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## The Rise and Fall of the Implied Warranty of Habitability

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# The Rise and Fall of the Implied Warranty of Habitability

David A. Super\*

*Growing concern about poverty in the late 1960s produced two sweeping legal revolutions. One gave welfare recipients specific legal rights against arbitrary eligibility rules and benefit terminations. The other gave low-income tenants recourse when landlords failed to repair their homes. The 1996 welfare law exposed the welfare rights revolution's frailty by ending Aid to Families with Dependent Children (AFDC) and severely cutting other key programs. Little noticed by legal scholars, the tenants' rights revolution's centerpiece, the implied warranty of habitability, also has failed, and for broadly similar reasons.*

*Deliberately withholding rent to challenge a landlord's failure to repair is not viable for many tenants in ill-maintained dwellings: either moving to better housing is a smarter option or the risk of retaliation from the tenant's landlord is too great. The implied warranty could still motivate landlords to repair if it limited evictions of low-income tenants who fall behind on their rent for other reasons, but a set of obscure yet powerful doctrines deem these tenants unworthy to claim the warranty's protection. Moreover, reformers left implementation to courts with neither the resources nor the inclination to transform landlord-tenant relations.*

*None of this was inevitable. The doctrines that effectively limited the warranty to deliberate withholding of rent had weak*

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*justifications. And contemporaneous procedural innovation in other areas of law offered alternatives to the unresponsive courts.*

*More daunting than legal doctrine was the transformation of the housing market. In today's market, fewer low-income tenants live in decrepit dwellings, but many suffer housing problems whose consequences may be even more severe: overcrowded units, locations far removed from jobs and good schools, and unmanageable rents. Lacking a clear, unified purpose, the tenants' rights revolution's legacy has failed to address these changes.*

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## INTRODUCTION

The antipoverty movement in the 1960s spawned two seemingly very different legal revolutions. In public law, the courts gave low-income people new substantive and procedural rights to welfare and other public benefits, and Congress established new or expanded programs providing health insurance, food assistance, and aid to the elderly and persons with disabilities. In private law, courts and state legislatures recognized sweeping new rights for low-income tenants. The focus of this effort was to find an implied warranty of habitability in residential leases, which was mutual with the tenant's covenant to pay rent. The foundational cases of these two revolutions, *Goldberg v. Kelly*<sup>1</sup> and *Javins v. First National Realty Corp.*,<sup>2</sup> are the only poverty law cases many law students read.<sup>3</sup>

Over the past two decades, many of the pillars of the welfare rights revolution have collapsed. Congress repealed the sixty-year-old Aid to Families with Dependent Children (AFDC) welfare program,<sup>4</sup> sought to strip welfare recipients of legal entitlements,<sup>5</sup> slashed program funding,<sup>6</sup> and shifted policymaking authority to states,<sup>7</sup> whose will<sup>8</sup> and capacity<sup>9</sup> to assist low-

1. 397 U.S. 254 (1970).

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

3. In addition, some contracts casebooks include *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). That case initially seemed to be the opening shot in a revolution on behalf of low-income consumers. Difficulty formulating satisfactory doctrinal bases of such a program, however, left only a smattering of isolated cases. The difficulties that aborted the nascent low-income consumers' revolution parallel closely those of the tenants' rights revolution addressed below.

4. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103(a)(1), 110 Stat. 2105, 2112 repealing 42 U.S.C. §§ 601-617 (1994).

5. *Id.* § 116(c) (codified at 42 U.S.C. § 601 note (2006)) (disclaiming any entitlement to cash assistance after October 1, 1996); *id.* § 601(b) (same); see David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CALIF. L. REV. 1051, 1085-97 (2005) (describing the accomplishments and limits of legal entitlements in public benefits law) [hereinafter Super, *Efficient Rights*].

6. DAVID A. SUPER ET AL., *CTR. ON BUDGET & POLICY PRIORITIES, THE NEW WELFARE LAW* (1996) (finding that the 1996 welfare law cut almost \$55 billion over six years from programs for low-income people).

7. See Jon Michaels, *Deforming Welfare*, 34 SETON HALL L. REV. 573, 600-04 (2004) (identifying structural and substantive difficulties in transferring welfare programs to states).

income people is open to question. More broadly, the switch from large government budget surpluses early in the last decade to deficits as far as the eye can see,<sup>10</sup> and the impending retirement of the baby boomers, have created fiscal pressures likely to lead to strong pressures for further cutbacks in these programs.<sup>11</sup> The prospects for substantial improvements to the government's tax-and-transfer policies for low-income people therefore are cloudy at best.

Under these circumstances, regulatory policy naturally will receive renewed attention as an alternative means of relieving low-income people's difficulties. Developing countries lacking the resources and infrastructure to relieve poverty through tax-and-transfer policies commonly maintain a range of industrial subsidies, price controls, trade restraints, and other market interventions, with the goal of easing the burdens of their poorest citizens.<sup>12</sup> Anti-regulatory economists have largely persuaded policymakers in this country that direct governmental transfers are a far superior means of poverty reduction,<sup>13</sup> but both legislatures and courts are likely to reopen that question if direct transfers cease to be available due to budgetary constraints. If regulation is reconsidered, the tenants' rights revolution—the boldest regulatory assault on poverty since the New Deal—will likely be a major focus of attention.

The late 1960s and early 1970s saw wide-ranging changes in tenants' rights. The civil rights movement led to prohibitions on racial discrimination.<sup>14</sup> Federal housing programs began subsidizing rents in privately owned buildings; landlords accepting those subsidies were required to afford tenants a host of new rights.<sup>15</sup> Some jurisdictions imposed rent control,<sup>16</sup> prohibited evictions without just cause,<sup>17</sup> limited condominium conversions,<sup>18</sup> or

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8. See Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 585 (1999) (finding state political processes dominated by affluent suburban interests hostile to low-income people).

9. See David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2614–40 (2005) (finding states' fiscal constitutions implicitly biased against programs for low-income people and particularly ill-suited to maintaining countercyclical programs).

10. CONG. BUDGET OFFICE, *THE BUDGET AND ECONOMIC OUTLOOK* (January 2010).

11. See HENRY J. AARON & ROBERT D. REISCHAUER, *COUNTDOWN TO REFORM: THE GREAT SOCIAL SECURITY DEBATE* 51–53 (rev. & updated ed. 2001).

12. Economists commonly blame policies restricting free trade for poverty in developing countries. See, e.g., JEFFREY D. SACHS, *THE END OF POVERTY* 52–55 (2005); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 72–73 (1962). Whether or not this oversimplifies, the reverse certainly is often true: severe poverty, and the failure to address it directly through transfers, creates political imperatives to intervene in the market for low-income people.

13. FRIEDMAN, *supra* note 12, at 177–82.

14. See, e.g., Fair Housing Act of 1968, Public Act No. 112 of 1968 (codified at MICH. COMP. LAWS §§ 564.101–564.704 (1970)), *superseded by* Public Act No. 453 of 1976.

15. See, e.g., MICH. COMP. LAWS ANN. § 125.694a (West 2006) (prohibiting evictions from subsidized housing without just cause).

16. See, e.g., CAL. CIVIL CODE § 1947.8 (West 2011) (allowing localities to control rents).

17. See, e.g., 2A N.J. STAT. ANN. § 18-61.2 (West 2000) (setting forth permissible causes for terminating tenancies).

18. See, e.g., MICH. COMP. LAWS ANN. § 559.204 (West 2006) (giving tenants rights in

authorized receiverships for ill-maintained rental housing.<sup>19</sup> The most prominent result of the revolution, however, was reading an implied warranty of habitability into residential leases,<sup>20</sup> with a corollary prohibition on evictions in retaliation for asserting these new rights.<sup>21</sup> These measures, eventually adopted in almost every state, seemed to reverse the landlord's historical dominance of the landlord-tenant relationship.

Reexamining the tenants' rights revolution is particularly timely because of recent changes in the housing market. The burst of the housing bubble in 2007 has resulted in a glut of vacant homes.<sup>22</sup> In addition, high energy costs and urban revitalization programs are leading many more affluent people to abandon suburbs and return to central cities. Although not widely recognized at the time, a similar housing glut helped launch the tenants' rights revolution<sup>23</sup> by forcing a historically anomalous moderation in rents that caused many to believe tighter regulation was possible. The housing vacancies of the 1960s and 1970s resulted from the white middle class's abandonment of the central cities in response to racial fears, the Federal Housing Administration's (FHA) deep subsidies of building costs, and the new Interstate Highway System's subsidy of commuting costs from the suburbs.<sup>24</sup> Many of the new suburbanites were first-time homebuyers vacating urban rentals. And for those who owned homes in cities, the subsidies were often sufficient to justify absorbing large losses on their former homes to relocate to the suburbs. This created a huge glut of housing, much of it initially quite good, that the urban rental market had to assimilate.<sup>25</sup> For a variety of reasons, however, much of that housing was lost—abandoned, destroyed, or gentrified—and with it the prospects for a relatively inexpensive improvement in millions of low-income tenants' quality of life. Subsidized housing has never been sufficient to accommodate more than a small fraction of this country's low-income people; in its absence, older housing left by families moving to more desirable neighborhoods has been the major source of housing for low-income people.<sup>26</sup> The failure to make the

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condominium conversions).

19. See, e.g., MICH. COMP. LAWS ANN. § 125.535 (West 2006) (setting terms for such receiverships).

20. See, e.g., MICH. COMP. LAWS ANN. § 554.139 (West 2006) (implying three quality-related covenants into residential leases).

21. See, e.g., MICH. COMP. LAWS § 600.5720(1)(b), (c) (West 2000) (creating defenses against retaliation for complaints to code enforcement agencies or other lawful acts as a tenant).

22. Jim Harger, *Housing Groups Seek Inspection Equity; Single-Family Rentals, Inflated by Foreclosures, Get Free Pass*, THE GRAND RAPIDS PRESS, Dec. 21, 2010, at A1.

23. Edward H. Rabin, *The Revolution in Landlord-Tenant Law*, 69 CORNELL L. REV. 517, 562–66 (1984).

24. KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 7–27 (1985).

25. *Id.* at 203–18.

26. MICHAEL N. DANIELSON, THE POLITICS OF EXCLUSION 5–6 (1976).

housing being vacated today due to mortgage foreclosures and reurbanization available to low-income people would repeat that tragedy.

To avoid repeating the failures of past reforms requires understanding why they fell short. The similarities between the welfare rights revolution and the tenants' rights revolution are instructive. The welfare rights revolution gave recipients of subsistence benefit programs the right to advance hearings to challenge reductions or terminations in those benefits<sup>27</sup> and prohibited eligibility conditions not authorized by federal law,<sup>28</sup> in particular rules counting money not available to families as income.<sup>29</sup>

The essence of the tenants' rights revolution was similarly straightforward. Legislatures and courts read implied warranties of habitability and repair into residential leases<sup>30</sup> and made them mutual with the tenant's covenant to pay rent.<sup>31</sup> Tenants could raise the landlord's failure to comply with these obligations as a defense in an eviction proceeding for nonpayment of rent.<sup>32</sup> This was seen as updating landlord-tenant law from the archaic vision of estates in land to the modern world of contracts and as giving landlords incentives to repair blighted housing. An early flurry of scholarship debated the economics of housing code enforcement and, by extension, its private-law analogue, the implied warranty of habitability.<sup>33</sup> In the following years, however, almost every state's legislature or courts adopted the new regime.<sup>34</sup> Courts and legal scholars hailed these changes as breakthroughs in the battle against slum landlords and as powerful new remedies with which the urban poor could compel landlords to maintain their buildings adequately.<sup>35</sup> Yet the results achieved by these changes in the law have been far from what their advocates predicted.

The welfare rights revolution foundered for six basic reasons. First, it lacked a coherent, broadly accepted set of goals. Some saw the changes as modernizing administrative law to reflect contemporary means of security analogous to traditional property rights.<sup>36</sup> Some saw the changes as a means of

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27. *Goldberg v. Kelly*, 397 U.S. 254, 272–74 (1970).

28. *Townsend v. Swank*, 404 U.S. 282, 287 (1971).

29. *Lewis v. Martin*, 397 U.S. 552, 559–60 (1970).

30. *See, e.g.*, MICH. COMP. LAWS ANN. § 554.139 (West 2005); UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 4.105, 7B U.L.A. 387 (2009) [hereinafter URLTA]; *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Lemle v. Breeden*, 462 P.2d 470 (Haw. 1969).

31. *See, e.g.*, *Berzito v. Gambino*, 308 A.2d 17 (N.J. 1973); *Fritz v. Warthen*, 213 N.W.2d 339 (Minn. 1973).

32. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.5720(1)(f) (West 2000).

33. *See infra* notes 103–117.

34. ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* §§ 3:16, 3:30, 3:31 (1980); *id.* §§ 3:16, 3:30, 3:31 (Cum. Supp. 2009).

35. *See, e.g.*, Carl Schier, *Draftsman: Formulation of Policy*, 2 PROSPECTUS 227 (1968); Mary Ann Beattie, *Persuader: Mobilization of Support*, 2 PROSPECTUS 239 (1968).

36. Charles Reich, *The New Property*, 73 YALE L.J. 733, 771–74 (1964).

achieving various instrumental ends<sup>37</sup> such as expanding the workforce,<sup>38</sup> promoting children's education,<sup>39</sup> or preserving social peace.<sup>40</sup> Some saw the changes as a means of redistributing wealth,<sup>41</sup> reversing a deeply entrenched American resistance to redistribution.<sup>42</sup> Finally, some saw the new legal regime in narrower, humanitarian terms as a means of relieving the most severe hardships.<sup>43</sup> Although subscribers to these widely divergent viewpoints could all support new procedural rights for welfare claimants, their coalition quickly fractured when new challenges arose, such as growing public hostility to welfare programs and recipients' inability to navigate the hearing process.

Second, at the same time the new order was empowering low-income people, it could not resist moralizing about them. During the New Deal, the U.S. Supreme Court boldly declared that "[p]overty and immorality are not synonymous."<sup>44</sup> By the 1960s, however, the Court was conceding low-income people's immorality and making only technical arguments against rules to punish them: "Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children . . ."<sup>45</sup> It temporarily abandoned its doctrine of rejecting attempts to add eligibility conditions not in public benefits statutes to permit local governments to deny aid to families refusing intrusive investigations of their morality.<sup>46</sup> And beginning just weeks after *Goldberg v. Kelly*, it upheld rules reducing or denying benefits based on dubious individual<sup>47</sup> or collective<sup>48</sup> moral judgments. For many low-income people, the material sustenance these moralizing rules withheld was far more important than the procedural rights they granted.<sup>49</sup> If anything, the veneer of procedural regularity

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37. David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 597 (2008) [hereinafter Super, *Laboratories*].

38. DAVID T. ELLWOOD, POOR SUPPORT 19–25 (1988).

39. HERBERT J. GANS, THE WAR AGAINST THE POOR 115 (1995).

40. WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE 319–21 (5th ed. 1994).

41. Super, *Laboratories*, *supra* note 37, at 596.

42. For example, in the Federalist Papers, James Madison argued that the structure of government must ensure the defeat of factions seeking redistribution. THE FEDERALIST NO. 10 (James Madison).

43. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 277 (1970); Super, *Laboratories*, *supra* note 37 at 594–95.

44. *Edwards v. California*, 314 U.S. 160, 177 (1941).

45. *King v. Smith*, 392 U.S. 309, 325 (1968).

46. *Wyman v. James*, 400 U.S. 309 (1971) (allowing officials to make submission to intrusive home visits a condition of eligibility for AFDC).

47. *Dandridge v. Williams*, 397 U.S. 471 (1970) (declining to determine whether the state had adequately accounted for the needs of children in large families).

48. *Jefferson v. Hackney*, 406 U.S. 535 (1972) (allowing states to provide lower grants to families with children, a group composed disproportionately of African Americans and Latinos, than to the elderly and persons with disabilities, both groups composed predominately of whites).

49. See Super, *Efficient Rights*, *supra* note 5, at 1086–88 (finding only a tiny fraction of recipients sought fair hearings and only a small fraction of those prevailed).



added to the sting of the moralizing rules, inhibiting deeper change by giving the impression that only the confirmed immoral still faced hardship.<sup>50</sup>

Third, the new welfare regime lacked a coherent, plausible theory of the nature and causes of poverty. It seemed to regard failures to address poverty as resulting from aberrations, such as the isolated irrationality of a hasty eligibility decision or a rogue eligibility rule. In particular, it assumed that low-income people, although financially impoverished, were relatively affluent in human capital. Thus, people dependent on subsistence benefits, providing far less than even many part-time minimum wage jobs, nonetheless were assumed to have the procedural sophistication to initiate and prosecute claims under a system of legal rules that even the Supreme Court characterized as “an aggravated assault on the English language, resistant to attempts to understand it.”<sup>51</sup> When it turned out that few recipients could bring successful claims on their own, and that Congress was unwilling to fund legal services lawyers to handle more than a tiny fraction of the cases,<sup>52</sup> the new procedural rights became an occasional annoyance<sup>53</sup> rather than a meaningful force in program operations.<sup>54</sup>

Fourth, and related, the welfare rights revolution had a crude vision of economics and, in particular, of the conditions and incentives of low-income people. It ignored transaction costs’ impact on people with very limited means, which can approximate that of outright denials of benefits.<sup>55</sup> More broadly, it ignored the sense of vulnerability that dominates low-income people’s lives, creating pervasive fear and stifling assertions of whatever rights they may have.<sup>56</sup> This simplistic economic model also ignored complexities of the incentives and opportunities of those whom it sought to influence—welfare eligibility workers.

Fifth, the welfare rights revolution also had a crude vision of institutional behavior. It incorrectly assumed both that administrative hearing procedures and broad class action lawsuits would motivate individual eligibility workers to follow rules<sup>57</sup> and that no contrary pressures would arise.<sup>58</sup>

Finally, the welfare rights revolution failed to anticipate important changes. It assumed that the conditions afflicting low-income people were static and would succumb to static reforms. The revolution was thus unprepared

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50. David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2066–72 (2004) [hereinafter Super, *New Moralizers*].

51. *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 n.14 (1985).

52. Super, *Efficient Rights*, *supra* note 5, at 1093–95.

53. *Id.* at 1087–88.

54. *Id.* at 1097–1117.

55. David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 832–35 (2004) [hereinafter Super, *Invisible Hand*].

56. Super, *Efficient Rights*, *supra* note 5, at 1088.

57. *Id.* at 1086–89.

58. *Id.* at 1097–1117.

for the economic changes after the recessions of 1979–82 eliminated many of the high-paying, low-skilled industrial jobs that had been the ladder out of poverty for tens of millions of people.<sup>59</sup> Thus, the poverty rate generally declined through the 1970s as Congress strengthened antipoverty programs<sup>60</sup> but then rose dramatically as President Reagan pushed deep cuts in those programs through Congress<sup>61</sup> and recipients could find only low-paying, often contingent, service-sector jobs.<sup>62</sup> The welfare rights revolution also failed to anticipate changing models of program administration, particularly privatization.<sup>63</sup> The lack of consensus about the reforms' goals, as well as the difficulty of the economic challenges, prevented formulation of a coherent proposal to adapt to dramatic changes in housing markets, labor markets, and antipoverty policy in subsequent decades.

This Article argues that the tenants' rights revolution suffered from the same six fundamental defects that prevented the welfare rights revolution from having a meaningful impact on poverty, and that it has failed similarly. Part I surveys the genesis of the implied warranty of habitability and related innovations. It finds the same normative ambivalence—cleaving on very similar lines—that prevented the welfare rights revolution from adapting. Some saw the reforms in solely legalistic terms: replacing property law's exceptionalism with contract law's efficient universality. Others had instrumental aims, seeing tenant protections as a means of improving the urban physical environment. Still others saw the reforms as a covert means of achieving broader redistributive ends. Finally, some held a humanitarian vision of empowering tenants to remedy deplorable housing conditions.<sup>64</sup> In addition, in the years immediately after the urban riots of the mid-1960s, some thought the reforms would contribute to social peace.

Part I then distills the conditions that must be met for landlord-tenant reforms to achieve each of these purposes. It finds that, just as new procedural due process rights were only relevant if claimants challenged denials of benefits, tenants' ability and willingness to assert the implied warranty of habitability were crucial to the tenants' rights revolution. Two groups of tenants—those who are financially stable and those who are not—face significantly different incentive structures. Financially stable tenants are much less likely to withhold rent voluntarily to force a confrontation with their landlords than deeply impoverished tenants are to challenge their landlords' failure to repair when they become involuntary defendants in eviction actions

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59. MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* 30–39 (2001).

60. Super, *Laboratories*, *supra* note 37, at 584–86.

61. *Id.* at 587–88.

62. KATZ, *supra* note 59, at 348–53.

63. David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393, 433–44 (2008).

64. *See infra* Part I.A.

after falling behind on rent for other reasons. Also vital are the courts' allocation of sufficient adjudicatory resources to these cases and their ability to transform their relationships with landlords and tenants. Finally, much of the benefit of the new regime depends on favorable housing market conditions. Although several theories of such conditions emerged, the most important raise significant paradoxes.

Part II identifies the key obstructions to the effectiveness of the reforms. One set of barriers are little-noticed substantive restrictions on the implied warranty of habitability that have the effect of preventing most involuntary defendants—those most likely to raise the warranty—from doing so effectively. The other barriers are procedural, arising from the lower courts' failure to adapt to the very different goals and demands of the new regime they were asked to enforce. Many of these procedural barriers have close analogues in the public benefits realm.

Part III finds the new regime's failure inevitable, both because of its own internal shortcomings and because of broader changes in the low-income housing market. It finds these legal shortcomings particularly unfortunate. It sees dubious policy and doctrinal support for the substantive rules that have closed the courts to tenants living in decrepit housing whose failure to pay rent resulted from poverty rather than militancy. It also suggests that lessons from the "new property" realm of public benefits can guide adjudication in the "old property" world of landlord-tenant law. In the end, however, it finds fundamental changes in the low-cost housing market transformed the meaning of bad housing conditions, leaving the new legal regime ill-suited to confront low-income tenants' most serious problems. In the same way, the legacy of the welfare rights revolution has proven ineffective in responding to the increasing inadequacy of benefit levels and the collapse of political support for key programs. This finding suggests far stronger commonalities between fiscal and regulatory antipoverty law than commonly understood.

The Article concludes with some observations about how to combat the range of housing problems facing low-income people and offers broad suggestions about how regulatory interventions on behalf of low-income people can be more effective. In so doing, it offers a way to integrate lessons from the welfare and tenants' rights revolutions.

## I.

### THE PROMISE OF THE TENANTS' RIGHTS REVOLUTION

Because the tenants' rights revolution enjoyed broad and diverse adoption, it should not be surprising that the implied warranty of habitability had more than one driving purpose. On the national level, the tenants' rights revolution of the late 1960s and 1970s was unusual among law reform initiatives in that it

proceeded simultaneously through case law and legislation.<sup>65</sup> In some states, the courts went first in announcing a warranty of habitability. In others, the legislature acted, sometimes by adopting the Uniform Residential Landlord and Tenant Act (URLTA)<sup>66</sup> and sometimes by amending existing summary eviction statutes.<sup>67</sup> Although the implied warranty received considerable attention in states that had been wracked by urban unrest in the 1960s, it came into force in many rural states at about the same time.

Section A identifies four leading purposes of the tenants' rights revolution. All but one of these purposes was instrumental, seeing the new legal regime as a means of accomplishing one or another change in society rather than as an end in itself. Disagreement about the relative importance, or even basic legitimacy, of these purposes proved important in limiting their effectiveness, as Part II demonstrates. Section B then explores the conditions necessary for the achievement of the new regime's instrumental goals.

#### *A. The Goals of the Tenants' Rights Revolution*

The tenants' rights and welfare rights revolutions proceeded from strikingly similar premises. Four major purposes motivated the welfare rights revolution of the 1960s and 1970s. First, some saw the extension of legal rights to public benefits cases as a modernizing move, affording the vital interests of those programs' beneficiaries the same kinds of protections that real property had secured to individual interests in an agrarian age.<sup>68</sup> Second, some advocated expanding low-income people's rights in public benefit programs as a means of accomplishing other social ends, such as reducing crime and securing social peace.<sup>69</sup> Third, welfare rights appealed to some as a means of redistributing income.<sup>70</sup> Finally, giving public benefit programs' recipients legal rights seemed to some an effective means of achieving the humanitarian ends of those programs.<sup>71</sup>

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65. See Neil K. Komesar, *The Revolution in Landlord-Tenant Law: A Comparative Institutional View*, 69 CORNELL L. REV. 612 (1984) (urging comparison of the efficiency of these two paths).

66. 7B U.L.A. 387 (Supp. 1999); see Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879 (1975) (discussing how ALI helped lead this transformation).

67. See, e.g., MICH. COMP. LAWS §§ 600.5720, 600.5741 (1972).

68. See Reich, *supra* note 36, at 785–86 (arguing that property rights are crucial to defending the individual against state intrusion and that public benefits form the modern analogue to traditional property rights).

69. See U.S. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 457–67 (1968) [hereinafter KERNER COMMISSION REPORT].

70. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS 264–65 (1977).

71. See Super, *Laboratories*, *supra* note 37, at 594–95; Super, *Efficient Rights*, *supra* note 5, at 1058–60.

Each of these purposes had at least a rough analogue in the four major purposes animating the tenants' rights revolution. Subsection 1 analyzes the legalistic, modernizing narrative of these reforms as replacing a paradigm based on estates in land with one based on contract law. Subsection 2 explores the instrumental motivation: improving the quality of urban housing through the agency of tenants of substandard units.<sup>72</sup> Subsection 3 briefly sketches the redistributive motives of some reformers. Subsection 4 considers the humanitarian vision of these reforms as improving the lives of low-income tenants. Finally, Subsection 5 notes an additional set of instrumental concerns that may have motivated the reforms' initial adoption but which soon disappeared from discussions of landlord-tenant law. Although these goals are superficially harmonious with one another, and indeed often invoked jointly by advocates of the reforms, Part III will demonstrate that the full realization of these goals may be inconsistent.

