findings to the court. Specifically, the Article sets forth data suggesting that most tenants who bring meritorious cases in the HCC achieve highly favorable outcomes. In addition, the Article examines five independent procedural features of the HCC and concludes that its inquisitorial features—dependent housing inspections, coupled with regular court hearings before a judge—are most correlated with the court’s success. The HCC’s use of traditional procedural mechanisms, namely the filing of formal court papers, settlement negotiations, and the issuance of court orders, appear to be far less associated with accurate case resolutions.

Part I of this Article describes the purpose and background of the Housing Conditions Court and depicts a typical proceeding, with particular focus on the court’s inquisitorial orientation. Part II evaluates the operation and practices of the HCC as a means of achieving substantive justice and provides data demonstrating that the court has an unusually strong record of accurate outcomes—one that has not often been observed in other systems of mass justice. Part III unpacks the procedural features driving the HCC’s substantive record, and makes the case that the court’s deployment of inquisitorial elements is highly correlated to the repair of substandard conditions. Despite limitations inherent to the data set and the methodology, the findings presented in this Part suggest that inquisitorial procedure holds promise as a mechanism for improving substantive justice in majority pro se courts.

I. AN INQUISITORIAL EXPERIMENT:
BACKGROUND AND PURPOSE OF THE HOUSING CONDITIONS COURT

In an effort to offer a meaningful remedy for the social and health issues raised by substandard housing conditions, the District of Columbia created an experimental

\(^{21}\) I characterize the HCC as a high-volume court due to several defining features: (1) litigants wait up to three hours in courtroom pews for their cases to be called; (2) hearings are held in a particularly public manner, with as many as fifty or sixty litigants observing an individual proceeding (3) most court hearings occupy no more than six minutes of the court’s time; (4) more than seventy-percent of cases involve an unrepresented party.

\(^{22}\) I engage a particular definition of “accuracy” for purposes of this paper, but acknowledge that the term is complex, sometimes subjective, and that a range of legitimate outcomes might be deemed “accurate.” See Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 Harv. L. & Pol’y Rev. 31, 54 (2013).
Housing Conditions Court (HCC) in 2010 through administrative court order. The HCC is fundamentally a problem-solving court and was created with the explicit goals of serving pro se litigants, offering speedy access to repairs, and addressing longstanding procedural barriers to housing code enforcement for tenants.

The HCC process works in the following way. Tenants file affirmative suits in the HCC seeking a repair order. The “court” is held once a week for approximately four hours and functions as more of a calendar or docket, where all cases involve the sole issue of housing code violations. The court does not entertain other housing disputes, even related ones, and will not hear a matter if an eviction suit has already been initiated in landlord-tenant court. Two judges share responsibility for presiding over cases filed in the HCC, one of whom was instrumental in developing the vision for the court. The judges who administer the HCC have described the court as a “fix-it” court and their primary goal as “getting repairs made.” They assert that they want to “solve a social problem” through a simple court process accessible to people without lawyers, rather than tying up parties in formal proceedings. The judges handle disputes in the HCC by relying on their presumptions and instincts about how best to achieve their stated goals. Their practices and procedures have not been codified or made public in written form, and it is possible they have not been recorded at all. The judges express their dispute resolution philosophy as aligned with the problem-solving model, in that they are focused on obtaining results and addressing an underlying problem, rather than on preserving an adversary contest that is agnostic as to outcomes.

Although the HCC can be accurately characterized as a problem-solving court with regards to its goals, orientation, and some of its methods, it departs from the general problem-solving rubric in one significant way. In a typical problem-solving court, the defendant must admit guilt or liability to gain access to the alternative proceeding. In the HCC, however, the court investigates and determines the landlord’s liability prior to monitoring repairs. The HCC does not refer to its model as inquisitorial, but the combination of judicially controlled investigation and enforcement creates an inquisitorial core at the center of the court’s problem-solving mission. While this Article examines the court as an inquisitorial experiment, some of the findings may be more broadly applicable to problem-solving courts in general.

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23 Superior Court of the District of Columbia Administrative Order 10-07, Housing Conditions Civil Calendar (April 2010).
24 A preliminary draft of written HCC procedural rules was developed in 2014, but has yet to be put out for public comment or implemented.
25 The inquisitorial orientation of the court is not acknowledged either in the court’s authorizing administrative order or by any of the judges or advocates who were critical to the effort of establishing the court. The judges refer to the HCC as a problem-solving court; however, while it shares certain elements with the problem-solving model, it also diverges in several key respects. In many problem-solving courts, the defendant must admit guilt in order to gain access to the proceeding. In the HCC, landlords do not have to admit liability in order to participate in the forum. In addition, the problem-solving model typically offers treatment instead of harsher forms of punishment such as incarceration, but imposes the pre-arranged criminal punishment if conditions of the alternative treatment regimen are not fulfilled. In the HCC, the
Before turning to an evaluation of the HCC’s procedures in achieving substantive justice, it is first necessary to situate the court in context by determining the procedures, evidentiary rules, and judging philosophies employed, and to note where they depart from traditional principles of adversarial litigation. The features of the court are most easily presented through a bird’s eye view of a typical proceeding, which I have drawn from an amalgam of eight weeks of informal observations, sixteen weeks of formal in-court data collection during which 327 hearings were observed, and an in-depth “longitudinal” review of the paper record in seventy-three cases. This Part aims only to describe the court; analysis of the relationship between the court’s procedural features and its case outcomes will be presented, infra, in Parts II and III.

A. Initiating an HCC Case

To initiate an action in the HCC, a tenant must file a written complaint asserting housing code violations and seeking repairs. The court has created a form complaint, which is available both online and in the clerk’s office. The form is not required, but in the study’s longitudinal data set, every tenant used it. Form complaints are becoming increasingly common in courts as a tool for unrepresented parties, but the HCC form is more fully developed and effective than most. The form elicits factual information to support the two legal elements of a habitability claim: that housing code violations exist; and that the landlord knew or should have known about the conditions alleged. The form lists all possible housing code violations in check-the-box format, and also offers several discrete factual assertions a tenant might choose from to support a claim that the landlord knew of the violations. These include, for example, “I left a voicemail for the landlord” and “I spoke directly to the landlord about the conditions.” The tenant is responsible for checking the correct boxes and handing the complaint to the clerk.

Although form complaints are typically referred to as nothing more than a type of “self-help,” it is worth noting that their use is in keeping with an inquisitorial spirit. Traditionally, parties are responsible for identifying their own legal theories, and in particular, for asserting legally relevant facts. The HCC’s form complaint removes the procedural burden of pleading properly and ensures that tenants who appear before the court will have facially valid claims. The court, in essence, develops a skeletal legal

only punishment imposed is the obligation to make repairs; no harsher sanctions are laid out in advance and then imposed in the event that the landlord refuses to bring the unit up to code. Last, problem-solving courts typically rely on a host of non-court actors to work with the defendant, including social workers, drug counselors, and probation officers. In the HCC, the inspector serves to validate or invalidate tenant allegations, but does not work with the landlord or tenant to address the underlying social problem. See Richard Boldt and Jana Singer, Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts, 65 Md. L. Rev. 82, 84-85 (2006).

26 I collected the in-court data along with a team of law students who were trained in the study’s data collection protocols.
claim on behalf of tenants, thus relieving parties of the need to engage in research or communicate with an attorney prior to filing.

At the time the complaint is filed, tenants must either pay a fifteen dollar filing fee or request the court’s permission to proceed \textit{in forma pauperis} (“as a pauper”). If the court determines that the tenant’s income and assets are sufficiently low, the filing fee will be waived and the court will complete service of process on their behalf.\textsuperscript{27} An initial hearing is typically scheduled three to four weeks from the date of the filing of the complaint.

