

**THE RISE AND FALL OF THE
IMPLIED WARRANTY OF HABITABILITY**

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Growing concern about poverty in the late 1960s produced two sweeping legal revolutions. One gave welfare recipients 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. Little-noticed by legal scholars, the tenants' rights revolution also has failed, and for broadly similar reasons.

Withholding rent deliberately to challenge landlords' failure to repair is unduly risky for most tenants in ill-maintained dwellings: either moving to better housing is a better option or the risk of retaliation 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 little-noticed doctrines deemed 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 effectively limiting the warranty to deliberate rent withholding have weak justifications. And contemporaneous procedural innovation in other areas of law offered alternatives to the unresponsive courts.

More daunting was the transformation of the housing market. Fewer low-income tenants live in decrepit dwellings, but many suffer housing problems whose consequences may be even more severe: overcrowding, locations remote from jobs and good schools, and rents that crowd other necessities from their budgets. Lacking a clear, unified purpose, the tenants' rights revolution cannot begin to adapt to these changes.

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INTRODUCTION

The anti-poverty 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 while 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 implying a warranty of habitability in residential leases, which warranty was made mutual with the tenant's covenant to pay rent. The foundational cases of these two revolutions, *Goldberg v. Kelly*¹ and *Javins v. First National Realty Corp.*,² are the only two poverty law cases most law students read.³

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,⁴ sought to strip welfare recipients of legal entitlements,⁵ slashed program funding,⁶ and shifted policymaking authority to states,⁷ whose will⁸ and capacity⁹ to assist low-income people is open to question. More broadly, the switch from large surpluses early in the last decade to deficits as far as the eye can see,¹⁰ and the impending retirement of the baby boomers, have created fiscal pressures likely to lead to strong pressures for further cutbacks in these programs.¹¹ The prospects for substantial improvements

¹397 U.S. 254 (1970).

²428 F.2d 1071 (D.C. Cir. 1969).

³Some contracts casebooks include *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 556 (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.

⁴Personal 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 CAL. L. REV. 1051, 1085-97 (2005) (describing the accomplishments and limits of legal entitlements in public benefits law)[hereinafter Super, *Efficient Rights*].

⁶DAVID A. SUPER, ET AL., *CTR. ON BUDGET & POL'Y 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).

⁷See Jon Michaels, *Deforming Welfare*, 34 SETON HALL L. REV. 573, 598-99 (2004) (identifying structural and substantive difficulties in transferring welfare programs to states).

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

⁹See 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).

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

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

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 that lack the resources and infrastructure to relieve poverty through tax and transfer policy 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.¹² Anti-regulatory economists have largely persuaded policymakers in this country that direct governmental transfers are a far-superior means of poverty reduction,¹³ but both legislatures and courts are likely to reopen that question if direct transfers cease to be available alternatives. If they do, the tenants' rights revolution, the boldest regulatory assault on poverty since the New Deal, will be a major focus of attention.

Re-examining the tenants' rights revolution is particularly timely because of the housing glut resulting from the collapse of the housing bubble and high energy costs that are driving many more affluent people to abandon suburbs and return to central cities. Although not widely recognized at the time, a similar housing glut¹⁴ helped launch the tenants' rights revolution. That glut forced a historically anomalous moderation in rents that caused many to believe tighter regulation was possible. The glut 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's) deep subsidies of building costs, and the new Interstate Highway System's subsidy of commuting costs from those suburbs. Many of the new suburbanites were first-time home-buyers, vacating urban rentals. For those that owned homes in the cities, the subsidies were sufficient for many to be willing to absorb large losses on their former homes. This created a huge glut of housing, much of it initially quite good, that the urban rental market had to assimilate. For a variety of reasons, however, much of that housing was lost, and with it the prospects for a relatively inexpensive improvement in millions of low-income tenants' quality of life. Losing the housing being vacated today due to mortgage foreclosures and reurbanization would repeat that tragedy.

The welfare rights revolution gave recipients of subsistence benefit programs the right to advance hearings to challenge reductions or terminations in those

¹²Economists commonly blame policies restricting free trade for poverty in developing countries. See, e.g., JEFFREY D. SACHS, *ENDING 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.

¹³FRIEDMAN, at 177-82.

¹⁴Edward H. Rabin, *The Revolution in Landlord-Tenant Law*, 62 *CORNELL L. REV.* 517, 562-67 (1984).

benefits¹⁵ and prohibited eligibility conditions not authorized by federal law,¹⁶ in particular rules counting money not available to families as income.¹⁷

The essence of the tenants' rights revolution was similarly straightforward. Legislatures and courts implied warranties of habitability and repair into residential leases¹⁸ and made them mutual with the tenant's covenant to pay rent.¹⁹ Tenants could raise the landlord's failure to comply with these obligations as a defense in an eviction proceeding for nonpayment of rent.²⁰ This was seen as updating landlord-tenant law from the archaic vision of estates in land to the modern world of contracts, as giving landlords incentives to repair blighted housing, and as giving low-income tenants better lives. An early flurry of scholarship debated the economics of housing code enforcement and, by extension, its private-law analogue, the implied warranty of habitability. In the following years, however, almost every state's legislature or courts adopted the new regime. Courts and legal scholars hailed these changes as breakthroughs in the battle against slum landlords, as powerful new remedies with which the urban poor could compel their landlords to adequately maintain their buildings.²¹ 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.²² Some saw the changes as means of achieving various instrumental ends²³ such as expanding the workforce,²⁴ promoting children's education,²⁵ or preserving social peace.²⁶ Some saw them as strengthening programs more broadly as a means of redistributing wealth,²⁷ reversing a deeply entrenched American resistance to redistribution.²⁸ Finally, some saw the new legal regime

¹⁵*Goldberg*, 397 U.S. at 272-74.

¹⁶*Townsend v. Swank*, 404 U.S. 282 (1971).

¹⁷*Lewis v. Martin*, 397 U.S. 552 (1970).

¹⁸*See, e.g., Javins*; *Lemle v. Breeden*, 462 P.2d 470 (Haw. 1969); MICH. COMP. LAWS ANN. § 554.139 (West 2008); UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.105, 7B U.L.A. 620 (2000) [hereinafter URLTA].

¹⁹*Berzito v. Gambino*, 308 A.2d 17 (N.J. 1973); *Fritz v. Warthen*, 213 N.W.2d 339 (Minn. 1973).

²⁰*See, e.g.,* MICH. COMP. LAWS ANN. § 600.5720(1)(f) (West 2008).

²¹*See, e.g.,* Carl Schier, *Draftsman: Formulation of Policy*, 2 PROSPECTUS 227 (1968); Mary Ann Beattie, *Persuader: Mobilization of Support*, 2 PROSPECTUS 239 (1968).

²²Charles Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964).

²³David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 597 (2008)[hereinafter Super, *Laboratories*].

²⁴DAVID T. ELLWOOD, POOR SUPPORT 19-25 (1988).

²⁵HERBERT J. GANS, THE WAR AGAINST THE POOR 115 (1995).

²⁶WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE 319-21 (5th ed. 1994).

²⁷Super, *Laboratories*, at 596.

²⁸THE FEDERALIST NO. 10 (James Madison) (arguing that the structure of government must ensure the defeat of factions seeking redistribution).

in narrower, humanitarian terms as a means of relieving the most severe hardships.²⁹ Although subscribers to these widely divergent viewpoints could all support new procedural rights for welfare claimants, their coalition quickly fractured when new challenges arose. In the end, the revolution performed badly in most of these dimensions.

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 Court boldly declared that “[p]overty and immorality are not synonymous.”³⁰ 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.”³¹ It temporarily abandoned its interpretive methodology to permit local governments to deny aid to families refusing intrusive investigations of their morality.³² And beginning just weeks after *Goldberg v. Kelly*, it upheld rules reducing or denying benefits based on dubious individual³³ or collective³⁴ moral judgments. For low-income people, the material sustenance these rules withheld was far more important than the procedural rights it granted. If anything, the veneer of procedural regularity added to the sting of these moralizing rules, inhibiting deeper change by giving the impression that only the confirmed immoral still faced hardship.³⁵

Third, the new regime lacked a coherent, plausible theory of the nature and causes of poverty. It seemed to regard poverty as the result of an aberration, 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 legal rules that even the Supreme Court once characterized as “an aggravated assault on the English language, resistant to attempts to understand it.”³⁶ When it turned out that few recipients could, and that Congress was unwilling to fund legal services lawyers to handle more than a tiny fraction

²⁹*Goldberg*, 397 U.S. at 277; Super, *Laboratories*, at 594-95.

³⁰*Edwards v. California*, 314 U.S. 160, 167 (1941).

³¹*King v. Smith*, 392 U.S. 309, 327 (1968).

³²*Wyman v. James*, 400 U.S. 309 (1971).

³³*Dandridge v. Williams*, 397 U.S. 471 (1970) (declining to determine whether state had adequately accounted for the needs of children in large family).

³⁴*Jefferson v. Hackney*, 406 U.S. 535 (1972)(allowing states to provide lower grants to families with children, a group composed primarily of African-Americans and Latinos, than to the predominately white elderly and persons with disabilities).

³⁵David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2066-72 (2004)[hereinafter Super, *New Moralizers*].

³⁶*Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1985).

of the cases,³⁷ the new procedural rights became an occasional annoyance³⁸ rather than a meaningful force in program operations.³⁹

Fourth, and related, the welfare rights revolution had crude vision of economics and, in particular, of the conditions and incentives of low-income people. It ignored that transaction costs' impact on people with very limited means could approximate that of denials of benefits.⁴⁰ More broadly, it ignored the all-encompassing sense of vulnerability that dominates low-income people's lives, creating fear that assertiveness must be paid for most dearly. This simplistic economic model also ignored complexities of the incentives and opportunities facing those whom it sought to influence: welfare eligibility workers.

Fifth, the welfare rights revolution had an equally 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 rules⁴¹ and that no contrary pressures would arise.⁴²

Finally, the welfare rights revolution assumed that the conditions afflicting low-income people were static and would succumb to static reforms. It thus was unprepared 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. Thus, the poverty rate generally declined through the 1970s as Congress strengthened anti-poverty programs⁴³ but then rose dramatically as President Reagan pushed deep cuts in those programs through Congress⁴⁴ and recipients could find only low-paying, often contingent service-sector jobs.⁴⁵ It also failed to anticipate changing models of program administration, particularly privatization.⁴⁶ The lack of consensus about the reforms' goals, as well as the difficulty of the economic challenges, prevented formulation even of a coherent proposal to adapt to dramatic changes in housing markets, labor markets, and anti-poverty 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 pre-

³⁷Super, *Efficient Rights*, *supra* note 5, at 1093-95.

³⁸*Id.* at 1087-88.

³⁹*Id.* at 1097-1117.

⁴⁰David 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*].

⁴¹Super, *Efficient Rights*, at 1086-89.

⁴²*Id.* at 1097-1117.

⁴³Super, *Laboratories*, *supra* note 23, at 584-86.

⁴⁴*Id.* at 587-88.

⁴⁵MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP* 348-53 (2001).

⁴⁶David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 *CAL. L. REV.* 393, 433-44 (2008).

vented the welfare rights revolution from adapting. Some saw the reforms in solely legalistic terms: replacing property law's exceptionalism with the efficient universality of contract. Others had instrumental aims, seeing tenants 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.

Part I then distills the conditions that must be met for those reforms to achieve each of these purposes. It finds that tenants' ability and willingness to assert the implied warranty of habitability are crucial. Two groups of tenants face significantly different incentive structures, with financially stable tenants 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 after falling behind for other reasons. Also vital are the courts' allocation of sufficient adjudicatory resources to these cases and 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 reforms' effectiveness. 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.

Part III criticizes the implementation of the new regime, both in its own terms and from the perspective of broader changes in the low-income housing market. It finds dubious policy and doctrinal support for the substantive rules that have closed the courts to tenants in decrepit housing whose confrontations with their landlords resulted from poverty rather than militancy. It also suggests 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. This suggests far stronger commonalities between fiscal and regulatory anti-poverty law than is commonly understood.

The article concludes with some observations about how to combat all types of housing problems and some broader suggestions about how regulatory interventions can be more effective on behalf of low-income people.

I. THE PROMISE OF THE TENANTS' RIGHTS REVOLUTION

The tenants' rights revolution of the late 1960s and the 1970s was unusual in

that it proceeded simultaneously through case law and legislation.⁴⁷ 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)⁴⁸ and sometimes by amending existing summary eviction statutes. 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.

With such broad and diverse adoption, it should not be surprising that the implied warranty of habitability had more than one driving purpose. Section A identifies four leading purposes of the tenants' rights revolution. All but one of these purposes was instrumental. Disagreement about the relative importance, or even basic legitimacy, of these purposes proved important in limiting their effectiveness, as Part II *infra* 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

Four major purposes animated 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.⁴⁹ Subsection 3 briefly sketches the redistributive motives of some reformers. Finally, subsection 4 considers the humanitarian vision of these reforms as improving the lives of low-income tenants. 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 one of these visions may be inconsistent with the others.

1. Modernization: Triumph of Contract

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.⁵⁰

⁴⁷See 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).

⁴⁸9 U.L.A. 107 (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).

⁴⁹Other 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.