### *1. Modernization: Triumph of Contract over Estates in Land*

Some courts and legislatures sought to explain the implied warranty of habitability, and the process of treating it as mutual with the tenant's duty to pay rent, as harmonizing landlord-tenant law with broader principles of contract law.<sup>73</sup> Some courts undoubtedly believed that the principles embodied in contract law were inherently fairer than the medieval property concepts that previously governed landlord-tenant relations in general and leases in particular. And some courts may simply have been offended by the disparity in treatment between landlords and tenants: while the courts rigorously enforced tenants' obligations to pay rent with expedited procedures, landlords were under virtually no pressure to perform their obligations to their tenants.<sup>74</sup>

This vision had the virtue of simplicity. The lease, as amended by the implied warranty, became a contract between landlord and tenant. As with

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72. Other factors also may have contributed to the reforms. Some small states with part-time legislatures often adopt uniform laws such as URLTA as an efficient way of keeping in step with the rest of the country. Similarly, once several states' courts had adopted the implied warranty, other states may have followed suit absent any clear reason to make the law of their state an outlier. None of these considerations, however, likely would have driven such a thorough overhaul of centuries of well-settled law.

73. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075 (D.C. Cir. 1970). See generally Leslie E. Gerwin, *A Study of the Evolution and Potential of Landlord Tenant Law and Judicial Dispute Settlement Mechanism in the District of Columbia, Part I: The Substantive Law and the Nature of the Private Relationship*, 26 CATH. U. L. REV. 457 (1977) (finding conformity to modern notions of contract law was one of the key factors guiding the evolution of a new landlord-tenant legal regime).

74. *Javins*, 428 F.2d at 1082 (“[T]he legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards.” (alteration in original)).

parties to other contracts, their relationship was to be symmetrical before the law. The courts had long provided landlords with a service essential to their businesses: eviction procedures, operating far more expeditiously than other civil actions, allowed landlords quickly and inexpensively to coerce and remove any tenants not paying rent. The courts would now demand that, in exchange for this extraordinary help in requiring tenants to perform their legal obligations, landlords comply with the laws on health and safety. Contract law already had a host of principles for assessing performance, handling mutual breaches, measuring damages, and so forth. This allowed the new legal regime to burst onto the scene fully formed, without need for the time-consuming articulation over series of cases that had been required to transform civil rights law and criminal procedure.

The central principles of the new regime of landlord-tenant law were as familiar to contract law as they were alien to feudal property law.<sup>75</sup> The landlord's new implied covenant of repair was made mutual with the tenant's covenant to pay rent.<sup>76</sup> The tenant owed the landlord rent only as long as the landlord maintained the premises. The landlord's failure to maintain the premises violated a condition to her or his right to receive rent.<sup>77</sup>

Because the contractualist view of the tenants' rights revolution saw those changes as ends in themselves, it did not depend on any further actions by landlord or tenant. It did, however, depend on the courts to hew fairly closely to established principles of contract law in deciding landlord-tenant disputes. Their failure to do so in practice<sup>78</sup> meant that one idiosyncratic legal regime, based on notions of estates in land, would give way to another, based on current public policy preferences.

This situation was anathema to contract law. The creation of a large core of common principles of contract law had been one of the law's great achievements in the nineteenth century.<sup>79</sup> Given the instrumental nature of the other three major goals of the tenants' rights revolution, keeping landlord-tenant law

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75. *But see* Michael Madison, *The Real Properties of Contract Law*, 82 B.U. L. REV. 405, 410–26 (2002) (questioning whether the new regime of landlord-tenant law is true to contract principles); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 820–34 (2001) (positing a more complex allocation of functions between property and contract).

76. *Rome v. Walker*, 196 N.W.2d 850, 853 (Mich. Ct. App. 1972).

77. The purely contractual rights tenants received with the implied covenants of repair are occasionally confused with rights tenants received at approximately the same time to participate in code enforcement proceedings. *See* MICH. COMP. LAWS ANN. § 125.530(3)–(5) (West 2006); MO. ANN. STAT. § 441.570 (West 2000); N.J. STAT. ANN. § 2A:42-92(b) (West 2010); OHIO REV. CODE ANN. § 5321.07B(1) (LexisNexis 2004); *Drew v. Pullen*, 412 A.2d 1331, 1334 (N.J. Super. Ct. App. Div. 1980); *DePaul v. Kauffman*, 272 A.2d 500 (Pa. 1971). Under these schemes, the tenant essentially becomes an agent of the code enforcement system. The tenant imposes what amounts to a penalty by depriving the landlord of rent until the landlord brings the premises up to code. *City of Lakewood v. Novak*, 111 Ohio Misc. 2d 1 (Lakewood Mun. Ct. 2000).

78. *See infra* notes 200–203 and accompanying text.

79. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 464–68 (1973).

in harmony with the larger body of contract law could be difficult. Although both landlords and tenants might invoke contract principles when convenient, the modernizing vision as an end in itself had no obvious, reliable advocates before either legislatures or courts. Indeed, some advocates' tactical embrace of contract principles was so feeble that they failed to notice when contract law reasoning offered a rebuttal to efforts to restrict the scope of the reforms.<sup>80</sup>

### 2. *Urban Restoration: Improving Rental Housing Conditions*

Some courts' and legislatures' goals were more instrumental; they saw the implied warranty and its enforceability in actions for nonpayment of rent as a means of compelling landlords to maintain their buildings up to minimum standards of repair. Deteriorating housing conditions have serious negative effects on surrounding communities: they depress property values and hence property tax revenues, contribute to the spread of insect and rodent infestation, give cities a negative image with visitors, and are correlated with crime.<sup>81</sup> States therefore have reasons to want to ameliorate bad housing conditions completely independent of any concern for the well-being of low-income tenants. In this regard, these reforms sought to remedy the failures of "inefficient and unworkable" code enforcement<sup>82</sup> that had failed "to halt or reverse urban blight."<sup>83</sup>

### 3. *Redistribution: Tapping Landlords' Wealth to Ameliorate Tenants' Poverty*

Although underrepresented in judicial opinions, another significant force driving the tenants' rights revolution was a desire to redistribute power,<sup>84</sup> wealth,<sup>85</sup> and income<sup>86</sup> into the hands of low-income people. Advocates saw

80. For example, contractarian concepts permeate *Javins*, yet the court also drops a footnote that, in dicta, approves orders requiring tenants to continue performing their duty to pay rent in order to litigate their landlord's prior breach of the implied warranty of habitability. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1083 n.67 (D.C. Cir. 1970). That requirement has no place in contract law. See *infra* notes 202–203, 300–305 and accompanying text.

81. See EDWIN S. MILLS, *URBAN ECONOMICS* 178–79 (1st ed. 1972); James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC, Mar. 1982, at 29 (arguing that even modest defects can have devastating effects).

82. Brett R. Dick & John S. Pfarr, Jr., *Detroit Housing Code Enforcement and Community Renewal: A Study in Futility*, 3 PROSPECTUS 61, 90 (1969).

83. Judah Gribetz & Frank P. Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1255 (1966); see Samuel Jan Brakel, *URLTA in Operation: The Oregon Experience*, 1980 AM. B. FOUND. RES. J. 565, 578.

84. SAR A. LEVITAN, *THE GREAT SOCIETY'S POOR LAW* 177–79 (1969) (describing the goals of the Office of Economic Opportunity's Legal Services Program).

85. Jonathan I. Rose & Martin A. Scott, "Street Talk" *Summonses in Detroit's Landlord-Tenant Court: A Small Step Forward for Urban Tenants*, 52 J. URB. L. 967, 979 (1975) (noting the Marxist critique of housing markets that society should provide housing without profit); Myron Moskowitz & The Nat'l Hous. & Econ. Dev. Law Project, *Moving Toward Tenant Control of Housing*, in *TENANTS AND THE URBAN HOUSING CRISIS* 203 (Stephen Burghardt ed., 1972).

86. Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing*

landlords' property rights, and tenants' lack of such rights, as defining broader status relationships.<sup>87</sup> Redistributivists believed that landlords charged exorbitant rents and sought public intervention to transfer some of this value back to tenants.<sup>88</sup> They sought to increase the bargaining power of tenants, especially poor tenants, relative to their landlords.<sup>89</sup> Where tenants' only legal remedy against their landlords had previously been costly and ineffective affirmative suits for damages (which, absent implied covenants of habitability, might have to be based on relatively far-fetched tort theories) they could not expect to have much effect on the landlords' behavior. The threat of cutting off all rent revenues to a non-repairing landlord, however, when backed by law limiting the recoverability of that rent, would have to be taken much more seriously and would be much more likely to motivate landlords to make concessions to their tenants in the form of needed repairs. Many redistributivists saw the implied warranty of habitability and related doctrines not as ends in themselves but as necessary complements to achieving rent control<sup>90</sup> and other policies that more directly redistributed wealth.

Even on the left, however, this view was controversial: some felt that targeting landlords for redistribution diverted low-income people's attention from the system as a whole.<sup>91</sup> Some critics also saw legalization and institutionalization as sapping the tenants' rights movement's vital strength and paving the way for a backlash.<sup>92</sup>

#### 4. Humanitarianism: A Better Life for Low-Income Tenants

One need not favor general redistribution of income to seek to ameliorate the most severe forms of hardship. Although this country's politics have staunchly rejected broad governmental redistribution of income, middle-class voters have been much more sympathetic to efforts to prevent hunger, homelessness, and other forms of extreme hardship. This is true even where the required market intervention causes significant economic inefficiency.<sup>93</sup> Non-redistributivist humanitarians have, however, faced the administrative challenge of limiting their interventions to those most in need and the political

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*Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1096, 1195 (1971).

87. Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 571-75 (1992).

88. Rose & Scott, *supra* note 85, at 977.

89. Beattie, *supra* note 35, at 240.

90. See, e.g., *Scofield v. Berman & Sons, Inc.*, 469 N.E.2d 805, 812 (Mass. 1984); Rose & Scott, *supra* note 85, at 971 n.18.

91. PIVEN & CLOWARD, *supra* note 70, at 20-21.

92. *Id.* at xxii.

93. See JANET POPPENDIECK, *SWEET CHARITY? EMERGENCY FOOD AND THE END OF ENTITLEMENT* 141-52 (1998) (describing longstanding political enthusiasm for inefficient commodity distribution programs).



challenge of convincing policymakers and the public that they are not redistributivists.

Similarly, the desire to improve housing conditions is not necessarily the same as improving the lot of the tenants in that housing. Urban renewal in the 1960s addressed decrepit housing conditions by evicting tenants and demolishing their former homes. The HOPE VI program, developed in the 1990s to convert public housing projects into mixed-income developments, took a similar approach, demolishing many units of decaying but inexpensive housing.<sup>94</sup> This eliminated the bad housing, but the tenants in those neighborhoods were no longer around to enjoy whatever replaced it. Thus, the instrumentalist desire to press landlords to repair their dwellings is not necessarily pro-tenant even though it may depend heavily on tenants raising and winning habitability claims. Evicting low-income tenants and converting their former homes into well-maintained housing for the affluent would meet only the narrow objective of eliminating decrepit housing conditions, not the humanitarian goal of ameliorating tenants' hardships.

An important objective of the reforms was to improve the lives of the most hard-pressed tenants.<sup>95</sup> Although framed in terms of expanding tenants' rights, these rights existed to serve some purpose. Just as the civil rights movement won rights that people of color could use to improve their well-being, so too this vision of the tenants' rights movement sought to give low-income tenants greater rights against their landlords, thus offering the means for those tenants to improve their standard of living.

### 5. *Social Stability*

Although some jurisdictions were moving to recognize the implied covenant of habitability in residential leases in the early 1960s,<sup>96</sup> the urban riots of the mid-1960s put housing law "into a completely new perspective."<sup>97</sup> Studies done immediately after the riots indicated that bad housing conditions were a major cause of the disturbances.<sup>98</sup>

Here, too, the parallel between the two legal revolutions persisted as the welfare system took much of the blame for the disturbances.<sup>99</sup> In both instances, however, when major unrest did not recur after 1968, social peace rapidly disappeared from policy discussions.

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94. David D. Troutt, *Katrina's Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1140 (2008).

95. Schier, *supra* note 35, at 227.

96. See, e.g., *Pines v. Perssion*, 111 N.W.2d 409 (Wis. 1961).

97. Beattie, *supra* note 35, at 242–44.

98. Rose & Scott, *supra* note 85, at 968 n.8; "[G]rievances related to housing were important factors" fomenting discontent and leading to the riots. KERNER COMMISSION REPORT, *supra* note 69, at 472–73 (1968).

99. KERNER COMMISSION REPORT, *supra* note 69, at 457.

*B. Requirements for the New Regime's Success*

Under the new landlord-tenant regime, tenants can bring repair disputes to court either offensively or defensively. Once the courts or legislature imply a warranty of habitability into residential leases, tenants in bad housing may sue their landlords for damages;<sup>100</sup> some jurisdictions will also grant equitable relief to such tenants. In practice, however, most tenants remaining in bad housing lack the legal or economic resources to sue affirmatively. As a result, the best chance for repairs to be adjudicated is in connection with an affirmative defense or counterclaim to the landlord's action for possession for nonpayment of rent.<sup>101</sup> If the tenant can prove the existence of defects in the premises, the court should determine that she or he does not owe some or all of the rent the landlord claims. By grafting the new rights onto the existing statutory eviction procedures, which in most jurisdictions were already required to be heard and decided on an accelerated schedule, the legislatures and courts could hope for quick action against non-repairing landlords. Speed is important not just for the humanitarian imperative of correcting hazardous living conditions but also to give tenants sufficient incentives to assert their new legal rights in court. Faced with the prospect of a protracted legal battle with their landlords before any hope of getting repairs, most tenants in houses and apartments with serious health and safety hazards would be much more inclined to move.

Inducing landlords to repair their units, however, is by no means as simple as revising substantive legal rules. The effectiveness of the reforms in changing landlords' behavior depends on changing landlords' economic incentives, which in turn depends in part on how effective low-income tenants are in asserting their new rights in court. Landlords have no incentive to maintain their units unless the cost of failing to do so exceeds the cost of repairs. The cost of failing to repair in the new legal regime depends upon four factors: the probability that a tenant in a substandard unit would assert her or his new legal rights, the probability that the tenant would be successful in doing so, and the cost of being held liable for failure to repair, all offset by any increase in the building's value resulting from the repairs.<sup>102</sup> Economic incentives were also important in the welfare rights context: the administrative fair hearings at the heart of the welfare rights revolution failed to achieve their promise in

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100. See, e.g., *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984) (recognizing affirmative suit to recover rent previously paid).

101. Put another way, less expected benefit than will be required to justify an affirmative suit will be sufficient to make defensive invocation of the warranty cost-effective.

102. Thus, repairing is only likely to be economically superior to ignoring a violation if:  
 $(\text{Probability}_{\text{Tenant asserts warranty}} \times \text{Probability}_{\text{Tenant prevails}} \times \text{Cost}_{\text{Loss}}) + \Delta \text{Value}_{\text{Building}} > \text{Cost}_{\text{Repairs}}$

significant part because the consequences for eligibility workers of losing the few hearings held were too minimal to influence behavior.<sup>103</sup>

The landlord's incentive to repair depends heavily upon the actions of both the tenant and the court.<sup>104</sup> In addition, both the landlord's actions and their consequences, for tenants and for the housing stock, depend on several crucial assumptions about housing markets and the nature of contemporary poverty. The following sections examine these prerequisites to the new regime's success.

### *1. Tenants' Propensity to Assert the Warranty of Habitability*

The probability that the tenant in an ill-repaired unit will assert the warranty of habitability depends on the tenant knowing about the warranty, knowing how to raise it, and deciding that doing so is in her or his interest. Thus, increasing the number of low-income tenants aware of the warranty of habitability and how to assert it may increase the likelihood that landlords will be motivated to make repairs. Who might provide this information, however, is an open question. The appellate courts that announced the warranty of habitability in most states generally lack the facilities and inclination to conduct community legal education.<sup>105</sup> State legislatures could finance such efforts, but even in those states where landlords could not block the warranty of habitability, they may have sufficient influence to prevent legislatures from funding outreach campaigns. Legal services and community organizations concerned about housing quality provide outreach in some areas, but these efforts are uneven and typically underfunded.<sup>106</sup> Ultimately, awareness of the warranty depends heavily upon tenants learning about it through word-of-mouth. And the likelihood that tenants aware of the warranty will pass that information along likely depends on how useful the warranty has seemed to

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103. Super, *Efficient Rights*, *supra* note 5, at 1086–89.

104. The state of the real estate market in the area is also important. The repairs are more likely to add to the value of the property if the location is desirable enough to compete for tenants or buyers that would pay more for a better-maintained structure. In depressed areas, tenants may simply lack the funds to pay more rent for a better unit: their demand curve may become almost perfectly elastic at some point. For example, when the author worked as a legal services lawyer in impoverished North Philadelphia, his clients' rent typically was five or ten dollars per month below the maximum public assistance grant amount. In this sense, the warranty of habitability is most likely to prove effective not in the troubled neighborhoods that typify deteriorating housing conditions to many but in more affluent areas where market forces already are providing landlords significant motivation.

105. General consumer protection laws may require landlords to give tenants some information about their rights when seeking to collect rent. Mary B. Spector, *Tenants' Rights, Procedural Wrongs: Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 207–08 (2000).

106. See Super, *Efficient Rights*, *supra* note 5, at 1093–94 (describing chronic underfunding of legal services programs).

them: tenants that have won repairs or financial recompense from their landlords are more likely to think the information is worth sharing.

Even if a tenant in a badly repaired unit knows about the implied warranty, she or he may not know how to raise it effectively. Initiating an action—framing a complaint, filing the complaint and either paying the filing fee or submitting an adequate motion for a fee waiver, arranging service of process, and so forth—is more demanding for the novice litigant than asserting a defense, but even the latter can be a challenge. Some courts require written answers,<sup>107</sup> which pro se litigants may not know how to generate. Even those courts that allow tenants to respond orally in open court on a particular day require a presence of mind and sense of timing that pro se litigants are likely to lack: the tenant may have only a few seconds to decide what to say, and the judge’s cue (such as “is this the amount you owe?”) may steer tenants into responding to the landlord’s accounting rather than raising an affirmative defense that may seem unresponsive. If the tenant does not understand what to say and when, her or his abstract awareness of the defense will be for naught.

The knowledgeable tenant might decide to raise the warranty of habitability under either of two very different sets of circumstances. First, the tenant could raise the warranty deliberately to obtain either financial recompense or performance of the landlord’s duty to repair. Alternatively, a tenant in financial distress who has failed to pay rent for other reasons—such as lack of funds or other pressing priorities—may raise the warranty in an effort to rescue her or his tenancy. The following Subsections show that tenants who become defendants in nonpayment actions involuntarily are far more likely to assert the warranty and thus that the tenants’ rights revolution’s instrumental success depends heavily on their success. Yet as Part III.A explains, little-appreciated substantive doctrines have prevented precisely these tenants from asserting the warranty.

#### *a. Deliberate Rent Withholding*

For a tenant the rationality of deliberately asserting the warranty depends on the likelihood that the tenant will be successful, the direct rewards (such as a rent abatement) the tenant will receive for being successful, the likelihood that the assertion of the warranty will cause the landlord to make repairs, the value of the repairs, and the costs the tenant will bear in raising the warranty. A rational tenant who knows about the warranty will choose deliberate rent withholding over the option of continuing to pay and endure the defects when the chances of the tenant prevailing times the benefits of prevailing—any rent

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107. BOSTON HOUS. CT. R. 3 (2009); *Catelli v. Fleetwood*, 842 A.2d 1078 (R.I. 2004).

abatement plus the possibility that the landlord will make valuable repairs—exceed the costs of raising the warranty, including the adverse consequences of losing.<sup>108</sup>

The costs of litigation include the direct costs of advancing a defense based on the warranty: time lost from work or other activities, fees and costs the court charges, any costs to obtain legal advice or representation, gathering evidence, and so on. The costs of litigation also include the chance that the tenant will not prevail and will have to move hurriedly. Finally, they include the chance that the landlord, although losing in the initial action, will retaliate against the tenant by terminating her or his lease, raising the rent, changing the locks, or taking other actions that injure the tenant or induce her or him to move.<sup>109</sup> Thus, the legally aware tenant of substandard housing can expect to benefit more from raising the warranty of habitability than from suffering in silence when the potential benefits of raising the warranty—the likelihood and amount of any rent abatement and increased chance of getting repairs—exceed the transaction costs of litigation and the risk and costs of defeat or those of retaliation for a success.<sup>110</sup>

In fact, however, tenants have a third alternative besides raising the warranty of habitability and putting up with the defects: they can move. Therefore, the rational tenant will only withhold rent when *both* the expected value of doing so is positive *and* that expected value is greater than that of moving.<sup>111</sup>

The appearance of moving costs (including the relative quality of current and prospective dwellings) on both sides of this calculation leads to something of a paradox. The expected value of asserting the warranty is more likely to be positive if the tenant is relatively willing to move. But a tenant willing to move quickly if the warranty-based defense fails<sup>112</sup> or if the landlord retaliates

108. Thus, the tenant will choose to withhold rent only when:

$$(\text{Prob}_{\text{Tenant prevails}} \times \text{Value}_{\text{Damages for prevailing tenant}}) + (\text{Prob}_{\text{Tenant prevails}} \times \text{Prob}_{\text{Repairs}} \times \text{Value}_{\text{Repairs}}) > \text{Cost}_{\text{Litigation}}$$

109. The landlord may evict the tenant even more suddenly through self-help. In most jurisdictions, this is unlawful. But under a similar calculation, a landlord may conclude that the likelihood of the tenant suing and winning, and the amount the tenant is likely to recover in such a suit, is insufficient to dissuade her or him from engaging in self-help.

The tenant's burdens of litigation also include losses of value in the leasehold from the landlord's unpleasant actions that fall short of compelling the tenant to move.

110. Accordingly, raising the warranty is advantageous only when:

$$(\text{Prob}_{\text{Tenant prevails in initial action}} \times \text{Value}_{\text{Damages for prevailing tenant}}) + (\text{Prob}_{\text{Tenant prevails in initial action}} \times \text{Prob}_{\text{Repairs}} \times \text{Value}_{\text{Repairs}}) > ((1 - \text{Prob}_{\text{Tenant prevails in initial action}}) \times (\text{Cost}_{\text{Moving}} + \text{Value}_{\text{Current dwelling}} - \text{Value}_{\text{New dwelling}})) + (\text{Prob}_{\text{Tenant prevails in initial action}} \times (1 - \text{Prob}_{\text{Tenant avoids retaliation}}) \times (\text{Cost}_{\text{Moving}} + \text{Value}_{\text{Current dwelling}} - \text{Value}_{\text{New dwelling}})) + \text{Direct Cost}_{\text{Litigation}}$$

111. Specifically, we can expect a tenant to assert the warranty only when:

$$(\text{Prob}_{\text{Tenant prevails in initial action}} \times \text{Value}_{\text{Damages for prevailing tenant}}) + (\text{Prob}_{\text{Tenant prevails in initial action}} \times \text{Prob}_{\text{Repairs}} \times \text{Value}_{\text{Repairs}}) - ((1 - \text{Prob}_{\text{Tenant prevails in initial action}}) \times (\text{Cost}_{\text{Moving}} + \text{Value}_{\text{Current dwelling}} - \text{Value}_{\text{New dwelling}})) - (\text{Prob}_{\text{Tenant prevails in initial action}} \times (1 - \text{Prob}_{\text{Tenant avoids retaliation}}) \times (\text{Cost}_{\text{Moving}} + \text{Value}_{\text{Current dwelling}} - \text{Value}_{\text{New dwelling}})) - \text{Direct Cost}_{\text{Litigation}} > \text{Cost}_{\text{Moving}} + \text{Value}_{\text{Current dwelling}} - \text{Value}_{\text{New dwelling}}$$

112. Indeed, even if the tenant's defense succeeds, the landlord or code enforcement authorities may require the tenant to move to facilitate repairs. *Knott v. Laythe*, 674 N.E.2d 660

successfully, may find moving without asserting the warranty a more reliable and efficient method of escaping a substandard dwelling.<sup>113</sup>

Thus, in a market where moving is fairly inexpensive, tenants in bad housing might be less afraid to fight but still prefer to move because they have a substantial chance of finding better housing. There, tenants' mobility rather than the warranty of habitability is likely to be the principal engine driving improvements in housing quality. This does not seem problematic, as the ease of moving suggests that, at least in the short term, the market is giving tenants some leverage.

On the other hand, in a tight housing market, tenants of substandard housing may feel they dare not assert the warranty because the likelihood they will end up somewhere worse is high. As a result, for the warranty of habitability to have a significant impact on housing conditions, raising it may need to be affirmatively attractive or only modestly costly; that raising it is simply less costly than enduring defective housing likely will not suffice. Thus, inducing tenants in tight housing markets to assert the warranty requires highly favorable values for the other elements in the calculation, including the tenant's chances of winning in the initial action and in avoiding retaliation, the damages (or rent abatement) awarded, and the likelihood that the landlord will repair. As Subsection 2 shows, this combination of circumstances is quite unlikely.

