REVITALIZING THE IMPLIED WARRANTY OF HABITABILITY

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ABSTRACT

The implied warranty of habitability was created by courts in the 1960s and 1970s in response to the ongoing failure of law and municipalities to adequately address substandard conditions in rental housing. After its creation, courts and legislatures enthusiastically adopted it, in a revolutionary change to property law. However, the implied warranty of habitability has not been used as frequently as we might expect, even as we see ongoing evidence of substandard rental housing conditions among low-income tenants.

There are several reasons for the underutilization of the implied warranty. Legislatures have erected barriers to raising it in the most likely procedural setting for it. Courthouse features work to deter its use by unrepresented low-income tenants—the demographic most likely to need the protections of the warranty. Establishing the implied warranty of habitability as a viable tool to address housing conditions is possible, if these obstacles are addressed.

Much of the literature about pro se litigants in general, and tenants facing eviction in particular, focuses on the right to counsel in civil cases. Recently, however, there has been an increased focus on non-lawyer approaches to access to justice. I take this school of thought and apply it to the implied warranty of habitability. I offer two proposals for procedural reform—heightened pleading requirements and requirements for specific judicial findings—that, together, could make the implied warranty of habitability an automatic element of every eviction proceeding.

INTRODUCTION

One of my favorite things to teach my property law classes is the implied warranty of habitability. Its creation in the 1960s and 1970s was a victory for tenants living in substandard housing across the nation.[1] From an academic

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standpoint, it is an elegant response to some vexing problems around housing code enforcement. It is not too much to call it the most significant step forward for tenants in modern landlord-tenant law. I am pretty animated when I explain it to students, who are usually hearing about it for the first time, even though most of them are tenants themselves.

The implied warranty of habitability is the idea that in every residential lease the law will imply a warranty by the landlord to maintain the premises above a certain baseline standard, usually dictated by local housing codes, and giving the tenant the right to reduce rent owed if the standard is not met.[2] This warranty cannot be waived.[3] It is legally present if the lease is silent or even in the not-uncommon case of a written lease provision expressly disclaiming any responsibility on the part of the landlord.[4] It is, in theory, a powerful tool for tenants to force landlords to maintain premises or risk jeopardizing their claim to rent.

When I am teaching my clinical students, however, I am much more cynical: I explain to them that there is a vast chasm between what the law requires and what tenants actually experience. Every time I am in court to watch eviction cases, I point out to my students that almost none of the tenants facing eviction for nonpayment of rent are represented, and very few of the tenants raise the implied warranty of habitability as a defense to nonpayment of rent. Those who do raise it are rarely successful in staving off eviction or even reducing the amount of rent they owe.

Across time and jurisdictions, the implied warranty of habitability has been underused, undermining its ability to promote better housing and to protect individual tenants from landlord indifference to their rental housing conditions.[5] Its underuse has prompted concerns about its viability in practice, to the point that a recent article felt the need to affirm that "the implied warranty of habitability lives."[6] It is still alive, but it needs to be revitalized.

Tenants almost never seem to be able to take advantage of the protections of the implied warranty of habitability. The reality is at odds with the promise of the implied warranty of habitability when it was created. Every day, in courts across the country, low-income tenants are evicted and/or receive money judgments against them that they should not be experiencing in a world with the implied warranty of habitability.

The implied warranty of habitability arose in the wake of the failure of property law and municipal housing code legislation to meaningfully incentivize landlords to maintain their rental properties with low-income

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1. *See* Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS U. L. REV. 1, 9–10 (2016).

2. *See id.* at 7–8.

3. *See id.* at 3.

4. *See id.*

5. *See id.* at 19.

6. *Id.* at 1.

tenants. Historically, property law treated landlord-tenant relationships as fundamentally different from contracts, and therefore judges declined to apply developing contract law principles to lease agreements.[7] This meant that ancient property principles combined to leave tenants without much in the way of legal remedy to address substandard rental housing conditions. One result of this legal lacuna for tenants was that, as society urbanized, many poor tenants found themselves living in dreadful housing conditions but without any rights to bring to bear on the problem.[8]

To address the problem of bad housing conditions, housing codes were born in the largest cities.[9] These proved incapable of meeting the challenge. Housing code enforcement requires that inspectors and a housing department are willing and able to enforce through effective tools.[10] It did not take long to realize that public enforcement was going to be ineffective without more resources.

Enter the implied warranty of habitability: a tool for tenants to wield as a sword and a shield against landlord claims for rent while failing to maintain conditions in leased dwellings. Its development promised to ameliorate some of the historic inequality in landlord-tenant relationships and to address important public policy concerns about housing conditions. In fact, the implied warranty of habitability was little used from its earliest days and remains underused to the present.

As a tenant lawyer and courtroom observer, I have seen hundreds of eviction proceedings involving low-income tenants. I have almost never seen anyone without a lawyer successfully raise the implied warranty of habitability. My observations are consistent with the experiences of other lawyers and scholars in eviction-specific contexts as well as in the broader context of courts dominated by unrepresented litigants: people without lawyers are often unable to navigate systems that are ostensibly designed for them to use.[11] Tenants are denied the protection of the implied warranty of habitability for reasons that often have nothing to do with the condition of their housing.

The standard prescription for the problem of unsophisticated users of "poor people's courts" is to give many litigants more access to lawyers.[12] This idea has been debated for decades and has recently seen some movement in the context of representation for tenants facing eviction, especially in larger cities.

In the shadow of the "access to lawyer" debate, some of the literature has focused on non-lawyer solutions.[13] The impetus to develop ideas that focus on

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7. *See id.* at 9.

8. *See* Thomas M. Quinn & Earl Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 236–37 (1969).

9. *See id.* at 239.

10. *See id.* at 239–40.

11. *See* Franzese, Gorin & Guzik, *supra* note 1, at 7 n.18.

12. *See* Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 744–45 (2015).

13. *See, e.g.*, *id.*

procedural reform gained momentum when the Supreme Court found, in the 2011 case *Turner v. Rogers*, that procedural safeguards could compensate for lack of representation in civil matters—even those where liberty was threatened.[14]

Turner simply added fuel to the fire of a conversation that had already begun about how to design reform that does "not rely on supplying attorneys or legal assistance to upgrade the abilities of litigants. Instead, it focuses on dismantling barriers put in place by procedural and evidentiary rules, and by narrow conceptions of the judicial role, so that pro se parties can compete more effectively within the court system."[15]

Surprisingly, the scholarship around reform has not focused closely on procedural obstacles for tenants who would assert the implied warranty of habitability as a defense to eviction for nonpayment of rent. This Article fills that gap and proposes reforms to courts and procedure that increase the ability of tenants to effectively raise the implied warranty of habitability as a defense, giving new life to a powerful but underused public policy tool and tenant protection.

In this Article, I try to reconcile the reality with the potential and offer some ideas about how to re-orient the implied warranty of habitability to live up to its promise. In Part I, I give a brief history of property law and its persistent failure to meet changing needs of urban, low-income tenants. In Part II, I describe the development of the implied warranty of habitability and its rapid spread across American landlord-tenant law. In Part III, I explain that tenants facing eviction for nonpayment of rent tend to raise the implied warranty of habitability much less frequently than we might expect, and I explore the reasons for this underuse. Finally, in Part IV, I propose changes to the procedure of eviction cases that would alert tenants to their rights and require judges to implement the protections of the implied warranty of habitability.

I. TENANTS AND HOUSING CONDITIONS IN HISTORY

The implied warranty of habitability emerged in the 1960s from a confluence of the tenant rights movement, a long history of government inability to regulate rental housing conditions, and a trend toward modernization of property law.[16] These forces coalesced around substandard rental housing.

Bad housing conditions for low-income tenants are a very stark physical manifestation of an enduring truth for low-income tenants: landlords have power and tenants have almost none. Tenants living in bad housing conditions historically had almost no legal recourse.[17] The laws of property were stacked firmly against them.

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14. Turner v. Rogers, 564 U.S. 431, 448–49 (2011).

15. Steinberg, *supra* note 12, at 788 (footnote omitted).

16. *See generally* Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793 (2013).

17. *See* Franzese, Gorin & Guzik, *supra* note 1, at 9.

Traditionally, landlord-tenant relationships were governed almost exclusively by the quirky and archaic laws of conveyances (as opposed to the law of contractual relationships).[18] Under property law, landlords had virtually no obligation vis-à-vis rental property other than delivery of possession—the condition of any dwelling was typically not germane to the lease agreement.[19]

The law regarding rental housing conditions was built on traditional notions of the leasehold agreement—the landlord would rent the land to the tenant for agricultural purposes, and the tenant would pay the rent from the fruits of the land.[20] Any dwelling on the property was assumed to be ancillary to the primary purpose of the leasehold, and neither landlord nor (it was presumed) tenant considered the condition of a dwelling to be important.[21] Additionally, the tenant-farmer population was generally seen as perfectly qualified to identify and repair any conditions in a dwelling that needed fixing.[22] Absent a lease provision expressly binding a landlord to maintain a rental dwelling, the landlord had no duty to the tenant.[23] For centuries, the common law reinforced and reaffirmed this principle of *caveat lessee*.[24]

Tenants were also disadvantaged by another quirk of history in property law's rule that covenants in a lease agreement were not *dependent*—that is, even if for some reason the landlord actually did have an obligation to maintain a dwelling, the failure to do so did not affect the tenant's obligation to pay rent.[25] Owing to the incidental nature of the dwelling in traditional leaseholds, failure to maintain the dwelling was not considered relevant to the tenant's obligation to pay rent.[26] Absent actual eviction of the tenant from the property, the tenant was obligated to pay the full rent.[27] "This meant that even if the landlord *expressly* agreed in the lease to keep the premises in a habitable condition, a breach of that agreement would not relieve the tenant from having to pay rent."[28] For a tenant facing eviction, this had important practical consequences: if the tenant did not pay the full rent, for whatever reason, no failure on the part of the landlord could be raised as a defense against eviction of the tenant.

The result of *caveat lessee* and independent covenants was that landlords had virtually no incentive to maintain properties once they had been rented, and

18. *See* Quinn & Phillips, *supra* note 8, at 228 n.4.

19. *See id.* at 228 ("[T]he landlord was not being paid to do anything. He was turning over the land to the tenant with the rent serving as continuous compensation for the transfer.").

20. *See id.* at 230–31.

21. *See id.* at 231.

22. *But see* John S. Grimes, *Caveat Lessee*, 2 VAL. U. L. REV. 189, 190 (1968) ("The origin, as well as the causes, of this doctrine of caveat emptor in leases is lost in the blue haze of history.").

23. *See* Franzese, Gorin & Guzik, *supra* note 1, at 9.

24. *See id.*

25. *See The California Lease—Contract or Conveyance?*, 4 STAN. L. REV. 244, 251 (1952) ("It is old conveyance lore that all covenants in leases are independent.").

26. *See* Campbell, *supra* note 16, at 796–97.

27. *See id.* at 797.

28. *Id.*

tenants living in substandard housing had almost no legal recourse. Property law principles reified and reinforced power imbalances between landlords and tenants, and would help keep that imbalance in place for a surprisingly long time.

Housing conditions for low-income tenants did not completely escape public attention. The American housing movement is usually traced to New York City in the late 1800s, when Jacob Riis shocked the public with his revelatory series of photos of New York City tenements and their appalling conditions.[29]

New York City[30] and Massachusetts created the earliest housing laws,[31] setting down rules about conditions and giving themselves police power to enforce them, but not giving tenants any ability to enforce them.[32] Courts in America began to look to housing codes to find negligence when a landlord did not comply with local code. Justice Cardozo famously found a landlord responsible for the injuries suffered by a tenant when a ceiling fell on her, finding the landlord to have violated a duty, imposed by local housing laws, not to let the premises fall into decay.[33] Still, courts declined to impose the duty to comply with housing codes vis-à-vis enforcement of leases or to link the tenant's obligation to pay rent with the landlord's inchoate duty to maintain the premises in good condition.

The persistence of the idea of independent covenants in leases contrasts sharply with developments in contract law. The erosion of independency of contracts began as early as 1773, when an English court found that not all covenants were independent.[34] By the early twentieth century, the idea had been thoroughly eroded by American courts. However, developments in contract law "had quite limited effects on landlord tenant law,"[35] and so the difficulty for tenants of addressing housing conditions lived on.