⁵⁰*Javins*, 428 F.2d at 1075; 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

Some courts undoubtedly felt that the principles embodied in contract law were inherently fairer than the medieval property concepts that previously governed leases in particular and landlord-tenant relations in general. And some 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.⁵¹

This vision had the virtue of simplicity. The lease, as amended by the implied warranty, became a contract between landlord and tenant. As with parties to other contracts, their relationship was to be symmetrical before the law. The courts had long provided landlords with services essential to their businesses: eviction procedures, operating far more expeditiously than other civil actions, allowing landlords quickly and inexpensively to could 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, the landlords themselves must comply with the law 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 already 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.⁵² The landlord's new implied covenant of repair was made mutual with the tenant's covenant to pay rent.⁵³ 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.⁵⁴

(1977).

⁵¹*Javins*, 428 F.2d at 1082.

⁵²*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).

⁵³*Rome v. Walker*, 196 N.W.2d 850, 853 (Mich. App. 1972).

⁵⁴The 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 1997); MO. ANN. STAT. § 441.570 (West 2000); N.J. STAT. ANN. § 2A:42-92(b) (West 2000); OHIO REV. CODE ANN. § 5321.07B(1) (Anderson 2004); *Drew v. Pullen*, 412 A.2d 1331, 1334 (N.J. 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. *Lakewood v. Novak*, 746 N.E.2d 719 (Ohio Mun. 2000).

Because the contractarian view of the tenants' rights revolution saw those changes as an end 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 would mean that one idiosyncratic legal regime, based on notions of estates in land, would give way to another, based on current public policy preferences. 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.⁵⁵ Given the instrumental nature of the other three major goals of the tenants' rights revolution, keeping landlord-tenant law 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 legislature or court. Indeed, some advocates' embrace of contract principles was so purely tactical that they failed to notice when contract law reasoning offered a rebuttal to efforts to restrict the scope of the reforms.

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 means of compelling landlords to maintain their buildings up to some minimum standards of repair. Deteriorating housing conditions have serious negative effects on surrounding communities: they depress property values and hence property tax revenues, they may contribute to the spread of insect and rodent infestation, they give the city a negative image with visitors, and they are correlated with crime. States therefore have reasons to want to ameliorate bad housing conditions that are 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 enforcement⁵⁶ that had failed "to halt or reverse urban blight."⁵⁷

3. Redistribution

Although not surprisingly underrepresented in judicial opinions, another significant force driving the tenants' rights revolution was a desire to redistribute power,⁵⁸ wealth,⁵⁹ and income⁶⁰ into the hands of low-income people. They saw

⁵⁵LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 464-68 (1973).

⁵⁶Brett R. Dick & John S. Pfarr, Jr., *Detroit Housing Code Enforcement and Community Renewal: A Study in Futility*, 3 *PROSPECTUS* 61, 90 (1969).

⁵⁷Judah Gribets & Frank Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 *COLUM. L. REV.* 1254 (1966); see Samuel Jan Brakel, *URLTA in Operation: The Oregon Experience*, 1980 *AM. B. FOUND. RES. J.* 565, 578.

⁵⁸SAR A. LEVITAN, *THE GREAT SOCIETY'S POOR LAW* 177-79 (1979)(describing the goals of the Office of Economic Opportunity's Legal Services Program).

⁵⁹Jonathan 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)(offering Marxist

the landlord's property rights, and tenants' lack of such rights, as defining broader status relationships.⁶¹ Redistributivists believed that landlords' rents were super-adequate and sought public intervention to transfer this value back to tenants.⁶² They sought to increase the bargaining power of tenants, especially poor tenants, relative to their landlords.⁶³ Where tenants' only legal remedy against their landlords had 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 upon 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 control⁶⁴ 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.⁶⁵ They also saw legalization and institutionalization as sapping the tenants' rights movement's vital strength and paving the way for a backlash.⁶⁶

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, they 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 interventions causes some dead-weight loss to the economy. Humanitarians have, however, faced the administrative challenge of how to limit their interventions to those most in need and the political challenge of convincing policymakers and the public that they are not redistributionists.

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

critique of housing markets); Myron Moskowitz, *Moving Toward Tenant Control of Housing*, in TENANTS AND THE URBAN HOUSING CRISIS 203 (Stephen Burghardt, ed. 1972).

⁶⁰Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1096, 1195 (1971).

⁶¹Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 571-75 (1992).

⁶²Rose & Scott, at 977.

⁶³Beattie, *supra* note 21, at 227-28.

⁶⁴*Scofield v. Berman & Sons*, 469 N.E.2d 805, 812 (Mass. 1984); Rose & Scott, at 971 n.18.

⁶⁵FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS 20-21 (1977).

⁶⁶*Id.* at xxii.

it. The HOPE VI program in the 1990s took a similar approach to dilapidated public housing projects: the bad housing may be gone, but the tenants whom it had affected most were no longer around to enjoy whatever had replaced it. Thus, the instrumentalist desire to press landlords to repair their dwellings is not necessarily pro-tenant even though it depends heavily upon tenants raising and winning claims. Evicting low-income tenants and converting their former homes into well-maintained housing for the affluent would meet the narrow objective of eliminating decrepit housing conditions.

An important objective of the reforms was to improve the lives of the most hard-pressed tenants.⁶⁷ 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 apply to improve their well-being, so too this vision of the tenants' rights movement believed that giving low-income tenants greater rights against their landlords would offer the means for those tenants to improve their standard of living.

Although some jurisdictions were moving to recognize the implied covenant of habitability in residential leases in the early 1960s,⁶⁸ the urban riots of the mid-1960s put housing law "into a completely new perspective."⁶⁹ Studies done immediately after the riots indicated that bad housing conditions were a major cause of the disturbances.⁷⁰

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;⁷¹ some jurisdictions also will 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 counter-claim to the landlord's action for possession for nonpayment of rent.⁷² 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

⁶⁷Schier, *supra* note 21, at 227.

⁶⁸*Pines v. Persson*, 111 N.W.2d 409 (1961).

⁶⁹Beattie, *supra* note 21, at 242-44.

⁷⁰Rose & Scott, *supra* note **Error! Bookmark not defined.**, at 968 n.8. "[G]rievances related to housing were important factors" fomenting discontent and leading to the riots. REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS 472-73 (1968).

⁷¹*See, e.g., Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984)(recognizing affirmative suit to recover rent previously paid).

⁷²Put another way, less expected benefit will make defensive invocation of the warranty cost-effective than will be required to justify an affirmative suit.

non-repairing landlords. Speed is important not just for humanitarian reasons but also to give tenants sufficient incentives to assert their new rights in court. Faced with the prospect of a protracted legal battle with their landlords before they would have 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 will 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 depended 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, the cost of being held liable for failure to repair, and any increase in the building's value resulting from the repairs. Thus, repairing is only likely to be economically superior to ignoring a violation if:

$$(\text{Probability}_{\text{Tenant asserts warranty}} \times \text{Probability}_{\text{Tenant prevails}} \times \text{Cost}_{\text{Loss}}) + \text{Value}_{\text{Building}} > \text{Cost}_{\text{Repairs}}$$

The landlord's incentive to repair depends heavily upon the actions of both the tenant and the court.⁷³ 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. This section examines 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 that are aware of the warranty of habitability and know how to assert it will tend to increase the likelihood that landlords will feel motivated to make repairs. Who might provide this information, however, is an open question. The appellate courts that announced the warranty of habitabil-

⁷³The 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, then, 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.

ity in most states generally lack the facilities and inclination to conduct community legal education.⁷⁴ State legislatures could, but even in those where landlords' influence was insufficient to block the warranty of habitability may not be able to go farther to fund outreach campaigns. Legal services and community organizations concerned about housing quality have done outreach in some areas, but these efforts are uneven and typically underfunded. 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 them: tenants that have won repairs or financial recompense from their landlords are much 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 effectively to raise it. Initiating an action – framing a complaint, filing the complaint and either paying the filing fee or 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,⁷⁵ 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 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 – lack of funds or other pressing priorities – may raise the warranty in an effort to rescue her or his tenancy. This subsection shows 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, *infra*, explains, little-appreciated substantive doctrines have prevented precisely these tenants from asserting the warranty.

a. Deliberate Rent Withholding

⁷⁴General 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).

⁷⁵BOSTON HOUSING CT. R. 3 (2009); *Catelli v. Fleetwood*, 842 A.2d 1078 (R.I. 2004).

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 repairs will cause the landlord to repair, the value of the repairs, and the costs the tenant will bear in raising the warranty. A tenant who knows about the warranty will rationally choose deliberate rent withholding over the option of continuing to pay and endure the defects, when:

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

The costs of litigation include, of course, 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, etc. The costs of litigating 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.⁷⁶ Thus, the aware tenant of substandard housing can be expected to benefit more from raising the warranty of habitability than from suffering in silence when:

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

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:

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

⁷⁶The 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.

$$\text{Cost}_{\text{Litigation}} > \text{Cost}_{\text{Moving}} + \text{Value}_{\text{Current dwelling}} - \text{Value}_{\text{New dwelling}} - \text{Direct avoids retaliation} \times (\text{Cost}_{\text{Moving}} + \text{Value}_{\text{Current dwelling}} - \text{Value}_{\text{New dwelling}})$$

The appearance of moving costs (including the relative quality of their 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 if the tenant is willing to move quickly if the warranty-based defense fails,⁷⁷ or if the landlord retaliates successfully, then moving could prove a more reliable and efficient method of escaping a substandard dwelling.⁷⁸

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 functioning reasonably well.

On the other hand, in a tight housing market, tenants of substandard housing may not feel they dare 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; simply making it less costly than enduring defective housing likely will not suffice. This 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, *infra*, this is quite unlikely.

The importance of moving costs in this calculation also tends to skew the warranty's impact in favor of less-poor tenants, undermining the reforms' instrumental goals. For many of the poorest tenants, a significant part of the cost of mov-

⁷⁷Indeed, 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 (Mass. App. 1997); *Creekside Apartments v. Poteat*, 446 S.E.2d 826 (N.C. 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. App. 1987) (affirming award of moving costs against landlord).

⁷⁸Moreover, 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 574 (1994) (finding that greater residential mobility explains much of the higher drop-out rate of children in step-parent 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.

ing is finding the funds to make a deposit on a new dwelling before they receive back their deposit on their current unit. Whether they 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. Less-poor clients may either be able to pay the second deposit themselves or have access to cheaper credit.⁷⁹ As a result, less impoverished tenants, who may be living in units with less severe problems, may nonetheless be more willing to chance raising the warranty of habitability. Because poorer tenants are most likely to live in substandard housing, the reduced likelihood 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, not only does increasing the likelihood that tenants with meritorious claims will prevail increase the likelihood that other tenants will become aware of the warranties, it also increases the likelihood that aware tenants will elect to press claims based upon those warranties by increasing their expectations of the success of doing so. Thus, the success rate of tenants in substandard dwellings is doubly important in persuading landlords to prefer repairing to litigation.⁸⁰

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. Conversely, 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 will not always correspond to the cost of repairing them: 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 cannot as readily be photographed. This effect may mimic the effects of information costs in a market.⁸¹

⁷⁹To be sure, less-poor tenants may have more possessions that would need to be moved and that could be lost or damaged in a move. They also might lose more wages if they must miss work to move. Nonetheless, these costs seem unlikely to have the deterrent effect that the risk of homelessness can have on lower-income tenants.

⁸⁰On 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.

⁸¹See Rabin, *supra* note 14, at 580 (endorsing the implied warranty only for latent defects).

Third, the value of any repairs increases with the number of months the tenant remains in the dwelling. Most repairs require many months of enjoyment before they are cost-effective. Therefore, the strength and duration of tenants' protection against evictions in retaliation are pivotal to the results.⁸²

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." 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 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 Arrearages

The strong reasons why tenants in defective housing may not raise the warranty of habitability as part of a deliberate strategy makes the warranty's effectiveness in improving housing conditions depend largely on tenants raising the warranty to defend non-intentional rent arrearages. 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 costs 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.⁸³ 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 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

⁸²Many states prohibit retaliatory terminations to buttress code enforcement programs and the new tenants' rights. *Edwards v. Habib*, 397 F.2d 687, 699-703 (D.C. Cir. 1968); URLTA § 5.101. 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. § 47a-20 (2007)(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 2008)(presuming non-retaliation if landlord waits ninety days to evict the tenant).

⁸³In 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.

whether she or he will raise the warranty to defend an inadvertent arrearage. 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 they are informed in the early stages of the proceeding.⁸⁴

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):⁸⁵

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

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, the value of rent abatements awarded involuntary defendants may be lower than that for deliberate rent withholders. The latter will benefit from any rent abatement, large or small. An impoverished tenant who could not afford to pay the contract rent, on the other hand, will only benefit from a rent abatement that is large enough to bring the cost of redeeming possession within her or his means. Thus, for example, an eight hundred dollar abatement from a thousand dollar rent claim may seem very favorable for the tenant. But if the tenant lacks the remaining two hundred dollars to redeem possession, she or he will have to move just as surely as if she or he had won no abatement at all.

Thus, impoverished tenants raising the warranty defensively after falling behind on her or his 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.⁸⁶ And as involuntary defendants likely are poorer as a group than deliberate rent withholders, their stronger incentives to raise the warranty comport with the reforms redistributive and humanitarian goals.

⁸⁴The 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 the courts made available to landlords. See Rose & Scott, *supra* note **Error! Bookmark not defined.**, at 1019-23. After a few years, when reorganizing the Detroit courts, the justices did not require the new court designated to handle eviction cases in that city to retain the informational forms. See also Lynn Cunningham, *Procedural Due Process Aspects of District of Columbia Eviction Procedures*, 7 RUTGERS RACE & L. REV. 107, 113-14 (2005)(arguing for requirement that landlords plead compliance with the implied warranty).

⁸⁵Indeed, invoking the warranty might induce the landlord to settle for additional time to move. This at least modestly increases landlords' costs of not repairing.

