

THE IMPLIED WARRANTY OF HABITABILITY LIVES: MAKING REAL THE PROMISE OF LANDLORD-TENANT REFORM

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Abstract

The implied warranty of habitability is an implicit promise that every residential landlord makes to provide tenants with premises suitable for basic human dwelling. Tenants can assert breach of the warranty affirmatively, in a suit against a landlord for providing substandard housing, but most often they assert the breach defensively in the context of a landlord's eviction proceeding against the tenant for non-payment of rent. Still, national data suggests that, notwithstanding its placement in the firmament of modern landlord-tenant law, few tenants actually assert breach of the implied warranty of habitability, whether affirmatively or defensively. Even in housing markets fraught with substandard rental dwellings, the warranty is underutilized. This Article endeavors to examine that lapse in the context of nonpayment of rent proceedings initiated by landlords in Essex County, New Jersey. Significantly, of the more than forty-thousand eviction proceedings brought there in 2014, only eighty tenants asserted breach of the implied warranty of habitability as a defense.

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The authors are indebted to Lloyd Garner of the New Jersey Office of Court Administration and Michael Eisner, Essex County Court Attorney, Jomini Chu, Timothy Chessher, and Dolores Bujnowski for their immensely helpful assistance. This Article was presented at the 2016 Progressive Property Conference and the Peterschein Scholarship Forum. The authors thank the participants for their valuable input.

The authors used that field to learn more about the efficacy of the defense and, when raised successfully, its capacity to prompt the remediation of on-site defects. They found that, notwithstanding its relative paucity of use, when invoked, the implied warranty of habitability can and does work to bring needed repair and improvement to otherwise substandard dwellings. Indeed, in more than half of the cases surveyed, the implied warranty of habitability was used successfully to cure housing code violations on leased premises. Moreover, irrespective of whether the defense succeeded or failed, the majority of tenants who did assert it stated unequivocally that they would resort to it again if faced with significant on-site infirmities. The warranty deserves an important place in the stock of affirmative actions and defenses available to aggrieved tenants. The considerable challenge is to remove obstacles to its assertion, whether in the form of onerous rent deposit requirements, the absence of centralized databases for courts and rent subsidizing agencies to use when making decisions regarding substandard premises' eligibility for continued government subsidies in view of their given defects, the subversive practice of "tenant blacklisting," the scarcity of effective assistance of counsel, or tenants' lack of awareness of their basic rights.

INTRODUCTION

In the canon of modern landlord-tenant law, the implied warranty of habitability ("the warranty") is a staple in the arsenal of tenant-protective measures. We teach it in our property classes, where our students learn that a residential tenant confronted with substandard living conditions can plead breach of the warranty affirmatively in a suit for on-site defects but is most likely to assert a breach defensively in response to a landlord's suit for non-payment of rent.¹ They read that

1. Indeed, in the landmark case *Javins v. First National Realty Corp.*, 428 F.2d 1071, 1072-73, 1081 (D.C. Cir. 1970), which incorporated the warranty of habitability into every residential lease, the warranty was raised defensively. See 43 AM. JUR. 3D *Proof of Facts* 329, § 2.5 (1997); see also Deborah H. Bell, *The Mississippi Landlord-Tenant Act of 1991*, 61 MISS. L.J. 527, 528 n.5 (1991) ("Most low-income tenants only use the warranty of habitability as a defense to a suit by the landlord. Few tenants have representation to bring affirmative actions against landlords for a violation of an act."); C. Stephen Lawrence, *George Washington University v. Weintraub: Implied Warranty of Habitability*

the warranty, a product of judge-made and statutory law in the overwhelming majority of the United States, provides that in every residential lease the landlord implicitly promises to provide tenants with habitable premises for the duration of the lease.² We tell tenants that this implied promise is deemed so essential to the cause of dignified dwelling that it is non-waivable.³ Any attempt by a landlord to extract from the tenant a modification, displacement, or waiver of the guarantee is deemed a nullity and is repugnant to public policy.⁴

What we tend to omit from the doctrinal discussion is this: even in rental markets known to be fraught with unsafe housing, few tenants actually plead breach of the implied warranty of habitability, whether affirmatively or defensively.⁵ The warranty is seldom asserted, even in

as a (*Ceremonial?*) *Sword*, 33 CATH. U. L. REV. 1137, 1138 (1984) ("Defensive use of the implied warranty of habitability is its most common application.").

2. See Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 504-05 (1982); see also 43 AM. JUR. 3D *Proof of Facts* 329, § 6 (1997).

3. See *Foisy v. Wyman*, 515 P.2d 160, 164 (Wash. 1973) (en banc) (declining to enforce a tenant's waiver of the warranty for a discount in rent). See generally Katheryn M. Dutenhaver, *Non-Waiver of the Implied Warranty of Habitability in Residential Leases*, 10 LOY. U. CHI. L.J. 41, 60 (1978) (noting that the benefit of implied warranty of habitability for tenants who need its protections "far outweighs the interest of law in contractual freedom").

4. See Dutenhaver, *supra* note 3 at 58-59; see also 43 AM. JUR. 3D *Proof of Facts* 329, § 16.6 (1997) (providing cases in which waivers of the warranty were found void).

5. See Allan D. Heskin, *The Warranty of Habitability Debate: A California Case Study*, 66 CALIF. L. REV. 37, 42-43 (1978) ("The legal services program had maintained an office in the study area for ten years prior to the commencement of this study. During the study period the staff was composed of five attorneys, three paralegals, three secretaries and numerous volunteers. The intake of the office for this period was 4,193 cases, a 24% increase over the previous year. Three hundred and eighty-one of the cases involved landlord-tenant disputes. Of these cases, 245 represented tenants eligible for legal services assistance living within the study area. In this group there were forty-eight warranty clients. These tenants lived in thirty-nine buildings owned by thirty-four landlords. . . . Three judges sit for the branch of the municipal court that serves the study area. One of these judges hears most of the landlord-tenant cases. Six hundred and seven civil cases were filed in this branch of the court during the study period. Of these, 206 were unlawful detainer actions involving property within the study area. Only eleven answering pleadings were filed, ten by legal services attorneys and one *in propria persona*. None of the cases resulted in a trial. Unlawful detainer actions are not accepted in small claims court in this jurisdiction."); see also Ben H. Logan, III & John J. Sabl, Note, *The Great Green Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729, 744 (1976) ("During the period examined, the implied warranty of habitability was pled as an affirmative defense in 56 cases constituting 4 percent of all unlawful detainer actions and representing 27 percent of all contested unlawful detainer actions filed in that court for the 5-month period in question."); David A. Super, *The Rise*

congested venues known to be rife with substandard rental housing.⁶ This Article examines that counter-intuitive premise in the context of nonpayment-of-rent proceedings initiated by landlords against residential tenants in densely-populated Essex County, New Jersey.⁷ Essex County is a racially and ethnically diverse vicinage that includes a significant percentage of rental housing in its cities and suburbs.⁸

and Fall of the Implied Warranty of Habitability, 99 CALIF. L. REV. 389, 406–07 (2011) (concluding that a tenant's propensity to raise the implied warranty of habitability and the probability that a tenant in a decrepit housing unit will raise it depends on three factors: that the tenant knows about the warranty, knows how to raise it, and decides that raising it would be in his or her best interest).

6. See Paula C. Murray, *The Evolution of Implied Warranties in Commercial Real Estate Leases*, 28 U. RICH. L. REV. 145, 173 (1994) (“One of the strongest rationales for creating an implied warranty of habitability in residential tenancies was the issue of health hazards to persons living in substandard housing.”); see also Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793, 813–14 (2013) (“The cases that are perhaps most similar to those that led to the adoption of the implied warranty of habitability, are those that allege slumlord conditions. These properties have numerous substandard conditions. The conditions include both structural and physical conditions of the property. Typically the facts of these cases are also particularly egregious. For example, in the seminal case of *Pines v. Persson*, the premises were in such disrepair that the landlord did not tell prospective tenants that he had previously resided on premises because he was embarrassed to admit that he had lived in such conditions. In *Hilder v. St. Peter*, another often-cited case, the tenant faced among other things broken windows, inoperable toilets, inadequate electrical wiring, and an overwhelming odor of raw sewage. More recently, slumlord condition cases continue to be surprisingly common. Since 2005, there were fourteen cases dealing with properties with slum conditions, 29% of the total cases where a breach of the implied warranty was found. Furthermore, the facts are no less egregious than some of the early cases. In a 2008 case from the District of Columbia, a housing inspection report found: ‘electrical deficiencies, ineffective heating, rotting structures, basement flooding, and rodent infestation.’ In a California case the court found a gas leak (resulting in period without heat and hot water), no stove, the floor in bathroom was caving in, the toilet leaked a foul smelling liquid, there were problems with electricity, and gaps between the floor and wall that allowed rats and spiders into the apartment.” (quoting *Chibs v. Fisher*, 960 A.2d 588, 589 (D.C. Cir. 2008))).

7. According to the U.S. Census Bureau, Essex County, New Jersey had a population of 797,434 as of July 1, 2015, and Newark, New Jersey, has a population of 281,944. *Quick Facts, Essex County, New Jersey*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/34013,3451000,00> (last visited Oct. 26, 2016). As of April 1, 2010, 42.6% of Essex County residents were black, 33.8% were Hispanic, and 23% were Caucasian. *Id.*

8. In Essex County, New Jersey, during the 2014 calendar year, there were 277,745 occupied housing units, of which 125,432 were owner-occupied and 152,313 were renter-occupied. See *American FactFinder, QuickFacts, Essex County, N.J.*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045215/34013,3451000,00>. 54.8% of the housing units in Essex County were renter occupied. *Id.*

Seventy-seven percent of the dwellers in its largest city, Newark, live in rental housing.⁹ Yet, of the more than forty-thousand residential eviction proceedings brought in 2014 in Essex County, only eighty asserted breach of the implied warranty of habitability as a defense.¹⁰ That figure is startling, revealing that the defense was raised in only *0.2% of residential eviction actions*, notwithstanding the far-greater statistical likelihood that significant housing code violations exist on leased premises in Essex County.¹¹ This Article endeavored to understand why the implied warranty of habitability defense is not raised more frequently in so hard-pressed an environment.

This Article used those eighty cases in which breach of the warranty was asserted to learn more about its efficacy as a defense and its capacity to prompt the remediation of on-site defects when raised successfully. Our findings are encouraging in some respects. We learned that, notwithstanding its relative paucity of use, when raised meritoriously, the implied warranty of habitability can function to bring needed repair and improvement to otherwise substandard dwellings.¹² In more than half of the cases surveyed, it was used successfully to cure housing code violations.¹³ In those cases, landlords completed repairs to remediate bug and rodent infestations, mold, lack of insulation, absences of heat and hot water, broken door locks, and defective appliances.¹⁴ Moreover, irrespective of the defense's success, the vast majority of tenants invoking it stated unequivocally that they would resort to it again if faced with significant on-site defects.¹⁵

9. As of April 1, 2010, there were 109,520 housing units in Newark, and 22.3% of those housing units were owner occupied, meaning that 85,097, or 77.7%, were rental units. *Quick Facts, Newark City, New Jersey*, U.S. CENSUS BUREAU, <http://census.gov/quickfacts/table/PST045215/3451000,34013,00> (last visited Oct. 26, 2016).

10. Lloyd Garner, Esq., Civil Division Manager of the Office of Court Administration, Superior Court of New Jersey, Essex Vicinage: Public Information Request (received Apr. 7, 2015) (on file with author).

11. As of 2007, the U.S. Department of Housing and Urban Development (HUD) estimated that 430,000 unassisted very low-income renters (out of a total population of about 300 million) lived in severely substandard housing. U.S. DEP'T OF HOUS. & URBAN DEV., HUD STRATEGIC PLAN FY 2010–2015, at 18 (2010), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_4436.pdf; see also MICHAEL N. DANIELSON & JAMESON W. DOIG, *NEW YORK: THE POLITICS OF URBAN REGIONAL DEVELOPMENT* 302 (1982) (providing that in the late 1960s, 40,000 of Newark's 136,000 housing units were classified as substandard, which was the highest proportion of any major U.S. city).