B. \textit{Housing Inspections}

Housing inspections are a particularly salient feature of the HCC. The court has a city-employed housing inspector designated for its exclusive use and the judges rely on that inspector to gather key information in each case.\textsuperscript{28} The parties agree to the date and time of the inspection in open court. The housing inspector then visits the premises at the agreed-upon time and conducts a comprehensive inspection. The inspector looks for any and all housing code violations that exist, and does not focus exclusively on allegations raised in the tenant’s complaint. After the inspection, the housing inspector completes a written report documenting her findings in the unit and submits it to the court. Where the inspector has noted violations not alleged by the tenant, the judge will often incorporate the new issues into the case, in essence amending the complaint \textit{sua sponte}. The housing inspector appears at every session of the HCC and is available to testify or answer questions about each report.

Depending on the trajectory of each case, the housing inspector might be asked to return to the unit for re-inspections a number of additional times. Ongoing factual disputes about whether repairs have been made, whether repairs are sufficient, or whether repairs are needed at all typically trigger the need for extra housing inspections. The judges place great weight on the housing inspector’s findings, often granting automatic credence to the written inspection report.

The investigatory component of the HCC is the bedrock of its inquisitorial model. In traditional proceedings, the parties are solely responsible for amassing evidence and

\textsuperscript{27} In the study’s sample, forty percent of tenants filed successful \textit{in forma pauperis} petitions, meaning the court found these tenants too poor to afford a $15 filing fee. It is quite likely that other tenants would have qualified for relief, but did not know to request it.

\textsuperscript{28} All tenants in the District of Columbia have the ability to request housing inspections of their units, but the agency responsible for inspections, the Department of Consumer and Regulatory Affairs (DCRA), has been accused of mismanaging funds, failing to conduct necessary inspections, and imposing lengthy wait times, even on tenants who face the most severe violations. \textit{See} Debbie Cenziper and Sarah Cohen, \textit{A Failure in Enforcement}, Wash. Post (Mar. 11, 2008).
proving their claims in court, which can be both costly and difficult.\textsuperscript{29} A tenant alleging a rodent infestation might be unable to produce physical evidence of the problem, short of hiring a professional extermination crew to document it. The housing inspection process unburdens the parties, to a large degree, of identifying probative, reliable, and trustworthy evidence. Using a trained eye, the inspector might notice claw marks, gnawed electrical cables, and droppings, all of which could suffice as evidence of the infestation. The housing inspector also relieves the tenant of the responsibility to raise all viable claims. Even where the tenant has not alleged a violation, the inspector may independently identify it and incorporate it into the lawsuit.

\textit{C. Hearings}

At the initial hearing, the judge actively questions the landlord and tenant about the allegations in the complaint.\textsuperscript{30} Neither party is sworn in. The complaint is effectively treated as the tenant’s testimony, and the judge typically starts the hearing by asking the landlord to respond to the allegations. The tenant also has an opportunity to speak, but is not required to re-state the allegations contained in the complaint. That is, the judge does not use the initial hearing as an opportunity to test the tenant’s credibility by comparing the consistency of the allegations in the complaint with the statements made by the tenant in open court. This practice departs quite strikingly from traditional civil practice where parties are required to testify in open court about the factual information underlying particular allegations, pleadings are not regarded as testimony, and close attention is paid to any discrepancy between the party’s statements in court and prior statements made about the same set of facts out of court.

Following the initial hearing, a number of status hearings are held. In keeping with inquisitorial practices, the judges control examination of the parties on a range of issues, including whether housing code violations exist, whether the landlord or tenant is responsible for fixing the violations, whether the landlord can afford to make the needed repairs, and whether the tenant has hindered access to the unit, thus preventing repairs from being made. Parties offer information in response to the judge’s questions and are also provided the opportunity to add additional information; however, any long-winded remarks deemed irrelevant by the judge are likely to be cut off promptly. In the study’s sample of more than 300 hearings, landlords had an average representation rate of forty-one percent and tenants had an average representation rate of thirty percent. Notably, not a single hearing was observed in which the lawyer performed a direct examination of her client, cross-examined an opponent, or played a substantial role in developing the factual record of the case.


\textsuperscript{30} Mary Ann Glendon, \textit{Comparative Legal Traditions in a Nutshell} (2008).
Four unique features of the HCC are worth highlighting. First, the HCC does not hold a single evidentiary hearing at which the major issues in the case are resolved. Instead, the judge conducts a series of hearings at which facts and evidence in each case unfold on a rolling basis—a practice common in inquisitorial tribunals but outside the norm in the adversary system. At the first hearing, the parties are likely to lodge their allegations with the court; at the next, the results of the inspection report are often entered into the record; at the third hearing, the parties might debate the adequacy of repairs made by the landlord—and so on.

Second, HCC judges are reluctant to make formal findings of fact. In a traditional forum, the judge resolves factual disputes in open court by taking testimony, weighing evidence, and issuing a decision. In the HCC, however, the judge typically takes a forward-looking approach, either investigating the matter further, or asking the parties to come to a mutually agreeable resolution of the issue. For example, where a landlord disputes that housing code violations exist, the judge is unlikely to pore over the parties’ photos, testimony, and documentary evidence, but rather will dispatch a housing inspector to visit the unit and report back to the court. In a second example, if a landlord complains that he is unable to make repairs because the tenant has changed the locks, the judge will not weigh the landlord’s credibility against the tenant’s denials in order to determine fault. Rather, the judge will direct the parties to agree that unencumbered access to the unit will be provided at a specific date and time in the near future, and will then schedule a status hearing to monitor the results of that encounter. In both examples, the judge’s focus on further developing the record or negotiating an outcome negates the need for a retrospective determination of the facts.

Third, the court manages both the liability and enforcement phases of the litigation. The administrative order giving rise to the HCC states that prevailing tenants are entitled to a repair order. However, during the study period, not a single HCC case was closed at the time a repair order was issued or when liability was otherwise established. Instead, status hearings continue to be scheduled until the judge is satisfied that the landlord has actually resolved all meritorious allegations or the parties stop coming to court. This practice deviates from that of traditional courts, where the case concludes at the moment a judicial order is issued, the parties manage enforcement on their own, and a separate action must be initiated to enforce the order where necessary.

Fourth, and relatedly, it is often difficult to determine the moment at which liability is adjudicated in the HCC. The judges’ tone and manner with the parties is informal, and the majority of matters do not result in a repair order. Rather, the judges regularly issue ambiguous directives, such as “I’d like to see you get started on these repairs by next Tuesday” or “Call your contractor when you leave court and ask him when he is available to begin work.” Directives such as these certainly suggest that the landlord has been found liable. Yet, it is also possible to regard the judge’s statements as

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31 Langbein, supra, note 29, at 826; 831-832.
strong recommendations, or attempts to mediate the dispute, imposing no formal legal
duty or obligation. The court relies heavily on these ambiguous directives to influence
party behavior. Often, the enforcement phase of the litigation appears to commence—
with the judge focusing the parties’ attention on when and how repairs will be made—
without any clear determination of liability or admission of guilt in the record.

D. Evidence and Witnesses

As further evidence of the HCC’s inquisitorial nature, the court provides no
explicit opportunity for parties to present their documentary evidence or witnesses.
Perhaps as a result, most parties do not attempt to introduce supplementary evidence into
the record to corroborate their factual statements. None of the observed hearings
involved production of a witness, and less than a fifth involved a party proferring
documentary evidence to the judge.