⁸⁶To be sure, non-repairing landlords only feel losses attributable to the warranty of habitability if their tenants redeem possession. As noted, involuntary defendants may be less likely to do so.

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.⁸⁷

As an analytical matter, this should be fairly straightforward: the new rules are not conceptually difficult to apply. Institutionally, however, the tenants' rights revolution imposed stresses the courts hearing eviction cases were ill-equipped to handle. Adapting to the new legal regime presented several distinct problems. First, hearing these cases would demand far greater resources than had been required to grant possession routinely to landlords under a legal regime where 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 the old regime, most tenants had no defenses to eviction.⁸⁸ 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 relative even to the small civil cases and misdemeanors the same courts typically handled, the increased demand for adjudicatory resources still confronted these courts with difficult choices.

Taking a broad view, appellate courts and legislatures imposed the implied warranty of habitability in significant part 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, etc. The transfer therefore increased the aggregate shortfall in resources.⁸⁹ Neither the legislatures, which

⁸⁷Ackerman, *supra* note 60, at 1108.

⁸⁸*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 the expiration of his tenancy and the issue in the ensuing litigation is simply whether he has paid or held over”).

⁸⁹To the extent the problem with administrative housing code enforcement was corruption, transfer-

could have created and funded new judgeships, nor the appellate courts, which might have diverting resources from other classes of cases, typically recognized this crucial condition to the success of the new legal regime they were creating.⁹⁰ Similarly, neither have much attention to the procedural reforms needed to make the courts accessible to unsophisticated *pro se* tenants.⁹¹

Few of the courts that were 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. Judges themselves admitted they dispensed “assembly-line justice.”⁹² Some of the skills and techniques useful 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 may seem relatively innocent 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 – leaving the court to enter a default judgment – could save everyone time.

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 same time legal services funding was at its apogee, these programs never had the resources to represent more than a small fraction of the number of tenants being evicted from substandard housing.⁹³ And those tenants with meritorious defenses commonly were among the least sophisti-

ring 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.

⁹⁰Many 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. 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.

⁹¹By contrast, those seeking to reform government transfer programs have paid keen attention to procedural denials of substantive rights. 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); Super, *Invisible Hand*, *supra* note 40, at 862-74.

⁹²Rose & Scott, *supra* note **Error! Bookmark not defined.**, at 988 n.88.

⁹³Even with a legal aid office across the hallway from Detroit Landlord-Tenant Court, fewer than ten percent of tenants in 1975 had lawyers. Rose & Scott, 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, 642 (2004) (distinguishing between programs like legal services that serve only an arbitrary number of people and those in which eligibility assures an applicant service).

cated,⁹⁴ tenants. 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.

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.⁹⁵ 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 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.⁹⁶ Even when 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.⁹⁷

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. Reasserting formal roles, much less holding trials on matters that previously had been routine and rendering judgments against familiar landlords, risked the perception of personal slights. This inevitably required considerable readjustment by all concerned. And some judges might find 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 services to landlords. As such, they are vulnerable to competitive pressures. If the new tenants' rights made evictions too burdensome, many landlords might abandon the courts and seek to evict their tenants

⁹⁴The lowest-income tenants, who typically live in the worst units, also are more likely to be marginally literate, as literacy correlates with earning capacity.

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

⁹⁶*See, e.g.*, Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1194-98 (1973).

⁹⁷*Neal v. Fisher*, 541 A.2d 1314 (Md. 1988) (describing trial judge's declaration that he could empathize with the landlord because he was a landlord himself).

themselves through (generally illegal) self-help tactics.⁹⁸ Judges could be understood for wanting to avoid the resulting chaos and the violence that would likely entail. Judges also could be expected to resent the loss of prestige as litigants abandon their courts.

Thus, instead of concentrating single-mindedly on adapting the courts to implement the new reforms, judges had to worry about the effect the reforms might have on their dockets, on their roles, and on the attitudes of landlords. These worries undoubtedly diminished the enthusiasm with which many courts welcomed their new roles implementing the 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 was somehow flawed in such a way that increased spending – at least within the ranges of which most low-income tenants were capable – could not reliably bring better housing conditions. In this view, rents exceeded those that a well-functioning market would produce,⁹⁹ and landlords were far more profitable than generally recognized.¹⁰⁰ The task, then, was to redistribute some of that surplus to tenants. The alternative explanation is that the market was reflecting 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 suffered bad housing conditions because they were 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

⁹⁸See Randy Gerchick, *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 procedures from this perspective).

⁹⁹See Rose & Scott, *supra* note **Error! Bookmark not defined.**, at 977 n.46 (asserting that rents “are always more than double [the] value of services necessary to maintain the house”).

¹⁰⁰*Id.* at 978.

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 housing is more scattered than that in most other major consumer markets.¹⁰¹ Low vacancy rates do not mean a lack of competition. Vacant housing causes losses for its owners, which they naturally seek to avoid.¹⁰² 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.

Others argued that low-income tenants lacked the sophistication to bargain effectively with their landlords, suffering a kind of information failure.¹⁰³ This 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, the tenants best able to assert the warranty are likely to be among those least affected by this market failure. Put another way, if this market failure hypothesis is correct, the warranty of habitability will prove ineffectual because tenants in substandard housing will be unlikely to raise it.

A more sophisticated argument for some market failure focuses on time. Housing takes a fairly long time to enter the market, leaving the short-term housing supply relatively inelastic.¹⁰⁴ 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.¹⁰⁵ 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 tenants' propensity to assert the warranty also depends on their willingness to move if that assertion is ineffective. If tenants' positions in the market are precarious, they presumably will be highly averse to moving. A tenant forced to move rapidly after

¹⁰¹Ackerman, *supra* note 60, at 1099-1100, 1149-50.

¹⁰²Rabin, *supra* note 14, at 576.

¹⁰³Duncan 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).

¹⁰⁴Conversely, discrimination may prevent slum landlords from exiting to compete in more upscale rental markets. Ackerman, at 1102.

¹⁰⁵Rose & Scott, at 977.

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 procedure 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 be designed to cause low-income tenants to increase their consumption of housing. In theory, causing low-income tenants to increase their consumption of housing need not be redistributive.¹⁰⁶ 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.¹⁰⁷ 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 or shrinking the supply of low-rent housing;¹⁰⁸ critics staunchly rejected this view.¹⁰⁹

Allowing low-income tenants to consume more housing for the same level of expenditures could happen if the housing supply function shifted to provide more housing at each price. The standard cause for supply curves to shift to the right is a reduction in the costs of production. Federal housing policy had 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 Administration, however, the federal government began to change from subsidizing supply to subsidizing individual tenants' purchases of housing through Section 8 vouchers and certificates. This allowed the minority of low-income tenants receiving vouchers and certificates to pay more for housing without sacrificing other expenditures, but it also increased aggregate demand, counteracting the effects of

¹⁰⁶Ackerman, at 1097.

¹⁰⁷Neil K. Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement*, 82 YALE L.J. 1175 (1973).

¹⁰⁸Ackerman, at 1177; Kennedy, at 507; Bruce Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar*, 82 YALE L.J. 1194 (1973).

¹⁰⁹Komesar, at 1178-83; Rabin, *supra* note 14, at 580; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 16.6, at 482-85 (6th ed. 2003).

the growth in supply. Some writers suggested that social segregation would stifle demand for housing in areas regarded as slums and inhibit landlords from exiting to compete in higher-priced markets.¹¹⁰

The courts adopting the tenants' rights reforms had no way to affect the supply of low-rent housing directly.¹¹¹ 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.¹¹² It also presumably depended at least 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 the costs of repairs compelled under the warranty of habitability.¹¹³ 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. Still, if landlords must make repairs and may not by law increase rents, they must either continue to operate at a reduced profit or take the unit off the market.

Second, a similar effect can be achieved by 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. Thus, the 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.¹¹⁴ 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 reduced profits 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 the capital invested in the unit, property taxes, insurance, the expenses of roof repairs and at least enough heat to keep the pipes from freezing whether

¹¹⁰Ackerman, at 1102.

¹¹¹Kennedy, at 499-501, argues that improved maintenance will extend the lives of rental units, thus increasing supply.

¹¹²See *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972) (assuming but not explaining such market conditions).

¹¹³Some 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. *Id.* at 487-92.

¹¹⁴A similar effect could be achieved by assuming absolute uniformity in the housing stock and in the effectiveness of regulations requiring better maintenance. Ackerman, at 1109.

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: even a very low rent should more than cover the landlord's marginal costs associated with having the unit occupied. Even in the medium-term, a very slight rate of return on the landlord's original investment might be superior to exiting the market.¹¹⁵ 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 cost of repairs.

None of these are 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 increases far more.¹¹⁶ 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 quantity supplied 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 try to compete for housing in higher-cost or physically remote rental markets.

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 investment 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.¹¹⁷ 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 mov-

¹¹⁵*Id.* at 1103.

¹¹⁶*Id.* at 1120. The total *monetary* value conferred on tenants, or the value of tenants' housing purchase, 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. 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 redistributionalists. See *supra* Part I.A.4.

¹¹⁷Landlords also could sell their units to other landlords that can make repairs, or prosecute eviction actions, more efficiently. This may resolve some borderline cases but still leaves the overall picture essentially unchanged.

ing the unit into a higher-cost housing market, either as a rental or through conversion to a condominium or cooperative. Indeed, enough landlords must decide to repair for the improvement in tenants' lives to offset the harm experienced by those that were unsuccessful in asserting the warranty of habitability (and thus lost the costs of litigation and the economic and non-economic costs of moving) *as well as* the adverse consequences of reducing the supply of low-cost housing.¹¹⁸

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 repairing 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 redistributionalists and humanitarians, who will see the benefit of improved housing accrue not to low-income tenants but to middle- and upper-income gentrifiers.

III. FLAWS IN THE NEW REGIME

As the preceding Part indicates, the implied warranty's success in improving housing conditions or in improving the well-being of tenants in decrepit housing 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 effectively, or may not choose to press their landlord to comply by raising the warranty either because they are unwilling to risk having to move or because they are too eager to move to invest resources fighting over their current abode. The warranty's effectiveness therefore is likely to depend heavily upon having tenants raise the warranty defensively after falling behind on their rent. Even then, the ability of very low-level courts to transform the way they handle landlord-tenant cases is pivotal.

The attention devoted to the broad strokes of reforming substantive landlord-tenant law, however, was not matched with similar focus on the finer points of the doctrine or to 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 resulting 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

¹¹⁸When the implied warranty was new, one could imagine the government making up for the loss of supply of low-income housing. Ackerman, at 1113-19. This, however, might have proved administratively difficult and could be less efficient than a direct cash transfer program. Komesar, at 1178 n.8, 1180-83.

raising the implied warranty defensively. Given the difficulty, described in the previous Part, of inducing tenants to challenge their landlords' repair records deliberately, excluding impoverished tenants defending non-payment actions has undermined the new regime of landlord-tenant law severely, 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 low-income tenants whose plight helped drive the transformation of the substantive law.

Section A describes two important sets of 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 actually handled eviction cases under the new legal regime. It finds 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 its key terms through leases. Competition for lease terms is rare even in otherwise competitive rental housing markets;¹¹⁹ this should allow many landlords to impose such terms. Tenants in the worst housing, who may be the least sophisticated and have fewer alternatives, may be the most susceptible to demands that they sign such leases. Many states recognized that implying a warranty of habitability into leases but making it waivable would accomplish little.¹²⁰ Yet even unenforceable lease terms may compound tenants' confusion about their rights.¹²¹ Only a few jurisdictions sought affirmatively to deter landlords from including such terms.¹²²

Even without these lease terms, however, the new regime of landlord-tenant law departed from symmetry between landlord and tenant in two subtle but important respects.¹²³ First, many jurisdictions impose substantive rules that effectively prevent tenants from challenging the landlord's breach of the implied war-

¹¹⁹Rabin, *supra* note 14, at 582-83.

¹²⁰*See, e.g.,* Leardi v. Brown, 474 N.E.2d 1094 (Mass. 1985); Fair v. Negley, 390 A.2d 240 (Pa. Super. 1978); Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845 (1988); Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791 (1974); *but see* P.H. Inv. v. Oliver, 818 P.2d 1018 (Utah 1991) (allowing waivers); Odneal v. Wolfe, 1980 WL 351332 (Ohio App. 6 Dist. 1980) (treating tenant's move into the premises as admission of their habitability); *cf.,* Pierre v. Williams, 431 N.Y.S.2d 249 (NY City Civ. Ct. 1980) (enforcing lease term waiving right to jury trial).

¹²¹Kuklin, at 868.

¹²²MICH. COMP. LAWS § 554.633 (West 2007); OHIO REV. CODE ANN. § 5321.13, .14 (Anderson 2004).

¹²³Some states imposed other limitations on the new regime, such as limits on which defects could justify a defense to a nonpayment action. TEX. PROP. CODE ANN. § 92.058 (West 2007).

ranty of habitability without the kinds of deliberate preparations that make that defense unavailable when a hard-pressed tenant misses a rental payment and must defend an action for possession for non-payment of rent.¹²⁴ Second, most jurisdictions require tenants defending possessory actions on the basis of the warranty of habitability to deposit contract rent as it comes due with the court. This effectively excuses the landlord's breach of his or her 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 have obvious roots in contract law. Instead, they appear to be products of further 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 implied 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 implies into residential leases.