Legal sensibilities were rapidly changing in contract and tort law, but not in property law. As one scholar notes, "The real historical mystery in all of this is why the treatment of eviction cases in landlord-tenant court remained in this nineteenth century mode until the late 1960s and early 1970s."[36] The dogged

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29. *See, e.g.*, Sam Roberts, *Jacob Riis Photographs Still Revealing New York's Other Half*, N.Y. TIMES (Oct. 22, 2015), https://www.nytimes.com/2015/10/23/arts/design/jacob-riis-photographs-still-revealing-new-yorks-other-half.html.

30. *See* Tenement House Act, 1901 N.Y. Laws, ch. 334.

31. *See* Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, 11 (1979).

32. *See id.* at 14 ("[V]iolation of a housing code provision was not considered a breach of any duty owed by the landlord, and these tenants had no direct remedies when code violations occurred.").

33. *See* Altz v. Leiberson, 134 N.E. 703, 704 (N.Y. 1922). Under the property law of the day, the tenant may have still owed rent.

34. *See* Kingston v. Preston (1773) 98 Eng. Rep. 606 (KB).

35. Richard H. Chused, Saunders (a.k.a. Javins) v. First National Realty Corporation, *in* PROPERTY STORIES 123, 131 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009).

36. *Id.* at 133.

resistance to adopting contract law principles was of more than simply academic concern. By denying tenants the benefits of contract principles, courts preserved the power imbalance between landlords and tenants even in the face of a rapidly changing rental housing reality.

Property law retained its idiosyncrasies even as they became an increasingly bad fit for the residential landlord-tenant relationship. The reality of rental housing changed quickly beginning in the nineteenth century. In nineteenth-century America, as in the rest of the world, tenants became more and more urbanized as the industrial revolution made cities more attractive places to live. More tenants were more interested in renting a place to live than a place to farm. At the same time, renters became less and less likely to be able to fix up their homes—due to changes in actual abilities as well as changes in the complexity and nature of building systems and methods. The dramatic shift from rural to urban population following the Industrial Revolution meant that more people were packed into smaller spaces than ever before, and the poorest among them were living in extreme conditions. Traditional property law offered no relief for these tenants.

Housing codes began to be promulgated in some large cities, but landlords appear to have been slowed down only slightly by these rules, and cities lacked the resources and willpower (and occasionally the legal authority) to turn these rules into meaningful change.[37] It was clear that housing code enforcement by governmental entities was simply not up to the huge task it faced.[38] For tenants, relying on public enforcement was not the answer that they needed.[39]

Property law was slow to respond to the changing reality.[40] A sense of the general frustration with the slow pace of reform can be felt in the words of a scholar writing in the 1960s:

> In contrast with concern for and protection of consumers of other necessities of life, legislatures have reinforced the legal status of suppliers of rental housing and have under-regulated their responsibilities. Moreover, by refusing to overturn or condemn illogical precedents or unreasonable practices, courts have further entrenched landlords' prerogatives and have impeded needed improvements to much urban low-income housing. There has been

37. *See* Cunningham, *supra* note 31, at 14–16.

38. *See id.* at 15 ("Substantial success in applying traditional modes of housing code enforcement would probably have rendered the 'revolution' in landlord-tenant law unnecessary. But all observers agree that local governments have been notably ineffective in code enforcement.").

39. *See* Campbell, *supra* note 16, at 800–01.

40. *See* Grimes, *supra* note 22, at 225 ("The caveat emptor concept in landlord and tenant relationships is only one of the numerous instances in which property law concepts molded under medieval conditions do not fulfill the demands of an expanding society."). Tova Indritz points out that the very terms "landlord" and "tenant" reflect the feudal origins of leases and "lessor" and "lessee" are more appropriate descriptions of modern leases. *See* Tova Indritz, *The Tenants' Rights Movement*, 1 N.M. L. REV. 1, 41 (1971). *But see* Campbell, *supra* note 16, at 797 (arguing that by the mid-1800s the "historical foundations on which the *caveat emptor* and dependent covenants doctrines were based came under attack," along with the rigid formality of property law generally).

> a conspicuous reluctance to revise legal theory to respond to the exigencies of the contemporary housing crisis.[41]

By the 1960s, the stodginess of property law, combined with the failure of municipal housing code enforcement, left tenants where they had always been: susceptible to poor housing and without any recourse, meaning they were seriously disadvantaged in terms of the power balance between tenants and landlords. For all of its failings, however, the housing code movement did have one important consequence: it fostered the idea that landlords had the responsibility to maintain their rental dwellings as a matter of public policy.[42]

Challenges to the status quo for tenants became stronger in the 1960s as a broad tenant rights movement was agitating for better conditions and a change in the power imbalance between landlords and tenants.[43] At the same time, "[t]he general prosperity made it seem feasible to launch and win a 'war against poverty' . . . . Judges and legislators believed that landlords could afford to give up some of their profits for the benefit of slum dwellers because the landlord's economic position, like that of everyone else, was improving."[44] Reforms to housing law took on new urgency in the mid-1960s after urban riots were linked to bad housing conditions.[45] It was in this context that the implied warranty of habitability was developed as a tool to protect tenants living in substandard conditions and promote important public policy goal of improving housing.

II. THE CREATION OF THE IMPLIED WARRANTY OF HABITABILITY

The idea of legally implying a promise in every residential lease, whether it was written into the lease or not, that the premises would meet a minimum standard, was raised by a court as early as 1931.[46] However, it would take another thirty years for the courts to be ready and the moment to be right to do anything with this idea.

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41. Paul G. Garrity, *Redesigning Landlord-Tenant Concepts for an Urban Society*, 46 J. URB. L. 695, 697–98 (1969) (footnote omitted).

42. *See* Campbell, *supra* note 16, at 802–03.

43. *See* Cunningham, *supra* note 31, at 9 (citing "higher concentrations of low-income tenants in central cities, an increasingly serious shortage of affordable housing, the inadequacy of traditional modes of housing code enforcement, the civil rights movement of the 1960's" as reasons for the acceleration in the developments).

44. Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 554 (1984).

45. *See* David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 404 (2011).

46. As early as 1931 the Minnesota Supreme Court held that there is an implied warranty of habitability in any lease of an apartment in a modern apartment building . . . . If this holding had been generally accepted and applied, the recent "revolution" in tenants' rights would have occurred in the 1930's instead of the 1960's and 1970's.

Cunningham, *supra* note 31, at 74–75 (footnote omitted) (citing Delamater v. Foreman, 239 N.W. 148 (Minn. 1931)).

The law did, over time, make some concessions to the changing notions of leaseholds and put some private enforcement mechanisms at the disposal of tenants. Developments in the law introduced some limited obligations for landlords and limited protections for tenants. Courts invented the concept of "constructive eviction"—when conditions caused by the landlord were so severe as to "evict" the tenant and absolve them of any rental obligation,[47] "based on the warranty implied in every lease—the tenant's right to quiet enjoyment."[48]

It would not be until the 1960s, however, when modernization of property law met the tenant rights movement, that the courts would take it upon themselves to craft a meaningful resolution to some of these tensions between property law and modern rental realities. The status quo was so entrenched that as late as 1968 one scholar concluded that "we must accept as gospel in the United States the basic principle of caveat lessee."[49]

Tenants who did not or could not pay rent could expect speedy evictions and insurmountable judicial resistance to raising habitability as a defense to nonpayment. As Richard Chused describes landlord-tenant courts in the 1960s:

> Most cases took only moments to hear. For those tenants who bothered to show up,[50] the proceedings went something like this:
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> The Clerk calls the parties to stand before the judge:
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> Landlord's Lawyer: (After introducing his rent payment records into evidence.) My records show that Tom and Teresa Tenant have not paid the rent for the past month. I rest.
>
> Court (speaking to the unrepresented tenant): Have you paid the rent?
>
> Tenant: No, but . . .
>
> Court: Judgment for landlord. Call the next case.[51]

In 1970, another scholar observed that "[f]or the most part, landlord-tenant courts operate as a mill, running on high volume and limited administrative

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47. *See, e.g.*, Dyett v. Pendleton, 8 Cow. 727, 735–36 (N.Y. 1826) (holding "indecent noise and disturbance" to have constructively evicted the tenant).

48. Campbell, *supra* note 16, at 797. The key to claiming the protection of the constructive eviction doctrine was that the tenant had to actually quit the premises—they had to be "evicted" by the condition (as opposed to actual eviction through a landlord's affirmative acts). *See id.* at 798–99. The challenge for tenants was that they had to vacate the premises to claim the benefits of constructive eviction—a hassle in any case and often a big risk, because if the conditions were found not to be constructive eviction, then the tenant still owed the rent, even having moved out. Or, if the tenant stayed too long in an apartment with bad conditions, they ran the risk of not being "evicted," and therefore ineligible for the protections of this new doctrine. The constructive eviction doctrine forced tenants to make a sizable gamble that included weighing the value of living in better conditions with the real risk of putting themselves in a worse financial and/or housing situation.

49. Grimes, *supra* note 22, at 206.

50. Tenants not showing up for hearings was a common problem at that time, *see* Indritz, *supra* note 40, at 45, and remains an issue today.

51. Chused, *supra* note 35, at 134–35 (footnote omitted).

resources."[52] Tenants facing eviction were confronting indifferent courts and ossified property laws and finding that they had very few rights indeed. It was not until the early 1960s that "courts in some states began to recognize that twentieth-century residential tenancies shared few characteristics with the common law tenancies of feudal England."[53] The most important was the D.C. Circuit Court of Appeals in its landmark decision in *Javins v. First National Realty Corp.*[54]

A. Javins v. First National Realty Corp.

The first court to declare that there was a non-waivable implied warranty of habitability[55] in every residential lease was the U.S. Court of Appeals for the D.C. Circuit in its landmark 1970 decision in *Javins v. First National Realty Corp.*[56] Others would quickly follow.[57]

The *Javins* case involved a large building in Washington, D.C. with low-income tenants and deplorable conditions.[58] The facts were by that time familiar: low-income tenants living in a D.C. apartment building were facing dreadful living conditions.[59] In 1966, tenants elected to engage in collective

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52. Gerald R. Gibbons, *Residential Landlord-Tenant Law: A Survey of Modern Problems with Reference to the Proposed Model Code*, 21 HASTINGS L.J. 369, 372 (1970).

53. Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137 (2000).

54. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (mem.).

55. In fact, the first court to find the implied warranty of habitability appears to have been the Supreme Court of Wisconsin in *Pines v. Perssion*, a case involving student tenants and a wretched rental dwelling. Pines v. Perssion, 111 N.W.2d 409 (Wis. 1961). In reviewing the landlord's responsibility to maintain the premises, the *Pines* court disavows the old ways, concluding that:

> To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*.

Id. at 412–13. However, the *Pines* court provided that the provision could be waived, undercutting its utility. This meant that tenants and landlords could easily contract around any obligation of the landlord to maintain the premises. Although contract theory typically assumes educated and balanced negotiations between parties, the reality is that landlords and tenants are rarely on equal footing. In light of the longstanding power imbalance between tenants and landlords, a waivable right was never going to be an effective tool to address substandard housing conditions—the more likely result would be a tenant with limited bargaining power agreeing to waive the right in exchange for access to bad housing at a low rent.

56. *See Javins*, 428 F.2d at 1082–83.

57. The New Jersey Supreme Court handed down its decision in Marini v. Ireland, 265 A.2d 526 (N.J. 1970), another seminal case imposing an implied warranty of habitability in residential leases, just eleven days after *Javins*. *See* Chused, *supra* note 35, at 160.

58. *Javins*, 428 F.2d at 1073.

59. *Id.*

action against their landlord by staging a rent strike.[60] Together, they stopped paying rent and, predictably, were served *en masse* with notices of the landlord's efforts to take them to court to get them evicted.[61] The tenants maintained their solidarity and prepared for their hearings with their lawyer.

On the appointed morning, the tenants and their lawyer arrived in court armed with evidence and stories of dreadful conditions. The judge, in keeping with longstanding tradition, refused to admit evidence of conditions,[62] and instead simply asked whether rent had been paid. Finding that it had not, the judge ordered the eviction of all of the nonpaying tenants.

The tenants appealed to the D.C. Circuit Court for a ruling on whether housing code violations that arise during a rental term affect the tenants' obligation to pay rent.[63] Historically, of course, the answer was a resounding "no"—it was not a close question.