12. See *infra* note 86 and accompanying text.

13. See *infra* note 86 and accompanying text.

14. See *infra* note 86 and accompanying text.

15. See *infra* note 86 and accompanying text.

When raised, the implied warranty of habitability can, and does, work. It deserves to have an important place in the stock of devices available to aggrieved residential tenants. Still, the authors found significant obstacles to tenant assertion of the defense. Those barriers include onerous rent deposit requirements,¹⁶ the absence of centralized databases for courts and rent subsidizing agencies to use when making decisions regarding substandard premises' eligibility for continued government subsidies in view of their given defects, the subversive practice of "tenant blacklisting," the scarcity of effective assistance of counsel,¹⁷ and tenants' lack of awareness of their basic rights.¹⁸

16. See *infra* note 86 and accompanying text.

17. See 144 Woodruff Corp. v. Lacrete, 585 N.Y.S.2d 956, 958–59 (N.Y. Civ. Ct. 1992) (citing a variety of early studies confirming that "landlords are represented in approximately eighty to ninety percent of summary eviction proceedings, while tenants are unrepresented in all but ten to fifteen percent of such proceedings"). A University of California, Berkeley School of Law study found that tenants with counsel were ten times more likely to prevail in court than tenants without counsel. REBECCA HALL, EVICTION PREVENTION AS HOMELESSNESS PREVENTION: THE NEED FOR ACCESS TO LEGAL REPRESENTATION FOR LOW-INCOME TENANTS 2 (1991); D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 919–20, 927 (2013) (discussing the results of a randomized Massachusetts District Court study which stated that tenants with an attorney retained possession of their dwellings twice as often as tenants who had limited attorney assistance); 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 L. & SOC'Y REV. 419, 423, 426–27 (2001) (discussing the results of a randomized New York Housing Court study of tenants without attorneys which showed that they were twice as likely to have final eviction orders entered against them in court); Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 483–84 (2011) (reporting on the results of a study which found that represented tenants were nearly four times more likely to retain possession of their homes than unrepresented tenants); see also CMTY. TRAINING & RES. CTR. & CITY-WIDE TASK FORCE ON HOUS. COURT, INC., HOUSING COURT, EVICTIONS AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL 13 (1993) [hereinafter CMTY. TRAINING], <http://cwtfhc.org/wp-content/uploads/pdf/donaldson.pdf> (finding that 11.9% of tenants in New York City Housing Court were represented by an attorney and 97.6% of landlords were represented by an attorney); N.Y. CTY. LAWYERS' ASS'N, REPORT: THE NEW YORK CITY HOUSING COURT IN THE 21ST CENTURY: CAN IT BETTER ADDRESS THE PROBLEMS BEFORE IT? 12 n.1 (2005) [hereinafter LAWYERS' ASS'N REPORT], http://cwtfhc.org/wp-content/uploads/2009/06/NYCLA_HC_in_21st_Cent.pdf ("[P]ractitioners in Housing Court estimate that 90 to 95 percent of tenants are unrepresented by counsel, whereas 85 percent of landlords are represented. The great majority of unrepresented litigants are poor or low income."). See generally Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 763–64 (1994) ("The Committee reported that landlords file over 400,000 new proceedings in the New York City Housing Court, producing nearly 30,000

I. THE IMPLIED WARRANTY OF HABITABILITY: THEORETICAL AND DOCTRINAL ANTECEDENTS

While the specific contours of the implied warranty of habitability vary from jurisdiction to jurisdiction, it universally requires that leased residential dwellings be suitable for human dwelling.¹⁹ Every residential landlord implicitly promises in the lease that basic living requirements will be met for the duration of the leasehold.²⁰ The appropriate standard for habitability is typically supplied by both local housing code and case law.²¹ A breach of the implied warranty of habitability has been found when, for example, leased premises are without heat in the winter, running water, or plumbing in good working

eviction orders against tenants. Approximately eighty to ninety percent of landlords are represented by attorneys in such proceedings, whereas only ten to fifteen percent of the tenants have lawyers to counsel them. Not surprisingly, the overwhelming majority of evictions involved unrepresented tenants—while in cases handled by pro bono attorneys, no evictions occurred.”).

18. See 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, 702 (2006) (“An unrepresented tenant is sorely disadvantaged because he or she likely does not have the specialized knowledge required to maneuver through the morass of the Housing Court.”); see also Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL’Y REV. 385, 414 (1995) (“[L]egal services tenants were far less likely to default on the terms of their settlement agreements—for example, by failing to make required use and occupancy payments or by failing to vacate on time—than unrepresented tenants. Only twelve percent of the legal services tenants who related settlement agreements with their landlords defaulted, while thirty-four percent of the unrepresented tenants defaulted.”); H. Thomas Wells, Jr., *Different Ways to Make A Difference Lawyers Can Aid Access to Justice Through Pro Bono, Advocacy and Financial Support*, 95 A.B.A. J. 9, 9 (2009) (“[A] recent study showed that when tenants are represented by lawyers, only 22 percent are evicted, while 51 percent of unrepresented tenants are evicted.”); LAWYERS’ COMM. FOR BETTER HOUS., NO TIME FOR JUSTICE: A STUDY OF CHICAGO’S EVICTION COURT 4 (2003), <http://www.lcbh.org/images/2008/10/chicago-eviction-court-study.pdf> (“Of 763 cases observed, both parties were represented by legal counsel in only 33 instances (4% of the cases). Tenants were represented by counsel approximately 5% of the time when they were present at the hearing. . . . While judges typically asked tenants whether they had paid the rent, judges only asked tenants if they had a defense in 27% of the cases. When the judge did ask for a defense, tenants presented a defense 55% of the time. If the judge didn’t ask for a defense, tenants presented a defense only 9% of the time.”).

19. Glendon, *supra* note 2, at 504–05.

20. Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, 5 (1979) (citing Restatement (Second) of Property § 5.1 (1977)).

21. *Id.* at 6–7, 12.

condition.²² Those are the sorts of infirmities deemed fundamentally incompatible with the implied promise that leased premises are fit for habitation.

An aggrieved residential tenant confronted with a landlord's breach of the implied promise to provide habitable premises has a range of remedial devices available to her. That tenant is within her rights to remain in possession and sue the landlord affirmatively for money damages occasioned by the breach,²³ move out and thereby terminate the lease,²⁴ make the repairs herself and deduct their costs from future rent ("repair and deduct"),²⁵ or reduce or withhold rent until the court can assess the premises' fair rental value in view of their defects.²⁶ Typically, to show her good faith (i.e., that she is not inventing an unwarranted claim as a means to avoid paying rent), the tenant must deposit some or all of the withheld rent with the court until the matter

22. *Id.* at 29, 47; see 43 AM. JUR. 3D *Proof of Facts* 329, § 13 (1997).

23. 5 THOMPSON ON REAL PROPERTY § 41.06(a)(6)(ii) (David A. Thomas ed., 2d ed. 2015) ("Breach of the implied warranty of habitability will also expose the landlord to liability for damages, whether or not the lease is terminated. The tenant may assert a claim for damages in a direct action against the landlord or by means of a counterclaim in the landlord's action for unpaid rent." (citing *Lemle v. Breeden*, 462 P.2d 470 (Haw. 1969))).

24. *Id.* § 41.06(a)(6)(i) ("There is general agreement among the courts that a breach by the landlord of the implied warranty of habitability entitles the tenant to terminate the lease and to avoid liability for future rent." (citing *Lemle v. Breeden*, 462 P.2d 470 (Haw. 1969); *Boston Hous. Auth. v. Hemingway*, 293 N.E.2d 831 (Mass. 1973); *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984))).

25. In *Marini v. Ireland*, 265 A.2d 526, 535 (N.J. 1970), the New Jersey Supreme Court established the doctrine of "repair and deduct," meaning that if a landlord fails to make repairs and/or replacements of vital facilities necessary to maintaining the premises in a livable condition for a period of time adequate for making such repairs and/or replacements, the tenant has the right to complete such repairs and/or replacements and deduct their cost from future rent. See THOMPSON ON REAL PROPERTY, *supra* note 23, § 41.06(a)(6)(iv) ("Several courts have indicated that the tenant has a self-help remedy for breach of the implied warranty of habitability: the tenant may repair the defect in the leased premises, and deduct the repair costs from future rent.").

26. THOMPSON ON REAL PROPERTY, *supra* note 23, § 41.06(a)(6)(iii) ("It has generally been recognized, in jurisdictions that have adopted the implied warranty of habitability, that the tenant may remain in possession following the landlord's breach of the implied warranty, cease making payments of rent, and assert the landlord's breach in a counterclaim to the landlord's action to recover rent, or as a defense to the landlord's action to recover the leased premises based on nonpayment of rent. If it is determined that the landlord has breached the implied warranty of habitability, the result will be a judicially approved reduction, or abatement, of the tenant's rental obligation. In most situations, this will probably be the most important remedial option available to a tenant.").

is adjudicated.²⁷

While firmly a part of the modern canon, the implied warranty of habitability is a relatively recent newcomer to the storied annals of landlord-tenant law.²⁸ Prior to the second half of the twentieth century, courts anchored their views of leasehold interests in a more agrarian or rural conceptualization whereby the lease conferred merely a possessory interest in land.²⁹ Any structures atop the land were largely beside the point.³⁰ The landlord was deemed to make no implied promises regarding dwellings on site.³¹ Instead, the governing norm was *caveat lessee*, or tenant beware.³² That paradigm yielded results in practice and in the case law that disproportionately favored landlords.³³

Over time, the landlord-tenant landscape moved from a rural to a principally urban base.³⁴ That demographic shift from agrarian to metropolitan, coupled with a larger emerging social and political consciousness concerning the marginalized and the poor, yielded a set of

27. *Id.* ("Rent withholding, and the tenant's ability to assert a breach of the implied warranty as a defense in the landlord's summary eviction proceedings, do involve potential economic risks for landlords. In the first place, permitting implied warranty claims to be addressed in summary eviction proceedings means that the proceedings may proceed less summarily, postponing the time when the landlord may obtain possession, or recover the unpaid rent, assuming that the landlord is able to do so. Second, even if the landlord does prevail on the breach of warranty issue, the tenant may have no money to pay the back rent. This risk may be reduced by the use of procedures, approved in many jurisdictions, by which the tenant 'escrows' all or a portion of withheld rent pending a resolution of the breach of warranty claim." (citing *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1083 (D.C. Cir. 1970); *Green v. Superior Ct.*, 517 P.2d 1168, 1182 (Cal. 1974); *King v. Moorehead*, 495 S.W.2d 65, 77 (Mo. Ct. App. 1973); RESTATEMENT (SECOND) OF PROPERTY § 11.3, cmt. e (1977))). "Some summary possession statutes also provide procedures under which the landlord may seek payment of accruing rent into the court during the pendency of the action." *Id.* (citing Cal. Civ. Proc. Code § 1170.5; Ohio Rev. Code. Ann. § 1923.061(B)).

28. See generally Charles Donahue, Jr., *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV. 242, 242-45 (1974) (discussing the shortcomings of the U.S.'s development of landlord-tenant law).

29. See 2 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 16B.03[1] (Michael Allan Wolf ed., 2000).

30. *Id.*

31. *Id.*

32. See generally Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 521 (1984) (explaining the "revolutionary" changes of American landlord-tenant law between the 1960s and 1980s).

33. See generally Myron Moskowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1446 (1974) (describing the benefits of landlords enjoyed before the adoption of the warranty).

34. See Donahue, *supra* note 28, at 245-46.

reforms intended to level the landlord-tenant playing field.³⁵ With the advent of the implied warranty of habitability in 1970, aggrieved tenants were given a significant basis upon which to proceed when confronted with substandard on-site living conditions.³⁶ Simultaneously, other tenant-protective mechanisms such as the implied covenant of quiet enjoyment³⁷ and the doctrine of retaliatory eviction³⁸ were developed to protect against landlord malfeasance.

The U.S. Court of Appeals for the District of Columbia Circuit's seminal 1970 ruling in *Javins v. First National Realty Corp.*³⁹ emphatically announced the arrival of the implied warranty of habitability. Reversing centuries-old precedent, the court famously found "a warranty of habitability . . . is implied by operation of law into leases of urban dwelling units . . . and that breach of this warranty gives rise to the usual remedies for breach of contract."⁴⁰ *Javins* acknowledged that outdated doctrines based on feudal property law

35. See, e.g., UNIF. RESIDENTIAL LANDLORD & TENANT ACT (UNIF. L. COMM'N 1972) (amended 1974), amended by REVISED UNIF. RESIDENTIAL LANDLORD & TENANT ACT (UNIF. L. COMM'N 2015) (providing tenant-protective measures in a uniform act to which all states were urged to subscribe), http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/RURLTA%202015_Final%20Act_2016sep12.pdf.

36. See Rabin, *supra* note 32, at 1445–47.

37. See POWELL, *supra* note 29.

38. *Retaliatory Eviction of Tenant for Reporting Landlord's Violation of Law*, 23 A.L.R. 5th 140, § 2[a] (1994) ("In the landmark case of *Edwards v Habib*, it was first judicially recognized that retaliatory eviction can be a defense against a landlord's possessory action, based in part, on the recognition that the social goal of promoting decent housing would be frustrated if tenants could not report their landlords' violations of housing laws without the fear of reprisal in the form of retaliatory eviction. Likewise, retaliatory eviction statutes tend to be founded on the principle that tenants should be encouraged to come forward and report code violations without fear of reprisal from the landlords, coupled with the recognition that the enforcement mechanism of housing laws alone is ineffective in preventing unsafe and inhabitable living conditions, and that permitting the threat of eviction would have the tendency to stifle justifiable complaints, and thereby frustrate the purpose of housing laws, which is to provide safe housing."); see also GREGORY G. DIEBOLD, N.J. INST. CONTINUED LEGAL ED., LANDLORD-TENANT PRACTICE (PRACTICAL SKILLS SERIES) 40 (2014) ("N.J.S.A. 2A:42-10.10 prohibits any eviction or substantial alteration of a tenancy because of the tenant's (1) attempt to enforce or secure any rights under the lease or contract or under the laws of New Jersey; (2) good faith complaint to a governmental authority about alleged violation of any health or safety law or regulation; or (3) involvement in any lawful organization's activity. The statute covers all residential tenancies except owner-occupied premises with two or less rental units. If any such actions are taken within ninety (90) days of the tenant activity, a rebuttable presumption that the landlord's action is retaliatory is established.").

39. 428 F.2d 1071 (D.C. Cir. 1970).

40. *Id.* at 1072–73.

principles “that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society” but were no longer applicable “in the case of the modern apartment dweller.”⁴¹ Writing for the court, Judge Skelly Wright described the primary value of the lease to the modern dweller as providing a tenant with a place to live.⁴² That tenant has little interest in the underlying land itself; rather he seeks a “well known package of goods and services” that goes beyond the floors, walls, and ceilings and extends to “adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.”⁴³ Accordingly, the lease is best viewed not as the grant of a possessory interest in land but instead as a contract.⁴⁴

Once the lease was reframed as a contract, it was not a significant leap to impute implied warranties to its accompanying provisions. Contracts can contain both express and implicit warranties.⁴⁵ Indeed, contracts for the sale of goods render express warranties enforceable and impose an implied warranty of merchantability when a merchant sells a good, whether in the form of a blender, a car, or any other movable thing.⁴⁶ Surely, the *Javins* court reasoned, if a blender comes with an implicit assurance that it will be suitable for its intended purposes, a residential lease should come with the tacit promise that the residence will be fit for human dwelling.⁴⁷ Moreover, the modern city dweller—unlike the “jack-of-all-trades” farm tenant of old—typically is without either the ability or the expectation that she would be responsible for significant on-site repairs.⁴⁸

Javins’ procedural context is significant. While the court noted that an allegation of breach of the implied warranty of habitability could be raised either affirmatively or defensively by an aggrieved tenant,⁴⁹ the landlord filed suit for possession of the premises due to a tenant’s

41. *Id.* at 1074.