When a party does proffer evidence, the judge’s reaction varies. In some
instances, the judge agrees to consider the evidence; in others, the judge is dismissive of
the evidence—sometimes declaring it unimportant and irrelevant to the proceedings, even
without looking at it. Typically, a party who references the ability to produce particular
evidence is discouraged from doing so by the judge. Even when the presiding judge
agrees to review a party’s text messages, previous housing inspection reports,
photographs, or contractor estimates—all items seemingly germane to the case—the
judge often appears to give them just a cursory glance. Corroborating evidence, apart
from that collected during the court’s investigation of the case, appears to play a very
small role in the judges’ decision-making processes.

II. SUBSTANTIVE JUSTICE IN THE HOUSING CONDITIONS COURT

This Part evaluates case outcomes in the HCC against markers of substantive
fairness and concludes that the court has an unusually successful record in producing
accurate outcomes. For purposes of this study, an accurate outcome was defined as one
in which the landlord took action consistent with the findings of the independent housing
inspector. Where the inspector substantiated a tenant’s allegations, an accurate outcome
would involve repairs. By the same token, when the housing inspector failed to
substantiate the tenant’s allegations, an accurate outcome would not involve repairs.

The methodology for determining case outcomes was a longitudinal review of
court records in seventy-three matters. I looked at the docket sheet, the tenant’s
complaint, the notes recorded by the court clerk from each hearing, all housing inspection
reports, any repair orders, and any other filing submitted by either party. I coded for a
number of variables, among them which conditions were alleged by the tenant; whether
the case had a housing inspection and how many inspections were conducted; whether
and which housing code violations were documented by the inspector; whether the record contained information on repairs at all, and if so, whether the landlord abated the violations; the type of and reason for the final case disposition; whether a repair order was issued; the length of the case; and the number of hearings held in a case. For each case that was part of the longitudinal study, at least one court hearing was observed in person, with data recorded on numerous procedural and substantive aspects of the proceeding.

In this Part, I focus first on an analysis of case merit in the HCC, as the accuracy of an outcome is intimately connected to the strength of the claim. I turn next to substantive outcomes in the cases containing information on whether the landlord abated the alleged housing code violations. In this subgroup, representing sixty-two percent of the total number of cases in the study, definitive conclusions can be drawn about whether favorable outcomes were achieved by tenants. Furthermore, in eighty-five percent of cases with abatement information, it was possible to conduct a merit assessment, creating a rich pool of data for analysis of the fairness of outcomes.

Last, this Part takes up the cases lacking information on whether the landlord made repairs. In these cases, it is impossible to know whether repairs were ultimately performed, potentially casting doubt on whether substantive fairness was achieved for any of these tenants. However, based on the presence of other case data in these matters, I tentatively conclude that the majority of cases without abatement information involved a tenant who abandoned the litigation at an early stage, rather than a recalcitrant landlord who refused to fix substantiated housing code violations. On the whole, the HCC appears to offer a relatively fair and accurate adjudicatory process not often observed in a high-volume court.

A. Merit in the HCC: an Analysis of Tenant Allegations and Housing Inspector Findings

A singular feature in the HCC permits conclusions to be drawn about the merit of the tenant’s allegations: the independent housing inspection. In the HCC, a housing inspector is dispatched to render an opinion on housing code violations within the tenant’s unit, typically within two to three weeks from the date of the initial hearing. Following the site visit, the inspector files a report in the case indicating whether the tenant’s allegations have been substantiated, and also noting any substandard conditions that exist in the unit but were not alleged by the tenant. The housing inspector is a fully institutionalized part of the HCC, not an investigatory device deployed at random or only

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32 I collected the longitudinal data along with a research assistant who was trained in the study’s data collection protocols. I double-checked the completed data collection instrument against the raw data for the first ten cases, and then subsequently checked twenty percent of the data sheets to ensure uniform coding and to minimize the risk for human error.

33 In total, 124 hearings were observed in relation to the seventy-three matters in the longitudinal study. These 124 hearings are part of the 327 total hearings in which formal data collection took place in court.
in selected cases. Housing inspections appear to be scheduled in almost every case that both survives the initial hearing and avoids dismissal for a technical reason, such as the tenant’s failure to appear or a pending eviction case. As a result, a rough merit assessment, based on the housing inspector’s findings, could be conducted for a majority of tenants’ claims.

I evaluated merit in the HCC by comparing the tenant’s allegations in the complaint against the results of the first housing inspection. Allegations substantiated by the housing inspector were deemed meritorious, while allegations that were unsubstantiated by the housing inspector were deemed unmeritorious. This method of assessment was not without drawbacks. In order to accept the validity of the housing inspector’s findings, one must trust that the inspector was both neutral and competent. Further, the potential for undercounting meritorious tenant allegations was a concern. A landlord might remediate some or all legitimate housing code violations in the interval between the initial hearing and the first inspection, leading the housing inspector to record those conditions as unsubstantiated. In addition, in a handful of cases, tenants offered evidence supplementing the housing inspector’s findings, and yet this evidence was not considered as “substantiating” for purposes of the merit assessment as it was too difficult to determine its trustworthiness. Notwithstanding these shortcomings, examination of the results of the independent investigation conducted by the housing inspector offered a credible method for determining the approximate merit of tenant claims.

Cases brought in the HCC during the study period were highly meritorious. In the sixty-two percent of cases that had housing inspections, tenants alleged an average of 5.6 substandard conditions in their complaints, and the housing inspector found an average of 5.5 conditions. These figures do not indicate a near-perfect rate of substantiation, as first appears, but rather offer data on two distinct aspects of the merit determination. The housing inspector substantiated an average of 3.65, or two-thirds, of tenant allegations but also discovered an average of 1.9 unlawful conditions the tenant did not allege. That is, not only were most tenant claims corroborated by the housing inspector but, typically, the inspector found evidence of additional violations. Very few cases in the HCC lacked merit entirely. In all but two matters, the housing inspector substantiated at least some of the tenant’s allegations. In eleven cases, all of the tenant’s allegations were substantiated.35

34 Based on my observations, and a careful examination of the housing inspector’s background and qualifications, there is nothing to warrant skepticism of the inspection reports. The inspector is employed by the city (not by either party or the court) and has extensive training in identifying housing code violations. In the hundreds of hearings observed, there were no instances in which complaints about the housing inspector’s neutrality were registered by either party or by an attorney for either side.

35 These findings appear to counteract the oft-stated concern that, if court processes are made more accessible to pro se parties, it will encourage a flood of meritless litigation. Jona Goldschmidt, How Are Courts Handling Pro Se Litigants?, 82 JUDICATURE 13, 19-20 (1998) (reporting on survey results in which
The merit determination allows for analysis of the HCC’s effectiveness on the measure that matters most: substantive justice. Studies that assess substantive case outcomes often look at whether a result is favorable for one party or another, but do not have reliable markers for assessing the fairness or accuracy of the result.\textsuperscript{36} The merit of a claim is usually unknown to the observer, and therefore it is impossible to determine what the “right” outcome should have been. Indeterminacy surrounding merit is sometimes regarded as a flaw in studies reporting on case outcomes.\textsuperscript{37} Even when a study demonstrates that one class of litigants—tenants, for example—routinely achieve unfavorable outcomes, it can be difficult to ascertain whether the poor outcomes are the result of unmeritorious claims, or are due to more problematic factors, such as lack of representation or structural unfairness within the adjudicatory process.