Judge Skelly Wright and his colleagues, however, refused to be bound by "largely historical" notions of the appropriate law, noting that "[c]ourts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life—particularly old common law doctrines which the courts themselves created and developed."[64]

The *Javins* court laid down a new, modern foundation for the jurisprudence of residential leases:

> The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society . . . . When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.[65]

Noting the power imbalance between landlords and tenants, as well as housing shortages and discrimination in the rental market and the society-wide negative impact of poor housing, *Javins* rejected old property law rules and instead looked to contract principles for "a more rational framework for the apportionment of landlord-tenant responsibilities."[66]

Analyzing the contemporary landlord-tenant relationship through a lens of contract law, the court held that local housing regulations implied a warranty of habitability, and that going forward,

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60. *Id.*

61. *Id.*

62. *Id.*; *see also* Chused, *supra* note 35, at 124.

63. *Javins*, 428 F.2d at 1072.

64. *Id.* at 1074.

65. *Id.* (footnote omitted).

66. *Id.* at 1080.

> the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition. In order to determine whether any rent is owed to the landlord, the tenants must be given an opportunity to prove the housing code violations alleged as breach of the landlord's warranty.[67]

By expressly tying leases to the existing body of contract law, the court could rely on an established set of principles that reinforced the symmetrical nature of the landlord-tenant relationship.[68] Courts could now use contract law as a "convenient, effective, and logical shortcut"[69] to enforce maintenance obligations.

B. The Promise of the Implied Warranty of Habitability

The theoretical impact of the implied warranty of habitability on the actual experience of low-income tenants would be significant. By tying the obligation to pay rent to the landlord's obligation to maintain housing, there would be two major changes.

First, landlords would be incentivized to improve and maintain their rental dwellings.[70] After all, if a tenant at any time could raise the implied warranty of habitability to offset rent, the landlord would have an incentive to never let the property fall into disrepair. By threatening to impede the ease with which landlords could evict tenants, the implied warranty of habitability would, in theory, impose a strong incentive to landlords to maintain properties.

Second, tenants in court facing eviction could expect a new script. Instead of a simple inquiry into whether rent had been paid, the hearing would be infused with a conversation about the conditions of the rental dwelling.[71] Eviction would no longer be as straightforward, and courts would no longer be so quick to serve landlord interests.

Armed with this new tenant right, we can imagine a new script in nonpayment eviction cases, consistent with *Javins* and its kin:

> Landlord's Lawyer: (After introducing his rent payment records into evidence.) My records show that Tom and Teresa Tenant have not paid the rent for the past month. I rest.
>
> Court (speaking to the unrepresented tenant): Have you paid the rent?
>
> Tenant: No, but the conditions at our apartment violate the local housing code in serious ways. We want to raise the implied warranty of habitability as a defense to the landlord's claims for unpaid rent.
>
> Court: I'm listening. Let's talk more about the conditions . . .

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67. *Id.* at 1082.
68. *See* Super, *supra* note 45, at 401.
69. Campbell, *supra* note 16, at 829.
70. *See* Super, *supra* note 45, at 402.
71. *See id.* at 403.

Tenant advocates and reformers heralded the implied warranty of habitability as an important new tool for tenants.[72] Its adoption by courts and legislatures was also enthusiastic and swift.[73] In "the most dramatic and sudden change in [leasehold] law in modern times,"[74] an idea that seemed "too radical to believe"[75] just a few years prior became effectively universal.[76]

In 1972 the drafters of the new Uniform Residential Landlord Tenant Act (URLTA) incorporated the tenant protections of the implied warranty of habitability.[77] Eventually, forty-nine states and the District of Columbia would adopt some version of the implied warranty of habitability.[78]

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72. Franzese, Gorin & Guzik, *supra* note 1, at 12.

73. *See, e.g.*, Green v. Superior Court, 517 P.2d 1168 (Cal. 1974); Lund v. MacArthur, 462 P.2d 482 (Haw. 1969); Lemle v. Breeden, 462 P.2d 470 (Haw. 1969); Jack Spring, Inc. v. Little, 280 N.E.2d 208 (Ill. 1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Steele v. Latimer, 521 P.2d 304 (Kan. 1974); Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973); Kline v. Burns, 276 A.2d 248 (N.H. 1971); Berzito v. Gambino, 308 A.2d 17 (N.J. 1973); Marini v. Ireland, 265 A.2d 526 (N.J. 1970); Foisy v. Wyman, 515 P.2d 160 (Wash. 1973) (en banc).

74. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 299 (3d ed. 2000).

75. Campbell, *supra* note 16, at 795.

76. *See* Cunningham, *supra* note 31, at 9 ("Although both legislative and judicial development of the principle that landlords must provide residential tenants with habitable rental housing started before 1965, the trend accelerated tremendously between 1965 and 1979.").

77. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 2.104 (UNIF. LAW COMM'N. 1972).

> § 2.104. [Landlord to Maintain Premises]
>
> (a) A landlord shall
>
> (1) comply with the requirements of applicable building and housing codes materially affecting health and safety;
>
> (2) make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;
>
> (3) keep all common areas of the premises in a clean and safe condition;
>
> (4) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by him;
>
> (5) provide and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and
>
> (6) supply running water and reasonable amounts of hot water at all times . . . .

Id.

78. One result was a robust debate about the merits of implied warranty of habitability—one scholar has described the post-implementation debate as an "academic melee." *See* Michael A. Brower, Comment, *The "Backlash" of the Implied Warranty of Habitability: Theory vs. Analysis*, 60 DEPAUL L. REV. 849, 849 (2011). Brower, conducting his own research, concluded that the implied warranty of habitability can improve conditions but leads to higher rents. *Id.* at 851–52. The question has not been well studied, despite decades of debate.

> The "revolution" in landlord-tenant law sparked a vigorous debate about the effects that housing code enforcement, tenant rights, and

A key aspect of the promise of the implied warranty of habitability is that it empowers tenants to hold landlords accountable for conditions in a way that had not been possible before. The URLTA, following the lead of *Javins*, set out a mechanical framework for enforcing the implied warranty of habitability.

A tenant asserting a breach of the implied warranty of habitability by a landlord may withhold rent—as the *Javins* tenants did. The URLTA provides that a tenant may affirmatively sue the landlord for breach of the obligation to maintain the premises,[79] if the tenant has given notice to the landlord of the offending conditions.[80]

More importantly for most tenants, the URLTA expressly allowed a tenant to raise the implied warranty of habitability as a defense to an action for eviction for nonpayment.[81] This type of defensive use can come in two forms. First, it may be intentional—when a tenant withholds rent due to a housing code violation or serious condition, as the *Javins* tenants did, and waits for the landlord to either make the repair or sue to evict the tenant for nonpayment. Second, the implied warranty of habitability may be raised when a tenant is facing eviction for unintentional arrears.

When a tenant raises landlord noncompliance with the implied warranty of habitability as a defense in an action for eviction due to nonpayment, the URLTA provides for an accounting: any rent owed is offset by the appropriate deduction for breach of the implied warranty of habitability.[82] If there is no rent due after this accounting, "judgment shall be entered for the tenant in the action for possession."[83]

Calculating the abatement of rent requires looking at the duration of the condition and the periodic rent paid by the tenant and then balancing that against any unpaid rent claimed by a landlord.[84] Assuming, for example, a monthly rent of $1000 and a condition that leads to a 20% abatement that has existed for five months, the value of the abatement to the tenant is $200 for five months, totaling $1000.

> the implied warranty of habitability have on the poor. Two camps of legal scholars formed at the time, with Bruce Ackerman leading one and Neil Komesar leading the other, in a debate about whether housing code enforcement hurts the poor. However, "[d]espite all the ink spilled in this debate, little empirical research has been conducted to inform either position."

Abraham Gutman, Katie Moran-McCabe & Scott Burris, *Health, Housing, and the Law*, 11 NE. U. L. REV. 251, 287 (2019) (alteration in original) (footnote omitted) (quoting Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 11 ANN. REV. L. SOC. SCI. 15, 22 (2015)).

79. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.104 (UNIF. LAW COMM'N. 1972).

80. *See id.* § 4.104(d) ("Rights of the tenant under this section do not arise until he has given notice to the landlord . . . .").

81. *See id.* § 4.105.

82. *See id.*

83. *Id.*

84. *See id.*

C. Intentional Withholding of Rent

In practice, the typical implied warranty of habitability case is not the proactive tenant who is intentionally seeking the protection of the implied warranty of habitability by withholding rent. Instead, it is much more likely that the implied warranty of habitability would arise in an "unintentional" posture, when a tenant who has not paid rent seeks to raise it as a defense to avoid eviction for nonpayment or, at a minimum, ameliorate the effects of eviction for nonpayment.

The tenant who deliberately withholds rent to spur landlord action is the platonic ideal of the implied warranty of habitability as developed by courts and statutes. However, these types of cases are not particularly common, for several reasons. First, tenants may not know about the implied warranty of habitability—landlords hardly advertise it, and not all tenants are sophisticated, informed actors. So, we may hypothesize some number of tenants living with housing code violations who simply do not understand that they have the right to a baseline standard of housing and a remedy to enforce that right.

There is also a group of tenants living with substandard conditions who do know about their rights but make a choice not to do anything about it. Some of this is probably apathy, or a belief that the improvement in condition is not worth the hassle to get it. But another, more troubling, element may also affect usage: fear of retaliation. It is not surprising that tenants in the kind of dwellings that suffer from implied warranty of habitability violations can, and regularly do, make the (very rational) decision that they do not want to go out of their way to pick a fight with their landlord.

The fear of retaliation from a landlord for a tenant's exercise of rights is a very real fear. Although the implied warranty of habitability is bolstered by formal prohibitions on retaliation, these protections may prove to be hollow in practice. A landlord may be prohibited from trying to evict a tenant based entirely on their efforts to take advantage of the implied warranty of habitability, but there is no bar on eviction generally. Tenants who have attracted the attention of a landlord may quickly find themselves living under a microscope, attracting unwanted attention from a landlord hoping to identify the slightest breach of the lease agreement.[85] Tenants who find themselves in any dispute with the landlord may also find themselves "blacklisted"—prevented from renting from other landlords as well.[86]

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85. *See* Werner Z. Hirsch, Joel G. Hirsch & Stephen Margolis, *Regression Analysis of the Effects of Habitability Laws upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CALIF. L. REV. 1098, 1131 (1975) ("[T]here is probably an unstated recognition on the part of tenants that the law can provide little protection against a hostile landlord. Tenants are acutely aware that a landlord can make a tenant's life extremely unpleasant despite the formal existence of retaliatory eviction laws. The costs of resorting to the law to vindicate one's rights as a tenant may become so burdensome as to make continued occupancy unpleasant even if a tenant's right to possession is formally sanctioned by the law.").

86. *See* Franzese, Gorin & Guzik, *supra* note 1, at 39.

Even if a tenant can abide by every lease obligation, most tenants have leases that are renewable only at the discretion of the landlord—that is, the landlord has no obligation to renew a lease when the term ends.[87] This is problematic enough when a tenant has a one-year lease and may face non-renewal when the term ends. It can be even harder on someone with a month-to-month lease, which could be terminated in less than sixty days. For that tenant, the choice is between dealing with substandard conditions or attracting the ire of a landlord and possibly facing dislocation in the near future.

When a tenant assesses the success rates of nonpayment eviction actions, the failure of retaliation actions, and the relative costs of just living with an issue or actively courting a lawsuit, it does not seem unlikely that they may just decide to leave well enough alone.[88] Intentional invocation of the implied warranty of habitability to abate rent is not likely to be common.

D. Unintended Nonpayment of Rent

The most likely way that implied warranty of habitability would come up would be unintentionally: a tenant being sued for nonpayment raises the implied warranty of habitability as a counterclaim or an affirmative defense.[89] In a typical case, a tenant who has been living in a rental unit with one or more implied warranty of habitability conditions does not pay the full rent—not in response to the conditions, but for one of the usual reasons that plague poor tenants: job loss, unexpected medical expenses, family needs, etc. The tenant is not withholding rent intentionally based on any condition—even if there is a housing code violation in the dwelling. In response, the landlord starts the eviction process claiming that the tenant has not paid the contract rent due.

It is here, under *Javins* and its progeny, that the implied warranty of habitability can be raised as a shield to either reduce the rent owed—and therefore any money damages and, in some cases, prevent eviction. In this situation, there seems to be little reason not to raise the implied warranty of habitability (assuming it is raised in good faith) in hopes of securing an abatement that will either fend off the eviction completely or reduce the amount of damages awarded to the landlord.[90]

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87. The push for laws that require a landlord to offer a lease renewal except for good cause is part of the ongoing effort of the current tenant rights movement to protect security of tenure for tenants.