42. *Id.*

43. *Id.* at 1074–75.

44. *Id.* at 1075.

45. The Uniform Commercial Code enforces express warranties or affirmative representations of fact made by sellers of goods. U.C.C. § 2-313 (AM. LAW INST. & UNIF. LAW COMM’N 2015). The statute also imposes implied warranties of merchantability on merchant sellers, § 2-314, and in certain instances an implied warranty that goods will be fit for their particular or specific purpose. *Id.* § 2-315.

46. *Id.* § 2-314.

47. 428 F.2d at 1075.

48. *Id.* at 1078.

49. *Id.* at 1073 n.3.

nonpayment of rent.⁵⁰ In response, the court ruled that a "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 accordance with local housing regulations.⁵¹ An aggrieved tenant would hence be relieved of the duty to pay rent until the on-site deficiencies were remediated and the premises restored to habitable condition.⁵²

Social justice reformers and tenants' advocates heralded the advent of the implied warranty of habitability with great hopefulness.⁵³ It was welcomed as a means to essentially deputize tenants as "private attorney[s] general,"⁵⁴ affording them the capacity on a case-by-case basis to raise the floor of habitability for residential dwellings.⁵⁵ Disappointingly, however, the warranty's application waned in the decades after the doctrine was announced.⁵⁶ Some attribute its diminished use to its failure to secure actual repairs to substandard premises.⁵⁷ Through that lens, the doctrine is viewed as "a complicated, litigation-based procedure to secure temporary rent reductions, not a

50. *Id.* at 1082.

51. *Id.*

52. *See id.*

53. *See* Lawrence, *supra* note 1 at 1137-38 ("In view of the increasing importance of residential leases, courts have developed legal doctrines to protect the lessee from the unscrupulous lessor. The implied warranty of habitability is the most recent of these doctrines. The landmark case of *Javins v. First National Realty Corp.* incorporated an implied warranty of habitability into every residential lease in the District of Columbia."); *see also* Eric T. Freyfogle, *The Installment Land Contract As Lease: Habitability Protections and the Low-Income Purchaser*, 62 N.Y.U. L. REV. 293, 299 (1987) ("In *Pines v. Persson*, the Wisconsin Supreme Court initiated a wave of reform by holding that landlords implicitly warranted the habitability of their premises at the commencement of a lease. Judge Skelly Wright carried the idea a major step forward in *Javins v. First National Realty Corp.*, by extending the habitability warranty from the beginning of the lease throughout the entire term.").

54. Federal Appellate Court Judge Jerome Frank first developed the concept of a private attorney general. *See, e.g.*, Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 L. & CONTEMP. PROB. 179, 182 (1998) (citing *Associated Indus. v. Ickes*, 134 F.2d 694 (2d Cir. 1943), *vacated*, 320 U.S. 707 (1943)).

55. An army of private attorneys general best describes the supplement to municipal code enforcement efforts that occur when individual tenants raise the warranty of habitability as a defense in non-payment cases.

56. *See generally* Super, *supra* note 5 (expounding the failure of the tenants' rights revolution to adequately address the unresponsiveness of courts and transformation of the housing market).

57. *See, e.g.*, Mary M. Zulack, *If You Prompt Them, They Will Rule: The Warranty of Habitability Meets New Court Information Systems*, 40 J. MARSHALL L. REV. 425, 427 (2007).

tool for actually making premises habitable.”⁵⁸ Others point to the fact that the vast preponderance of residential low- and moderate-income tenants are without effective assistance of counsel to assert breach of the warranty.⁵⁹ Still others cautiously cite to the requirement’s formidable barrier, subsequently imposed since *Javins*, that a tenant who alleges breach of the warranty must deposit withheld rent into escrow until the court can assess the premises’ rental value in view of its defects.⁶⁰

The rent deposit requirement emerged to mitigate the possibility of bad-faith tenants using the breach of warranty defense frivolously or as an end run around the duty to pay rent.⁶¹ As initially conceived,⁶² the

58. *Id.* at 428.

59. 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, 703–04 (2006). (“People facing eviction proceedings without lawyers are far more likely to be evicted than similarly situated people represented by counsel. Yet most tenants appear in New York City’s Housing Court without counsel, while most landlords have representation. A 1993 study found that counsel represented fewer than 12% of the tenants appearing in the Housing Court, while over 97% of the landlords were represented. The gross disparity in representation is due largely to the extreme poverty of most tenants appearing in the Housing Court. As of 1993, 47.9% of the tenants appearing in the Housing Court had annual incomes under \$10,000, and only 18% had incomes greater than \$25,000.”).

60. See Super, *supra* note 5, at 426; see also Michele Cotton, *When Judges Don’t Follow the Law: Research and Recommendations*, 19 CUNY L. REV. 57, 71 (2015) (“Another form of relief to which tenants are entitled under law is an abatement of rent paid into escrow to reflect the lower value of the housing in its defective condition. However, judges almost never (only three times that we saw) abated the amount of rent to be deposited into escrow. That was so even though most tenants apparently established factual entitlement to abatement, and even though the rent escrow law puts the burden on the landlord to show cause why an abatement should not be granted. We only observed one case where the judge asked the landlord why the rent should not be abated. Judges usually ignored or refused tenants’ fairly frequent explicit requests to abate the rent going into escrow. The norm was instead for the judge to assume that the rent going into escrow would not be abated, or even to state explicitly that it could not be abated.”); Sharon Y. Vaughn, *Project: Special Project on Landlord-Tenant Law in the District of Columbia Court of Appeals: Protective Order.*, 29 HOW. L.J. 127, 128, 130 (1986) (“The use of the term ‘protective order’ is peculiarly unique to the District of Columbia. Most jurisdictions refer to a protective order as a deposit of rent into the registry of the court. Although the various terms encompass the same concept, the District of Columbia’s protective order procedure was initially designed to protect the landlord. As evidenced by the foregoing discussion, the development of the protective order in the District of Columbia was through judicial channels. In other jurisdictions [such as Ohio, Pennsylvania, New York, and Oregon] the use of protective orders was statutorily enacted.”).

61. See Bruce Zucker, *Green Perseveres: The Implied Warranty of Habitability Enters the 21st Century in California*, 20 T. JEFFERSON L. REV. 277, 302 (1998) (“The California Legislature also began its retreat from this doctrine by limiting its use. In 1996, it

requirement intended to give courts the latitude and discretion to decide on a case-by-case basis whether all, some, or no portion of rent should be placed into escrow pending the matter's resolution.⁶³ For example, a court could order that a reduced amount be deposited, based

implemented the Pretrial Rent Deposit Pilot Project in several California courts seeking to limit the 'abuses and delays' caused by tenants who 'frivolously' raise the implied warranty of habitability as an affirmative defense to an unlawful detainer action."); Super, *supra* note 5, at 428–29 ("The courts establishing LPOs appear to have little understanding of how these orders impact low-income tenants. While courts devote pages of meticulous legal reasoning to support their recognition of the implied covenants, they impose LPO requirements, often virtually without explanation, in a paragraph or a footnote, generally as dictum. Some tenants' advocates shared this lack of understanding, themselves suggesting LPOs. Some courts and commentators cannot resist moralizing at tenants invoking the new defenses, calling LPOs necessary to demonstrate *their 'good faith.'*" (emphasis added)).

62. Those jurisdictions include: Alabama, ALA. CODE § 35-9A-405(a) (2016); Arizona, ARIZ. REV. STAT. ANN. § 33-1365(A) (2016); Connecticut, CONN. GEN. STAT. ANN. § 47a-14h(h) (West 2016); Florida, FLA. STAT. ANN. § 83.60(2) (West 2016); Georgia, GA. CODE ANN. § 44-7-75(a) (West 2016); Hawaii, HAW. REV. STAT. ANN. § 521-78(a) (2016); Kentucky, KY. REV. STAT. ANN. § 383.645(1) (West 2016); Montana, MONT. CODE ANN. § 70-24-421(1) (West 2015); Nevada, NEV. REV. STAT. ANN. § 118A.490(1) (West 2015); New Hampshire, N.H. REV. STAT. ANN. § 540:13-d(II) (2016); Ohio, OHIO REV. CODE ANN. § 5321.07(B)(1) (West 2016). *See also* Chernin v. Welchans, 844 F.2d 322, 324 (6th Cir. 1988) (describing Ohio's five-step procedure to raising the warranty as a defense, including rent deposits). Still, those states cited above, along with others, embrace a more nuanced approach to the question of just how much withheld rent must be placed into escrow, allowing for equity-based calculations by the court depending upon the particular facts and circumstances.

63. *See* Super, *supra* note 5, at 429, 431 ("Rationales offered for LPOs expose fissures between the various purposes of the underlying reforms. For example, those focused on the instrumental goal of housing improvement view LPOs as creating a pool of money for repairs. This suggestion—that rent excused under the implied warranty should repair the landlord's building—certainly clashes with the redistributive goal, and low-income tenants may face pressing humanitarian needs for which that money could prove vital. And requiring the buyer to pay the purchase price to a breaching seller to correct the latter's noncompliance is hardly standard in contract law. At most the 'repairs pool' argument might justify *post-judgment* escrowing of that portion of the rent not abated under the implied warranty. The argument most striking in its resistance to the new regime, however, was that LPOs were needed to reduce the number of tenants asserting the new habitability defense. . . . The failure of many jurisdictions to specify the penalty or response for a tenant's failure to make payments required under an LPO, and a procedure for imposing that penalty or response, suggests that many judges and legislators are so far removed from the condition of low-income tenants that they cannot imagine noncompliance. Although LPOs delay-preventing rationale would make an accelerated trial on the merits a logical response to nonpayment of escrow, a number of jurisdictions refuse to allow tenants to raise their defenses, deny tenants jury trials, or issue 'default judgments' for landlords.").

on its preliminary determination as to the premises' condition or the aggrieved tenant's showing of expenses already incurred to remediate on-site deficiencies.⁶⁴ Alternatively, a court could decline to impose any rent deposit requirement at all in view of its findings as to the condition of the given premises.⁶⁵

Over time, and in part as a response to the demands of overcrowded dockets, the bounds of judicial discretion with respect to the rent deposit requirement narrowed.⁶⁶ Rather than determine, on a fact-

64. By statute in New York, for example, the court has the ability to authorize a lower rent deposit requirement depending on the nature of the violations at issue and the funds already spent by tenant to remediate. See N.Y. REAL PROP. L. § 235-b(3)(b) (McKinney 2016). The statute also allows for a minimum civil penalty to be assessed in appropriate circumstances. See N.Y. MULT. DWELL. L. § 328(3) (McKinney 2016) ("In any action or proceeding before the housing part of the New York city civil court either (a) the visually displayed or (b) the printed computerized violation files of the department responsible for maintaining such files and all other computerized data as shall be relevant to the enforcement of state and local laws for the establishment and maintenance of housing standards, including but not limited to the name, address and telephone number of the present owner of the building and whether or not he is a member in good standing of the rent stabilization association or registered pursuant to the emergency tenant protection act of nineteen hundred seventy-four or the rent stabilization law of nineteen hundred sixty-nine where one or more dwelling units therein are subject to the rent stabilization law, shall be prima facie evidence of any matter stated therein and the courts shall take judicial notice thereof as if same were certified as true under the seal and signature of the commissioner of that department.").

65. See Super, *supra* note 5, at 432 ("[V]ery few low-income tenants appear to receive relief based on the implied warranty of habitability and related doctrines (such as constructive eviction and retaliatory eviction). Because they sharply reduce the expected value of pursuing those defenses, LPOs likely are a significant contributor to the low rate of relief granted to low-income tenants. When Detroit's Landlord-Tenant Court made the right to a trial by jury conditional on compliance with LPOs, a year-long study found that not one of the more than 20,000 tenants appearing unrepresented received a jury trial. Furthermore, both the burden of LPO payments and the risk of suffering the penalties for noncompliance are considerably greater for the poorest tenants and for those with the most serious repair problems. Conversely, LPOs provide the greatest benefit to the least responsible landlords: those who fail to maintain their units—and thus who would be most likely to lose in a trial on the merits—and those willing to act ruthlessly to drive an assertive tenant from her or his dwelling. LPOs therefore directly undermine the repair-forcing, redistributive, and humanitarian goals of the tenants' rights revolution.").