The importance of moving costs in this calculation also tends to skew the warranty's impact in favor of better-off tenants, undermining the reforms' instrumental goals. For many of the poorest tenants, a significant part of the cost of moving is finding the funds to make a deposit on a new dwelling before they receive back their deposit on their current unit. If these tenants have to borrow in the illicit credit market or expend one of the finite favors they can call in from family or friends, the effective interest rate is likely to be exorbitant.<sup>114</sup> In contrast, better-off tenants may either be able to pay the second

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(Mass. App. Ct. 1997); *Creekside Apartments v. Poteat*, 446 S.E.2d 826 (N.C. Ct. App. 1994); *see Lau v. Bautista*, 598 P.2d 161 (Haw. 1979) (finding a statutory right to relocation assistance in such a case); *cf. Allen v. Lee*, 538 N.E.2d 1073 (Ohio. Ct. App. 1987) (affirming award of moving costs against landlord).

113. Moreover, moving on the tenant's own timetable is likely to be less costly, both in direct costs and in the tenant's ability to obtain better new housing, than hurried moving should the tenant lose the initial case or the landlord effectively retaliate. *See Chester Hartman & David Robinson, Evictions: The Hidden Housing Problem*, 14 HOUS. POL'Y DEBATE 461 (2003) (finding correlation between forced evictions and homelessness); Nan Marie Astone & Sara S. McLanahan, *Family Structure, Residential Mobility, and School Dropout*, 31 DEMOGRAPHY 575 (1994) (finding that greater residential mobility explains much of the higher dropout rate of children in stepparent families). Evictions commonly bring severe collateral consequences. Mary Spector, *Tenant Stories: Obstacles and Challenges Facing Tenants Today*, 40 J. MARSHALL L. REV. 407 (2006). Thus, ease of moving is more likely to make departure appealing than it is to make the risk of withholding rent acceptable.

114. Friends and family may not explicitly charge interest, but meeting their expectations of reciprocity may be costly and failing to do so even costlier if the tenant encounters another emergency.

deposit themselves or access cheaper credit.<sup>115</sup> As a result, less-impooverished tenants, even if living in units with less-severe problems, may nonetheless be more willing to chance raising the warranty of habitability. Because it is poorer tenants that are most likely to live in substandard housing, the reduced probability that they will feel comfortable raising the warranty of habitability is likely to reduce the warranty's effectiveness in remedying the worst housing conditions.

Several additional observations are in order here. First, increasing the likelihood that tenants with meritorious claims will prevail does more than increase the likelihood that other tenants will become aware of the warranties: by increasing these aware tenants' expectations of success it also increases the likelihood that they will elect to press claims based upon those warranties. Thus, the success rate of tenants in substandard dwellings is doubly important in persuading landlords to prefer repairing to litigation.<sup>116</sup>

Second, this calculus is unlikely to yield the same result for all repairs or all landlords. Defects that are relatively inexpensive to fix, either because of their nature or because a particular landlord has an efficient system for making repairs, are more likely to be repaired even in a system that generates insufficient pressure to make costlier repairs cost-effective. As a result, the costs to the landlord of losing, and the value to the tenant of winning, a case under the warranty of habitability presumably should vary with the severity of the defect. The severity of a defect's impact on the tenant's enjoyment of the premises, however, will not always correspond to the cost of repairing the defect: exposed wiring could cause horrific harm to small children yet be inexpensive to repair, while repairing an isolated unevenness in the floor that creates a slight tripping hazard might require ripping up the entire floor and replacing support beams below. The warranty thus will tend to promote cost-beneficial repairs just as a well-functioning market would. Some defects also may be more difficult or costly for tenants to prove, such as inadequate heat or some kinds of infestation. Landlords that might repair obvious holes in walls and exposed wiring might prefer to contest claims of defects that tenants cannot as readily photograph. This effect may mimic the effects of information costs in a market.<sup>117</sup>

Third, the value to the tenant of any repairs increases with the time the tenant remains in the dwelling. Most repairs require many months of enjoyment

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115. To be sure, better-off tenants may have more possessions that would need to be moved and that could be lost or damaged in a move. They might also lose more wages if they must miss work to move. Nonetheless, these costs seem unlikely to have as severe a deterrent effect as the risk of homelessness would have on lower-income tenants.

116. On the other hand, if many tenants prevail on unsound assertions of the warranty of habitability, landlords may conclude that repairing will not help to avoid such losses.

117. See Rabin, *supra* note 23, at 580 (endorsing the implied warranty only for latent defects).

for raising the warranty to be cost-effective to the tenant. Therefore, the strength and duration of tenants' protections against retaliatory evictions are pivotal to the results.<sup>118</sup>

Finally, tenants' behavior in these matters is unlikely to be consistently rational. As one long-time tenants' lawyer remarked, "nothing gets people where they live like getting them where they live."<sup>119</sup> Thus, some tenants may be extremely risk averse and decline to pursue the warranty even if the actuarial value of doing so exceeds that of passivity. Conversely, some tenants may become so incensed about a landlord's failure to repair—particularly if they see defects in their unit threatening the well-being of their children—that they may tilt at their landlords despite meager prospects for success. Nonetheless, given the high stakes, most tenants, particularly the poorest tenants, are likely to be quite risk-averse and hesitant to assert the warranty to confront their landlords over repairs unless the balance of risks and benefits seems heavily in favor of doing so. Absent a high likelihood of success or heavy financial penalties against landlords for the failure to repair, this will be difficult to achieve, particularly for tenants in the worst housing.

#### *b. Raising the Warranty to Defend Unintended Arrears*

Because tenants in defective housing may justifiably decline to raise the warranty of habitability as part of a deliberate strategy, the warranty's effectiveness in improving housing conditions depends largely on tenants raising the warranty to defend non-intentional rent arrears. If the tenant lacks the money to pay the contract rent, she or he no longer has the option of staying and putting up with the defect. This makes the cost of moving less determinative: whether the tenant raises the warranty and fails or raises no defense at all, she or he is likely to have to move by approximately the same date.<sup>120</sup> Even if the tenant prevails and then becomes subject to the landlord's retaliation, she or he will surely have at least somewhat longer to move—as

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118. Many states prohibit retaliatory terminations to buttress code enforcement programs and the new tenants' rights. URLTA § 5.101; *see, e.g.*, *Edwards v. Habib*, 397 F.2d 687, 699–703 (D.C. Cir. 1968). Proving the landlords' motives is difficult, however, particularly for pro se tenants and those in systems without meaningful discovery. Kathleen Eldergill, *The Connecticut Housing Court: An Initial Evaluation*, 12 CONN. L. REV. 296, 311–12 (1980). Courts may presume the legitimacy of landlords' terminations, in all cases or those not immediately following the tenants' assertion of rights. *See, e.g.*, CONN. GEN. STAT. ANN. § 47a-20 (2006) (prohibiting rent increases, service cuts, or evictions within six months of a tenant's efforts to enforce housing codes); MICH. COMP. LAWS ANN. § 600.5720(2) (West 2000) (presuming non-retaliation if landlord waits ninety days to evict the tenant).

119. Marilyn T. Mullane, now executive director of Michigan Legal Services, made this observation to the author while he was a law student.

120. In many states, statute fixes the length of time a tenant has to move after the landlord wins possession. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.5744 (West 2000) (allowing ten days to move after judgment). Thus, even if the tenant alienates the landlord or the court by raising the warranty, the court has little opportunity to punish the tenant.



well as whatever rent abatement she or he won. Thus, a tenant's risk aversion, which plays a crucial role in determining which tenants will deliberately withhold rent, is largely irrelevant to whether she or he will raise the warranty to defend an inadvertent arrear. In addition, because these tenants need only learn of the implied warranty before they respond to the landlord's eviction action, the courts have greater ability to ensure that tenants are informed in the early stages of the proceeding.<sup>121</sup>

As a result, a rational tenant in substandard housing who has fallen behind on rent and is aware of the warranty of habitability will invoke it if the expected gains from appearing and defending exceed the costs of doing so (perhaps lost time from work, child care costs, or transportation expenses).<sup>122</sup> These direct costs are only a subset of the costs tenants contemplating deliberate withholding must weigh, meaning that a much more modest rate of success in the courts may justify expending modest litigation costs. On the other hand, rent abatements may have less value to involuntary defendants than to deliberate rent withholders. The latter will benefit from any rent abatement, large or small. An impoverished tenant who cannot afford to pay the contract rent, on the other hand, will benefit only from a rent abatement large enough to bring the cost of redeeming possession within her or his means. Thus, for example, an \$800 abatement from a \$1,000 rent claim may seem very favorable for the tenant. But if the tenant lacks the remaining \$200 to redeem possession, she or he will have to move just as surely as if she or he had won no abatement at all.

Impoverished tenants raising the warranty defensively after falling behind on their rent involuntarily are pivotal to the success of the warranty of habitability. This aligns tenants' incentives well with the new regime's housing quality aims: unlike the case of tenants contemplating deliberate withholding, involuntary defendants in the worst housing presumably have the greatest chances of success.<sup>123</sup> And as involuntary defendants likely are poorer as a

121. The Michigan Supreme Court found an innovative approach by inserting information on these rights on summonses used in Detroit for eviction cases and on optional form notices to quit that the courts made available to landlords. *See* Rose & Scott, *supra* note 85, at 1019. After a few years, when reorganizing the Detroit courts, the justices did not require the new eviction court to retain the informational forms. *See also* Lynn E. Cunningham, *Procedural Due Process Aspects of District of Columbia Eviction Procedures*, 7 RUTGERS RACE & L. REV. 107, 113 (2005) (arguing for the requirement that landlords plead compliance with the implied warranty).

122. Legally aware tenants in this position should raise the warranty whenever:

$$(\text{Prob}_{\text{Tenant prevails in initial action}} \times \text{Value}_{\text{Damages for prevailing tenant}}) + (\text{Prob}_{\text{Tenant prevails in initial action}} \times \text{Prob}_{\text{Repairs}} \times \text{Value}_{\text{Repairs}}) > \text{Direct Cost}_{\text{litigation}}$$

Indeed, this may understate the desirability of invoking the warranty because doing so might induce the landlord to settle for additional time to move. This serves the instrumental purpose of promoting repairs, as it at least modestly increases landlords' costs of not repairing.

123. To be sure, non-repairing landlords feel losses attributable to the warranty of habitability only if their tenants redeem possession. As noted, involuntary defendants may be less likely to do so.

group than deliberate rent withholders, their stronger incentives to raise the warranty comport with the reform's redistributive and humanitarian goals.

## 2. Courts' Propensity to Rule for Tenants on Repair Defenses

In addition to its direct impact on non-repairing landlords' incentives, the rate of success that tenants of substandard housing enjoy when raising the warranty of habitability is crucial both to spreading word of that defense within the tenant community and to inducing other tenants to assert the warranty. Uniform application of new standards may be essential to improving housing quality without raising rents.<sup>124</sup>

As an analytical matter, this should be fairly straightforward, as the new rules are not conceptually difficult to apply. Institutionally, however, the tenants' rights revolution imposed stresses that the courts hearing eviction cases were ill-equipped to handle. Adapting to the new legal regime presented several distinct problems. First, hearing these cases demanded far greater resources than had been required to grant possession routinely to landlords under a legal regime in which tenants had few defenses. Second, trying disputes about housing conditions required very different skills than many of these courts previously had employed. And third, the judges hearing landlord-tenant disputes had to be willing to rule against landlords that had almost invariably prevailed in their courts under the prior regime. In this respect, the tenants' rights revolution was at a distinct disadvantage relative to the welfare rights revolution. The latter created a new forum that it could design to meet its special needs, while the former tried to repurpose an existing forum with entrenched customs designed to perform very different functions.

In the old regime, most tenants had no defenses to eviction.<sup>125</sup> The few contested cases that did arise—typically challenges to the landlord's accounting—generally could be resolved with documents. As a result, few judicial resources were required to resolve large numbers of cases quickly.

The new defenses of failure to repair and retaliatory eviction required considerably more judicial resources. Because the condition of the tenant's dwelling, or the landlord's intent in terminating the tenancy, could raise genuine issues of fact, the right to a jury trial suddenly was no longer hypothetical. Although these cases remained quite simple even relative to the small civil cases and misdemeanors the same courts typically handled, the

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124. See Ackerman, *supra* note 86, at 1108 (arguing that comprehensive rather than selective code enforcement will increase housing quality but not rents).

125. Marilyn Miller Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Minuscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 U. MICH. J.L. REFORM 8, 10–12 (1973); cf. *Lindsey v. Normet*, 405 U.S. 56, 64–65 (1972) (discussing “those recurring cases where the tenant fails to pay rent or holds over after expiration of his tenancy and the issue in the ensuing litigation is simply whether he has paid or held over”).

increased demand for adjudicatory resources still confronted these courts with difficult choices.

More broadly, appellate courts and legislatures imposed the implied warranty of habitability largely to make up for the failure of housing code enforcement. That failure resulted in significant part from a lack of adjudicatory resources for code enforcement. The new landlord-tenant regime shifted this excess demand for adjudicatory resources to the courts. Judicial adjudication, however, is much costlier than administrative processes: more people are involved, judges and some clerks likely are better paid than inspectors, suitable courtrooms must be constructed and maintained, and so on. The transfer therefore increased the aggregate shortfall in resources.<sup>126</sup> Neither the legislatures, which could have created and funded new judgeships, nor the appellate courts, which might have diverted resources from other classes of cases, typically recognized this crucial condition to the success of the new legal regime they were creating.<sup>127</sup> Similarly, neither gave much attention to the procedural reforms needed to make the courts accessible to unsophisticated pro se tenants.<sup>128</sup>

Few of the courts given the responsibility of carrying out the policies embodied in the reforms had experience handling cases of major public policy import. Many had dockets dominated by traffic tickets, criminal arraignments, and routine debt collection actions. By necessity, these courts had become specialists more in the art of processing cases in volume than in resolving fine points of justice in individual cases.<sup>129</sup> Judges themselves admitted they dispensed “assembly-line justice.”<sup>130</sup> Some of the skills and techniques useful

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126. To the extent the problem with administrative housing code enforcement was corruption, transferring those responsibilities to the courts might have helped. Nonetheless, even without being corrupt, the landlord-tenant courts remain disproportionately vulnerable to influence from landlords and their lawyers, who typically are repeat players.

127. Many other categories in their caseloads, however, had a far higher incidence of representation on both sides; those lawyers could be expected to exert political pressure if they felt their interests being slighted. See Richard S. Wells, *Lawyers and the Allocation of Justice*, in *THE POLITICS OF LOCAL JUSTICE* 149–53 (James R. Klonoski & Robert I. Mendelsohn eds., 1970). Other categories lacking representation, such as traffic tickets, already may have been handled on a mass basis with few additional resources available to be skimmed.

128. By contrast, those seeking to reform government transfer programs have paid keen attention to procedural denials of substantive rights. See David A. Super, *The Quiet “Welfare” Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1351–70 (2004) [hereinafter Super, *Quiet Revolution*]; Super, *Invisible Hand*, *supra* note 55, at 862–74.

129. ROBERT C. LAFOUNTAIN ET AL., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2007 STATE COURT CASELOADS 3 (2009) (Alternative subtitle: NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT), available at <http://www.ncsc.org/topics/specialty-courts/traffic-courts-and-procedures/resource-guide.aspx> (follow the hyperlink to the title) (showing that some states consign as much as 90 percent of their civil caseloads to specialized courts of limited jurisdiction).

130. Rose & Scott, *supra* note 85, at 988 n.88; see *id.* at 987–88 (describing opacity of court procedures and unintelligibility of jargon on court forms); Anthony Fusco, Jr. et al.,

for efficient processing of large numbers of cases were antithetical to the goal of finding facts, even relatively simple ones, in each case. The rapid use of jargon and opaque procedures<sup>131</sup> may seem relatively benign when the bewildered tenants had no defenses to raise. Similarly, when the result in the courtroom was virtually a foregone conclusion, having clerks explain that result to parties and encourage them to go home—leave the court to enter a default judgment—could save everyone time.<sup>132</sup>

For tenants to assert defenses based on the warranty or retaliation, effectively, however, they must understand the proceedings. The amounts of money involved are likely to make retained counsel infeasible. Although the warranty came into being at about the apogee of legal services funding, these programs never had the resources to represent more than a small fraction of the number of tenants being evicted from substandard housing.<sup>133</sup> And those tenants with meritorious defenses commonly are among the least sophisticated.<sup>134</sup> Many of these tenants inevitably become confused at times, requiring judges and clerks to decide how much they are comfortable explaining consistent with their view of the adversary process.<sup>135</sup>

Finally, implementing the new tenants' defenses required a profound transformation of courthouse culture. Larger landlords and many landlords' lawyers are repeat players, well known to judges and clerks.<sup>136</sup> Under the old regime, the landlord receiving judgment in virtually every case was a part of the pattern governing their interactions, almost as much as the salutation "your Honor." With few cases requiring judicial discretion, some judges and clerks may have seen little harm in relaxing the barriers separating them from landlords and their counsel. These relationships may have seemed symbiotic: cooperative relationships with landlords and their lawyers could facilitate the

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*Chicago's Eviction Court: A Tenants' Court of No Resort*, 17 URB. L. ANN. 93, 105 (1979) (describing tenants' befuddlement at court procedures).

131. Rose & Scott, *supra* note 85, at 987–88

132. See *infra* note 231 and accompanying text.

133. Even with a legal aid office across the hallway from the Detroit Landlord-Tenant Court, fewer than 10 percent of tenants in 1975 had lawyers. Rose & Scott, *supra* note 85, at 993, 1000. Legal services never came close to being a "responsive entitlement" committed to serving all eligible people with meritorious cases. See David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 654 (2004) (distinguishing between programs like legal services that serve only an arbitrary number of people and those in which eligibility assures an applicant service) [hereinafter Super, *Political Economy*].

134. The lowest-income tenants, who typically live in the worst units, also are more likely to be marginally literate, as literacy correlates with earning capacity.

135. The substance of landlord-tenant law is far simpler than that of public welfare programs' rules, but most eviction courts' procedures are more challenging for inexperienced tenants than the inquisitorial model of public benefits fair hearings. See 7 C.F.R. § 273.15(l)-(q) (2010) (establishing simple procedures for hearings in the Supplemental Nutrition Assistance Program (SNAP), with the hearing officer broadly responsible for ensuring full development of the issues).

136. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 120 n.59 (1974) (quoting Mosier & Soble, *supra* note 125).

expeditious disposition of large dockets. Elected judges may have come to expect the support of the landlords' bar, and that bar may have seemed a natural pool from which to draw new judges. Repeat litigants may be among the relatively few non-court personnel from whom judges may hope to receive the respect and deference that often must substitute for financial compensation. Lacking many of the trappings, and interesting cases, of higher courts, this value should not be underestimated. Thus, some courts may be as vulnerable to "capture" by repeat players nominally subject to their jurisdiction as are administrative agencies.<sup>137</sup> Even when the courts were not dealing with repeat players, the assumption that landlords were entitled to win virtually all cases may have induced judges and clerks to assist confused landlords in making out the elements of their claims.<sup>138</sup>

Although landlords had no legally cognizable interest in a substantive legal regime that assured them of virtually complete success, the social reliance interests on all sides likely were immense. For the courts to reassert formal roles, much less hold trials on matters that previously had been routine and render judgments against familiar landlords, risked that landlords would perceive the courts' actions as personal slights. This inevitably required considerable readjustment by all concerned. And some judges might have found demeaning the prospect of simplifying and explaining the proceedings to make them more intelligible to unsophisticated pro se tenants.

In addition to being trustees for finite pools of adjudicatory resources, courts also can be seen as vendors of eviction services to landlords. Landlords can remove their tenants through the courts or through (generally illegal) self-help methods. Although some landlords may always choose the courts as a matter of principle, others may choose based on relative costs and benefits. As such, the courts are vulnerable to competitive pressures. If the new tenants' rights made evictions too burdensome, landlords might abandon the courts and seek to evict their tenants themselves.<sup>139</sup> Judges may understandably want to avoid the resulting chaos and violence that would likely entail. Judges also may resent the loss of prestige if litigants abandon their courts.

Thus, instead of focusing solely on adapting the courts to implement the new reforms, judges had to worry about the effect the reforms might have on their dockets, on their roles, and on the attitudes of landlords. These worries undoubtedly diminished the enthusiasm with which many courts welcomed

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137. See, e.g., Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1194-98 (1973) (explaining how administrative agencies are often captured by the industries they regulate).

138. See *infra* note 231; *cf.*, e.g., *Neal v. Fisher*, 541 A.2d 1314, 1320 (Md. 1988) (describing trial judge's declaration that he could empathize with the landlord because he was a landlord himself).

139. See Randy G. Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759 (1994) (analyzing summary eviction procedures as substitutes for self-help eviction methods).

their new roles implementing public policies against bad housing conditions and in favor of increased bargaining power for tenants.

### 3. *Assumptions About Housing Markets and Poverty*

Achieving any of the reforms' instrumental goals depends on housing economics. In particular, any plausible scenario in which the reforms could improve housing conditions, redistribute wealth, or even ameliorate humanitarian crises depends on a plausible explanation of why low-income tenants cannot obtain better housing by spending more in the existing market. The reforms' advocates divided between two theories. Some maintained that the housing market is somehow flawed in such a way that increased spending—at least within the ranges of which most low-income tenants are capable—cannot reliably bring better housing conditions. In this view, rents exceed those that a well-functioning market would produce,<sup>140</sup> and landlords are far more profitable than generally recognized.<sup>141</sup> The task, then, is to redistribute some of that surplus to tenants. The alternative explanation is that the market reflects low-income tenants' preferences: as much as they might dislike their decrepit dwellings, they would dislike even more the reductions in food, utility service, or other necessities required to pay for any increase in their consumption of housing. Put simply, low-income tenants suffer bad housing conditions because they are too poor to afford anything more.

On closer examination, the market failure theory proves difficult to support except in small submarkets or for relatively short intervals. It also has a paradoxical effect on tenants' propensity to raise the implied warranty. Yet if one concludes that low-income tenants' poverty is the reason they cannot avoid bad housing conditions, the warranty of habitability could easily cause them more harm than good. And if housing markets operate competitively in the medium and long term, pressing landlords to repair could cause units to depart, either upward or downward, from the low-cost rental market.

#### *a. Bad Housing Conditions as a Result of Market Failure*

Those claiming failure in the housing markets had some difficulty specifying the nature of that failure. Some argued that many urban housing markets had low vacancy rates and suggested that this meant tenants suffered from a lack of competition among landlords. A true lack of competition—a market controlled by one or a few suppliers who can insist on prices above competitive equilibrium—is indeed a market failure, but ownership of rental

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140. See Rose & Scott, *supra* note 85, at 977 n.46 (asserting that rents “are always more than double [the] value of services necessary to maintain the house”); Ted R. Vaughan, *Landlord-Tenant Relations in a Low-Income Area*, in *TENANTS AND THE URBAN HOUSING CRISIS* 77–83 (Stephen Burghardt ed., 1972).

141. Rose & Scott, *supra* note 85, at 978.

housing is more heterogeneous than that in some other major consumer markets.<sup>142</sup> Low vacancy rates do not necessarily result from a lack of competition. Vacant housing causes losses for its owners, which they naturally seek to avoid.<sup>143</sup> A market with low vacancy rates may be one in which supply has matched demand closely. Moreover, many cities actually had relatively high vacancy rates during the period when the implied warranty was winning recognition.<sup>144</sup>

Others argued that low-income tenants lacked the sophistication to bargain effectively with their landlords, suffering a kind of information failure.<sup>145</sup> Thus, whether landlord or tenant is responsible for repairs would matter because transaction costs would prevent tenants from bargaining with their landlords in a Coasean manner for an optimal level of maintenance.

The theory that tenants lacked bargaining capacity creates something of a paradox. As noted above, the implied warranty of habitability's effectiveness depends in significant part on tenants' sophistication in learning about the warranty and navigating court procedures to assert it effectively. The more arduous those procedures are, the more they will deny relief to tenants whose lack of sophistication has exposed them to the information failures hypothesized to justify the imposition of the warranty. Thus, if the market failure hypothesis is correct, the warranty of habitability will prove ineffectual because tenants in substandard housing will be unlikely to raise it successfully.<sup>146</sup>

A more sophisticated argument for market failure focuses on time. Housing takes a fairly long time to enter the market, leaving the short-term housing supply relatively inelastic.<sup>147</sup> Some of the reforms' advocates argued that this inelasticity could be fairly persistent due to land-use controls, building codes, expensive union "featherbedding," and other factors.<sup>148</sup> They did not identify the surge in demand to which the market was failing to respond: if anything, the decades following World War II saw a rapid *shrinkage* in demand for rental housing in central cities, as much of the middle class became suburban homeowners. Moreover, this theory creates another paradox because

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142. See Ackerman, *supra* note 86, at 1099–100, 1149–50.

143. See Rabin, *supra* note 23, at 576.

144. U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF POLICY DEV. AND RESEARCH, 1980 NATIONAL HOUSING PRODUCTION REPORT 43 (1980).

145. Duncan Kennedy, *The Effect of the Warranty of Habitability on Low-Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485, 497–98 (1987).

146. In other words, the same skills that would allow more sophisticated tenants to raise the implied warranty of habitability successfully will, under this market failure hypothesis, allow them to avoid living in defective housing in the first place.

147. Conversely, discrimination may deny slum landlords an alternative, more upscale market for their units even if they repair those units. Middle-income renters will decline to live in housing in "bad neighborhoods" even if that housing is otherwise desirable. Ackerman, *supra* note 86, at 1102.

148. Rose & Scott, *supra* note 85, at 977.

tenants' willingness to move affects their propensity to assert the warranty. If tenants' positions in the market are precarious, they presumably will be highly averse to moving. A tenant forced to move rapidly after losing an eviction case will be among the most vulnerable to short-term market conditions. This paradox is partially ameliorated for impoverished tenants raising the warranty when other financial setbacks make them involuntary defendants in eviction proceedings. These tenants still, however, must master court procedures sufficiently to assert the warranty effectively in defending their failure to pay rent.