88. For a robust economic analysis of tenant decision making on this point, see Super, *supra* note 45, at 406–11. Anecdotally, I have regularly heard variations on this analysis from tenants living with serious housing code violations.

89. *See id.* at 411.

90. *But see id.* at 412 n.122 (noting that "[l]egally aware tenants [facing eviction for nonpayment] should raise the warranty whenever [a complex economic formula produces a particular result]" and presumably not in other cases).

The presence of a housing code violation is not necessarily a defense to eviction for nonpayment.[91] The mechanics of a nonpayment eviction case mean that the implied warranty of habitability works to reduce the rent owed during the period the condition exists.[92] If rent owed/claimed by the landlord is less than this amount—and eviction is often a case of being a few days late with a single month's rent[93]—then raising the condition defensively should theoretically prevent eviction.

Even if the amount of any abatement will not on its own prevent an eviction, it can reduce the amount of a judgment against a tenant. Although many tenants who are evicted for nonpayment are judgment proof, they still feel the effects of money judgments against them. In many cases, an outstanding judgment will impact a tenant's ability to secure housing in the future, because many landlords will be disinclined to rent to tenants with outstanding unpaid judgments. The easier it is to pay off any judgment, the better for a tenant. Obviously, any potential challenge to collection of rent for a landlord should incentivize ongoing maintenance of rental housing.

The ability to raise the implied warranty of habitability defensively is "pivotal" for the success of the implied warranty of habitability in achieving its purposes of addressing tenant conditions and addressing power imbalances between landlords and tenants.[94] It is also, obviously, the only place that the implied warranty of habitability's anti-eviction properties can be realized. When tenants facing eviction from housing with serious housing code violations do not—or cannot—raise the implied warranty of habitability, there is an increased likelihood that they will be evicted when they should not be or found liable for a judgment greater than it should be, frustrating the purposes of the implied warranty of habitability. It happens every day.

III. UNDERUSE OF THE IMPLIED WARRANTY OF HABITABILITY

The reality is that the implied warranty of habitability is not used all that much at present, and it probably never has been. Multiple studies over the past forty-five years have reached the same conclusion. As early as 1974, studies showed relatively low usage of the implied warranty of habitability. A study of San Francisco Municipal Court and San Francisco Small Claims Court for the first half of 1974 concluded that "[t]he implied warranty of habitability, established in California by *Green v. Superior Court*, is not being extensively used."[95]

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91. *See* Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 405 (1995).

92. *See id.*

93. *See* Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 551 n.61 (1992) (reporting that 78% of eviction cases in Baltimore revolved around missed rent payment of one month).

94. *See* Super, *supra* note 45, at 412.

95. Ben H. Logan III & John J. Sabl, Note, *The Great* Green *Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729, 776 (1976).

The low usage has continued to the present. It was well-documented in a recent study in New Jersey, where legal scholars found the implied warranty of habitability was raised only eighty times in approximately forty thousand eviction cases in a city known to have plentiful substandard housing,[96] a usage rate of approximately 0.2%.[97] These findings are consistent with my own experience observing countless landlord-tenant cases in person in court. The promise of the implied warranty has not been fulfilled, and it "has been underutilized to the point that some have raised doubts about its continued viability."[98]

The underutilization is particularly mysterious because we know the implied warranty of habitability can work. Studies suggest that when tenants raise the implied warranty of habitability meritoriously, they can achieve repairs in their apartments.[99]

It is possible that the implied warranty of habitability is underused because substandard housing is in short supply. However, that seems unlikely. In its most recent report, the U.S. Department of Housing and Urban Development (HUD) identified 8.3 million households as "renters with very low incomes—no more than 50 percent of the Area Median Income (AMI)—who do not receive government housing assistance and who pay more than one-half of their income for rent, live in severely inadequate conditions, or both."[100] The report does not break out how many renter households are in one group or the other, but the overall picture is not a new one: significant numbers of American families still live in substandard housing and, because they are paying so much of their income for housing, are constantly on the verge of finding themselves facing eviction for nonpayment of rent.

Given the prevalence of substandard housing and its correlation with low-income tenants—the tenants most likely to be facing eviction—and the apparent success of the implied warranty of habitability when raised, we would most likely expect to see the implied warranty of habitability raised much more frequently.[101] Instead, tenants still are routinely evicted from substandard housing when they should not be, and they are found liable for rents that they should not owe.

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96. *See* Franzese, Gorin & Guzik, *supra* note 1, at 22.

97. *See id.*

98. *Id.* at 19.

99. *See id.* at 23 ("We learned that, notwithstanding its relative paucity of use, when it is invoked the implied warranty of habitability can work to bring needed repair and improvement to otherwise substandard dwellings."); *see generally* Allan David *Heskin*, *The Warranty of Habitability Debate*: *A California Case Study*, 66 CALIF. L. REV. 37 (1978) (suggesting that the implied warranty of habitability works when used).

100. U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, WORST CASE HOUSING NEEDS: 2017 REPORT TO CONGRESS ix (2017), https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf.

101. *But see* Heskin, *supra* note 99, at 67 (reporting the results of a 1974 empirical study and concluding that the implied warranty of habitability "is being employed more often . . . than assumed").

What is the source of this underuse of the implied warranty of habitability? There are several factors that work to prevent tenants facing eviction from raising the implied warranty of habitability successfully, which fit broadly into two categories: legislative procedure obstacles and court-based obstacles.

A. Legislative Procedural Barriers

A tenant facing the threat of eviction for unintentional arrearage is likely to immediately confront procedural obstacles imposed by legislatures eager to prevent a tenant from raising the implied warranty of habitability in this very situation. Chief among them are requirements that a landlord receive notice of any condition before a tenant can claim the right to abatement, and rules requiring the deposit of contested rents in escrow.[102]

1. Required Notice of Condition and Intent to Abate

When I teach the implied warranty of habitability to my Property students, I include an element that was not part of *Javins*—notice. Modern property law generally holds that to claim the benefits of the implied warranty of habitability in the form of rent abatement, a tenant must first give the landlord written notice of any serious housing code violations.[103] This requirement was incorporated by many states as they were creating their own implied warranty of habitability.[104] Tenants often must follow complex procedures,[105] and meet unnecessarily high standards to comply with the notice requirement.

With a notice requirement, a tenant is barred from claiming a violation of the implied warranty of habitability unless they have first notified the landlord and given them time to cure the violation.[106] Notice requirements ensure that tenants cannot raise implied warranty of habitability without a decent amount of knowledge and planning and that raising the implied warranty of habitability

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102. *See, e.g.*, UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.104(d) (UNIF. LAW COMM'N 1972).

103. *See* Super, *supra* note 45, at 425.

104. *See id.* at 425 n.176, for a comprehensive list. New Mexico's rule regarding abatement, based on the Uniform Residential Landlord Tenant Act, is representative:

> If there is a violation of [the implied warranty of habitability] . . . the resident shall give written notice to the owner of the conditions needing repair. If the owner does not remedy the conditions set out in the notice within seven days of the notice, the resident is entitled to abate rent [per statutory rules] . . . .

N.M. STAT. ANN. § 47-8-27.2(A) (2019).

105. *See, e.g.*, Chernin v. Welchans, 844 F.2d 322, 324 (6th Cir. 1988) (describing the five-step process in effect in Ohio, including: (1) landlord noncompliance; (2) written notice from tenant to landlord with the specific details of landlord's noncompliance; (3) tenant gives landlord reasonable time to remedy; (4) based on landlord's response, tenant must reassess grounds for rent withholding; (5) tenant must be current in rent payments; and asserting the clerk may still require the tenant to provide an affidavit that these statutory preconditions have been fulfilled).

106. *See* Super, *supra* note 45, at 425–26.

is done intentionally and in good faith. It cannot be raised as a last-ditch effort to avoid liability for rent when facing eviction for nonpayment.

Notice requirements make it very clear that there is a "good" implied warranty of habitability claim and a "bad"[107] implied warranty of habitability claim. As discussed above, cases of tenants intentionally invoking the implied warranty of habitability by withholding rent are the exception, not the rule. By barring the use of the implied warranty of habitability as a defense in unintentional cases, notice requirements can effectively remove the implied warranty of habitability from the consideration of obligations of landlords and tenants.

Professor Bezdek describes observing the effect of notice requirements in Baltimore Housing Courts, where she describes "the practice of several rent court judges to prefer the statute's most stringent version of 'notice' of defects—a tenant's certified letter to the landlord, of which the tenant has kept a copy and the returned receipt."[108] This often leads to a tenant receiving a judgment against them for rent claimed by the landlord, despite the presumed existence of abatable conditions.[109] Arguing for their abolition, Professor Super points out that notice requirements reflect a "moral judgment"[110] rather than a reflection of principles of law. The requirement of a "good faith" withholding is not supportable under contract law, where "the standard rule . . . is that a non-breaching party need not continue to perform once the other has committed a material breach."[111] The failure of a tenant to notify the landlord of the landlord's breach "should not necessarily excuse the landlord's performance."[112]

I agree with Professor Super's rationale and his conclusions. Rules that prevent tenants from raising the implied warranty of habitability have led to what is effectively the re-creation of the power differential between tenants and landlords. These rules reinstate the archaic principle of independent covenants: tenants are literally unable to raise the implied warranty of habitability for reasons that have nothing to do with the actual conditions, and landlords can make rent-based claims without having to concern themselves with conditions. Even though the implied warranty of habitability has expressly tied the rent payment requirement to the conditions of the dwelling, notice requirements can decouple these lease covenants while serving as a bar to raising legitimate violations of the implied warranty of habitability. They should be reformed and tenants should be freed from these restrictions.

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107. *See, e.g.*, Landmarks Restoration Corp. v. Gwardyak, 485 N.Y.S.2d 917, 918 (City Ct., Westchester Cty. 1985) (awarding attorney fees to a landlord because "[t]he court is convinced from the totality of the testimony that the rent was not withheld because of the condition of the premises but rather because the tenant, unfortunately, did not have the funds with which to pay his rent.").

108. Bezdek, *supra* note 93, at 571.

109. *See id.* at 574.

110. Super, *supra* note 45, at 441.

111. *Id.*

112. *Id.*

2. Rent Deposit Requirements

Another barrier imposed by legislatures identified by scholars is the requirement that a tenant asserting breach and claiming abatement must deposit any disputed amount into escrow pending a determination by the court of the actual rental value of the premises in light of any defects.[113] This requirement has been adopted in most jurisdictions.[114]

The rent deposit is designed to reduce the risk to a landlord of "bad-faith tenants using the breach of warranty defense frivolously or as an end run around the duty to pay rent."[115] It serves to make sure that if the court finds that there is no basis for abatement of rent, the landlord can be made whole.[116] Although initially intended to be flexible in terms of how much rent, if any, a tenant might be required to deposit, "judges have tended to resort, as a matter of convenience and efficiency, to a bright-line standard requiring that full rent due continue to be paid into escrow pending the dispute's final resolution. That judicial posture has rendered the warranty less accessible."[117]

As with notice rules, the rent deposit requirement has the effect of severely hindering the tenants who are most likely to raise the implied warranty of habitability—those who were not able to pay the rent.[118] To expect that a tenant who could not pay rent to then pay the rent to the court is almost comically hopeless. Rent deposit requirements shift the balance completely in the favor of landlords in unintentional nonpayment situations.

Scholars argue that the chilling effect on use of the implied warranty means that rent deposit requirements should be "recast to allow for premises-specific determinations of whether and how much rent ought to be deposited with the court."[119] Professor Super argues that rent deposit requirements may actually be unconstitutional.[120]

Together, these procedural limitations on the use of the implied warranty of habitability seriously weaken the protections of the warranty for tenants because they prevent tenants from raising it when a tenant is facing eviction for nonpayment of rent. Any effort to revitalize the implied warranty of habitability

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113. *See* Franzese, Gorin & Guzik, *supra* note 1, at 13.

114. *See id.* at 13 n.60.

115. *Id.* at 13.

116. Professor Michele Cotton has noted that the standard practice in even the best case for tenants is to order the repairs and then, once they have been made, turn over the entire escrow amount to the landlord, ignoring any abatement for the time that the dwelling was not up to the legal standard. *See* Michele Cotton, *When Judges Don't Follow the Law: Research and Recommendations*, 19 CUNY L. REV. 57, 71 (2015). So, landlords suffer virtually no consequences for noncompliance with statutory duties, and tenants are not compensated for their time living in substandard housing. *See id.* at 78.