66. See Cotton, *supra* note 60, at 80–81 ("In addition, we saw cases where tenants were whipsawed and unable to assert claims based on their housing conditions at all: told by a judge when sued by the landlord for nonpayment of rent that a defense based on housing code violations was not permitted because such a claim was supposedly exclusive to the rent escrow action, but then unable to make the claim affirmatively in a rent escrow action because of failure to deposit the amount of alleged arrears (or the judgment amount resulting from the faster-moving nonpayment case). For example, in a nonpayment case, a judge instructed a tenant to take her problem with the conditions to a

separate rent escrow action, and then granted the landlord a judgment against the tenant in the full amount of the alleged arrears. The judge overseeing the rent escrow case would not consider the tenant's request for damages for the violation of the warranty of habitability, despite the inspection report indicating eight housing code violations, five of which were serious, because she was unable to first deposit the amount of the judgment against her with the court. The judge then dismissed the rent escrow case, leaving the tenant unable to have warranty claims considered by either court. We even saw a few instances where judges gave landlords judgments against tenants in the amount of alleged unpaid rent in rent escrow cases—even in a case where the tenant defaulted and had no notice that by filing a rent escrow petition she was exposing herself to a judgment in whatever amount the landlord claimed was past due rent.”); *see also* Super, *supra* note 5, at 434–38 (“A wide variety of courts, using a wide variety of procedures, handle eviction cases. Studies of the new landlord-tenant regime’s implementation further vary in methodology and in quality. Their conclusions, however, are strikingly consistent. Each step required to raise and favorably resolve claims relating to disrepair has proven problematic. First, the new substantive regime did not appear to increase the number of eviction cases filed. This suggests that few tenants are withholding rent deliberately to bring the issue of repairs to court. Second, the judicial resources applied to the average case are quite modest. Nine-minute trials take the concept of a ‘rocket docket’ to an entirely different level, and the number of jury trials has remained extremely small. Third, a huge fraction of eviction cases never reach open court. Landlord-tenant courts have extremely high default rates. Courts depend on default judgments to control their dockets and design procedures to obtain them whenever possible, typically requiring no motion or affidavit—which pro se landlords might not know how to produce—before entering a default judgment. In addition, court personnel and landlords’ lawyers induce most tenants to concede in formal or informal settlements. Once the landlords receive all that they sought—either rent or possession—they voluntarily dismiss their cases. This suggests that many tenants are indeed choosing to move rather than litigate. A number of judges encourage those tenants who do reach court to make the same choice. Fourth, of the minority of cases that reach court, the overwhelming majority are resolved with no reference to the condition of the premises. Some tenants may have their defenses foreclosed by failure to give the landlord notice or to pay escrow under an LPO. For a great many, however, this is the result of an overwhelming mismatch in knowledge and litigation capacity. Many tenants lack the sophistication to assert the warranty in a written pleading or the presence of mind and assertiveness to do so orally in the momentary window of opportunity presented in open court. Because of very limited legal services funding, tenants are seldom represented by counsel, and without the help of lawyers may not have a clear understanding of their new rights or of court procedures. . . . Fifth, studies indicate that landlords have won an overwhelming proportion of the nonpayment actions filed. Even where rental housing conditions were bad and getting worse, landlords were winning total victories in upwards of 97 percent of all nonpayment cases started. And with the lack of counsel and lack of sophistication among pro se tenants contributing significantly to these results—and with the poorest tenants typically living in the worst housing—the largest disparity between objective housing conditions and results in court is likely among those whom the reforms most sought to aid. Sixth, even in those rare cases where courts did award tenants relief for defective housing, the amounts of those awards were far too small to incentivize landlords to make repairs or to encourage other tenants to raise defenses. Seventh, although objective data is unavailable

specific basis, whether and how much rent ought to be deposited with the court, 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.⁶⁷ That judicial posture has rendered the warranty less accessible,⁶⁸ putting aggrieved tenants into the untenable position of having to decide whether to relocate (a task that is both disruptive and costly), or remain on site, submit to judicial proceedings, and be forced to deposit into escrow the full rent due no matter the premises' defective condition, a task that is both onerous and counter-productive to the goal of

on the number of tenants with valid retaliation defenses, judgment for a tenant on this basis is extremely rare. A landlord contemplating a retaliatory eviction is unlikely to be deterred by a prohibition so seldom enforced. Although no empirical evidence allows comparison of the number of landlords resorting to self-help before and after the reforms, their success rate in court gives them little reason to resort to self-help.”).

67. See Super, *supra* note 5, at 426 (“Probably the most important formal limitations on the new regime of landlord-tenant law are landlords’ protective orders (LPOs). LPOs are court orders or statutory requirements that tenants deposit rent with the court during the pendency of these actions as a condition to being heard on their defenses or receiving a jury trial. For more affluent tenants with incomes sufficient to make these payments, LPOs may be mere nuisances. But for low-income tenants, those most likely to live in slum housing, these orders may effectively keep the implied warranty out of court. This frustrates the instrumental, redistributive, and humanitarian goals of the new landlord-tenant regime. Moreover, because these orders find little precedent in other areas of contract law, they arguably preserve some of the exceptionalism that the reforms sought to purge from landlord-tenant law.”).

68. See Cotton, *supra* note 60, at 71–73 (“Large numbers of violations and evidence of long-standing failure to make repairs didn’t seem to make a difference. For example, in a case in which the inspector found eight code violations, and in which the tenant requested an abatement in court and alleged that she had given the landlord actual notice of the conditions two months previous to the filing of the petition, the judge denied the relief without explanation. . . . Some judges evidently perceived a very high bar to tenants obtaining monetary relief. For example, a judge denied a tenant any portion of the rent escrow account, even though it had taken three months for repairs, because the premises—which had been documented by a housing inspection report as having seven violations, including four for mold—had not been rendered ‘unusable’ by the conditions. The law does not require that the housing be unusable to justify monetary relief; it just has to have serious deficits that reduce its value. Even where evidence actually indicated that the premises were unfit for human habitation, judges tended to think that the landlord still ought to get most of the rental amount set forth in the lease. In one case, the tenant testified about a serious rodent infestation dating back three years and had an older inspection report to prove it, and the inspector testified as well that there was ‘a bad rat infestation in the property, a lot of openings[,] . . . a lot of droppings throughout the property,’ even opining that the dwelling was unfit for human habitation ‘if you have small kids’ (which the tenant did). The judge awarded the tenant a refund of only two months’ rent.” (final alteration in original)).

improving stocks of decent rental housing.⁶⁹ Further, tenants obliged to continue paying rent into escrow even in view of the premises' defects will typically have little, if any, disposable income leftover to accomplish essential on-site remediation of defects, thereby frustrating the promise of the repair and deduct option.⁷⁰

The problem is compounded when leased premises are governmentally subsidized. Then, largely because of the absence of coordinated databases in many venues, sizable government rent checks continue to be paid to landlords no matter the pending challenges to the leased premises' suitability for human dwelling.⁷¹ That assured continued cash flow removes incentives for landlord compliance with applicable standards of habitability.⁷²

New Jersey's application of the rent deposit requirement is afflicted by all of those unintended consequences. In *Marini v. Ireland*,⁷³ the Supreme Court of New Jersey gave trial courts the discretion to order tenants who assert breach of the implied warranty of habitability to deposit withheld rent payments with the court until the matter is adjudicated.⁷⁴ Since then, so-called *Marini* hearings are conducted at

69. *Id.*

70. A rent deposit scheme that does not provide room for downward adjustment based on the condition of the dwelling can in some cases force the tenant to forgo the repair and deduct option, creating an "either-or" situation. Either the tenant elects to repair and deduct or the tenant withholds rent and deposits it with the court. For most low-income tenants, repairing the deficiency and depositing the full rent requirement with the court will put serious strain on their finances. The tenant is therefore faced with a choice: either (1) attempt to repair the deficiency and deduct it from the rent, that is, if the deficiencies are within the tenant's means to deduct; or (2) withhold rent, deposit it with the court, and hope that the tenant is able to prevail in housing court.

71. See *infra* text accompanying note 86.

72. As exemplified by the case of tenant Esperanza Menendez-Jackson, recounted *infra* notes 89-92 and accompanying text, government subsidies accounted for 83% of Ms. Menendez-Jackson's rent obligation and were paid directly to her landlord each month, no matter the dilapidated condition of the premises. Her withholding of a mere 17% of the rent obligation did nothing to spur the landlord to action. It was not until the Department of Community Affairs cut off the other 83% of the rent (a consequence of a protracted court proceeding aided by Ms. Menendez-Jackson's legal services attorney) that the landlord was motivated to action.

73. 265 A.2d 526 (N.J. 1970).

74. *Id.* at 147 ("We realize that the foregoing may increase the trials and appeals in landlord and tenant dispossession cases and thus increase the burden of the judiciary. By way of warning, however, it should be noted that the foregoing does not constitute an invitation to obstruct the recovery of possession by a landlord legitimately entitled thereto. It is therefore suggested that if the trial of the matter is delayed the defendant may be required to deposit the full amount of unpaid rent in order to protect the landlord

the start of every eviction action for nonpayment of rent that is answered with a tenant's defense that the premises are uninhabitable.⁷⁵ At those hearings, courts routinely order that rent owed be deposited with the court and that future rent payments be similarly remitted as they become due until the case runs its course.⁷⁶

Whether the rent deposit requirement (and, for government subsidized rentals, the assured continuation to landlords of subsidies no matter the premises' significant defects) is correlative or causative, the implied warranty of habitability since *Javins* has been underutilized to the point that some have raised doubts about its continued viability.⁷⁷ Meanwhile, academic discussions of its efficacy have proceeded along the extremes of moral indignation against slumlords⁷⁸ to the belittlement of "do-gooders" who refuse to recognize that positive cash flow from tenants (and/or government coffers) may be the only way to fund the rehabilitation of deteriorating urban dwellings.⁷⁹ Lost in the debate about the warranty's usefulness is an appreciation that it can and should be part of a larger coordinated effort by courts, governmental rent-subsidizing agencies, and housing code inspectors to establish a floor for decent and habitable housing for low- to middle-income citizens.⁸⁰ Indeed, the warranty, when coupled with adequate housing code enforcement backup, can perform a function similar to that first envisioned when private causes of action were created to buttress regulatory functions in securities and consumer law.⁸¹ There is

if he prevails. Also, an application for a stay of an order of removal on appeal should be critically analyzed and not automatically granted.").

75. See, e.g., *Daoud v. Mohammad*, 952 A.2d 1091, 1092 (N.J. Super. Ct. App. Div. 2008) (providing that a tenant may raise lack of habitability concerns and request a *Marini* hearing provided she deposited the rent with the court clerk).

76. *Id.*

77. See *supra* note 66.

78. See Campbell, *supra* note 6, at 803, 813.

79. See generally Bruce Zucker, *California Pretrial Rent Deposit Pilot Project: A Legal and Empirical Analysis of the System in Action in the Los Angeles Municipal Court (Central Division)*, 35 C.L. W. L. REV. 159, 161-62 (1998) (discussing a Los Angeles Municipal Court pilot project designed to speed up the eviction process in favor of landlords in order to decrease losses and increase profits).

80. Bruce Ackerman set forth perhaps the foremost discussion of the societal need to establish a floor of habitable housing. Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1095-96 (1971).

81. *J. I. Case Co. v. Borak*, 377 U.S. 426, 430-32 (1964) (holding that stakeholders are authorized to proceed privately to remediate securities violations), *abrogation recognized in* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67 (2001).

much to be said in favor of creating an *individual army of private attorneys general*⁸² to supplement the role of government regulators in making markets safe and shielding them from the harmful effects of rogue actors.

II. THE WARRANTY IN PRACTICE: A VIEW FROM THE TRENCHES

This study set out to learn more about the warranty's actual application and viability in practice. The authors were able to reach and extensively interview thirty of the eighty tenants who asserted breach of the warranty in nonpayment of rent proceedings brought in 2014 in Essex County, New Jersey.⁸³ Our study, while small, suggests that the warranty can still have a meaningful place in the repertoire of devices available to an aggrieved residential tenant confronted with substandard premises.⁸⁴ We found that when the warranty was raised, it had an overall beneficial effect.⁸⁵

Our most startling finding was that even the most brazenly recalcitrant landlords were assured a continued cash flow in the form of tenant rent payments or government rent subsidies, no matter the nature and extent of tenants' complaints about the condition of the premises and the pendency of court proceedings where those complaints were brought to the fore.⁸⁶ We realized that to function effectively, the warranty must be made to coincide with a larger, more integrated template that links housing courts to housing code inspection efforts and governmental rent subsidizing agencies, whether in the form of Section 8 federal vouchers⁸⁷ or state grants.⁸⁸ A centralized database would allow judges to access information about a given premises'

82. *See id.*

83. Telephone Interviews with Essex County *Marini* Defense Study Tenants (Summer 2016) (on file with author).

84. *Id.*

85. *Id.*

86. *Id.* Indeed, in the case of Mrs. Menendez-Jackson, the government continued to pay her landlord while she withheld her portion of the rent (amounting to a mere seventeen percent) and notified the department that managed her voucher regarding the condition of her apartment and her subsequent actions.

87. *See generally* Kathleen Claussen, *Default Localism, or: How Many Laboratories Does it Take to Make a Movement?*, 48 CREIGHTON L. REV. 461, 475-77 (2015) (providing the history and functionality of Section 8 federal vouchers within a larger debate of federalism in public housing).

88. *See Housing Assistance*, N.J. DEP'T OF CMTY. AFF., <http://www.state.nj.us/dca/divisions/dhcr/offices/ha.html> (last visited Oct. 22, 2016) (listing New Jersey's housing assistance programs).

history and current condition before imposing rent deposit requirements.

More essentially, by tying landlord compliance with the warranty to the landlord's entitlement to continued rent subsidies, landlords are incentivized to comply with standards of habitability and tenants are afforded a form of leverage that they are otherwise without. Hence, to be vindicated, the warranty's assurances must be paired with more nuanced rent deposit requirements, ready access by housing court judges to premises' housing code compliance history, the specter of the noncompliant landlord's forfeiture or suspension of governmental subsidies, education-based initiatives aimed at tenant empowerment, and a more concerted effort on the part of the bar and law schools to make real the promise of effective assistance of counsel for indigent tenants.

For the eighty cases in which the warranty was raised in 2014 in Essex County, there were 39,920 residential actions brought by landlords for nonpayment of rent in which the defense was not raised.⁸⁹ The challenge is to learn more about the experiences of that vast majority of tenants, many of whom live at the margins without access to counsel or much meaningful choice. The entry of a default judgment against a tenant who does not (or cannot) appear in court limits that tenant's range of options and all but closes the window of opportunity for consideration of viable defenses and alternatives to dispossession. Moreover, this study does not focus on those instances where tenants fail to pay rent because of financial hardships unrelated to the condition of the leased premises, a matter worthy of attention as affordable housing stocks dwindle and the ranks of the desperately poor grow.⁹⁰

Our analysis nonetheless yields several important conclusions and suggests an agenda for reform of eviction proceedings. With certain reforms, the implied warranty of habitability can achieve its intended purposes and vindicate its promise. To expand the scope and effectiveness of its reach, the rent deposit requirement must be applied

89. See Garner, *supra* note 10.

90. Colleen O'Dea, *Shortage of Affordable Housing Explored at NJ Spotlight on Cities*, NJ SPOTLIGHT (Oct. 20, 2016), <http://www.njspotlight.com/stories/16/10/19/chronic-shortage-of-affordable-housing-explored-at-nj-spotlight-on-cities>. Across the nation, stocks of affordable, subsidized housing continue to shrink. Ronda Kaysen, *Divided by a Windfall: Affordable Housing in New York City Sparks Debate*, N.Y. TIMES (Nov. 14, 2014), http://www.nytimes.com/2014/11/16/realestate/affordable-housing-in-new-york-city-sparks-debate.html?_r=1; David L. Harris, *Affordable Housing in Boston is Dwindling According to Report*, BOS. BUS. J. (Sept. 2, 2016), http://www.bizjournals.com/boston/real_estate/2016/09/affordable-housing-in-boston-is-dwindling-fast.html.

with greater nuance so that judges, as a matter of course, tailor the extent of the duty to the given circumstances. Courts should be obliged to take into account the premises' history together with the instant tenant's experiences with the premises. Courts would consider, for example, whether and to what extent that tenant has expended time and money to accomplish essential repairs.