These rules' impact 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 by themselves 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.¹²⁵ 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.”¹²⁶ Some

¹²⁴An extreme version of this approach is *Foisy v. Wyman*, 515 P.2d 160 (Wash. 1973), which prohibited the defensive invocation of the warranty of habitability unless tenant is entitled to a complete rent abatement or somehow calculated and paid the portion of rent not meriting abatement.

¹²⁵*See, e.g.*, *280 Broad, LLC v. Adams*, 2006 WL 2790909 (Conn. Super. 2006) (denying rent abatement to tenant whose furnace exploded because economic difficulties contributed to nonpayment of rent). The state might require proof of a complaint to code enforcement agencies. *Eldergill, supra* note 83, 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 1997)(establishing municipal escrow account for this purpose). One court, however, held that tendering payment to the landlord waived the warranty. *Eldergill*, at 309.

¹²⁶*See, e.g.*, *Brakel, supra* note 57, at 569; *but cf.* *279 4th Ave. Management, L.L.C. v. Mollett*, 898 A.2d 1036 (N.J. Super. A.D. 2006) (reversing dismissal of tenant's habitability defense entered because tenant's rent payments were late).

do this explicitly, even requiring an affidavit that the tenant has taken five specified preparatory steps.¹²⁷ One state imposes monetary penalties on tenants who withhold rent absent strict compliance with statutory conditions.¹²⁸

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.¹²⁹ The Restatement declares that the landlord must "keep the leased property in a condition that meets the requirements of governing health, safety, and housing codes"¹³⁰ but grants tenants remedies only when the "the landlord does not correct his failure within a reasonable time after being requested to do so."¹³¹ These requirements migrated to the contractual side of landlord-tenant law from its tort side, which focuses on the landlord's negligent disregard of known defects.¹³² Some courts have required more formal notice than many tenants are likely to provide¹³³ or sanctioned tenants with valid defenses who had not given their landlords notice.¹³⁴

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 into court during the pendency of

¹²⁷See *Chernin v. Welchans*, 844 F.2d 322, 324 (6th Cir. 1988)(describing Ohio's procedure).

¹²⁸TEX. PROP. CODE ANN. § 92.058 (West 2007).

¹²⁹See, e.g., *Jesse v. Lindsley*, 2008 WL 2313406 (Idaho 2008); *Chiodini v. Fox*, 207 S.W.3d 174 (Mo. App. 2006); *Dulin v. Sowell*, 919 So. 2d 1010 (Miss. App. 2005); *McIntyre ex rel. Howard v. Philadelphia Hous. Auth.*, 816 A.2d 1204 (Pa. Commw. 2003); *N.Y.C. Hous. Auth. v. Roberts*, 2002 WL 759637 (N.Y. App. Term 2002); *Glasoe v. Trinkle*, 479 N.E.2d 915 (Ill. 1985); *Geyer v. Frank*, 1985 WL 8144 (Ohio App. 12 Dist. 1985); *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984); *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979); *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. 1973); *Marini v. Ireland*, 265 A.2d 526 (N.J. 1970); URLTA § 1.304, 4.101(a); TEX. PROP. CODE ANN. § 92.052(a) (West 2007); MICH. STANDARD JURY INSTRUCTION 100.01 (2010); 49 AM. JUR. 2d, *Landlord & Tenant*, §§ 566, 1025 (1995); JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 10.6 (2d ed. 2005); ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 3:24 (1980); but see *In re Estate of Jordan*, 800 N.Y.S.2d 490 (Sur. Ct. 2005); *Gennings v. Newton*, 567 So. 2d 637 (La. App. 1990) (rejecting notice requirement); *Miller v. C.W. Myers Trading Post, Inc.*, 355 S.E.2d 189 (N.C. App. 1987) (finding notice not required for many defects); OR. REV. STAT. § 90.360 (2004).

¹³⁰RESTATEMENT (SECOND) OF PROPERTY, LAND, & TEN. § 5.5(1) (1977).

¹³¹*Id.* § 5.5(4); see *Moser v. Cline*, 214 S.W.3d 390 (Mo. 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, (N.J. Super. A.D. 1981) (finding no breach because delay in repairs not unreasonable).

¹³²*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).

¹³³*Myrah v. Campbell*, 163 P.3d 679 (Utah. App. 2007) (finding "informal emails" and telephone calls insufficient); *Dugan v. Milledge*, 494 A.2d 1203 (Conn. 1985) (affirming dismissal of tenants' claims because tenant could not prove a prior complaint to housing inspectors).

¹³⁴*Landmarks Restoration Corp. v. Gwardyak*, 485 N.Y.S.2d 917 (N.Y. City 1985) (awarding attorneys' fees to landlord despite tenant's meritorious defense and usual rule denying attorneys' fees in contract cases).

these actions as a condition to being heard on their defenses¹³⁵ or receiving a jury trial.¹³⁶ For more affluent tenants with incomes sufficient to make these payments, LPOs may be mere nuisances. But for low-income tenants, the ones 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, they arguably preserve some of the exceptionalism that the reforms sought to purge from landlord-tenant law.

a. The Genesis of LPOs

LPO requirements in many jurisdictions have extensive histories going back long before the implied covenants of habitability and the prohibition on retaliatory eviction.¹³⁷ Prior to the recognition of the implied warranty and the related defense of retaliatory eviction, tenants had few defenses available in eviction cases. Where “the only issue is whether the allegations of the complaint are true,”¹³⁸ an LPO had the effect only of requiring tenants to pay an undeniable obligation.¹³⁹ Similarly, requiring rent payments on appeal after a trial has found that rent owing merely echoes the court’s findings, providing the landlord security against loss during the period the appeal is pending.¹⁴⁰ And although most jurisdictions substantially rewrote their statutes on eviction procedure at the time

¹³⁵ 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 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.

URLTA § 4.105.

¹³⁶MICH. CT. R. 4.201(H)(2) (2009).

¹³⁷See, e.g., MICH. REV. STAT. ch. 123, § 8303 (1846).

¹³⁸Lindsey v. Normet, 405 U.S. 56, 63 (1972).

¹³⁹Even 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.

¹⁴⁰*Cooks v. Fowler*, 437 F.2d 669, 674 (D.C. Cir. 1970)[hereinafter *Cooks I*]; *Bell v. Tsintolas Realty Co.*, 430 F.2d 474, 483 (D.C. Cir. 1970); *but see*, *Cooks v. Fowler*, 459 F.2d 1269, 1272 (D.C. Cir. 1971)[hereinafter *Cooks II*]. A somewhat different situation is presented by bonds imposed on appeal from courts that do not afford the parties full trials. Jurisdictions with these procedures typically refer eviction actions to quasi-judicial magistrates for initial determinations. Unsuccessful parties may then “appeal” to a higher court, at which they receive a trial de novo. MD. CODE ANN., REAL PROP. § 8-332(a), (d) (2008); N.C. GEN. STAT. § 42-32 (2003). 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*, 438 F. Supp. 1215 (W.D.N.C. 1977), leading the state to exempt indigent tenants from part of the requirement. N.C. GEN. STAT. § 42-34(c1) (2003).

Access to appeal can be important to counter some of the problems described *infra* section 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 Mortgage Ass’n v. Wingate*, 273 N.W.2d 456, 460-61 (Mich. 1979); *Cooks I*; *Cooks II*.

they recognized reforms, having LPO requirements in their previous statutes probably made these states more likely to continue to impose them without careful consideration of their compatibility with the new regime.¹⁴¹

LPOs may be attempts to soothe landlords upset by the recognition of implied covenants of habitability in residential leases, a pretrial rent collection mechanism as a *quid pro quo*.¹⁴² This would be especially true of courts that were recognizing the covenants without statutory support¹⁴³ and therefore subject to landlords' criticism for exceeding their institutional roles.¹⁴⁴ Some courts seemed to feel that LPOs were compelled to protect landlords' due process rights.¹⁴⁵ They have been particularly inclined to point to a perceived change in the "once-summary" nature of eviction proceedings,¹⁴⁶ and suggested that landlords deserved compensation for delays¹⁴⁷ in the form of assured collection of any rent owed.¹⁴⁸

The courts establishing LPOs appear to have little understanding of how they might impact low-income tenants. While they devote pages of meticulous legal reasoning to support their recognition of the implied covenants,¹⁴⁹ they impose

¹⁴¹Commentators have been of little help. 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, 9-10, n.39 (1976). Another major article on the tenants' rights reforms offers an essentially noncommittal summary of the then-existing law on LPOs. Myron Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CAL. L. REV. 1444, 1473-80, 1482-87 (1974). The one discussion specifically treating the escrow requirement in landlord-tenant 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).

¹⁴²*Smith v. Wright*, 416 N.E.2d 655, 662 (Ohio App. 1979).

¹⁴³*E.g.*, *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. 1973); *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Hinson v. Delis*, 102 Cal. Rptr. 661 (Cal. Ct. App. 1972); *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979); *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").

¹⁴⁴*See, e.g., Pugh*, 405 A.2d at 903-05.

¹⁴⁵*Martins Ferry Jaycee Hous. v. Pawlaczyk*, 448 N.E.2d 512, 514 (Ohio App. 1982); *Rush v. Southern Property Management, Inc.*, 173 S.E.2d 744, 746 (Ga. App. 1970).

¹⁴⁶*Bell v. Tsintolas Realty Co.*, 430 F.2d 474, 481-82 (D.C. Cir. 1970).

¹⁴⁷*Id.* at 484; *KNG Corp. v. Kim*, 110 P.3d 397 (Haw. 2005); *Stranger v. Ridgway*, 404 A.2d 56 (N.J. Dist. 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 Management, 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).

¹⁴⁸*See Bell*, 430 F.2d at 479 & n.10; *Green v. Superior Court*, 517 P.2d 1168 (Cal. 1974); *Dameron v. Capitol House Associates Ltd. Partnership*, 431 A.2d 580 (D.C. 1981).

¹⁴⁹*See, e.g., King*, 495 S.W.2d at 67-77; *Javins*, 428 F.2d at 1072-83; *Hinson*, 102 Cal. Rptr. at 662-67; *Pugh*, 405 A.2d at 900-10.

LPO requirements, often virtually without explanation, in a paragraph¹⁵⁰ or a footnote,¹⁵¹ generally as dictum.¹⁵² Some tenants' advocates shared this lack of empathy, themselves suggesting LPOs.¹⁵³ Indeed, some cannot resist moralizing at tenants invoking the new defenses, calling LPOs necessary to demonstrate their "good faith."¹⁵⁴

Some 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.¹⁵⁵ Suggesting 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.¹⁵⁶ Most striking in its resistance to the new regime was the view that LPOs were needed to reduce the number of tenants asserting the new habitability defense.¹⁵⁷

b. Characteristics of LPOs

In general, LPOs are imposed on tenants when they raise defenses based upon their new rights¹⁵⁸ or when they demand jury trials.¹⁵⁹ 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",¹⁶⁰ but others allow LPOs

¹⁵⁰See, e.g., *King*, 495 S.W.2d at 77; *Hinson*, 428 F.2d at 666; *Pugh*, 405 A.2d at 907.

¹⁵¹See *Javins*, 428 F.2d at 1083, n.67.

¹⁵²See, e.g., *Teller v. McCoy*, 253 S.E.2d 114 (W.Va. 1978); *King*, 495 S.W.2d at 77; *Javins*, 428 F.2d at 1083, n.67; *Hinson*, 102 Cal. Rptr. at 666. Indeed, the landlord in *King* did not respond to the tenant's appeal in the Missouri Court of Appeals.

¹⁵³*Lindsey*, 405 U.S. at 67 n.13; *Javins* at 1083, n.67; *LePrade v. Liebler*, 614 A.2d 546 (D.C. 1992); *Jackson v. Rivera*, 318 N.Y.S.2d 7 (N.Y. City Civ. Ct. 1971); *Spector*, *supra* note 74, at 207.

¹⁵⁴*Dameron*; *L.V.G. Realty Corp. by Oles v. Maltez*, 561 N.Y.S.2d 630 (N.Y. City Ct. 1990); see *Emily Jane Goodman, Housing Court: The New York Tenant Experience*, 17 URB. L. ANN. 57, 59 (1979).

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

¹⁵⁶See, e.g., ALASKA STAT. § 34.03.190(a) (Michie 2004); MASS. GEN. LAWS ANN. ch. 239, § 8A (West 2004); N.H. REV. STAT. ANN. § 540:13-d(II) (1997).

¹⁵⁷*Stranger v. Ridgway*, 404 A.2d 56 (N.J. Dist. Ct. 1979).

¹⁵⁸See, e.g., MICH. CT. R. 4.201(H)(9)(a) (2009); HENNEPIN COUNTY (MINN.) MUN. CT. R. 10.06 (2008); *Bell*, 430 F.2d at 483; URLTA § 4.105(a).

¹⁵⁹See, e.g., MICH. CT. R. 4.201(H)(2); *Bell*, 430 F.2d at 483.

¹⁶⁰URLTA § 4.105(a); *Bell*, 430 F.2d at 483; *Lindsey v. Prillman*, 921 A.2d 782 (D.C. 2007).

even when the landlord has not put rent at issue.¹⁶¹ Some jurisdictions also restrict LPOs to delays clearly caused by tenants.¹⁶²

Although many jurisdictions require LPOs in all cases¹⁶³ or allow them on the judge's own motion,¹⁶⁴ others require the landlord to take the initiative by filing a motion and showing "a clear need for protection" or something similar.¹⁶⁵ LPOs are equitable in nature¹⁶⁶ so landlords theoretically should establish the usual prerequisites for obtaining equity, including irreparable harm, inadequacy of their remedies at law, likely success on the merits¹⁶⁷ and clean hands. This would require landlords to prove that they have complied with health and safety laws to receive the "extraordinary"¹⁶⁸ protection of an LPO, although little evidence suggests that this happens in practice.