117. Franzese, Gorin & Guzik, *supra* note 1, at 17 (footnote omitted).

118. *See* Super, *supra* note 45, at 426 ("[F]or low-income tenants, those most likely to live in slum housing, [rent deposit rules] may effectively keep the implied warranty out of court.").

119. Franzese, Gorin & Guzik, *supra* note 1, at 36.

120. *See* Super, *supra* note 45, at 446–49.

should include elimination of these requirements when tenants are facing eviction actions for nonpayment of rent.

B. Pro Se Courts as an Impediment to the Implied Warranty of Habitability

Formal rules such as notice requirements and landlord protective orders are not the only reason that tenants do not raise the implied warranty of habitability when they are facing eviction for nonpayment. (In fact, the courts that hear landlord-tenant cases often eschew formal rules.) Tenants are also discouraged by their experience in the courts that are home to most landlord-tenant cases.[121]

Although some larger cities have specialty housing courts, in most jurisdictions, nonpayment evictions are handled by small-claims courts of general jurisdiction. These courts are uniformly high-volume courts characterized by a large percentage of unrepresented litigants, procedural informality and a tendency toward becoming "an assembly line, a collection agency with the imprimatur of the state."[122]

The high volume of eviction cases handled by landlord-tenant courts exerts tremendous pressure on judges to handle cases expeditiously and to rely as little as possible on formal procedural requirements. Complaints in evictions are usually spare documents that are short on details and typically only present the most minimal of proof.[123]

The hearings in eviction cases are usually no more procedurally robust than the pleadings. Informality reigns.[124] Proof offered—and asked for—is minimal.[125] Rules of evidence are relaxed.[126] All of these features work in service of efficiently dispossessing tenants and working to collect any rents claimed by a landlord.

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121. *See* Mark H. Lazerson, *In the Halls of Justice, the Only Justice Is in the Halls*, *in* 1 THE POLITICS OF INFORMAL JUSTICE 119, 129 (Richard L. Abel ed., 1982).

122. *Id.*

123. *See* Lynn E. Cunningham, *Procedural Due Process Aspects of District of Columbia Eviction Procedures*, 7 RUTGERS RACE & L. REV. 107, 107 (2005) (describing the typical complaint as "a half page complaint stating the landlord's conclusory allegations").

124. *See* Bezdek, *supra* note 93, at 553 n.66 (describing rent court procedures as "lax").

125. *See id.* at 570 ("As practiced in Baltimore's rent court, a person appearing at the landlord's table is virtually never asked to prove any element of his case, including the amount of rent allegedly unpaid, a lease basis for other claimed charges, authority to collect rent, or title."); Cunningham, *supra* note 123, at 131–32 (asserting that "[n]o judge ever tests the validity of plaintiffs allegations" in many landlord-tenant judgments); Super, *supra* note 45, at 436 (asserting that landlord-tenant "courts typically require less specificity than the usual level of notice pleading"); LAWYERS' COMM. FOR BETTER HOUS., NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT 14 (2003), https://www.lcbh.org/sites/default/files/resources/2003-lcbh-chicago-eviction-court-study.pdf ("Landlords are seldom required specifically to establish the elements of the prima facie case entitling them to an order of possession; judges seem to presume that they have been met. This presumption in favor of landlords seems not to have changed dramatically over time.").

126. *See* Bezdek, *supra* note 93, at 535–36.

The speed at which routine nonpayment eviction hearings take place can be hard to grasp without experiencing it. A 2003 study by Chicago-Kent College of Law found that eviction cases in Cook County averaged one minute and forty-four seconds—a dramatic drop from the (still very brief) three-minute average in their own 1996 study.[127] A trial lasting only a few minutes[128] is not enough time for meaningful compliance with rules of evidence, rules of civil procedure, and substantive law.[129]

For a tenant facing eviction for nonpayment, the script has not changed appreciably since the days before the implied warranty of habitability. A representative script is something like this:

> Judge (to Landlord): Base rent?
>
> Landlord's attorney: $1000
>
> Judge (to Landlord): Late fees?
>
> Landlord's attorney: $100
>
> Judge (to Landlord): Termination fee?
>
> Landlord's attorney: $100
>
> Judge (to Landlord): Utilities?
>
> Landlord's attorney: $100
>
> Judge (to Landlord): Court costs?
>
> Landlord's attorney: $100
>
> Judge (to Landlord): Attorney fees?
>
> Landlord's attorney: $100
>
> Judge: Ok, that's $1500.
>
> Judge (to Tenant): Is that correct?
>
> Tenant: Yes.
>
> Judge (to Tenant): Ok, judgment for Plaintiff. You have seven days to move out and I'm entering a money judgment against you for $1500.

The judge will usually have no idea whether conditions are adequate, and judgments rarely take the implied warranty of habitability into account. A hearing may be over in an instant, without ever addressing the implied warranty

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127. *See* LAWYERS' COMM. FOR BETTER HOUS., *supra* note 125, at 11.

128. Mark Lazerson gives an estimate of five minutes in New York City courts in the 1970s. Lazerson, *supra* note 121, at 125. David Super settles on a relatively leisurely nine minutes. Super, *supra* note 45, at 434 ("Nine-minute trials take the concept of 'rocket docket' to an entirely different level . . . .") (footnote omitted). Barbara Bezdek reports that in her observation in Baltimore rent court, "[c]ases in which both landlord and tenant appear typically take no more than two minutes." Bezdek, *supra* note 93, at 566.

129. *See* LAWYERS' COMM. FOR BETTER HOUS., *supra* note 125, at 5 (concluding that "hearings are excessively brief, making them appear unjust to tenants. Judges seem impatient to arrive at an outcome they regard as a foregone conclusion and do not ensure that proper judicial procedures are followed or that the tenants understand what is being done and why.").

of habitability if the tenant is not aware and prepared enough to raise an implied warranty of habitability claim.[130]

The courts that created the implied warranty of habitability handed off enforcement of the implied warranty of habitability to lower courts. However, to implement and protect the inchoate defense of failure to maintain a rental would require "considerably more judicial resources" than courts handling landlord-tenant cases devoted historically to evictions for nonpayment.[131] These courts have historically not chosen to devote their limited resources to the implied warranty of habitability with any consistency. Concerns about efficiency and judicial economy disincentivize the kind of attention that a robust enforcement of the implied warranty of habitability would require.[132]

By walking the landlord through their case, the judge can efficiently address the most likely issues to arise to get to an amount of money owed. However, courts resist helping tenants make their cases. Moving cases along in this way serves efficiency.[133] It may also reflect judicial concern about duties of impartiality and avoiding the appearance of unfairness.[134]

The procedure and atmosphere of a high-volume, fast-track court are, themselves, a powerful impediment for tenants. There has been an effort to make pro se courts less formal than courts where litigants are typically

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130. Professor Bezdek presents a local variation on this script, with her annotations of the subtext:

> Judge: "Landlord claims rent due of $297. Is that amount due?" [The issue here is whether you paid. Have you paid? If you haven't paid the man, then you lose].
>
> Tenant: "Yes" [There are numerous subtexts for this one-word reply: Yes I haven't paid; Yes that is what he claims; and, Yes you are the powerful one here].
>
> Judge: "Judgment for Landlord for possession." [Pay the landlord this amount or plan to move].

Bezdek, *supra* note 93, at 569 (alterations in original) (footnote omitted).

131. *See* Super, *supra* note 45, at 413.

132. *See id.* at 416–17. ("[I]nstead of focusing solely on adapting the courts to implement the new reforms, judges had to worry about the effect the reforms might have on their dockets, on their roles, and on the attitudes of landlords. These worries undoubtedly diminished the enthusiasm with which many courts welcomed their new roles implementing public policies against bad housing conditions and in favor of increased bargaining power for tenants.").

133. *See id.* at 414–15.

134. *See* Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 372 (2008) ("Even judges inclined to provide some assistance felt constrained by their understanding of impartiality."). *But see* Cotton, *supra* note 116, at 81–82.

> One of the reasons sometimes surmised for why tenants do so poorly in enforcing the warranty of habitability is that judges' ethical concern for maintaining impartiality impedes them from assisting tenants in establishing their cases. However, judicial concern for impartiality does not seem like a good explanation for what we saw in our research.

Id. (footnote omitted).

represented.[135] This idea applies generally to poor people's courts—poor people do not have access to lawyers, and so the courts are, in theory, accessible to them.[136] Courts relax formality in the name of allowing unsophisticated actors to participate meaningfully in a sophisticated process.[137]

In the 1980s, a robust scholarly debate about informality and justice flared briefly and then died down. Proponents of informality argued that "[f]ormal justice tends to serve the status quo."[138] Its opponents argued that informality in a system of "vastly unequal resources" would "amplify" the inequality through curtailing of procedural rights.[139]

It is easy to conclude that "informal" means "no set rules," but in practice that tends not to be the case. Eschewing formality may indeed lead to a departure from the written rules that typically guide courtroom proceedings. It cannot mean that there are no rules—it just leads to rules disguised as customary practices and folkways. Informal rules are not knowable without experiencing, on a long-term basis, the culture in which they arise. While these "soft" rules are not inherently good or bad, they are unlikely to be known by litigants—such as most tenants—who are not repeat players. Tenants are not likely to know the rules, but judges, lawyers, and landlords probably will. Tenants are worse off than if there were formal rules—they are still confronting a set of rules, just not knowable (at least not to them) or easily enforceable. As one participant in the debate noted, "the question that needs to be addressed is not whether informalism is good or bad but . . . [who] it will favor."[140] In eviction cases, the answer is that it almost always favors landlords.[141] Any theorized benefit for pro se tenants of informality has not materialized.

C. Pro Se Tenants and the Courts

In addition to considering the features of pro se courts, we should also look at the tenants themselves. Tenants are overwhelmingly unrepresented,[142]

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135. *See* David M. Trubek, *Turning Away from Law?*, 82 MICH. L. REV. 824, 829–33 (1984).

136. *See* Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. ON POVERTY L. & POL'Y. 473, 491–92 (2015) (noting that "poor people's courts" were designed based on the idea that simplified procedures reduce the need for lawyers and, therefore, make courts more accessible to the poor).

137. *See* Richard Lempert, *The Dynamics of Informal Procedure: The Case of a Public Housing Eviction Board*, 23 LAW & SOC'Y. REV. 347, 348 (1989) ("[S]mall claims court was conceived as a forum in which procedural rules were relaxed so that plain folk such as tradespeople, lodging housekeepers, and wage earners would be allowed to use the machinery of law.").

138. Lazerson, *supra* note 121, at 159.

139. *Id.*

140. *Id.* at 121.

141. *See* Richard Abel, *Informalism: A Tactical Equivalent to Law?*, 19 CLEARINGHOUSE REV. 375, 379 (1985) (noting that landlords successfully lobbied to divert evictions into informal procedural processes).

142. The usual figure quoted in New York City is that only 5–10% of tenants *have* lawyers, but only 15% of landlords *do not have* lawyers. *See* Harvey Gee, *From Hallway Corridor to*

meaning that their ability to navigate the speed, language, and structure of a courtroom is extremely low. This is a strong factor in the low rates of utilization of the implied warranty of habitability.

For starters, many pro se tenants do not know about the implied warranty of habitability. To raise an implied warranty of habitability claim successfully, a tenant must know about the implied warranty of habitability and how to apply it to their situation. If a litigant lacks knowledge, of course, they will not be able to raise a defense based on conditions. This lack of knowledge has been identified repeatedly as a problem to be overcome to save the implied warranty of habitability.[143]

Most tenant litigants who are facing eviction are not sophisticated actors or particularly knowledgeable about law. In fact, several studies indicate that the typical tenant in housing court is a poor, not particularly well-educated woman of color with children and a single income (if any).[144] It is hard to conceive of a less privileged cohort, or one less likely to have the requisite knowledge of landlord-tenant law needed to raise a sophisticated defense to nonpayment of rent.[145]

A second, more significant barrier for tenants is not knowing how to use the implied warranty of habitability in real time. It takes an especially informed and empowered tenant to respond to a judge's question about rent owed with "no, actually, the rent should be abated due to the presence of the following conditions . . ."[146] The unrepresented tenant usually lacks the ability to present

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Homelessness: Tenants Lack Right to Counsel in New York Housing Court, 17 GEO. J. ON POVERTY L. & POL'Y 87, 88 (2010). In New Mexico, where I currently practice, it is uncommon for either side to have a lawyer, even in the largest cities.

143. *See* Franzese, Gorin & Guzik, *supra* note 1; Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699, 705 (2006) ("Most cases proceed swiftly through the eviction process without the tenant ever raising available defenses or even knowing that such defenses exist.").

144. *See* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2064 (1999) (describing New York City Housing Court litigants: "Unrepresented [tenants] disproportionately are poor women of color, often with a limited understanding of English."); *id*. at 2059 (describing Boston Housing Court litigants as "poor, female, and people of color"). This is certainly consistent with my own anecdotal experience.

145. Substantive knowledge may be less of an issue than we might expect, however. Professor Bezdek notes that her interviews with tenants at Baltimore Housing Court suggest that many of them are in fact aware of the implied warranty of habitability. Bezdek, *supra* note 93, at 581 (noting that exit interviews suggested "50–60% of appearing tenants had knowledge of the specific protections the court was empowered to provide tenants"). In my experience, it is not surprising for tenants to have an idea that it is fundamentally unfair for the landlord to collect full rent on a substandard dwelling, even if they are not familiar with the legal doctrine of the implied warranty of habitability.

146. N.Y. CTY. LAWYERS' ASS'N., THE NEW YORK CITY HOUSING COURT IN THE 21ST CENTURY: CAN IT BETTER ADDRESS THE PROBLEMS BEFORE IT? 13 (2005), https://www.nycla.org/siteFiles/Publications/Publications195_0.pdf ("[A]s a general matter, *pro se*'s have difficulty in articulating or presenting their claims or defenses because the court system

a "theory of the case" or a coherent narrative structure for the case.[147] To respond to the landlord's narrative of "the tenant is shirking rent and it is the court's job to evict her" a tenant needs to be able to articulate the counter-narrative that "the landlord is obligated to maintain the dwelling but has not; therefore, the rent should be reduced accordingly, and it is the court's job to enforce that." Unsurprisingly, most tenants are not able to tell that story in the courtroom.

Pro se litigants who are poor and unsophisticated may not feel empowered to speak, even if they know what they are supposed to do in a small-claims court. Although the dirty and crowded halls of a small claims court are not intimidating to most lawyers, they are imposing projections of state power for many pro se litigants.[148] These litigants may have the right to speak to a judge, but it is not uncommon to see them stand silently while they and their families are evicted.[149]

Unrepresented tenants are not sure what they can and cannot say, and under what circumstances they might be able to get away with challenging the words of their landlord or when it is their turn to talk. When a tenant does respond to a judicial invitation to speak, they may be told that they are talking about irrelevancies or are in some other way not speaking the way they are supposed to.[150] They are unlikely to develop the kind of narrative that the court wants to hear: a "theory of the case" that focuses on the legal elements rather than the typical disjointed and rambling narrative of an unsophisticated and scared tenant trying to avoid eviction.[151] Unrepresented tenants rarely speak, and are even more rarely heard.[152]

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embodies a language and culture with which *pro se*'s are unfamiliar and in which they are untrained. In particular, members of the group noted that *pro se*'s are frequently unable to function effectively as a result of the fear they experience in a 'strange' atmosphere and they are willing to sign stipulations of settlement, no matter how unbalanced, rather than face the daunting formality of a trial.").

147. *See* Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659, 684 (2006).

148. *But see* MacDowell, *supra* note 136, at 499.

> Unlike the traditional image of an awe-inspiring and lofty court of law, poor people's courts are more akin to other places where low-income people go to seek services or resolve disputes: administrative offices and agencies where, like the courts, one is likely to find crowded and shabby waiting rooms, long waits, opaque and frustrating procedures, and a predominance of black and brown-skinned people.

Id. (footnote omitted).

149. *See* Baldacci, *supra* note 147, at 661 (noting that pro se litigants, thrust into the role of litigator, are effectively silenced).

150. *See* Bezdek, *supra* note 93, at 586 (noting that a judge who invites tenants to speak either "waits through the story or interrupts it, but at either point, tells the tenant that her remarks are irrelevant, and orders judgment for the landlord").

151. *See* Baldacci, *supra* note 147, at 684.

152. *See* Bezdek, *supra* note 93, at 578.

Tenant silence may sometimes be a deliberate and resigned choice. Professor Bezdek explains the mismatch between tenant knowledge of the implied warranty of habitability and raising it as a defense in terms of tenants being skeptical about the value of raising a claim, having seen how infrequently tenant speech leads to meaningful results.[153] When a tenant sees that landlords always win,[154] that tenants are shut down, and that implied warranty of habitability claims, if raised, are not taken seriously, then tenants understand that there is no point in raising their own claims.[155] They would have been better off staying home and packing boxes.

The implied warranty of habitability has not thrived in landlord-tenant courts, to the detriment of individual tenants and to larger public policy goals. The combination of pro se tenants and courtroom informality, concerns about impartiality, and the relentless push for efficiency lead inexorably to silencing tenants and result in evictions and judgments that should not be happening when there is an implied warranty of habitability.

The factors that have resulted in the underutilization of the implied warranty of habitability in evictions are not simply minor bugs—they undermine the entire premise of the implied warranty of habitability. Tenants are stripped of an important tool and source of protection. They are evicted when they should not be—at considerable personal and social cost.[156] They are saddled with judgments that they should not have, meaning more difficulty securing housing in the future and another impossible choice about how to allocate insufficient resources.[157]

At the same time, the elimination of the implied warranty of habitability in eviction defenses means that landlords have almost no incentive to maintain their properties. From the standpoint of a landlord who is disinclined to invest in housing maintenance, the easiest thing to do is nothing and wait. If a tenant notifies the landlord of an intention to abate, the landlord can act. Otherwise, there is no point—if the implied warranty of habitability will not be an impediment to evicting a nonpaying tenant, it may not make economic sense to maintain premises up to housing code.

The important public policies and the advances in tenant rights that were originally embodied in the implied warranty of habitability are erased every day in our courts. When tenants cannot effectively raise the implied warranty to offset rent, we have returned to the pre-modern property law of independent covenants and the power imbalance that it carried with it. The enduring inability of tenants to utilize the implied warranty as a defense in evictions represents a giant step backwards for policy goals and for tenant rights. It is an unwelcome

153. *Id.* at 591.

154. *See* LAWYERS' COMM. FOR BETTER HOUS., *supra* note 125, at 15–16.

155. *See* Bezdek, *supra* note 93, at 586–89.

156. *See* Kathryn A. Sabbeth, *Housing Defense as the New* Gideon, 41 HARV. J.L. & GENDER 55, 66–68 (2018).

157. *See id.* at 67–68.

return to the archaic days of property law and another reminder of the enduring power imbalance between landlords and tenants.

IV. REVITALIZING THE IMPLIED WARRANTY OF HABITABILITY

So, what is to be done about underuse of implied warranty of habitability and its impacts on low-income tenants and public policy? First, we should remove obstacles that prevent the assertion of the implied warranty of habitability in cases of unintentional nonpayment of rent.[158] This, while easier said than done, is a fairly straightforward prescription for revitalizing the implied warranty of habitability. Next, we must turn to the more nuanced challenge of addressing the problems related to courts and the experience of unrepresented tenants in court.

A. Lawyers for Pro Se Tenants

Scholars focusing on solving the problem of unrepresented litigants often call for an expansion of access to lawyers. The idea is self-evident, and quite easy to understand: litigants will have better outcomes when they have lawyers than when they do not. Studies have generally borne this out,[159] although not without some caveats.[160]

In the landlord-tenant arena, studies yield similarly unsurprising results: represented tenants have better outcomes.[161] This has consistently led to calls for increasing access to lawyers for tenants facing eviction.[162] Some scholars have argued that the interests at stake are so important, and the law so

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158. *See* discussion *supra*, Part III.

159. *See* Tonya L. Brito et. al., *What We Know and Need to Know About Civil* Gideon, 67 S.C. L. REV. 223, 237 (2016). "[T]he majority of these studies have supported commonsense notions about the importance of representation in court. In general, they find that being represented in court is positively correlated with winning cases." *Id.* (footnote omitted).

160. Some observers have cautioned against relying too heavily on these studies:

> Because they study outcomes of civil litigation, but not the process, outcome-based, statistical models alone cannot provide the empirical base necessary for creating evidence-based policy and intervention. While they can retroactively tell us *whether or not* a legal aid intervention has affected case outcomes, they cannot tell us *how* that intervention did or did not make a difference. Those questions remain a "black box" in the model.

Id. at 238.

161. *See* Gunn, *supra* note 91, at 413; Karl Monsma & Richard Lempert, *The Value of Counsel: 20 Years of Representation Before a Public Housing Eviction Board*, 26 LAW & SOC'Y REV. 627 (1992); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2001).

162. *See* Scherer, *supra* note 143, at 710; Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187, 190 (2009); Franzese, Gorin & Guzik, *supra* note 1, at 43 ("[P]ublic and private sector lawyers, the organized bar, law schools, and tenant empowerment groups must be enlisted to serve to link the assurances of the implied warranty of habitability to landlord rent entitlements.").

specialized and complicated, that "people who face losing their homes in legal proceedings must have a right to be represented by counsel in those proceedings."[163]

The argument for the right to counsel in eviction cases traces its roots to a 1988 article by Andrew Scherer.[164] Relying on the balancing test laid down by the Supreme Court in *Mathews v. Eldridge*,[165] Scherer argued that tenants have property interests in their dwellings that they cannot be deprived of without due process.[166] Scherer argued that the property interest was so strong that due process could not be adequately protected without access to counsel in an eviction proceeding.[167] This reasoning has largely been the foundation for subsequent arguments for the right to counsel in eviction proceedings.[168] Providing lawyers would at a single stroke reduce or eliminate problems associated with tenant lack of knowledge and lack of familiarity with the courtroom. The benefits of a right to counsel in eviction cases would go beyond the courtroom as well, such as preventing displacement, decreasing homelessness, and preserving affordable housing.[169]

A single-minded focus on the right to counsel in eviction cases is not without its limitations. It may not adequately address the wide range of concerns of low-income tenants—a narrow, technical solution to eviction only addresses one of many problems they face.[170] And, because the right to counsel in evictions focuses on defensive action, it is necessarily reactive and often comes too late to address real issues.[171] Even so, the push for a right to counsel in eviction cases has justly attracted significant attention from scholars for quite some time.

The hope for finding a constitutional right to counsel for individuals facing eviction suffered a serious blow at the Supreme Court in 2011 in *Turner v.*

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163. Scherer, *supra* note 143, at 700.

164. *See* Andrew Scherer, Gideon*'s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 557 (1988).

165. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) ("First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

166. Scherer, *supra* note 164, at 564.

167. *See id.* at 562.

168. *See* Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J.L. & SOC. PROBS. 527, 543–44 (1991); Rachel Kleinman, *Housing* Gideon*: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507, 1511–12 (2004).

169. *See* Sabbeth, *supra* note 156, at 85–88.

170. *See* MacDowell, *supra* note 136, at 476–77.

171. *See* Sabbeth, *supra* note 156, at 110. With this in mind, Kathryn Sabbeth argues persuasively for the value of appointing "affirmative lawyers" for tenants. *See id.* at 63.

Rogers.[172] In *Turner*, a South Carolina court ordered Mr. Turner jailed for contempt after he was found not to have paid child support.[173] The judge "spent less than five minutes, made no findings on the record, [and] left the form incomplete . . . ." [174] Mr. Turner was unrepresented in his child support case, and argued to the Supreme Court that South Carolina did not provide sufficient protections to his liberty interest.[175]

The Supreme Court found that, while due process was violated by South Carolina, Mr. Turner had no right to an attorney in his civil proceeding.[176] The Court reasoned that his due process rights could have been protected by adequate "substitute procedural safeguards" consistent with a *Mathews* property interest analysis.[177] The Court went on to identify four procedural protections,[178] that, taken together, could "significantly reduce the risk of an erroneous deprivation of liberty. . . . without incurring some of the drawbacks inherent in recognizing an automatic right to counsel."[179]

The Court deemed these sufficient to protect the interest at stake—in this case, Mr. Turner's liberty.[180] The meaning and impact of *Turner* has been hotly debated by scholars,[181] but it is clear that an interest in retaining rental housing does not give rise to the level of due process protection that would require a right to counsel.

Of course, *Turner* does not prevent states and cities from implementing their own rules. In 2017, New York City became the first jurisdiction[182] to guarantee a right to counsel for tenants facing eviction when it passed Intro 214-B.[183] Similar initiatives are underway or planned in Philadelphia[184] and San

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172. Turner v. Rogers, 564 U.S. 431 (2011).

173. *See id.* at 436.

174. Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 160 (2011).

175. *Turner*, 564 U.S. at 438.

176. *See id.* at 448.

177. *Id.* at 447.

178. These procedural protections are:

> (1) [N]otice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.

Id. at 447–48.

179. *Id.* at 447.

180. *Id.* at 448.

181. *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 (2013).

182. *See* Sabbeth, *supra* note 156, at 59.

183. N.Y.C., N.Y., Ordinance Int. 0214-2014-B (Aug. 11, 2017) (codified at N.Y.C. ADMIN. CODE §§ 26-1301 to -1305 (2019)).

184. *See Philadelphia Eviction Prevention Project (PEPP)*, PHILLYTENANT.ORG (Dec. 17, 2019), http://www.phillytenant.org/pepp.

Francisco.[185] The outcomes of these municipal initiatives will go a long way in determining the impact of providing counsel to all tenants in eviction cases.

In the context of the implied warranty of habitability, it is self-evident that having a lawyer would help many tenants raise it in an eviction defense, overcoming many of the court-based obstacles to its assertion. Lawyers may not be able to solve all of the problems facing low-income tenants in eviction proceedings, but they would surely be able to identify appropriate cases for assertion of the implied warranty of habitability and then to assert the defense appropriately. There is no obvious downside to providing counsel in these cases.

For most municipalities, however, even those with the political will to support tenants, the right to counsel remains impractical due to cost.[186] Lawyers are resource intensive, and a right to counsel requires an ongoing commitment to funding them. Because we cannot rely on this commitment with any certainty at present, it is important to develop solutions other than the right to counsel to protect the interests of low-income tenants.

B. Court-Based Reform and the Implied Warranty of Habitability

The literature around access to justice for pro se litigants has historically been dominated by calls for more access to lawyers, but there are of course other options. As one critic has asked, "[W]hy is it that the answer to . . . [concerns about pro se litigants] is always more lawyers?"[187] The importance of non-lawyer reform took on increased salience after *Turner*, but scholars have long argued for the development of innovative, testable reforms at the courthouse level.

By focusing on sustainable, one-time systemic fixes, we would allocate scarce resources more efficiently. Compared to lawyer-based reform, "[i]f a systematic effort were made to simplify the law and procedure in courts with large pro se dockets, it could improve outcomes in those courts and do more for the poor than a guarantee of counsel, all at less cost."[188] Rather than attempting to solve this problem with more lawyers, "we should see [the current pro se

185. *See How Will San Francisco's Tenant Right to Counsel Legislation Work in Practice?*, TENANT L. GROUP (Feb. 20, 2019), https://www.tenantlawgroupsf.com/blog/2019/february/how-will-san-francisco-s-tenant-right-to-counsel.

186. However, there is some evidence that it is actually more cost-effective to provide lawyers to low-income tenants than to incur the social and financial burdens that arise when these tenants are evicted. *See* Sabbeth, *supra* note 156, at 60.

187. Benjamin H. Barton, *Against Civil* Gideon *(and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1269 (2010). Professor Barton has forcefully pushed back against civil *Gideon*, pointing out that *Gideon* has "hardly guaranteed equal access to the courts for the poor." *Id.* at 1230. He argues that the state of the criminal justice system "is bad enough that any civil *Gideon* advocate should think twice before importing a broken criminal system into our civil courts." *Id. See also* Cotton, *supra* note 116, at 87 ("[More lawyers] does not seem to be the most promising option for improving the situation.").

188. Barton, *supra* note 187, at 1233.

crisis] as an opportunity to make American law simpler, fairer, and more affordable."[189]

Professor Jessica Steinberg uses the term "demand side reform" to describe an approach that does "not rely on supplying attorneys or legal assistance to upgrade the abilities of litigants. Instead, it focuses on dismantling barriers put in place by procedural and evidentiary rules, and by narrow conceptions of the judicial role, so that pro se parties can compete more effectively within the court system."[190] This requires a focus on removing technical obstacles and incorporating changes that reduce the need for technical ability and that make application of reforms automatic.[191]

The conversation about pro se court reform is a lively and ongoing one. And it is not merely theoretical—as Benjamin Barton notes, "the pro se court reform train is warmed up and leaving the station."[192] Courts and scholars are moving in the direction of pro se reform to address the reality of pro se litigants in courts across the land.[193]

These same principles can inform the development of meaningful reforms that revitalize the implied warranty of habitability and its important protections. Historically, efforts to assist tenants to take advantage of the protections of the implied warranty of habitability have been in the area of affirmative tenant action, rather than using implied warranty of habitability as a defense. Small-scale innovations like forms for notifying a landlord that a tenant intends to abate rent are common.[194] On a larger scale, reform has included specialized courts with the mission of helping tenants pursue repairs from landlords,[195] although these are limited to larger cities.

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189. *Id.* at 1234.

190. Steinberg, *supra* note 12, at 788 (footnote omitted).

191. *See* Cotton, *supra* note 116, at 88 ("[T]he adoption of routinized court processes that 'automatize' the application of law can improve both the speed and correctness of decision-making."); *see also* Super, *supra* note 45, at 413.

192. Barton, *supra* note 187, at 1270.

193. *See id.* at 1270–72.

194. See, for example, the form promulgated by the New Mexico Metropolitan Court, which tracks the statute as to affirmative raising of the implied warranty of habitability. N.M. COURTS, RESIDENT'S SEVEN-DAY NOTICE OF ABATEMENT OR TERMINATION OF RENTAL AGREEMENT, https://s3.amazonaws.com/realfile3016b036-bbd3-4ec4-ba17-7539841f4d19/d121645d-bccf-4962-b31d-29b77adf7521?response-content-disposition=filename%3D%22Rule+4-902A+-+Resident%27s+Seven-Day+Notice+of+Abatement+or+Termination+of+Rental+Agreement+-+CV-107.pdf%22&response-content-type=application%2Fpdf&AWSAccessKeyId=AKIAIMZX6TNBAOLKC6MQ&Signature=%2BjqsHdoN7vVy9vP4zpDFnvD2n2I%3D&Expires=1590783895 (last visited May 29, 2020).

195. The Housing Conditions Court is an experimental "fix-it court" with the goal of "getting repairs made." Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 LAW & SOC. INQUIRY 1058, 1063 (2017). The court has responsibility to help a tenant through the process of making and pursuing a conditions-based claim, including investigation and enforcement of any remedies. *Id.*

Missing from any discussion of reform, however, is the reality that we are most likely to see implied warranty of habitability is in the defensive context. It is there that we should be looking at demand-side reforms and how they would play out.

These reforms must focus on helping tenants facing eviction for unintentional nonpayment of rent assert this important right. It is clear from the experience of the past forty years that we cannot rely on low-income tenants to raise and enforce the implied warranty of habitability. Changes will need to address pro se tenants' lack of legal knowledge and inability to craft compelling narratives in the courtroom. Reforms will also need to overcome the obstacles created by the courts themselves that silence tenants. Reform should make tenant knowledge less important, prevent retaliation, overcome procedural barriers, and, of course, make sure the defense is raised in meritorious situations. Super argues that "the system's operation should be as automatic as possible" to avoid reliance on low-income tenants.[196]

C. Proposals for Reform

I propose two reforms that, together, would make it significantly likely that the implied warranty of habitability would function as intended as a policy tool and a tenant right: (1) requiring landlords seeking to evict a tenant for nonpayment to plead whether or not there are any conditions that would abate the rent owed; and (2) requiring judges to make specific findings about conditions in any nonpayment eviction.

1. Pleading Requirements that Elicit Implied Warranty of Habitability Information

First, specific pleadings should be required in nonpayment eviction cases.[197] To support a claim of rent owed, a landlord should be required to plead as to the existence of any conditions that would lead to an abatement of rent.

In conjunction with landlord pleading requirements, specific forms for tenants highlighting the implied warranty of habitability would make the right more robust. I imagine a form answer, included with any summons or complaint, alerting the tenant as to the landlord's claims about conditions and asking the tenant to respond with a list of any serious conditions and their duration. The form would also indicate the value of bringing proof to court on the day of trial.

Requiring a pleading as to compliance with the implied warranty of habitability was briefly debated—and then apparently forgotten—in New York

196. Super, *supra* note 45, at 462.

197. Not every eviction case is for nonpayment of rent, of course, but my proposal only covers nonpayment cases. Other types of breaches—conduct based, for example—are less likely to be impacted by the implied warranty of habitability. A tenant will have a reduced rent obligation if a landlord does not comply with the implied warranty of habitability, but no landlord-implied warranty of habitability breach will affect whether a tenant can have loud parties every night, for example.

City courts in the earliest days of the warranty. Tenants apparently raised the failure to plead compliance as a defense to nonpayment eviction, with mixed results. One court determined that requiring an allegation of compliance "would operate unnecessarily in many instances to jeopardize the summary nature of summary proceedings. The issue of compliance would be introduced in every case even though neither party desired to raise it."[198] That same year, another New York City court disagreed, reasoning:

> The practical effect of [requiring a landlord to plead compliance with the implied warranty of habitability compliance] is not prejudicial to the petitioner. Certainly this is the case, where the premises are concededly habitable and safe. Should the petitioner be aware that conditions of the premises are violative of [the implied warranty of habitability], then this requirement prudently forewarns the owner to remedy the conditions prior to commencement of a non-payment proceeding, consistent with the law and public policy. The foregoing acts as a deterrent to certain landlords who are unwilling to provide proper upkeep for their properties without penalizing those with a history of proper maintenance.[199]

The disagreement between the courts was resolved by New York appellate court in 1982, holding that there was no requirement to plead compliance with the implied warranty of habitability,[200] and there the matter seems to have rested in terms of judicial determinations.[201]

Professor Lynn Cunningham has provided a persuasive argument for reading existing rules of procedure for evictions in Washington, D.C. to require a landlord in a nonpayment case to plead "whether or not the tenant rent was fully or partially abated as a result of the landlord's violation of the statutory warranty of habitability."[202] Professor Cunningham supports his argument by noting that a "landlord cannot seriously contend that the tenant holds without right if the landlord has provided a unit that is seriously out of compliance with the housing code standards, leaving no rent due."[203] I find this reasoning persuasive, and I will add that in addition to possession, eviction cases usually address outstanding rents due. A landlord cannot seriously argue the right to rent in a particular amount if the implied warranty of habitability would operate to reduce that amount. Requiring pleadings that address habitability is appropriate to support claims for possession as well as rent due.

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198. Maryanov v. Peters, 409 N.Y.S.2d 691, 692 (Civ. Ct. 1978).

199. Hous. Realty Corp. v. Castro, 404 N.Y.S.2d 796, 798 (Civ. Ct. 1978).

200. *See* Atl. Westerly Co. v. De Almeida, 461 N.Y.S.2d 143, 144 (App. Term 1982) (holding that "to our view the court in *Houston Realty Corp. v Castro* erred in casting as a jurisdictional requisite to nonpayment proceedings a requirement that nonpayment petitions allege compliance with the warranty of habitability."). It appears that this was the last court to address the question in a written decision.

201. *See id.*

202. Cunningham, *supra* note 123, at 113.

203. *Id.* at 113 n.16.

A pleading requirement that alerts the court to important tenant rights is not without precedent. For example, New York City courts require pleadings in eviction cases that indicate the city rent regulation rules that apply to the dwelling—not to bar evictions one way or another, but because the court needs that information to properly follow the law.[204] It is not the tenant's burden to alert the court as to the appropriate rent regulations to apply. Similarly, the implied warranty of habitability should not depend on tenants to inform the court of potential issues—the warranty is an important element of public policy, but landlords currently have a strong disincentive to raise it. It can only increase justice if each party clearly states their position on important relevant aspects of a proceeding.[205]

Pleading requirements requiring a landlord to address compliance are also consistent with contract law, which disfavors a claim of breach of contract by a party that is itself breaching the contract. Ancient ties to property law notwithstanding, a modern nonpayment eviction case is primarily a breach of contract case.[206] The elements of a breach of contract claim, while not the same in every state, are broadly the same. In many states, a complaint for breach of contract must contain four elements: (1) there was a contract, (2) the complaining party complied with the contract, (3) the other party did not comply, (4) the complaining party suffered damages due to the other party's breach.[207]

While noncompliance with the implied warranty of habitability may not necessarily be fatal to a nonpayment eviction, it is appropriate to require a landlord alleging breach by a tenant to plead whether or not they have complied with all aspects of the lease—including the warranty that is implied in every residential lease.