A housing code inspection should precede any determination of how much rent ought to be deposited with the court. Inspection findings, in turn, should be entered into a central, county-wide data base that would allow courts and rent-subsidizing state and federal agencies to know the given premises' history and the number of violations brought or pending against the dwelling. That data would inform the court's imposition of a rent deposit requirement. Moreover, that central database would be a tool for government to reduce or withhold any rent subsidies until the premises are restored to an inhabitable condition. A concerted and coordinated effort on the part of the judiciary, housing inspectors, and governmental rent-relief agencies is possible and would vastly expand the system's capacity to compel landlord compliance with standards of habitability, empower aggrieved tenants, and promote accountability.

III. METHODOLOGY: TOWARDS AN UNDERSTANDING OF AGGRIEVED TENANTS' EXPERIENCES

In 2014, in Essex County, New Jersey, 40,000 eviction suits for non-payment of rent were brought by landlords against residential tenants.⁹¹ Of those, only eighty had tenants asserting breach of the implied warranty of habitability as a defense.⁹² That figure is startling. It reveals that the defense was raised in only 0.2% of *eviction actions*, notwithstanding the far greater statistical likelihood that significant housing code violations exist on leased premises in Essex County.⁹³ We endeavored to understand why the implied warranty of habitability defense is not raised more frequently in so hard-pressed an environment and to learn more about the defense's efficacy when it is raised.

Throughout 2015 and 2016, using public databases and court

91. Garner, *supra* note 10.

92. *Id.*

93. See *id.*; see also DANIELSON & DOIG, *supra* note 11, at 302 (stating that thirty percent of Newark's housing units were classified as substandard, which was the highest proportion of any major U.S. city).

records, we were able to reach and extensively interview thirty of those eighty tenants, or 37.5%, who did assert the defense of breach of the implied warranty of habitability in response to an eviction action for non-payment of rent.⁹⁴ The study's methodology was interview-based, using a written questionnaire⁹⁵ to form the backdrop for in-person interviews, telephone interviews, and subsequent follow-ups. The questions sought to elicit case histories as well as affected tenants' perceptions of the warranty's efficacy and, when raised successfully, its capacity to prompt the remediation of on-site defects. Tenants were asked, for example, to describe their leasing history, their experiences with the subject premises, the impetus for the decision to withhold rent, the extent and nature of their interactions with the landlord, what prompted them to raise the defense of breach of warranty, their experiences with the judicial system, the extent of any remediation of on-site defects, and whether they would raise the warranty again if the need arose.⁹⁶

Our findings are encouraging in a number of respects. 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.⁹⁷ Indeed, in more than half of the cases surveyed, the implied warranty of habitability was used successfully to cure significant housing code violations.⁹⁸ In those cases, landlords completed repairs to remediate problems that ran the gamut, including bug and rodent infestations, mold, lack of insulation, dust, broken outside door locks, defective appliances, lack of adequate heat, and the absence of hot water.⁹⁹ Moreover, irrespective of whether the defense succeeded or failed, the overwhelming majority of tenants who did assert it stated unequivocally that they would resort to

94. The interviewers endeavored to reach out to the tenants by using a variety of different tools including social media, LexisNexis, and telephone number local directory assistance. However, some information led to "dead-ends," such as disconnected phone numbers, which is why only a total of thirty out of eighty tenants were ultimately interviewed. The authors suspect that this was due in part to the fact that these tenants moved from their last known addresses.

95. See *infra* app., Initial Tenant Survey

96. See *infra* app., Initial Tenant Survey, questions 4, 5, 8, 10, 12.

97. Fifteen out of thirty-one cases received some sort of repairs. Seven were fully repaired, and eight were partially repaired.

98. In those instances where landlords did not remediate, tenants' experiences were mixed. Several remained on site, making repairs at their own expense. Several others received rent abatements, and, still, others vacated. See *supra* note 86 and accompanying text.

99. See *supra* note 86 and accompanying text.

it again if faced with substantial on-site infirmities.¹⁰⁰

Our study offers seeds of hope for the implied warranty of habitability's renewed viability. The warranty can have an important place in the arsenal of devices available to aggrieved tenants confronted with substandard living conditions. The challenge is to remove obstacles to its effective assertion, whether in the form of rent deposit requirements imposed without regard to context, the failure of subsidizing governmental agencies to exercise their strong-arm powers to incentivize housing code compliance, the scarcity of effective assistance of counsel, or tenants' lack of awareness of their basic rights.

Of the cases surveyed, the story of Ms. Esperanza Menendez-Jackson is emblematic of the warranty's promise, efficacy, and limitations. In that case, we saw how the breach of warranty defense can succeed when an aggrieved tenant living in an uninhabitable apartment is effectively represented by counsel.¹⁰¹ At the start of the proceedings, in response to her grievances about the premises' defects, the tenant received a fifty percent rent abatement. She used that abatement to make some of the necessary repairs. Thereafter the landlord, chronically remiss in remediating on-site deficiencies, lost government subsidies, thereby freeing up allocation reserves for housing code compliant landlords. The tenant, in turn, was successfully placed in an alternative subsidized and inhabitable residence.

The Menendez-Jackson case is significant in several respects. First, it demonstrates that a tenant apprised of her rights is more inclined to assert them. Second, it reveals that government subsidies to landlords who provide stocks of affordable housing can be used as both sword and shield. On the one hand, those subsidies help to keep low-income rental housing stocks viable and available. On the other, the specter of a suspension of those subsidies can and should be used to greater effect as a means to incentivize landlord compliance with the warranty's assurances. When faced with recalcitrant landlords who fail to abide by the mandate that subsidized premises be in livable condition, government can and should exercise its prerogative to withhold financial allotments pending remediation. A landlord who knows that failure to maintain a leased dwelling will prompt a disruption in government cash flow has a built-in incentive to make necessary repairs.

100. Twenty-two out of thirty-one tenants (70.9%) stated they would resort to the implied warranty of habitability defense again.

101. Abbott Gorin, Esq., in his capacity as a staff attorney at Essex Newark Legal Services, represented Esperanza Menendez-Jackson in this matter.

Third, the case makes plain that the rent deposit requirement can be applied judiciously and with nuance to help to better achieve the warranty's intended purpose of assuring that leased dwellings be inhabitable. The Menendez-Jackson court obliged the tenant in view of the premises' defects to deposit only half of the rent otherwise owed, thereby affording her the opportunity to make at least some repairs pending final resolution of the matter. Ultimately, the court's adjudication that the warranty had been breached succeeded in removing that substandard apartment subsidized at taxpayer expense from the stock of government-assisted units, allowing for a housing code-compliant dwelling to take its place.

IV. THE STORY OF ESPERANZA MENENDEZ-JACKSON: MAKING THE CASE FOR THE IMPLIED WARRANTY OF HABITABILITY'S CONTINUED VIABILITY

The case of tenant Esperanza Menendez-Jackson presents an archetypal instance of the implied warranty of habitability's promise and potential pitfalls. The authors tell her story with her permission. Ms. Menendez-Jackson is a single mother who lived with her three children in a government subsidized apartment building in Newark, New Jersey. Early into the start of her lease, she discovered a bed bug infestation on site. The premises were often without hot water, heat, and a working oven. The apartment's one bathroom suffered from a serious mold problem.

On the rare occasion when the Menendez-Jackson family had visitors, entering the apartment was a complicated and onerous process.¹⁰² To avoid the spread of bed bugs, visitors had to leave all personal belongings in the hallway and then change clothes immediately upon exiting the apartment.¹⁰³ That tedious ritual also became a fact of daily life for Ms. Menendez-Jackson and her children.

Hot water was seldom available, and when it was, the family bathed in a mold-infested bathroom. Without heat in the winter, the tenant and her children wore layers of heavy clothing and, on the coldest nights when the indoor temperature dipped into the teens, sought shelter with relatives and friends. Over time, that possibility narrowed as a result of the stigma and fear associated with the

102. See Jerome Goddard & Richard deShazo, *Bed Bugs (Cimex Lectularius) and Clinical Consequences of Their Bites*, 301 J. AM. MED. ASS'N 1358, 1358-66 (2009), <http://jamanetwork.com/journals/jama/fullarticle/183643>.

103. *Id.* Importantly, "reactions to insect bites, embarrassment, and mental anguish have been the basis for lawsuits against landlords." *Id.* at 1361.

premises' bed bug infestation. The oven worked only intermittently, and when it did function it could not reach temperatures sufficient to actually cook a meal.

As soon as the problems became apparent, Ms. Menendez-Jackson contacted her landlord. She described his attempts at remediation as sporadic, unsuccessful, and akin to applying a Band-Aid to a hemorrhaging wound. For example, to abate the bed bug problem, rather than use a professional extermination company, her landlord sprayed the apartment with various chemicals, a short-term fix that repeatedly failed to rid the apartment of the pests. After a spray-treatment, the infestation would decrease in intensity only to return weeks later. Each time her landlord sprayed, the tenant became hopeful that the problem was resolved for good. She would therefore discard her infested furniture and clothes, only to be disappointed and afraid when the bed bugs returned. By the time the family finally moved out, Ms. Menendez-Jackson had disposed of three different sets of furniture and countless items of clothing.

Over the course of the year in which the family was in possession, her landlord chose similarly quick and ineffective methods to repair the problems with the heat. To abate the mold infestation, rather than exterminate, her landlord would simply scrape off the largest sections of growth. Those would reappear within days. Her landlord replaced the broken oven with another broken oven.

Ms. Menendez-Jackson read up on her rights and, in addition to reaching out to the landlord for relief, she notified government authorities. Her research led her to Essex-Newark Legal Services, one of New Jersey's largest legal aid agencies. There, she secured counsel¹⁰⁴ and learned that her landlord had breached the implied warranty of habitability, and that she would be within her rights to withhold rent until the problems with the apartment were abated. She did so, prompting her landlord to move to evict for nonpayment of rent.

At the ensuing *Marini* hearing, the court was persuaded to allow Ms. Menendez-Jackson to deposit, pending judicial resolution of the matter, only fifty percent of the rent that she would otherwise owe. The tenant's monthly rent payment was one hundred-fifty dollars, and her landlord received the bulk of the eighteen-hundred-dollar monthly rent payments from the New Jersey Department of Community Affairs.¹⁰⁵

104. Co-author Abbott Gorin, an attorney with Essex-Newark Legal Services, represented Ms. Menendez-Jackson.

105. See Martin J. McMahon, Annotation, *Tenants' Procedural Rights Prior to Eviction or Termination of Benefits Under § 8 of Housing Act of 1937* (42 U.S.C.A. § 1437f), 81

That lion's share of rent continued to be paid to her landlord in full, notwithstanding the substantially defective condition of the premises. In that way, Ms. Menendez-Jackson became voiceless. She could relentlessly protest the conditions in her home and even assert breach of the implied warranty of habitability in court, but still her landlord's principal cash flow was not at risk.

It took a full ten months for the matter to be resolved, during which time her landlord continued to receive full state subsidies for rent no matter the apartment's dilapidated state. That may be the most shocking aspect of the Menendez-Jackson story. Had a state-wide dwelling inspection registry akin to systems in place in other venues¹⁰⁶ been available, those subsidies would have been at risk, a consequence that would have been known to her landlord and likely to have incentivized more timely compliance with standards of inhabitability.

It could be argued, by contrast, that the continued flow of rent subsidies is necessary to assure landlords the stocks of cash needed to make repairs and remain in affordable rental markets. Our review suggests otherwise. The assurance of uninterrupted cash-flow seemed, in the cases studied, to be the principal enabler of landlords' inaction. It was not until that cash-flow was at real risk, or in fact cut-off, that

A.L.R. Fed. 844, § 2 (1987) ("The purpose of the Section 8 program is to aid lower income families in obtaining a decent place to live and to promote economically mixed housing (42 U.S.C.A. § 1437f(a)). In order to qualify for the Section 8 new construction program, a prospective tenant must have an income within the Department of Housing and Urban Development's (HUD's) specified limits set forth at 24 [C.F.R.] Parts 812 and 889. The owner of the housing project is responsible for determining whether the applicant is eligible (24 [C.F.R.] 880.603(b)). Once accepted for the program, the tenant leases an assisted unit, paying the project owner 'tenant rent,' which is set at an amount between 15 percent and 25 percent of the tenant's income. HUD pays the balance of the total rent, or 'contract rent,' for the assisted unit by making monthly payments, known as 'housing assistance payments,' directly to the project owner (24 [C.F.R.] 880.101(b), (c)).").

106. For example, New York City has provided a computer terminal at the bench of each of its housing court judges. This database, in either screen display or hard copy, can be accepted into evidence by judges pursuant to section 328(3) of the New York State Multiple Dwelling Law. N.Y. MULT. DWELL. L. § 328(3) (McKinney 2016). The Multiple Dwelling Law also provides for the designation of certain violations as "rent impairing," which in effect reduces the amount of rent that a landlord can collect from the apartment where such a violation occurs. *Id.* §§ 302(1)(b), 302-a(2)(a). New York City also has in place a dedicated housing court inspectorial squad which housing court judges utilize to inspect units in question in accordance with the New York State Multiple Dwelling Law and Housing Maintenance Code where every possible housing violation rated and recorded is classified under a three-tiered system as either (A) non-hazardous, (B) hazardous, or (C) immediately hazardous. N.Y. City, N.Y., Admin. Code § 27-2115(a) (2016).

tenants' complaints were heeded—if at all. As long as rent payments for substandard dwellings continue to be paid to recalcitrant landlords by government subsidizing agencies, landlords' remiss remains supported and, in our study, all but assured. The problem is only compounded when a landlord knows that the affected tenant is without access to counsel or the disposable income necessary to relocate.