LPOs may require tenants to pay all current rent as it accrues,¹⁶⁹ or although some may require less,¹⁷⁰ such as the "reasonable rent for the premises."¹⁷¹ They may also require tenants to deposit all of the back rent in dispute¹⁷² or the undisputed portion of the back rent.¹⁷³ LPOs generally require tenants to make payments into a registry at the court,¹⁷⁴ but some compel tenants to pay landlords

¹⁶¹MICH. CT. R. 4.201(J)(1); *Cunningham v. Phoenix Management, Inc.*, 540 A.2d 1099 (D.C. 1988).

¹⁶²CONN. GEN. STAT. ANN. § 47a-26b (West 1994 & Supp. 2004) allows LPOs when the tenant delays filing his or her answer.

¹⁶³FLA. STAT. ANN. § 83.60(2) (West 2004); GA. CODE ANN. § 61-30444-7-75 (1991); N.Y. MULT. DWELL. LAW § 302-a (McKinney 2001); *but see Amanuensis, Ltd. v. Brown*, 318 N.Y.S.2d 11, 20-21 (N.Y. Civ. Ct. 1971); HENNEPIN COUNTY (MINN.) MUN. CT. R. 10.06; *King v. Morehead*, 495 S.W.2d 65, 77 (Mo. App. 1973).

¹⁶⁴URLTA § 4.105(a).

¹⁶⁵*Bell*, 430 F.2d at 483; *Teller v. McCoy*, 253 S.E.2d 114 (W. Va. 1978); *McNeal v. Habib*, 346 A.2d 508, 512 (D.C. 1975) (giving tenant right to be heard but no right to present evidence); MICH. CT. R. 4.201(H)(2); CONN. GEN. STAT. ANN. § 47a-26b (West 1994 & Supp. 2004).

¹⁶⁶*Bell*, 430 F.2d at 479.

¹⁶⁷*Id.* at 484.

¹⁶⁸*Id.* at 481.

¹⁶⁹*See, e.g.*, FLA. STAT. ANN. § 83.60(2) (West 2004); GA. CODE ANN. § 47-7-75 (a) (1991); HAW. REV. STAT. ANN. § 521-78(a) (Michie 2000); *Lipshutz v. Shantha*, 240 S.E.2d 738 (Ga. App. 1977) (refusing to reduce amount of LPO by amount tenants spent on repairs).

¹⁷⁰*See, e.g.*, URLTA § 4.105(a).

¹⁷¹*Bell*, 430 F.2d at 483; MICH. CT. R. 4.201(H)(1) (2009).

¹⁷²*See* MONT. CODE ANN. § 70-24-421(1) (2003)(allowing the court to require tenants to pay "all or part of the rent accrued" into court); GA. CODE ANN. § 47-7-75(a) (1991)(mandatory deposit of all back rent "allegedly owed" for which the tenant cannot show a receipt); URLTA § 4.105(a); FLA. STAT. ANN. § 83.60(2) (West 2004); *Fritz v. Warthen*, 213 N.W.2d 339, 343 (Minn. 1973); *see Swartwood v. Rouleau*, 1999 WL 293898 (Minn. App. 1999) (requiring tender of all back rent allegedly due).

¹⁷³*See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1365(A) (West 2000).

¹⁷⁴*See, e.g.*, MICH. CT. R. 4.201(H)(2)(1)(A)(i); URLTA § 4.105(a); *Bell*, 430 F.2d at 479; HAW. REV. STAT. ANN. § 521-79 (Michie 2000); GA. CODE ANN. § 47-7-75 (1991); FLA. STAT. ANN. § 83.60(2) (West 2004); *Pugh v. Holmes*, 405 A.2d 897, 907 (Pa. 1979); *King v. Morehead*, 495 S.W.2d 65, 77 (Mo. App. 1973).

directly¹⁷⁵ or the court to disburse the tenant's payments to the landlord¹⁷⁶ before a trial on the merits or even after the tenant has prevailed.¹⁷⁷ LPO requirements may only come into effect if the action has not been tried after a certain waiting period,¹⁷⁸ and they may be limited to a certain duration.¹⁷⁹

The failure of many jurisdictions to specify the penalty or response for tenants' failure to make payments required under an LPO, and a procedure for imposing that penalty or response,¹⁸⁰ suggests that many judges and legislators are so far removed from the condition of low-income tenants that they cannot imagine noncompliance.¹⁸¹ Although LPOs' delay-preventing rationale would make an accelerated trial on the merits a logical response to nonpayment of escrow,¹⁸²

¹⁷⁵See, e.g., NEV. REV. STAT. ANN. 118A.490(1) (Michie 2003); *Dameron v. Capitol House Associates Ltd. Partnership*, 431 A.2d 580 (D.C. 1981); *City of Mount Vernon v. Brooks*, 469 N.Y.S.2d 517 (N.Y. City Ct. 1983).

¹⁷⁶*Cunningham v. Phoenix Management, 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. 1982); see, e.g., 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); MICH. CT. R. 4.201(H)(2)(2) (requiring court to "consider the defendant's defenses" but does not specify 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 (D.C. 2001) (allowing all collected rents to go to landlord if tenant did not raise habitability early in proceedings); but see *Hinson v. Delis*, 102 Cal. Rptr. 661, 666 (Cal. App.1972); *Bell*, 430 F.2d at 485; *Leejon Realty Co. v. Davis*, 416 N.Y.S.2d 948 (N.Y. Sup. 1977) (denying disbursement to landlord who had failed to repair).

¹⁷⁷*Temple v. Thomas D. Walsh, Inc.*, 485 A.2d 192 (D.C. 1984).

¹⁷⁸See, e.g., *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 1977) (finding LPO inappropriate where trial imminent); GA. CODE ANN. § 47-7-75 (1991) (LPO may be entered only after one month from the date of the complaint); 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).

¹⁷⁹See, 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 2004) (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) (1997) (one month limit on tenants' post-trial deposits).

¹⁸⁰See, e.g., URLTA § 4.105(a); *Bell* 430 F.2d 474; *King* 495 S.W.2d 65.

¹⁸¹But 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").

¹⁸²CONN. GEN. STAT. ANN. § 47a-26b (West 1994 & Supp. 2004); see also *Rome v. Walker*, 196 N.W.2d 850, 854 (Mich. App. 1972).

a number of jurisdictions refuse to allow tenants to raise their defenses,¹⁸³ deny tenants jury trials,¹⁸⁴ or issue “default judgments” for landlords.¹⁸⁵

c. LPOs’ Effect

Data on the issuance of, and compliance with LPOs, is largely lacking.¹⁸⁶ As discussed in the next section, however, very, very few low-income tenants appear to receive relief based on the implied warranty of habitability and related doctrines; because they sharply reduce the expected value of pursuing those defenses, LPOs likely are a significant part of the reason. And when Detroit’s Landlord-Tenant Court made the right to a trial by jury conditional on compliance with LPOs, a year-long study found not one of the more than 20,000 tenants appearing unrepresented received a jury trial.¹⁸⁷

Beyond this sparse data, both the burden of LPO payments and the risk of suffering the penalties for non-compliance 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 that fail to maintain their units – and thus that 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’ right revolution.

LPOs’ impact varies dramatically depending upon 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 some-

¹⁸³See, e.g., *Swartwood v. Rouleau*, 1999 WL 293898 (Minn. App. 1999) (affirming refusal to allow tenant to offer defenses without tendering all back rent allegedly due); *Conway v. Nissley*, 1995 WL 723298 (Ohio App. 1995) (affirming dismissal of counterclaims of tenant in arrearage on rent); *Smith v. Wright*, 416 N.E.2d 655, 657 (Ohio App. 1979); FLA. STAT. ANN. § 83.60(2) (West 2004); *Jaroush v. Cook*, 296 S.E.2d 544 (W.Va. 1982) (requiring consideration of defenses of tenant missing LPO payments).

¹⁸⁴See, e.g., *Harris v. Housing Authority of Baltimore City*, 549 A.2d 770 (Md. App. 1988) (requiring a hearing for tenant missing LPO payments); MICH. CT. R. 4.201(H)(2)(a)(iii)(I) (2009). This might also be the response of jurisdictions that impose LPOs in response to tenants’ jury demands. See *Bell v. Tsintolas Realty Co.*, 430 F.2d 474, 483 (D.C. Cir. 1970).

¹⁸⁵See, e.g., HAW. REV. STAT. ANN. § 521-78(b) (Michie 2000); GA. CODE ANN. § 47-7-75(c) (1991); *Davis v. Rental Associates, Inc.*, 456 A.2d 820 (D.C. 1983) (approving default judgment despite tenant’s tender of full amount of arrearage prior to trial); *Mahdi v. Poretsky Management, Inc.*, 433 A.2d 1085 (D.C. 1981) (approving of judgment for landlord as sanction for tenant’s non-payment of LPO); but see *Rotheimer v. Arana*, 892 N.E.2d 1183 (Ill. App. 2008) (rejecting judgments of possession as sanctions for nonpayment of LPOs); *K.D. Lewis Enterprises Corp., Inc. v. Smith*, 445 So.2d 1032, 1035 (Fla.App. 5 Dist., 1984) (granting landlord possession but allowing tenant to litigate counterclaims).

¹⁸⁶See RICHARD T. LEGATES & ALAN GREENWOOD, AN ANALYSIS OF ADMINISTRATIVE AND JUDICIAL COSTS OF PRE-TRIAL RENT DEPOSITS IN CALIFORNIA (1992)(estimating large administrative costs to expand LPOs).

¹⁸⁷Marilyn 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, 47, 25, 36 (1973). In 20,228 cases, the tenant had no attorney.

times be impossible and may often require foregoing other necessities.¹⁸⁸ Where the tenant actually owes the demanded funds but faces a horrific dilemma, she or he may only seek relief under equity courts' traditional mandate of mercy for the poor.¹⁸⁹ 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 meeting other needs. In addition, public assistance programs pay some tenants' rent directly to the landlord; the tenant may be unable to redirect those payments to the court in time to prevent a default on the LPO.¹⁹⁰

Unethical landlords may induce tenants to default on escrow payments. Landlords are more likely to be repeat players with greater familiarity with court procedures;¹⁹¹ 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," pro se tenants may default after relying upon inaccurate information from the landlord. The landlord may persuade the court to issue an escrow order for more than the contract rent amount.¹⁹² Similarly, landlords jurisdictions requiring payment of back rent in dispute may demand money they already received. Poor tenants are particularly 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.

LPOs' burden may be compounded if the low-income tenants' dwelling has severe defects, i.e., if the tenant has strong defenses under the implied warranty of habitability. The tenant may have to spend his or her rent money to mitigate the damages a defect in the premises has caused.¹⁹³ For example, a tenant without adequate heat may spend the rent money on space heaters. Malicious

¹⁸⁸Harris v. Housing Authority of Baltimore City, 549 A.2d 770 (Md. App. 1988) (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 (describing hardships low-income families face when they have insufficient funds for both food and shelter costs).

¹⁸⁹J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 88-89, 104 (2d ed. 1979).

¹⁹⁰Cf. Shipman v. Carr, 449 A.2d 187 (Conn. Super. 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.

¹⁹¹A. Pollock & G. Korus, *The Model Residential Landlord-Tenant Code: Proposed Procedural Reforms*, 26 U. MIAMI L. REV. 317, 321-22 (1972).

¹⁹²Lovejoy v. Intervest Corp., 794 So. 2d 1205 (Ala. Civ. App. 2001); Amanuensis, Ltd. v. Brown, 318 N.Y.S. 2d 11, 20-21 (N.Y. Civ. Ct. 1971).

¹⁹³See Lipshutz v. Shantha, 240 S.E.2d 738 (Ga. App. 1977) (refusing to reduce amount of LPO by amount tenants spent on repairs).

landlords can force tenants to divert their rent money by cutting off essential utilities or creating some other intolerable condition once an LPO issues.

Well-intentioned tenants with strong defenses may fail to make required escrow payments because they doubt the courts will grant them redress. A tenant whose dwelling has deteriorated to the 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 be 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.

First, the new substantive regime did not appear to increase number of eviction cases filed.¹⁹⁴ This suggests that few tenants are withholding rent deliberately to bring the issue of repairs to court.

Second, the judicial resources the average case receives are quite modest.¹⁹⁵ Nine-minute trials¹⁹⁶ take the concept of a "rocket docket" to an entirely different level. The number of jury trials has remained extremely small.¹⁹⁷

Third, a huge fraction of eviction cases never reach open court.¹⁹⁸ Landlord-tenant courts have extremely high default rates.¹⁹⁹ Courts depend on default

¹⁹⁴Mosier and Soble, *supra* note 204, 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.

¹⁹⁵In 1985, each New York City Housing Court judge handled 8,688 evictions. Ken Karas, *Recognizing the Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 J.L. & SOC. PROB. 527, 537 n.86 (1991). Detroit Landlord-Tenant Court judges annually disposed of more than 10,000 cases each in the 1970s. Mosier & Soble, at 21.

¹⁹⁶Rose and Scott, *supra* note 59, at 1001-03, found the average contested case nine minutes. Anthony Fusco, Jr., et al., *Chicago's Eviction Court: A Tenants' Court of No Resort*, 17 URB. L. ANN. 93, 105 (1979), report that in Chicago "[t]he average court-allotted time for each contested case was approximately two minutes," including the approximately 20 seconds "necessary to call the case and for the parties to approach the bench."