Like any pleading, the landlord's allegations (and the tenant's response) will need to be proven at trial. Landlords wishing to avail themselves of the court's power to dispossess a tenant should have to follow up their required pleadings by proving the condition of the dwelling and the rental value of the dwelling in support of any claim for rents due and unpaid.

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204. *See* 251 E. 119th St. Tenants Ass'n v. Torres, 479 N.Y.S.2d 466 (Civ. Ct. 1984) (stating that the need to plead rent regulatory status is jurisdictional, but it is most important at time of judgment in determining what will happen).

205. *See* Cunningham, *supra* note 123, at 145 (arguing that clear and accurate complaints in eviction cases mean that "the court will be forced to operate more fairly").

206. *See id.* at 133.

207. *See, e.g.*, Oasis W. Realty, LLC v. Goldman, 250 P.3d 1115, 1121 (Cal. 2011) ("[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff."); Smith Int'l, Inc. v. Egle Grp., LLC, 490 F.3d 380, 387 (5th Cir. 2007). "In Texas, '[t]he essential elements of a breach of contract action are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach.'" *Id.* (quoting Valero Mktg. & Supply Co. v. Kalama Int'l, LLC, 51 S.W.3d 345, 351 (Tex. App. 2001)).

2. Express Judicial Findings

In addition to revised pleading requirements, judges should be required to make a finding on conditions in every lawsuit—for possession or damages—based on nonpayment of rent. First, courts should expressly find whether there are or have been any conditions during the term of the lease that are (or were) serious violations of the relevant standard under the implied warranty of habitability—usually the local housing code. Second, courts should make an express determination of the rental value of the dwelling during any period of nonpayment. Together, these findings would lead to an accurate determination of the rent actually owed and how it relates to the amounts claimed by the landlord. This would convert judges from passive observers into active agents to develop the facts in the case.

In the absence of any investigation, pleading requirements simply become pro forma and, if tenants are not savvy enough to read the pleadings or raise an answer (and, as we have seen, they often do not know how or when to raise anything in court), this could be little more than a speed bump on the way to eviction. When judges have a duty to make a finding, however, there will be actual discussion of conditions.[208]

Because conditions are crucial to a determination of the amount of rent due and/or evictability in nonpayment cases, a determination about conditions should be a part of every nonpayment eviction case. A judicial finding would require a judge to elicit a story about conditions, inquire about statements from pleadings, take evidence into account and determine whether there is an implied warranty of habitability problem or not, and how that affects rent.

A requirement to make specific findings is not a radical idea. The Supreme Court in *Turner* identified making "express finding[s]" as one of the alternative procedural safeguards that could protect the right of an unrepresented litigant.[209] In a nonpayment eviction case, a pro se tenant is likely to need procedural safeguards that prevent unwarranted eviction from their home. Requiring a judge to affirmatively investigate and make findings about conditions that are relevant to rent owed protects tenant rights and advances the policy goals of the implied warranty of habitability.

This will present some new questions related to evidence and summary proceedings—specifically, how can a court conduct a full inquiry while complying with summary proceeding requirements? It seems likely that there will be cases in which the court needs more evidence. The court should adjourn and ask for more evidence from the parties—it would take very few instances of this sort of adjournment before landlords learned to be prepared to prove their claims about conditions at the first hearing.

208. For example, the 2004 University of Chicago-Kent study found that when tenants were not asked about defenses, they raised it only 9% of the time. That rate rose to 55% when the judge asked about defenses. LAWYERS' COMM. FOR BETTER HOUS., *supra* note 125, at 4.

209. Turner v. Rogers, 564 U.S. 431, 448 (2011).

D. Impact of Proposed Reforms

The impact of these reforms would be diffuse. They would revitalize the implied warranty of habitability and its impact on the lived reality of low-income tenants. They would also transform the experiences of pro se litigants facing eviction for nonpayment.

First, my proposed reforms would more strongly incentivize landlords to provide housing that is up to code. With the current ability to blithely disregard the implied warranty of habitability removed, landlords would have to re-calibrate their calculation of how much to comply with housing codes. Tenants would be the beneficiaries of renewed attention to housing codes and improved residential conditions. Strengthening the impact of the implied warranty of habitability by incentivizing landlord compliance would benefit tenants before they ever go near a courthouse or need a lawyer.

For tenants facing eviction for nonpayment, the changes would be more dramatic and visible. At the pre-trial phase, pleading requirements that explicitly address conditions will alert tenants to the importance of this issue, possibly spurring them to collect evidence. At a minimum, the tenant will know what the landlord intends to say about conditions and can prepare accordingly.

These changes let tenants know what the landlord is going to say about the conditions. Tenants are more likely to say something about conditions when they disagree with a landlord's assertion about the conditions. They are also more prepared to discuss their case—and more likely to have proof—if they understand that the landlord is likely to disagree with them. This leads to real fact finding or brings us closer to it than waiting for this important issue to arise organically in the courthouse.

Once a tenant arrives in court, there would be a new script that is dramatically different from what we see now. I imagine it would begin something like this:

> Judge (to Landlord): So you are claiming that the tenant owes you $800 per month in rent for the past three months. Now, it says here that there are no conditions that violate the housing code/implied warranty of habitability. Is that correct?
>
> Landlord: Yes.
>
> Judge (to Tenant): Do you agree that there are no violations?
>
> Tenant: Not at all. That place is in terrible condition. We have no heat, the toilet doesn't work right, and we have cockroaches.
>
> Judge: And how long have these conditions existed?
>
> Tenant: For several months.
>
> Judge (to Landlord): Ok. Landlord, what proof do you have related to what the tenant has claimed?

The most obvious impact of requiring judicial findings about implied warranty of habitability compliance is that it would no longer require tenant knowledge of the implied warranty of habitability to have it be present in every case in which a landlord is seeking to evict a tenant for nonpayment of rent.

A "passive" approach obviates the need for tenants to be aware of the implied warranty of habitability. Any lack of tenant knowledge—when knowledge is required to enforce the implied warranty of habitability—undermines the policy goals of the implied warranty of habitability. By putting the onus on landlords, tenant knowledge of the implied warranty of habitability is irrelevant, or at least seriously minimized as a factor.

In addition, when the implied warranty of habitability is made part of the case automatically and there is a judicial finding requirement, there is no need for a tenant to know when or how to be able to raise the issue in the courtroom. It is raised for them in the pleadings, and again by the court when a judge makes the necessary inquiry into conditions as part of their specific finding requirement. The tenant will no longer carry the burden of crafting an appropriate narrative for the court—that will be the court's job.

These changes mean there is no need to worry about informal procedure undermining the rights of unrepresented tenants.[210] Instead, they go the other direction: they introduce a sort of hyper-formality with respect to conditions and the implied warranty of habitability that protects the interests of individual tenants.

A requirement of judicial findings also addresses judicial concerns about impartiality—it is hardly partial to engage in required fact-finding. These concerns may be unwarranted regardless in light of an increasing openness to judicial participation in protecting pro se litigants.[211]

These proposals would also reduce concerns about retaliation and blacklisting. One of the issues with the implied warranty of habitability is the potential for retaliation when a tenant gives a landlord notice of their intent to abate.[212] This presumably has a chilling effect on the availability of the implied warranty of habitability as a defense in eviction proceedings.[213] Automatically making the implied warranty of habitability a part of any nonpayment eviction proceeding incentivizes landlord compliance in all units, theoretically reducing the need for tenants to notify the landlord of problems—and, therefore, significantly reducing the fear of retaliation.

By making conditions an issue, the judge will have more opportunity and incentive to think about conditions during an eviction proceeding. It allows the court to fashion the correct remedy in terms of how much rent is actually due and owing. This is important for its own sake, of course. But we also need to be mindful of the need for safeguards that protect pro se tenants from unlawful eviction as informed by *Mathews* and *Turner*. It is not clear whether my

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210. *See* Steinberg, *supra* note 12, at 788 (arguing for "formal and specific rules that govern litigation" in pro se courts).

211. *See* Engler, *supra* note 181, at 45 ("[T]he attitudes toward the roles of judges . . . have undergone a sea change over the past fifteen years. The increased emphasis at conferences and trainings on judges playing an active role in protecting the rights of litigants and the publication of materials to guide judges in actively assisting litigants while remaining neutral reflect this reality.").

212. *See* Franzese, Gorin & Guzik, *supra* note 2, at 39.

213. *See id.* at 40–41.

proposals would go far enough to satisfy *Mathews*, but they are a step in that direction.

One source of friction is likely to come from courts. Courts will understandably be concerned about anything that slows down the already overcrowded eviction docket. And these reforms will assuredly add time to the proceedings—although perhaps not very much in every case.[214] Even so, we can anticipate judges having to take more time to address conditions and to make judicial findings. However, it may not be quite as bad as it might seem initially. These proposals would have a chilling effect on filings: landlords of dwellings with multiple or severe conditions would be slowed in their willingness to start eviction proceedings.[215] The resulting reduction in caseload could theoretically offset the additional time required in each individual case.

I do not want to overstate what can be accomplished with court-based technical reforms that promote the use of the implied warranty of habitability. Even in a best-case scenario, the implied warranty of habitability is not going to address key concerns of the tenant rights movement such as housing affordability and security of tenure. The implied warranty of habitability is primarily a tool to lift the worst housing in America to a minimum standard as a matter of public policy, and its effects on other important problems faced by low-income tenants is limited. It should be seen as one tool among many—including rent control, good cause eviction rules, prohibitions on blacklisting, provision of counsel to tenants facing eviction, and others.

At the same time, I want to be careful not to understate the importance of the implied warranty of habitability. Millions of American households are living in precarious and substandard rental housing.[216] By protecting these tenants in a way that incentivizes landlord maintenance of rental housing, the implied warranty of habitability still has an important role to play in promoting tenant rights and public policy. It is a small but essential piece in the larger fight for tenant rights.

The value of any reform lies in its actual impact on the lives of the low-income people who are the intended beneficiaries of the implied warranty of habitability.[217] The proposals in this Article are no different. They should be subjected to rigorous study to determine whether they have the intended impact, and whether that impact is sufficient to justify the imposition of new duties on landlords and courts. Armed with that knowledge, we can accurately assess the value of continuing to rely on the implied warranty of habitability as a tool to

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214. Possibly not—there are of course going to be many times when tenants and landlords agree that the conditions are fine. Of course, this might be a new area for retaliation/concern if, for example, a tenant is worried about being blacklisted.

215. *But see* Cotton, *supra* note 116, at 86 (arguing that better justice for tenants would lead to *more* use of the courts by tenants). However, Professor Cotton is describing a situation in which tenant-initiated housing condition cases received judicial support, in contrast to the landlord-initiated process of eviction.

216. *See* Indritz, *supra* note 40, at 94.

217. *See generally* Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J.L. & SOC. CHANGE 295 (2009).

protect tenants and promote the important public policy goal of ensuring that all tenants live in housing that meets our societal standards.

CONCLUSION

Regulating rental housing conditions is an important public policy goal that has proven elusive from its inception. As a result, millions of American tenants still live in conditions that we as a society have deemed substandard. Despite our best efforts, we have not been able to regulate these conditions out of existence. The problem, from a tenant's (or tenant advocate's) perspective, is that we have made it too challenging for tenants to enforce housing regulations.

The creation of the implied warranty of habitability was supposed to change all of that. Instead, it has proven to be wildly inefficient and ineffective as a tool for tenants. Although scholars may debate the value of a fully functional implied warranty of habitability, the reality has been anything but fully functional—we cannot draw even the most basic of conclusions about the effects of the implied warranty of habitability because it is used so little. Despite the lack of use, meaningful reforms to the implementation of the warranty have not materialized. They have hardly been discussed.

As more jurisdictions are seeing the value of helping unrepresented tenants and providing counsel, there has not been a parallel effort to identify court-based reforms that may be more sustainable and cost-effective, especially in smaller cities and rural areas. To promote the important societal goal of making sure that everyone has decent housing, we need to consistently advance new ideas, assess their impact, and respond accordingly.

Simple changes to the eviction process can transform the court experience for unrepresented tenants and allow them to meaningfully enforce their right to decent rental housing. Better housing has manifold benefits for tenants, and it is our responsibility to make sure that our systems are designed to allow even the poorest tenants to participate in those benefits.