Significantly, pursuant to New Jersey's summary eviction statute, Ms. Menendez-Jackson could not assert a counter-claim for damages that would entitle her to all or some part of the government subsidized portion of the rent.¹⁰⁷ Other states have allowed aggrieved tenants to collect as abatements not just their portion of the monthly rent, but also some or all of the subsidized amounts that would otherwise be remitted to a code-compliant landlord.¹⁰⁸ An amendment to the New Jersey Court Rules to allow for the assertion of such a counterclaim would greatly leverage a tenant's ability to compel code compliance.

V. OTHER TENANTS' STORIES

The Menendez-Jackson case is unfortunately the standard-bearer in our study, echoed again and again by the experiences of other tenants surveyed. For example, Jane Doe¹⁰⁹ lived with her two school-age children in a one-bedroom subsidized apartment in Newark, New Jersey. Her share of the monthly rent payment was seventy dollars. State and federal government subsidies paid for the remaining, approximately eight hundred-fifty dollars, monthly rent obligation. Two years into her lease, the apartment's heaters failed. On cold, late autumn and early winter days, the internal thermostat hovered at about fifty-one degrees. The tenant contacted her landlord as soon as the problem became apparent and was assured that the heating system would be repaired. It was not.

Thereafter, the tenant described a frustrating months-long process by which the heater would function effectively for a day or two and then quickly fail. Finally, the tenant purchased a used space heater. Her request that her landlord pay half that expense was refused, as was her subsequent request that her landlord set-off her monthly rent obligation by the considerably higher amounts the tenant now owed for electricity.

107. N.J. CT. R. 6:3-4.

108. See *Committed Cmty. Assocs. v. Croswell*, 659 N.Y.S.2d 691, 694 (N.Y. App. Term 1997), *aff'd*, 673 N.Y.S.2d 708 (N.Y. App. Div. 1998).

109. At the tenant's request, her actual name is not used.

By the end of February, the apartment's plumbing failed, a problem attributable to frozen pipes. The tenant complained to the relevant state and federal subsidizing agencies, but still the monthly rent subsidies continued to be paid to her landlord. By April, those previously frozen pipes burst, causing extensive flooding. Her landlord responded by shutting down all water systems to the apartment. For several months, the tenant relied on the kindness of another tenant and a nearby relative for access to a working bathroom.

The tenant did not have the means to relocate and was fearful of the possibility of homelessness. It was not until June when, faced with mounting and dangerous accumulations of water on-site and hoping to precipitate landlord remediation, the tenant decided to withhold rent. She continued to withhold rent until her landlord brought an eviction action against her in December of 2014. At the commencement of the eviction proceeding and throughout its pendency, the tenant was ordered to remit into escrow the entire amount of her share of the rent due, no matter the glaring defects on-site and the added costs of her attempts at repair. She abided by that request for the next six months of the case's pendency. During that time, her landlord continued to receive full government subsidies for the dwelling.

Appearing *pro se* and using Essex County's self-help desk as a resource,¹¹⁰ the tenant asserted the defense of breach of warranty. Her landlord was represented by counsel. The tenant, outmaneuvered and overwhelmed, lost the case and received no rent abatement. Still, she felt that her assertion of breach of warranty was effective, as it did prompt her landlord to take matters more seriously and, albeit belatedly, make some repairs. Eventually, the plumbing was repaired and the heating system, while still flawed, was rendered functional.

In another case, John Smith¹¹¹ lived with his wife and four school-age children in a rent-subsidized three-bedroom dwelling. The tenant's rent obligation varied from one hundred fifty dollars to two hundred seventy-five dollars per month, depending on his and his wife's income. Government subsidies covered the remainder of the one thousand five hundred and fifty dollar monthly bill. In October 2013, as a result of the unkempt condition of the vacant upstairs apartment, the premises became rodent and roach infested. The tenant notified his landlord repeatedly, but the problem persisted. In the meantime, the tenant used over-the-counter roach repellent, rat traps, and rat repellent to no

110. The self-help desk, an arm of Essex County's housing court, dispenses information on relevant landlord-tenant laws.

111. The tenant asked that his name not be used.

avail. His landlord finally came to the property in mid-November, saw the problems, but still did nothing to remediate. By December, fearing for his family's safety and hoping to prompt his landlord to exterminate and repair several broken entry-level windows, the tenant began to withhold rent. In January and February of 2014, the infestation problem worsened. The tenant sent letters of complaint to the government subsidizing agencies, the Newark Health Department, and Essex County Animal Control, all to no avail. It was not until June, when his unpaid share of the monthly rent by then exceeded two thousand four hundred dollars that his landlord, rather than remediate, moved to evict for non-payment of rent.

His landlord was represented by counsel. The tenant appeared pro se, asserting breach of warranty in his defense. He told us that he learned of the defense from a friend who had used it in similar circumstances. The tenant abided by the mandate that he deposit all withheld rent into escrow. Thereafter, in September of 2014, the case settled. His landlord agreed to hire a professional exterminator in exchange for the release to him of all withheld rent monies. Today, the tenant continues to live in the apartment, infestation free.

Sadly, the cases chronicled here represent not the exception but the norm in the pool of cases studied. In no instance studied was the breaching landlord's governmental rent subsidy either withheld or reduced in response to the given tenant's allegations of on-site defects, irrespective of the documented severity of those defects. In most instances, remediation did come, eventually, in response to the tenant's assertion of breach of warranty, but it could have come sooner had the stick of rent subsidy loss been wielded. Not surprisingly, those very few cases where tenants were represented by counsel yielded better and quicker outcomes. In the preponderance of cases, tenants who learned of the breach of warranty's availability as a defense came to that awareness haphazardly, whether by word of mouth, advice from a friend, on-line resources, or the housing court help desk.

VI. LESSONS LEARNED FROM THE FIELD: TOWARDS AN AGENDA FOR REFORM

Our study yielded several important conclusions. First, the implied warranty of habitability is vastly underutilized. Second, when it is raised meritoriously—and in none of the cases studied was it raised without merit—it can and does work. In half the cases surveyed, the warranty's successful assertion yielded substantial repairs and

improvements to otherwise substandard dwellings.¹¹² In the other half of the cases, tenants either relocated, rather than endure protracted court proceedings and the burdens of having to deposit rent for largely uninhabitable dwellings, or, without counsel, missed court dates and eventually defaulted. Still, irrespective of the outcome, virtually all of the tenants interviewed who alleged breach of the implied warranty indicated that they would do so again if faced with significant on-site defects.¹¹³

The challenge is to remove obstacles to the warranty's assertion and efficacy, whether in the form of scarce access to effective assistance of counsel,¹¹⁴ the tenants' lack of awareness of their basic rights,¹¹⁵ rent

112. See *supra* note 86 and accompanying text.

113. See *supra* note 86 and accompanying text.

114. Certainly, there must be a greater investment of public and private sector resources to allay the alarming scarcity of legal representation opportunities for low-income and indigent tenants. Indeed, a preponderance of residential tenants go without effective assistance of counsel in landlord-tenant proceedings. See CMTY. TRAINING, *supra* note 17, at 13 (finding that only 11.9% of tenants in New York City Housing Court were represented by counsel, whereas 97.6% of landlords were represented by counsel); see also 144 Woodruff Corp., v. Lacrete, 585 N.Y.S.2d 956, 958 (N.Y. Civ. Ct. 1992) (concluding, after citing multiple studies, that "landlords are represented in approximately eighty to ninety percent of summary eviction proceedings, while tenants are unrepresented in all but ten to fifteen percent of such proceedings"); Harvey Gee, Essay, *From Hallway Corridor to Homelessness: Tenants Lack Right to Counsel in New York Housing Court*, 17 GEO. J. ON POVERTY L. & POL'Y 87, 88 (2010) (describing that, in New York City Housing Court, "[l]andlords are represented in approximately eighty-five percent of cases; by contrast, practitioners in Housing Court estimate that ninety to ninety-five percent of tenants are unrepresented by counsel." (citing LAWYERS' ASS'N REPORT, *supra* note 17, at n.1)). A right without the means for its actualization is more illusory than real. Here, bar associations, private bar associations, and law schools must step up efforts to assist public legal services organizations to help to provide counsel to underrepresented tenant constituencies. Many law schools help by providing free legal clinics for indigent tenants. See *Affordable Housing Transactions Clinic (Harrison Institute)*, GEO. L., <https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/HIHC/index.cfm> (last visited Oct. 26, 2016); *Fair Housing Clinic (FHC)*, HOW. U. SCH. L., <http://www.law.howard.edu/101> (last visited Oct. 26, 2016); *Affordable Housing and Community Development Clinic*, U. BUFF. SCH. L., <http://www.law.buffalo.edu/beyond/clinics/affordable-housing.html> (last visited Oct. 26, 2016); *Housing Clinic*, U. TEX. SCH. L., <https://law.utexas.edu/clinics/housing/> (last visited Oct. 26, 2016); *Housing Discrimination Testing Program*, SUFFOLK U. L. SCH., <http://www.suffolk.edu/law/academics/59759.php> (last visited Oct. 26, 2016); *Housing Initiative*, U. CHI. L. SCH., <http://www.law.uchicago.edu/clinics/mandel/housing> (last visited Oct. 26, 2016); *Tenant Advocacy Project*, HARV. L. SCH., <http://clinics.law.harvard.edu/tap/> (last visited Oct. 26, 2016); *Housing Law Clinic*, B.C. L. SCH., <https://www.bc.edu/bc-web/schools/law/academics-faculty/experiential-learning/clinics/housing.html> (last visited Oct. 26, 2016); *Housing Law Clinic*, HARV. L. SCH., <http://hls.harvard.edu/dept/clinical/>

clinics/housing-law-clinic-lsc/ (last visited Oct. 26, 2016); *Landlord-Tenant Clinic*, YALE L. SCH., <https://www.law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/landlord-tenant-clinic> (last visited Oct. 26, 2016); *Landlord-Tenant Mediation Clinic*, GA. ST. U. C. L., <http://law.gsu.edu/landlord-tenant-mediation-clinic/> (last visited Oct. 26, 2016); *Litigation and Housing Law Clinic*, U. VA. SCH. L., <http://www.law.virginia.edu/html/academics/practical/housingclinic.htm> (last visited Oct. 26, 2016); *Tenants' Rights Clinic*, U. MIAMI SCH. L., <http://www.law.miami.edu/academics/clinics/tenants-rights-clinic> (last visited Oct. 26, 2016). Similarly, state bar associations similarly lend support by organizing attorneys to contribute pro bono hours to helping low-income tenants in housing court. See *BBA Lawyer for the Day in the Boston Housing Court*, BOS. B. ASSOC., http://www.bc.edu/schools/law/center-experiential-learning/clinical-programs/housing_law_clinic.html (last visited Oct. 26, 2016) (partnering with Volunteer Lawyers Project of the Boston Bar Association, Greater Boston Legal Services, The Legal Services Center of Harvard Law School, and the Boston Housing Court); *Forum on Affordable Housing and Community Development Law*, A.B.A., http://www.americanbar.org/groups/affordable_housing.html (last visited Oct. 26, 2016); *Housing & Urban Development Committee*, N.Y.C.B., <http://www.nycbar.org/housing-and-urban-development> (last visited Oct. 26, 2016); *Housing Justice Project, Pro Bono Services*, KING CTY. B. ASS'N, <https://www.kcba.org/pbs/HJP.aspx> (last visited Oct. 26, 2016); *Lawyer for a Day Program – Probate & Family*, HAMPSHIRE CTY. B. ASS'N, <http://hampshirebar.org/lawyer-for-a-day/> (last visited Oct. 26, 2016); *Legal Clinic*, HAMPSHIRE CTY. B. ASS'N, <http://www.hcbar.org/category/5303/legal-clinic.htm> (last visited Oct. 26, 2016); *The Pro Bono Program of the New Hampshire Bar Association*, N.H. LEGAL AID, <http://www.nhlegalaid.org/about/pro-bono> (last visited Oct. 26, 2016); *Volunteer Lawyers Project, Pro Bono & Volunteer Opportunities*, NASSAU CTY. B. ASS'N, <https://www.nassaubar.org/For%20Our%20Members/Pro%20Bono.aspx> (last visited Oct. 26, 2016).

115. Further, even a modest amount of preventative education would go a long way towards arming aggrieved tenants with the means to effectively proceed pro se. New Jersey has made some strides in that regard, using its Department of Community Affairs website to provide education resources on topics such as housing code enforcement, affordable housing, and landlord-tenant rights. *Publications*, N.J. DEPT COMMUNITY AFF., <http://www.state.nj.us/dca/divisions/codes/publications/#10> (last visited Oct. 26, 2016). New Jersey's Truth-in-Renting Act, N.J. STAT. ANN. § 46:8-43 (West 2016), requires that all tenants be provided with an annually updated statement describing the legal rights and responsibilities of tenants and landlords of rental dwelling units. *Id.* § 46:8-45. Other states have similar "truth-in-renting" statutes. *Accord* MICH. COMP. LAWS ANN. § 554.631 (West 2016) ("This act shall be known . . . as the 'truth in renting act.'"). New Jersey's Truth-in-Renting Act affirmatively obliges landlords to distribute the statement to tenants when a lease is entered into and it calls for distribution of the statement to all tenants with a rental term of at least one month living in residences with more than two dwelling units (or more than three if the landlord occupies one). N.J. DEPT OF CMTY. AFF., TRUTH IN RENTING: A GUIDE TO THE RIGHTS AND RESPONSIBILITIES OF RESIDENTIAL TENANTS AND LANDLORDS IN NEW JERSEY 1 (10th ed. 2010), http://www.state.nj.us/dca/divisions/codes/publications/pdf_lti/t_i_r.pdf.

The landlord is required to give a copy of the current statement to each tenant when a lease is entered into, and to make available the current statement in the building where the tenants can easily find it. The landlord should keep documen-

tation or receipts verifying distribution of the Truth in Renting statement to new tenants.