¹⁹⁷Mosier and Soble, 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 five-one-hundredths of a percent of Ohio evictions were tried to a jury. 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).

¹⁹⁸Some 96% of Maryland eviction cases are uncontested, making the appearance of crowded dockets illusory. *Williams v. Housing Authority of Baltimore City*, 760 A.2d 697 (Md. 2000).

¹⁹⁹Some 53% 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*

judgments to control their dockets and design procedures to obtain them whenever possible,²⁰⁰ typically requiring no motion or affidavit – which pro se landlords might not know how to produce – before entering a default judgment.²⁰¹ In addition, court personnel and landlords’ lawyers induce most tenants to concede in formal or informal settlements.²⁰² Once the landlords receive all that they sought – either rent or possession – they voluntarily dismiss their cases.²⁰³ This suggests that many tenants are indeed choosing to move rather than litigate. A number of judges encourage those tenants reaching court to make the same choice.²⁰⁴

Fourth, of the minority of cases reaching court, the overwhelming majority are resolved with no reference to the condition of the premises.²⁰⁵ 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 a overwhelming mismatch in knowledge and litigating capacity. Many tenants lack the sophistication to assert the warranty in a written pleading²⁰⁶ or the presence of mind and assertiveness to do so orally in the momentary window of opportunity presented in open court.²⁰⁷ Because of very limited legal services funding,²⁰⁸ ten-

People Help Themselves, 17 URB. L. ANN. 71, 79 (1979). Mosier and Soble, at 26, reported that in 1970-71, 59.2 percent of the nonpayment actions and 51.4 percent of other eviction actions resulted in default judgments against the tenant. Rose & Scott, at 994, recorded a default rate of 49.4 percent in nonpayment actions and 45.2 percent other eviction cases. About eighty percent of Washington, D.C., tenants default. Cunningham, *supra* note 84, at 107, 134.

²⁰⁰Rose & Scott, at 988 n.88.

²⁰¹Cunningham, at 111; *compare* FED. R. CIV. PROC. 55(b) (2010)(requiring an affidavit or motion).

²⁰²Cunningham, at 117; 144 Woodruff Corp. v. Lacrete, 585 N.Y.S.2d 956 (N.Y. City Civ. Ct. 1992) (describing tenants’ propensity to sign settlements out of fear even where they have meritorious defenses).

²⁰³Mosier and Soble, at 26, found 23.5 percent of nonpayment defendants, and 17.0 percent of other eviction defendants, capitulated before their cases reached court. Rose and Scott, at 994, similarly found 24.6 percent of nonpayment defendants and 11.2 percent of other tenant-defendants gave up before their court dates.

²⁰⁴Judges 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, at 1009-10; Fusco et al., at 105 n.61; Garrett v. Cross, 935 So.2d 845 (La. 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”).

²⁰⁵*See* Berman & Sons, Inc. v. Jefferson, 396 N.E.2d 981 (Mass 1979) (noting that tenants raise the new defenses in only a tiny fraction of cases, making the cost for landlords slight).

²⁰⁶*E.g.*, Vanlandingham v. Ivanow, 615 N.E.2d 1361 (Ill. App. 1993); Sandefur Mgmt. Co. v. Smith, 486 N.E.2d 1234 (Ohio App. 1985); . A clerk reported “it is almost impossible to educate tenants that an answer should be filed prior to the hearing.” 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.” Winer, at 78.

²⁰⁷Bezdek, *supra* note 61, at 566-97.

²⁰⁸Karas, *supra* note 195, at 535-36; Lynn Cunningham, *The Legal Needs of the Low-Income Population of Washington*, 5 U.D.C. L. REV. 21 (2000).

ants are seldom represented by counsel,²⁰⁹ and without the help of lawyers have not understood their new rights or court procedures well.²¹⁰ Landlords, on the other hand, are far more likely to be represented²¹¹ and frequently leverage their superior legal knowledge to confuse and mislead unrepresented tenants.²¹² Even when landlords are not represented, courts typically require even less specificity than the usual level of notice pleading.²¹³ Legal stationery stores or even courts provide landlords with form complaints that prompt them for all allegations required to make out their cases,²¹⁴ with no comparable resource typically available to *pro se* tenants unsure about their defenses.²¹⁵ Judges and clerks commonly assist landlords in making their cases and refuting their tenants.²¹⁶ Thus landlords, in sharp contrast to tenants, actually fare better in court unrepresented.²¹⁷

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 ver-

²⁰⁹Brakel, *supra* note 57, at 581, reports that Legal Aid attorneys represent only nine percent of tenants in contested eviction cases. Mosier & Soble, at 36, report tenants being represented in Detroit Landlord-Tenant Court in only 7.0 of contested cases. Fusco et al., *supra* note **Error! Bookmark not defined.**, 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, at 29, this means that only one to two percent of tenant facing eviction have counsel. Only twelve 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).

²¹⁰When 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, at 997-99.

²¹¹Mosier and Soble, at 36, report that landlords were represented in 48.6% of the “contested cases.” Fusco et al., 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., at 421.

²¹²The 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. (Copy on file with author.)

²¹³Cunningham, *supra* note 84, at 127-29.

²¹⁴*Id.* at 119.

²¹⁵A court committee in Detroit designed, but did not widely distribute, a form answer. Rose & Scott, at 986-91, 1024. The Connecticut Housing Court made similar efforts to be open to pro se litigants. Eldergill, *supra* note 125, at 299-300.

²¹⁶Fusco, et al., at 108-25; *see* Espinoza v. Calva, 87 Cal.Rptr.3d 492 (Cal. 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 Management Corp. v. Ahmad, 819 N.Y.S.2d 382 (N.Y. App. Div. 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 (N.Y. Sup. 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 Apartments v. Braddy, 538 P.2d 603 (Okla. Civ. App. 1975) (finding bias in trial judge’s questioning tenant about receipt of welfare).

²¹⁷Mosier & Soble, at 35-37 (citing results from Detroit and Brooklyn); Rose & Scott, at 1001-02.

sion of notice pleading, approaching an inquisitorial approach. Tenants, on the other hand, must articulate an explicit legal defense in a way more reminiscent of old common law pleading²¹⁸ – or even the old English practice of “waging one’s law.”

Fifth, landlords won an overwhelming proportion of the nonpayment actions filed. Even where rental housing conditions were bad²¹⁹ and getting worse,²²⁰ landlords were winning total victories in upwards of 97 percent of all nonpayment cases started.²²¹ And with 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.

²¹⁸See *Payne v. Rivera*, 2010 N.Y. Slip Op. 20182 (N.Y. City. Civ. 2010) (severing tenant’s counterclaim for failure to repair); *Garrett v. Cross*, 935 So.2d 845 (La. 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. 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); *601 West Realty LLC. v. Chapa*, 2003 WL 22087614 (N.Y. Civ. Ct. 2003) (dismissing tenant’s counterclaim because tenant “failed to establish the impact of” lead paint and other housing code violations); *Cater v. Saunders*, 2002 WL 31207219 (N.Y. Dist. Ct. 2002) (same); *Flynn v. Riemer*, 1991 Mass. App. Div. 50 (1991) (finding no breach of warranty when tenant was without water for four weeks but did not prove that landlord acted willfully); *L & M Inv. Co. v. Morrison*, 605 P.2d 1347 (Or. App. 1980) (finding housing code violations insufficient to establish lack of habitability); *Brown v. Robyn Realty Co.*, 367 A.2d 183 (Del. Super. 1976) (dismissing tenant’s habitability argument for failure to plead terms of lease properly); *cf.*, *Dickhut v. Norton*, 173 N.W.2d 297 (Wis. 1970) (imposing strict requirements on tenants alleging retaliatory eviction).

²¹⁹At 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 McIntyre, *URLTA in Operation: The Ohio Experience*, 1980 AM. B. FOUND. RES. J. 587, 594. The estimated rat population of the City of Detroit in 1974 was 750,000. DETROIT NEWS, July 1, 1974, at 2B.

²²⁰The Detroit Department of Health reported in 1972 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, at 64, n. 92. Approximately 30 percent of Detroit’s housing was “deteriorating” or “dilapidated” in 1972. *Id.*

²²¹Gerchick, *supra* note 98, at 790. Mosier and Soble report that Detroit tenants in 1970-71 won total victories in only one-tenth of one percent of the cases started. Mosier & Soble, 33-34. Tenants won partial rent abatements in another two percent of the cases. Rose & Scott, *supra* note 204, at 1009, report that landlords were winning favorable outcomes in 97.5 percent of the nonpayment cases started in 1974. Fusco et al., , at 104, report that Chicago landlords in 1976 won everything they sought in at least 84.6% of the “contested cases” heard. This figure is virtually identical to the “contested case” statistics reported by Mosier and Soble. Mosier & Soble, at 33. (A “contested case” is one in which both the landlord and the tenant appear. Mosier and 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 sophisticated middle-class tenants, hardly those whose conditions prompted the reforms. See McIntyre, at 596.

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 give landlords incentives to repair or to encourage other tenants to raise defenses.²²²

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.²²³ A landlord contemplating a retaliatory eviction would be unlikely to be deterred by a prohibition so seldom enforced.²²⁴ 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 statistics is a consistent picture of courts ill-equipped or disinclined to carry out the transformative role the tenants' rights revolution envisioned for them.²²⁵ One state high court lamented:

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

²²²*See, e.g.*, 303 Beverly Group, L.L.C. v. Alster, 735 N.Y.S.2d 908 (N.Y. Sup. 2001) (disallowing consequential damages); Surratt v. Newton, 393 S.E.2d 554 (N.C. App. 1990) (disallowing damages exceeding the amount of rent paid); Landmarks Restoration Corp. v. Gwardyak, 485 N.Y.S.2d 917 (N.Y. City 1985) (abating rent 20% but offsetting that with an exceptional award of attorneys' fees to the landlord); Tower West Associates v. Derevnuk, 450 N.Y.S.2d 947 (N.Y. City Civ. 1982) (granting 10% rent abatement); C. F. Seabrook Co. v. Beck, 417 A.2d 89 (N.J. Super. App. 1980) (denying rent abatements for months other than those for which landlord's action sought rent); *but see* Brown v. LeClair, 482 N.E.2d 870 (Mass. App. 1985) (affirming award of statutory damages for willful failure to repair); Pleasant East Associates v. Cabrera, 480 N.Y.S.2d 693 (N.Y. City Civ. Ct. 1984) (awarding punitive damages where failure to repair racially motivated).

²²³According to Mosier & Soble, at 34-35, Detroit tenants in 1970-71 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* were for all "contested cases," including both nonpayment and other termination actions.)

²²⁴Moreover, 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* Building Monitoring Systems, Inc. v. Paxton, 905 P.2d 1215 (Utah 1995) (allowing retaliatory evictions once premises repaired and tenant given time to find other housing).

²²⁵Fusco et al., at 108-25. Judges ruled against tenants even when the tenants' was the only competent testimony on an issue, even when they supported a defense of payment with receipts, and even when they proved the existence of serious repair problems with unrebutted photographic evidence. Judges relied upon the incompetent hearsay of landlords' lawyers who admitted having had no direct contact with the premises. 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' uncross-examined "telephone testimony." "[D]ead attorneys and landlords have secured favorable judgment when represented by persons unauthorized to practice law." *Id.* at 118. Rose & Scott, at 1009-12, describe similar practices in Detroit's Landlord-Tenant Court.

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.²²⁶

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

IV. WERE THE NEW REGIME'S FAILURES INEVITABLE?

The result of the supposed tenants' rights revolution, then, falls far short of achieving any of its three instrumental goals. As discussed above, the covenants of landlord and tenant are not truly mutual if tenant's breach renders landlord's irrelevant but the converse is not true. And landlord-tenant law remains an idiosyncratic world unto itself if landlords can obtain an effectively equitable remedy without showing pre-requisites 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 the pendency of the action.

The state of rental housing may have changed during this period,²²⁷ but the implied warranty appears to have affected far too few cases to be a likely cause.²²⁸ 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 limiting who can raise the implied warranty are a form of rationing judicial resources that had not increased with the new need to find facts concerning housing conditions.

²²⁶Fed. Nat'l Mortgage Ass'n v. Wingate, 273 N.W.2d 456, 460-61 (Mich. 1979).

²²⁷See Part IV.C, *infra*.

²²⁸The overwhelming empirical evidence of the warranty's non-enforcement in court would seem to require econometricians claiming to find evidence of its effects, *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), to explain a mechanism by which that result might be achieved.

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' right 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. Criticizing Formal Rules

Analyzing the impact of policies that have curtailed the implied warranty of habitability is difficult for two reasons. Some, such as the complexity of trial courts' operating procedures and attitudes of trial judges and clerks, are difficult to document and may genuinely 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 may not be intended as such.

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 their own lawyers describe the requirement that tenants have the funds to pay the contract rent as demonstrating "good faith." Yet lacking funds is no indication of dishonesty.²²⁹ It does, of course, mean that the tenant may be incapable of present performance. That should not necessarily excuse the landlord's performance.

Ordinarily, "[i]t is customary to pay rent in advance"²³⁰ for each month. The landlord must perform his or her 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.²³¹ The standard

²²⁹"Poverty and immorality are not synonymous." *Edwards v. California*, 314 U.S. 160, 177 (1941).

²³⁰*Lindsey v. Normet*, 405 U.S. 56, 65 (1972).