The inspector’s participation in the case permits a determination to be made about the accuracy of an outcome independent of whether the outcome is favorable or unfavorable for a particular party. To illustrate, imagine a case in which the tenant alleges an inoperable stove but the landlord fails to make repairs. Typically, the outcome would be recorded as “unfavorable” for the tenant. But this study, in relying on inspection data, can evaluate the case outcome by indicia more significant than whether the result is

\textsuperscript{36} Studies that assess substantive case outcomes often look at whether a result is favorable for one party or another, but do not have reliable markers for assessing the fairness or accuracy of the result.

“good” or “bad” for a particular party. If the housing inspector conducts a site visit and confirms the tenant’s contention that the stove is broken, a case that concludes without repairs is not just unfavorable but “inaccurate”—the proper result did not materialize. Conversely, if on this same allegation, the housing inspector finds a functioning stove, the landlord’s refusal to repair it results in an accurate outcome—even if the tenant experiences it as unfavorable. In this way, the rough merit score assigned by the study in each HCC case provides a gauge for whether the outcome produced a socially desirable result.

B. Case Outcomes for Meritorious Allegations

More than half of the cases in the study sample contained information on both housing inspections and abatements, and I focus first on these, as the strongest statements can be made about results in matters where a merit assessment was conducted and the repair rate was known.38 That is, for these cases, a fundamental question about substantive justice can be answered: where the housing inspector confirmed the presence of substandard conditions, did the landlord perform the necessary repairs?

The outcome data for these cases are quite striking, especially if one compares them to the typical rate of success for tenants in housing court. Looking at meritorious allegations—those substandard conditions alleged by the tenant and substantiated by the housing inspector—the landlord abated ninety-two percent of housing code violations. To break down that statistic a bit further, the HCC complaint lists forty-one possible housing code violations, which I grouped into eleven categories for purposes of coding. These categories include, among others, broken appliances, inadequate heating or cooling systems, mold and mildew, leaks, infestations, and electrical issues. In every category except one, the landlord abated one-hundred percent of meritorious allegations. In the final category—inadequate heat or air conditioning—the landlord abated two-thirds of the alleged and substantiated violations.

Significantly, the “accuracy” determination undercounted favorable outcomes for tenants. In an additional ten percent of cases, landlords repaired alleged conditions before the housing inspector visited the premises, and yet these outcomes were not recorded as accurate because the tenant’s allegations were never substantiated. Of course, nearly half of the cases in the study pool were missing either housing inspection data or abatement data, or both, and therefore, less can be said about the court’s effectiveness in those matters. Nonetheless, in a full fifty-two percent of matters in the study sample, nearly all corroborated violations were remedied.

38 Sixty-two percent, or forty-five, cases contained abatement information, and eighty-five percent, or thirty-five of these, also contained housing inspection data. In total, fifty-two percent of cases in the study sample contained both abatement and housing inspection information.
As an additional marker of fairness, the abatement rate for unsubstantiated housing code violations was very low. Of the eighty-five allegations tenants made that were unsubstantiated by the inspector, the landlord repaired only eleven percent. Thus, two themes emerge. When a tenant sets forth a meritorious habitability claim, the case is highly likely to result in repairs. Conversely, repairs are highly unlikely to be made in response to an unmeritorious allegation. On both measures, HCC outcomes can be considered accurate, with tenants as well as landlords experiencing a just result.  

It is worth noting two factors that make the findings on substantive justice in the HCC particularly significant. First, the court’s self-appointed enforcement function allows for a deeper understanding of case outcomes than is often available, as the record reflects whether repairs were actually made, rather than whether a paper judgment was issued. In a traditional court, a case typically concludes when the court adjudicates liability and issues an order providing relief to the prevailing party. As a result, data on substantive outcomes is often limited to whether a particular party was awarded a paper judgment; little to no information exists on whether the losing party conformed to the terms set forth in the court order.

The rate of enforcement matters, as a disconnect may exist between the court’s records on outcomes and the litigant’s recounting of whether the remedy sought was obtained. In wage cases, for example, employees who prevail on claims of unpaid overtime or meal breaks often find it difficult to coax court-ordered back wages out of

39 Significantly, the “accuracy” determination undercounted favorable outcomes for tenants. In eight cases, the case file indicated that landlords had repaired alleged conditions before the housing inspector visited the premises. Because the tenant’s allegations were never substantiated, I did not record these abatements as accurate outcomes—although one might surmise that the landlord would likely not have performed repairs had the allegations been frivolous.
noncompliant employers. Likewise, in domestic violence proceedings, research suggests that abusers violate the terms of victims’ restraining orders with some frequency. The HCC’s practice is to follow a case to full conclusion—through enforcement—which offers a more meaningful measure of substantive outcomes. The court’s unusually high rate of repairs is, therefore, especially consequential. In all cases for which abatement information was available—representing more than half of matters in the study—almost every meritorious claim was resolved favorably, defined not by a judicial declaration of landlord liability but by verified repairs that brought the unit up to code.

Second, the source of information about abatements is typically a highly reliable one—the housing inspector or the tenant—which provides an extra degree of assurance that the repairs noted in the case file were, in fact, performed. In sixty percent of cases with inspection and abatement information, the housing inspector reported on landlord abatements in an official inspection report. In these matters, a final site visit was conducted toward the conclusion of the case, allowing the inspector to confirm that repairs had been made. In twenty-two percent of cases, the tenant related abatement information to the judge. In only eighteen percent of cases was abatement information reported by the landlord, without corroboration from a less self-interested source. Notably, this only occurred when the tenant failed to appear at the final case hearing, and thus the landlord was the only party present to speak to repairs performed at the unit. There were no instances in which final abatement information was recorded on the basis of statements made by the landlord over the tenant’s objection. That the HCC’s abatement data was largely obtained by reliable sources—whose reports in this context can be trusted—strengthens the finding that fair outcomes were reached for most tenants.

Notwithstanding the high repair rate, it is worth examining the length of the adjudicatory process in the HCC to determine whether results must be discounted by the time it takes to achieve them. For matters with housing inspection and abatement data on record, the average length of a case, from complaint to final case disposition was 147 days, or nearly five months. The average number of hearings in these cases was 5.9. Taking into account all that is accomplished in these matters—the tenant files and serves a complaint, the landlord responds to the allegations in open court, the housing inspector visits the premises at least once, multiple hearings are held before a judge, and the

42 Sometimes, this took place outside the courtroom. In order to avoid attending a final hearing in the case, the tenant might place a call to the judge’s chambers to confirm that all repairs had been made and that the case could be closed.
43 While it is impossible to know, one might guess that tenants in these matters opted against attending the final hearing because they no longer required court intervention in order to fix ongoing violations.
landlord makes repairs—five months is not an unusually lengthy process. Formal
adversarial proceedings rarely result in a final judgment—let alone enforcement of that
judgment—in less time.\footnote{A portion of the five-month process simply reflects the time
investment one must expect when handling any matter in court. For example, on average, it
takes twenty-two days to execute service of process in the court—a transaction cost that
would likely exist in any tribunal. However, it must be noted that the litigation process in
the HCC involves more hearings than a typical proceeding and potentially requires
parties to miss several days of work in order to prosecute or defend their claims.}

One possible pitfall of the study’s data is that substantive outcomes were
evaluated at the time of the final case disposition and did not take into account the long-
term quality of repairs. A unit might appear to be up to code at the conclusion of the case,
only for violations to resurface soon thereafter. This concern is somewhat minimized due
to the housing inspector’s multiple return visits to the premises, in which half-baked
repairs might be discovered and remediated instantly. For instance, in one case, the
landlord plugged holes in a tenant’s baseboard with vinyl, and at a subsequent hearing,
the court ordered the repair to be undone and replaced with sturdier material. Yet it is
likely that similar issues might be identified only after the court process is over. For
example, a landlord might hire an exterminator once, which keeps the mice at bay for a
period, but will not permanently purge the building of them. The data does not indicate
whether units remain up to code after the litigation ends.