*b. Bad Housing Conditions as a Result of Poverty*

If low-income tenants' inability to secure better housing is attributed not to market failure but simply to their poverty, the warranty of habitability would potentially cause low-income tenants to increase their consumption of housing. In theory, regulatory policy that causes low-income tenants to increase their consumption of housing need not be redistributive.<sup>149</sup> It could, instead, represent a judgment that they would be better off in superior housing even if they had to sacrifice other expenditures to pay for it.<sup>150</sup> Yet forcing tenants to endure hunger in order to live in better apartments is hardly consistent with the 1960s notion of expanding individual rights—it is at once paternalistic, inefficient, and cruel. Therefore, the implied warranty of habitability likely would not have attracted any significant number of adherents absent some argument that low-income tenants could receive better housing without reducing their ability to purchase other necessities. The implied warranty's advocates developed several theories about why landlords under some circumstances might be compelled to absorb the added costs of improved maintenance, neither raising rents nor shrinking the supply of low-rent housing;<sup>151</sup> critics staunchly rejected these views.<sup>152</sup>

Allowing low-income tenants to consume more housing for the same cost could happen if the housing supply function shifted to provide more housing at each price.<sup>153</sup> Such a shift would occur with a reduction in the costs of production. Federal housing policy sought to increase production, but with ambiguous effects. During the three decades after World War II, the federal government subsidized the cost of supplying housing by constructing public housing. The white middle class's heavily subsidized abandonment of the inner cities similarly swelled the supply of rental housing. Beginning in the Nixon

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149. Ackerman, *supra* note 86, at 1097.

150. Neil K. Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement*, 82 YALE L.J. 1175, 1175–76 (1973).

151. Ackerman, *supra* note 86, at 1177; Bruce Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar*, 82 YALE L.J. 1194, 1198 (1973).

152. Komesar, *supra* note 150, at 1183; Rabin, *supra* note 23, at 580; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 16.6 (6th ed. 2003).

153. In other words, the supply curve would shift to the right.



Administration, however, the federal government began to change from subsidizing supply to subsidizing individual tenants' purchases of housing through Section 8 vouchers and certificates.<sup>154</sup> This allowed a minority of low-income tenants—those receiving subsidies—to pay more for housing without sacrificing other expenditures, but it also increased aggregate demand, counteracting the effects of the growth in supply. Some writers suggested that social segregation, on the other hand, would stifle demand for housing in areas regarded as slums and inhibit landlords from exiting to compete in higher-priced markets.<sup>155</sup>

The courts adopting the tenants' rights reforms had no way to affect the supply of low-rent housing directly.<sup>156</sup> State legislatures might have, but state-level social spending initiatives of this scale were rare in this period, and the federal government had assumed the mantle of housing financing. Thus, states' ability to increase low-income tenants' consumption of housing depended on finding and exploiting some flaw in the housing market that would prevent landlords from charging low-income tenants more for improved housing.<sup>157</sup> It also presumably depended on not adversely affecting the supply of low-rent housing.

At least three features of the housing market in some places may prevent landlords from passing along to tenants the costs of repairs compelled under the warranty of habitability.<sup>158</sup> First, some urban areas have rent control. The fraction of the low-income housing market covered by rent control, however, was modest even when the tenants' rights revolution was taking shape and has steadily declined since.<sup>159</sup> Still, if landlords must make repairs and may not by law increase rents, they must either absorb the cost of the repairs or take the unit off the market.

Second, a similar effect can be achieved through fixed public assistance grant levels. If the maximum monthly welfare grant for a family of three is \$400, and a substantial fraction of low-income tenants receive welfare, landlords may not be able to charge more than that amount for two-bedroom units whose size or location will not attract middle-income renters.<sup>160</sup> Thus, the

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154. Super, *Laboratories*, *supra* note 37, at 585; KATZ, *supra* note 59, at 129–32 (2001).

155. See, e.g., Ackerman, *supra* note 86, at 1102.

156. Indirectly, however, improved maintenance increases supply by extending the life of rental units. Kennedy, *supra* note 145, at 499–501.

157. See *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853, 860 (D.C. Cir. 1972) (assuming but not explaining such market conditions).

158. Some posit that the supply of housing dropping out of higher-cost housing markets will deny landlords the bargaining power to raise rents above their current expenses, particularly in declining neighborhoods. Kennedy, *supra* note 145, at 487–88.

159. D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 285 (2006).

160. To be sure, landlords could increase the rent for a unit to the level of the maximum welfare grant for the next-larger family, effectively forcing more crowding. As discussed more fully *infra* Part III.C.2, this would convert one kind of bad housing, decaying conditions, into

demand function is effectively discontinuous, with demand in the lowest segment almost perfectly elastic with respect to price at the levels corresponding to public assistance grant levels.<sup>161</sup> The effect is somewhat similar to that of rent control: if the warranty compels a landlord to make repairs and the elasticity of demand at the public-assistance-grant level prevents the landlord from recovering those costs, the landlord may have to choose between absorbing the repair cost and making enough improvements to the unit to appeal to a higher segment of the rental market.

Finally, a large proportion of landlords' costs are fixed. The landlord incurs the cost of capital invested in the unit, property taxes, insurance, roof repairs, and at least enough heat to keep the pipes from freezing whether the unit is occupied or not. Therefore, in the short term, landlords have a strong incentive not to raise rents to the point where the unit might fall vacant, as even a very low rent should more than cover the unit's marginal occupancy costs. Even in the medium term, a very slight rate of return on the landlord's original investment might be superior to exiting the market.<sup>162</sup> Thus, in a housing market with a substantial vacancy rate, the landlord in the near term may have to absorb at least a substantial portion of the additional costs of repairs.

None of these is altogether satisfactory. The first two affect only small segments of the rental housing market, and none of the three is reliable beyond the short term. In addition, even if these or other factors prevent landlords from passing along the full cost of additional repairs, tenants may not be better off. Low-income tenants with very tight budgets may face serious hardship if their housing costs increase, even if the value they receive far exceeds the price.<sup>163</sup> Getting a \$5,000 ocean cruise for \$100 sounds like a great deal—unless that \$100 is needed to prevent a utility shut-off, to pay for cardiac medication, or the like. Moreover, even where market conditions prevent increases in price, they typically lead to a reduction in the number of units entering the market when the costs of production rise. Even if landlords could not raise rents in the near term, a reduction in the supply of low-cost housing could result in overcrowding, homelessness, and tenants exiting the affected market to compete for housing in higher-cost or physically remote rental markets.

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another, overcrowding.

161. A similar effect could be achieved by assuming absolute uniformity in the housing stock and in the effectiveness of regulations requiring better maintenance. Ackerman, *supra* note 86, at 1109.

162. *Id.* at 1103.

163. *See id.* at 1120. The total *monetary* value conferred on tenants, or the value of tenants' housing purchases, may improve if the warranty compels landlords to make repairs that improve the quality of the unit by more than the cost they pass along to tenants. *See also* Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 398 (1991). Tenants' aggregate welfare, however, could readily decline if the incremental value of the housing gained is less than that of the goods or services sacrificed to purchase it. Narrow, monetary calculations of low-income people's well-being can stoke humanitarians' suspicions of redistributivists. *See supra* Part I.A.4.

Even if landlords cannot pass along all, or even some, of the cost of repairs, they have two additional options in the medium and long term besides defying the warranty or making the repairs the warranty commands. They may disinvest in the property to the point that it falls out of the rental market completely through abandonment or arson. Or they may make substantial new investments in the property to move it out of the lowest-rent segment of the market.

Thus, the landlords' decision function described above is incomplete—it considers only two of at least four options.<sup>164</sup> To improve the lives of tenants, the option of repairing must not only become more attractive to landlords than ignoring the implied warranty, it must also prevail over both disinvestment and moving the unit into a higher-cost housing market, either as a rental or through conversion to a condominium or cooperative. Indeed, in order to achieve a socially beneficial outcome, enough landlords must decide to repair to make the improvement in tenants' lives offset the harm experienced by those unsuccessful in asserting the warranty of habitability, who will have forfeited the economic and noneconomic costs of litigation and moving, as well as the adverse consequences of reducing the supply of low-cost housing.<sup>165</sup>

Here, too, a paradox arises affecting tenants' propensity to assert the warranty. If a significant number of landlords remove units from the market rather than repair them, the supply of low-rent housing will decline, the cost of moving will increase, and fewer tenants will be inclined to assert the warranty. More generally, as the low-rent housing market tightens, any economic pressures on landlords to maintain their dwellings as a way of attracting tenants, as well as market pressures not to raise rents to cover the costs of repairs or otherwise, will largely disappear. Decrepit housing may well disappear, which may satisfy those who saw the warranty as a response to urban blight. But the results will bitterly disappoint redistributivists and humanitarians, who will see the benefit of improved housing accrue not to low-income tenants but to middle- and upper-income gentrifiers.

### C. Conclusion

The implied warranty's success in improving decrepit housing units or in improving the well-being of their tenants depends upon a series of factors, several of which are highly problematic. Those tenants most affected may not be aware of their rights, may lack the sophistication to assert those rights

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164. Landlords could also sell their units to other landlords who can make repairs or prosecute eviction actions more efficiently. This may resolve some borderline cases but still leaves the overall picture essentially unchanged.

165. When the implied warranty was new, one could imagine the government making up for the loss of supply of low-income housing. See Ackerman, *supra* note 86, at 1113–19. This, however, might have proved administratively difficult and could be less efficient than a direct cash transfer program. Komesar, *supra* note 150, at 1178 n.8, 1180–83.

effectively, or may decline to raise the warranty either because they are unwilling to risk having to move or because they prefer moving to investing resources fighting over their current abode. The warranty's effectiveness therefore is likely to depend heavily on having tenants raise the warranty defensively after falling behind on their rent. Even then, the ability of low-level courts to transform the way they handle landlord-tenant cases is pivotal.

## II.

### FLAWS IN THE NEW REGIME

Like the welfare rights revolution, the tenants' rights revolution suffered from deep normative ambivalence that led to rules sharply limiting its practical impact. Courts and legislatures did not match the attention they devoted to the broad strokes of reforming substantive landlord-tenant law with similar focus on the finer points of the doctrine or the procedural and institutional steps required to ensure that the implied warranty would improve either substandard housing or the lives of the tenants of those units. The ensuing problems have resulted in extremely low rates of success for tenants with meritorious claims under the implied warranty of habitability. In particular, these policies have tended to prevent tenants from raising the implied warranty defensively. Given the previously described difficulty of inducing tenants to challenge their landlords' repair records affirmatively, excluding impoverished tenants defending nonpayment actions has severely undermined the new regime of landlord-tenant law, rendering it irrelevant or even counter-productive with respect to many of the problems it set out to address. Moreover, the regime's failure has disproportionately afflicted the lowest-income tenants whose plight helped drive the transformation of the substantive law.

Section A describes some important formal limitations on tenants' ability to assert the implied warranty of habitability, one substantive, the other procedural. Section B then summarizes what is known about how the courts have actually handled eviction cases under the new legal regime. It finds that an array of procedural obstacles have rendered the implied warranty of habitability almost irrelevant in practice, with tenants prevailing far too rarely to induce other tenants to learn about and raise the new defenses or to induce landlords to increase their maintenance efforts.

#### *A. Formal Limitations on the New Rules*

An initial substantive challenge the new regime faced came from landlords' efforts to waive the implied warranty through explicit lease terms. Competition for lease terms is rare even in otherwise competitive rental housing markets;<sup>166</sup> this lack of competition should allow many landlords to impose such terms. Tenants in the worst housing, who may be the least

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166. Rabin, *supra* note 23, at 582–83.

sophisticated and have fewer alternatives, may be the most susceptible to demands that they sign such leases. Many states recognized that reading an implied warranty of habitability into leases that was waivable would accomplish little.<sup>167</sup> Yet even unenforceable lease terms may compound tenants' confusion about their rights.<sup>168</sup> Only a few jurisdictions sought affirmatively to deter landlords from including such terms.<sup>169</sup>

Even without these lease terms, however, the new regime of landlord-tenant law created asymmetry between landlord and tenant in two subtle but important respects.<sup>170</sup> First, many jurisdictions impose substantive rules that effectively prevent tenants from challenging the landlord's breach of the implied warranty of habitability without deliberate preparation.<sup>171</sup> Such rules make the defense difficult for a hard-pressed tenant who misses a rental payment and must defend a possessory action for nonpayment of rent. Second, most jurisdictions require tenants raising warranty of habitability defenses to deposit with the court contract rent as it comes due. This effectively excuses the landlord's breach of her or his covenant of repair unless the tenant continues to perform her or his covenant to pay rent.

Although contract law has never been perfectly symmetrical—and certainly is not so today—none of these rules has obvious roots in contract law. Instead, they appear to be products of social engineering or hesitation about imposing the warranty of habitability. On the other hand, they are not necessarily offensive to the contractualist, or modernizing, vision of the new regime of landlord-tenant law. After all, the warranty of habitability was read into contracts reached between landlord and tenant that contained no such provision. Each of these rules could be framed as additional implied warranties from the tenant or as limitations on the landlord's warranty that the law reads into residential leases.

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167. See, e.g., *Leardi v. Brown*, 474 N.E.2d 1094, 1099–1100 (Mass. 1985); *Fair v. Negley*, 390 A.2d 240, 243 (Pa. Super. Ct. 1978); Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791 (1974) (describing how judges find ways to rule in favor of tenants when their leases waive rights to which they are entitled); Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845, 886 n.132 (1988). But see P.H. Inv. v. Oliver, 818 P.2d 1018, 1022 (Utah 1991) (allowing waivers); *Odneal v. Wolfe*, 1980 WL 351332, at \*4 (Ohio Ct. App. 1980) (treating tenant's move into the premises as admission of their habitability); cf., *Pierre v. Williams*, 431 N.Y.S.2d 249, 250–51 (N.Y. Civ. Ct. 1980) (enforcing lease term waiving right to jury trial).

168. Kuklin, *supra* note 167, at 868.

169. See, e.g., MICH. COMP. LAWS ANN. §§ 554.633(1)(a), 554.636 (West 2005); OHIO REV. CODE ANN. §§ 5321.13(E), 5321.14(A) (LexisNexis 2004).

170. Some states imposed other limitations on the new regime, such as limits on which defects could justify a defense to a nonpayment action. See, e.g., TEX. PROP. CODE ANN. § 92.052–.058 (West 2007).

171. An extreme version of this approach is *Foisy v. Wyman*, 515 P.2d 160, 168 (Wash. 1973), in which the court prohibited the defensive invocation of the warranty of habitability unless the tenant is entitled to a complete rent abatement, or somehow calculated and paid the portion of rent not meriting abatement.

The impact of these rules on the tenants' rights revolution's instrumental goals, however, is profound. Although other factors intervened to help reshape the low end of the housing market and the lives of low-income renters, these rules alone likely would have sufficed to distort severely the impact of the tenants' rights revolution. This Section describes these rules and considers how they may rearrange the incentives analyzed in Part II above.

### *1. The Requirement that Rent Withholding Be Deliberate*

Most states effectively require tenants invoking the implied warranty of habitability to demonstrate that their sole motive in failing to pay rent was to raise repair issues.<sup>172</sup> These rules commonly are described as requiring the tenant to show "good faith." Some commentators suggest that tenants who have failed to pay rent for some reason other than the landlord's failure to repair should perhaps be barred from raising the habitability defense as a "legal afterthought."<sup>173</sup> Some states enact such a bar explicitly, even requiring an affidavit that the tenant has taken five specified preparatory steps.<sup>174</sup> One state imposes monetary penalties on tenants who withhold rent absent strict compliance with statutory conditions.<sup>175</sup>

The most common method of ascertaining that the tenant's invocation of the warranty was deliberate is to require the tenant to prove that she or he gave the landlord notice of any defects alleged.<sup>176</sup> The Restatement declares that the

172. See, e.g., 280 Broad, LLC v. Adams, 2006 WL 2790909 (Conn. Super. Ct. 2006) (denying rent abatement to tenant whose furnace exploded because economic difficulties contributed to nonpayment of rent). The state might require proof that the tenant lodged a complaint with code enforcement agencies. See Eldergill, *supra* note 118, at 306. The state might require the tenant to demonstrate that she or he has the money required to pay the rent. See, e.g., MICH. COMP. LAWS ANN. § 125.530(3) (West 2006) (establishing municipal escrow account for this purpose). One court, however, held that tendering payment to the landlord waived the warranty. See Eldergill, *supra* note 118, at 309.

173. See, e.g., Brakel, *supra* note 83, at 569. *But cf.* 279 4th Ave. Mgmt., L.L.C. v. Mollett, 898 A.2d 1036, 1039 (N.J. Super. Ct. App. Div. 2006) (reversing dismissal of tenant's habitability defense entered because tenant's rent payments were late).

174. See *Chermin v. Welchans*, 844 F.2d 322, 324 (6th Cir. 1988) (describing Ohio's procedure).

175. TEX. PROP. CODE ANN. § 92.058(a) (West 2007).

176. See, e.g., TEX. PROP. CODE ANN. § 92.052(a) (West 2007); URLTA § 4.101(a); *Jesse v. Lindsley*, 233 P.3d 1, 7 (Idaho 2008); *Glasoe v. Trinkle*, 479 N.E.2d 915, 920 (Ill. 1985); *Dulin v. Sowell*, 919 So. 2d 1010, 1012 (Miss. Ct. App. 2005); *Chiodini v. Fox*, 207 S.W.3d 174, 176 (Mo. Ct. App. 2006); *King v. Moorehead*, 495 S.W.2d 65, 75 (Mo. Ct. App. 1973); *Marini v. Ireland*, 265 A.2d 526, 535 (N.J. 1970); *N.Y.C. Hous. Auth. v. Roberts*, Nos. 570853-01, 02-026/027, 2002 WL 759637, at \*1 (N.Y. App. Term Apr. 16, 2002); *Geyer v. Frank*, No. CA84-06-074, 1985 WL 8144, at \*4 (Ohio Ct. App. Jan. 14, 1985); *Pugh v. Holmes*, 405 A.2d 897, 906 (Pa. 1979); *McIntyre ex rel. Howard v. Phila. Hous. Auth.*, 816 A.2d 1204, 1208 n.9 (Pa. Commw. Ct. 2003); *Hilder v. St. Peter*, 478 A.2d 202, 210 (Vt. 1984); MICH. STANDARD JURY INSTRUCTION 100.01 (2010); 49 AM. JUR. 2D, *Landlord & Tenant*, § 450 (2010); SCHOSHINSKI, *supra* note 34, § 3:24 (1980); JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 10.6 (2d ed. 2005). *But see* OR. REV. STAT. § 90.360 (2009); *Gennings v. Newton*, 567 So. 2d 637 (La. Ct. App. 1990) (rejecting notice requirement); *In re Estate of Jorden*, 800 N.Y.S.2d 490, 496 (N.Y. Sur. Ct.

landlord must “keep the leased property in a condition that meets the requirements of governing health, safety, and housing codes,”<sup>177</sup> but grants tenants remedies only when the “the landlord does not correct his failure within a reasonable time after being requested to do so.”<sup>178</sup> These requirements migrated to the contract side of landlord-tenant law from its tort side, which imposed liability for the landlord’s negligent disregard of known defects.<sup>179</sup> Some courts have required more formal notice than many tenants are likely to provide<sup>180</sup> or sanctioned tenants for raising valid defenses without having given their landlords notice.<sup>181</sup>

## 2. Landlords’ Protective Orders

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<sup>182</sup> or receiving a jury trial.<sup>183</sup> 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.

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2005); *Miller v. C.W. Myers Trading Post, Inc.*, 355 S.E.2d 189 (N.C. Ct. App. 1987) (finding notice not required for many defects); SCHOSHINSKI, *supra* note 34, § 3:16.

177. RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT § 5.5(1) (1977).

178. *Id.* § 5.5(4); *see Moser v. Cline*, 214 S.W.3d 390, 395 (Mo. Ct. App. 2007) (awarding landlord double rent because tenant failed to show that delay in repairing sewer was unreasonable); *Chess v. Muhammad*, 430 A.2d 928, 930 (N.J. Super. App. Div. 1981) (*per curiam*) (finding no breach because delay in repairs not unreasonable).

179. *See Michael J. Davis & Phillip E. DeLaTorre, A Fresh Look at Premises Liability as Affected by the Warranty of Habitability*, 59 WASH. L. REV. 141, 157 (1984).

180. *See, e.g., Dugan v. Milledge*, 494 A.2d 1203, 1206 (Conn. 1985) (affirming dismissal of tenants’ claims because tenant could not prove a prior complaint to housing inspectors); *Myrah v. Campbell*, 163 P.3d 679, 683 (Utah. Ct. App. 2007) (finding “informal emails” and telephone calls insufficient).

181. *See, e.g., Landmarks Restoration Corp. v. Gwardyak*, 485 N.Y.S.2d 917, 918–19 (N.Y. City Ct. 1985) (awarding attorneys’ fees to landlord despite tenant’s meritorious defense and usual rule denying attorneys’ fees in contract cases).

182. *See, e.g., URLTA* § 4.105 (“In [the] event [the tenant counterclaims for money under the rental agreement or the Act] the court from time to time may order the tenant to pay into court all or part of the rent accrued and thereafter accruing, and shall determine the amount due to each party. The party to whom a net amount is owed shall be paid first from the money paid into court, and the balance by the other party.”).

183. *See, e.g., MICH. CT. R. 4.201(H)(2)* (2009).

*a. The Genesis of LPOs*

LPO requirements in many jurisdictions have extensive histories going back long before the recognition of the implied warranty of habitability and the related defense of retaliatory eviction<sup>184</sup>—prior to which tenants had few defenses available in eviction cases. Where “the only issue is whether the allegations of the complaint are true,”<sup>185</sup> an LPO has the effect only of requiring tenants to pay an undeniable obligation.<sup>186</sup> Similarly, when a court requires rent payments on appeal after a trial has found that rent is owed, it merely echoes the court’s findings and provides the landlord security against loss during the period the appeal is pending.<sup>187</sup> And although most jurisdictions substantially rewrote their statutes on eviction procedure at the time they recognized reforms, having LPO requirements in their previous statutes probably made these states more likely to continue to impose LPOs without careful consideration of their compatibility with the new regime.<sup>188</sup>

184. See, e.g., MICH. REV. STAT., ch. 123, § 8303 (1846).

185. *Lindsey v. Normet*, 405 U.S. 56, 63 (1972).

186. Even before the tenants’ rights revolution, tenants could argue constructive eviction or challenge the landlord’s assertion about the rent level. Thus, even under the old regime, “[o]f course, it is possible for [LPOs] to be applied so as to deprive a tenant of a proper hearing in specific situations . . . .” *Lindsey*, 405 U.S. at 65.

187. See, e.g., *Cooks v. Fowler (Cooks I)*, 437 F.2d 669, 674 (D.C. Cir. 1970) (finding that the equities are more likely to favor appeal bonds than pretrial LPOs); *Bell v. Tsintolas Realty Co.*, 430 F.2d 474, 483 (D.C. Cir. 1970). *But see* *Cooks v. Fowler (Cooks II)*, 459 F.2d 1269, 1272, 1274 (D.C. Cir. 1971) (“Judicial protection of the landlord, whether pretrial or post-trial, can be justified only within the area of fair compensation for the possession he loses during the period of litigation. A protective order is unsustainable insofar as it requires the tenant to deposit as security more than the landlord could legitimately claim on that account.”). Bonds imposed on appeal from courts that do not afford the parties full trials present a somewhat different situation. Jurisdictions utilizing these procedures typically refer eviction actions to quasi-judicial magistrates for initial determinations. Unsuccessful parties may then “appeal” to a higher court, where they receive a trial de novo. See, e.g., MD. CODE ANN., REAL PROP. § 8-332(a), (d) (LexisNexis 2010); N.C. GEN. STAT. § 42-32 (2009). Some of the parties’ basic procedural rights, in particular the right to a jury trial, may only be made available on this “appeal.” This caused one court to invalidate these “appeal bonds,” *Usher v. Waters Ins. & Realty Co.*, 438 F. Supp. 1215, 1220–21 (W.D.N.C. 1977), leading the state to exempt indigent tenants from part of the requirement. N.C. GEN. STAT. § 42-34(c1).

Access to appeal can be important to counter some of the problems described *infra* Part II.B. See *Lindsey*, 405 U.S. at 74–79 (invalidating on equal protection grounds an Oregon statute requiring tenant-appellants to post bond for double rent to perfect an appeal); *Fed. Nat’l Mortg. Ass’n v. Wingate*, 273 N.W.2d 456, 460–61 (Mich. 1979) (overturning requirement that tenants seeking to appeal eviction orders make large cash deposits); *Cooks I*, 437 F.2d at 673; *Cooks II*, 459 F.2d at 1275–76 (vacating a trial court’s order that a tenant pay the full contract rent into court as an appeal bond despite serious defects in the premises).

188. Commentators have been of little help. Even one of the more thorough critiques of URLTA mentions LPOs only in passing. Richard E. Blumberg & Brian Quinn Robbins, *Beyond URLTA: A Program for Achieving Real Tenant Goals*, 11 HARV. C.R.-C.L. L. REV. 1, 9 n.39 (1976). Another major article on the tenants’ rights reforms offers an almost exclusively descriptive summary of the then-existing law on LPOs. Myron Moskowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1473–80, 1482–87 (1974). The one discussion specifically treating the escrow requirement in landlord-tenant



LPOs may be attempts to appease landlords upset by the recognition of implied covenants of habitability in residential leases, offering a pretrial rent collection mechanism as a quid pro quo.<sup>189</sup> This is especially true of courts that recognized the covenants without statutory support<sup>190</sup> and therefore are subject to landlords' criticism for exceeding their institutional roles.<sup>191</sup> Some courts seemed to believe LPOs were necessary to protect landlords' due process rights.<sup>192</sup> These courts were particularly inclined to point to a perceived change in the once summary nature of eviction proceedings,<sup>193</sup> and to suggest that landlords deserve assured collection of any rent owed<sup>194</sup> as compensation for delays.<sup>195</sup>

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,<sup>196</sup> they impose LPO requirements, often virtually without explanation, in a paragraph<sup>197</sup> or a footnote,<sup>198</sup> generally as dictum.<sup>199</sup> Some tenants' advocates

litigation focuses on appeal bonds rather than LPOs. Comment, *Landlord Protective Orders – A Lack of Guidelines for Appellate Use*, 9 SAN DIEGO L. REV. 132 (1971).

189. See Smith v. Wright, 416 N.E.2d 655, 662 (Ohio Ct. App. 1979).

190. See, e.g., Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1076–77, 1083 n.67 (D.C. Cir. 1970); Hinson v. Delis, 102 Cal. Rptr. 661, 666 (Ct. App. 1972); King v. Moorehead, 495 S.W.2d 65, 75 (Mo. Ct. App. 1973); Pugh v. Holmes, 405 A.2d 897, 900, 907 (Pa. 1979) (favoring, but not requiring, an escrow procedure); see also Bell v. Tsintolas Realty Co., 430 F.2d 474, 482 (D.C. Cir. 1970) (suggesting that LPOs may be required to correct for the side effects of “judicial innovation”).

191. See, e.g., Pugh, 405 A.2d at 903–05.

192. See, e.g., Martins Ferry Jaycee Hous., Inc. v. Pawlaczyk, 448 N.E.2d 512, 514 (Ohio Ct. App. 1982); Rush v. S. Prop. Mgmt., Inc., 173 S.E.2d 744, 746 (Ga. Ct. App. 1970).

193. See, e.g., Bell, 430 F.2d at 481–82.

194. See *id.* at 479 & n.10; Green v. Superior Court, 517 P.2d 1168 (Cal. 1974); Dameron v. Capitol House Assocs. Ltd., 431 A.2d 580 (D.C. 1981).

195. Bell, 430 F.2d at 481; KING Corp. v. Kim, 110 P.3d 397 (Haw. 2005); Stanger v. Ridgway, 404 A.2d 56 (N.J. Cumberland County Ct. 1979). *But see* Pernell v. Southall Realty, 416 U.S. 363, 371–76 (1974) (finding ancient roots for the right to trial by jury in landlord-tenant cases). The delay argument assumes that tenants are primarily responsible for delays in the proceedings and hence subject to deterrence, that LPOs provide effective deterrence, that shifting the costs of delay through LPOs will not induce landlords to stall, and that the costs of the averted delays outweigh the burdens LPOs impose. See Cunningham v. Phoenix Mgmt., Inc., 540 A.2d 1099 (D.C. 1988) (upholding dismissal of tenant's pleadings and payment of escrow to landlord without trial when tenant missed a payment after a year of receiving no relief on her complaints of code violations).

196. See, e.g., Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1072–83 (D.C. Cir. 1970); Hinson v. Delis, 102 Cal. Rptr. 661, 662–67 (Ct. App. 1972); King v. Moorehead, 495 S.W.2d 65, 67–77 (Mo. Ct. App. 1973); Pugh, 405 A.2d at 900–10.

197. See, e.g., Hinson, 102 Cal. Rptr. at 666; King, 495 S.W.2d at 77; Pugh, 405 A.2d at 907.

198. See Javins, 428 F.2d at 1083 n.67.

199. See, e.g., *id.* at 1083 n.67; Hinson, 102 Cal. Rptr. at 666; King, 495 S.W.2d at 77; Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1978). Indeed, the landlord in King did not respond to the tenant's appeal in the Missouri Court of Appeals. King, 495 S.W.2d at 67.

shared this lack of understanding, themselves suggesting LPOs.<sup>200</sup> Some courts and commentators cannot resist moralizing at tenants invoking the new defenses, calling LPOs necessary to demonstrate their “good faith.”<sup>201</sup>

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.<sup>202</sup> 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.<sup>203</sup> 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.<sup>204</sup>

#### *b. Characteristics of LPOs*

In general, LPOs are imposed on tenants when they raise defenses based upon the warranty of habitability or retaliatory eviction<sup>205</sup> or when they demand jury trials.<sup>206</sup> Some jurisdictions limit LPOs to “action[s] for possession based upon nonpayment of the rent” and “action[s] for rent when the tenant is in possession,”<sup>207</sup> but others allow LPOs even when the landlord has not put rent

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200. See, e.g., *Lindsey v. Normet*, 405 U.S. 56, 67 n.13 (1972); *Javins*, 428 F.2d at 1083 n.67; *LaPrade v. Liebler*, 614 A.2d 546 (D.C. 1992); *Jackson v. Rivera*, 318 N.Y.S.2d 7 (Civ. Ct. 1971); *Spector*, *supra* note 105, at 207.

201. *Dameron v. Capitol House Assocs. Ltd.*, 431 A.2d 580, 584 (D.C. 1981); *L.V.G. Realty Corp. v. Maltez*, 561 N.Y.S.2d 630, 631 (City Ct. 1990); see Emily Jane Goodman, *Housing Court: The New York Tenant Experience*, 17 URB. L. ANN. 57, 59 (1979).

202. See, e.g., *Scroggins v. Solchaga*, 552 N.W.2d 248, 252 (Minn. Ct. App. 1996); *King*, 495 S.W.2d at 79; *City of Mount Vernon v. Brooks*, 469 N.Y.S.2d 517, 519 (City Ct. 1983); *176 East 123rd Street Corp. v. Flores*, 317 N.Y.S.2d 150, 155 (Civ. Ct. 1970); *Morbeth Realty Corp. v. Velez*, 343 N.Y.S.2d 406, 412 (Civ. Ct. 1973); see also *Pugh*, 405 A.2d at 907 (exhibiting confusion as to which party’s interests LPOs serve).

203. See, e.g., ALASKA STAT. § 34.03.190(a)(3) (2010); MASS. GEN. LAWS ANN., ch. 239, § 8A (West 2004); N.H. REV. STAT. ANN. § 540:13-d(II) (LexisNexis 2006).

204. *Stanger v. Ridgway*, 404 A.2d 56 (N.J. Cumberland County Ct. 1979).

205. See, e.g., MICH. CT. R. 4.201(H)(2) (2009); HENNEPIN COUNTY (MINN.) HOUS. CT. R. 608 (2000), available at <http://www.mncourts.gov/ruledocs/general/GRtitleVII.htm#g608>; URLTA § 4.105(a); *Bell v. Tsintolas Realty Co.*, 430 F.2d 474, 483 (D.C. Cir. 1970).

206. See, e.g., MICH. CT. R. 4.201(H)(2)(a)(iii); *Bell*, 430 F.2d at 483.

207. URLTA § 4.105(a); see *Lindsey v. Prillman*, 921 A.2d 782 (D.C. 2007); *Bell*, 430 F.2d at 483.

at issue.<sup>208</sup> Some jurisdictions also restrict LPOs to delays clearly caused by tenants.<sup>209</sup>

Although many jurisdictions require LPOs in all cases<sup>210</sup> or allow them on the judge's own motion,<sup>211</sup> others require the landlord to take the initiative by filing a motion and showing "a clear need for protection" or something similar.<sup>212</sup> LPOs are equitable in nature,<sup>213</sup> so landlords theoretically should establish the usual prerequisites for obtaining equity, including irreparable harm, inadequacy of their remedies at law, likely success on the merits,<sup>214</sup> and clean hands. Equity principles would require landlords to prove that they have complied with health and safety laws to receive the "extraordinary"<sup>215</sup> protection of an LPO, but there is little evidence that this happens in practice.

LPOs may require tenants to pay all current rent as it accrues,<sup>216</sup> although some may require less,<sup>217</sup> such as the "reasonable rent for the premises."<sup>218</sup> They may also require tenants to deposit all of the back rent in dispute<sup>219</sup> or the undisputed portion of the back rent.<sup>220</sup> LPOs generally require tenants to make payments into a registry at the court,<sup>221</sup> but others compel tenants to pay

208. MICH. CT. R. 4.201(J)(1); *Cunningham v. Phoenix Mgmt., Inc.*, 540 A.2d 1099 (D.C. 1988).

209. CONN. GEN. STAT. ANN. § 47a-26b (West 2006) allows LPOs when the tenant delays filing her or his answer.

210. FLA. STAT. ANN. § 83.60(2) (West 2004); GA. CODE ANN. § 44-7-75 (2010); HENNEPIN COUNTY (MINN.) HOUS. CT. R. 608 (2000), available at <http://www.mncourts.gov/ruledocs/general/GRtitleVII.htm#g608>; N.Y. MULT. DWELL. LAW § 302-a.3.c. (McKinney 2001); *King v. Moorehead*, 495 S.W.2d 65, 77 (Mo. Ct. App. 1973). *But see Amanuensis, Ltd. v. Brown*, 318 N.Y.S.2d 11, 20–21 (Civ. Ct. 1971).

211. URLTA § 4.105(a).

212. CONN. GEN. STAT. ANN. § 47a-26b (West 2006); MICH. CT. R. 4.201(H)(2); *McNeal v. Habib*, 346 A.2d 508, 512 (D.C. 1975) (giving tenant right to be heard but no right to present evidence); *Bell*, 430 F.2d at 483–84; *Teller v. McCoy*, 253 S.E.2d 114 (W. Va. 1978).

213. *Bell*, 430 F.2d at 479.

214. *Id.* at 484.

215. *Id.* at 481–82.

216. *See, e.g.*, FLA. STAT. ANN. § 83.60(2) (West 2004); GA. CODE ANN. § 47-7-75 (a), (b) (2010); HAW. REV. STAT. ANN. § 521-78(a) (LexisNexis 2006); *Lipshutz v. Shantha*, 240 S.E.2d 738 (Ga. Ct. App. 1977) (refusing to reduce amount of LPOs by amount tenants spend on repairs).

217. *See, e.g.*, URLTA § 4.105(a); *Bell*, 430 F.2d at 483.

218. MICH. CT. R. 4.201(H)(2)(a) (2009).

219. *See* FLA. STAT. ANN. § 83.60(2) (West 2004); GA. CODE ANN. § 47-7-75(a) (2010) (mandatory deposit of all back rent "allegedly owed" for which the tenant cannot show a receipt); MONT. CODE ANN. § 70-24-421(1) (2009) (allowing the court to require tenants to pay "all or part of the rent accrued" into court); URLTA § 4.105(a); *Fritz v. Warthen*, 213 N.W.2d 339, 343 (Minn. 1973); *see also Swartwood v. Rouleau*, No. C8-98-1691, 1999 WL 293898 (Minn. Ct. App. May 11, 1999) (requiring tender of all back rent allegedly due).

220. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1365(A) (West 2007).

221. *See, e.g.*, FLA. STAT. ANN. § 83.60(2) (West 2004); GA. CODE ANN. § 47-7-75 (2010); HAW. REV. STAT. ANN. § 521-78 (LexisNexis 2006); MICH. CT. R. 4.201(H)(2)(1)(a)(i) (2010); URLTA § 4.105(a); *Bell*, 430 F.2d at 479; *Pugh v. Holmes*, 405 A.2d 897, 907 (Pa. 1979); *King v. Moorehead*, 495 S.W.2d 65, 77 (Mo. Ct. App. 1973).

landlords directly<sup>222</sup> or require the court to disburse the tenant's payments to the landlord<sup>223</sup> before a trial on the merits—or even after the tenant has prevailed.<sup>224</sup> LPO requirements may only come into effect if the action has not been tried after a certain waiting period,<sup>225</sup> and they may be limited to a specific duration.<sup>226</sup>

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,<sup>227</sup> suggests that many judges and legislators are so far removed from the condition of low-income tenants that they cannot imagine noncompliance.<sup>228</sup> Although LPOs' delay-preventing rationale would make an accelerated trial on the merits a logical response to nonpayment of escrow,<sup>229</sup> a number of jurisdictions refuse to allow tenants to raise their defenses,<sup>230</sup> deny tenants jury trials,<sup>231</sup> or issue "default judgments" for landlords.<sup>232</sup>

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222. See, e.g., NEV. REV. STAT. ANN. § 118A.490(1) (LexisNexis 2010); Dameron v. Capitol House Assocs. Ltd., 431 A.2d 580 (D.C. 1981); City of Mt. Vernon v. Brooks, 469 N.Y.S.2d 517 (City Ct. 1983).

223. Cunningham v. Phoenix Mgmt., Inc. 540 A.2d 1099 (D.C. 1988); McNeal v. Habib, 346 A.2d 508, 512 (D.C. 1975); Juliano v. Strong, 448 A.2d 1379 (Pa. Super. Ct. 1982); see, e.g., MICH. CT. R. 4.201(H)(2)(b) (requiring court to "consider the defendant's defenses" but not specifying whether this consideration must take the form of the trial); *Fritz*, 213 N.W.2d at 343; *King*, 495 S.W.2d at 77; cf. Washington v. H.G. Smithy Co., 769 A.2d 134, 139 (D.C. 2001) (allowing all collected rents to go to landlord if tenant did not raise habitability early in proceedings). But see URLTA § 4.105(a) (allowing the court to "determine the amount due to each party" but not specifying that this determination must be after a full trial on the merits); Hinson v. Delis, 102 Cal. Rptr. 661, 666 (Ct. App. 1972); *Bell*, 430 F.2d at 485; Leejon Realty Co. v. Davis, 416 N.Y.S.2d 948 (Sup. Ct. 1977) (denying disbursement to landlord who had failed to make repairs).

224. Temple v. Thomas D. Walsh, Inc., 485 A.2d 192 (D.C. 1984).

225. See, e.g., MICH. CT. R. 4.201(H)(2)(a), 4.201(J)(1) (LPOs may be entered only for delays of more than seven days); MINN. STAT. ANN. § 504B.341(a) (West 2002) (LPOs may be entered for adjournments of more than six days); Liam Hooksett, LLC v. Boynton, 956 A.2d 304 (N.H. 2008) (allowing LPOs only when trial adjourned to allow for repairs); Edmond v. Waters, 374 A.2d 483 (N.J. Super. Ct. App. Div. 1977) (finding LPO inappropriate where trial imminent).

226. See, e.g., MINN. STAT. ANN. § 504B.341(b) (West 2002) (limiting adjournments and LPOs to three months); cf. ALASKA STAT. § 34.03.190(a) (Michie 2010) (six-month limit on tenants' post-trial deposits where landlords have been found to have failed to maintain the premises); N.H. REV. STAT. ANN. § 540:13-d(II) (LexisNexis 2006) (one month limit on tenants' post-trial deposits).

227. See, e.g., URLTA § 4.105(a); *Bell*, 430 F.2d 474; *King*, 495 S.W.2d 65.

228. But see *Lovejoy v. Intervest Corp.*, 794 So. 2d 1205 (Ala. Civ. App. 2001) (upholding "the principle that an excessive bond may not be used to deny a meritorious appeal to a person of modest means").

229. See CONN. GEN. STAT. ANN. § 47a-26b(d) (West 2006); see also *Rome v. Walker*, 196 N.W.2d 850, 854 (Mich. Ct. App. 1972).

230. See, e.g., FLA. STAT. ANN. § 83.60(2) (West 2004); *Swartwood v. Rouleau*, No. C8-98-1691, 1999 WL 293898 (Minn. Ct. App. May 11, 1999) (affirming refusal to allow tenant to offer defenses without tendering all back rent allegedly due); *Conway v. Nissley*, No. 68536, 1995 WL 723298 (Ohio Ct. App. 1995) (affirming dismissal of counterclaims of tenant in arrearage on rent); *Smith v. Wright*, 416 N.E.2d 655, 661 (Ohio Ct. App. 1979) (denying tenants the right to raise the condition of the premises where they have not complied with an LPO); *Jaroush v. Cook*, 296 S.E.2d 544 (W. Va. 1982) (requiring consideration of defenses of tenant missing LPO

*c. LPOs' Effect*

Data on the issuance of, and compliance with, LPOs is largely lacking.<sup>233</sup> As discussed in the next Section, however, very 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.<sup>234</sup>

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.

The impact of LPOs varies dramatically depending on the wealth of the tenant. For well-to-do tenants, complying with an LPO may be a bother and an expense. For the lowest-income tenants, however, making escrow payments may sometimes be impossible and may often require foregoing other necessities.<sup>235</sup> Where the tenant actually owes the demanded funds but faces a

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payments).

231. See, e.g., MICH. CT. R. 4.201(H)(2)(a)(iii) (2009); *Harris v. Hous. Auth. of Balt. City*, 549 A.2d 770 (Md. Ct. Spec. App. 1988) (requiring a hearing for tenant missing LPO payments). This might also be the response of jurisdictions that impose LPOs in response to tenants' jury demands. See *Bell*, 430 F.2d at 483.

232. See, e.g., GA. CODE ANN. § 47-7-75(c) (2010); HAW. REV. STAT. ANN. § 521-78(b) (LexisNexis 2006); *Davis v. Rental Assocs., Inc.*, 456 A.2d 820 (D.C. 1983) (approving default judgment despite tenant's tender of full amount of arrears prior to trial); *Mahdi v. Poretsky Mgmt., Inc.*, 433 A.2d 1085 (D.C. 1981) (approving judgment for landlord as sanction for tenant's nonpayment of LPO). But see *K.D. Lewis Enters. Corp., Inc. v. Smith*, 445 So. 2d 1032, 1035 (Fla. Dist. Ct. App. 1984) (granting landlord possession but allowing tenant to litigate counterclaims); *Rotheimer v. Arana*, 892 N.E.2d 1183 (Ill. App. Ct. 2008) (rejecting judgments of possession as sanctions for nonpayment of LPOs).

233. Cf. RICHARD T. LEGATES & ALAN GREENWOOD, AN ANALYSIS OF ADMINISTRATIVE AND JUDICIAL COSTS OF PRE-TRIAL RENT DEPOSITS IN CALIFORNIA i (1992) (estimating large administrative costs to expand LPOs).

234. Mosier & Soble, *supra* note 125, at 25, 36, 47. In 20,228 cases, the tenant had no attorney. See *id.* at 26, 36.

235. *Hous. Auth. of Balt.*, 549 A.2d 770 (rejecting hardship defense of unemployed tenant); see CHILDREN'S SENTINEL NUTRITION ASSESSMENT PROGRAM (C-SNAP), FUEL FOR OUR FUTURE: IMPACTS OF ENERGY INSECURITY ON CHILDREN'S HEALTH, NUTRITION, AND LEARNING 3 (2007), available at [http://www.childrenshealthwatch.org/upload/resource/fuel\\_for\\_our\\_future\\_9\\_18\\_07.pdf](http://www.childrenshealthwatch.org/upload/resource/fuel_for_our_future_9_18_07.pdf) (describing hardships low-income families face when they have insufficient funds for both food and shelter costs).

terrible dilemma, she or he may seek relief only under equity courts' traditional mandate of mercy for the poor.<sup>236</sup> But if the landlord has failed to maintain the premises, the implied warranty of habitability vitiates some or all of the tenant's rental obligation, and she or he should not be faulted for diverting those funds to meet other needs. In addition, public assistance programs pay some tenants' rent directly to the landlord; these tenants may be unable to redirect those payments to the court in time to prevent a default on the LPO.<sup>237</sup>

Unethical landlords may induce tenants to default on escrow payments. Landlords are more likely to be repeat players with greater familiarity with court procedures;<sup>238</sup> they may be able to mislead or confuse their tenants about the latter's escrow obligations. In a jurisdiction providing for an automatic forfeiture of the tenant's rights upon a default in escrow payments, the landlord may be able to induce a default with a hint of forbearance. Where the escrow order was oral or written in "legalese," a pro se tenant may default after relying on inaccurate information from the landlord. The landlord may persuade the court to issue an escrow order for more than the contract rent amount.<sup>239</sup> Similarly, landlords in jurisdictions requiring payment of back rent in dispute may demand money already received. Poor tenants particularly are susceptible to these tactics, both because they cannot afford to make double payments and because their market position prevents them from insisting upon more formal accounting procedures.

The burden of LPOs may be compounded if the low-income tenant's dwelling has severe defects. The tenant may have to spend her or his rent money to mitigate the damages a defect in the premises has caused.<sup>240</sup> For example, a tenant without adequate heat may spend the rent money on space heaters. As such, malicious landlords can force tenants to divert their rent money by cutting off essential utilities or creating some other intolerable condition once an LPO issues.

Finally, tenants may have their own reasons for not complying with an LPO. Tenants with strong defenses who would welcome decisions on the merits may fail to make required escrow payments because they doubt the courts will grant them redress. A tenant whose dwelling has deteriorated to the

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236. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 88–89, 104 (2d ed. 1979).

237. *Cf. Shipman v. Carr*, 449 A.2d 187 (Conn. Super. Ct. 1982) (rejecting habitability defense where Section 8 payments on behalf of tenant terminated due to landlord's failure to repair). A sophisticated tenant could explain this to the court; many low-income tenants, however, may not know when or how to explain this or may be embarrassed by their public assistance status.

238. Alan J. Pollock & George A. Kokus, Comment, *Model Residential Landlord-Tenant Code—Proposed Procedural Reforms*, 25 U. MIAMI L. REV. 317, 321–22 (1971).

239. *Lovejoy v. Intervest Corp.*, 794 So. 2d 1205 (Ala. Civ. App. 2001); *Amanuensis, Ltd. v. Brown*, 318 N.Y.S.2d 11, 21 (Civ. Ct. 1971).

240. *See Lipshutz v. Shantha*, 240 S.E.2d 738 (Ga. Ct. App. 1977) (refusing to reduce amount of LPO by amount tenants spent on repairs).

point that it is worth far less than the payment the LPO requires may see compliance as throwing good money after bad. Moving may seem a more reasonable alternative, at least avoiding payment of back rent to the non-repairing landlord. By encouraging tenants to move rather than to pursue claims against non-repairing landlords, LPOs frustrate the instrumental, redistributive, and humanitarian purposes of the tenants' rights reforms (although they may occasionally further contract principles by prompting efficient breaches).

### *B. Empirical Evidence of the New Regime's Impact in Court*

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.<sup>241</sup> 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.<sup>242</sup> Nine-minute trials<sup>243</sup> take the concept of a "rocket docket" to an entirely different level, and the number of jury trials has remained extremely small.<sup>244</sup>

Third, a huge fraction of eviction cases never reach open court.<sup>245</sup> Landlord-tenant courts have extremely high default rates.<sup>246</sup> Courts depend on

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241. Mosier & Soble, *supra* note 125, at 22, report that the number of possession actions filed in Detroit's Landlord-Tenant Court remained almost the same in 1969, the first full year in which the reforms were in force. The number rose somewhat the next year, but then began moving back towards its pre-tenants'-rights level.

242. In 1985, each New York City Housing Court judge handled 8,688 evictions. Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J.L. & SOC. PROBS. 527, 537 n.86 (1991). Detroit Landlord-Tenant Court judges annually disposed of more than 10,000 cases each in the 1970s. Mosier & Soble, *supra* note 125, at 21.

243. Rose & Scott, *supra* note 85, at 1001-03, found the average contested case is nine minutes. Fusco et al., *supra* note 130, at 105 & n.60 (1979), reported that in Chicago "[t]he average court-allotted time for each contested case was approximately two minutes," including the approximately twenty seconds "necessary to call the case and for the parties to approach the bench."

244. Mosier & Soble, *supra* note 125, at 49, report that only nine jury trials were held in Detroit's Landlord-Tenant Court in twelve months of 1970 and 1971. Over a fifteen-year period, less than 0.05 percent of Ohio evictions were tried to a jury. See Frank G. Avellone, *The Maddening Status of the "Habitability Defense" in Ohio Eviction Law: Revisiting Where We Must*, 23 URB. LAW. 355, 359 n.31 (1991).

245. Some 96 percent of Maryland eviction cases are uncontested, making the appearance of crowded dockets illusory. *Williams v. Hous. Auth. of Balt.*, 760 A.2d 697 (Md. 2000).

246. Some 53 percent of the eviction actions filed in Springfield, Massachusetts in 1978 resulted in defaults being entered. Jerrold B. Winer, *Pro Se Aspects of Hampden County Housing Court: Helping People Help Themselves*, 17 URB. L. ANN. 71, 79 (1979). Mosier & Soble, *supra*

default judgments to control their dockets and design procedures to obtain them whenever possible,<sup>247</sup> typically requiring no motion or affidavit—which pro se landlords might not know how to produce—before entering a default judgment.<sup>248</sup> In addition, court personnel and landlords’ lawyers induce most tenants to concede in formal or informal settlements.<sup>249</sup> Once the landlords receive all that they sought—either rent or possession—they voluntarily dismiss their cases.<sup>250</sup> 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.<sup>251</sup>

Fourth, of the minority of cases that reach court, the overwhelming majority are resolved with no reference to the condition of the premises.<sup>252</sup> 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<sup>253</sup> or the presence of mind and assertiveness to do so orally in the momentary window of opportunity presented in open court.<sup>254</sup> Because of very

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note 125, at 26, reported that in 1970–1971, 59.2 percent of the nonpayment actions and 51.4 percent of other eviction actions resulted in default judgments against the tenant. Rose & Scott, *supra* note 85, at 994, recorded a default rate of 49.4 percent in nonpayment actions and 45.2 percent in other eviction cases. About 80 percent of Washington, D.C., tenants default. Cunningham, *supra* note 121, at 107, 134.

247. Rose & Scott, *supra* note 85, at 988 n.88.

248. Compare Cunningham, *supra* note 121, at 111, with FED. R. CIV. PROC. 55(b) (2010) (requiring an affidavit or motion).

249. Cunningham, *supra* note 121, at 117; 144 Woodruff Corp. v. Lacrete, 585 N.Y.S.2d 956 (Civ. Ct. 1992) (describing tenants’ propensity to sign settlements out of fear even where they have meritorious defenses).