²³¹When 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.

rule in contract is that a non-breaching party need not continue to perform once the other has committed a material breach,²³² one that gives the tenant “substantially less or different” from what the warranty of habitability requires.²³³ 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 rent ceased when material defects appeared in the premises.²³⁴ Once the landlord materially breaches the implied warranty of habitability, the tenant’s ability or inclination to pay rent would become irrelevant because that “performance is excused”²³⁵ until the landlord came into compliance, at which point damages for the landlord’s breach would be ascertained.

Alternatively, if the landlord’s failure to repair is not material and the tenant has stopped paying rent, the contract law would treat both parties as being in breach and award appropriate damages against each.²³⁶ 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.²³⁷ 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 his or her 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 non-performing party’s conduct,²³⁸ not the contemporaneous state of mind of the party alleging the breach.²³⁹

“Ordinarily, notice or demand is unnecessary where the obligation to perform is absolute and unconditional.”²⁴⁰ Exceptions apply when the obligated party has no way to know when its performance is necessary or when the contract expli-

The tenant’s tender of the next month’s rent is therefore not a condition to the landlord’s performance of his or her covenants for that month since the landlord has yet to earn all of the rent that he or she has already received.

²³²For 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).

²³³RICHARD A. LORD, WILLISTON ON CONTRACTS § 63.3 at 438 (4th Ed. 2002).

²³⁴Conversely, 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.

²³⁵WILLISTON § 63.3 at 443.

²³⁶ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 946 (one volume edition, 1952); WILLISTON § 63.3 at 428.

²³⁷WILLISTON § 63.2 at 427.

²³⁸RESTATEMENT (SECOND) OF CONTRACTS § 235(2) (1981).

²³⁹WILLISTON § 63.1 at 434.

²⁴⁰17A AM. JUR. 2d CONTRACTS § 594 (2010).

citly requires notice.²⁴¹ Although some defects may be within the sole knowledge of tenants, many are not. Some are present when the tenant takes possession.²⁴² Landlords can observe most others when they inspect their properties to ensure that tenants are not causing damage. The U.C.C.'s rule requiring notice of breach of warranty for defective goods²⁴³ 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.²⁴⁴

Of course, because the warranty of habitability is a term implied into the landlord-tenant contract by law, the courts could insert a notice requirement.²⁴⁵ 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 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 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 at 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

²⁴¹*Id.*

²⁴²Limiting the implied warranty to latent defects, *see* Rabin, *supra* note 14, at 580, thus would strengthen notice requirements and make it still-harder to enforce.

²⁴³U.C.C. § 2-607.

²⁴⁴WILLISTON § 52:42 at 242.

²⁴⁵Most legislative implied warranties of habitability have no such term.

revolution in landlord-tenant law represents a fundamental change or a modest, nearly cosmetic, update.

Subsection a considers and dismisses the major rationales offered for LPOs. Subsection 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

Arguments that LPOs are 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 landlords during the course of the litigation of possession disputes is no different from that suffered by any plaintiff with a meritorious claim. Second, whether accruing rentals are in fact the landlord's property is unclear until trial of the tenant's defenses. Third, even assuming the landlord's claim's validity, routine litigation delays likely do not constitute a deprivation of due process.²⁴⁶ The Court seems unlikely to apply *Mathews v. Eldridge*²⁴⁷ 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.²⁴⁸ 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 LPOs²⁴⁹ reflect the normative confusion underlying the tenants' rights revolution. For example, several of the arguments for LPOs reveal deep diffidence about the new regime's enterprise of 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 pre-trial enforcement. Similarly, while LPOs protect landlords from the possibility of unenforceable judgments,²⁵⁰ no comparable measure assures tenants that landlords will make repairs a trial finds necessary or pay any judgments on the tenants' counter-claims.

²⁴⁶Any 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).

²⁴⁷424 U.S. 319 (1976).

²⁴⁸*Barker v. Wingo*, 407 U.S. 514 (1972)(finding even constitutional right to speedy trial in criminal cases not violated by modest, routine delays).

²⁴⁹*See supra* Part III.A.2.a.

²⁵⁰Many states' summary proceedings do not award money judgments against tenants but "state [rental arrearages] 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*, 430 F.2d at 485 n.29; *Schlesinger v. Brown*, 282 A.2d 790, 791 (N.J. Dist. Ct. 1971). Landlords in these states have no judgments to enforce.

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 in order to assert their defenses even when the amount in controversy is far higher than the value of most dwellings in summary proceedings cases.²⁵¹ One court found “no evidence that it is any more difficult to satisfy a judgment against a tenant than against any other debtor.”²⁵²

Imposing LPOs to prevent delay in landlord-tenant proceedings is similarly idiosyncratic. As the 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 . . . 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.²⁵³

Although defendants in more complex cases can stall with abusive discovery, eviction cases, with little or no discovery, provide no such opportunity. Treating the raising of the new defenses as 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,²⁵⁴ reflecting a sense that they are less important than the rest of the courts’ dockets.²⁵⁵ Prompt scheduling is the obvious remedy.²⁵⁶

Achieving the instrumental goal of improving urban housing conditions requires courts to be open to large numbers of cases, at least initially. Yet some courts openly acknowledged using LPOs for docket control.²⁵⁷ These instrumental purposes also require tenants in ill-repaired dwellings to undertake the risk, expense, and effort required to assert the implied warranty; requiring the tenant to pay rent that the landlord has not earned as a “pool” to finance repairs largely eliminates that incentive – and 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,²⁵⁸ the motivation for LPOs appears largely moralistic. Granting welfare rights only to those recipients

²⁵¹Bell v. Tsintolas Realty Co., 430 F.2d 474, 479 (D.C. Cir. 1970).

²⁵²Santiago v McElroy, 319 F. Supp. 284, 294-95 (E.D. Pa. 1970).

²⁵³Pernell v. Southall Realty, 416 U.S. 363, 385 (1974).

²⁵⁴See David A. Super, *Against Flexibility*, 96 CORNELL L. REV. ____ (2011) (discussing shortages of adjudicatory resources).

²⁵⁵Eldergill, *supra* note 215, at 297.

²⁵⁶See, e.g., MICH. COMP. LAWS ANN. § 600.5735(2), (4) (West 2000); BOSTON HOUSING COURT R. 5 (2008).

²⁵⁷MICH. CT. R. 4.201(H)(2)(a)(iii)(II) allows the court to preserve a non-paying tenant’s right to a jury trial “if, in the trial judge’s discretion, the court’s docket and schedule permit it.”

²⁵⁸KATZ, *supra* note 45, at 64-66.

proving their moral worth through participation in workfare obviated the need to confront stereotypes of the lazy poor;²⁵⁹ confining tenants' rights to those tenants proving their sincerity with deposits in court similarly 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*,²⁶⁰ monetary court access barriers not only bar meritorious arguments by those unable to make payments but also allow frivolous claims “by others who can afford” the required amounts. Little evidence suggests that tenants are more prone to raise meritless defenses than landlords are to make abusive claims²⁶¹ 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,²⁶² *Lindsey v. Normet*²⁶³ declined to constitutionalize the implied warranty of habitability. LPOs, however, are procedural. At the same time as the implied warranty of habitability was sweeping the country, several newly evolving 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' litigative resources as well as the difficulty low-income tenants faced 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. Their prevalence therefore seems attributable to courts' deeper ambivalence about the tenants' rights revolution.

First, just as courts were adopting LPOs, the Court was striking down filing fees for divorces,²⁶⁴ double appeal bonds for tenants appealing eviction decisions,²⁶⁵ prohibitions on remarriages for absent parents behind on their child support payments,²⁶⁶ and paternity actions in which putative fathers were denied blood tests for which they could not pay.²⁶⁷ When the Court upheld filing fees for bankruptcy²⁶⁸ and for appeals of welfare fair hearing decisions,²⁶⁹ it distin-

²⁵⁹Super, *New Moralizers*, *supra* note 35, at 2046.

²⁶⁰405 U.S. 76, 78 (1972).

²⁶¹*Amanuensis, Ltd. v Brown*, 318 N.Y.S.2d 11, 21 (N.Y. Civ. Ct. 1971).

²⁶²*Bd. of Regents v. Roth*, 408 U.S. 563 (1972).

²⁶³405 U.S. 56 (1972).

²⁶⁴*Boddie v. Connecticut*, 401 U.S. 371 (1971).

²⁶⁵*Lindsey v Normet*, 405 U.S. 56 (1972).

²⁶⁶*Zablocki v. Redhail*, 434 U.S. 374 (1978).

²⁶⁷*Little v. Streater*, 452 U.S. 1 (1981); *see also Hovey v. Elliott*, 167 U.S. 409 (1887)(rejecting monetary barriers to court access).

²⁶⁸*United States v. Kras*, 409 U.S. 434 (1973).

guished the prior cases as involving a state monopoly on the means to resolve those petitioners' claims. Defendants by definition face a judicial monopoly on resolution of the claims brought against them.²⁷⁰ The Court also seemed to think that some of the access fees it upheld were *de minimus* burdens that would not deter determined litigants;²⁷¹ monthly rental payments are not *de minimus*.²⁷²

A second line of cases during this period struck down coerced pre-judgment deprivations of property.²⁷³ The Court required a prior judicial determination of probable cause to support the seizure opposing claimant's position²⁷⁴ 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.²⁷⁵ The Court also required the party seeking a seizure post a bond against wrongful deprivations of property.²⁷⁶ Coerced deprivations, such as LPOs, are treated identically with physical seizures.²⁷⁷ 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 pendency of the litigation" and hence seized.²⁷⁸ Beyond this, the court must balance the parties' interests in determining whether any pre-judgment seizure is justified.²⁷⁹ At a minimum, these cases would seem to compel courts to hold a trial of the possession dispute

²⁶⁹*Ortwein v. Schwab*, 410 U.S. 656 (1973); *see also* *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988)(upholding fifteen percent penalty on unsuccessful appeals of money judgments).

²⁷⁰In *Little, Lindsey, and Hovey*, litigants successfully challenging access barriers had been brought into court involuntarily as defendants. *Kras* and *Ortwein* rejected challenges from parties seeking to initiate judicial proceedings. 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 hailed into court as a defendant, however, she or he must depend on the court to vindicate her or his rights in the litigation.

²⁷¹*Kras*, 409 U.S. at 449; *Ortwein* 410 U.S. at 660 (describing the fee as providing "some small" revenues).

²⁷²They most resemble the child support payments in *Zablocki*, 434 U.S. at 374.

²⁷³*North Georgia Finishing, Inc. v. Di-Chem*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). This was one of the grounds on which *Amanuensis, Ltd. v. Brown*, 318 N.Y.S.2d 11, 21 (N.Y. Civ. Ct. 1971), struck down New York's LPO statute.

²⁷⁴*North Georgia*, at 606-07. Indeed, *Connecticut v. Doehr*, 501 U.S. 1 (1991), decided two decades after LPOs came into broad use, holds that pre-judgment seizures may be unconstitutional even after a showing of probable cause.

²⁷⁵*Id.*

²⁷⁶*Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 606-07 (1974).

²⁷⁷*See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 20 n.26 (1978).

²⁷⁸*North Georgia*, 419 U.S. at 606.

²⁷⁹*Mitchell*, 416 U.S. at 606-10. Crucial in *Mitchell* were that the proceedings there had a "low risk of a wrongful determination of possession," *id.* at 610, that the issues were amenable to simple documentary proof, *id.* at 609-10, and the relatively modest stakes for those subject to seizure, *id.* at 610. None of these factors militate in favor of LPOs.

within about ten days.²⁸⁰ They also would invalidate automatic requirements for escrow payments without specific judicial findings.²⁸¹

More broadly, the Court in this period was exploring numerous application of the longstanding principle that “[t]he fundamental requisite of due process of law is the opportunity to be heard”,²⁸² allowing the defendant to “choose for himself whether to appear or default, acquiesce or contest.”²⁸³ By 1976, the Court had crystallized much of its due process analysis into the *Mathews v Eldridge*²⁸⁴ balancing test, weighing “the private interest that will be affected”, “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 “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”²⁸⁵ Tenants’ private interests, as the Court has acknowledged,²⁸⁶ are substantial; a tenant’s leasehold also was recognized as property at common law, long before the advent of the “new property.” The risk of erroneous deprivation when a tenant failing to make required payments is denied a trial on her or his defenses is roughly equal to the fraction of tenants with good defenses.²⁸⁷ 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.²⁸⁸ As for the governmental interests, the state shares the tenant’s interest in an accurate adjudication.²⁸⁹ 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

²⁸⁰*Id.* at 607.

²⁸¹*North Georgia*, 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.

²⁸²*Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

²⁸³*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

²⁸⁴424 U.S. 319 (1976).

²⁸⁵*Id.* at 335. Although *Eldridge* was an administrative law case, the Court applied its criteria to private civil litigation. *Little v. Streater*, 452 U.S. 1, 7 (1981); *but see Dusenbery v. United States*, 534 U.S. 161 (2002)(narrowing *Eldridge*’s applicability long after LPOs had become well-established).

²⁸⁶*Pernell v. Southall Realty*, 416 U.S. 363, 385 (1974); *Greene v. Lindsey*, 456 U.S. 444, 452 (1982); *see also Thorpe v. Housing Authority*, 386 U.S. 670 (1967).

²⁸⁷*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.

²⁸⁸*See Pernell*, 416 U.S. at 385 (suggesting many tenants have little chance without a jury). According to Rose & Scott, *supra* note **Error! Bookmark not defined.**, at 1002, 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.

²⁸⁹*Cf.*, *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 17, 28 (1981)(finding a similar state interest); *Little v. Streater*, 452 U.S. 1, 12 (1981)(same).

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.²⁹⁰

These and other theories²⁹¹ would have been contested. They nonetheless suggest that courts had ample means to question LPOs' legitimacy, had they been so inclined.