Furthermore, it is worth re-emphasizing that the HCC provides access to a limited
remedy—repairs. Tenants cannot recoup financial losses that arise from living with
housing code violations, and unless a landlord proves particularly recalcitrant, they are
not able to obtain rent abatements either. The HCC is very successful at achieving a
modest goal.

B. A Caveat to Substantive Justice: What About Cases Without Abatement Information?

Thus far, this Part has covered only cases where information on both housing
inspections and abatements was available in the court file. In thirty-eight percent of
cases, however, the written record contained no information on whether the landlord
abated the housing code violations alleged by the tenant. In this Section, I consider the
significance of these cases in the overall assessment of the court’s record of substantive
fairness. Although it is impossible to know exactly why abatement information is
unavailable in certain case files, and no firm conclusions can be reached regarding the
repair rate in these matters, analysis of certain data from each case permits strong
inferences to be drawn about substantive outcomes. I conclude that there is good reason
not to make the worst-case assumption: that in all, or most, of these matters the tenant set
forth meritorious allegations and yet the landlord performed no repairs.

In nearly two-thirds of matters without abatement information, the case
terminated at a very early stage in the litigation—before the housing inspector was
dispatched. The housing inspector typically visits the premises of any unit that is the subject of a factual or legal dispute in the court, with no triage or case assessment performed by the judge prior to deploying the inspection. Where a case file lacks housing inspection data, it is a strong indication that the case concluded before the parties articulated their dispute in open court. Indeed, the case files for eleven of the eighteen matters confirm that a final case disposition was entered because either the tenant failed to appear at an early hearing or the judge dismissed the action due to a pending eviction matter in landlord-tenant court.\textsuperscript{45} In the remainder of matters, no clear data indicates the reason the case was dismissed, but it is reasonable to conclude that the tenant opted, toward the outset of the case, not to prosecute the matter, or was stymied by a procedural requirement (such as service of process) that led to abandonment of the case. This theory is bolstered by the minimal degree of litigation in these matters: the average case length was 37.3 days and an average of 1.7 hearings were held.

If it is burdensome or difficult for tenants to appear in court at all—either due to a procedural hurdle, such as service of process, or because a day of work must be sacrificed to make a court appearance—perhaps initial barriers should be assessed. Nonetheless, the subject of this study is the availability of substantive fairness to tenants who take full advantage of the opportunity to litigate their claims. Matters that terminate before the tenant appears in court and communicates her allegations to the judge cannot be counted against the HCC in evaluating its case outcomes. Most cases lacking abatement information appear to fall into this camp.

Importantly, there are ten cases in which housing inspections were conducted, and yet no abatement information was available in the record. These cases—fourteen percent of the total number of cases in the study—represent the court’s failings on accuracy and fairness. In two of these matters, the case concluded pursuant to a settlement agreement that was not filed with the court, and therefore not much is known about the outcomes. In all others, case data strongly indicate that the landlord waged a war of attrition, and with the weapons of delay, inaction, or disappearance, was successful in driving the tenant away from adjudication. In these cases, each tenant had meritorious claims and was fully committed to the litigation. The average case length was 143.3 days, an average of three housing inspections were conducted, and an average of 5.1 hearings were held. Yet, following months of faithful court appearances, the tenants in each matter ultimately stopped coming to court, and the matter was dismissed on that basis.

It is possible that, in some instances, the tenant’s failure to appear in court might be explained by the completion of repairs, rather than their absence. However, this explanation appears unlikely. A landlord who performs repairs at the conclusion of a long court battle is highly likely to appear at the final case hearing to report the abatements to the judge—and yet this did not occur. In each of the cases described, the landlord failed to appear at the final case hearing as well, leaving the court without any

\textsuperscript{45} The HCC will not hear matters in which an eviction suit was filed first.
information on the state of repairs. It is improbable that a landlord would rely on the
tenant to disappear in order to obtain dismissal of a case—particularly one in which the
landlord’s actions have been under court scrutiny for some time. These cases suggest
that the HCC is not adept at securing fair outcomes in cases involving particularly
recalcitrant landlords.

Nonetheless, the court’s overall record is quite good. Even probing the HCC’s
case outcomes with a skeptic’s eye, the least favorable narrative that can be told about the
court is this: it achieves accurate outcomes in fifty-two percent of matters—those where
the landlord’s actions mirrors the findings of the independent housing inspector—and
merely favorable outcomes for an additional ten percent of tenants whose landlords
perform repairs even in the absence of a substantiating housing inspection. It falters
slightly, perhaps on markers of procedural access to justice, in the twenty-four percent of
cases involving tenants who file complaints but then abandon their suits early or are
prevented from litigating their claims due to a technical reason. And it flops in the
fourteen percent of cases where tenants allege valid habitability issues, and invest
valuable time in the court process, only to emerge without improvement to their living
conditions. For a high-volume court, in which twenty or thirty cases might be heard in a
three-hour period, results such as these are unusually positive.

III. INQUISITORIALISM AND SUBSTANTIVE JUSTICE

Having described the court’s features and substantive record, this Part takes up
the Article’s final inquiry: is there evidence that the HCC’s inquisitorial procedures might
be directly responsible for producing its accurate outcomes?
In an adversarial tribunal, housing cases proceed along a familiar trajectory. A lawsuit is filed, the parties engage in out-of-court settlement negotiations, a formal evidentiary hearing is held if negotiations fail, and a judgment is then issued from the bench. By contrast, as discussed at length, supra, in Part I, inquisitorial features such as independent investigation, regular court hearings, and active judging are the hallmark procedural components of the HCC’s model. Yet, the court also employs recognizable features drawn from traditional adversary procedure: the plaintiff initiates an action by filing court papers, parties can pursue settlement if they so desire, and the court will, on occasion, issue a formal repair order establishing a landlord’s liability. In fact, the only adversarial feature almost entirely lacking is the formal hearing.46

To determine whether the court’s inquisitorial procedural framework might be responsible for its case outcomes, this Part examines five procedural features employed by the court and attempts to delineate which are most correlated with fair results. Three procedural features are traditional to the adversary system: the filing of a complaint, the settlement of cases, and the issuance of judicial orders to award a remedy. Two procedural features are squarely inquisitorial: neutral housing inspections and sequential appearances before a judge. After addressing the traditional procedures, and explaining why they do not appear to be driving the court’s substantive results, I set forth evidence that the HCC’s inquisitorial procedures do appear to be highly correlated with its fair outcomes. While correlation is not causation, the analysis in this section suggests that inquisitorial procedure may account for the HCC’s superior performance in comparison to sister housing courts.47

A. Traditional Adversary Procedures

To determine whether housing inspections and sequential court hearings are the procedural juggernauts propelling the HCC’s results, it is first necessary to set aside the possibility that its case outcomes are the product of traditional procedures. This Subpart demonstrates that very few of the court’s substantive outcomes are correlated to the use of traditional procedures. Every tenant in the HCC files a written complaint to initiate an action; however, the filing of a lawsuit, with nothing more, does not appear to bring about the court’s results. During the study period, only a tiny fraction of landlords had taken

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46 In place of formal evidentiary hearings, the judges conduct a series of informal hearings during the entire pendency of the case, as described, supra, in Parts II and III.B. Although, note that some formal hearings are very occasionally held at a time other than the traditional Monday calendar.