250. Mosier & Soble, *supra* note 125, at 26, found 23.5 percent of nonpayment defendants, and 17.0 percent of other eviction defendants, capitulated before their cases reached court. Rose & Scott, *supra* note 85, at 994, similarly found 24.6 percent of nonpayment defendants and 11.2 percent of other tenant-defendants gave up before their court dates.

251. Judges repeatedly interrupted tenants’ testimony about defects in the premises with coercive suggestions that the tenants move: “If it’s so bad, why don’t you move?,” “Of course you want to move,” “Maybe he’s doing you a favor,” etc. Rose & Scott, *supra* note 85, at 1009–10; Fusco et al., *supra* note 130, at 105 n.61; Garrett v. Cross, 935 So. 2d 845, 847 (La. Ct. App. 2006) (affirming trial judge who responded to tenant’s complaints about repairs by telling tenant that was “one reason, probably, why you want to move out”).

252. See Berman & Sons, Inc. v. Jefferson, 396 N.E.2d 981, 985 (Mass. 1979) (noting that tenants raise the new defenses in only a tiny fraction of cases, making the cost for landlords slight).

253. E.g., Vanlandingham v. Ivanow, 615 N.E.2d 1361 (Ill. App. Ct. 1993); Sandefur Mgmt. Co. v. Smith, 486 N.E.2d 1234 (Ohio Ct. App. 1985). A clerk reported, “it is almost impossible to educate tenants that an answer should be filed prior to the hearing.” Winer, *supra* note 246, at 78. Perhaps because of “an inability to express one’s feelings in writing, . . . the vast majority of tenants simply appear in court to give their side of the story without any prior notice.” *Id.*

254. Bezdek, *supra* note 87, at 566–97.



limited legal services funding,<sup>255</sup> tenants are seldom represented by counsel,<sup>256</sup> and without the help of lawyers may not have a clear understanding of their new rights or of court procedures.<sup>257</sup> Landlords, on the other hand, are far more likely to be represented<sup>258</sup> and frequently leverage their superior legal knowledge to confuse and mislead unrepresented tenants.<sup>259</sup> Even when landlords are not represented, courts typically require less specificity than the usual level of notice pleading.<sup>260</sup> Legal stationery stores, and even courts, provide landlords with form complaints that prompt them for all allegations required to make out their cases.<sup>261</sup> No comparable resources are typically available to pro se tenants unsure about their defenses.<sup>262</sup> Judges and clerks commonly assist landlords in making their cases and refuting their tenants' cases.<sup>263</sup> Thus landlords, in sharp contrast to tenants, actually fare better in court unrepresented.<sup>264</sup>

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255. Karas, *supra* note 242, at 535–36; Lynn E. Cunningham, *The Legal Needs of the Low-Income Population of Washington, DC*, 5 UDC/DCSL L. REV. 21, 58–61 (2000).

256. Brakel, *supra* note 83, at 581, reports that legal aid attorneys represent only 9 percent of tenants in contested eviction cases. Mosier & Soble, *supra* note 125, at 36, report tenants being represented in Detroit Landlord-Tenant Court in only 7 percent of contested cases. Fusco et al., *supra* note 130, at 105 n.63, report that only 7.1 percent of the tenants appearing in contested cases were represented. With only one in five cases contested, Mosier & Soble, *supra* note 125, at 29, this means that only 1 to 2 percent of tenants facing eviction have counsel. Only 12 percent of New York City tenants in contested cases had lawyers in the 1990s. 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, 421 (2001).

257. When Detroit's Landlord-Tenant Court briefly replaced traditional legalese notices and summonses with "plain English" forms briefly mentioning the defenses of retaliation and failure to repair, tenants raised defenses at up to twice the prior rate. Rose & Scott, *supra* note 85, at 997–99.

258. Mosier & Soble, *supra* note 125, at 36, report that landlords were represented in 48.6 percent of the "contested cases." Fusco et al., *supra* note 130, at 105 n.62, found 73.8 percent of Chicago landlords represented. Ninety-eight percent of New York City landlords had counsel. Seron et al., *supra* note 256, at 421.

259. The Center for National Housing Law Reform's 1978 study of landlord-tenant cases in eleven Michigan cities found that in 90 percent of the cases resolved out-of-court, tenants received terms as bad as or worse than the harshest judgments the court could have issued (on file with author).

260. Cunningham, *supra* note 121, at 127–29.

261. *Id.* at 119.

262. A court committee in Detroit designed, but did not widely distribute, a form answer. Rose & Scott, *supra* note 85, at 986–91, 1024. The Connecticut Housing Court made similar efforts to be open to pro se litigants. Eldergill, *supra* note 118, at 299–300.

263. Fusco et al., *supra* note 130, at 108–25; *see* Espinoza v. Calva, 87 Cal. Rptr. 3d 492, 496 (Ct. App. 2008) (reversing trial court for so limiting tenants' time to present evidence as to "in effect, preclude[] them from presenting their defense"); R & O Mgmt. Corp. v. Ahmad, 819 N.Y.S.2d 382 (App. Term. 2006) (reversing dismissal of tenant's counterclaims, which the landlord-tenant court had entered because the landlord was unprepared); Koch v. Mac Queen, 746 N.Y.S.2d 229 (App. Term. 2002) (reversing trial judge that rejected habitability defense after refusing to subpoena building inspector and refusing to admit photographs of the premises); Prince Hall Village Apts. v. Braddy, 538 P.2d 603 (Okla. Civ. App. 1975) (finding bias in trial judge's questioning of tenant about receipt of welfare).

264. Mosier & Soble, *supra* note 125, at 35–37 (citing results from Detroit and Brooklyn);

The adjudicatory model that emerges is a curious hybrid of the common law adversarial system and an almost administrative inquisitorial system. Landlords—these courts’ traditional constituents—benefit from a particularly lenient version of notice pleading, approaching an inquisitorial approach. Tenants, on the other hand, must articulate an explicit legal defense in a way more reminiscent of antiquated common law pleading<sup>265</sup>—or even the old English practice of “waging one’s law.”<sup>266</sup>

Fifth, studies indicate that landlords have won an overwhelming proportion of the nonpayment actions filed. Even where rental housing conditions were bad<sup>267</sup> and getting worse,<sup>268</sup> landlords were winning total victories in upwards of 97 percent of all nonpayment cases started.<sup>269</sup> And with

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Rose & Scott, *supra* note 85, at 1001–02.

265. See *Brown v. Robyn Realty Co.*, 367 A.2d 183 (Del. Super. Ct. 1976) (dismissing tenant’s habitability argument for failure to plead terms of lease properly); *Garrett v. Cross*, 935 So. 2d 845 (La. Ct. App. 2006) (finding tenant’s complaint about landlord’s failure to repair insufficient to assert habitability defense); *Jablonski v. Casey*, 835 N.E.2d 615 (Mass. App. Ct. 2005) (affirming dismissal of habitability defense despite housing code violations, including leaks, cracked walls and floors, and ant infestation, for tenant’s failure to show clear harm); *Flynn v. Riemer*, 1991 Mass. App. Div. 50 (Dist. Ct. 1991) (finding no breach of warranty when tenant was without water for four weeks but did not prove that landlord acted willfully); *Payne v. Rivera*, 904 N.Y.S.2d 878 (Civ. Ct. 2010) (severing tenant’s counterclaim for failure to repair); 601 West Realty LLC. v. Chapa, No. 59446/03, 2003 WL 22087614 (N.Y. Civ. Ct. July 28, 2003) (dismissing tenant’s counterclaim because tenant “failed to establish the impact of” lead paint and other housing code violations); *Cater v. Saunders*, No. SP 5881/01, 2002 WL 31207219 (N.Y. Dist. Ct. Sept. 30, 2002) (same); *L & M Inv. Co. v. Morrison*, 605 P.2d 1347 (Or. Ct. App. 1980) (finding housing code violations insufficient to establish lack of habitability); *cf. Dickhut v. Norton*, 173 N.W.2d 297 (Wis. 1970) (imposing strict requirements on tenants alleging retaliatory eviction).

266. Compurgation, or wager of law, required certain litigants to recite long, complicated oaths asserting the merit of their position. Any slips of the tongue and the matter would be decided against them. *BAKER*, *supra* note 236, at 5–6.

267. At the same time Cleveland’s landlord-tenant court was rarely invoking the warranty, 64,000 of the 133,000 rental units in Cleveland were “substandard.” David M. McIntyre, *URLTA in Operation: The Ohio Experience*, 1980 AM. B. FOUND. RES. J. 587, 595. The estimated rat population of the City of Detroit in 1974 was 750,000. *DETROIT NEWS*, July 1, 1974, at 2B.

268. The Detroit Department of Health reported in 1972 that there were 5,185 fewer well-maintained residential structures in the city that year than there were in 1968, the year Michigan’s legislature passed the tenants’ rights reforms. Mosier & Soble, *supra* note 125, at 64, n.92. Approximately 30 percent of Detroit’s housing was “deteriorating” or “dilapidated” in 1972. *Id.*

269. Gerchick, *supra* note 139, at 790. Mosier & Soble report that Detroit tenants in 1970–1971 won total victories in only 0.1 percent of the nonpayment of rent cases started. Mosier & Soble, *supra* note 125, at 33. Tenants won partial rent abatements in another 2 percent of the cases. *Id.* Rose & Scott, *supra* note 85, at 1009 fig.17, report that landlords were winning favorable outcomes in 97.5 percent of the nonpayment cases started in 1974. Fusco et al., *supra* note 130, at 104, report that Chicago landlords in 1976 won everything they sought in at least 84.6 percent of the “contested cases” heard. This figure is virtually identical to the “contested case” statistics that Mosier & Soble report. Mosier & Soble, *supra* note 125, at 33. (A “contested case” is one in which both the landlord and the tenant appear. Mosier & Soble reported that only 20.1 percent of the Detroit cases were “contested.” *Id.* at 26. If the Chicago court had a similar rate of defaults and voluntary dismissals by landlords before cases came to court, it too would have an approximately 97 percent victory rate for landlords.) And some of the winners were more

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.<sup>270</sup>

Seventh, although objective data is unavailable on the number of tenants with valid retaliation defenses, judgment for a tenant on this basis is extremely rare.<sup>271</sup> A landlord contemplating a retaliatory eviction is unlikely to be deterred by a prohibition so seldom enforced.<sup>272</sup> 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.

Beyond these outcome measures is a consistent picture of courts ill-equipped or disinclined to carry out the transformative role the tenants' rights revolution envisioned for them.<sup>273</sup> Michigan's Supreme Court lamented:

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sophisticated middle-class tenants, hardly those whose conditions prompted the reforms. *See* McIntyre, *supra* note 267, at 596.

270. *See, e.g.*, C.F. Seabrook Co. v. Beck, 417 A.2d 89 (N.J. Super. Ct. App. Div. 1980) (denying rent abatements for months other than those for which landlord's action sought rent); 303 Beverly Grp., L.L.C. v. Alster, 735 N.Y.S.2d 908 (App. Term 2001) (disallowing consequential damages); Landmarks Restoration Corp. v. Gwardyak, 485 N.Y.S.2d 917 (City Ct. 1985) (abatent rent 20 percent but offsetting that with an exceptional award of attorneys' fees to the landlord); Tower West Assocs. v. Derevnuk, 450 N.Y.S.2d 947 (Civ. Ct. 1982) (granting 10 percent rent abatement); Surratt v. Newton, 393 S.E.2d 554 (N.C. Ct. App. 1990) (disallowing damages exceeding the amount of rent paid). *But see* Brown v. LeClair, 482 N.E.2d 870 (Mass. App. Ct. 1985) (affirming award of statutory damages for willful failure to repair); Pleasant East Assocs. v. Cabrera, 480 N.Y.S.2d 693 (Civ. Ct. 1984) (awarding punitive damages where failure to repair is racially motivated).

271. According to Mosier & Soble, *supra* note 125, at 34–35, Detroit tenants in 1970–1971 won only 0.4 percent of all simple termination cases started. Some of these cases may have involved other defenses, such as an assertion that the notice to terminate tenancy was improper in form or service. So the actual number of cases in which tenants prevailed on the retaliation defense could be even smaller. (The Chicago figures reported, *supra* note 269, were for all “contested cases,” including both nonpayment and other termination actions.)

272. Moreover, because the only penalty for attempted retaliation is refusal to allow that eviction, even strict enforcement of the prohibition would have little deterrent value. *See* Bldg. Monitoring Sys., Inc. v. Paxton, 905 P.2d 1215 (Utah 1995) (allowing retaliatory evictions once premises repaired and tenant given time to find other housing).

273. Fusco et al., *supra* note 130, at 108–25. Judges ruled against tenants even when the tenants were the only competent testimony on an issue, *id.* at 112, even when they supported a defense of payment with receipts, *id.* at 113, and even when they proved the existence of serious repair problems with un rebutted photographic evidence, *id.* at 111 n.91. Judges relied upon the incompetent hearsay of landlords' lawyers who admitted having had no direct contact with the premises. *Id.* at 125. Judges asked landlords' lawyers to check tenants' allegations with their clients by telephone and then entered judgment against the tenants on the basis of the landlords' un-cross-examined “telephone testimony.” *Id.* “[D]ead attorneys and landlords have secured

The atmosphere of the Detroit Landlord-Tenant Court . . . does not encourage deliberate, reasoned and compassionate justice, although it deals with one of the basic material essentials of life, a roof over one's head. Judges, litigants and court personnel are harassed and depressed. In many cases both the landlords and tenants are barely making it financially, and oftentimes they are not making it at all. Cases involve housing conditions that are not the most desirable. Consequently, relations are often strained and not infrequently beyond the breaking point. Many of the tenants do not understand their rights at all, although some understand them too well. Sometimes landlords are in the same posture. It would be difficult to handle these cases with justice under the best of circumstances. But circumstances are far from the best. The case load is incredible. The court facilities are just a little better than tolerable. Matters that can be avoided are avoided.<sup>274</sup>

As noted above, tenants' propensity to raise the landlord's failure to repair, and hence the implied warranty's deterrent effect, depends heavily on tenants' prospects of success in court, both initially and against any subsequent retaliation. This particularly is true for tenants contemplating deliberate rent withholding. With substantive rules barring involuntary defendants and courts' tepid implementation deterring more financially stable tenants, the implied warranty's effect is limited to a small group of outliers. The next Part asks whether means were available to do better.

### III.

#### WERE THE NEW REGIME'S FAILURES INEVITABLE?

The result of the supposed tenants' rights revolution falls far short of achieving any of its three instrumental goals of improving the condition of rental housing, redistribution of income, and averting humanitarian crises.<sup>275</sup> Different substantive and procedural rules might have made the tenants' rights revolution more effective. On the other hand, changes that have taken place in the housing market over the past several decades might have limited the impact of even a more sensitively designed regime of landlord-tenant law. In the same way, the demise of high-paying, low-skill, industrial jobs and changing

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favorable judgment when represented by persons unauthorized to practice law." *Id.* at 118. Rose & Scott, *supra* note 85, at 1009–12, describe similar practices in Detroit's Landlord-Tenant Court.

274. Fed. Nat'l Mortg. Ass'n v. Wingate, 273 N.W.2d 456, 460–61 (Mich. 1979).

275. Moreover, as discussed above, *supra* notes 267–72 and accompanying text, even the new regime's intramural goal of legal modernization faltered. The covenants of landlord and tenant are not truly mutual if the tenant's breach renders the landlord's irrelevant, but the converse is not true. As such, the reform failed to modernize this area of law. Landlord-tenant law remains an idiosyncratic world unto itself if landlords can obtain an effectively equitable remedy without showing prerequisites for equitable relief, including clean hands and the lack of an adequate remedy at law—and without themselves being subject to equitable orders compelling their compliance with the covenant of repair during an action's pendency.

attitudes toward social provision following the collapse of communism would have limited the success of even a more robust regime of welfare rights.

The state of rental housing may have changed during this period,<sup>276</sup> but the implied warranty appears to have affected far too few cases to be a likely cause.<sup>277</sup> For the same reason, it seems unlikely that the implied warranty has done much to improve the quality of life of the low-income tenants whose plight it claimed to address.

Although the substantive and procedural obstacles to the implied warranty's implementation are superficially separate, they are linked. The doctrines that limit who can raise the implied warranty impose a form of rationing of judicial resources, which seemed necessary to the courts because those resources did not increase with the new need to find facts concerning housing conditions. The number of tenants deliberately invoking the warranty is small enough that the courts could adjudicate their cases more or less within existing resource constraints.

This Part analyzes the tenants' rights revolution's failure on several levels. Section A shows that the explicit legal rules that have prevented widespread invocation of the implied warranty were not inevitable corollaries of the new tenants' rights. Section B considers whether the tenants' rights revolution might have benefited from an infusion of procedural ideas from the contemporary welfare rights revolution. Section C explores broader changes in the housing market to which the tenants' rights revolution has failed to respond. Finally, Section D sums up the new regime's impact, highlighting the similarity between its failings and those of the welfare rights revolution identified in the Introduction.

#### *A. Substantive Failures: Unjustified Limitations on the Implied Warranty*

Identifying the sources and underlying rationales of the policies that have curtailed the implied warranty of habitability is difficult for two reasons. Some reasons for the warranty's failure, such as the complexity of trial courts' operating procedures and attitudes of trial judges and clerks, are difficult to document and genuinely may not result from any organized, conscious decision making. Others, including notice requirements and LPOs, are obvious and deliberate but have impacts that are hard to trace in the empirical literature. All of these barriers operate as a system, even if they were not designed as such. Subsection 1 critiques the requirement that tenants withhold rent deliberately if

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276. See *infra* Part III.C.

277. The overwhelming empirical evidence of the warranty's non-enforcement in court would seem to require econometricians claiming to find evidence of its effects to explain a mechanism by which that result might be achieved. *E.g.*, Werner Z. Hirsch, *From "Food For Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws*, 69 CORNELL L. REV. 604, 609 (1984); Werner Z. Hirsch, *Habitability Laws and the Welfare of Indigent Tenants*, 63 REV. ECON. & STAT. 263 (1981).

they wish to raise the implied warranty of habitability. Subsection 2 questions the wisdom and legality of LPOs. In both instances, ambivalence about the implications of the tenants' rights revolution, or about low-income tenants, proved far more important than broader legal and policy principles. Had they tried, courts and advocates would have found compelling reasons to reject the requirements of deliberate withholding and of LPOs.

### *1. The Requirement of Deliberate Rent Withholding*

The doctrines confining the implied warranty's availability to tenants deliberately provoking nonpayment actions, and excluding those raising the warranty only defensively, in part represent a moral judgment. The precise basis of that judgment is unclear: surely a struggling business that fell behind on its payments to a vendor could argue that the vendor's goods were defective without opprobrium. Middle-class judges and lawyers, however, pay for their purchases on time as a matter of pride, and by failing to do so without a deliberate, legally sanctioned plan, low-income tenants place themselves outside of the middle-class value system. Courts and even tenants' own lawyers describe the requirement that tenants have the funds to pay the contract rent as demonstrating "good faith." Yet lacking funds is not an indication of dishonesty,<sup>278</sup> but rather means the tenant may be incapable of present performance. That should not necessarily excuse the landlord's performance.

"It is customary to pay rent in advance"<sup>279</sup> for each month. The landlord must perform her or his covenants during the upcoming month to earn the prepaid rent. If the premises fall into disrepair during the ensuing month, the landlord has not earned the rent already paid and is in breach.<sup>280</sup> The standard rule in contract is that a non-breaching party need not continue to perform once the other has committed a material breach<sup>281</sup>—in the present context, a breach that gives the tenant "substantially less or different" from what the warranty of habitability requires.<sup>282</sup> Not all breaches of the covenant to repair are material, but many are. Thus, if the landlord's implied covenant to repair is truly mutual with the tenant's express covenant to pay rent, the tenant's obligation to pay

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278. "Poverty and immorality are not synonymous." *Edwards v. California*, 314 U.S. 160, 177 (1941).

279. *Lindsey v. Normet*, 405 U.S. 56, 65 (1972).

280. When rent is prepaid and the tenant stops paying rent after the premises have fallen into disrepair, the landlord will have failed to render performance for which the tenant has already paid. The tenant's tender of the next month's rent is therefore not a condition to the landlord's performance of her or his covenants for that month since the landlord has yet to earn all of the rent that she or he has already received.

281. For example, "[I]t is a condition of each party's remaining duties to render performance to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time." RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981).

282. 23 RICHARD A. LORD, WILLISTON ON CONTRACTS § 63:3 (4th ed. 2002) [hereinafter WILLISTON].

rent ceases when material defects appear in the premises.<sup>283</sup> Once the landlord materially breaches the implied warranty of habitability, the tenant's ability or inclination to pay rent becomes irrelevant because that "performance is excused"<sup>284</sup> until the landlord comes into compliance, at which point damages for the landlord's breach are ascertained.

Alternatively, if the landlord's failure to repair is not material and the tenant has stopped paying rent, contract law would treat both parties as being in breach and award appropriate damages against each.<sup>285</sup> Where the tenant's duty to pay rent depends on the landlord's performing the covenant to repair and the landlord fails to do so, the landlord is entitled to damages, not the contract rent.<sup>286</sup> Under this view, both landlord and tenant must answer for their respective breaches where the tenant has stopped paying rent on a defective dwelling. Requiring the tenant to perform, or demonstrate capacity to perform, her or his covenant in order for the landlord to be liable for her or his breaches is inconsistent with true mutuality of obligations.

Similarly, whether the tenant knows her or his legal rights at the time she or he stops paying rent would be irrelevant under general contract law. Breach is defined by the nonperforming party's conduct,<sup>287</sup> not the contemporaneous state of mind of the party alleging the breach.<sup>288</sup> The general rule in contract is that "notice or demand is unnecessary where the obligation to perform is absolute and unconditional."<sup>289</sup> Exceptions apply when the obligated party has no way to know when its performance is necessary or when the contract explicitly requires notice.<sup>290</sup> Although some defects may be within the sole knowledge of the tenant, many are not. Some are present when the tenant takes possession.<sup>291</sup> Landlords can observe most others when they inspect their properties to ensure that tenants are not causing damage. The Uniform Commercial Code's (UCC) rule requiring notice of breach of warranty for defective goods<sup>292</sup> provides a dubious analogy because there the vendor has no continuing access to the goods; in any event, most courts hold it inapplicable where the vendor is aware of the breach, as landlords often will be.<sup>293</sup>

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283. Conversely, of course, once the tenant stopped paying rent, a landlord who was then in compliance with the covenant to repair may regard the tenant as being in breach.

284. 23 WILLISTON, *supra* note 282, § 63:3.

285. ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 946 (one vol. ed. 1952); 23 WILLISTON, *supra* note 282, § 63:3.

286. 23 WILLISTON, *supra* note 282, § 63:2.

287. RESTATEMENT (SECOND) OF CONTRACTS § 235(2) (1981).

288. 23 WILLISTON, *supra* note 282, § 63:1.

289. 17A AM. JUR. 2d CONTRACTS § 594 (2004).

290. *Id.*

291. Limiting the implied warranty to latent defects, *see* Rabin, *supra* note 23, at 580, thus would strengthen notice requirements and make the warranty still harder to enforce.

292. U.C.C. § 2-607 (2009).

293. 18 WILLISTON, *supra* note 282, § 52:42 (4th ed. 2001).

Of course, because the warranty of habitability is a term read into the landlord-tenant contract by courts, the courts could insert a notice requirement as well.<sup>294</sup> Doing so, however, would be unwise, particularly in light of the lower courts' difficulty in enforcing the new landlord-tenant regime. Giving notice exposes the tenant to the risks of retaliation. Tenants currently unaware of the warranty of habitability and of the legal protection against retaliatory eviction are exceedingly unlikely to risk giving notice to a landlord they suspect does not wish to repair the premises further. For the tenant that is familiar with her or his rights, the decision whether to give notice is similar to, but not identical with, that discussed in the preceding Part about whether to invoke the warranty of habitability affirmatively: the tenant has no immediate prospect of monetary reward for taking action, but she or he also does not face any immediate litigation costs and may hope that merely notifying the landlord of a defect may not be as likely to provoke retaliation as withholding rent or filing suit. As discussed above, however, making the implied warranty available only to tenants making a deliberate decision to punish the landlord's failure to repair is likely to limit the effectiveness of that warranty considerably.

## *2. Landlords' Protective Orders*

The justifications offered for LPOs correspond closely to those for insisting that rent withholding be deliberate. Even more directly than the requirements of deliberate withholding, LPOs have become a means of docket control, helping to bridge the gap between the new regime's generous substantive pronouncements and its parsimonious allocation of adjudicatory resources. LPOs are likely to cause some cases to settle and others to drop from dockets when tenants miss escrow payments due to financial emergencies or fatigue from living in the poorly repaired dwelling. This docket-control orientation likely explains why rules limiting LPOs to unusual circumstances quickly gave way to near-universal issuance.

Because they so explicitly limit the mutuality of the covenants of landlord and tenant and so directly subordinate the instrumental goals of the new substantive regime, LPOs provide a useful basis for assessing whether the apparent revolution in landlord-tenant law represents a fundamental change or a modest, nearly cosmetic, update. Subsection 2.a considers and dismisses the major rationales offered for LPOs. Subsection 2.b suggests that contemporary constitutional law provided courts several bases on which they could have declined to impose, or struck down, LPO requirements.

### *a. Deficiencies in the Justifications Offered for LPOs*

The weak justifications for LPOs suggest that LPOs are not necessary to the implementation of the warranty of habitability. Arguments that LPOs are

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294. Most legislative implied warranties of habitability have no such term.



required to avoid depriving landlords of property without due process of the law cannot bear serious scrutiny. First, the supposed deprivation of property suffered by a landlord during the course of the litigation of a possession dispute is no different from that suffered by any plaintiff with a meritorious claim. Second, whether the accruing rent is in fact the landlord's property is unclear until trial of the tenant's defenses. Third, even assuming the validity of the landlord's claim, routine litigation delays probably do not constitute a deprivation of due process.<sup>295</sup> The U.S. Supreme Court seems unlikely to apply *Mathews v. Eldridge*<sup>296</sup> or similar due process tests to constitutionalize the scheduling of civil litigation, least of all in "summary proceedings" already expedited more than most civil cases.<sup>297</sup> Indeed, landlords have no more right to compensation for the new defenses' elongation of possessory actions than tenants had when summary proceedings replaced slow-moving common law ejectment.

LPOs, therefore, represent policy choices rather than constitutional obligations. The policy arguments for LPOs<sup>298</sup> reflect the normative confusion underlying the tenants' rights revolution. For example, several of the arguments for LPOs reveal deep diffidence about equalizing the position of landlord and tenant. Arguments that LPOs protect landlords from harm while the litigation is pending apply equally well to tenants living in defective housing, yet only the tenant's covenant, and not the landlord's, receives extraordinary pretrial enforcement. Similarly, while LPOs protect landlords from the possibility of unenforceable judgments,<sup>299</sup> no comparable measure assures tenants that landlords will make repairs the court finds necessary or pay any judgments on the tenants' counterclaims.

LPOs also preserve the exceptionalism of landlord-tenant law that the new regime sought to end: few other civil litigants must pay the moneys sought by their adversaries to assert their defenses—even when the amount in controversy is far higher than the value of most dwellings in summary proceedings cases.<sup>300</sup>

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295. Any rule allowing tenants to stay in their dwellings during the pendency of the litigation is "in no way responsible for" the tenants' actions as it only "permits but does not compel" those private actions. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165 (1978).

296. 424 U.S. 319 (1976).

297. See *Barker v. Wingo*, 407 U.S. 514, 536 (1972) (finding even the constitutional right to a speedy trial in a criminal case not violated where the record indicates "that the defendant did not want a speedy trial").

298. See *supra* Part II.A.2.a.

299. Many states' summary proceedings do not award money judgments against tenants but state rental arrears "only for the purpose of prescribing the amount which . . . shall be paid to preclude issuance of the writ of restitution." MICH. COMP. LAWS ANN. § 600.5741 (West 2000); *Bell v. Tsintolas Realty Co.*, 430 F.2d 474, 485 n.29 (D.C. Cir. 1970); *Schlesinger v. Brown*, 282 A.2d 790, 791 (N.J. Essex County Ct. 1971). Landlords in these states have no judgments to enforce.

300. *Bell*, 430 F.2d at 479 (noting that "such a protective order represents a noticeable break with the ordinary processes of civil litigation").

And as one court found, there is “no evidence which indicates that it is any more difficult to satisfy a judgment against a tenant than against any other debtor.”<sup>301</sup>

Imposing LPOs to prevent delay in landlord-tenant proceedings similarly lacks justification. As the Supreme Court has noted,

Some delay . . . is inherent in any fair-minded system of justice. A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law, unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home.<sup>302</sup>

Eviction cases, unlike more complex civil cases, provide little opportunity to stall with abusive discovery. To treat the warranty defense as a culpable delay betrays an ambivalence about the new regime that courts and legislatures can address substantively if they are so inclined. The main cause of delay in many courts is a deficient allocation of resources to adjudicate eviction cases,<sup>303</sup> reflecting a sense that they are less important than the rest of the courts’ dockets.<sup>304</sup> Prompt scheduling, not LPOs, is the obvious remedy.<sup>305</sup>

LPOs likewise fail to serve the instrumental goal of improving urban housing conditions. The achievement of this goal requires courts to accept large numbers of cases, at least initially. Yet some courts openly acknowledge using LPOs for docket control.<sup>306</sup> LPOs also eliminate the incentives for tenants in ill-repaired dwellings to undertake the risk, expense, and effort required to assert the implied warranty by requiring them to create a “pool,” which the landlord has not earned, to finance repairs. This pool also reduces landlords’ incentives to maintain their units prior to litigation.

As with the roughly contemporaneous imposition of costly work requirements that did little to enhance welfare recipients’ employability,<sup>307</sup> the motivation for LPOs appears largely moralistic. Granting welfare rights only to those recipients proving their moral worth through participation in workfare obviated the need to confront stereotypes of the lazy poor;<sup>308</sup> confining tenants’ rights to those tenants proving their sincerity with deposits in court similarly

301. *Santiago v. McElroy*, 319 F. Supp. 284, 295 (E.D. Pa. 1970).

302. *Pernell v. Southall Realty*, 416 U.S. 363, 385 (1974).

303. *See* David A. Super, *Against Flexibility*, 96 CORNELL L. REV. (forthcoming 2011) (discussing shortages of adjudicatory resources).

304. Eldergill, *supra* note 118, at 297.

305. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.5735(2), (4) (West 2000) (establishing strict scheduling timelines); BOSTON HOUS. CT. R. 5 (2009).

306. *See, e.g.*, MICH. CT. R. 4.201(H)(2)(a)(iii) allows the court to preserve a non-paying tenant’s right to a jury trial “if, in the court’s discretion, the court’s schedule permits it.”

307. KATZ, *supra* note 59, at 64–66.

308. Super, *New Moralizers*, *supra* note 50, at 2045–46.

insulated judges and legislators from attacks based on the stereotypes of the irresponsible, manipulative poor. In each case, however, the failure to understand the challenges low-income families confront led to numerous false negatives—industrious welfare recipients unable to navigate workfare bureaucracies and honest tenants unable to comply with LPOs—and prevented the underlying substantive reforms from reaching more than a tiny fraction of their target populations. As the Court noted in *Lindsey v. Normet*, monetary barriers to access to the court system not only bar meritorious arguments by those unable to make payments, but also allow frivolous claims “by others who can afford” the required amounts.<sup>309</sup> Little evidence suggests that tenants are more prone to raise meritless defenses than landlords are to make abusive claims<sup>310</sup> or, indeed, than litigants in other kinds of cases are to abuse the process.

*b. Constitutional Questions About LPOs*

In keeping with the sharp line the Court insisted it was drawing between substance and process,<sup>311</sup> *Lindsey v. Normet* declined to constitutionalize the implied warranty of habitability.<sup>312</sup> LPOs, however, are procedural. At the same time the implied warranty of habitability was sweeping the country, several newly evolving due process doctrines seemed to cast grave doubt on the constitutionality of LPOs. Curiously, however, few reported decisions consider such challenges. This may reflect the paucity of low-income tenants’ litigation resources, as well as the difficulty low-income tenants face staying in disputed units long enough for their cases to reach appellate courts. At a minimum, these doctrines suggest that LPOs were far from inevitable. The prevalence of LPOs therefore seems attributable to courts’ deeper ambivalence about the tenants’ rights revolution.

At least three evolving doctrines might have rendered LPOs unconstitutional. First, just as courts were adopting LPOs, the Court was striking down other similar payment requirements: filing fees for divorces,<sup>313</sup> double appeal bonds for tenants appealing eviction decisions,<sup>314</sup> prohibitions on remarriages for absent parents behind on their child support payments,<sup>315</sup> and paternity actions in which putative fathers were denied blood tests for which they could not pay.<sup>316</sup> When the Court upheld filing fees for bankruptcy<sup>317</sup> and

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309. 405 U.S. 76, 78 (1972).

310. *Amanuensis, Ltd. v. Brown*, 318 N.Y.S.2d 11, 21 (Civ. Ct. 1971).

311. *Bd. of Regents v. Roth*, 408 U.S. 563, 564 (1972) (differentiating between an employee’s substantive and procedural due process rights).

312. 405 U.S. at 64.

313. *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

314. *Lindsey*, 405 U.S. at 74.

315. *Zablocki v. Redhail*, 434 U.S. 374, 382 (1978).

316. *Little v. Streater*, 452 U.S. 1, 17 (1981); *see also Hovey v. Elliott*, 167 U.S. 409, 409 (1887) (rejecting monetary barriers to court access).

for appeals of welfare fair hearing decisions,<sup>318</sup> it distinguished the prior cases as involving a state monopoly on the means to resolve those petitioners' claims. The same logic would seem to distinguish LPOs, because defendants by definition face a judicial monopoly on resolution of the claims brought against them.<sup>319</sup> The Court also seemed to think that some of the access fees it upheld were *de minimus* burdens that would not deter determined litigants;<sup>320</sup> monthly rental payments are not *de minimus*.<sup>321</sup>

A second line of cases during this period invalidated coerced prejudgment deprivations of property,<sup>322</sup> a category that might be expected to include LPOs. In these cases, the Court required a prior judicial determination of probable cause to support the seizure of an opposing claimant's property<sup>323</sup> and, even then, permitted deprivations only for the briefest of periods necessary to arrange and hold a hearing to adjudicate the claims to possession of the disputed property.<sup>324</sup> The Court also required the party seeking a seizure to post a bond against wrongful deprivations of property.<sup>325</sup> Coerced deprivations, such as LPOs, are treated identically with physical seizures.<sup>326</sup> Whether or not the rent is turned over to the landlord, the property is "impounded and, absent a bond, put totally beyond [the defendant's] use during the pendency of the litigation" and hence seized.<sup>327</sup> Beyond this, the court must balance the parties' interests in determining whether any prejudgment seizure is justified.<sup>328</sup> At a

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317. *United States v. Kras*, 409 U.S. 434, 443–44, 450 (1973).

318. *Ortwein v. Schwab*, 410 U.S. 656, 656, 658–61 (1973) (per curiam); see also *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 85 (1988) (upholding 15 percent penalty on unsuccessful appeals of money judgments).

319. In *Little, Lindsey, and Hovey*, litigants successfully challenging access barriers had been brought into court involuntarily as defendants. *Little*, 452 U.S. at 3; *Lindsey*, 405 U.S. at 59–62; *Hovey*, 167 U.S. at 409–10. *Kras* and *Ortwein* rejected challenges from parties seeking to initiate judicial proceedings. *Kras*, 409 U.S. at 437; *Ortwein*, 410 U.S. at 656–57. To be sure, fortuitous circumstances can determine whether a litigant is a plaintiff or a defendant. Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1154–58. Once someone is haled into court as a defendant, however, she or he must depend on the court to vindicate her or his rights in the litigation.

320. See *Ortwein*, 410 U.S. at 660 (describing the fee as providing "some small revenue"); *Kras*, 409 U.S. at 449.

321. They most resemble the child support payments in *Zablocki*, where the appellee was ordered to pay \$109 per month. 434 U.S. at 378.

322. *N. Ga. Finishing, Inc. v. Di-Chem*, 419 U.S. 601, 605–08 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 96–97 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 (1969). This was one of the grounds on which *Amanuensis, Ltd. v. Brown*, 318 N.Y.S.2d 11, 15, 21 (Civ. Ct. 1971), struck down New York's LPO statute.

323. *Di-Chem*, 419 U.S. at 606–07. Indeed, *Connecticut v. Doehr*, 501 U.S. 1, 24 (1991), decided two decades after LPOs came into broad use, holds that prejudgment seizures may be unconstitutional even after a showing of probable cause.

324. *Doehr*, 501 U.S. at 15.

325. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 606–07 (1974).

326. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 20 n.26 (1978).

327. *Di-Chem*, 419 U.S. at 606.

328. *Mitchell*, 416 U.S. at 606–10. Crucial in *Mitchell* were that the proceedings there had

minimum, these cases would seem to compel courts to hold a trial of the possession dispute within about ten days.<sup>329</sup> They also would invalidate automatic requirements for escrow payments without specific judicial findings.<sup>330</sup> And yet these arguments rarely appear in LPO cases.

A third doctrine the Court explored in this period involved the longstanding principle that “[t]he fundamental requisite of due process of law is the opportunity to be heard,”<sup>331</sup> allowing the defendant to “choose for himself whether to appear or default, acquiesce or contest.”<sup>332</sup> By 1976, the Court had crystallized much of its due process analysis into the *Mathews v. Eldridge*<sup>333</sup> balancing test—a test that LPOs would be unlikely to pass. *Mathews* requires the court to weigh three factors: (1) “the private interest that will be affected”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>334</sup> Taking these factors in turn, first, tenants’ property interests, as the Court has acknowledged,<sup>335</sup> are substantial; the common law also recognized a tenant’s leasehold as property long before the advent of the “new property.”<sup>336</sup> Second, the risk of erroneous deprivation when a trial is denied to a tenant failing to make required payments is roughly equal to the fraction of tenants with good defenses.<sup>337</sup> The probable value of doing away with the sanctions for LPOs is the sum of the individual values of each of the “procedural safeguards” that would then become available at a trial. The procedural detriment also is high where failure to make required payments results in loss of the right to a jury.<sup>338</sup> Finally, as for the

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a “low risk of a wrongful determination of possession,” *id.* at 610, the issues were amenable to simple documentary proof, *id.* at 609–10, and the stakes were relatively modest for those subject to seizure, *id.* at 610. None of these factors militates in favor of LPOs.

329. *Id.* at 607.

330. *Di-Chem*, 419 U.S. at 606. Nor may the court issue an LPO upon only conclusory allegations in a complaint or application, or upon more specific information based upon hearsay. *Id.* at 607.

331. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

332. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

333. 424 U.S. 319 (1976).

334. *Id.* at 335. Although *Mathews* was an administrative law case, the Court applied its criteria to private civil litigation. *Little v. Streater*, 452 U.S. 1, 6 (1981). *But see Dusenbery v. United States*, 534 U.S. 161, 167–68 (2002) (narrowing *Mathew*’s applicability long after LPOs had become well established).

335. *Pernell v. Southall Realty*, 416 U.S. 363, 385 (1974); *Greene v. Lindsey*, 456 U.S. 444, 452 (1982); *see also Thorpe v. Hous. Auth.*, 386 U.S. 670 (1967) (recognizing that tenants’ security of tenure was an important goal of federal housing legislation).

336. SCHOSHINSKI, *supra* note 34, § 1.2.

337. *Greene*, 456 U.S. at 453, rejected hypothetical evaluation of defaulted parties’ cases as an insufficient answer to those parties not fitting the stereotypes on which the evaluation—or speculation—is based.

338. *See Pernell*, 416 U.S. at 384–85 (suggesting that a jury trial may be essential to

governmental interests, the state shares the tenant's interest in an accurate adjudication.<sup>339</sup> This is particularly true where those adjudications seek to serve the broader social aims of the implied warranty of habitability. The state has interests in the well-being of both its landlords and its tenants, but those interests seem more apt to support substantive rules than procedures shifting burdens among litigants.<sup>340</sup> To be sure, eliminating LPOs would increase the number of cases state courts would have to decide on the merits, increasing costs. Still, the state legislatures and courts adopting the implied warranty surely were aware that doing so would increase litigation costs and concluded that bearing those costs was in the state's interests.<sup>341</sup> Overall, each of the *Mathews* factors suggests that LPOs should be eliminated because they deprive tenants of due process.

Tenants' lawyers could have invoked each of these three doctrines to invalidate LPOs. Even where lawyers did not raise these doctrines, however, courts could and should have considered them in declining to announce LPO requirements. This was particularly true in the many instances in which the posture of the cases before them did not present LPOs for decision. Because these courts were already reaching beyond questions presented to them, they should have been careful to identify possible constitutional concerns.<sup>342</sup> Although these and other theories<sup>343</sup> would have been contested, they

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obtaining justice for tenants). According to Rose & Scott, *supra* note 85, at 1003, tenants' chances of winning at least partial victories improved from one in seventeen to one in three when the hearing was extended from less than five minutes to eleven minutes or more.

339. Cf. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 28 (1981) (finding a similar state interest in a case involving the termination of parental rights); *Little v. Streater*, 452 U.S. 1, 13–14 (1981) (finding a similar state interest in a case involving paternity).

340. The same sort of state interests in protecting classes of litigants received only the scantiest discussion in *Di-Chem, Fuentes*, and *Sniadach*. Under *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158, 165 (1978), and *Lindsey v. Normet*, 405 U.S. 65, 71 (1972), the state could revert to allowing landlords to repossess property through self-help. And *Lindsey* effectively allows it to reduce the number and complexity of defenses available to tenants. 405 U.S. at 86 (Douglas, J., dissenting in part). But the state's broad freedom to set substantive law does not imply authority to achieve similar ends procedurally. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

341. In due process analysis, the state is generally not considered to have a legitimate interest in avoiding decisions on the merits of claims it has chosen to authorize. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

342. In other words, the courts were already disregarding prudential principles that counsel against considering arguments not raised by the parties when they issued dicta about the procedures in future eviction cases.

343. Separate majorities in *Logan* found due process and equal protection violations in a state law that created rights but denied the opportunity to those whose complaints a state agency did not process rapidly. The right to a trial could have served as the fundamental right to trigger elevated scrutiny under the equal protection model announced in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35–36 (1973). The entrenchment of LPOs in the new regime of landlord-tenant law also coincided with the growth of state constitutional law as an independent source of civil liberties. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

nonetheless suggest that courts had ample means to question the legitimacy of LPOs, had they been so inclined.

*B. Procedural Failures: Lessons from the Welfare Rights Revolution*

The procedural concerns central to the welfare rights revolution received grossly insufficient attention in the tenants' rights revolution. A few jurisdictions recognized that procedural change was necessary to implement the tenants' rights revolution's substantive changes.<sup>344</sup> Unfortunately, these jurisdictions relied on a self-transformation by the least-funded, lowest-status courts in the judiciary, courts with well-developed sets of commitments largely inconsistent with the new regime's needs. This naïve reliance sprang from an overestimation of the importance of the line between courts and administrative agencies. Just as procedural due process and legitimacy concerns have compelled administrative tribunals to take on many of the characteristics of courts, managerial considerations have caused low-level courts to become more like administrative agencies.

Although landlord-tenant courts emphatically adhere to a judicial form, they have much in common with administrative tribunals. Like administrative agencies, they must efficiently handle large numbers of cases with modest resources. Also like administrative tribunals, they occupy an extremely low place in the legal system's social and structural hierarchy, and their decisions often are subject to review by courts with little or no other appellate jurisdiction.<sup>345</sup> Thus, lessons from the welfare rights revolution's administrative tribunals may apply to the courts hearing landlord-tenant cases.

The adversarial system implicitly assumes that parties are rational actors with lawyers and substantial, evenly matched resources to devote to litigation.<sup>346</sup> None of these assumptions are reliably met in eviction cases, where tenants frequently lack representation and possess inferior resources. Even as low-status courts were holding tenants rigidly to the adversarial requirement that they develop the facts of repair problems, elite courts—whose litigants were far better suited to the adversarial system—were increasingly adopting continental ideas giving judges more responsibility for factual development.<sup>347</sup>

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344. See Eldergill, *supra* note 118, at 297–99.

345. Compare, e.g., MICH. COMP. LAWS ANN. § 600.605 (West 2008) (establishing circuit courts as courts of general jurisdiction), and 42 PA. COMP. STAT. ANN. § 931 (West 2004) (same for common pleas courts), with MICH. COMP. LAWS ANN. § 600.5753 (West. 2008) (allowing appeals of evictions to circuit courts), and 68 PA. STAT. § 250.513 (2004) (same for common pleas courts).

346. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 511–15 (1986).

347. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1247 (2005) (arguing that this shift was not entirely new but was rather a revival of older traditions); John H. Langbein,

Welfare recipients' inability to initiate actions prevented *Goldberg v. Kelly*'s administrative hearing system from transforming public welfare law, but those hearing officers did far better at reaching individualized, merits-based adjudications despite inferior resources and far more complex substantive law.<sup>348</sup> Whether by transferring eviction cases to actual administrative tribunals or relying on magistrates, special masters, or other parajudicial officers whose lower cost and specialization allow them to devote the time required to inquire into the condition of the premises, easing the resource constraints and either abandoning or destabilizing courthouse culture could have resulted in much broader application of the implied warranty. This sort of transformation occurred a decade or so later in another area of law with a strong adversarial history—child support. Some states maintain highly judicialized child support systems, but many have responded to federal incentives to transfer most jurisdiction to administrative tribunals.<sup>349</sup> Whether or not the cases stayed in court, states adopted guidelines substantially narrowing adjudicatory discretion.<sup>350</sup>

### C. *The Dynamics of Housing Problems*

The most fundamental challenge for the tenants' rights movement, one even harder to remedy than inconsistent substantive rules or unresponsive courts, springs from its inability to adapt to social and economic change. In particular, the movement was rooted in a conception of bad housing that seemed to make sense in the peculiar conditions of the late 1960s and early 1970s but that has long since become obsolete. Just as the welfare rights movement's response to the problems of arbitrary eligibility workers and malicious states proved wholly ineffectual when the national consensus in favor of subsistence benefit programs collapsed, the tenants' rights movement was ill-equipped to respond to housing problems not involving vermin and falling plaster. This Section shows how three other forms of bad housing became increasingly important after the implied warranty of habitability arose. These kinds of bad housing proved far less susceptible to a regulatory response. The effects of tenants' poverty are likely to be hydraulic: unless tenants' incomes improve, efforts to reduce the incidence of one kind of bad housing are likely to increase the incidence of the others.

#### 1. *Types of Bad Housing*

Housing is one of the most socially and economically complex commodities individuals purchase. Housing arrangements can adversely affect residents in at least four different ways. First, and most obviously, housing can

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*The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 825, 858–66 (1985).

348. Super, *Efficient Rights*, *supra* note 5, at 1086–89.

349. See 42 U.S.C. § 666(c) (2006).

350. See *id.* §§ 666(a)(10), 667(a).



include unhealthy or unsafe conditions. Second, it can be remote from important services its occupants need. Third, it can provide too little room for the number of people occupying it. And fourth, it can consume so much of the residents' income that they face deprivation of other necessities. All four types of housing problems often have severe deleterious consequences.

Unhealthy or unsafe conditions in decaying housing can cause profound harm. Chipping and peeling paint at home is the dominant cause of childhood lead poisoning, which can profoundly and permanently stunt children's intellectual and emotional development.<sup>351</sup> Asthma is the leading cause of urban school absences, and roach, rodent, and mold infestation are leading causes of asthma.<sup>352</sup>

Another adverse effect of housing can be its relative isolation. Living in inexpensive areas increases the difficulty and cost of obtaining employment and child care. One study found that for every dollar low- and moderate-income working families save on housing they spend seventy-seven cents more on transportation: those in relatively inexpensive housing had to pay more than three times as much for transportation.<sup>353</sup> Indeed, some 44 percent of moderate-income working families devote more than half of their incomes to shelter and transportation.<sup>354</sup> Inexpensive areas also often have bad schools,<sup>355</sup> crime, violence, and a dearth of opportunities<sup>356</sup> that can have long-term impacts on children's lives. Access to jobs has become increasingly important as public benefit programs have ceased to aid the long-term unemployed and increased the administrative burdens of retaining assistance.<sup>357</sup>

Overcrowded housing also has a significant negative impact on children's educational attainment<sup>358</sup> and health.<sup>359</sup> Children in crowded housing are more likely to suffer delayed cognitive development, to have trouble reading, and to act out in school.<sup>360</sup> Crowding into smaller spaces is only a partially successful strategy: overcrowded families remain at higher risk for food shortages.<sup>361</sup>

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351. CTRS. FOR DISEASE CONTROL & PREVENTION, THIRD NATIONAL REPORT ON HUMAN EXPOSURE TO ENVIRONMENTAL CHEMICALS 38–42 (2005).

352. Patrick L. Kinney et al., *On the Front Lines: An Environmental Asthma Intervention in New York City*, 92 AM. J. PUB. HEALTH 24, 24–25 (2002).

353. *Id.* at 16–18, 25.

354. *Id.* at 20.

355. *Id.* at 14.

356. See SHARON VANDIVERE ET AL., FUNDERS' NETWORK FOR SMART GROWTH & LIVABLE COMMUNITIES, HOW HOUSING AFFECTS CHILD WELL-BEING (2006).

357. See Super, *Invisible Hand*, *supra* note 55, at 832–36.

358. Dalton Conley, *A Room with a View or a Room of One's Own? Housing and Social Stratification*, 16 SOC. FORUM 263 (2001).

359. BARBARA J. LIPMAN, CTR. FOR HOUS. POL'Y, SOMETHING'S GOTTA GIVE: WORKING FAMILIES AND THE COST OF HOUSING 35 (2005).

360. Gary W. Evans et al., *Chronic Residential Crowding and Children's Well-Being: An Ecological Perspective*, 69 CHILD DEV. 1514, 1514–15 (1998).

361. LIPMAN, *supra* note 359, at 35.

Finally, high housing costs negatively impact residents' ability to afford other essentials. Moderate-income working tenants spending more than half their incomes on housing spend significantly less on food and clothing, and barely a quarter as much on health care, as those whose housing costs consumed no more than 30 percent of their funds.<sup>362</sup> As a result, they are significantly more likely to run out of food before the end of the month and to lack health insurance than similar families in more affordable housing.<sup>363</sup> Children in food-insecure households such as these are 30 percent more likely to be hospitalized and 90 percent more likely to be in fair or poor health compared to their peers; they also are more likely to have mental illnesses and problems in school.<sup>364</sup> High housing costs are a significant cause of the high rate of personal indebtedness among low- and moderate-income families.<sup>365</sup>

Stating which of these four defects is the most harmful is impossible a priori. For example, although numerous physical defects may endanger residents' physical health, overcrowding can endanger their mental health, isolation from healthcare facilities can cause treatable conditions to worsen, and high rents can render tenants unable to afford medication. Thus low-income tenants could quite reasonably choose badly maintained housing over a better but more expensive dwelling. Despite conventional wisdom that public housing is low quality, children in public housing projects are significantly more likely to advance in school than other children in tenant households.<sup>366</sup> Policy-makers should be loath to assume that their value judgments about the best housing for a family are superior to the family's own decisions.

## 2. *The Changing Mix of Bad Housing*

When courts and legislatures began to recognize the implied warranty of habitability, housing codes routinely imposed maximum occupancy requirements and the relationship between housing value and location was well known.<sup>367</sup> Indeed, overcrowding historically has been at least as prominent an image of slum housing as physical defects.<sup>368</sup> And many of the same studies that mobilized concern about bad housing also detailed the broader effects of

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362. *Id.* at 16.

363. *Id.* at 29.

364. CHILDREN'S SENTINEL NUTRITION ASSESSMENT PROGRAM (C-SNAP), THE SAFETY NET IN ACTION 3 (2004).

365. LIPMAN, *supra* note 359, at 25.

366. Janet Currie & Aaron Yelowitz, *Are Public Housing Projects Good for Kids?*, 75 J. PUB. ECON. 99, 101 (2000).

367. *See, e.g.*, WILLIAM ALONSO, LOCATION AND LAND USE: TOWARD A GENERAL THEORY OF LAND RENT 111–13 (1964) (describing housing values as complementary to commuting costs).

368. JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 9, 205–07 (1961). The two forms of bad housing often will be related: overcrowding results in more intensive wear and more physical defects.

poverty.<sup>369</sup>

Conditions at the time, however, distracted policymakers, activists, and many scholars from forms of bad housing other than disrepair. A glut of housing resulting from explosive suburban growth and white flight<sup>370</sup> yielded historically low rents.<sup>371</sup> This, in turn, reduced the extent of overcrowding: a low-income family might move into a cramped unit, but it was less likely to have to double up with another low-income family.<sup>372</sup> Optimism about the simultaneous welfare rights revolution likely also produced complacency about the availability of necessary funding.<sup>373</sup> Finally, rapid suburbanization was turning on its head the traditional means of valuing location, in which property values declined the farther out from the center.<sup>374</sup>

As the unusual conditions of the 1960s and 1970s subsided, however, the unsustainable housing glut disappeared and more typical housing market conditions returned.<sup>375</sup> Once again, new rental housing construction disproportionately targets the top fifth of the rental market,<sup>376</sup> doing little to ease pressures in the lower end of the market. Housing costs are rising faster than median incomes and much faster than incomes in the lower end of the distribution.<sup>377</sup> As a result, although a great many low-income renters still live in decaying homes, other types of bad housing have come more to the fore. In addition, this country's industrial decline and the rise of a bicoastal economy has led to much sharper regional differences in housing markets than were

369. KERNER COMMISSION REPORT, *supra* note 69, at 258–59, 457–82. One of the most influential antipoverty manifestos of the 1960s carefully addressed each of these forms of bad housing. MICHAEL HARRINGTON, *THE OTHER AMERICA* 3–5, 147–49, 153–54, 164–65 (1962).

370. Deborah Kenn, *Paradise Unfound: The American Dream of Housing Justice for All*, 5 B.U. PUB. INT. L.J. 69, 70 (2005).

371. See George Sternlieb & James W. Hughes, *Private Market Provision of Low-Income Housing: Historical Perspective and Future Prospects*, 2 HOUSING POL'Y DEBATE 123, 129–30 (1991) (describing a surplus of housing arising in the 1960s and increasing in the 1970s).

372. If proponents considered crowding at all, it was as a means by which tenants could discipline landlords for raising rents. See Ackerman, *supra* note 86, at 1105.

373. Failure to come to grips with income issues also may reflect the lack of overlap between people working on housing and income issues. The former were addressed in state courts and state legislatures' judiciary committees; the latter appeared in administrative agencies, federal courts, Congress, and state legislatures' appropriations processes. Influential legal services lawyers typically specialized in housing or welfare, not both. Two welfare-oriented activists' study of social movements in the 1960s and early 1970s has no chapter on tenants' unions. PIVEN & CLOWARD, *supra* note 70.

374. Proponents of the warranty saw the undesirable locations of low-income tenants' housing as undermining landlords' market power. Kennedy, *supra* note 145, at 487–92.

375. See Dowell Myers & John Pitkin, *Demographic Forces and Turning Points in the American City, 1950–2040*, 626 ANNALS AM. ACAD. POL. & SOC. SCI. 91, 94 (2009) (describing correction of low rents through large real increases from 1970 to 2000, outstripping income growth).

376. JOINT CTR. FOR HOUS. STUDIES, *THE STATE OF THE NATION'S HOUSING: 2004*, at 23 (2004). "Middle market" building nationally, however, has been proportionate to its share of the rental market. *Id.*

377. *Id.* at 20.

appreciated at the outset of the tenants' rights revolution. It may have seemed slightly odd a quarter-century ago for a high court in a rural state to invoke the problems of urban slums to recognize the implied warranty of habitability.<sup>378</sup> That incongruity pales next to that seen today between housing market dynamics in coastal boomtowns such as Seattle and Boston, on the one hand, and those in collapsing industrial cities in the nation's interior, such as St. Louis and Detroit, on the other.

Data from the U.S. Department of Housing and Urban Development's (HUD) American Housing Survey over the past three decades show a huge decline in the availability of unsubsidized low-rent housing.<sup>379</sup> These same data show a significant increase in overcrowding among low-income people, particularly in the prosperous metropolitan areas on the East and West Coasts where redevelopment has reestablished the desirability of central locations.<sup>380</sup>

As a result, HUD has reported that about half of very-low-income renters not receiving public subsidies have "worst-case" housing problems.<sup>381</sup> Almost 60 percent of tenants with worst-case housing needs are children, elderly, or people with disabilities.<sup>382</sup> Almost four in five very-low-income renters have moderate to severe housing problems—bad conditions, crowding, or housing consuming so much of the family's budget that it tends to crowd out other necessities<sup>383</sup>—with most of the rest apparently receiving government subsidies.<sup>384</sup>

Yet over the decades since the implied warranty became widely recognized, the nature of these worst-case problems has changed. The number of very-low-income tenants reported in severely inadequate conditions has dropped by about two-thirds, but the number with crushing rent burdens skyrocketed.<sup>385</sup> Despite a broad consensus that housing should not consume more than one-third of a family's budget, some 60 percent of households with incomes below 30 percent of their area's median—households HUD classifies

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378. See, e.g., *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984).

379. See, e.g., EDWARD B. LAZERE, CTR. ON BUDGET & POLICY PRIORITIES, IN SHORT SUPPLY: THE GROWING AFFORDABLE HOUSING GAP (1995); PAUL A. LEONARD & EDWARD B. LAZERE, CTR. ON BUDGET & POLICY PRIORITIES, A PLACE TO CALL HOME: THE LOW INCOME HOUSING CRISIS IN 44 MAJOR METROPOLITAN AREAS (1992).

380. See MILLS, *supra* note 81, at 64 (expounding an economic model in which the cost of housing is inversely related to its distance from the center); Doug Timmer, *Urban Revitalization? Bah, Humbug*, CHI. TRIB., Oct. 14, 1998, at 18 (discussing the varying recent development patterns of coastal and interior cities).

381. OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URB. DEV., TRENDS IN WORST CASE NEEDS FOR HOUSING, 1978–1999, at 7 (2003) [hereinafter HUD TRENDS]. The U.S. Housing Act defines "very-low-income" as less than half of median income in the area, which includes the overwhelming majority of people below the poverty line and many of the near-poor. *Id.* at 10.

382. *Id.* at 3.

383. *Id.* at 13.

384. See *id.* at 27.

385. *Id.* at 8.

as extremely low-income—pay over half of their incomes for rent.<sup>386</sup> Thirteen million working families, including four million supported by a full-time worker, pay over half of their incomes for shelter.<sup>387</sup>

The tenants' rights movement did not successfully adapt to these changes in housing needs. The implied warranty is not a tool for preventing high rent burdens or overcrowding. Moreover, the substantive and procedural obstacles discussed above suggest that the warranty of habitability is unlikely to have played any significant role in reducing the incidence of housing defects. That reduction probably is the result of the lack of long-term economic viability of much of the low-cost housing market except in areas with extremely low land values. The current glut resulting from the burst housing bubble is depressing housing values in the short term, although likely not to the degree that white flight did in the post-World War II decades. The lesson of the past thirty years, however, is that this momentarily inexpensive housing will not last: some will be rehabilitated and reabsorbed into the middle-income market, and much of the rest will be abandoned and destroyed. Because much of the newly vacant housing is of less substantial construction than what the new suburbanites left behind in the central cities previously, the process of decay and abandonment may proceed more rapidly.

Policies prioritizing elimination of physically defective housing over other kinds of housing problems have wide-ranging consequences for antipoverty policy. Eliminating physically defective housing may increase rents, thereby pushing more low-income households to live in remote areas, which in turn is likely to aggravate problems connecting them with employment and transportation. Transportation is one of the least subsidized major expenses for low-income families, and even public transportation policy commonly favors affluent suburbanites who must be lured out of their cars.<sup>388</sup> Concentration of low-income people in undesirable urban locations also is likely to reduce employment opportunities,<sup>389</sup> as well as the education available to low-income children and the fiscal stability of the municipalities with concentrated poverty.<sup>390</sup>

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386. DANILO PELLETIERE ET AL., NAT'L LOW-INCOME HOUS. COAL., WHO'S BEARING THE BURDEN? SEVERELY UNAFFORDABLE HOUSING 1 (2005).

387. LIPMAN, *supra* note 359, at 10. This study defined a family as working if at least half of its income was earned and its annual income was less than 120 percent of the local area median income. *Id.* at 15.

388. N.Y. Urban League, Inc. v. New York, 71 F.3d 1031 (2d Cir. 1999) (finding such favoritism a rational exercise of transit system managers' business judgment); Comm. for a Better N. Phila. v. Se. Pa. Transp. Auth., Civ. A. No. 88-1275, 1990 WL 121177 (E.D. Pa. Aug. 14, 1990) (recognizing such disparities but not finding them actionable); Sean B. Seymore, Comment, *Set the Captives Free!: Transit Inequity in Urban Centers, and the Laws and Policies Which Aggravate the Disparity*, 16 GEO. MASON U. C.R. L.J. 57 (2005).

389. WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 149-82 (1996).

390. James M. Buchanan, *Principles of Urban Fiscal Strategy*, 11 PUBLIC CHOICE 1, 13-

In addition, the tenants' rights movement has neglected the issue of overcrowding. Increasing the numbers of low-income families doubling up in housing can prevent public benefit programs' eligibility tests from measuring need properly.<sup>391</sup> Involuntary overcrowding also can twist power relationships within families, increasing the risk of abuse; such intra-familial abuse is a problem that antipoverty law finds particularly difficult to address.<sup>392</sup>

Finally, the tenants' rights movement has not adapted to what appears to be the current major housing problem: high rent burdens. Allowing housing costs to crowd out other necessities exacerbates the inequities between the large majority of low-income people receiving no major housing subsidies and the minority that do.<sup>393</sup> It also increases the chances that families will feel compelled to trade some of the public benefits they receive to meet other needs for housing, thus undermining those programs' integrity and support.

Even if the implied warranty of habitability and housing code enforcement were effective against defective housing, the effects of low-income tenants' poverty likely would have proven hydraulic, producing a different kind of bad housing. Indeed, this is true even if one posits that rent control prevented sharp cost increases as landlords were compelled to make repairs—a highly debatable assumption—and that housing code enforcement further prevented overcrowding. Nevertheless, in economically healthy metropolitan areas this hydraulic effect might well have shrunken the supply of low-cost housing units to the point that low-income renters faced stiff competition even for units isolated from jobs and transit lines, with many at risk for homelessness.

### 3. *Consequences of Selective Enforcement of the Warranty*

As shown above, substantive and procedural limitations on the new landlord-tenant regime tend to limit the warranty of habitability's applicability to more affluent tenants that deliberately initiate disputes with their landlords rather than poorer ones who might raise the warranty defensively. This has several perverse impacts, some apparent and others hidden. Most obviously, this frustrates the redistributive and humanitarian purposes of the reforms and leaves most serious housing problems unaddressed. Thus, the net effect of the new regime, if selectively enforced in this manner, may be negative rather than neutral. A major source of new, low-cost, unsubsidized housing has long been units that "filter-down" from higher-cost housing markets after years of

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16 (1971).

391. See *Robinson v. Block*, 869 F.2d 202 (3d Cir. 1989) (finding that two siblings residing in the same house may not "live together" for purposes of rules requiring co-resident adult siblings to apply for food stamps together).

392. ROB GEEN ET AL., *URBAN INST., WELFARE REFORM'S EFFECT ON CHILD WELFARE CASELOADS* 9–10, 34–37 (2001); ELIZABETH BARTHOLET, *NOBODY'S CHILDREN* 118–21 (1999).

393. See David A. Super, *From the Greenhouse to the Poorhouse: Carbon-Emissions Control and the Rules of Legislative Joinder*, 158 U. PA. L. REV. 1093, 1170–71 (2010) (quantifying these inequities) [hereinafter Super, *Greenhouse*].

disrepair.<sup>394</sup> If middle-income tenants compel their landlords to keep their dwellings in good repair, the warranty may stymie the slow decay that allows units to migrate to the low-cost market.<sup>395</sup>

This suggests that, at least in healthy cities, low-income tenants' quality of life may not be improving even if the incidence of housing code violations has declined. Some continue to under-consume housing, but in different ways: renting units that are too small or in isolated or dangerous areas rather than ones that are decrepit. Others may be consuming more housing but paying for it with painful sacrifices in other areas of consumption, such as food, clothing, and utility service. The lack of "filter-down" housing is certainly not the only factor shrinking the supply of low-cost housing. Gentrification, continued lower-profile efforts at urban renewal, and recent reductions in federal housing subsidies<sup>396</sup> all have reduced supply. At the same time, the stagnation of the minimum wage, cuts in income support programs, and other factors have increased poverty and hence demand. This suggests that the low-cost housing market in many areas is precarious enough to raise fears that seeking to force improvements in housing quality or tenants' well-being could risk potentially serious unintended consequences.

The story likely is somewhat different in the ailing cities in the nation's heartland. There, declining populations have placed less pressure on housing demand. Abandonment, however, has caused a continuing exodus of units from the low-cost housing market. Enforcing the warranty of habitability on behalf of middle-income tenants deliberately raising repair claims cannot halt the deterioration of low-cost housing to the point that abandonment becomes economically desirable. Here, stronger enforcement of the warranty of habitability on behalf of those in the worst housing may still have significant promise. But, as shown above, that remains an elusive goal.

#### *D. The Failure of the Implied Warranty of Habitability*

Although appealing in the abstract, the new regime of landlord-tenant law inaugurated four decades ago has failed at achieving any of its major goals. Some individual tenants no doubt have benefited. Some conscientious landlords may have yielded to the moral suasion of the implied warranty. Some inefficient landlords may have been induced to sell to companies better capable of performing repairs. Some community organizing efforts built around the

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394. Ackerman, *supra* note 86, at 1113–17.

395. On the other hand, preventing housing decay in transitional communities may have large positive externalities for neighbors, *see* Wilson & Kelling, *supra* note 81 (finding that even small defects in buildings can have a crucial negative signaling effect), and can help stabilize those communities by increasing social and economic diversity.

396. *See, e.g.*, DOUGLAS RICE & BARBARA SARD, CTR. ON BUDGET & POLICY PRIORITIES, DECADE OF NEGLECT HAS WEAKENED FEDERAL LOW-INCOME HOUSING PROGRAMS (2009), available at <http://www.cbpp.org/2-24-09hous.pdf>.

implied warranty may have produced positive results. And in some segments of the middle-income housing market, these reforms may have achieved positive results. For the most part, however, the supposed tenants' rights revolution is the legal system's exercise in self-delusion. The mistaken belief that the implied warranty of habitability somehow "solved" low-income people's housing problems may have induced an unfortunate sense of complacency.

As different as its doctrinal and institutional setting, the tenants' rights revolution in the end succumbed to the same six defects that doomed the contemporaneous welfare rights revolution. First, its multiplicity of goals—modernization, housing restoration, redistribution, and humanitarianism—prevented a definitive assessment. It did introduce more contract principles into landlord-tenant law, although the result is still very much a hybrid without particularly compelling reasons for its idiosyncrasies. Without a better-defined goal than "modernization," this seems a rather modest achievement. Its substantive and procedural limitations appear to have confined its direct effects to a tiny handful of cases. These likely were too few to have much impact on the overall urban environment or the broader distribution of wealth. The extreme infrequency of the implied warranty's application has prevented an empirical resolution to the debate about whether it would improve the lot of low-income tenants or burden them with an inefficient housing market. It did allow some sophisticated, or represented, tenants the choice of whether to demand repairs: instead of an absolute right for all tenants, the implied warranty should be analyzed as an option available to the small minority of tenants winning the legal services "lottery."<sup>397</sup> These individual tenants may be best equipped to assess whether their particular landlords will respond and whether the value to them of repairs exceeds not only the risks of litigating but also any increase in rent as their dwelling becomes more desirable. The warranty may therefore have accomplished some redistribution on a micro scale. Still, those tenants most in need of redistribution—or simply humanitarian aid—typically have been among the least able to assert the warranty.

Second, many of these shortcomings result from policy-makers' inability to resist moralizing at low-income people. Those most likely to find the new defenses worth raising, and who typically live in the worst housing, are very-low-income tenants falling behind on their rent involuntarily. Yet the new regime could not bring itself to enlist these willing soldiers because it deemed them unworthy of the warranty's assistance. The presence of a few redistributionalists in their midst also may have alarmed the new regime's other supporters and caused them to bend over backwards to demonstrate that they were not seeking to give poor tenants something for nothing. The stakes for

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397. Whether legal services contribute to social welfare by representing these few tenants has spawned vigorous debate. *E.g.*, Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 *YALE L. & POL'Y REV.* 385 (1995).



landlords—and their superior wealth, connections with social elites, and ability to organize collective action—made a backlash inevitable. History suggests attacks on low-income people often take the form of moralizing.<sup>398</sup> Nonetheless, the regime's champions were unprepared for that backlash and failed to equip judges and legislators to resist it.

Third, because the new regime never developed any coherent theory of why many tenants had low incomes, it was unprepared for the procedural challenges it was creating. The same lack of basic skills that prevents many low-income people from obtaining better jobs that would allow them to afford better housing also tends to make them ineffective advocates in court.<sup>399</sup> Represented tenants did far better in court, but with no one prepared to fund free representation for more than a token number of low-income tenants, or to wholeheartedly embrace an active role for the judge that would mitigate tenants' disadvantages from being unrepresented, the few tenants winning the legal aid lottery have had little impact on the overall picture. More broadly, the new regime replaced a system in which landlords dominate by a preponderance of financial capital alone with one in which they dominate by a combination of preponderances in financial and human capital.

Fourth, the tenants' rights revolution's crude vision of economics required it to assume the conditions required for its success. Some of these—particularly a glut of rental housing—may fortuitously have existed at the revolution's inception. Others were lacking, including market conditions that prevented landlords from exiting the low-rent housing market and sufficient incentives for tenants to deliberately withhold rent.

Fifth, the tenants' rights revolution relied on a simplistic understanding of the lower courts that hear eviction cases. Hard-pressed courts can and do ration adjudicatory resources and otherwise behave in many of the same ways as administrative agencies. Judges and clerks have well-established views of their mission. Many have longstanding relationships with repeat-player landlords and landlords' lawyers. Policy-makers underestimated how difficult it would be to implement the warranty under these conditions.

Finally, and most importantly, the revolution's multiplicity of goals prevented any creative adaptation to the dramatic changes in both housing markets and antipoverty policy since the revolution's onset. Resurrecting the new regime of landlord-tenant law will require a willingness to confront these and other entrenched problems and the devotion of political capital to surmount them. Based on the record to date, we have little grounds for optimism.

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398. Super, *New Moralizers*, *supra* note 50, at 2053–55, 2073–74.

399. See Martha R. Burt, *The "Hard-to-Serve": Definitions and Implications*, in WELFARE REFORM: THE NEXT ACT 163–70 (Alan Weil & Kenneth Finegold eds., 2002) (finding that many of the conditions preventing low-income people from finding and holding jobs, such as illiteracy and psychological ailments, also prevent them from interacting effectively with the welfare system).

## CONCLUSION

The breadth and severity of legal, economic, and practical problems surely doomed the implied warranty of habitability. Some of its goals may have been unrealistic from the start: the economics of the housing market may well have prevented significant redistribution of wealth from landlords to tenants and made efforts to stamp out one kind of housing problem likely to yield more housing problems of another type. A more thoughtful approach, however, might have allowed more effective humanitarian interventions and might have produced a more coherent modernization of landlord-tenant law.

The narrow lesson of the failure of the implied warranty of habitability is that direct subsidies have far more potential than regulatory action to improve low-income tenants' housing conditions. Researchers have come to see improving incomes, rather than housing-specific strategies, as pivotal to preventing homelessness.<sup>400</sup> HUD reports the number of tenants with worst-case housing needs moderates only when incomes rise.<sup>401</sup> In a sense, the implied warranty was a forerunner of the movement to shift responsibility for aiding low-income people to elements of the private sector, albeit here unwilling ones.

Housing assistance programs increasingly attempt to address all four kinds of detrimental housing conditions.<sup>402</sup> Units long have needed to pass inspections to receive subsidies under federal voucher programs. Since the late 1960s, federal subsidy programs have sought to limit tenants' shelter costs to 30 percent of their incomes.<sup>403</sup> A family's size determines the size of the unit for which it is eligible. And Congress and HUD have steadily made housing vouchers more portable, allowing low-income recipients to move from areas of concentrated poverty.<sup>404</sup> Unfortunately, the supply of vouchers has never approached the number of low-income renters in need.<sup>405</sup> Indeed, Congress consistently has failed to increase the supply of housing vouchers sufficiently to offset the shrinkage in unsubsidized low-cost housing. As a result, only one in five eligible families receives a subsidy.<sup>406</sup>

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400. Martha R. Burt, *Causes of the Growth of Homelessness During the 1980s*, 2 HOUS. POL'Y DEBATE 903, 904 (1991).

401. HUD TRENDS, *supra* note 381, at 1.

402. Although welfare economics might suggest that cash transfers would be more beneficial than in-kind assistance, Komesar, *supra* note 150, at 1175–76, the U.S. electorate has developed a strong antipathy for cash aid programs. Super, *Quiet Revolution*, *supra* note 128, at 1291–92.

403. U.S. Housing Act of 1937, 42 U.S.C. § 1437f(o)(2)(A)(i) (2006).

404. ABT ASSOCS. INC., EFFECTS OF HOUSING VOUCHERS ON WELFARE FAMILIES vi (2006).

405. See Super, *Political Economy*, *supra* note 133, at 695–701 (explaining the difficulty the electorate has comprehending programs that do not serve all eligible people making application).

406. See Super, *Greenhouse*, *supra* note 393, at 1190–96 (proposing consolidation of existing housing assistance efforts into a single program available to all low-income people).

The broader lesson is that a far more sophisticated approach is required to regulate effectively on behalf of low-income people. Even Milton Friedman recognized that a necessary *quid pro quo* for avoiding the inefficiency of regulatory redistributions was an adequate system of direct supports for low-income people.<sup>407</sup> With contemporary conservatives increasingly unwilling to support tax-and-transfer policies, low-income people's advocates cannot afford to abandon regulatory responses to humanitarian problems altogether.

Regulatory interventions, however, must be much more carefully designed than they have been in the past. First, they should either seek to correct some demonstrable market failure or should serve an important humanitarian purpose. Vague concepts like modernization are unlikely to mobilize much support but can sow confusion. Instrumental arguments also muddy the waters and make the enterprise vulnerable to counter-proposals to accomplish the same ends in another way. Above all, even a hint of broad redistributive goals will taint the effort and cause its champions to make disastrous concessions to distance themselves from that taint.

Second, humanitarian regulation should not be attempted unless its advocates are prepared to respond to efforts to stigmatize beneficiaries. Thus, for example, prohibiting utility terminations during winter months will benefit spendthrifts as well as infirm seniors; if the plan's proponents are unwilling to make the case that cutting off anyone's heat in the dead of winter is inhumane, debates over what are and are not worthy causes for arrears will quickly consume the plan.

Third, the system's operation should be as automatic as possible. Relying on low-income people to negotiate even fairly simple procedures, or on bureaucracies to empathize with them and adjudicate in their favor, all but guarantees a high failure rate. Moral tests are among the most problematic to adjudicate; avoiding them is likely to improve the regulatory regime's operation considerably.

Fourth, burdens should be spread broadly through society to avoid creating an obvious core of opponents. Barring winter shut-offs, for example, increases utility companies' costs, which they presumably pass on to consumers. The impact on each individual consumer, however, is too small to spur political mobilization.<sup>408</sup>

Fifth, where possible, regulatory interventions should seek to motivate actions with benefits that clearly exceed their costs. Thus, for example, the cost for a landlord to cover exposed wiring is a pittance, yet the potential harm to the tenant's children is extreme. Imposing severe penalties for exposed wiring is unlikely to drive landlords from the market. Such a regulatory regime would

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407. FRIEDMAN, *supra* note 12, at 177–82.

408. The vehemence of utility companies' opposition to moratoria on terminations is likely to depend on what other issues are pending on the state's energy regulatory agenda.

merely reproduce the result the parties likely would have negotiated themselves with full information and bargaining capacity.

Finally, where regulation demands costly changes, advocates should carefully explore possible collateral consequences. They then should monitor implementation and be prepared to adapt if new or unnoticed conditions undermine their regulatory scheme similar to the way housing market changes undermined the tenants' rights revolution. For example, the cost of abating lead paint is daunting, but the lifelong harm to children exposed to lead makes it necessary. The cost is great enough to affect the supply of rental housing. Advocates therefore should consider whether subsidizing those costs or taking other actions to preserve housing supply are cost-effective, and they should monitor changes in that supply.

Even following all of these principles will provide no guarantees of success and will not supplant fiscal policy as the primary means of protecting low-income people from humanitarian crises. It will, however, mean that all of the hope and effort invested in the tenants' rights revolution will not have been in vain.