A landlord who does not properly distribute the statement is subject to a penalty of up to \$100.00 for each offense. Enforcement of this statute is handled through the Superior Court, Special Civil Part, Landlord-Tenant Section of the county where the building is located or of the county where the defendant resides.

Id. It is difficult to know whether the obligation is abided to and whether, even if adhered to, tenants are apt to understand the disclosure document's essential terms. Legal Services of New Jersey, the state's largest legal services provider, offers free legal representation to extremely low-income individuals. See *About Us*, LEGAL SERVS. N.J., <https://lsnj.org/AboutUS.aspx> (last visited Oct. 26, 2016). It has twenty-three offices in twenty-one counties and a variety of legal departments, including Housing, Family Law, Elder Law, Criminal Record Expungement, and Social Security Disability. LEGAL SERVS. N.J., <https://lsnj.org/> (last visited Oct. 26, 2016). It also makes available helpful guides that aim to afford aggrieved tenants with information on how to secure landlord compliance with the mandate to provide habitable premises, and set forth guidelines for tenants on how, for example, to make repairs and then deduct those costs from future rent. See *Bed Bugs: Your Rights as a Tenant*, LSNJLAW, http://www.lsnjlaw.org/Housing/Landlord-Tenant/Repairs-Habitability/Pages/Bed-Bugs-Your-Rights-as-a-Tenant.aspx#.Vv_6sRMrLeQ (last visited Oct. 26, 2016); *Your Right to Safe and Decent Housing*, LSNJLAW, http://www.lsnjlaw.org/Housing/Landlord-Tenant/Repairs-Habitability/Pages/Safe-Decent-Housing.aspx#.Vv_6nRMrLeQ (last visited Oct. 26, 2016). Similarly, the New Jersey Tenants Organization advises members of their rights through either e-mail or telephone. N.J. TENANTS ORG., www.njto.org (last visited Oct. 26, 2016). Membership requires a twenty-five-dollar annual fee. *Id.* Still, those materials, while informative, do not show tenants how to proceed pro se. The New Jersey Department of Community Affairs has available a "Habitability Bulletin," which provides a basic overview of the responsibilities of both landlords and tenants in the maintenance of residential rental dwellings. *Habitability Bulletin*, N.J. DEP'T CMTY. AFF. (Feb. 2008), http://www.state.nj.us/dca/divisions/codes/publications/pdf_lti/habitablty.pdf. It provides an easy-to-read guide, which defines and explains the implied warranty of habitability and what it means, describes how to report housing code violations, and informs tenants of their rights and remedies if the landlord fails to maintain the dwelling in a habitability condition. *Id.* Specifically, the bulletin describes the remedies of repair and deduct, constructive eviction, rent abatements, withholding rent or a portion of it, and rent receiverships. *Id.* However, it does not give any guidance as to how a tenant may actually assert these remedies or file a complaint.

In New York, the Metropolitan Council on Housing provides free tenants' rights clinics, a tenants' rights hotline, and various guides on evictions, repairs, rent stabilization, and rent control. *About Us: What is the Metropolitan Council on Housing?*, METRO. COUNCIL ON HOUS., http://metcouncilonhousing.org/about_us (last visited Oct. 26, 2016). The Pratt Area Community Council offers one-on-one tenant counseling, tenant rights workshops and legal clinics, and assistance to buildings that want to create or strengthen tenant associations. See *Advocacy Organizations for Tenants*, Bill de Blasio, <http://archive.advocate.nyc.gov/landlord-watchlist/resources> (last visited Oct. 26, 2016). The New York City Department of Housing Preservation and Development provides "The ABC's of Housing" guide that provides information on tenants' rights, landlord responsibilities, and housing court proceedings. N.Y.C. DEP'T HOUS. PRES. & DEV., THE

deposit requirements imposed by courts without nuance, sufficient context, or opportunity to modify those based on the condition of the premises and the landlord's record of compliance or noncompliance with applicable housing code standards. Most essentially, housing court judges must be armed with the capacity to decree suspension or forfeiture of rent subsidies until on-site remediation is achieved.

Hence, an integrated approach is needed to assure the warranty's viability. Courts must consider context and applicable facts before imposing rent deposit requirements. Centralized, county-wide databases like those in place in some jurisdictions, such as New York City¹¹⁶ and Massachusetts,¹¹⁷ are needed to give housing court judges and federal and state rent subsidizing agencies ready access to leased

ABC'S OF HOUSING 3 (2015), <http://www1.nyc.gov/assets/hpd/downloads/pdf/ABCs-housing-singlepg.pdf>. The most effective educational tool may be the various videos, manuals, and community that the New York State Court's website provides. *Videos, Publications and Community Seminars*, NYCOURTS.GOV, <http://nycourts.gov/COURTS/nyc/smallclaims/videos.shtml> (last visited Oct. 26, 2016). Specifically, "The Resolution Part" video is designed for pro se tenants appearing for the first time in the New York City Housing Court and explains the court's procedures, objectives, the roles of different court personnel, and claims that a tenant proceeding pro se will have a more enlightened understanding of how the court system can help them in resolving their cases after watching the video. *The Resolution Part*, NYCOURTS.GOV, <https://www.nycourts.gov/courts/nyc/smallclaims/resolutionvideo.shtml> (last visited Oct. 26, 2016). The video entitled "How Tenants Can Get Repairs and Services" explains the step-by-step procedures from filing a Housing Court case to its resolution by following the story of a tenant whose apartment is in need of repairs. *How Tenants Can Get Repairs and Services*, NYCOURTS.GOV, https://www.nycourts.gov/courts/nyc/smallclaims/seminar_repairs.shtml (last visited Oct. 26, 2016). There are many more videos of recorded seminars on topics. See *"Defenses to a Non-Payment Proceeding" Seminar*, NYCOURTS.GOV, (Nov. 3, 2005) https://www.nycourts.gov/courts/nyc/smallclaims/seminar_nonpayment.shtml (last visited Oct. 26, 2016); *"Need Repairs"*, NYCOURTS.GOV (Oct. 29, 2008), https://www.nycourts.gov/courts/nyc/smallclaims/seminar_needrepairs.shtml (last visited Oct. 26, 2016); *"Tenants' Rights & Responsibilities"*, NYCOURTS.GOV (April 25, 2007), https://www.nycourts.gov/courts/nyc/smallclaims/seminar_rights.shtml (last visited Oct. 26, 2016); *"What To Do If You've Been Evicted" Seminar*, NYCOURTS.GOV (Jan. 6, 2006), https://www.nycourts.gov/courts/nyc/smallclaims/seminar_evicted.shtml (last visited Oct. 26, 2016). These resources provide aggrieved tenants with the means to effectively proceed pro se. The realm of tenant training and education is another area where New Jersey can learn from New York's initiatives. Indeed, one scholar concludes that New York's comprehensive efforts in tenant education are an effective tool in preventing the growth of homelessness. See Salley Kim, Note, *Preventing Shelterization: Alleviating the Struggles of Homeless Individuals and Families in New York City*, 42 FORDHAM URB. L.J. 1019, 1057 (2015).

116. See Zulack, *supra* note 57, at 435, 448, 450; see also *supra* note 102.

117. See *Housing Court FAQ*, MASS. CT. SYS., <http://www.mass.gov/courts/court-info/trial-court/hc/hc-faq-gen.html> (last visited Oct. 26, 2016).

premises' housing inspection findings and litigation histories. Those central registries can function as both carrot and stick, assuring continued rent subsidies to code-compliant landlords while suspending or terminating those subsidies for non-compliant landlords. Certainly, a coordinated database would more readily allow the specter of rent-subsidy forfeiture to deter breaches of the warranty and, when the warranty is breached, allow suspension of subsidies pending remediation to compel landlord compliance.¹¹⁸

As soon as the defense of breach of the implied warranty of habitability is raised, housing authorities should be alerted and dispatched to the site. That practice, which ought to become a matter of routine, would help to allay and prevent much of the inertia that aggrieved tenants told us they faced. Indeed, if housing authorities had been alerted at the start of the Menendez-Jackson, Smith, and Doe proceedings, a significant amount of human suffering could have been avoided.

A. The Mechanics of Reform

Most jurisdictions mandate that a tenant who raises breach of the implied warranty of habitability as a defense to the landlord's suit for non-payment of rent deposit all or some portion of withheld rent into escrow pending judicial resolution of the matter.¹¹⁹ Courts impose that requirement to close the door to tenants' bad faith assertions of breach of the warranty as a means to avoid payment of rent.¹²⁰ We found in the cases studied that the rent deposit requirement was imposed without sufficient consideration of context. Thus, it quickly became unduly

118. See Zulack, *supra* note 57, at 440, 448–54; see also *supra* notes 83–85, 103 and accompanying text.

119. See ALA. CODE § 35-9A-405(a) (2016); FLA. STAT. ANN. § 83.60(2) (West 2016); HAW. REV. STAT. ANN. § 521-78(a) (2016); MONT. CODE ANN. § 70-24-421(1) (West 2015); NEV. REV. STAT. ANN. § 118A.490(1) (West 2015); N.H. REV. STAT. ANN. § 540:13-d(II) (2016); N.J. STAT. ANN. § 2A:18-55 (West 2016); OHIO REV. CODE ANN. § 5321.07(B)(1) (West 2016); *Marini v. Ireland*, 265 A.2d 526, 535 (N.J. 1970); see also ARIZ. REV. STAT. ANN. § 33-1365(A) (2016); CONN. GEN. STAT. ANN. § 47a-14h(h) (West 2016); FLA. STAT. ANN. § 83.60(2) (West 2016); GA. CODE ANN. § 44-7-75(a) (West 2016); HAW. REV. STAT. ANN. § 521-78(a) (2016); KY. REV. STAT. ANN. § 383.645(1) (West 2016); *Chernin v. Welchans*, 844 F.2d 322, 324 (6th Cir. 1988) (describing Ohio's five step procedure to raising the warranty as a defense, including rent deposits). Still, those states, along with others, embrace a more nuanced approach to the question of just how much withheld rent must be placed into escrow, allowing for equity-based calculations by the court depending upon the particular facts and circumstances.

120. See *supra* note 119.

onerous for tenants who, for example, were using withheld sums to make the essential repairs themselves in view of landlord intransigence.¹²¹

Rent deposit requirements imposed by the court without context or nuance can impose a practical bar to aggrieved tenants' very assertion of the defense of breach of the warranty. A tenant obliged to continue paying rent for significantly substandard premises is deprived of the opportunity to use withheld sums for needed repairs. Concurrently, a recalcitrant landlord assured of continued rent payments is without the incentive to remediate. All of the tenants interviewed noted the hardships imposed by the rent deposit requirement when it was applied without gradation or consideration of the given circumstances.

The rent deposit requirement must be recast to allow for premises-specific determinations of whether and how much rent ought to be deposited with the court, pending the given case's resolution. Summary eviction statutes should be amended to allow aggrieved tenants living in subsidized housing to receive, in the form of rent abatements, not just all or some portion of their monthly rent obligation, but also all or some of the governmentally subsidized amounts that would otherwise be remitted to a code-compliant landlord.¹²² Those sums would be applied by affected tenants to remediate existing deficiencies.

A central, county-wide database can and should be established to serve as a repository of leased premises' histories of code compliance or noncompliance, housing inspectors' reports, and applicable rent subsidies. That database would be used by housing court judges to set the amount, if any, of rent that tenant must deposit with the court pending the case's resolution. It can and should also be used by federal and state agencies to withhold, suspend, or reduce rent subsidies until landlord compliance with applicable habitability standards is assured.

Prior to conducting this study, it was our expectation that when a tenant raised a warranty of habitability defense, the judge handling the case would dispatch a housing inspector to gauge the merits of the claim, document the condition of the given premises, and report back his or her findings. The judge would then consider the amount and severity of the violations and determine, on a case-specific basis based

121. New Jersey, like the vast majority of jurisdictions, recognizes "repair and deduct," or the right of an aggrieved tenant to make necessary repairs herself in the face of landlord inaction and then deduct those repair costs from future rent. See *Marini*, 265 A.2d at 535; *supra* note 119 and accompanying text.

122. See *Committed Cmty. Assocs. v. Crosswell*, 659 N.Y.S.2d 691, 694 (N.Y. App. Div. 1997).

on the premises' fair rental value in view of existing defects and tenant's other abatement measures, how much, if any, withheld rent had to be deposited into escrow.¹²³ We thought that courts would also avail themselves of the discretion to order that some or all of any state or federally subsidized rent income be withheld until the landlord complied with the law or redistributed to the tenant to reimburse her for any repairs made or to allow her to make needed repairs in the face of landlord recalcitrance.

Our expectation yielded to the realities of housing court practice in the field studied. There was no mechanism in place for coordination between housing courts, housing inspectors, and state and federal rent subsidizing agencies. There was no ready means (such as a centralized database and online registry) for judges to access the given premises' rental history when making determinations about the parties' rights and duties. State and federal rent subsidizing agencies were not alerted to subsidized premises' betrayal of habitability standards. Instead, even the most intractable landlord was assured a steady and uninterrupted governmental cash flow (which represented the vast share of rent due) as protracted court proceedings played out. Meanwhile, the tenant, no matter how aggrieved, was obliged to regularly deposit her share of the rent with the court pending the case's final resolution.¹²⁴

The rent deposit obligation is unjust when it is applied without context and without room for downward adjustment of the monies to be deposited depending, for example, on the extent and nature of the violations or on whether the tenant already expended sums to cure on-site deficiencies. A low-income tenant who has expended monies on essential repairs is ill-equipped to place the full amount of rent that would otherwise be due into escrow. Here, state legislatures would be best advised to enact the Uniform Residential Landlord and Tenant Act ("Act").¹²⁵ The Act, which has been adopted in some states,¹²⁶ allows for

123. While *Marini* does not explicitly prescribe such a protocol, that protocol is consistent with the spirit of the court's ruling and its commitment to assuring basic fairness. 265 A.2d at 535.