47 This Part does not make an argument for the superiority of inquisitorial procedure, nor does it attempt to respond to the many valid critiques that are often raised with regards to inquisitorial procedure. It merely asks whether the types of inquisitorial procedures employed in the HCC might be responsible for the court’s record on substantive case outcomes. Even if the answer is “yes”—and I tentatively conclude it is—there might be drawbacks to an inquisitorial approach. These include a limited role for a lawyer, the sacrifice of many procedural protections, and the minimizing of individual rights in favor of a more objective search for the truth.
action to respond to the tenant’s allegations by the time of the initial hearing. With regards to settlements and judicial orders—the primary means of resolving disputes in the adversary system—neither procedural mechanism was employed with sufficient frequency in the HCC to explain its overall substantive record. I do not assert in this Part that traditional procedures are incapable of producing fair outcomes, but rather make the narrower observation that they are not strongly correlated with the particular substantive outcomes recorded in the HCC.

1. Filing of Court Papers

In both adversarial courts and the HCC, the first step toward litigating a claim involves filing a complaint. In recent years, pleading with factual specificity has become the norm and this practice is adhered to in the HCC. Tenants provide facts relevant to each element of a housing conditions claim, and most importantly, allege housing code violations in particular detail. The HCC complaint distinguishes, for example, between cracks and holes in the “ceiling” as opposed to the “walls,” and puts landlords on notice of very specific violations, such as a “lack of waterproof floor in the bathroom.” Therefore, it is safe to assert that landlords are not simply notified of the existence of housing code violations, but are furnished with very specific information that would make repairs viable immediately upon receipt of the complaint.

There is some evidence that, in traditional courts, merely filing a lawsuit can catalyze a defendant to act. The threat of lengthy litigation, the cost of pre-trial discovery, or a belief that a finding of liability is likely, may drive a defendant’s decision to acquiesce to some or all of plaintiff’s demands before litigation begins in earnest. Some defendants may take affirmative action to address allegations set forth in a complaint. A landlord may, for example, permit a tenant with five children to occupy a unit in response to a lawsuit alleging family status discrimination. Other defendants may respond to a complaint with inaction, creating for the plaintiff a de facto entitlement to the relief requested. In adversarial housing courts, for example, up to fifty percent of tenants fail to respond to a landlord’s complaint, resulting in default judgments that are likely to grant the landlord possession of the contested unit as well as damages for unpaid rent, even in the absence of a formal settlement or adjudication.

In the HCC, neither phenomenon was observed with any great frequency. The filing of a complaint in the HCC was not strongly correlated with either affirmative or

48 A theory recovery for attorney’s fees was, at one time, built around the notion that the plaintiff could claim “prevailing party” status if her lawsuit catalyzed the defendant to act, even if the case was never litigated. See, e.g., Oxford House-A v. City of Univ. City, 87 F.3d 1022 (8th Cir. 1996); Brown v. Local 58, Int'l Bhd. of Elec. Workers, AFL-CIO, 76 F.3d 762 (6th Cir. 1996)
passive action on the part of the landlord. In only six cases did the tenant appear at the first hearing and report that the landlord had taken affirmative action to initiate repairs. The vast majority of landlords made no effort to respond to tenant allegations upon receiving the HCC complaint, despite the fact that ninety-eight percent of those later subject to housing inspections were deemed responsible for at least one housing code violation. Furthermore, the filing of HCC complaints did not cause landlords to passively acquiesce to tenant demands. Once service was perfected, every landlord but one entered an appearance in court. Thus, tenants did not typically obtain judicial orders or sanctions on the basis of a landlord’s default.

There are no data that provide an explanation for why the filing of a lawsuit in the HCC has relatively little impact on the behavior of landlords. Perhaps the relative ease and low cost of participating in an HCC case disincentivizes landlords—even those who know they are most likely liable—from acting until an inspector officially corroborates the existence of housing code violations. Moreover, the court issues sanctions quite infrequently, and perhaps judicial reticence on this front inadvertently encourages landlords to prolong litigation, rather than defaulting or making immediate repairs. In other words, not only does it cost little to litigate an HCC case, but early resolution of the dispute is unlikely to minimize the landlord’s risk or financial exposure, as very few landlords are ultimately subject to monetary sanctions. Regardless of the reason, the upshot is clear: the filing of tenant lawsuits is not substantially correlated to accurate outcomes in the court. The vast majority of tenant allegations are addressed only in the wake of substantial judicial intervention.

2. Settlements

Settlement is an important procedural device in an adversarial system. No housing court, or even general jurisdiction civil court, could function if a large percentage of parties opted for trial; the system depends on settlement in the bulk of matters.\(^{50}\) Parties may opt for settlement due to the expense of formal trials or to avoid the immense risk of participating in a winner-takes-all process. It has also been observed that settlements may produce outcomes that benefit both parties, which a court-ordered judgment cannot always achieve, making it an attractive option for many litigants.\(^{51}\) Settlement can a fair and effective way to resolve disputes, and is the mechanism by which disputes are resolved in the vast majority of matters in the civil justice system.\(^{52}\)

\(^{50}\text{Kevin M. Clermont, } \text{Litigation Realities Redux,} \text{ 84 NOTRE DAME L. REV. 1919, 1951 (2009)}\)

\(^{51}\text{Carrie Menkel-Meadow, } \text{Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases),} \text{ 83 GEO. L.J. 2663, 2672-2673 (1995).}\)

\(^{52}\text{Carrie Menkel-Meadow, } \text{Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases),} \text{ 83 GEO. L.J. 2663, 2669-70 (1995) (arguing that settlement can promote some of the fundamental values of our legal and political systems, including “consent, participation, empowerment, dignity, respect, empathy and emotional catharsis, privacy, efficiency, quality solutions, equity, access, and yes, even justice”); Marc Galanter & Mia Cahill, } \text{“Most Cases Settle:” Judicial\)}
Lending further credibility to the theory that inquisitorial procedure may be responsible for the court’s outcomes, settlements do not appear to be contributing to the HCC’s substantive record in any significant way. Distinct from other formal courts, only six percent of cases settled in the HCC. The data do not indicate that settled cases resulted in unfair or unfavorable case outcomes. In fact, in two of the settled cases most or all repairs were made, and in the other two, no information on the abatement rate was available and therefore the accuracy of the outcome is unknown. However, even if settlement offers a viable method for achieving a fair result in the HCC, the low rate of settlement indicates that, as a procedural device, it is not correlated to the vast majority of outcomes. The lion’s share of cases were fully adjudicated in court and resolved by a judge following numerous court hearings and at least one housing inspection.

It is difficult to know why settlement is so infrequent in the court, especially because there are ample opportunities to settle HCC matters. Parties are often subjected to an hours-long wait before their cases are called and the court has a mediator on-site who can be called upon to work with the parties. Furthermore, the typical incentives to settle appear present in the HCC. During the longitudinal study period, forty-one percent of landlords were represented, suggesting that indefinite litigation is not entirely cost-neutral for a substantial portion of landlords. Last, landlords have access to the information necessary to assess the strength of their opponents’ case. The housing inspector often visits the premises early in the case, thus putting the landlord on notice of potential liability, much in the same way pre-trial discovery might in a traditional court.

Perhaps the low settlement rate can be explained by examining the incentives of tenants. Settlement implies that the parties have met in the middle, or least that both sides made concessions. In HCC cases, however, landlords may not be able to convince tenants to make concessions or settle for lesser repairs. Tenants may feel buoyed by the housing inspector’s report, or empowered by seemingly unlimited access to the judge, spurring an eagerness to continue litigating until all repairs are complete. Moreover, those landlords who are used to bullying tenants into unfavorable settlements in eviction cases might be low-balling offers of settlement in the HCC, unaware that the value of striking a deal has shifted substantially for the tenant.53

It is possible that the HCC’s low settlement rate may even promote more accurate results, although a firm connection is hard to discern. I base this theory on the widely held perception that, in systems of mass justice, settlement is more likely to fuel unfair

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53 An experienced Legal Aid lawyer theorized that landlords in the HCC also have little incentive to settle, as the tenant is likely to demand a consent order setting forth agreed-to repairs as part of a settlement agreement, and the landlord will know that the judge is very unlikely to issue such an order if the parties appear in court.
outcomes than in other contexts.\textsuperscript{54} In out-of-court negotiations, the relative status and power of the litigants can have an outsized impact.\textsuperscript{55} It follows that in housing court—where almost all tenants are unrepresented—settlements have been roundly criticized as producing bad faith agreements that function more like default judgments, in which the landlord wins all and the tenant does not benefit from any sort of compromise.\textsuperscript{56} In the HCC, seventy-percent of tenants are pro se, and twenty-seven percent must litigate their case against a represented landlord. Therefore, it is possible that a low settlement rate may actually be contributing to better case outcomes in the HCC across the board. Certainly, at the very least, the inverse is true: the court’s outcomes are not primarily the result of negotiated agreements.

3. Repair orders

In a traditional court, every case that does not settle concludes with the issuance of a judicial order either awarding or denying relief. A favorable court judgment is typically considered a “win” for the prevailing party, regardless of what transpires after the litigation concludes. In the HCC, a “win” was defined differently—not by issuance of an order, but by completion of repairs that the housing inspector deemed necessary. Therefore, this Section considers whether, and to what degree, judicial orders in the HCC might be influencing liable landlords to make repairs.

Like settlements, the rate of repair orders in the HCC was very low. During the study period, only eleven repair orders were issued. In seventy-six percent of cases involving abatement information, no repair order was on record. Therefore, it is unlikely that repair orders were particularly influential in shaping the court’s case outcomes at large.

Notwithstanding the fact that most HCC outcomes cannot be traced to the issuance of a repair order, it is worth considering whether a heavier emphasis on formal orders might benefit the court. In eighty-two percent of cases involving a repair order, the landlord eventually made repairs. Even if the great majority of repairs were performed in the absence of an order, the fact that orders are highly correlated with actual repairs seems to suggest it might be a meaningful procedural device. On the flip side,

even where judicial orders led to abatements, an average of 146 days and 5.4 hearings elapsed between the order and the repairs, raising questions as to whether the order itself—rather than additional housing inspections and court hearings—was the force driving the landlord to act. It is unclear why the judges are so disinclined to formalize a landlord’s liability with an order.57 Perhaps making orders a regular feature of the court might have some effect on the recalcitrant, hard-to-reach landlords.

B. Inquisitorial Procedures

If traditional procedures are not strongly correlated with the HCC’s outcomes, then it is reasonable to theorize that the court’s use of inquisitorial procedures might explain its results. This Subpart sets forth quantitative and qualitative data suggesting that housing inspections and regular court appearances appear to play a substantial role in influencing landlord behavior. Landlords appear quite responsive to the housing inspector’s findings: when the inspector identifies housing code violations, landlords overwhelmingly make repairs—even when the tenant’s complaint does not allege the violations. Qualitative observations of judicial conduct at hundreds of hearings provide examples of how sequential court hearings in the HCC operate to complement the work of the housing inspector. The judges repeatedly advise both parties of their legal obligations, create a formal space for problem-solving, and impose a measure of public accountability. This Section does not isolate and test the impact of inquisitorial procedures on the court’s outcomes, and therefore makes no claim of causation. However, the data herein form the basis of a theory that judicial investigation and management may promote accurate outcomes in a high-volume court.

1. Housing Inspections

Independent investigation of the facts is a critical component of inquisitorial procedure, and the housing inspector occupies that role in the HCC. In Part II, supra, I contend that the housing inspector’s findings permit a merit determination to be made. That merit determination, in turn, allows the accuracy of an outcome to be established. But, is it possible that the housing inspector’s independent investigation is the procedural mechanism spurring landlord action?

Even a cursory review of the data indicates that housing inspections are facially correlated with outcomes in the court. Eighty-one percent of cases with any abatement

57 The judges state that they prefer to keep the discourse between the parties informal; however, in reviewing the paper files that were part of the longitudinal study, it was difficult to determine what separated a case in which an order was issued from a case in which no order was issued. The cases with repair orders did not involve formal evidentiary hearings or any notable difference in the form of adjudication. My original hypothesis—that judges issues repair orders only when landlords were most recalcitrant—was disproved by the data.
information at all involved at least one inspection. Therefore, save a few cases, the inspector visited the premises of most units in which repairs were ultimately made. It is difficult to tease out the impact of the housing inspector on the court’s accurate outcomes, as I have defined an accurate result as one in which the housing inspector makes a merit determination regarding the tenant’s allegations. Therefore, all “accurate” outcomes, as defined by this study, necessarily involve a housing inspection.

To probe the influence of the inspector, then, it is useful to examine the abatement rate for housing code violations identified *sua sponte* by the inspector. In most cases, the inspector independently detected at least one violation that was not raised in the tenant’s court filing. Earlier, I defined as an “accurate” outcome only those repairs made to conditions that were both alleged by a tenant and substantiated by the housing inspector. In cases where the inspector independently detected the violation, any resulting abatement was not counted as a fair outcome. In fact, one might reasonably assert that such a repair represents an unfair result, as the landlord was not put on notice of the violation via the tenant’s complaint. This Subpart considers whether the inspector’s *sua sponte* findings are correlated to landlord abatements. If landlords abate violations identified *sua sponte*, perhaps the decision to repair does, in fact, hinge on the inspector’s findings. If, however, landlords do not abate violations identified *sua sponte*, perhaps the inspector has less impact on a landlord’s decision to abate violations than initially seems apparent. The data here are revealing. Over the course of forty-seven cases, the housing inspector discovered and reported on sixty-three violations not alleged by the tenant. Landlords abated ninety-three percent of these conditions. Extrapolating from these cases, I posit that the inspector’s role may not be merely ancillary in catalyzing outcomes at large, but rather a principal force.

These data are suggestive of the housing inspector’s central role in prompting landlords to repair housing code violations, but alternative explanations exist. It is possible, for instance, that landlords view the housing inspection as the functional equivalent of a judicial determination of liability and are simply acting in accordance with that determination irrespective of who issued it. Certainly, the judges appear to grant the inspection report a great deal of weight. In most hearings observed, the judge relied heavily—often exclusively—on the inspector’s findings to guide the next steps in the case. Perhaps, then, landlords would be just as likely to make repairs if housing inspections were eliminated and, instead, HCC judges were tasked with fact-finding at formal evidentiary hearings—as traditional adversary procedure would dictate.

There is reason to hypothesize, however, that a substitution of judicial fact-finding for housing inspections might not yield equivalent results, particularly in a high-volume court. In the HCC, the housing inspector performs the fact-finding role actively, through independent investigation, rather than passively, by assembling the assorted facts provided by the parties. This is particularly important in a setting like the HCC where a high number of parties are unrepresented and evidence is difficult to amass. Returning to
the rodent infestation as illustration, how might a pro se tenant demonstrate to the court that such a violation exists? It is difficult to collect, transport, and authenticate mouse droppings, and even trickier to record shuffling feet and squeaky movements within walls so that the judge might hear evidence of the infestation. The housing inspector can investigate the tenant’s allegations in their natural habitat and report on observations that might not translate well to physical evidence.

Research from adversarial tribunals offers some insight into the comparative advantage of the housing inspector as fact-finder. In traditional housing courts, unrepresented tenants often struggle to find and present acceptable or reliable proof that corroborates their allegations. This can be problematic, as judicial fact-finding is driven solely by evidence brought forward by the parties. Judges and researchers have consistently pointed to inadequate evidence as a barrier to fair outcomes, noting that, in the adversary system, the judge must rule against a party who lacks credible proof even when the judge suspects that the party’s claim may have merit.

The impact of the housing inspector’s investigatory role can be seen most plainly when comparing case outcomes of parties with and without representation in both traditional courts and the HCC. In adversarial proceedings—where the parties must produce their own evidence—the unrepresented consistently achieve less favorable outcomes. This is especially true in cases where the landlord has counsel and the tenant does not, as fact-finding can skew heavily toward the represented party. By contrast, a wide disparity in outcomes was not observed in the HCC. Seventy-percent of tenants in the HCC were unrepresented during the study period. Further, in twenty-seven percent of cases, the landlord had an attorney while the tenant was pro se. It is typically assumed that cases involving lopsided representation pose the greatest challenge to fairness. However, in HCC cases involving an unrepresented tenant and a represented landlord, tenant claims were substantiated and abated at roughly the same rate as in other cases. That unrepresented parties who face a represented counterpart fare just as well as the general pool of litigants in the HCC lends powerful support to the notion that the housing inspector’s fact-finding may correlate to fair outcomes in a way that traditional, adversarial judicial fact-finding would not.

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60 Of course, it is possible that legal services providers are accepting only the most difficult HCC cases on behalf of tenants, and thus a win rate equivalent to that of pro se tenants does not necessarily demonstrate that lawyers in the HCC forum are unable to obtain more favorable outcomes.
2. Sequential Court Hearings

The housing inspector appears to play a central part in influencing liable landlords to repair units, and thus in advancing fair and accurate outcomes. However, the housing inspector does not operate in a vacuum and landlords may not be prompted to act upon a housing inspector’s findings alone. This next Subpart considers the impact of a second inquisitorial feature: sequential court hearings before the judge.

A key feature of the HCC is the requirement that parties return to court for regular hearings until repairs are complete. Although the study produced less evidence of a correlation between sequential hearings and the court’s substantive case outcomes than it did with regards to housing inspections, indications of a connection exist. First, the
simple fact of judicial oversight might influence landlord behavior. In forty percent of cases involving a housing inspection, the landlord had performed all repairs either by the hearing following the inspection, or by the next court hearing, typically three to four weeks later. Perhaps the knowledge that a return to court would be required was sufficient to galvanize landlord action. Second, in most cases, even the sixty percent of landlords who initially failed to make immediate repairs did eventually abate the violations recorded by the inspector. Thus, some feature of the court, in combination with the inspector’s visit, must be prompting them to act.

In this Section, I focus on the latter subgroup of cases, those in which tenant allegations were substantiated, and yet the landlord was noncompliant in making repairs—at least at the outset. In these matters, judges exercised substantial management over the process, scheduling an average of six hearings over a five-month period after the initial housing inspection. At a surface level, regular court hearings are correlated with fair case outcomes: seventy percent of landlords who displayed initial reluctance to performing repairs ultimately remediated all habitability issues on their properties. The quantitative data provide no additional evidence of a link between court hearings and the repair of housing code violations, but analysis of the study’s qualitative data, gleaned from hundreds of in-court observations, offers greater insight into how judicial management in the HCC might influence outcomes.

At hearings that post-date the initial housing inspection, HCC judges performed a variety of functions. They resolved collateral legal and factual disputes, ordered additional housing inspections, mediated the parties’ interpersonal disputes, and reprimanded landlords for not making best efforts towards repairs. Consider a number of representative examples. In one matter, a tenant returned to court for a fourth hearing and reported that her substantiated cockroach infestation had not been remedied. The housing inspector had visited the unit more than a month prior, and yet the violation had gone unaddressed. The judge sternly directed the landlord to “do what is necessary to solve [the] problem.” By the following hearing, three weeks later, the landlord had begun to install metal barriers to plug up holes through which the vermin were entering the unit. In addition, an exterminator had been hired to attend to the infestation every two weeks.

In a second case, a housing inspection turned up evidence of leaks, broken windows, and non-functioning electrical outlets. At the hearing following the inspection, the landlord claimed to have abated all habitability issues. The tenant, however, reported that leaks persisted and the repairs had been ineffective. Moreover, the tenant claimed she had reported the faulty repair to the landlord promptly, but had not received a satisfactory response—an allegation the landlord strenuously denied. The judge

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61 The problem-solving model has been built around the assumption that regular judicial monitoring can greatly influence the behavior of defendants in completing treatment and reducing recidivism. See Leslie Eaton and Leslie Kaufman, *Judges Turn Therapist in Problem-Solving Court*, New York Times (April 26, 2005).
sidestepped the dispute, re-focusing the parties’ attention instead on actions they would take next. The landlord was instructed to order proper materials and come up with a plan for making repairs within two weeks. Six weeks later, all repairs had been performed.

In a third matter, the landlord claimed that the tenant would not permit him to enter the unit in order to make repairs and, also, that she had used her dog to intimidate him. The tenant retorted that the landlord expected unencumbered access to the premises and did not respect her privacy. The judge expressed frustration with both parties. The landlord was instructed to provide twenty-four hours notice prior to entering the tenant’s home, and the tenant was instructed to keep her dog restrained. By the following hearing, repairs were in progress.

These are but a few illustrations of judicial management in the HCC drawn from in-court observations. In each case, the judicial actions were quite basic. The judge engaged in basic problem solving, or provided a neutral venue in which the parties could communicate, or simply prodded the landlord to action. Yet, this oversight may well have been effective. At one hearing, the tenant commented to the judge that the landlord only seemed to work on repairs just prior to the next court date. Significantly, the court’s investigatory power continues to work in tandem with judicial oversight throughout the life of an HCC case. In addition to returning to court for monitoring, parties are subject to additional site visits by the housing inspector. The inspector delivers to the court first-hand reports on the sufficiency and adequacy of ongoing repairs, providing the judges with fodder to guide their discussions with the parties.

This study offers evidence of some correlation between regular court hearings and outcomes: in the cases where judges heavily managed recalcitrant landlords, seventy percent ultimately made repairs. Thus, inspections and regular hearings appear to be a potent procedural combination that might be credited for bringing units up to code in most cases heard in the HCC during the study period.

Conclusion

Substantive justice is often seen as elusive in high-volume courts. A large number of cases, compounded by pervasive lack of counsel, make it difficult for the traditional adversary process to function effectively. This Article takes on the social issue of habitability and looks at whether inquisitorial procedure might provide a meaningful court remedy to tenants. Traditionally, the courts have not been a reliable source of relief for tenants with legitimate habitability claims. Yet, in the District of Columbia’s Housing Conditions Court—where court-controlled investigation and intensive judicial management are the dominant procedural features—most cases appear to resolve in an accurate manner.

The HCC is unique in three important ways. First, it attempts a meaningful way to bring the legal system to bear on the seemingly intractable social and economic
problem of substandard housing. Second, it is one of the few venues housed in a formal trial court system with the explicit goal of serving pro se litigants. And last, it has adopted an inquisitorial procedural framework, marking the court as an experimental forum in which traditional adjudicatory norms do not prevail. This Article demonstrates that accurate case outcomes are achievable in the habitability context, and provides some preliminary evidence that inquisitorial procedures may be linked to better results.