B. Procedural Failures: From New Property to Old

A few jurisdictions recognized that procedural change was necessary to implement the tenants' rights revolution's substantive changes.²⁹² As a result, they 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 hope 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. Like administrative tribunals, they occupy an extremely low place in the legal system's social and structural hierarchy. Their decisions often are subject to review by courts with little or no other appellate jurisdiction.

The adversarial system implicitly assumes that parties are rational actors with lawyers and substantial, evenly matched resources to devote to litigation.²⁹³ None of these assumptions are reliably met in eviction cases, with tenants' lack of representation and inferiority of resources particularly telling. 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 bet-

²⁹⁰The same sort of state interests in protecting classes of litigants received only the scantiest discussion in *North Georgia, Fuentes*, and *Sniadach*. Under *Flagg Bros, Inc. v. Brooks*, 436 U.S. 149 (1978), and *Lindsey*, the state could revert to allowing landlords' self-help to repossess property. And *Lindsey* allows it to reduce the number and complexity of defenses available to tenants. But its 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 (1985).

²⁹¹Separate majorities in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), 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 Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (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. William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

²⁹²Eldergill, *supra* note 255, at 297-99.

²⁹³Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 510-14 (1986).

ter-suited to function adversarially – were increasingly adopting continental ideas giving judges more responsibility for factual development.²⁹⁴

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.²⁹⁵ Whether by transferring eviction cases to actual administrative tribunals or relying on magistrates, special masters, or other para-judicial officers whose lower cost and specialization allowed 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, many responded to federal incentives to transfer most jurisdiction to administrative tribunals.²⁹⁶ Whether or not the cases stayed in court, states adopted guidelines substantially narrowing adjudicatory discretion.²⁹⁷

C. The Dynamics of Housing Problems

The most fundamental challenge for the tenants' rights revolution, 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, it is 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 revolution'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 revolution was ill-equipped to respond to housing problems not involving vermin and falling plaster.

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, most obviously, housing can 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 can cause severe harm.

²⁹⁴Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005); John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 825 (1985).

²⁹⁵Super, *Efficient Rights*, *supra* note 5, at 1086-89.

²⁹⁶42 U.S.C. § 666(c) (2006).

²⁹⁷*Id.* §§ 666(a)(10), 667(a).

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.²⁹⁸ Asthma is the leading cause of urban school absences, and roach, rodent, and mold infestation are leading causes of asthma.²⁹⁹

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.³⁰⁰ Indeed, some forty-four percent of moderate-income working families devote more than half of their incomes to shelter and transportation.³⁰¹ Inexpensive areas also often have bad schools,³⁰² crime, violence, and a dearth of opportunities³⁰³ 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.³⁰⁴

Overcrowded housing, too, has a significant negative impact on children's educational attainment³⁰⁵ and health.³⁰⁶ Children in crowded housing are more likely to suffer delayed cognitive development, to have trouble reading, and to act out in school.³⁰⁷ Crowding into smaller spaces is only a partially successful strategy: overcrowded families remain at unusually high risk for food shortages.³⁰⁸

And high housing costs take their toll. Moderate-income working tenants spending more than half of 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 thirty percent of their funds.³⁰⁹ As a result, they are significantly more likely to run out of food before the end of the month

²⁹⁸CTRS. FOR DISEASE CONTROL & PREVENTION, THIRD NATIONAL REPORT ON HUMAN EXPOSURE TO ENVIRONMENTAL CHEMICALS (2005).

²⁹⁹Patrick L. Kinney, et al., *On the Front Lines: An Environmental Asthma Intervention in New York City*, 92 AM. J. PUB. HEALTH 24 (2002).

³⁰⁰*Id.* at 16-18.

³⁰¹*Id.* at 20.

³⁰²*Id.* at 14.

³⁰³SHARON VANDIVERE, ET AL., FUNDERS' NETWORK FOR SMART GROWTH & LIVABLE COMMUNITIES, HOW HOUSING AFFECTS CHILD WELL-BEING (2006).

³⁰⁴See Super, *Invisible Hand*, *supra* note 40, at 832-36.

³⁰⁵Dalton Conley, *A Room with a View or a Room of One's Own? Housing and Social Stratification*, 16 SOCIOLOGICAL FORUM 263 (2001).

³⁰⁶LIPMAN, at 35.

³⁰⁷Gary W. Evans, et al., *Chronic Residential Crowding and Children's Well-Being: An Ecological Perspective*, 69 CHILD DEVEL. 1514 (1998).

³⁰⁸LIPMAN, at 35.

³⁰⁹*Id.* at 16.

and to lack health insurance than similar families in more affordable housing.³¹⁰ Children in food insecure households such as these are thirty percent more likely to be hospitalized and ninety percent more likely to be in fair or poor health than their peers; they also are more likely to have mental illnesses and problems in school.³¹¹ High housing costs are a significant cause of the high rate of personal indebtedness among low- and moderate-income families.³¹²

Stating which of these 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 health care facilities can cause treatable conditions to fester, and so can rents so high that the tenant cannot afford medication. Low-income tenants could quite reasonably choose badly maintained housing over a better but more expensive dwelling. Children in public housing projects – widely regarded as affordable but low quality – are significantly more likely to advance in school than other children in tenant households.³¹³

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.³¹⁴ Indeed, overcrowding historically has been at least as prominent an image of slum housing as physical defects.³¹⁵ And many of the same studies that mobilized concern about bad housing also detailed the broader effects of poverty.³¹⁶

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 yielded historically low rents. 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.³¹⁷ Optimism about the simultaneous welfare rights revolution likely also produced complacency about the availability of necessary

³¹⁰*Id.* at 29.

³¹¹CHILDREN'S SENTINEL NUTRITION ASSESSMENT PROGRAM (C-SNAP), THE SAFETY NET IN ACTION 7 (2004).

³¹²LIPMAN, at 25.

³¹³Janet Currie & Aaron Yelowitz, *Are Public Housing Projects Good for Kids?*, 75 J. PUB. ECON. 99 (2000).

³¹⁴*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).

³¹⁵JUNE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 9, 205-07 (1961).

³¹⁶REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS 258-59, 457-82 (1968). One of the most influential anti-poverty 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).

³¹⁷If proponents considered crowding at all, it was as a means by which tenants could discipline landlords for raising rents. Ackerman, *supra* note 60, at 1105.

funding.³¹⁸ 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.³¹⁹

As the unusual conditions of the 1960s and 1970s subsided, however, the unsustainable housing glut disappeared and more typical housing market conditions reasserted themselves. New rental housing construction disproportionately targets the top fifth of the rental market,³²⁰ 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.³²¹

Data from the U.S. Department of Housing and Urban Development's (HUD's) American Housing Survey over past three decades show a huge decline in unsubsidized low-rent housing.³²² This 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.

As a result, HUD has reported that about half of very-low-income renters not receiving public subsidies have "worst-case" housing problems.³²³ Almost sixty percent of tenants with worst-case housing needs are children, elderly, or people with disabilities.³²⁴ Almost four in five very-low-income renters had 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 necessities³²⁵ – with most of the rest apparently receiving government subsidies.³²⁶

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

³¹⁸Failure to come to grips with income issues also may reflect the lack of overlap of 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 65.

³¹⁹Proponents of the warranty saw the undesirable locations of low-income tenants' housing as undermining landlords' market power. Kennedy, *supra* note 113, at 487-92.

³²⁰JOINT CTR. FOR HOUS. STUDIES, STATE OF THE NATION'S HOUSING 23 (2004).

³²¹*Id.* at 11.

³²²*See, e.g.*, EDWARD B. LAZERE, CTR. ON BUDGET & POL'Y PRIORITIES, IN SHORT SUPPLY: THE GROWING AFFORDABLE HOUSING GAP (1995); PAUL A. LEONARD & EDWARD B. LAZERE, CTR. ON BUDGET & POL'Y PRIORITIES, A PLACE TO CALL HOME: THE LOW INCOME HOUSING CRISIS IN 44 MAJOR METROPOLITAN AREAS (1992).

³²³OFFICE OF POL'Y DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URB. DEV., TRENDS IN WORST CASE NEEDS FOR HOUSING, 1978-1999 7 (2003)[hereinafter "HUD TRENDS"]. HUD defines "very-low-income" as less than half of area median income, which includes the overwhelming majority of people below the poverty line and many of the near-poor. *Id.* at 10.

³²⁴*Id.* at 3.

³²⁵*Id.* at 13.

³²⁶*Id.* at 27.

two-thirds, but the number with crushing rent burdens skyrocketed.³²⁷ Despite a broad consensus that housing should not consume more than one-third of a family's budget, some sixty percent of households with incomes below half of their area's median pay over half of their incomes for rent.³²⁸ Thirteen million working families, including four million supported by a full-time worker, pay over half of their incomes on shelter.³²⁹

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 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.

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 in distress. 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. In fact, however, 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 long has been units that "trickle-down" from higher-cost housing markets after years of disrepair.³³⁰ If middle-income tenants compel their landlords to keep up their dwellings, the slow decay that allows units to migrate to the low-cost market may be averted.

This could suggest that, at least in healthy cities, low-income tenants' quality of life may not be improving even if the incidence of housing code violations

³²⁷*Id.* at 8.

³²⁸DANILO PELLETIERE, ET AL., NAT'L LOW-INCOME HOUS. COALITION, WHO'S BEARING THE BURDEN? SEVERELY UNAFFORDABLE HOUSING 1 (2005).

³²⁹BARBARA J. LIPMAN, CTR. FOR HOUS. POL'Y, SOMETHING'S GOTTA GIVE: WORKING FAMILIES AND THE COST OF HOUSING 10 (2005). This study defined a family as working if at least half of its income was earned and its annual income was between about sixty percent of the poverty line and 120% of its area median income. *Id.* at 15.

³³⁰Ackerman, *supra* note 60, at 1114-17.

may have declined. Some continue to under-consume housing, but in a 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 having to pay for doing so with painful sacrifices in other areas of consumption, such as food, clothing, and utility service. The lack of “trickle-down” housing is certainly not the only factor in shrinking the supply of low-cost housing. Gentrification, continued lower-profile efforts at urban renewal, and recent reductions in federal housing subsidies³³¹ all have reduced supply at the same time the stagnation of the minimum wage, cuts in income support programs, and other factors have increased in poverty and hence demand. This suggests that the low-cost housing market in many areas is precarious enough to present limited opportunities to generate improvements in housing quality or to increase tenants’ well-being without risking potentially serious unintended consequences.

The story likely is somewhat different in the ailing cities in the nation’s heart-land. 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 feasible. 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 proven a failure at achieving any of its major goals. Some individual tenants no doubt have benefited. Some inefficient landlords may have been induced to sell to companies better capable of performing repairs. 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.

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 prevents 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 overall urban environment or

³³¹See, e.g., DOUGLAS RICE & BARBARA SARD, CTR. ON BUDGET & POL’Y PRIORITIES, DECADE OF NEGLECT HAS WEAKENED FEDERAL LOW-INCOME HOUSING PROGRAMS 9 fig.5 (2009), available at <http://www.cbpp.org/2-24-09hous.pdf>.

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, then, the implied warranty should be analyzed as an option available to the small minority of tenants winning the legal services "lottery."³³² 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 – are typically among the least-able to assert the warranty.

Second, many of these shortcomings result from its 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 the consequences of their poverty disturbed it. 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 landlords – and their superior wealth, connections with social elites, and ability to organize collective action – made a backlash inevitable. History suggests that attacks on low-income people often take the form of moralizing. 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. More broadly, it replaced a system in which landlords dominate by financial capital alone with one in which they dominate by a combination of 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.

³³²Whether legal services contribute to social welfare by representing these few tenants has spawned vigorous debate. Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385 (1995).

Fifth, the tenants' rights revolution relied on an equally 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.

Finally, and most importantly, the revolution's multiplicity of goals prevented any creative adaptation to the dramatic changes in both housing markets and anti-poverty 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.

CONCLUSION

The narrow lesson is that direct subsidies have far more potential than regulation to improve low-income tenants' housing conditions. Researchers have come to see improving incomes, rather than housing-specific strategies, as pivotal to preventing homelessness.³³³ HUD reports the number of tenants with worst-case housing needs moderates only when incomes rise.³³⁴ 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 bad housing. 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 thirty percent of their incomes.³³⁵ 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.³³⁶ Unfortunately, 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.³³⁷

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

³³³Martha R. Burt, *Causes of the Growth of Homelessness During the 1980s*, 2 HOUS. POL'Y DEBATE 903, 904 (1991).

³³⁴HUD TRENDS, *supra* note 323, at 1.

³³⁵U.S. Housing Act of 1937, 42 U.S.C. §§ 1437e (2006).

³³⁶GREGORY MILLS, ET AL., ABT ASSOC., EFFECTS OF HOUSING VOUCHERS ON WELFARE FAMILIES (2006).

³³⁷*See From the Greenhouse to the Poorhouse: Carbon Emissions Regulation and the Rules of Legislative Joinder*, 158 U. PA. L. REV. 1093, 1190-96 (2010) (proposing consolidation of existing housing assistance efforts into a single program available to all low-income people).

people.³³⁸ 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. 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 arrearages 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 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 a political mobilization.

Fifth, where possible regulatory interventions should target changes whose benefits 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 them from the market. Such a regulatory regime would 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 the possible collateral consequences. They then should monitor implementation and be prepared to adapt if new or unnoticed conditions undermine their regulatory scheme 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 con-

³³⁸FRIEDMAN, *supra* note 12, at 177-82.

sider 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 be in vain.