124. *Id.* at 535. The text of *Marini* exemplifies the court's fear of opening the floodgates to sizeable amounts of landlord-tenant litigation and therefore seems to give the judge the discretion whether or not to impose a rent deposit requirement. *Id.* ("We realize that the foregoing may increase the trials and appeals in landlord and tenant dispossession cases and thus increase the burden of the judiciary."). It does seem clear, however, that if a rent deposit requirement is to be instituted, it must be instituted in full, meaning there is no room for adjustment; it is an all-or-nothing decision.

125. UNIF. RESIDENTIAL LANDLORD & TENANT ACT (UNIF. L. COMM'N 1972) (amended 1974), amended by REVISED UNIF. RESIDENTIAL LANDLORD & TENANT ACT (UNIF. L.

the exercise of discretion by housing courts when setting the amount that a given tenant must deposit into escrow pending the case's final adjudication.¹²⁷ At present no such prerogative exists in New Jersey.¹²⁸

By contrast, New York's legislative scheme, following the Act's lead, gives the housing court the ability to order on a case-specific basis either a reduced, nominal, or zero rent deposit requirement depending on the nature of the violations at issue and the monies already expended by the aggrieved tenant to remediate.¹²⁹ The New York model is commendable, too, because it builds into the system a coordination of effort between the courts and housing inspectors.¹³⁰ The New York City Department of Housing Preservation and Development's system for central recording of housing violations creates a streamlined registry that judges can consult before ruling on any rent deposit requirement.¹³¹ That registry has become an integral part of residential landlord-tenant proceedings and a helpful tool when making relevant rent deposit determinations.¹³²

Certainly, New Jersey needs a unified housing code enforcement system that can be applied whenever a tenant asserts breach of warranty. If court efforts are joined with municipal code enforcement efforts, a joinder lacking in many jurisdictions—certainly in Essex County, the situs of this study—distressed housing markets could move closer to establishing a floor for decent housing. As an attendant matter, that coordinated effort would include a mechanism for state and federal agencies to be notified whenever a *Marini* defense is raised with

COMM'N 2015), http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/RURLTA%202015_Final%20Act_2016sep12.pdf.

126. Arizona, ARIZ. REV. STAT. ANN. § 33-1365 (2016), Iowa, IOWA CODE ANN. § 562A.24 (West 2016), Kansas, KAN. STAT. ANN. § 58-2561 (West 2016), Kentucky, KY. REV. STAT. ANN. § 383.645 (West 2016), Montana, MONT. CODE ANN. § 70-24-421 (West 2015), Nebraska, NEB. REV. STAT. § 76-1428 (West 2016), and Rhode Island, 34 R.I. GEN. LAWS ANN. § 34-18-32 (West 2016).

127. REVISED UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 408(d)(2) (UNIF. L. COMM'N 2015), http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/RURLTA%202015_Final%20Act_2016sep12.pdf.

128. See *supra* note 64.

129. See generally N.Y. REAL PROP. L. § 235-b (McKinney 2016).

130. See Zulack, *supra* note 57, at 435–37.

131. See *id.* at 425, 432, 437–39, 450, 451, 453. This study of New York City's court information systems contains seven screen shots of the computer screen available to a Housing Court judge that classifies the violations, includes statements of the tenant and landlord, photos, findings of the court, and a list of a given building's previous and current violations. *Id.*

132. *Id.* at 432, 435, 446.

respect to government-subsidized premises. Those agencies would thereby be afforded the opportunity to suspend or reduce subsidies until a housing inspector is dispatched to assess the premises. That prospect would give the warranty real teeth and, at the same time, prevent waste.

B. The Consequences of Tenant Blacklisting

During the course of our study we also learned that a tenant named as a defendant in a landlord's suit for nonpayment of rent, no matter the viability of that tenant's defenses, can be placed on a "blacklist," or central registry, maintained by private agencies that becomes the de facto equivalent of a miserable credit rating.¹³³ Tenants placed on that list find themselves denied future renting opportunities and worse.¹³⁴ Further, the specter of being blacklisted imposes a considerable chilling effect, dissuading tenants from exercising otherwise assured rights and remedies.¹³⁵

Court systems like those in place in New Jersey inadvertently feed the practice of tenant blacklisting. Companies calling themselves "credit reporting agencies"¹³⁶ will screen a prospective tenant at the landlord's request and, in exchange for a fee that the prospective tenant must pay, report all instances in which that tenant was named as either a defendant or plaintiff in a landlord-tenant court action.¹³⁷

133. See Rudy Kleysteuber, Note, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1346, 1356–57, 1360–62 (2007); Julie Satow, *On the List, and Not in a Good Way*, N.Y. TIMES (Oct. 16, 2014), http://www.nytimes.com/2014/10/19/nyregion/a-tenant-blacklist-culled-from-tedium.html?_r=0.

134. See Kim Barker & Jessica Silver-Greenberg, *On Tenant Blacklist, Errors and Renters with Little Recourse*, N.Y. TIMES (Aug. 16, 2016), <http://www.nytimes.com/2016/08/17/nyregion/new-york-housing-tenant-blacklist.html>. One tenant, Margot Miller, as reported by Kim Barker, was denied an apartment even though she had a 760 credit score, which is labeled as "stellar." *Id.*

135. *Id.*

136. *Using Consumer Reports: What Landlords Need to Know*, FED. TRADE COMM'N (Dec. 2001), <https://www.ftc.gov/system/files/documents/plain-language/bus49-using-consumer-reports-what-landlords-need-know.pdf>; accord *Press Release, FTC Warns Data Brokers That Provide Tenant Rental Histories They May Be Subject to Fair Credit Reporting Act*, FED. TRADE COMM'N (April 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/04/ftc-warns-data-brokers-provide-tenant-rental-histories-they-may>.

137. See Gary Williams, *Can Government Limit Tenant Blacklisting?*, 24 SW. U. L. REV. 1077, 1082 (1995) ("One service they perform is compiling lists of persons who have been defendants in unlawful detainer cases. For a fee, tenant screening services will inform a landlord if a prospective tenant has been a defendant in an unlawful detainer action

Those reports, which can sink a tenant's prospects of finding rental housing, reveal nothing about context and do not indicate, for example, whether or not the listed tenant successfully defended the litigation or raised breach of warranty.¹³⁸ In addition to unfairly stigmatizing a tenant, the reports skew market efficiencies, creating "false negatives" of prospective renters who, in fact, would be fine tenants, thereby rendering apartments even less accessible for the poor.¹³⁹

If the failure to resolve tenant Esperanza Menendez-Jackson's habitability problems presents the limitations of raising a *Marini* defense, then the circumstances surrounding tenant Maurice Smith's¹⁴⁰ blacklisting make plain the problems with tenant reporting systems, including their stigmatizing effects and real threat of homelessness that tenants on a blacklist face.¹⁴¹ Over the span of nine months, between 2011 and 2012, Newark resident Maurice Smith raised defenses in two separate non-payment of rent proceedings. In both cases, Mr. Smith successfully defended the non-payment actions. Still, the fact that both cases were resolved in Mr. Smith's favor did not prevent him from subsequently suffering rejection at the hands of two separate subsidized property managers for having popped up in a "Tenant Safe" report, or blacklist.

To add insult to injury, as a prospective tenant at the later sites, Mr. Smith was required to pay for the very background checks that blacklisted him and sunk his rental chances. This occurred even though Mr. Smith presented proof to the managing agent that the previous litigation had been resolved in his favor. Apparently, there is no appeal process or chance for an affected tenant to explain to a prospective landlord how and why he came to appear on the given tenant-screening

virtually anywhere in the nation. Once a prospective tenant has been identified as a defendant in an unlawful detainer action, he or she usually finds it difficult, if not impossible, to secure rental housing.").

138. *Id.* at 1083.

139. *Id.* at 1154–56.

140. We tell Mr. Smith's story with his permission.

141. On December 8, 2011, a non-payment proceeding was commenced against Maurice Smith by his landlord, HG3 management. This proceeding was dismissed on January 11, 2012 after Smith asserted that HG3 had rented him an illegal apartment. Smith vacated and began residence in a different apartment. A second non-payment proceeding was commenced against him under the docket number LT 02010012 on July 3, 2012. This proceeding was dismissed on August 6, 2012 after Smith asserted that the former landlord, St. Catherine, no longer had the standing to seek physical possession of the apartment due to the fact that prior to the commencement of this second non-payment proceeding, the Essex County Chancery Court had allowed a mortgagee to exercise its right as mortgagee in possession and to collect all rents for the subject premises.

database. It was only with dogged persistence that, months later, Mr. Smith was able to convince the Tenant Safe reporting service to remove him from its listing. Thereafter, Mr. Smith was able to find a suitable apartment.

Tenant blacklisting essentially punishes a tenant for exercising her right to be assured of inhabitable premises. As such, the practice is repugnant to public policy and the right of access to courts for dispute resolution.¹⁴² Minnesota, recognizing the danger and inherent unfairness of the practice, recently enacted a statute regulating the tenant-reporting industry.¹⁴³ The statute requires tenant-screening services to disclose the “nature and substance of all information in its files on the individual at the time of request” together with “the sources of the information.”¹⁴⁴ Most significantly, the Minnesota statute mandates notice to the affected tenant whenever a report is issued.¹⁴⁵ It obligates the screening service to reinvestigate the comprehensiveness and veracity of its report if the tenant disputes it.¹⁴⁶ The service must then delete any erroneous or unverifiable information and issue a corrected report.¹⁴⁷ It must also allow a prospective tenant to “explain any eviction report or any disputed item not resolved by reinvestigation.”¹⁴⁸ That explanation must be included in any subsequent report.¹⁴⁹ State legislatures would do well to follow Minnesota’s lead.

Most recently, in August, 2016, the New York City Council’s Consumer Affairs Committee began considering legislation that would require tenant screening companies to include with their reports complete descriptions of the housing court cases that form the basis for their listings.¹⁵⁰ Significantly, those descriptions must indicate “when tenants won, or when an apartment was decrepit.”¹⁵¹ As the legislation’s sponsor indicated, “No one should be condemned to being homeless just because they were in housing court.”¹⁵²

New Jersey and other similarly-situated jurisdictions need to

142. Williams, *supra* note 137, at 1081, 1127–28, 1141–42.

143. MINN. STAT. ANN. § 504B.241 (West 2016).

144. *Id.* §§ 504B.241(1)(a)(1)–(2).

145. *Id.* § 504B.241(1)(b).

146. *Id.* § 504B.241(2).

147. *Id.* §§ 504B.241(1)(b), (2).

148. *Id.* § 504B.241(3).

149. *Id.*

150. See Barker, *supra* note 134.

151. *Id.*

152. *Id.*

engage in comparable reform efforts. Reform of the tenant reporting industry should require tenant-screening companies to omit from their registries any listing of housing court proceedings resolved in tenants' favor or include with their reports the full and accurate context for all information that they provide. Reform efforts should also mandate that tenants identified in reports be afforded the opportunity to clear their reputations.

Reports should have a statute of limitations, such as three years, after which it would be illegal to continue reporting on stale litigation. Tenant screening companies reporting incomplete or inaccurate information should be held liable for their actions. Tenants denied housing, mortgages, loans, and other opportunities because of faulty reports should be entitled to damages from negligent tenant screening companies. Restrictions should also be placed upon landlords themselves. For example, a landlord receiving a tenant screening report should be required to deliver a copy of that report to the prospective tenant, thereby providing the tenant with notice and an opportunity to provide relevant context.

CONCLUSION

The hope that the implied warranty of habitability would be a tool to raise the floor for residential rental housing has not been realized. Still, our glimpse of aggrieved tenants' experiences with the warranty in those instances where it was raised as a defense over the course of one year in Essex County, New Jersey, presents an odd paradox. Despite its relative paucity of use, when breach of the warranty was asserted it did eventually work to provide effective relief. The considerable challenge is to remove obstacles to its assertion, whether in the form of onerous rent deposit requirements, the absence of centralized databases for courts and rent subsidizing agencies to use when making decisions regarding substandard premises' eligibility for continued government subsidies in view of their given defects, the subversive practice of "tenant blacklisting," the scarcity of effective assistance of counsel, or tenants' lack of awareness of their basic rights.

This is an opportune moment for needed reform, as the plight of the working poor and those left out of the promise of habitable housing comes into sharper focus.¹⁵³ To make that promise real, more than expanded government rent subsidies will be required. A concerted effort

153. See, e.g., MATTHEW DESMOND, *EVICTED: PROPERTY AND PROFIT IN THE AMERICAN CITY* (2016) (chronicling the experiences of Milwaukee tenants living at the margins).

on the part of housing courts, housing inspectors, and government rent-subsidizing agencies must be undertaken to insure that government housing support money is not wasted. Moreover, public 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. The Menendez-Jackson case and others like it reveal that overstretched government agencies, by themselves, will not fulfill that mission.

APPENDIX: INITIAL TENANT SURVEY

1. Name: _____.
2. Present Address: _____.
3. Previous Address: _____.
4. How many months of rent withheld? _____.
5. Why did you withhold rent? _____.
6. Did you move out after the lawsuit? _____.
7. If yes, what was the reason you moved? _____.
8. Did you notify the landlord of the problems? _____. If yes, when? _____.
9. Were repairs made to the apartment? _____. If yes, when? _____.
10. What was left unrepaired? _____.
11. What happened next?
 - a. Judicial resolution (court)? _____.
 - b. Remained in Apartment? _____.
 - c. Moved from Apartment? _____.
12. If the repairs had been made, would you have stayed in the apartment: _____.

13. If the answer to Question 5 was "Yes," answer the following: Did you have trouble renting a new apartment:

14. What was the cause of that trouble?

15. Do you think you would withhold rent again as a way to get defective on-site conditions addressed?

16. How many people were in your family when you began withholding rent? _____.

17. Were you employed when you began withholding your rent?
___ Yes ___ No.

18. What was your primary source of income when you began withholding your rent?

19. Were you aware that withholding rent could affect your credit rating? ___ Yes ___ No.

20. Have you experienced any consequences because of the mark on your credit rating?

21. Where are you living now?

22. Since this eviction have you been subject to another?

23. If applicable, do you have any issues with your current landlord?

24. May we contact you in the future for follow-up? Contact Information:
